

SUPREME COURT OF NOVA SCOTIA
Citation: *Stutzinger v. Blecker*, 2025 NSSC 374

Date: 20251127
Docket: HFX No. 537609
Registry: Halifax

Between:

Juergen Stutzinger and Olena Stutzinger

Applicants

v.

Jens Blecker

Respondent

DECISION

Judge: The Honourable Justice Ann E. Smith
Heard: May 15, 2025, in Halifax, Nova Scotia
Post Hearing Submissions: May 22, 2025
Counsel: Nathan Sutherland, for the Applicants
James Downie, for the Respondent

By the Court:

Introduction

[1] This proceeding is an Application in Chambers.

[2] The Applicant, Juergen Stutzinger seeks declaratory and other relief against the Respondent, Jens Blecker related to a deeded right of way.

Background

[3] Mr. Stutzinger is the owner of 47 Eagle View Drive (Lot 12-27) located in Richmond County, Nova Scotia (the “Property”). Mr. Stutzinger and his wife, Olena Stutzinger own the Property. At points in this decision I will refer to Juergen Stutzinger and Olena Stutzinger as the “Applicants”, or to Mr. Stutzinger as the “Applicant”. Nothing turns on these distinctions.

[4] Jans Blecker is the owner of a parcel of land in Richmond County, Nova Scotia, which provides access to the Applicant’s Property, and which is known as Eagle View Drive (EVD). Mr. Blecker and his partner Andreas Fruhmark own this parcel.

The Right of Way

[5] On July 25/26, 2012, Mr. Blecker conveyed Lot 27 to Mr. Stutzinger by way of a Deed (the “Deed”).

[6] The Deed grants the Applicant a right of way over EVD. The Deed describes a parcel of land known as EVD-1”, and describes the right of way as follows:

Together with a 66 foot Right of Way, in common with others having a similar right, over Eagle View Drive being Parcel EVD-1 on said plan.

Together with a right of Easement, in common with others having a similar right, over the said 66 foot Right of Way (Parcel EVD-1) for the placement of utilities including but not limited to utility poles and utility pole guide wires, underground cable and or piping, over and or under the said Right of Way, so long as the placement of the utilities does not interfere with the rights of vehicular and pedestrian travel over the said 6 foot Right of Way (Parcel EVD-1).

The Allegations in the Notice of Application

[7] The Applicant uses the Right of Way to access the Applicant’s Property by vehicular and pedestrian travel.

[8] Mr. Stutzinger says that in or about late July 2024, Mr. Blecker placed large boulders along EVD, i.e., along the Right of Way, where it runs adjacent to his property line.

[9] Mr. Stutzinger says that these boulders obstruct his use of the Right of Way and prevent him from accessing part of his Property from EVD.

[10] Mr. Stutzinger says that on August 9, 2024 he advised Mr. Blecker, through counsel, that the boulders were obstructing his use of the Right of Way. He says that Mr. Blecker did not respond.

[11] Mr. Stutzinger says that on September 27, 2024, his counsel asked Mr. Blecker again to remove the boulders and advised that the boulders were interfering with his use of the Right of Way.

[12] Mr. Stutzinger says that the Mr. Blecker has refused to remove the boulders which he claims obstruct his use of the Right of Way.

[13] He seeks the following relief:

- (a) A declaration that he is entitled to use EVD as a right of way for access to and egress from the Applicant's Property;
- (b) An order prohibiting Mr. Blecker from blocking his travel along any part of the Right of Way or obstructing his access to the Applicant's Property from the Right of Way;
- (c) An order directing Mr. Blecker to remove the boulders he placed on the Right of Way adjacent to the Applicant's Property;
- (d) Damages for the Respondent's unlawful interference with the Applicant's use of the Right of Way;
- (e) Costs.

The Notice of Contest

[14] The Respondent acknowledge the deeded Right of Way.

[15] The Respondent states that he owns the private roadway identified as Parcel EVD-1 (Eagle View Drive).

[16] The Respondent also owns various other parcels of land on or around EVD, including Lot 12-22, Lot 12-21, Lot 20-29 and Lot PID 75104513.

[17] The Respondent confirms that the Applicant Mr. Stutzinger and his wife Olena Stutzinger own the property located at 47 EVD (Lot 12-27) and that he and his partner Andreas Fruhmark sold Lot 12-27 to the Applicant in July 2012.

[18] The Respondent confirms that the deed to the Applicant contains the Right of Way.

[19] The Respondent says that the Applicant's Property is subject to various restrictive covenants, as set out in Schedule B of the Deed, including the following:

No excavation shall be made on the Property, nor shall any soil, sand or gravel be removed from the Property or stored upon the Property, except with the prior written consent of the Grantor.

...

The Property shall be kept clean, sanitary and contain no unsightly storage of miscellaneous materials of any kind including but not limited to derelict vehicles, garbage, cleared brush, and no waste material of any kind shall be dumped or spread or allowed to remain on the Property except clean earth, rocks, gravel or other materials for grading or landscaping purposes.

[20] Mr. Blecker claims that Mr. Stutzinger has used, and continues to use, the Right of Way in a manner that is outside the scope of the rights granted in the Deed. Mr. Blecker also says that Mr. Stutzinger has imposed additional burdens on the servient land, outside the scope of the original easement.

[21] The Respondent pleads that Mr. Stutzinger has engaged in the following impermissible usage of the Right of Way, without his consent or approval:

- (a) Constructed garden beds within the boundaries of Eagle View Drive;
- (b) Installed boulders within the boundaries of Eagle View Drive;
- (c) Excavated an artificial pond within the boundaries of EVD;
- (d) Operated an excavator and other heaving equipment within the boundaries of EVD;
- (e) Installed a flagpole within the boundaries of EVD;
- (f) Store materials and place structures within the boundaries of EVD.

[22] Mr. Blecker says in the summer of 2024, he performed work to improve the gradient of EVD. He says that this work was necessary for winter snow removal and to prevent damage to the surrounding properties from drainage. Mr. Blecker

says that this work was performed within the boundary of his property and that it was necessary to ensure the safety, maintenance and functionality of EVD.

[23] Mr. Blecker states that he paid approximately \$4,000 to complete the necessary improvements to EVD and that at all times he was exercising his rights as the property owner of Eagle View Drive.

[24] Mr. Blecker denies that he obstructed the Right of Way, but states that if there were obstructions, these do not constitute a substantial interference and are not actionable.

[25] Mr. Blecker also states that Mr. Stutzinger has engaged in threatening behaviour directed towards him and his family to prevent them from exercising their property rights.

The Evidence

The Applicant

[26] The Applicant filed the following evidence:

- (a) The Affidavit of Juergen Stutzinger, sworn February 6, 2025;
- (b) The Affidavit of Olena Stutzinger, sworn February 6, 2025;
- (c) The Rebuttal Affidavit of Juergen Stutzinger, sworn March 3, 2025;

(d) The Supplemental Affidavit of Juergen Stutzinger, sworn April 7, 2025.

[27] The Respondent filed the following evidence:

(a) The Affidavit of John J. Delorey, Land Surveyor, sworn February 5, 2025;

(b) The Affidavit of Jens Blecker, sworn February 26, 2025

(c) The Supplemental Affidavit of Jens Blecker, sworn April 17, 2025.

[28] None of the affiants were cross-examined on their affidavits.

Issues

[29] This Court frames the issues as follows:

1. Do the boulders placed along the Right of Way by the Respondent constitute a substantial interference with the Applicant's use of the Right of Way?
2. If so, what remedies are appropriate?

Analysis and Findings

Credibility

[30] A word about credibility. Since none of the affiants were cross-examined on their affidavits, the Court did not have the benefit of hearing from the witnesses. However, to the extent that there were different versions of facts laid out in the affidavits of the parties, none of these differing facts were directly relevant to the issues before the Court. As a result, the Court is not called upon to make credibility

findings per se. The Court accepts that in their affidavits, the parties stated the facts from their own perspectives without an attempt to lie or deceive. It does not follow, however, that the Court will not prefer the evidence of one party over that of another, taking into account all of the evidence before the Court.

The Scope of the Deeded Right of Way

[31] It is undisputed that the Applicant has a Right of Way over EVD. The only question is what the Right of Way entails, and whether the Respondent has interfered with Mr. Stutzinger's right to use the Right of Way.

[32] Many Nova Scotia cases have stated that in order to determine the dominant tenement owner's rights, courts must consider the "wording of their express grant of right-of-way but also any implied easement to which they may be entitled" (*Miller v. MacLean et al*, 1972 CanLii 2240 (NSSC)) at para 50.

[33] The interpretation of an express grant in a deed is subject to the same principles of interpretation as a contract (*Romkey v. Osborne*, 2019 NSSC 56 at para 80).

[34] In *Smith v. Balen*, 2018 BCSC 918 at para 52, the Court stated:

When interpreting an easement, the court must have regard to the plain and ordinary meaning of the words in the grant to determine what the intention of the parties was at the

time the agreement was entered into. Surrounding circumstances, that is, objective evidence of background facts at the time of the execution of the contract, are to be considered in interpreting the terms of the contract.

[35] Justice Arnold in *Romkey* stated that the surrounding circumstances are “the facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting”. (para 83, citing *Sattva Capital Corp v. Creston Moly Corp*, 2014 SCC 53 at para 60).

[36] The Nova Scotia Court of Appeal in *Knock v. Fouillard*, 2007 NSCA 27 at para 60 confirmed that, in case of doubt, the grant should be construed in favour of the grantee.

[37] The deeded Right of Way before the Court grants the Stutzingers a 66 foot Right of Way over EVD. It is apt to repeat the wording again at this point in the Court’s decision:

Together with a 66 foot Right of Way, in common with others having a similar right, over Eagle View Drive being Parcel EVD-1 on said plan.

Together with a right of Easement, in common with others having a similar right, over the said 66 foot Right of Way (Parcel EVD-1) for the placement of utilities including but not limited to utility poles and utility pole guide wires, underground cable and or piping, over and or under the said Right of Way, so long as the placement of the utilities does not interfere with the rights of vehicular and pedestrian travel over the said 6 foot Right of Way (Parcel EVD-1).

[Emphasis added]

[38] The wording of the easement is very broad, i.e., the right to travel over the Right of Way by foot and vehicle. It does not restrict in any way, the point at which the Stutzingers may access their Property.

[39] In *Pink v. Lohnes-Davis*, 2014 NSSC 304 Coughlan J. explained the rights of the servient tenement (i.e. the Bleckers in these circumstances), with reference to *Anger & Honsberger*:

[90] The servient tenement, on the other hand, cannot unduly restrict the use of the right-of-way. An act which substantially interferes with the exercise of a right-of-way is a nuisance. There is an actionable disturbance of a right-of-way if the way cannot be practically and substantially exercised as conveniently as before the interference. To be actionable, the interference must be substantial. Thus the erection of a gate is not necessarily an interference with a private right-of-way if the owner of the dominant land has reasonable access to the way. In determining the degree of interference, the nature of the obstruction is relevant. Thus, where the obstruction is permanent this may be seen as creating the requisite degree of obstruction although the actual interference with the right-of-way is not great:

[W]here the thing that is complained of is the erection of a substantial and permanent structure upon the land over which the grantor has already given a right of way, it appears...to be almost impossible to say that there is not a real and substantial interference with the right conveyed.

If the owner of the servient tenement obstructs the right-of-way, the owner of the dominant tenement may remove as much of the obstruction as is necessary in order to exercise the right-of-way or may deviate and go around the obstruction if it cannot be easily removed. The right to deviate must be exercised in a reasonable manner.

[40] The Bleckers, as the servient holder of the land in question, must ensure that the Right of Way is substantially free of obstructions such that the dominant holder (the Stutzingers) may enjoy access over the land. The dominant holder does not

have the right to demand that the entire ROW be kept free of any obstructions (see *Romkey v. Osbourne*, 2019 NSSC 56 at para. 139).

[41] I accept the evidence of Mr. Stutzinger that in early August 2024, he hired an excavator to remove the boulders, but was prevented from doing so by Mr. Blecker who became upset and called the RCMP. I also accept that he expended money to hire the excavator. However, have no evidence of the amount of expenditure.

[42] Counsel for the Respondents submits that grading work Mr. Blecker performed near the Stutzingers' Property was an "improvement", and that Mr. Blecker required that area for snow clearing. He submitted that the grading and the placement of boulders along EVD near the Stutzinger's Property is consistent with Mr. Blecker's right to maintain his property.

[43] In that regard, Mr. Blecker states that the boulders he placed act as a retaining wall to support the structural integrity of that portion of EVD. The Court notes that Mr. Blecker's evidence is not supported or confirmed by an expert.

[44] It is not in dispute that Mr. Blecker has a right to maintain his own property. However in doing so, he can not do so in a manner or to an extent which interferes with the Stutzingers' right to use the Right of Way. Wood, J (as he then was) said just this in *Cobalt Investments Ltd. Panko*, 2012, NSSC 34, "As owner, they are

entitled to use their property provided this does not undermine the rights of the holder of the easement”. (para. 29).

[45] This Court does not accept that Mr. Blecker requires the space near the northwest part of the Stutzingers’ Property for snow clearing. The overheard photographs attached to several affidavits show that there is plenty of other space along EVD to dump or deposit snow.

[46] At this point, the Court notes that Mr. Blecker, in his Affidavit, asserts that the Stutzingers obstructed EVD. In that regard, he says that in 2020, Mr. Stutzinger dug a pond which he says protrudes into EVD. He also states that Mr. and Mrs. Stutzinger placed various large boulders within the boundaries of EVD surrounding the perimeter of the pond. Mr. Blecker states that in 2020 he told Mr. Stutzinger to stop constructing the pond and to fill it back in. He also states that he told Mr. Stutzinger that the location of the pond would restrict his ability to travel upon and maintain EVD. Mr. Blecker states that Mr. Stutzinger only filled in a portion of the pond after his request.

[47] Mr. Blecker also states that Mr. Stutzinger constructed two garden beds and installed a flagpole within the boundaries of EVD without his consent.

[48] Mr. Blecker states in his Affidavit that,

It is necessary that I am able to remove snow from my properties during the winter months. EVD is a rather narrow road. The narrow nature of the road, along with the Applicant's obstructions within the boundaries of the road makes it extremely challenging to safely and effectively remove excess snow.

[49] Neither these allegations against the Applicants, nor the submission that the Respondent was entitled to carry out "improvements" provide a defence or answer to the issues before the Court, which concern the interpretation of the Right of Way and whether the boulders placed by Mr. Blecker interfere substantially with the Stutzingers' rights. There is no Respondents' claim in this matter.

[50] Regardless, it is apparent from the evidence before the Court, that Mr. Blecker has in fact cleared snow on EVD after the Stutzingers installed the pond, gardens and flag people in 2020. To suggest otherwise is not believable.

[51] Further, the exhibits to affidavit evidence before the Court show that there are other places on EVD to deposit snow, rather than at the northwest part of the Stutzingers' Property.

Do the Boulders Substantially Interfere With the Use of the Right of Way?

[52] I accept Mr. Stutzinger's evidence that he placed a Sea-Can (a metal storage container) close to EVD at some point shortly after coming to Canada from Germany in 2016. Mr. Blecker says that he shipped a number of personal items from Germany to Canada in the Sea-Can. Mr. Stutzinger states that Mr. Blecker

did not object to the placement of the Sea-Can at that time, and according to Mr. Stutzinger, prepared a base for the Sea-Can prior to its arrival. Mr. Blecker states that he advised Mr. Stutzinger at the time it was placed, that the storage of the Sea-Can was to be temporary.

[53] However, it appears from the affidavit evidence that what started off as a good relationship between the Applicants and Respondents began to deteriorate by 2019. At that time, Mr. Stutzinger says that he built a garage on the Property. Mr. Blecker advised that the garage extended into EVD and was angry about that. Mr. Stutzinger says that a survey of his Property confirms that the garage is entirely on his Property.

[54] Mr. Stutzinger says that in 2020, he and his wife dug a fire pond on their Property. He states that there were no survey markers at the time showing the extent of their Property, and the pond was dug partly onto EVD. Mr. Stutzinger states that Mr. Blecker told him on a number of occasions that he was unhappy about this and that he has apologized to Mr. Blecker.

[55] Mr. Stutzinger also says that in December 2023 or January 2024, Mr. Blecker demanded that they move the Sea-Can off of EVD, and that they did so, moving the Sea-Can to its current location on their Property in April or May 2024.

[56] Mr. Stutzinger states that along with moving the Sea-Can, he and his wife planned to build a car port on their Property to cover the Sea-Can and store a camper. In order to do so, they had planned to access the car port via EVD.

[57] I accept Mr. Stutzinger's evidence that in mid-July, 2024, he and his wife went to Germany for a two-week vacation. When they returned, there were boulders on a small portion of EVD along the border of their Property, in front of the location of the Sea-Can. Mr. Blecker has acknowledged that he placed the boulders in that location. The boulders are only located on EVD in front of the Stutzinger Sea-Can, and nowhere else along the length of EVD.

[58] The placement of the boulders by Mr. Blecker prevent Mr. Stutzinger from accessing the northwest part of his Property from EVD. In particular, he cannot access the Sea-Can from EVD. Mr. Stutzinger states that because he cannot access that part of his Property by vehicle, and in order to do so, he would need to build a new driveway extension from his Property which connects the Sea-Can to his current driveway which ends near his house.

[59] Mr. Stutzinger states that because he cannot access the northwest part of his Property with a vehicle, he has also been unable to move ahead with the construction of the car port that he intended to build.

[60] I find as a fact that the placement of large boulders by the Respondent along the Right of Way does constitute an unreasonable and substantial interference with the Applicant's use of the deeded Right of Way. The Applicants have met their burden of so proving.

[61] I accept the evidence of the Applicant, that the placement of the boulders prevents his ability to access his Property at that point. There is nothing in the wording of the deeded Right of Way which restricts access along the Right of Way to any particular point. The Respondent, as the owner of the servient lot, may not arbitrarily choose at what point the Applicant may access his Property.

[62] If one looks to the circumstances at the time of the grant of the Right of Way, the evidence before the Court shows that the subdivision where EVD is situated, was under development. There were no pre-existing driveways or points of access at that time.

[63] This Court specifically rejects the argument of the Respondents that the Stutzingers are restricted in their ability to access their Property from the Right of Way to the current location of their driveway. That argument is not supported by the wording of the deeded Right of Way, the circumstances at the time of the grant, or by the case law.

[64] In that regard, in *Carter v. Walford*, the applicant sought to have the respondent ordered to remove trees planted by the respondent near her property on a right of way that prevented her from accessing her property. The Court ruled that although the applicant (the dominant tenement) already had two driveways by which she could enter and exit her property, given the broad wording of the grant at use, “a private road access for entrance and exit”, the applicant could relocate one of her driveways to access her Property at the point of her choosing (para. 9).

[65] Similarly, in *Smith v. Balen*, 2018 BCSC 918, the plaintiffs’ only vehicle access to their property was by way of a road running along an easement on the defendants’ property. The defendants blocked the plaintiffs’ access to the easement by planting trees, placing objects such as large concrete blocks, and erecting a fence. The erection of the fence and installation of gates meant that the plaintiffs could only access their property at certain defined places. Mr. Justice Brundrett held that the various obstructions placed on the easement constituted an unreasonable and substantial interference with the intended use and enjoyment of the easement by the plaintiffs (at para. 88). Justice Brundrett granted a mandatory injunction requiring the defendants to remove the obstructions (at para. 92).

[66] The Respondents referred this Court to the 1923 decision of the Ontario Court of Appeal in *Lewis v. Wakeling* (1923), 54 OLR 647 (Ont. C.A.) in support of their

contention that the Stutzingers do not have the right to access EVD from any point on their Property.

[67] However, this Court finds that the *Lewis v. Wakeling* decision is distinguishable on its facts that the facts before this Court.

[68] In *Lewis v. Wakeling* (1923), 54 O.L.R. 647 (C.A.), the defendant had a right of way over an adjoining strip of the plaintiff's property, seven feet by eighty feet, and the plaintiff wanted to erect a boundary fence on the right of way to separate the two properties. The issue was the constraints on the right of the owner of the servient tenement to build a fence on the portion of the land that was subject to the right of way. The plaintiff was entitled to do so, as long as the defendant had reasonable access to the right of way through a gate. The wording of the easement gave the dominant tenement "reasonable access".

[69] The other case relied upon by the Respondents concerned whether a gate constituted a substantial interference with the dominant's tenement owner's use, *Pettey v. Parsons*, [1914] 2 Ch. 653 (Eng CA). The head note to this decision reads:

Where a right of way over land laid out as a roadway is granted or reserved to the owner of adjoining land as appurtenant thereto and to every part thereof, he is not entitled to have the roadway left unfenced for ever, but to reasonable access to the roadway.

[70] The *Petty* case and the *Lewis* case do not assist the Respondents. They both dealt with adjoining properties, and do not concern rights of ways. EVD was never fenced or gated. The boulders placed by Mr. Blecker do not function like a gate. They are permanent in nature, and cannot be easily moved, or driven around.

[71] Mr. Blecker states in his Affidavit evidence that he intends to enforce all or the restrictive covenants and other property rights with respect to the Applicants' plans for the northwest corner of the Stutzinger lot.

[72] Any such matters are not before this Court.

Conclusions

[73] This Court orders the Bleckers to remove all of the boulders from the Right of Way. They are to do so entirely at their own cost. They are to do whatever work is required to return the landscape where the boulders were placed to its condition prior to the placement of the boulders. All of this work must be completed by December 31, 2025.

[74] The Applicants are awarded general damages in the amount of \$1,000.00 for the inconvenience they suffered as a result of the unlawful placement of the boulders.

[75] The Applicants are granted a declaration that they are entitled to use EVD as a right of way for access to and egress from their Property.

[76] The Applicants are entitled to costs. If the parties are unable to resolve the issue of costs, this Court will accept short written submissions from the parties within thirty calendar days of the date they receive this decision.

[77] I ask counsel for the Applicants to prepare a draft form of order, for review and consent (as to form) by counsel for the Respondents.

Smith, J.