SUPREME COURT OF NOVA SCOTIA
Citation: *Livingston v. Cabot Links*, 2018 NSSC 140

Date: 20180118
Docket: Hfx. No. 465452
Registry: Halifax

Between:

Neal Brian Livingston

Applicant

v.

Cabot Links Enterprises ULC

Respondent

Judge:	The Honourable Justice Patrick J. Murray
Written Decision:	January 18, 2018, in Sydney, Nova Scotia
Motion by Correspondence:	Respondent Submissions – November 23, 2017 Applicant Submissions – December 7, 2017 Respondent Reply Submissions – December 14, 2017
Counsel:	Derek A. Simon and Jennie Pick, for the Applicant, Neal Brian Livingston John A. Keith, Q.C. and John Boyle, for the Respondent, Cabot Links Enterprises

By the Court:

Introduction

[1] This is a motion made by Cabot Links Enterprises ULC, "Cabot" to strike certain parts of the affidavit evidence submitted by Neal Brian Livingston.

[2] This proceeding relates to a parcel of land located within the Cabot Links Golf Course in Inverness, NS. The property in question is owned by Cabot Links Enterprises ULC and is identified as PID No. 50023803.

[3] The Applicant, Neal Livingston, alleges that the property has been previously dedicated for public use and accepted as such by the public at large. The Respondent, Cabot, has filed a notice of contest disputing the Applicant's claim.

[4] In this motion, Cabot seeks to strike the following paragraphs in the affidavit evidence, pursuant to *Civil Procedure Rule 39.04*.

- Paragraph 30 and 31 of the Affidavit of Mary Poirier dated July 7, 2017 to the extent it is relied on for the truth of its contents;
- Paragraph 14 of the Affidavit of Kathleen Poirier dated July 7, 2017 to the extent it is relied on for the truth of its contents;
- Paragraph 6 of the Supplemental Affidavit of Kathleen Poirier dated October 10, 2017; and
- Paragraphs 10 – 24 of the Supplemental Affidavit of Neal Brian Livingston dated October 10, 2017.

Issues

1. Whether paragraph 14 of the Affidavit of Kathleen Poirier dated July 7, 2017, and paragraph 30 of the Affidavit of Mary Poirier dated July 7, 2017, should be struck for containing inadmissible hearsay.
2. Whether paragraph 6 of the Supplemental Affidavit of Kathleen Poirier dated October 10, 2017, and paragraphs 10 – 24 of the Supplemental Affidavit of Neal Brian Livingston dated October 10, 2017, should be struck for containing inadmissible opinion evidence.

Issue 1 - Hearsay

[5] Paragraphs 30, 31 and 14 are contained in Appendix "A" attached to this decision. Paragraphs 10 – 24 are contained in the supplemental affidavit filed by Mr. Livingston.

[6] The parties agree that paragraph's 30, 31,and 14 contain hearsay evidence. Hearsay evidence is presumptively inadmissible. It is therefore only admissible pursuant to an exception to the hearsay rule. In this case, Mr. Livingston relies on the "principled exception" to the hearsay rule.

> Under the principled exception, hearsay statements overcome the presumption of inadmissibility when they are supported by indicia of necessity and reliability such that the probative value outweighs the prejudicial effects: R v. Starr, 2000 SCC 40 [book of Authorities of Cabot Links, Tab 1].

[7] Cabot agrees that the only way the impugned paragraphs are admissible is if the principled exception is met, which turns on whether the evidence is necessary and reliable.

[8] Cabot has acknowledged that the necessity requirement has been met but states there is not sufficient *indicia* of reliability to warrant the admission of the evidence.

Position of Cabot

[9] Cabot acknowledges that the actions of previous owners and the historical use of the public is relevant to the central issue before the Court.

[10] Pursuant to *Rule 39.03(1)*, Cabot submits however that while affidavit evidence is admissible, the affidavits must contain admissible evidence. If they do not, the Judge must strike that portion of the affidavit pursuant to *Rule 39.04(2)(a)*.

[11] *Rule 5.17* states as follows:

> 5.17 The rules of evidence, including the rules about hearsay, apply on the hearing of an application and to affidavits filed for the hearing except a judge may, in an *ex parte* application, accept hearsay presented by affidavit prepared in accordance with Rule 39 – affidavit.

[12] Cabot argues the affidavits of Kathleen Poirier and Mary Poirier refer to inadmissible comments made by Charles MacArthur, a former MLA and Municipal Warden. Mr. MacArthur passed away on February 24, 2010.

Position of the Applicant

[13] The Applicant argues that the affidavits of Kathleen and Mary Poirier describe statements made by Mr. MacArthur during the course of his duties as an elected member of the legislative for the riding of Inverness North and for the combined riding of Inverness.

[14] The necessity of these statements arises from the fact that Mr. MacArthur is deceased, as conceded by Cabot.

[15] Mr. Livingston submits these statements, made by a public official, are reliable and only available to the Court through these affidavits. Both affiants will be available for cross-examination.

[16] These statements, says the Applicant, have significant probative value and reflect the knowledge possessed by Mr. MacArthur. It cannot be replaced by non-hearsay evidence.

[17] The evidence in these three paragraphs, says the Applicant, are reliable for the truth of their contents and should be admitted.

Burden of Proof

[18] On a motion, the burden is normally on the mover to prove to the Court that it is entitled to the Order sought. In this case the mover is Cabot. However, both parties agree paragraphs 14, 30 and 31 contain hearsay statements.

[19] The starting point therefore is that the paragraphs are inadmissible. The burden on this motion therefore is on the Applicant, Mr. Livingston to establish their admissibility under the principled exception or on some other basis. For example, the public documents exception.

Analysis

[20] Cabot says paragraph 14 contains pure hearsay, "double hearsay" in fact because it refers to the residents being upset and also refers to Mr. MacArthur maintaining that the Inverness Beach Park would be returned to the County once Cape Bald Packers Ltd. (a previous owner) no longer required it.

[21] In paragraph 30, Cabot argues the statement is retold by Kathleen Poirier, but says it is not retold by her in her own affidavit.

[22] Mr. Livingston responds stating the statements to Kathleen Poirier and Mary Poirier were made by Mr. MacArthur "in reference to the needs and rights of his constituents".

[23] The Applicant argues these statements are further bolstered by the fact that Kathleen Poirier and Mary Poirier corroborate each other's evidence.

[24] In ***MacNeil v. MacNeil***, 2014 NSSC 171, a decision of Edwards, J. certain affidavit evidence was deemed inadmissible because it contained "blatant hearsay". In ***MacNeil*** some evidence was held to be admissible because the statements were made to several of the opposing parties. The Court found this provided a level of reliability.

[25] Cabot submits there is no similar guarantee of reliability here.

[26] A key argument of the Applicant, as contained on page 3 of his brief, is based on the notion that "public officers will perform their tasks properly, carefully, and honestly".

[27] Mr. Livingston submits this is sufficient "indicium of reliability" under the principled exception to make these statements admissible for their truth. He refers to paragraph 162 of the ***McEwing v. Canada (Attorney General)***, 2013 FC 525, decision as an exception to the hearsay rule related to public documents.

[28] Cabot argues the public document exception does not apply as there is no document, let alone a public one. These are purportedly oral statements made by Mr. MacArthur prior to his death.

[29] Cabot says these were statements made by Mr. MacArthur to a co-worker and a friend. There is insufficient *indicia* of reliability to allow the trier of fact to evaluate the truth of the statement, it submits.

[30] Recently, the Supreme Court of Canada has taken a more restrictive approach to the admission of hearsay in the criminal context.

[31] In ***R v. Bradshaw,*** 2017 SCC 35, the court confirmed that hearsay evidence is presumptively inadmissible, as it is often difficult for the trier of fact to assess its truth.

[32] The Court acknowledged that hearsay evidence can be admitted under the principled exception if the criteria of necessity and threshold reliability are met on a balance of probabilities.

[33] In assessing threshold reliability the court stated it is established when the dangers associated with the difficulties in testing it (the evidence) are overcome.

[34] The court noted that these dangers may be overcome on the basis of corroborative evidence, when it shows given the circumstances, that the only likely explanation for the statement or material aspects of it, is the declarant's truthfulness about it.

[35] The court in paragraph 57 referred to steps the court should follow in this regard. In addition to corroboration, the court can assess the circumstances in which the statement was made.

Decision - Paragraphs 30 and 31 of Mary Poirier

[36] I have considered both paragraphs 30, 31 of the affidavit of Mary Poirier and in doing so I find it reasonable to conclude that both are "blatant hearsay".

[37] In paragraph 30, the affiant states she had requested an answer from the MLA at that time. His assistant, Kathleen Poirier, told Mary that "Charlie told her" (Kathleen) that "it", the picnic table in the Park could still be used, that it was there for everyone's use.

[38] As stated by Edwards, J in ***MacNeil***, perhaps nothing further need be said, except that the principled approach calls for the Court to assess the *indicia* of reliability present, so as to

determine if the hearsay statement was made in circumstances sufficiently trustworthy to justify its admission, on a balance of probabilities.

[39] The main danger here is the lack of means to test the declarant, Mr. MacArthur under cross-examination. The Applicant suggests this is overcome by the fact that Mr. MacArthur was acting as an MLA, and his statements should be considered reliable for their truth because he was speaking as a public officer.

[40] Firstly, it was not Mr. MacArthur who spoke to Mary in paragraph 30, it was Kathleen, purportedly. Secondly, it was Charlie who spoke to Kathleen, but she does not recount this conversation in her own affidavit.

[41] Thirdly, there is the argument that the public document exception does not apply as paragraphs, 30 and 31 refer to oral statements. Paragraph 162 of ***McEwing*** refers to "statements made in public documents" and refers to the "truthfulness of the entry arising from the duty". Clearly this refers to an entry in a public document.

[42] On the other hand, paragraph 162 also refers to the belief that "public officers will perform their tasks, properly, carefully and honestly".

[43] That said, I do not find that paragraphs 30 and 31 as worded are sufficient to overcome the prejudice to Cabot arising from the inability to cross-examine Mr. MacArthur.

[44] Paragraph 30 conveys the clear impression of being "double hearsay". Paragraph 31 gives little or no context of the conversation at the Legion, other than it happened "later".

[45] The majority of Mary Poirier's lengthy affidavit deals with the personal and public use of the Inverness Beach Park. With the exception of these two paragraphs (30, 31) there is little or no mention of Mr. MacArthur, except that he was "our MLA".

[46] In the result, even though Mary (and Kathleen) can both be cross-examined, the fact remains that the source of the information, is the late Honourable Mr. MacArthur, who is unavailable to be cross-examined.

[47] I have considered whether paragraph 14 of Kathleen's affidavit could provide sufficient corroboration for paragraph 31 of Mary's affidavit.

[48] Paragraph 14 itself is hearsay and also objected to on that basis. Paragraph 14, if admissible, does not address any conversation that either Kathleen or Mr. MacArthur had with Mary.

[49] In the result, I am going to strike paragraphs 30 and 31 of Mary Poirier's affidavit to the extent they are relied on for the truth of their contents; on the basis that the dangers of hearsay remain.

Decision - Paragraph 14 of Kathleen Poirier

[50] I turn to consider whether or not paragraph 14 of Kathleen Poirier's affidavit will be admitted under the principled exception.

[51] Having considered the affidavit of Kathleen Poirier, I think her circumstances are quite different from Mary Poirier in terms of her involvement with the Park and with Mr. MacArthur. She worked at the park as a young person in and around 1969, and is very familiar with Mr. MacArthur having worked as his constituency assistant for some 10 years. She had known him for much longer.

[52] Paragraph 14 does refer to her working with him as a friend, volunteer, *and his Assistant* but also states that "in his *public* and private life he maintained the Inverness Beach Park would return to the ownership of the county once Cape Bald Packers no longer require it".

[53] There are no specific statements made in this paragraph but it refers to a position Mr. MacArthur formulated. It is within the personal knowledge of the affiant that Mr. MacArthur held this view from her long experience with him.

[54] In paragraph 159 of ***McEwing*** the Court was satisfied that information collected by public officers contained in their sworn affidavits was reliable. In this case, I find a similar analogy can be made with the information received by Ms. Poirier, in the course of business as his constituency assistant.

[55] While some hearsay dangers remain, I think that cross-examination can be used to determine the weight that should be afforded to paragraph 14.

[56] I have considered the submissions of Cabot including those contained in its reply brief.

[57] Cabot states there is no evidence these statements were intended to serve as a permanent record and not all statements made by public officials are made in the discharge of their duty. In this case, Ms. Poirier can be asked about that in cross-examination.

[58] The Court agrees the public documents exception does not apply, but I find the principles as enunciated are still of assistance in determining whether a statement is made in circumstances that are trustworthy.

[59] In addition, and in keeping with ***Bradshaw***, there is some corroboration for paragraph 14, in Exhibit B of the initial affidavit of Mr. Livingston. These minutes reflect that Mr. MacArthur was involved and, in fact, moved the motion involving the property and Cape Bald Packers.

[60] In the result, I am satisfied that paragraph 14 was made in circumstances sufficiently reliable to warrant its admission for the truth of its contents.

[61] Under the principled approach the Court has a residual discretion, even if satisfied the documents meet the threshold reliability test, to exclude hearsay statements if the prejudicial effect outweighs their probative value.

[62] Cabot has argued that the probative value of Mr. MacArthur's statements is outweighed by their prejudicial effect. It states Mr. MacArthur's views are not probative.

[63] Respectfully, I do not concur that paragraph 14 reflects Mr. MacArthur's personal views only, as earlier noted.

[64] Secondly, I do not agree that the Minutes referred to in Exhibit "B" serve to reduce the probative value of paragraph 14.

[65] I have considered whether this evidence strays closer to the central issue before the Court and whether that affects its probative value and the prejudicial effect of admitting it.

[66] On balance, I am satisfied that I should not exercise my residual discretion to exclude the evidence. Once admitted the weight to be accorded can be assessed with all of the other evidence, at the hearing, which will include the right to cross-examine Ms. Poirier and other affiants.

Issue 2 – Objection to Paragraphs 6 of K. Poirier and 10 – 24 of N. Livingston

[67] The second issue to be dealt with in this motion involves the admissibility of aerial photographs referred to in paragraph 6 of the Supplemental Affidavit of Kathleen Poirier and paragraphs 10 – 24 of the Supplemental Affidavit of the Applicant, Neal Brian Livingston, both dated on October 10, 2017.

[68] Cabot strongly objects to these paragraphs which reference the same photographs contained in Exhibit "B" of paragraph 8 of Mr. Livingston's Supplemental affidavit. While there is no objection to Exhibit "B", the exhibits referred to in paragraphs 6 and 10 – 24 are in a different format. Many are "zoomed in" and marked to identify objects in the photos. Cabot objects to the language used by the affiants to describe these items, submitting it is in the nature of opinion evidence.

[69] Cabot's objections range from the photos being manipulated and misleading to there being no indication of the boundaries of the property in question.

[70] In its brief Cabot's submissions were as follows in part:

> Lay witnesses, such as Neal Brian Livingston and Kathleen Poirier, are generally prevented from giving opinion evidence, particularly in relation to subject matters that require a specialist's knowledge: ***R v. Graat***, [1982] 2 SCR 819 [Tab 4]. In specified and recognized areas of expertise, opinion evidence is limited to witnesses who have been qualified as experts.
>
> In Mr. Livingston's supplemental affidavit he purports to take aerial photographs from Service Nova Scotia and Municipal Affairs, Nova Scotia Geomatics Centre and zoom in on particular potions of certain pictures. These zoomed in photos are found at Exhibits C, D, E, F, G and H in his supplemental affidavit. He then

> identifies various pieces of infrastructure from the pictures, such as picnic tables, paths, a water tap, vehicles, and barriers.
>
> In Ms. Poirier's supplemental affidavit, she interprets one of Mr. Livingston's zoomed in aerial photographs as including a water tap, parking area, swing-set, teeter totter, camping area, picnic tables, and a fence are visible in the photograph.
>
> Mr. Livingston ultimately asks the Court to infer that his opinions regarding these temporary structures enable the Court to infer that the Property was permanently dedicated to (and accepted by) the public.

[71] The main objection Cabot makes is that the impugned paragraphs constitute lay opinion evidence, which is inadmissible. For example, Cabot refers to Exhibit "E" wherein Mr. Livingston identifies "a log barrier, demarcating the edges of the parking lot".

[72] Further objection is taken to the use of the word "infrastructure" by Ms. Poirier in identifying "picnic tables, benches, playground equipment, and fire pits".

[73] This is a mischaracterization says Cabot, whose basic objection is that it is beyond the scope of lay witnesses to interpret and manipulate aerial photographs. Cabot alleges this has been done here by the Applicant.

[74] The Court must be watchful (as per ***Waverly***) of affidavit evidence that is in the nature of a plea or submission. It is often a "two way street". As opposed to infrastructure (also noted in the Livingston affidavit at paragraph 15) the Respondent has for example, referred to these as "temporary" structures. (***Waverly (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs***, [1993] N.S.J. No. 151)

[75] In terms of whether lay opinion can be offered, Cabot refers to Justice Hood's decision in ***Burrell v. NS(AG)***, 2004 NSSC 249 at paragraph 83, which states in part:

> 83. I did not allow opinion evidence to be given by Lawrence Burrell to interpret the aerial photographs he submitted into evidence. I concluded at trial that interpretations of such photographs must be given by an expert in geomatics. However, those aerial photographs are of some use in showing the extent of the travelled way at various times, especially where *viva voce* testimony confirmed the extent of the travelled way.

[76] Cabot argues then, that only in exceptional circumstances can the Court allow the use of aerial photographs without expert opinion. Essentially it submits these are situations involving obvious landmarks which are clear to the naked eye. For example, the cleared area in ***MacNeil***, and the sloping of land in ***MacMillan v. MacMillan***, 2013 NSSC 393.

[77] In these circumstances, given that the central issue involves the dedication or lack thereof a specific parcel, the lack of evidence as to boundaries remains as a major objection by Cabot to these photos in terms of their probative value, and their potential to mislead the Court.

[78] The Applicant, Mr. Livingston, says otherwise. This is not opinion evidence but rather witnesses identifying objects from their personal knowledge and experience with the property.

[79] The Applicant argues a witness is normally permitted to identify in Court, and also mark the location of objects and things in a normal trial. This is no different, except given the mode of evidence by affidavit he will not have the opportunity to provide direct *viva voce* testimony.

[80] There is no intention to manipulate and the existence and use of infrastructure is very relevant to the main issue of whether or not the land has been dedicated, argues the Applicant.

[81] In its brief Mr. Livingston makes the following submission:

> In short, to accept the position of Cabot Links is to raise aerial photographs to an entirely different standard from which ordinary photographs are held. To the extent Mr. Livingston and Kathleen Poirier can be said to be "interpreting" the aerial photographs submitted into evidence, they only do so as individuals would ordinarily interpret any photograph. They have pointed out structures and uses of the land in question – only the timeline with respect to which, rather than the existence of, is in dispute – from their own knowledge and personal observations. The evidence is properly admitted as part of the direct evidence of Mr. Livingston's witnesses in this Application and should not be struck.

[82] The main submission of the Applicant in support of admission is that the photos are relevant and will be of assistance to the Court. In addition, they are necessary for the Applicant to establish its case.

[83] In terms of a lack of boundary evidence these are matters which go to weight, not admissibility, submits the Applicant.

[84] Further, arguments of Mr. Livingston include that the affidavit evidence of Cabot supports the timeline in terms of the objects identified by the Applicant, as shown in the Applicants brief. (pages 5 – 7)

[85] In terms of further evidence to support the admission, the Applicant refers to the affidavit of Ms. Cassandra Bannister, dated July 7, 2017, and the plan in Exhibit "G" which references a road and parking lot.

[86] The Applicant disagrees with Cabot as to the principle in ***Burrell*** and says there is no clear legal principle whereby expert evidence is required to interpret aerial photos.

[87] The Applicant submits, even if this were lay opinion evidence, it would be admissible because : 1) of the personal knowledge of the affiants; 2) these witnesses are in a better position than the trier of fact; 3) these witnesses have the experiential capacity to draw the inference; and 4) the witness could not adequately and reasonably describe the facts in testimony. (Sopinka, Lederman, & Bryant on *The Law of Evidence in Canada*, 3rd ed (Markham, Ontario: LexisNexis Canada Inc., 2009)

[88] I have carefully weighted and considered the evidence and submissions of the parties.

[89] In doing so, I have concerns at the outset as to the reliance by Mr. Livingston on others in his supplemental affidavit, while at the same time directing others to mark the objects on the photos.

[90] In addition, I have concerns with the many references in his affidavit to "The zoomed in potions attached include the Inverness Beach Park". There is also the statement that his own memory goes back to 1978, while the photos begin in 1961. I recognize he has relied on other's that have provided evidence to "fill the gap", and they will be available for cross-examination.

[91] In fairness, I do not think there is a problem with "zooming in", in terms of manipulation, especially given that all of the aerial photos themselves, in original form as per the flash drive containing electronic copies, are not disputed in terms of their admissibly. (Exhibit "B" paragraph 8 of N. Livingston Supplemental)

[92] Further, I find that mere identification of objects on a plan, sketch, or photo, from a witnesses with personal knowledge, does not constitute the giving of expert evidence.

[93] That said the use of aerial photos must be approached with caution, as suggested in the ***Burrell*** decision. Where real property and boundaries are concerned, surveys often need to be introduced and interpreted by an expert. They will often note for example the "scale" used 1 to 50, 1 to 100, when describing aerial photos used to support their work.

[94] This type of detailed calculation, depending on the particular issue, can be critically important in dealing with land issues.

[95] Articulation of degrees, courses, distances, natural monuments all come into play. As demonstrated in ***Burrell***, the legal description in the deed is often "down the list" in terms of priority in establishing title, and the "extent of title". The latter phrase refers to the amount of acreage, the size of the lot, and the extent of its boundaries.

[96] In some ways, it is a simple exercise to enlarge a photo and indicate the location of objects upon it. The photo will often speak for itself. If it does not, then the potential for it to be interpreted becomes greater. The concern for the Court is that it not be misled or confused, even unintentionally by the evidence.

[97] In ***Donovan v. Gunn***, 2015 NSSC 339, an expert witness, a surveyor used enlarged aerial photos to "overlay" them on a survey so as to compare historical usage with what had existed on the ground.

[98] The Applicant submits his case hinges on establishing historical use of the property over time. The affiants wish to show the Court what has been there or existed, from their own knowledge.

[99] While reference to the various plans contained in the evidence is helpful, it can be difficult to obtain a clear sense of the Park boundaries from the photos themselves. Certain of the affidavit evidence referred to logs forming a boundary around the parking lot.

[100] With these concerns in mind, I turn to a summary of the general rule on the admission of real evidence in the form of photographs, as contained in the *Canadian Encyclopedic Digest, Evidence, VII.4*.

> 407. Photographs are useful pieces of evidence that reveal information free of many of the frailties affiliated with oral testimony. Photographs relevant to an issue are admissible where they accurately represent the facts depicted, evince no intention to mislead, and are verified by a person capable of testifying. The burden of establishing authenticity lies on the party seeking to make use of the photo, and where there is evidence that the photo has been altered, edited or changed in some manner, it may be excluded. Where photographs are authenticated, they may still be excluded where the probative value of the evidence is outweighed by its prejudicial effect.

[101] The principles contained in this rule are in large measure dispositive of the issues before me. I now turn to my decision on this issue.

Decision – Paragraph 6 of the Supplemental Affidavit of Kathleen Poirier

[102] Paragraph 6 of this affidavit will be admitted for the limited purpose of identifying the "picnic tables", "teeter totter" and "swing set". These images are somewhat vague but discernible for labeling purposes.

[103] In my respectful view, the remaining items referred to in paragraph 7 and Exhibit "A" (consisting of four pages) are not clearly visible. Simply put, it is not of sufficient quality to add probative value, in spite of personal knowledge of the affiant.

[104] In the result, paragraph 6 will remain as worded. Paragraph 7 will now read as follows:

> 7. As has been marked on Exhibit "A", *picnic tables, teeter totter and swing set* are visible in the photograph. These pieces of infrastructure were erected on the Inverness Beach Park prior to 1975 and still existed on the property in 1975.

[105] Paragraph 8 will be deleted as no camping area is identified or clearly visible.

[106] In terms of the reference to "the Inverness Beach Park", that will be a matter of the weight to be assigned to the evidence as will references to such things as "infrastructure".

Decision – Paragraph 10 - 24 of the Supplemental Affidavit of Neal Livingston

[107] The Exhibits referenced in paragraphs 10, 11, 12, 13, 17 and 18 being Exhibits "C", "D" and "F" shall be struck for reasons similar to those in the ruling on Ms. Poirier's affidavit.

[108] Due to the quality of these exhibits and the resulting enlargement, I am not satisfied they accurately represent what is being depicted in the photos. In the result, Exhibit "C", "D" and "F" and paragraphs 10, 11, 12, 13, 17 and 18 shall be struck.

[109] With respect to Exhibit "E" referenced in paragraphs 14, 15, 16, paragraph 14 will be admitted as an introductory paragraph. Paragraph 15 shall be admitted to indicate the location of the "picnic tables", "teeter totter" and "swing set". The remaining items in paragraph 15 and shown on Exhibit "E" shall be struck as will paragraph 16.

[110] In the result paragraph 15 will now read as follows:

> 15. At my direction, the photographs attached hereto as Exhibit "E" have been marked to indicate the location of *picnic tables, teeter totter, and a swing-set* that are visible on the Inverness Beach Park in the photographs. I was assisted in identifying these items at an in-person meeting on August 31, 2017 with Kathleen Poirier, who viewed the photographs with me and who, as per her affidavit filed in this proceeding, was employed in building the noted infrastructure. Kathleen Poirier has informed me and I do verily believe that the infrastructure identified on the photographs attached as Exhibit "E" existed at the time the aerial photograph was taken in 1975.

[111] In Exhibit "G" the reference to "parked cars" is not clearly visible. In my view, the photo does not speak for itself and requires some interpretation.

[112] In the result paragraphs 19 and 20 and Exhibit "G" shall be struck.

[113] With respect to Exhibit "H" referenced in paragraphs 21 and 22, I will admit this Exhibit and those paragraphs as an indication of the location of the Boardwalk in 1999.

[114] I have concerns about the reference to "boardwalk access" in paragraph 22, but there is some verification in Exhibit "A". In the end the affiant will be available for cross-examination.

[115] With respect to Exhibit "I", referenced in paragraphs 23 and 24, I will admit this on the basis that it likely depicts what is referenced and the affiant will be available for cross-examination. Paragraphs 23 and 24 shall be admitted as well.

[116] In summary, with respect to lay opinion evidence, I am satisfied the impugned affidavits were intended in the main to identify objects, and not provide opinion evidence.

[117] In those instances where the evidence strays into opinion the Court will ultimately determine what weight, if any, to give the evidence. The Court as trier of fact will ultimately determine what facts have been proven, after assessing the evidence in its entirety.

Conclusion

[118] Mary Poirier Affidavit dated July 7, 2017 – Paragraphs 30 and 31 struck.

[119] Kathleen Poirier Affidavit dated July 7, 2017 – Paragraph 14 admitted.

[120] Kathleen Poirier Supplemental Affidavit dated October 10, 2017 – Paragraph 6 – admitted, but related paragraph 7 struck in part, and related paragraph 8 struck.

[121] Neal Livingston Supplemental Affidavit dated October 10, 2017 – Paragraphs 10 – 24:

Paragraphs 10, 11, 12, 13, 17, - Struck;
Paragraph 14 – Admitted;
Paragraph 15 – Struck in part;
Paragraph 16 – Struck;
Paragraphs 19 and 20 – Struck;
Paragraphs 21 and 22 – Admitted;
Paragraphs 23 and 24 – Admitted.

[122] This concludes my decision on the motion.

J. Murray

APPENDIX "A"

30. After the Cape Bald building was built, I called Charles MacArthur's office, who was our MLA at that time. There was still a picnic table in the Park and I wanted to know if I could still use it to feed my kids. His assistant (Kathleen Poirier) told me we could still use it because Charlie told her to tell me it was still there for everyone to use.

31. I later spoke to Charlie directly at the Legion, and he told me that we could use the Park and the only thing was we were not to interfere with what ever business Cape Bald was running there, and that if Cape Bald ever left, the land would revert to the community.

14. During the time I worked with Charles, and as a friend, volunteer and his Assistant, I heard him state on several occasions that he realized that residents of Inverness were upset over the fact that the Inverness Beach Park land had been sold and a building constructed on this beachfront property, but in his public and private life he maintained that the Inverness Beach Park would return to the ownership of the County once Cape Bald Packers no longer require it.