NOVA SCOTIA COURT OF APPEAL

Citation: ***Knock v. Fouillard***, 2007 NSCA 27

Date: 20070228
Docket: CA 267440
Registry: Halifax

Between:

Charles Everett Knock

Appellant

v.

Anne D. Fouillard and John Duckworth

Respondents

Judges: Roscoe, Bateman & Fichaud, JJ.A.

Appeal Heard: January 24, 2007, in Halifax, Nova Scotia

Held: Appeal allowed in part per reasons for judgment of Fichaud, J.A.; Roscoe and Bateman, JJ.A. concurring.

Counsel: G. F. Philip Romney, for the appellant
David Farrar, Q.C. & Sara Scott, for the respondent

Reasons for judgment:

[1] Charles Knock owns vacant oceanfront land at Kingsburg, Lunenburg County. Anne Fouillard owns and, with her husband John Duckworth, resides on the adjacent property. The Fouillard property separates the Knock property from the highway. Mr. Knock claims a right-of-way over the southern portion of the Fouillard property to the highway, and says that the right-of-way permits him to cut trees, stake and construct a vehicular road. Ms. Fouillard and Mr. Duckworth dispute the existence of any right-of-way and say alternatively that, if it exists, the right-of-way does not allow motor vehicular passage. The trial judge dismissed Mr. Knock's claim and ruled there was no right-of-way. The issues are whether there is a right-of-way over the Fouillard property by prescription or deed and, if so, what mode of use is allowed to the owners of the Knock property.

1. Background

[2] The trial judge, Justice Wright, cited Ms. Fouillard's property as the "homestead property," and Mr. Knock's as the "fish lot." I will do the same.

[3] The trial judge reviewed the historical usage of the homestead property for the benefit of the fish lot. There was little evidence before the 1940's. A 1939 deed between successive owners of the fish lot referred to a right-of-way to the public road. Until 1993, which I will discuss, no title document to the homestead property mentioned a right-of-way to serve the fish lot.

[4] Charles Knock's father Everett Knock owned the fish lot from 1947 until his death in 1960. From 1961 until 1982, Everett's widow MaryAnn Knock owned the fish lot. In 1982 she conveyed it to her son, Albert Knock, who owned it until 1992 when he reconveyed it to his mother. On June 3, 1993 MaryAnn Knock conveyed the fish lot to her other son, the appellant Charles Knock.

[5] In the 1940's, Charles Knock's grandfather Bennett Knock owned the homestead property, which later passed in title to Bennett's son, Carson Knock, uncle of Charles. After Carson Knock died in 1988, his Will devised the homestead property to his widow Irene Knock (later Irene Wolfe after remarriage). Irene Wolfe deeded the homestead property to the respondent Anne Fouillard on June 17, 1993.

[6] The witnesses testified about the usage of the claimed right-of-way beginning in the late 1940's. The owners of the fish lot hauled seaweed, rocks and sand over the claimed right-of-way. The trial judge summarized his findings on the usage of the homestead property by the owners of the fish lot (2006 NSSC 143):

> [46] The plaintiff (born in 1935) was age 12 when his father Everett acquired the fish lot. He said that his father used it as well to haul seaweed, beach rocks and sand in a wagon pulled by oxen or horses. He testified that they accessed the fish lot for these purposes by using the right-of-way in the location shown on the Berrigan plan.
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> . . .
>
> [65] I accept the evidence of the plaintiff and his brother Albert in recounting the use made of the right-of-way for access to the fish lot by their father Everett Knock who they sometimes helped in their younger years. That evidence supports a finding that Everett Knock made continuous, uninterrupted, open and peaceful use of the right-of-way during his period of ownership of the fish lot from 1947 until his death in 1960. The acts of user also support the inference that they were carried out on the basis of a claimed right. However, that period of ownership of the fish lot and the use of the right-of-way to gain access to it extended for only 13 years. It may well be that Everett Knock's predecessors in title to the fish lot made similar use of the right-of-way but there is insufficient evidence before the court to enable that conclusion to be drawn. It is necessary, therefore, to closely examine the use made of the right-of-way between 1960 and 1967 to determine whether the plaintiff meets the 20 year requirement for reliance on the lost modern grant doctrine.
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> [66] As recited earlier, the successor owner of the fish lot following the death of Everett Knock in 1960 was his widow, Mary Ann Knock. Indeed, she held the title to the fish lot until 1982 when she conveyed it to her son Albert. The title to the homestead property was then held by the plaintiff's grandfather, Bennett Knock, who owned it from 1922 until his death in 1978.
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> [67] It is apparent from the evidence that there was a marked decline in the use of the right-of-way to access the fish lot after the death of Everett Knock in 1960. The activity of using the fish lot for drying salt cod was no longer carried on and the only occasional use made of it between 1960 and 1967 was by the plaintiff to haul seaweed and by his brother Albert for purposes of gathering seaweed or to

> get sand or beach rocks. I conclude from the evidence that the use of the fish lot over this seven year period was at best sporadic.

[7] As noted, on June 17, 1993 Irene Wolfe deeded the homestead property to the respondent Anne Fouillard. The deed's legal description contained a paragraph referring to Charles Knock's claimed right-of-way:

> The lands hereinbefore described ***are subject to a perpetual, free and uninterrupted Right-of-Way for all purposes***, Ten feet (10') in width leading ***from the Eastern sideline of the travelled portion of the said road*** leading to Hell Point ***to and from*** the lands now of Manson Embro Mossman and ***the lands of Charles Knock***, including the branched Right-of-Way leading to the said lands of Manson Embro Mossman and over the portion of the paved driveway, ***all situated as shown on the plan*** hereinbefore referred to [the survey plan dated March 29, 1993 prepared by Lester W. Berrigan N.S.L.S. No. 409]. [Emphasis added]

The trial judge's decision attached as Schedule "A" the portion of the Berrigan survey plan showing the right-of-way.

[8] The events leading to this deed from Irene Wolfe to Ms. Fouillard were significant to the trial judge's reasoning and to the arguments on the appeal. Rather than paraphrase, I will set out in full the trial judge's recitation:

> [5] Sometime in January of 1993, the defendants reached an agreement with Irene Wolfe (formerly Irene Knock) to purchase the homestead property as their principal residence. The defendants [Ms. Fouillard and Mr. Duckworth] retained Peter McDonough, Q.C. to represent them on the purchase and Ms. Wolfe retained Borden Conrad, Q.C. to represent her on the sale.
>
> [6] A file note made by Mr. Conrad records that on February 2, 1993 he received a call from the plaintiff mentioning a right-of-way over the homestead property to his fish lot. Mr. Conrad's file note further indicates that he then made calls to Manson Mossman, the owner of another fish lot abutting the north boundary line of the plaintiff's fish lot (as shown on Schedule "A") as well as to his client Irene Wolfe. Mr. Conrad recorded that his client confirmed the right-of-way for Mr. Mossman and Mary Ann Knock running from the public road over her driveway and past the barn along the Doerenkamp property fence line to the fish lots.
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> [7] On the next day, February 3rd, Mr. Conrad wrote to Mr. McDonough enclosing a legal description he had composed from the title information which he

had available. Mr. Conrad further informed Mr. McDonough in that letter that he had earlier forgotten to mention a right-of-way which ran along the south side of the homestead property to give access to the fish lots on Kings Bay. Since no survey plan then existed that could be referred to, Mr. Conrad drafted a closing paragraph in the legal description as follows:

> The lands hereinbefore described are also subject to a perpetual free and uninterrupted right-of-way for all purposes over the existing driveway on the Southern side of the house on the aforesaid property leading from the Eastern sideline of the aforesaid Public Highway over the said driveway and continuing Easterly along the Northern sideline of the aforesaid lands of Hildegard Doerenkamp to and along the Western sideline of the lands of Mary Ann Knock and the lands of Manson Morrison.

[8] On receipt of that letter, Mr. McDonough replied to Mr. Conrad on February 5th advising that his client intended to retain the services of Lester Berrigan, a Nova Scotia Land Surveyor, to prepare a survey of the homestead property. Mr. McDonough also asked Mr. Conrad if he would act as agent with respect to a title certificate for the lands, since Mr. Conrad practised in Lunenburg County and had some familiarity with the property. Mr. Conrad agreed to take on that dual role.

[9] Meanwhile, on February 17, 1993, Manson Mossman signed a deed in favour of himself, his wife and Golam Properties Limited conveying title to his own fish lot abutting the northern boundary of the plaintiff's fish lot. Added to the legal description in that deed was a 10 foot wide right-of-way over the homestead property, at all times and for all purposes in common with Mary Ann Knock, extending from the public road to the two fish lots in the same general location as put forward by Mr. Conrad in the legal description that he provided to Mr. McDonough. Mr. Mossman testified that this deed (including the description) was prepared by Lester Berrigan but Mr. Berrigan denied having done so, as did Mr. Conrad. The affidavit attached to the deed was sworn to before another Bridgewater lawyer but the evidence is inconclusive as to who prepared the deed.

[10] Coincidentally, on that same date of February 17th, the defendant John Duckworth wrote to Mr. Berrigan asking for a quote for the preparation of the survey plan. That prompted Mr. Berrigan to set up a meeting on site with Mr. Conrad, Mr. Mossman and the plaintiff Charles Knock on February 19th. Mr. Berrigan wanted to talk to them about the location of the boundary line between the homestead property and the two fish lots. At that meeting, according to Mr. Berrigan, Messrs. Conrad, Mossman and Knock (the latter being there on behalf

of his mother Mary Ann Knock) asserted the existence of a right-of-way along the southern boundary of the homestead property to provide access to the fish lots from the public highway.

[11] I interject here that the plaintiff's testimony was that he was only present that day as a bystander and took no part of the discussion. I do not find that aspect of his evidence to be credible, however, especially where he had made a point of calling Mr. Conrad about the right-of-way only two weeks earlier.

[12] At all events, having identified the location of the fish lots lying between the homestead property and the ocean, and with the benefit of some title information obtained from Mr. Conrad, Mr. Berrigan provided a quotation to Mr. Duckworth on February 22nd. Mr. Duckworth accepted the quotation and authorized Mr. Berrigan to proceed with the survey by letter dated March 2nd.

[13] It was three weeks later, on March 23rd, that Mr. Berrigan carried out a field survey on the homestead property and the abutting fish lots. Mr. Berrigan's field notes indicate the finding of traces of an old road extending from just inside the rear boundary of the fish lot in a westerly direction just past the shed as shown on Schedule "A" (roughly one third of the total distance of the right-of-way claimed). In his evidence at trial, Mr. Berrigan explained that he was able to discern wheel ruts or indentations on the ground approximately 8 feet apart in that area. Based on that physical evidence, and what he had been told by Messrs. Conrad and Mossman along with the plaintiff, Mr. Berrigan concluded that there was a 10 foot wide right-of-way to the fish lots to be shown, extending from the public highway along the southern boundary of the homestead property. He accordingly included it in the survey plan which he then prepared and certified under date of March 29, 1993, a portion of which comprises Schedule "A" attached to this decision.

[14] Mr. Berrigan also then prepared a metes and bounds description of the homestead property for purposes of the deed to which he added the following paragraph:

> Subject however to a Ten foot (10') right of way in favor (sic) of the Fish Lot Owners, so called, crossing the herein described lot as by reference to plan of survey hereinbefore named will more fully appear.

[15] Mr. Berrigan stated in his evidence that in his opinion as a surveyor, the foregoing paragraph sets out how the right-of-way should be described, based on the information he had. Mr. Berrigan sent his survey to Mr. Duckworth on April

> 1st and also billed the fish lot owners for a portion of his time spent surveying the fish lots as well.
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> [16] After receiving the survey, Mr. Duckworth sent a copy to Irene Wolfe by letter dated May 4, 1963 and asked her to confirm his understanding that the right-of-way shown was not public in nature, but rather was to permit owner access to the two specific fish lots along the shore. This letter eventually made its way to the lawyers which culminated in a letter by Mr. Conrad to Mr. McDonough dated May 26th in which Mr. Conrad stated that Mr. Duckworth's understanding was perfectly correct, namely, that the right-of-way was not for public use but rather was for access specifically to the Knock and Mossman fish lots.

[9] Mr. Conrad preferred the wording set out earlier (¶ 7) to Mr. Berrigan's suggestion. On June 17, 1993, Ms. Wolfe executed the deed, describing the right-of-way as drafted by her solicitor, Mr. Conrad.

[10] According to the findings, after the 1993 deed Mr. Knock attempted to use his right-of-way only once. That was in 2002 or 2003, when the respondents prevented Mr. Knock from taking his car over their property. Mr. Knock then cut limbs from trees and staked the right-of-way with a view to establishing a road for motor vehicles. Ms. Fouillard and Mr. Duckworth removed the stakes. Mr. Knock sued for an injunction.

[11] The trial judge found that the evidence was insufficient for a prescriptive right-of-way. He ruled that the June 17, 1993 deed from Ms. Wolfe to Ms. Fouillard did not grant a right-of-way. Later I will discuss his reasons. He dismissed Mr. Knock's action.

[12] Mr. Knock appeals.

2. Issues

[13] The issues are whether the trial judge committed an appealable error by ruling that (1) there was no prescriptive right-of-way or (2) there was no right-of-way by deed and, if there was such an error, (3) whether the right-of-way permits Mr. Knock to cut branches and stake a road for motor vehicular use.

3. Standard of Review

[14] The Court of Appeal reviews the trial judge's reasons for correctness respecting extractable issues of law, and palpable and overriding error respecting both factual issues and mixed issues with no extractable legal error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at ¶ 8, 10, 19-25, 31-36. A palpable and overriding error of a fact is a finding that is clearly wrong and is shown to have affected the result: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at ¶ 65 and 69. *Mason v. Partridge*, 2005 NSCA 144 at ¶ 15-16 exemplifies the application of this standard to a right-of-way dispute.

4. First Issue -
Right-of-Way by Prescription

[15] In *Mason v. Partridge*, at ¶ 18, this court adopted the following passage from the decision of the Ontario Court of Appeal in *Henderson v. Volk* (1992), 35 O.R. (2d) 379, at ¶ 14:

> It should be emphasized that the nature of the enjoyment necessary to establish an easement under the doctrine of lost modern grant is exactly the same as that required to establish an easement by prescription under the **Limitations Act**. Thus, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was continuous, uninterrupted, open and peaceful for a period of 20 years. However, in the case of the doctrine of lost modern grant, it does not have to be the 20-year period immediately preceding the bringing of an action.

[16] The trial judge applied that test to Mr. Knock's claim. As set out in his findings quoted earlier (¶ 6), the trial judge concluded that there was evidence of sufficient use for thirteen years from 1947 to 1960. From 1960 to 1967, however, the usage declined markedly, as the trial judge noted:

> I conclude from the evidence that the use of the fish lot over this seven year period was at best sporadic.

[17] He concluded:

> [70] The evidence of continuous user of the right-of-way in the present case after 1960 is scant. It essentially hangs on the sporadic acts of user by the

> plaintiff and his brother Albert as earlier described. In my view, this evidence was somewhat gilded and in any event is not sufficiently clear or cogent to satisfy the user continuity requirement under the lost modern grant doctrine.

[18] The trial judge made no error of law. He found that the acts of usage, including those by Charles and Albert Knock, from 1960 to 1967 were sporadic. So there was no period of 20 years continuous use. A review of the record satisfies me that the trial judge's finding was consistent with the evidence and he made no palpable error.

[19] That is sufficient to dismiss the ground of appeal related to the prescriptive claim. The trial judge determined alternatively that the acts of usage by Albert and Charles Knock were not done on behalf of the owner of the fish lot, MaryAnn Knock. I do not comment on this alternative reasoning.

5. Second Issue - Right-of-Way by Grant

[20] Mr. Knock first cites the 1939 deed of the fish lot from Edwin Mossman to Edna Wentzell. Ms. Wentzell later conveyed the fish lot to Everett Knock in 1947. The 1939 deed's legal description is followed by the words "with a rightway [sic] from said lot to the public road." To this, the trial judge said:

> [26] . . . Quite apart from the fact that this bare reference to a right-of-way contains no description whatsoever as to its location, more importantly it is contained in a deed made only between successive owners of the dominant tenement. It is trite law that a piece of land cannot be burdened as the servient tenement on an easement by virtue of a deed made only between successive owners of the dominant tenement.

[21] This reasoning correctly disposed of the claim based on the 1939 deed, and I would dismiss the ground of appeal related to that deed.

[22] I disagree, however, with the trial judge's reasoning respecting the 1993 deed from Irene Wolfe to Anne Fouillard. The June 17, 1993 deed of the homestead property contained a paragraph, quoted fully above (¶ 7), with the following words:

> The lands hereinbefore described are subject to a perpetual, free and uninterrupted Right-of-Way for all purposes, Ten feet (10') in width leading from the Eastern sideline of the travelled portion of the said road . . . to and from . . . the lands of Charles Knock, . . . all situated as shown on the plan hereinbefore referred to.

The plan cited in this paragraph identified the right-of-way from the fish lot crossing the homestead property.

[23] The trial judge decided, for two reasons, that this wording did not give Mr. Knock a right-of-way by grant. I will discuss his reasons in turn.

(i) Trial Judge's First Reason - No Intent

[24] First, the trial judge concluded that Ms. Wolfe did not intend to grant a right-of-way. He said:

> [28] First, the evidence clearly shows that there was never any intent of the parties to actually create the right-of-way by its insertion in the deed. Its insertion was at the hand of Mr. Conrad who testified that he was simply attempting to clarify what was already there. Mr. Conrad acknowledged that he had no personal knowledge whatsoever of the location of the right-of-way or of its past use. He was also aware that there had been no prior express grant of the right-of-way in the chain of title.
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> [29] In confirming his belief that such a right-of-way existed, Mr. Conrad relied on what he had been earlier told by both the plaintiff and Mr. Mossman. Both, of course, had a self-interest in what they said. Mr. Conrad also relied on his client Irene Wolfe who acknowledged (as detailed later) that she always thought that a right-of-way was there over the homestead property.
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> [30] Mr. Conrad also relied on his general knowledge of how land divisions were historically made in the community of Kingsburg. In his experience, land divisions in Kingsburg historically gave rise to reservation of rights-of-way for all purposes in the absence of public roads to provide access.
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> [31] In drafting the description of the right-of-way as he did for insertion in the 1993 deed, Mr. Conrad readily acknowledged that he was not intending to expand anything beyond that which already existed. As he put it, "I expressed the right-of-way in Irene's deed; I didn't create it". It is to be observed that the words

> he used in describing the right-of-way are consistent with that premise in that no express words of grant or reservation are to be found.
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> [32] It is also abundantly clear from the evidence of Irene Wolfe that she had no present intention of her own to grant or otherwise create a right-of-way over the homestead property to the fish lot by virtue of the 1993 deed she signed in favour of the defendants. It is obvious from her evidence that she had a vague understanding that a right-of-way of some sort was there along the southern boundary of the homestead property but it was something that she never concerned herself with during the 40 year period that she lived there, from 1954 until 1993.
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> [33] When the time came to sign the deed, which Mr. Conrad read over to her, Ms. Wolfe unequivocally acknowledged that she was placing great reliance on Mr. Conrad as her longtime lawyer and that if a right-of-way was set out in the deed, she thought it was supposed to be there. When asked if she gave instructions to Mr. Conrad to have the right-of-way described as being "for all purposes", she said that she probably had, but didn't know. When further asked if she understood the contents of the deed she was to sign, she answered no; that there were lots of legal words in it and that she simply depended on Mr. Conrad.
>
> [34] The defendants, on the other hand, accepted the deed at the time in the belief that the right-of-way as described somehow existed from some valid origin. There was obviously no intention on their part to thereby create or acknowledge a new right-of-way to provide a means of access to the fish lot; nor did they then understand the implications of the right-of-way being described as "for all purposes".
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> [35] It is in the face of all this evidence that I conclude that there was no intention on anyone's part to create a new right-of-way over the homestead property to provide access to the fish lot by virtue of the 1993 deed.

[25] In this passage, the trial judge’s only reference to the 1993 deed is his statement “no express words of grant or reservation are to be found”. The trial judge relies principally on his finding respecting Ms. Wolfe’s subjective wishes and motives. He said that in 1993 Ms. Wolfe believed that there had been a right-of-way in the past and, for that reason, she signed the deed as worded. Because in 2006 the trial judge dismissed the prescriptive claim, Ms. Wolfe’s belief has been mistaken. So the trial judge concluded that the deed’s reference to the right-of-way was ineffective.

[26] It is not entirely clear whether the trial judge reached his conclusion by (1) interpreting the deed, or (2) superimposing on the deed a legal principle that allows a departure from the deed's wording. Counsel for the respondents urges both approaches in the alternative. I will consider the trial judge's analysis from both perspectives.

[27] In the interpretation of a conveyance it is important to recall three governing principles:

(a) First, it is unnecessary to use a particular incantative word of "grant". The *Conveyancing Act*, R.S.N.S. 1989, c. 97, s. 10(2) says that a conveyance "does not require ... any special form of words." LaForest, *Anger and Honsberger* , *Law of Real Property* (3rd ed. - looseleaf, Canada Law Book) vol. 2, ¶ 17:20.20(b) says:

> It is not necessary to use the word "grant" or any other particular words to create an easement by deed, so long as the words used show an intention to create an easement which is recognized in law. Where, on the face of the deed there appears a manifest intention to create an easement, that intention will be given effect if the words of the deed can bear that construction.

To the same effect: *Halsbury's Laws of England* (4th Edition), vol. 14, ¶ 50. The question is whether the deed's words show an intent that there be a right-of-way not conditioned on prescriptive rights.

(b) Second, to ascertain whether the words show this intent, the court should construe the document as a whole, if possible giving meaning to all its words. The *Conveyancing* Act, s. 11(1) says: "A conveyance shall be read as a whole and if it contains contradictory provisions the later provisions shall be effective." Fridman, *The Law of Contract* (5th Edition), p. 457 says:

> The contract should be construed as a whole, giving effect to everything in it if at all possible.
>
> No word should be superfluous (unless of course, as happened in one instance, it is truly meaningless and can be ignored).

This principle applies to the interpretation of a deed: *Anger and Honsberger*, ¶ 25:40. *Gale on Easements* (Sweet v. Maxwell, 17th ed.) ¶ 9-14 says:

> In the case of an express grant the language of the instrument must be referred to. The court will have regard to the conveyance as a whole, including any plan that forms part of it, even though the plan is not mentioned in the parcels or is said to be for identification purposes only.

In *Wheeler v. Wheeler* (1979), 25 N.B.R. (2d) 376 (C.A.), the deed's text granted a remainder interest to an individual who was not identified as a grantee in the deed's premises. The court (¶ 5) cited this principle - construction as a whole - to uphold the conveyance of the remainder. Here, the 1993 deed does not identify Mr. Knock as a "grantee", but the schedule contains the wording concerning the right-of-way. The court must try to give meaning to that wording. The words are not shelved just because they appear in the schedule.

(c) Third, the court's first task is to determine whether an unambiguous intention is manifested objectively by the words of the deed, not by the parties' subjective wishes, motives or recollections. The primary source is the document, not the psyche. *Fridman*, p. 15 states:

> Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions . . .
>
> Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed and if so, upon what. This is especially true where a document containing their agreement has been prepared and signed by the parties. If the plain wording of the document reveals a clear and unambiguous intent, it is not necessary to go further.

In the process of interpretation, a court may not utilize the parties' subjective wishes, motives or intent to alter the unambiguous and objectively manifest intent in the deed's wording. *Fridman*, pp. 443-4 and cases cited; *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 at p. 518-520; *Bauer v. Bank of*

> *Montreal* (1980), 110 D.L.R. (3d) 424 (S.C.C.) at p. 432; *Anger v. Honsberger* ¶ 17:20.30(a) quoted below at ¶ 60.

[28] Had Ms. Wolfe's deed said that the lands "are subject to any easement that already existed by prescription", then the deed would manifest an intent that the right of way be conditional on the existence of a prior prescriptive easement: eg. *Wardle v. Manitoba Farm Loans Association*, [1956] S.C.R. 3, at pp. 11-12 for an equivalent incorporation of outside rights. But Ms. Wolfe's deed makes no reference to pre-existing or outside rights, by prescription or otherwise. Her deed says simply that the homestead lands "are subject to a perpetual, free and uninterrupted right-of-way". There is no condition precedent (that there be a prescriptive right-of-way) or condition subsequent (that the easement terminates if a court later rules there had been no prescriptive right-of-way). Ms. Wolfe's belief in a prescriptive right-of-way may have motivated her inclusion of the unconditional right-of-way in the deed. But her motive does not inscribe a condition in the deed.

[29] The argument is tempting - if the deed intended to grant Mr. Knock a right-of-way, the deed would name him as a "grantee". But the argument's corollary is that the schedule's unconditional designation of an immediate and perpetual right-of-way is meaningless. As noted, the court should interpret the document as a whole and, if possible, treat nothing as superfluous. I cannot accept an argument that, in the guise of interpretation, just vitiates a passage in Ms. Wolfe's deed.

[30] In *Myers v. Brennan* (1974), 10 N.S.R. (2d) 391 (S.C.A.D.) the deed contained the words "subject to a right-of-way . . . at all times and for all purposes over and along the lot of land firstly described in this deed . . ." (¶ 6). Justice Coffin for the Court found assistance in an earlier decision of the Ontario Supreme Court Appellate Division:

> 73 In *Miller v. Tipling* (1918), 43 D.L.R. 469, a grantor conveyed a lot to the grantee subject to a right-of-way in favour of adjoining property. Riddell, J., said at pp. 477 and 478:
>
>> "... where the instrument conveying the servient tenement purports to reserve an easement (or as here to except an easement) in favour of the owner of the dominant tenement, the true effect is to create an easement in favour of the latter by a new grant of the right to the grantor of the servient tenement by the grantee ...."

> 74 I should mention the real point in *Miller v. Tipling*. The conveyance was made subject to a right-of-way for the grantor and for "the owners or occupants of the adjacent premises to the north ...". What was actually decided was that the right-of-way in the reservation was limited to its owners or occupants of the land to the north as it was to this land that the easement was appurtenant.

Justice Coffin concluded:

> 77 In my view the authorities support the conclusion that there was a right-of-way as a result of the documentation set out in the decision of the trial judge. I agree with the submission of Mr. Hallett on behalf of the respondent that the respondent is entitled to enjoy the right-of-way as a tenant in common and to have the obstructions therein removed.

[31] Ms. Wolfe's 1993 deed, objectively interpreted, manifests the unambiguous intent that from the moment of execution the deeded lands "are subject to a perpetual . . . right-of-way". The trial judge has interpreted the 1993 deed as if it said:

> ***Provided that a right-of-way already exists by prescription***, the lands hereinbefore described are subject to a perpetual, free and uninterrupted right-of-way . . .

The italicized condition does not appear in the deed. Its figurative insertion alters the unambiguous meaning of the deed and, in my respectful view, errs in law.

[32] Counsel for Ms. Fouillard refers alternatively to the exceptions when subjective elements may vitiate or alter a contract, citing the following passage from *Fridman*, p. 445:

> One obvious situation arises where a party alleges that the written contract was obtained by fraud, misrepresentation, mistake, or other vitiating conduct on the part of the other party; he may adduce evidence to establish his allegation, so as to have the written contract nullified at common law, or perhaps, if this would aid him, to have it rectified in accordance with equitable principles. In such circumstances the party in question is not so much seeking interpretation of the written contract by extrinsic evidence as proving its invalidity, or at least its incorrectness as an expression in writing of the intentions of the parties as manifested in their oral negotiations of which the written contract purports to be the result. The admission of parol evidence in cases in which fraud,

> misrepresentation, and other reasons for upsetting a transaction may be alleged is not a true exception to the parol evidence rule. Such evidence does not affect the terms of the contract so much as to negate its validity.

[33] I agree that a court may migrate from the deed's words to extrinsic evidence to consider whether either the deed is invalid on a vitiating ground recognized by law or it should be rectified. But these principles do not apply here, for several reasons.

[34] First, the trial judge did not rule that there was fraud, misrepresentation, mistake, duress, undue influence or any legally recognized vitiating element. The trial judge did not, for instance, refer to the doctrine of common mistake or consider its legal prerequisites. The trial judge moved directly to Ms. Wolfe's subjective intent as the interpretive touchstone, with the passing observation that the deed had "no express words of grant".

[35] Second, the respondents do not ask the court to vitiate the 1993 deed. Ms. Fouillard and Mr. Duckworth want to keep the homestead property, conveyed to them by that deed. They wish to retain the transaction but delete from the deed only those words that mention the Knock right-of-way. Essentially, they seek rectification. But there is no basis for rectification here, procedurally or substantively.

[36] The respondents have not claimed rectification in their pleadings. Ms. Wolfe, the grantor in the 1993 deed, is not a party to this proceeding. The trial judge did not refer to rectification, or the legal prerequisites for that remedy.

[37] Apart from the procedural shortcomings, rectification would not apply to this transaction. In *Performance Industries Limited v. Sylvan Lake Golf and Tennis Club Ltd.*, [2002] 1 S.C.R. 678 at ¶ 31. Justice Binnie said:

> 31 . . . Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. . . . The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other.

To similar effect: *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at 630; *Ship M.F. Whalen v. Point Anne Quarries Ltd.* (1921), 63 S.C.R. 109, at 126-7; *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550 (O.C.A.), at p. 558, all cited by Justice Binnie. In *Sylvan*, Justice Binnie cited with approval the following passage from *Fridman* (4th ed.), now in *Fridman* (5th ed.) p. 826:

> Rectification is concerned with contracts and documents, not intentions. The essence of rectification is to bring the document which was expressed or intended to be in pursuance of a prior agreement into harmony with that prior agreement. It deals with the situation where, contracting parties have reduced into writing the agreement reached by their negotiations, some mistake was made in the wording of the final, written contract, altering the effect, in whole or in part, of the contract. What the court does is to alter the document, in accordance with the evidence, and then enforce the document as changed. Rectification is not used to vary the intentions of the parties, but to correct the situation where the parties have settled upon certain terms but have written them down incorrectly. But the court will not give a remedy for a party who is displeased with what the contract has brought him.

[38] There was no disparity between Ms. Wolfe's 1993 deed and her preceding agreement with Ms. Fouillard and Mr. Duckworth. The trial judge's recitation of the facts is quoted earlier (¶ 8). Mr. Knock telephoned Ms. Wolfe's solicitor, and mentioned his right-of-way. Ms. Wolfe's solicitor confirmed with Ms. Wolfe that there was a right-of-way. Ms. Wolfe's solicitor notified the solicitor for Ms. Fouillard and Mr. Duckworth of the right-of-way. Mr. Duckworth retained a surveyor who confirmed the right-of-way on his written survey to Mr. Duckworth. Mr. Duckworth, a real estate broker, wrote to Ms. Wolfe and asked Ms. Wolfe to confirm Mr. Duckworth's understanding that the right-of-way was private for the fish lot, not for the public. Ms. Wolfe's solicitor replied that the right-of-way was private, not public. Communications between the solicitors for Ms. Wolfe and Ms. Fouillard/Mr. Duckworth confirmed that the deed would contain the wording referring to the right-of-way.

[39] The deed embodied the prior agreement. There was no error, escaping the parties and their solicitors, whereby the deed misrecorded the prior agreement. The prerequisite to rectification is missing.

[40] The trial judge cited Ms. Wolfe's belief that there had been a prescriptive right-of-way, compared to his ruling after this trial that there had been no prescriptive right-of-way. The trial judge concluded that, had Ms. Wolfe known in 1993 what is now decided, she may not have included the right-of-way in her deed. But this is not a rectifiable error. Rectification does not restructure the contract whenever after acquired knowledge alters the parties' motivations. When the deed matches the preceding agreement, it does not matter that, with immaculate prescience, the parties might have made a different agreement. As Justice Binnie said in *Sylvan*, the court does not rectify "a belatedly recognized error of judgment by one party of the other."

[41] In summary, whether the trial judge attempted to interpret the 1993 deed, or effectively to rectify it, he erred in law.

(ii) Trial Judge's Second Reason - No Privity

[42] The trial judge stated a second reason that Ms. Wolfe's 1993 deed did not grant a right-of-way:

> [36] The second, and perhaps overriding reason why the plaintiff's position on this issue cannot be sustained is the fact that the deed in question was made only between successive owners of the servient tenement. There simply is no privity to that deed or the underlying transaction by the plaintiff upon which he could assert any legal rights. The plaintiff cannot, in my opinion, claim the establishment of a right-of-way under an instrument to which he is not a party nor paid any consideration. The deed here is merely part of the evidence of an existing easement.
>
> [37] I asked counsel for the plaintiff to provide legal authority that might support the plaintiff's position on this issue. The only authority I have been referred to, or have otherwise been able to find, is an old decision of the Nova Scotia Supreme Court in *McDonald v. McDougall* (1897) 30 N.S.R. 298, a case cited in the *Nova Scotia Real Property Practice Manual* authored by Charles MacIntosh. That case, as convoluted as it may be to read, is to be distinguished on its facts because the same individual grantor held an ownership interest in both the dominant and servient tenements. I do not read it as standing for the proposition asserted by the plaintiff.
>
> [38] In the absence of any legal authority to the contrary, I find for both of the foregoing reasons that the plaintiff cannot rely on the 1993 deed as an express

> grant or reservation of the right-of-way claimed. It follows that in order to succeed in this case, the plaintiff must establish that the right-of-way claimed was validly created by prescription.

[43] According to this reasoning, it is insufficient that the deed with the easement be signed, sealed and delivered by the owner of the servient tenement. It is also necessary that the recipient of the easement, the owner of the dominant tenement, have privity of contract with the grantor in the transaction that underlies the deed.

[44] In my respectful view, this reasoning is erroneous.

[45] I note first that Mr. Knock was not a stranger to the underlying transaction. The trial judge accepted Mr. Conrad's evidence that on February 2, 1993 Mr. Knock telephoned Mr. Conrad, solicitor for Ms. Wolfe, "mentioning a right-of-way over the homestead property to a fish lot." The trial judge said that Mr. Conrad called Ms. Wolfe and that Mr. Conrad "reported that his client confirmed the right-of-way" from the road to the fish lot. In correspondence before the closing, the solicitor for Ms. Wolfe notified the solicitor for Ms. Fouillard and Mr. Duckworth of the right-of-way. Mr. Duckworth wrote Ms. Wolfe stating his view that the right-of-way was private for the fish lot, not public. The solicitor for Ms. Wolfe confirmed the private right-of-way. All this preceded Ms. Wolfe's deed of June 17, 1993.

[46] In any case, it is not a legal requirement that the recipient of an interest in land, who is identified in a properly executed deed, have privity of contact with the grantor in the underlying transaction. We are concerned not with a contract, under which only a party with privity may sue, but with a conveyance by deed. A conveyance by deed usually stems from a contract, but need not. It may be a gift. Deeds of land usually are executed by the grantor, but not the grantee. The deed must sufficiently identify the recipient to satisfy the sealed contract rule and comply with the requirements for a valid conveyance, which I will discuss shortly. If those conditions are met, a grantee need not even know of the transaction or deed. Provided the deed satisfies the prerequisites for an easement by grant, which I will also discuss, that deed may create an easement.

[47] *Anger & Honsberger*, ¶ 25.50.10 says:

> A deed may be effectively delivered and operated without the grantee having notice or knowledge of it, and it operates to vest title in the grantee subject to the right to repudiate.

The leading authority is *Standing v. Bowring* (1885), 31 CH. D. 282 (C.A.), at p. 288, where Cotton, L.J. said:

> . . . I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, "I will not take it". When informed of it, he may repudiate it, but it vests in him until he so repudiates it.

In *Standing*, at p. 290, Lindley, L.J. concurred in the point:

> . . . I take it now to be settled, that although a donee may dissent from and thereby render it null a gift to him, yet that a gift to him of property, whether real or personal, by deed, vests the property in him subject to his dissent.

To the same effect, *London & County Banking Co. Ltd. v. London & Riverplate Bank Ltd.* (1888), 21 Q.B.D. 535 (C.A.) at p. 541. This principle has been adopted in Canada. In *Purdom v. Northern Life Assurance Co.*, [1928] 4 D.L.R. 679 (O.S.C., A.D.) at p. 693, affirmed without written reasons [1930] 1 D.L.R. 1003 (S.C.C.), Chief Justice Mulock said:

> I think it is the law that, when one person transfers property to another without that other's knowledge, the property at once vests and remains vested in the other until he expressly or impliedly repudiates the transfer, and that the same results follow if the subject-matter of the transfer is as here, an equitable right.

[48] There was no legal requirement that Mr. Knock have privity in the underlying contract either with Ms. Wolfe or among Ms. Wolfe, Ms. Fouillard and Mr. Duckworth.

[49] Though Mr. Knock is not a named grantee in the premises of the 1993 deed, the body of the deed describes the right-of-way "to and from the lands of Charles Knock" as shown on the Berrigan survey cited in the deed. Mr. Knock is identified on the face of the deed. He is not an undisclosed principal, who is excluded from the benefit by the sealed contract rule: *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842.

[50] There are, of course, requirements for an effective conveyance by deed. The *Conveyancing Act*, s. 10(1) says: "A conveyance that identifies the parties and property, and specifies the property right to be conveyed, and which is validly executed, is effective to convey that property right." *Anger and Honsberger*, ¶ 25:20 states:

> In its widest sense, a deed is any document under seal but, in the ordinary sense, a deed is the grant or conveyance of an estate or interest in land in a formal written instrument which is signed, sealed and delivered by the grantor, and in which the grantor expresses an intention to pass an interest to the grantee. A deed is used whether the conveyance is by way of gift or is for money or other consideration.

See also the *Conveyancing Act*, s. 12. I have discussed earlier my view that Ms. Wolfe's 1993 deed objectively manifests an intention to grant a right-of-way. Ms. Wolfe and Mr. Knock are identified, as is the right-of-way over the property. Ms. Wolfe signed and sealed the deed. This leaves delivery.

[51] *Anger and Honsberger*, ¶ 25:50.10 discusses "delivery":

> . . . The mere affixing of the seal does not render it a deed, but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as a presently binding deed, it is sufficient. . . .
>
> Where a party to any instrument reads it and declares in the presence of a witness that it is delivered as a deed but keeps it in their possession and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in possession, it is a valid and effectual deed, and delivery to the party who is to take by the deed, or to any person for their use, is not essential, even should it be a voluntary deed. . . .
>
> Delivery to a third person for the use of the party in whose favour the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made . . .
>
> Since delivery of the deed is a question of fact, it may be inferred from the execution of the deed in the presence of an attesting witness.
>
> It is a well-established rule that, in the absence of evidence to the contrary, a deed is presumed to have been delivered on the date mentioned in it. . . .

> Since a conveyance cannot be registered unless it has been completely executed, it is virtually impossible to establish that a deed registered with the grantor's knowledge and approval has not been delivered.

[52] In *Anning v. Anning*, (1916), 34 D.L.R. 193 (Ont. S. Ct. Ap. Div.) at 194 Middleton, J. stated:

> An attempt is now made to suggest that the deeds were not delivered. To establish that a deed which has been registered by the grantor or with his full knowledge and approval was not delivered ought to be an impossible task.

[53] Ms. Wolfe's deed is stated to be "signed, sealed and delivered" in the presence of a witness. It was dated and delivered to Ms. Fouillard's solicitor. It was registered at the Registry of Deeds, open to the world. These are words and acts showing Ms. Wolfe's intent to be bound by the deed's terms. Clearly it was "delivered".

[54] Provided the transaction satisfies the essentials for an easement, a deed of the servient tenement may grant the fee to one grantee and an easement to another person: *Wickham v. Hawker* (1840), 7 M & W 63, 151 E.R. 679. *Wickham*, though venerable, is cited as authority by *Halsbury's Laws of England* (4th ed.), vol. 14 at ¶ 139 (note 12) and Rand J. in *Wardle*, (S.C.C.) at p. 11.

[55] *Gale on Easements*, ¶ 1-07 lists the four essentials for an easement, stated by the Court of Appeal in *Re Ellenborough Park*; *Re Davis*, [1956] Ch. 131:

> 1. There must be a dominant and a servient tenement.
>
> 2. An easement must accommodate the dominant tenement.
>
> 3. Dominant and servient owners must be different persons.
>
> 4. A right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.

[56] Respecting the right-of-way in Ms. Wolfe's 1993 deed:

1. The dominant tenement is the fish lot and the servient tenement is the homestead property.

2. The easement accommodates the dominant tenement - the fish lot.

3. The dominant tenement owner was Charles Knock. The servient tenement owner was Ms. Wolfe before the deed and Ms. Fouillard after.

4. A right-of-way as described in the deed, and set out on the Berrigan plan cited in the deed, is capable of forming the subject matter of a grant.

(iii) Summary - 1993 Deed

[57] Ms. Wolfe's June 1993 deed (1) unambiguously expressed an objectively manifest intent to grant a right-of-way, (2) identified Irene Wolfe, Charles Knock and the property, (3) met the formal requirements for the execution of a deed and (4) satisfied the prerequisites of an easement. I would allow this ground of appeal.

6. Third Issue -
Mode and Extent of Right -of- Way

[58] Because the trial judge ruled that there was no right-of-way, he did not express a view on the permitted mode of usage. Rather than remit this to the trial judge for further litigation, in the interests of finality I will give my view on this issue. I accept the trial judge's factual findings that bear on the point.

[59] A right-of-way's purpose is not the same as its mode of usage. The purpose relates to the intended activity on the dominant tenement - eg. to harvest seaweed. The mode relates to how the passage is accomplished over the servient tenement - for instance pedestrian or vehicular. *Gale on Easements*, ¶ 9-02, 9-05 to 9-13, 9-15 to 9-26. The 1993 deed says that the right-of-way is "for all purposes" but is silent on mode of usage. So the deed is unclear whether the right-of-way includes travel by motor vehicle.

[60] Absent a direction from the words in the deed, the court may draw assistance to resolve ambiguity from the surrounding circumstances at the time of the deed's

execution. *Anger and Honsberger*, ¶ 17; 20.30(a) summarizes the approach to determine the extent of a right-of-way by express grant:

> . . . The nature and extent of a right-of-way created by an express grant depends on the proper construction of the language of the instrument creating it. The following rules apply in interpreting the instrument: (1) The grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect of the intention of the parties.(2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant.(3) The past behaviour of the parties in connection with the use of the right of way may be regarded as a practical construction of the use of the way. (4) In case of doubt, construction should be in favour of the grantee.

See also: *Laurie v. Winch*, [1953] 1 S.C.R. 49, at p. 56; *Gale on Easements*, ¶ 1-123, 9-15.

[61] The trial judge noted the testimony of Charles Knock and his brother Albert that they had used a motor vehicle a few times since the 1950's. The trial judge preferred the testimony of Ms. Wolfe. He said:

> [55] I found Ms. Wolfe to be the most credible of all of the family witnesses and accept her evidence over the others wherever contradictions arise. She gave her evidence in a direct and forthright manner, without embellishment, and without favouritism. . . .
>
> [56] When asked whether she had ever observed any vehicular use of the right-of-way during her 40 years' residence there, she answered "not really, but if someone wanted to use a tractor, they went...we never stopped anybody... there weren't many tractors going down there". She further said that she never saw the plaintiff or Albert Knock, or for that matter their father Everett Knock, ever use a tractor on the right-of-way. She reiterated that people in the community generally didn't mind if someone walked over their property.

[62] I cannot find any palpable error in the trial judge’s assessment of this evidence. From his comments, I conclude that, when Ms. Wolfe executed the 1993 deed, there was no significant context of motor vehicular usage to inform the interpretation of her grant of the right-of-way.

[63] The trial judge's findings do not support Mr. Knock's contention that he is entitled to motor vehicular usage for which he may stake and construct a road. His right-of-way is limited to modes of usage not including motor vehicles.

7. Conclusion

[64] I would allow the appeal in one respect. Mr. Knock has a right-of-way by grant over the homestead property, in the terms described by Ms. Wolfe's June 17, 1993 deed, to benefit the fish lot as the dominant tenement. His passage is not limited to any particular purpose for which the fish lot may be used. Mr. Knock is entitled to "free and uninterrupted" passage not involving a motor vehicle. The dismissal of Mr. Knock's other grounds of appeal, below, does not entitle the respondents to impede modes of access other than by motor vehicle. If Mr. Knock's access by modes other than motor vehicle is blocked, then he would be entitled to clear the right-of-way sufficiently to allow that access.

[65] In all other respects I would dismiss the appeal. The extent of the easement does not include motor vehicular use, and does not entitle Mr. Knock to alter the homestead property by staking, tree-cutting or road construction to accommodate motor vehicular use. I would dismiss Mr. Knock's claim for an injunction to restrain Ms. Fouillard and Mr. Duckworth from blocking these activities.

[66] As success was divided on the contentious issues, the parties should bear their own costs in this court and at trial.

Fichaud, J.A.

Concurred in:

Roscoe, J.A.
Bateman, J.A.