

2020

SCC SN No. 500741

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Bonner v. Campbell*, 2021 NSSM 38

BETWEEN:

STEPHANIE BONNER

CLAIMANT

and

RALPH CAMPBELL and ELIZABETH CAMPBELL

DEFENDANTS

REASONS FOR DECISION

BEFORE:

A. Robert Sampson, Q.C., Adjudicator

DATE OF HEARING:
Scotia on:

Hearing held by teleconference at Sydney, Nova

- i) 27 Jan 2021, 5 pm; and
- ii) 24 Feb 2021, 5 pm; and
- iii) 6 April 2021, 5 pm to 8:50 pm

DECISION RENDERED:

September 8, 2021

APPEARANCES:

For the Claimant:

Stephanie Bonner - Self-Represented

Witnesses:

Edward O'Quinn

For the Defendant:

Allan Stanwick, Counsel

Witnesses:

Ralph Campbell

Steve Campbell

Keith McKeen P. Eng.

PRELIMINARY MATTERS

[1] This matter was initiated with the Court by way of Claim (Form 1) filed by Ms. Bonner on September 29, 2020. It included a one page summary setting out the details of the Claim. A brief/general statement of Defence was filed by Mr. Stanwick on November 25, 2020. The matter was initially scheduled for hearing on January 27, 2021. As a result of continuing “COVID Protocols” adopted by the Nova Scotia Courts, hearings were to be held by way of telephone conference. As one would expect, at times this method presented some challenges for both the Court and the parties. As a result, the practice was generally adopted whereby the initial hearing date was used somewhat akin to a trial readiness conference whereby the Court was able to converse with the parties for purposes of identifying the anticipated number of witnesses, any preliminary issues and to ensure that everyone had in hand copies of all anticipated exhibits to be tendered by either party during the telephone proceeding and that such documents were clearly numbered and so forth. On this date it became clear that a full exchange of exhibits between the parties had not occurred. In addition, the witnesses the Defendant intended to call were on the call and Ms. Bonner noted that she was not aware of her right to call witnesses. That was clarified to her. The Court reviewed in some detail how the proceedings would occur and highlighted the fact that the Claimant carried the burden to prove their claim through whatever witnesses/evidence she felt necessary to present.

[2] The Court explained, mainly to Ms. Bonner as it appeared she was unfamiliar with the process, that she must have personal knowledge of matters she intended to testify to or otherwise arrange to have a witness who can provide direct knowledge of any matters relating to proving her claim. The Court also explained to the parties the required standard of proof expected, that being that the evidence must prove, on a balance of probabilities, that the Defendant breached some form

of agreement between the parties that may have existed or otherwise committed a wrong against the Claimant or her property and in so doing caused the Claimant to suffer damages and the corresponding amount being claimed. This is generally the practice of this Court in dealing with Small Claim Court matters and is principally for the benefit of parties who are self-represented.

[3] In addition, during this initial conference call the Defendant identified the witnesses they intended to call (as noted above) as well as the documents they intended to tender. Ms. Bonner also reviewed the various documents she had already tendered to the Court and Defendants. However, Ms. Bonner confirmed that she had not had sufficient time to pick up the Defendants' document package from the courthouse prior to this hearing date. Further on this point, the Court file reveals that Mr. Stanwick had only delivered the Defendants' documents to the Clerk of the Court on January 27, 2021. As a result arrangements were agreed upon to ensure a full exchange of documents took place immediately after the call and before the next scheduled hearing date. Otherwise, all parties agreed to a new hearing date scheduled for February 24, 2021 at 5:00 pm by way of conference call and that prior to this date each would ensure the other party was provided a full set of any documents intended to be exhibited to the Court.

[4] The second preliminary issue arose a few days following this initial session on January 27, 2021. As noted above, the Claimant's documents had been tendered to the Court with the Claim and one of them included a copy of an "Interim Order" from the Supreme Court of Nova Scotia identified as Syd No. 420895. The named parties were Ralph and Elizabeth Campbell as Plaintiffs and Stephanie Bonner and Edward (Ted) Quinn as Defendants. The order essentially adopted a settlement agreement that had been entered into by the parties back in

March 2014. The terms of that agreement were incorporated into the order. In at least one of the intended exhibits Ms. Bonner intended to present was a picture of a driveway with typed print on the page which referenced a specific caption in the settlement agreement which was adopted by the Court. At this point, although this Court had not received any formal evidence as no hearing had yet taken place, it appeared clear that the Claimant, at least in part, was intending to rely on the terms of the earlier Interim Order. This led this Court to note a further provision of the settlement agreement which stated at paragraph 10, “The Court shall retain jurisdiction (if it will agree) to adjudicate on any issues that arise in the implementation of this settlement agreement”. On the face of the Interim Order it appeared that the Court adopted the settlement agreement completely and thus this included this provision to retain jurisdiction. Further, at least in part, the matters set forth in the Interim Order “appeared” to relate to the matters described on the face of the written Claim (Form 1).

[5] The above situation led this Court on its own initiative to have the Court Clerk highlight this potential issue/concern to both parties by way of letter requesting that both parties be in a position to address this issue on February 24, 2021 and specifically whether the jurisdiction of the matters now before the Court arise from an alleged breach of the March 2014 settlement agreement and therefore rightfully still remain under the jurisdiction of the Supreme Court. Subsequently, Ms. Bonner wrote to the Court (February 4, 2021) and clarified that her claim had nothing to do with a breach of the Court Order. Upon further investigation of the Court records associated with the original Supreme Court matter it was also discovered that a “final order” had been issued by the Supreme Court in March 2015 determining that all matters arising from the original action had been settled and the action was fully dismissed by consent. Both parties were represented by

legal counsel at the time. The foregoing satisfied this Court that it had the jurisdiction to hear this Claim.

[6] The Court reconvened by way of conference call on February 24, 2021. All parties and their intended witnesses were on the call. Before proceeding, a final review of the exchange of documents between the parties was carried out and it was discovered that Mr. Stanwick, on behalf of the Defendants, did not have a number of the Claimant's documents she intended to exhibit. There did not appear to be any known explanation for this. The Court file was complete. Those documents the Defendant did not have were identified and the Court undertook to arrange to have its Clerk copy from its files and ensure copies were provided to Mr. Stanwick. As a matter of note, in February 2021 the Court was still operating under limited physical access and this at times presented some degree of challenges to both the Court and parties in their efforts to successfully complete document exchanges. The Court was prepared to afford the required time to allow the Defendants to secure all of the anticipated exhibits and therefore the matter was further adjourned to April 6, 2021. Of further note, Ms. Bonner subsequently wrote (e-mail) directly to the Adjudicator on February 25, 2021 expressing her concern about the fact that Mr. Stanwick did not have in his possession all of the Claimant's documents and felt this was a "stall tactic" given that the Defendant "had sold" his property and that she would no longer be able to secure payment, should she be successful in her action against Mr. Campbell. While it was regretful that a further delay arose given that both parties had all of their intended witnesses present on the call (for the second time), the Court accepts that COVID protocols has given rise to unexpected delays and confusion at times as the Small Claims Court process adhered to COVID guidelines within the Court system and adjusted to hearings by phone. Normally in a traditional court hearing where the

parties are present, when an exhibit or two may have been misplaced it would simply be a matter of taking a five minute adjournment and making the required copies. In conducting a hearing by phone that cannot be done and it is largely for that reason that the initial hearing date is conducted in an effort to prevent issues such as this arising. However and most importantly, what does remain as an essential ingredient of this Court is the importance of ensuring full disclosure and a fair hearing process for all parties. It was with that in mind together with the fact that there had not been a significant passage of time since the pleadings were closed as well as the amount of the Claim itself that the Court was satisfied in the interest of ensuring a complete and fair hearing take place that a further adjournment was necessary. More directly, the Court did not find any conduct by Mr. Stanwick on behalf of the Defendants as an attempt to stall these proceedings. As Ms. Bonner herself stated to the Court in her e-mail, at this juncture Mr. Campbell had already sold his property.

[7] The hearing was reconvened on April 6, 2021 by way of tele-conference. It commenced at 5:00 pm and continued through to 8:50 p.m. at which point all of the evidence was completed. The Court invited each of the parties to provide verbal summations at which point Mr. Stanwick asked for some time to consider whether he wished to call a witness for purposes of re-direct surrounding an issue that arose associated with the brook. Further at this point, the Claimant confirmed to the Court that she had been participating in the hearing from the basement of her employer and had to immediately leave the call. Therefore, having regard to Mr. Stanwick's request and Ms. Bonner's predicament, the Court directed that Mr. Stanwick had ten days to determine whether he wished to call any re-direct evidence which would require a further hearing date or alternatively the parties could provide any summation comments to the Court in writing. Both parties

subsequently submitted “post hearing submissions” which have been reviewed by this Court prior to rendering this decision.

SUMMARY OF CLAIM/DEFENCE

[8] The Claimant alleges in her claim that she and the Defendants had a contract whereby the Claimant paid to the Defendants the sum of \$25,000.00 in return for a release of an existing right-of-way over the Claimant’s lands which the Defendants held and used for purposes of traveling over a portion of the Claimant’s lands to access their own property. The payment was also intended as a contribution towards the anticipated costs of the Defendants constructing a new road/driveway on their own lands leading to the Defendants’ home located immediately adjacent to the Claimant’s remaining lands. The Claimant contends that the terms of their agreement were followed up to the completion of the new driveway by the Defendants’ contractors but sometime afterwards the Defendants placed rocks and concrete for the purposes of re-directing the water flow from the Defendants’ driveway and the ditches along each side onto the Claimant’s lands, causing the Claimant’s lands to be saturated with water and undevelopable without having to carrying out major in-fill of material (stone and fill) to make the lands usable. The Claimant advances the position that the cost of carrying out the required work to place her land back into a usable condition is \$25,000.00.

[9] In summary, the thrust of the Claimant’s claim is that certain actions of the Defendant re-directed the flow of water from the Defendants’ lands (roadway) onto the Claimant’s lands and caused damage to the Claimant’s lands. As the evidence bears out, the contract referenced by the Claimant in her written claim is in fact the

settlement agreement entered into by the parties and incorporated into the Supreme Court Interim Order which was ultimately determined to be satisfied and dismissed by the Supreme Court in 2015. It would appear, as confirmed in the Claimant's written claim that upon the Defendants completing the construction of their new driveway everything appeared to be in compliance with the terms of settlement and one can assume for that reason that both parties consented to the dismissal of the initial Court Order. The evidence of the Claimant is that the problem and damages she allegedly sustained to her land as a result of the Defendants' actions occurred sometime after the driveway was constructed. The settlement agreement tendered as Exhibit #7 purports to resolve both a Claim and Counter-claim and dealt with the permitted conduct of both parties while certain matters were to be carried out, one of which was the "construction" of a new driveway. The relevant clause in that settlement agreement which the Claimant attempts to rely upon is as follows:

12. In the event that the construction of a driveway on the 30 foot strip creates the need to redirect water from the brook which passes across that strip, all reasonable efforts shall be made to re-direct the water to an area on the Campbell lands and in the event that it is not possible in the professional pinion of the surveyor or engineer, the water shall be redirected to have the least negative impact on neighboring lands as possible. The brook and/or water shall not be redirected onto Bonner's lands.

[10] The named Defendant, Elizabeth Campbell, had passed away prior to the commencement of this proceeding. Otherwise, the Defendant, Mr. Campbell, denies the claim and specifically that any actions by the Defendant or anyone on his behalf re-directed any water onto the Claimant's lands resulting in any damage to the Claimant's lands. The Defendants' position was simply that the action they did take by placing rocks and cement at a location on their lands adjacent to their new driveway was solely to slow the flow of water onto their lands and assist in having the water flow directed into a long-established brook which had been in

existence for many years and upgraded when they constructed their driveway to perform better in moving the water flow into the brook and out towards the lower lands and Blackett's Lake. Their position was that the lands which the Claimant suggests were damaged or wet, as well as a portion of the Defendants lands immediately adjacent, have always been considered "wetlands" particularly during rain seasons when the water level of Blackett's Lake, which both parties lands abut to, rises to the point of exceeding the natural level of both the Defendants' and Claimant's lands and in turn naturally floods their lower lands. They deny having taken any action to cause damage and further maintain the position that they fully complied with the terms of the original settlement agreement and that all actions taken in relation to the construction of their new driveway back in 2014-15 were carried out under the direction of an engineer and experienced contractor.

THE CLAIMANT'S EVIDENCE

[11] The Claimant, Ms. Bonner, was affirmed and gave evidence. She initially reviewed each of her exhibits for the purposes of describing their intent. There was a total of 14 exhibits from the Claimant. She initially identified Exhibit #7 as representing the agreement that was in place back in 2014 through the Courts between her and the Campbells surrounding the release of right-of-way over her lands and construction by Campbell of a new driveway running adjacent to her remaining lands. She initially referenced the photo in Exhibit #3 which showed the location of the culvert/pipe which was located beneath the new driveway and its outflow extended onto the Campbell lands as per the settlement agreement. She testified that this photo was taken back in 2014. She also identified in this photo a red survey maker which was located on the boundary line between hers and the

Campbell lands. She identified Exhibit #1 as a photo of the Campbell driveway after it had been constructed. It showed what appeared to be a professionally constructed, very long paved roadway, fully ditched with heavier stone along the driveway on both sides. She stated, in her opinion, that there was a “French drain” running along both sides of the driveway. Exhibit #2 was represented as showing the in-flow end of the culvert that was shown in Exhibit #3.

[12] The witness confirmed that the “brook” referenced in paragraph 12 of the settlement agreement (Exhibit #7) was located on the Campbell lands. Ms. Bonner references the photo in Exhibit #4 as showing the end of the culvert shown in Exhibit #3 although in this photo she states it also shows the rocks, dirt and concrete that appears to be located just beyond the outflow of the culvert. The Claimant’s position was that these materials were purposely placed there by the Defendants for the purposes of re-directing the water outflow from the culvert so that the water would flow onto her lands as opposed to the Campbell lands. The picture did not show any water flowing nor any trace of a route on the ground showing the direction of the water flow. The only evidence as to when the various photos were taken was with Exhibit #8 which showed the driveway only and was date stamped November 13, 2017. She stated that this photo appears to be similar to Exhibit #1 and therefore that photo was likely taken in November 2017 as well.

[13] She testified that Exhibit #9 was an invoice she received from Keith McKeen dated August 2014 which related to test pits that he had supervised completion of in relation to the proposed sub-division of her lands. She testified Exhibit #10 was a report from the Department of Environment, also dated August 2014, which confirmed the proposed lots, including Ms. Bonner’s remainder lot,

was suitable for subdivision at the time. Exhibit #11 was tendered. This was a “file activity report” dated November 2013 where someone had reported Ms. Bonner as having placed building debris in a potential wetland area. It notes that Environment staff had viewed the area and did not consider it to be wetland. Exhibits #5, 6 and 7 each showed wet/saturated lands which Ms. Bonner described as her lands adjacent to the Defendants’ and the volume of water on these lands which she believes was/is a direct result of the Defendants’ actions insofar as placing the stone and concrete at the outflow of the culvert for purposes of re-directing the large flow of water onto her lands. These pictures did not reveal where the water in the photos originated from nor the location of this area of her land relative to the outflow from the culvert.

[14] Exhibits #12, 13 and 14 were individual quotes provided to Ms. Bonner for the cost of excavation and removal of unsuitable materials from her lands and the required replacement fill/materials to make her lands usable. None of the written quotes provided any specific information as to the actual location on her lands that required in-fill. The quotes for this work were as follows:

Exhibit 12 - Cantwells dated Sept. 16, 2020 - \$33,350.00

Exhibit 13 – Lomaxx Construction dated Sept. 10, 2020 - \$31,625.00

Exhibit 14 – Taylor Tractor Service dated Sept. 17, 2020 - \$32,200.00

Note: each quote also contained an additional amount for construction of an access road required to carry out this work.

[15] Cross-examination was testy at times between counsel and Ms. Bonnar. She was reluctant to admit there had been tensions between herself and the

Campbells mainly over her desire to have the Campbells remove their right-of-way over her lands so she could sell a large portion of her property. She acknowledged that matters led to a Court action initiated by the Campbells mainly over their use of the right-of-way. She confirmed on cross that the photo in Exhibit #3 was taken just after the driveway was constructed back in 2014. She also acknowledged that the photo in Exhibit #4, showing the placement of rocks and concrete, was taken after the snow melt in 2020. She was not able to confirm the actual date/year when the rocks and concrete were placed. She acknowledged on cross that this photo (Exhibit #4) shows the rocks but no water flowing. It was her position that when the water is flowing it has nowhere to go but to the right-hand side which is towards her lands. She was questioned on Exhibits #5, 6 and 7, all of which showed wetlands, but none showed where the water source was. She agreed but stated, in her opinion, this water was re-directed onto her lands as a result of what the Defendants had done with placement of rocks and concrete at the end of the culvert.

[16] Ms. Bonner was shown and confirmed Exhibit D-6 which represented a plan of subdivision of the Bonner lands dated July 29, 2014. She was directed on cross to a number of markings on the plan which purported to represent “wetlands” as well as the notation typed on the plan itself over the Bonner lands stating “wetlands”. Her response was that she did not have a hard copy of the plan and was not familiar with any part of her lands being “wetlands”. She did agree that the northern end of her lot bordered onto Blackett’s Lake as did the Campbells’ as well as the lands on the other side of her lot.

[17] The Claimant's only witness was Mr. O'Quinn. He was affirmed. The Defendant counsel objected to his evidence on the basis that Mr. O'Quinn had or used to have a relationship with Ms. Bonner where they had, and the Defendant believed, still lived together. As a matter of note, with reference to Claimant's Exhibit #7, Mr. O'Quinn is one of the named Defendants in the original action between the parties. The Court determined there was no conflict and Mr. O'Quinn was questioned by the Claimant. He confirmed the dates on which several of the Claimant exhibits/photos were taken and his evidence was much the same as the Claimant herself. Of specific note, he confirmed that the photo identified in Exhibits #5, 6 and 7 were taken in early summer 2020. He also acknowledged being aware of the photos of the test pits taken back in 2014 in connection with the required subdivision process. He confirmed these were taken prior to the driveway construction by the Campbells. He acknowledged that the lands may have been a bit wet down by the lake. He identified what was shown in Exhibit #4 as being the concrete and rocks that, in his opinion, were placed for purposes of re-directing the water onto the Bonner lands. He testified that the present condition of the lands is as shown in Exhibits #5, 6 and 7 and needs to be built up to avoid water being retained on the Bonner lands.

[18] On cross-examination he confirmed he had been in a relationship with the Claimant. He stated that they had been on and off since 2016 and presently are not together. He stated they initially broke up after Mr. Campbell had him arrested over land he had nothing to do with. He confirmed that he owns Lomaxx Construction which provided one of the quotes for the work the Claimant advanced had to take place to repair the damage arising from the Defendants' actions.

THE DEFENDANT'S EVIDENCE

[19] The Defendant's first witness, Keith McKeen, was affirmed. He was presented as an expert witness to provide testimony surrounding the construction of the driveway which he had been directly involved with on behalf of the Campbells, including the location of the culvert, placement of the rock and concrete alleged to have diverted the water from the driveway and the general flow of water on both the Campbell lands as well as the Bonner lands and the resulting impact and effect to these lands. Mr. McKeen testified that he was a Professional Civil-Geotechnical Engineer and has worked full-time in this capacity since 1969. He confirmed that he worked for the Department of Transportation for the Province of Nova Scotia between 1969 and 1996. He testified his main area of responsibility was to oversee all road construction and upgrading carried out by the Province. This included overseeing the design and construction of every different type of roadway and in every instance issues of soil make-up, water sources and flows would be required to be identified and dealt with. He testified that since 1996 he has continued practicing civil engineering involved with road construction as well as carrying out geotechnical engineer work associated with determining land and soil conditions of various properties and issues surrounding the suitability of drainage as it relates to the installation of septic systems. The Claimant was asked if she had any questions of Mr. McKeen as it related to his qualifications - there was none. Based on Mr. McKeen's testimony pertaining to his professional and work experience as an engineer for over 50 years as well as his familiarity with the subject lands, the Court was satisfied of his qualifications to provide expert opinion to the Court as it relates to certain aspects of this claim.

[20] Mr. McKeen testified that the construction of a driveway is very similar to building any road. He confirmed that he had been hired by Mr. Campbell in around

2014 to design a driveway leading from Crestdale Drive into his home and which is the one which is the subject of these proceedings. He confirmed that the driveway constructed is approximately 1000 feet long as identified in Claimant's Exhibit #1. He testified that it was a standard road construction with required ditches filled with stone. He noted specifically that the ditches on each side of the road were just that, an open ditch and not constructed as any type of French drain. He testified that he had been out to the site (being the Campbell/Bonner lands) earlier in the day to familiarize himself. He testified that he recalls having to obtain a permit for placement of the culvert which was situated beneath the driveway and the one referenced in the evidence.

[21] He testified that the main part of the water flow into the culvert does not come from the Campbell road and associated ditches but rather directly from the adjacent property owner he identified as being Boyd. He confirmed that the culvert is located on the Campbell property/driveway and further that the water flows down from an existing brook and through the culvert. He testified that there had been an old culvert leading from the brook which was previously located higher up on the driveway and much closer to the Bonner lands. The new culvert was placed lower so as to ensure the water flow from it was directed onto the Campbell lands. He spoke to the photo tendered as Exhibit #4 where rock and concrete is shown to have been placed towards the end of the culvert outflow. He stated that the purpose of the rocks and stone is akin to creating a dissipation pool whereby such set up takes energy from a water flow and slows the overall flow down so as to minimize any resulting damage from a fast flow of water. He said it is very common. He confirmed that the placement of these materials was not done as part of the original driveway construction nor under his direction. However, he further testified that these rocks and concrete serve a useful purpose as well as

assisting to direct the flow of water into the existing brook located close to where the new culvert is directed which in turn allows any water to run down towards the lower lands towards Blackett's Lake. He stated that the placement of the rock and concrete does not divert the flow of water onto the Bonner property.

[22] He testified that he walked the brook which leads out onto the lower Campbell lands earlier in the day and confirmed, because the lands are all flat, once any water exited the established brook/ditch, water was going everywhere. He testified that in his opinion nothing has changed on the lands of either Bonner or Campbell since when he first visited the lands back in 2014 for purposes of completing the test pits in relation to the proposed subdivision. He referenced the survey plan (Exhibit D-6) and readily identified the fact that this plan, again dated back to 2014, clearly showed the Bonner lands, as well as the Campbell lower lands leading towards Blackett's lake, were identified as "wetlands". He testified that the continuation of the brook travels from at or near the side of the roadway where the culvert is located and continues down until the existing ditch runs out and there is nothing at that point to divert or direct the flow of the water. As a result, it simply discharges everywhere onto both the Bonner lands as well as the Campbell lands. He testified that the location of the continued ditch was, in his opinion, located on the Campbell lands and has been there for many years. As a result he stated that these lands were wet back in 2014 before any work was carried out by anyone and are still wet/swampy today. It was his opinion that the water from the new culvert was directed to flow into the continuation of the brook/ditch on the northwest side of the driveway and from there continued the same path as it always had, towards the lower lands.

[23] On cross-examination Mr. McKeen acknowledged that he had been made aware of the settlement agreement reached in and around 2014 as it related to the driveway construction. The Claimant read to him paragraph 12 of Exhibit #7 in the settlement agreement and his response was simply that the water was never re-directed from the Campbell lands to the Bonner lands. He confirmed that the existing brook continues down approximately 25 feet or more to a point where the brook stops and any water simply disburses onto the Campbells' flat lands and presumably from there onto both the Campbell and Bonner lower flat lands. He re-confirmed that in his opinion the water that comes from the culvert goes directly into the continued brook as it always has. He responded to the Claimant's questions indicating that water will always flow downhill which is the situation here and therefore the only way of preventing water from entering onto the lower lands would be to construct some form of dyke. When asked on cross "where would water have gone before" he further testified that, in his opinion, there was no more water now than there was in 2013.

[24] Further on cross-examination McKeen testified that after the original test pits were done, he recalls saying that the only way the lot being created by Ms. Bonner (identified on the plan as lot 1) could be used would require the lands being infilled with materials. He also testified that when the driveway was constructed back in 2014, he specifically recalled having the contractor freshen up the existing ditch where the brook ran out and continued the ditch for approximately 75 feet along the boundary line, on the Campbell side to where it ran out into the flat lands as it always did.

[25] Ralph Campbell, the Defendant, was sworn to provide evidence. He confirmed that he and his wife purchased their home back in 1997. He testified that

the existing brook ran from the neighboring property which was owned by Dr. Boyd. He confirmed that this was the same brook that now travels through a new culvert beneath his driveway. He testified that he engaged a Professional Engineer, Mr. McKeen, as well as a reputable contractor to complete the construction of his driveway and relied fully upon their skill and knowledge. He confirmed that he has never done or directed anyone to re-direct any water flow from his lands onto the Bonner lands. It was his evidence that everything as it relates to water flow into and from the brook remains the same as it always did. He testified that the water flows from the new culvert into the continuation of the brook/ditch downwards along his property until a point where it disburses into flat lands situate near Blackett's lake. He testified that his lower lands as well as those of Bonner and others have always been wet.

[26] He testified that the placement of the concrete and flag stone rocks near the out flow of the culvert was simply to slow the flow and pressure of the water at times and ensure that it was directed into its natural course which had always been the continued brook/ditch leading down along his property line to a point where it disbursed approximately 300 feet from the lake. He testified that the lower area has always been marsh lands for as long as he could remember and this area included both his lower lands as well as those of the Claimant. He further testified that the concrete came from left over material from work he had done at his home.

[27] On cross he confirmed that Mr. McKeen had been made aware of the importance of ensuring that in connection with the construction of his new driveway there was to be no water specifically directed onto the Bonner lands. He also confirmed that it is his estimation that the brook originates on the high side of the new driveway from lands owned by Dr. Boyd, water runs through the culvert

and then travels downwards through the existing brook/ditch located on his lands approximately 100 feet before it disburses into the lower flat lands. He acknowledged that ultimately the water that travels through the existing brook/ditch disburses onto both his lands as well as the Bonner lands confirming that such has always been the case and nothing has changed.

[28] Steve Campbell was sworn to provide evidence. Mr. Campbell is the nephew of Mr. Ralph Campbell. He is employed as a Police Officer for the Cape Breton Regional Police. He testified that he had been at the Campbell property over the years on many occasions. He testified that he was not familiar with the “old culvert” or brook but was aware of the new culvert that had been installed in connection with the new driveway. He testified that he had helped his uncle out in connection with pouring a new walkway at his home. There had been some left over cement which covered some flagstone and he thought it would be a good idea to drop it near the exit of the new culvert for the sole purpose of slowing or breaking the water flow during heavy run-off. He testified there had been no digging or ground preparation. The material was simply placed as shown in the photo (Exhibit #4). He testified that he had never himself seen a flow of water but confirmed that where the concrete and flagstone was placed, the ground was muddy/grassy. He confirmed that these materials were placed 6-7 feet on the Campbell lands and the placement was not designed nor intended to re-direct any water flow but only to serve as a “brake” in the volume so as to allow the water to maintain its natural flow to the existing brook/ditch.

[29] The Defendants concluded their evidence. As matter of note and for the record, while the Defendant at the outset identified several intended Exhibits which were submitted to the Court, only one exhibit, identified and marked as D-6

(Subdivision Plan) was actually tendered through the witnesses for the Defendant. Therefore, the Court will disregard the remaining documents.

ANALYSIS OF THE EVIDENCE AND DECISION

[30] At the outset the Court recognizes the fact that the Claimant is a lay person and was not represented by legal counsel. The Court further understands why the Claimant would base her Claim on breach of contract, believing that the settlement agreement, which in itself was a contract, would still be in effect and thus, with reference to paragraph 12 of the settlement agreement, such would serve as the basis for this claim. However, the evidence presented was clear that the parties represented to the Supreme Court in 2015 that all terms of settlement as set forth in their agreement had been satisfied and therefore the terms of the settlement agreement were determined by the Court and consented to by the parties as having been satisfied. Further, by the Claimant's own admission in her written claim and testimony, upon completion of the construction of the driveway there were no problems relating to the flow of water or any suggestion that water was being diverted as a result of the work that was carried out. However, while the original settlement agreement (contract) may not have been in play at the point in time when the Claimant determined certain actions were taken by the Defendant which she believed cause damage to her land, if the same could be proven it would be sufficient to support a claim in tort. Therefore, again while it is the determination of this Court, based on the evidence, that the original settlement agreement and later Interim Order of the Supreme Court cannot form the basis for this claim, the Court has chosen to proceed to adjudicate this matter on the chance that the evidence of the Claimant may prove sufficiently that some other form of claim may have existed.

[31] As was made clear to the Claimant at the initial telephone conference, she held the burden of proving her claim such that her evidence should prove on the balance of probabilities that it was/is more probable than not that the actions of the Defendant caused damage to her and/or her property as well as the resulting cost of such damage. This is a well-accepted standard of proof imposed upon civil cases of this nature. The leading case in Canada on the standard of proof in a civil proceeding being a balance of probabilities comes from a 2008 Supreme Court of Canada decision. The case is *F.H. v McDougall*, 2008 SCC 53. In this decision, Justice Rothstein wrote at paragraph 40:

Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

And further at paragraph 49:

In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

The McDougall decision has been referenced and adopted as accepted law in numerous decisions from the Nova Scotia Supreme Court. It is with that backdrop the Court must now conduct a review of the evidence presented in an effort to determine whether this requisite standard of proof has been met.

[32] The theory of the Claimant's case was made clear through her evidence. She alleges that the actions of the Defendant, by placing the rock and concrete in

the location near the outflow of the new culvert, had caused water to be re-directed onto her lands with the resulting effect of turning portions of her lands into a significant wetland/swamp area. The evidence is not contradicted in that the stone and concrete was in fact placed in the location as shown in Exhibit #4 by the Defendants. However, where the Claimant's evidence falls significantly short is in providing little or no evidence which showed with any degree of certainty what "actual" effect the placement of these rocks and concrete had on the flow of water from the culvert. The Claimant was not in a position to provide direct evidence that she actually witnessed this happening at any point in time. I further find that while the photos shown in Claimant's Exhibits 5, 6 and 7 clearly show a significant amount of water on her land, it is impossible for the Court to place the location of these photos in context to the alleged source of the problem which is alleged to occur at or near the outfall of the culvert. Added to this is the evidence of Mr. O'Quinn who testified that these photos were taken some time in the spring of 2020. This begs the question as to when (or how) this problem arose and further as to when the Claimant first became aware of the condition of her lands.

Unfortunately, there was no evidence from anyone as to the actual date or year in which the Defendant actually placed the concrete and rocks. Added to this, while photos were exhibited to the Court of different parts of the Claimant's lands and the Defendant's lands having been taken in 2014, 2017 and 2019, there is nothing which allows the Court to put together a "before and after" situation relative to the timing of the actions taken by the Defendant which are the basis of complaint by the Claimant.

[33] When the survey/subdivision plan, which was tendered under D-6, was shown to the Claimant on cross-examination, these seemed somewhat unfamiliar to

her when in fact the plan was actually prepared for her own subdivision back in 2014. Equally important is the fact that this plan clearly referenced the lower portion of her Lot 1 (remainder Lot) as being “wetlands”. This again takes the Court back to reviewing Exhibits #5, 6 and 7, two of which (Exhibit 5 and 6) appear to show a body of water in the background. This leads this Court to surmise whether these photos were taken of an area of the Claimant’s lands closer to Blackett’s Lake where in fact the original survey from 2014 clearly notes this area as being wetlands.

[34] In contrast to the Claimant’s evidence, most notably is the evidence of Mr. McKeen. Ironically in this situation involving the Claimant’s parcel of land, Mr. McKeen had worked for both parties at different times and for completely different reasons. Otherwise he was independent of both as his relationship arose and was conducted in his professional capacity. Therefore, the Court accepts him as a qualified expert engineer and a credible independent witness. Mr. McKeen stated with certainty that it was his opinion that the placement of the rock and concrete by the Defendant in the location as shown on the photo (Exhibit #4) did not in any way cause any water to be re-directed from the Defendant’s property to the Claimant’s property. He further testified that when the Defendant engaged him to design and oversee the construction of his driveway back in 2014-15, he was aware of the requirement to ensure nothing was done and every step was taken to ensure that no water was re-directed onto the Bonner lands. He was completely satisfied that this was done and as noted above, so too was the Claimant following the driveway construction until some unknown point into the future which triggered her Claim now before the Court.

[35] Mr. McKeen testified that it was his opinion that the Claimant's lands from his site visit in April 2021 were in the same condition as he recalls them being back in 2013-14 when he was first engaged by the Claimant to attend on the lands to conduct soil tests. His evidence was that the lands were wet back then and are no more but no less wet in 2021. In addition, the Court accepts the explanation provided, both from Mr. McKeen and both Campbells who testified that the primary purpose of using the stone and concrete was to slow the flow of water at times when it is running hard so as to allow the water to maintain its natural flow through the brook/ditch that leads down along the Defendant's lands and is disbursed, as it appears to have always been, throughout the lower flat lands. I also accept Mr. McKeen's opinion that once the water leaves the end of the existing ditch there is nothing to control where it goes.

[36] While there are various pieces of the evidence that I could reference, and I have taken into consideration all of the evidence presented to me, I believe the points highlighted above are sufficient to establish that the Claimant has not, in the opinion of this Court, met the required burden of proof to establish that the conduct of the Defendants has caused any harm or damage to the Claimant or her lands. With this finding there is no need for the Court to turn its attention to the evidence tendered to prove the value of the Claimant's alleged claim. However, suffice for the Court to note that two of the three quotes tendered to the Court provided little or no details as to the scope of the work, where on the land it was intended to be carried out and any contractor's opinion as to why the work was required. Having regard to the value of the claim the Court would expect much more direct detail and explanation. As for the third quote which was from Mr. O'Quinn's company, while he was a witness for the Claimant he was not asked on direct examination nor did he comment on the details of his quote. In fact, the Court learned that he

was the owner of this company through cross-examination only but no additional details were provided.

[37] Having regard to all of the evidence before me, including the various exhibits tendered into evidence I find that the Claimant has failed to meet the required standard of proof to establish that any actions or conduct by or under the direction of the Defendant caused any harm or damage to the Claimant's lands. Therefore this Claim is hereby dismissed.

DATED at Sydney, Nova Scotia this 8th day of September, 2021.

A. ROBERT SAMPSON, Q.C.

Adjudicator