

May 11, 2011

Via Email: legc.hebbgd@gov.ns.ca & Hand Delivery

Gordon Hebb, Q.C.
Office of Legislative Counsel
9th Floor, 1690 Hollis Street
PO Box 1116
Halifax, NS B3J 2X1

Dear Mr. Hebb:

RE: Bill No. 57 – *Private Ways Act*

The issue surrounding these amendments is focussed on a particular problem: Should Susan Sheehan have a permanent driveway over her neighbour's lands? There are no other known cases or situations where these proposed amendments would apply. Ms. Sheehan and HRM both acknowledge this fact.

Ms. Sheehan may have compelling reasons to justify her request for a driveway, but those reasons are clearly both private and personal. The Crons may also be able to describe their own need to preserve the integrity of their property. Those reasons would be equally private and personal. The purpose of this letter is not to advocate for one perspective or disparage the other.

The fact of the matter is that these amendments seek to resolve a single and unique private dispute in favour of one citizen over another. Regardless of what one might think about the circumstances of this case, this prospect raises troubling philosophical issues for the legislative process. The legislature should not be seen as a vehicle whereby one citizen may seek customized statutory relief which promotes and protects their private claims over another citizen. The legislative process is designed for broader public service and ought not be transformed into a place where private citizens can legislate solutions to their own personal problems.

John A. Keith | Partner

Direct 902 491 4217 Main 902 421 6262 Fax 902 421 3130 Email jkeith@coxandpalmer.com

Purdy's Wharf Tower I 1100-1959 Upper Water Street Halifax NS

Correspondence PO Box 2380 Central Halifax NS B3J 3E5

May 11, 2011

Having said that, if the legislature seeks to proceed with these amendments, I agree that the *Private Ways Act* is deficient and offer the following concrete proposals for consideration as part of the amendments:

1. Remove section 3 of the proposed amendments providing that the amendments be imposed retroactively. Again, this change is intended entirely to alter the course of a single private dispute which is scheduled to be heard by the Nova Scotia Court of Appeal in September 2011. During yesterday's Law Amendments Committee meeting, Mr. Epstein suggested that, in his view, this appeal is unlikely to succeed. If Mr. Epstein is correct, there is no need for the retroactive provisions.
2. The proposed amendments will, in a very blunt and rough manner, abrogate a private landowner's common law right to negotiate the terms under which a right of way is placed over his or her own land – including the size of the right of way, appropriate building standards, obligation to repair and maintain the right of way, compensation for the right of way, etc. Many of these issues are appropriately addressed in the *Expropriation Act*. However, if this statute is to be separated from (and independent of) the *Expropriation Act*, the owner of the lands upon which a right of way is being imposed (i.e. the servient tenement) should equally be entitled to statutory protection for the loss and exposure created by that imposition. Put another way, the owner of the dominant tenement lands must accept the burden as well as the benefit associated with taking a right of way over neighbouring lands. To that end, I propose:
 - (a) Incorporating the compensation process and model provided under the *Expropriation Act*. The *Expropriation Act* allows for an impartial process which also ensures fair value for the land being taken (see, for example, sections 16 and 26 to 27 of the *Expropriation Act*). The concepts of "fair market value" and "injurious affection" are particularly important.
 - (b) Adding a provision confirming that the right of way being granted shall be no greater than the width or size required to accommodate such reasonable access required by the dominant tenement.
 - (c) Confirming that the granting of any right of way shall be conditional on:
 - (i) the right of way being constructed in accordance with such reasonable standards as determined by an independent engineer licensed to practice in the Province of Nova and appointed by the municipal council and who shall ensure that all applicable statutes and regulations are met including, for example, any requirements of environmental legislation. All associated construction costs shall be borne by the owner of the dominant tenement benefit;

May 11, 2011

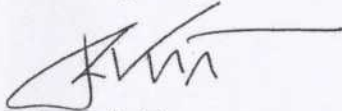
- (ii) the owner of the dominant tenement who is benefitting by the right of way maintaining and repairing the road so as to permit the safe passage of vehicle and pedestrians travelling across the right of way. All associated costs shall be borne by the owner of the dominant tenement; and
- (iii) the owner of the dominant tenement benefitted by the right of way maintaining liability insurance sufficient to cover any reasonable risks associated with the new right of way and indemnifying the owner of the servient tenement over whose lands are being burdened with the right of way in respect of all liability.

I do not have experience in drafting legislation but will attempt to provide any assistance required if you think it is necessary.

I am also prepared to discuss the proposed amendments if required.

Thank you for your consideration.

Yours very truly,



John A. Keith

JAK/amb

cc: Members of the Law Amendments Committee
cc: Karen MacDonald
cc: Susan Sheehan