NOVA SCOTIA COURT OF APPEAL
Citation: *Johnston v. Roode*, 2019 NSCA 98

Date: 20191219
Docket: CA 483504
Registry: Halifax

Between:

Glen Robert Johnston, Deborah Gail Johnston, and Alyssa Rose Johnston

Appellants

v.

Leo Roode and Wendy Roode

Respondents

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	October 15, 2019, in Halifax, Nova Scotia
Subject:	Adverse Possession – Mistaken Belief in Boundary – Exclusivity of Possession Prescriptive Right of Way – Alteration of Route
Summary:	The parties owned cottage lots on Caribou Island for over 50 years. The respondents claimed ownership of 50' x 102' portion of appellants' land by adverse possession. They also claimed prescriptive right of way to access the beach. The trial judge found that the parties and their predecessors in title were mistaken with respect to location of common property boundary. He found that requirements for adverse possession were relaxed and title was established over entire lot. The trial judge also found prescriptive right of way in favour of respondents to access the beach even though they had started using an altered route after construction of a road in 2006.

Issues:

(1) Did the trial judge err in finding adverse possession over the entire lot?

(2) Can consecutive periods of possession be tacked together in order to extinguish title?

(3) Once a prescriptive right of way is established does the creation of a new route allow the location of the prescriptive right to be adjusted?

Result:

There was no evidence of a mistake as to boundary location by the appellants or their predecessor in title so there could be no mutual mistake. The trial judge made a palpable and overriding error in finding adverse possession of the entire lot in the absence of proof of exclusivity. There was sufficient evidence of possession as it related to a garden and shrubs which encroached on the appellants' land. As long as there was no break in possession consecutive periods were cumulative without requirement for express conveyance.

The Court set aside declaration of title over 50' x 102' lot and reduced it to the area for which adverse possession was established.

Once right of way to the beach was established by prescription the route could not be changed except by agreement. Fact that a new road to the beach was built over part of the old path did not alter route of the prescriptive right. The Court set aside declaration of right of way over new road and declared location to be over original beach path.

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Judges:	Wood, C.J.N.S.: Hamilton and Bryson, JJ.A.
Appeal Heard:	October 15, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed in part, per reasons for judgment of Wood, C.J.N.S.; Hamilton and Bryson, JJ.A. concurring
Counsel:	Brian A. Casey, Q.C. and Meghan Russell, for the appellants J. Gregory MacDonald, Q.C. and Daniel Boyle, for the respondents

Reasons for judgment:

[1] Gordon and Ina Johnston lived in Hilden, Colchester County for many years. They were good friends with William and Margaret Nelson who also lived in Hilden. Both families ended up acquiring land and building cottages at Caribou Island, Pictou County on the shore of the Northumberland Strait. The Johnstons built first, in the late 1950s, and the Nelsons followed suit in the 1960s.

[2] The Johnston and Nelson families spent as much time as possible at their Caribou Island cottages. They socialized together and enjoyed the beach.

[3] Over the years, Ina Johnston acquired several lots at Caribou Island. In December 1971, she purchased land to the north of the Nelson cottage. The path used by the Nelsons, and other area landowners, to reach the beach crossed this lot.

[4] In 1989, Ina Johnston conveyed this property to her son, Glen Johnston, and herself as joint tenants and, in 1992, she deeded her remaining interest to him. In April 1991, Margaret Nelson conveyed her cottage lot to her children, Linda Watson and Wendy Roode, and their spouses. Linda Watson and her spouse conveyed their interest to Wendy and her spouse, Leo Roode, in October 1992.

[5] Glen Johnston and Wendy Roode are now involved in litigation over the location of their common boundary and access to the beach. The location of the boundary as found in their deeds was determined by a survey prepared for the Johnstons in 1996 and confirmed by a second survey done for the Roodes in 1999. One issue in the litigation was whether the Roodes had acquired possessory title to any portion of the Johnston land. The other issue related to whether they had the right to cross the Johnston property to access the beach. They had no deeded right of way but had used a path across the Johnston land since they acquired their lot in 1991. Margaret Nelson and her husband had also used this path during their ownership which began in 1966.

[6] The dispute between the parties seems to have arisen in 2012 when Mr. Johnston migrated his property under the *Land Registration Act*, S.N.S. 2001, c.6. Counsel for Mr. Johnston sent a letter dated January 5, 2012 to Leo and Wendy Roode notifying them that they must remove some gravel and trees which had been placed on the Johnston property and to refrain from mowing any grass on the Johnston side of the boundary.

[7] In December 2012, the Roodes commenced a proceeding under the *Quieting Titles Act*, R.S.N.S. 1989, c. 382 against Mr. Johnston, his wife, and their daughter claiming ownership by adverse possession of a 50' x 102' portion of the Johnston property and a prescriptive right of way to the shore of the Northumberland Strait. The lands claimed were immediately to the north of the common boundary which had been fixed by survey in 1996 and 1999.

[8] Following trial, the Honourable Justice N.M. Scaravelli issued a decision (2018 NSSC 293) finding in favour of the Roodes on both issues. The Johnstons have now appealed that decision.

[9] The trial and resulting decision must be examined in some detail in order to provide context for the issues raised on appeal and, in particular, the requirement for the Roodes to establish exclusive possession of the land being claimed.

Trial and Decision

[10] The trial took place over four days in May 2018. The Roodes presented evidence and argument claiming that they owned a 50' x 102' portion of the Johnston property as a result of adverse possession for a period in excess of 20 years. They also asserted that they had a right of way by prescription over the Johnston property to the shore of the Northumberland Strait. The acts of possession which were relied upon included planting a vegetable garden and shrubs on a portion of the area, parking vehicles and trailers from time to time, using a horseshoe pit and mowing grass.

[11] Margaret Nelson testified about the history of her Caribou Island cottage and its use. Part of her evidence related to a discussion she had with her late husband in the 1960s about purchasing an additional 50' of land from Archibald Baird who had sold them the initial lot. She said that her husband told her there was an agreement with Mr. Baird to buy this for $225 and she produced, at trial, a receipt in that amount dated February 1967 and signed by Mr. Baird. The additional 50' of land was never conveyed to the Nelsons and the Roodes now claim the area by adverse possession.

[12] Counsel for the Johnstons objected to the admissibility of this portion of Mrs. Nelson's evidence on the basis that it was hearsay. Counsel for the Roodes agreed that it was hearsay, but said it was not being tendered for the truth of its contents (i.e. that there was an agreement with Mr. Baird to sell an additional lot)

but only to prove Margaret Nelson's belief with respect to location of the property boundary.

[13] Although not argued by the parties, the trial judge concluded that this was a situation where there was a mutual mistake with respect to the location of the boundary between the Nelson and Johnston properties. In the trial judge's view, the existence of this mistake impacted the adverse possession analysis. For example, the decision says:

> [8] Under the circumstances of this case, the analysis of adverse possession is contextual as opposed to a strict technical analysis of the elements of adverse possession. *Gould v. Edmonds* 2001 NSCA 184. In *Gould* the Nova Scotia Court of Appeal cited the following with approval.
>
> > **53** Among the authorities relied on by the appellant, to be further considered below, is **Bacher v. Wang**, [2000] O.J. No. 3146 in which Nordheimer, J. stated at s. 24 and 25:
> >
> > > ... [T]he respondent relies on *Elias v. Coker*, [1990] O.J. No. 982 (Dist. Ct.) where Lang D.C.J. said, at p. 10:
> > >
> > > > When a claim for adverse possession centres on a piece of land as small as the one in issue here, the claimants must show continuous use of every inch.
> > >
> > > I make two observations with respect to the above quotation. First, it is clear that the words used cannot be taken literally since it is virtually impossible to use "every inch" of any piece of property "continuously". Secondly, the *Elias* case dealt with the situation where the claimant of the property could fairly be characterized as a trespasser, that is, a person who occupied the property with knowledge that it belonged to someone else. The authorities draw a very sharp distinction between cases where the claimant is a trespasser and cases, such as the one before me, where the claimant occupies the property in the mistaken belief that it is hers only to find out many years later that the legal title to the property actually belongs to someone else. In the latter cases, the requirements for actual possession are less rigidly applied.
>
> …
>
> [30] In cases of mutual mistake the court can draw an inference that a claimant intended to exclude everyone including the true owners, see *Gould*, supra.
>
> [31] Based upon the evidence I am satisfied the Nelson's believed they were the true owners of the 50' lot since 1967. Further, that the true owners of the land mistakenly believed that the Nelsons and their successors, the plaintiffs, owned the 50' lot, only to discover otherwise from the 1996 survey. Under these

> circumstances the true owner's entry would have been by permission either by express or implied. The facts in this case are distinguishable from the facts in *Bowater* where there was no mistake in ownership.
>
> [32] I find that, in the context of this case, entry with permission of the occupier would not restart the adverse possession period. In *Henneberry v. Compton* 2014 NSSC 298 adverse possession was found to a driveway where the respondents had used it by permission.
>
> [33] Keeping in mind that the requirements for adverse possession are less rigidly applied where the claimants believe they owned the property, I am satisfied that the acts of possession by the Nelsons, including mowing grass, parking vehicles, utilizing a horseshoe pit, planting bushes and creating and maintaining the garden (since 1975) are consistent with the acts of an owner in possession of a seasonal resident. The Nelson's adverse occupation and use continued from 1967 until Mrs. Nelson's daughter, the plaintiff and her spouse Leo Roode took possession of the 50' lot in 1999, a period well in excess of 20 years. The plaintiffs continued their adverse possession until these proceedings.

[14] It is conceded by the Roodes that the reference to 1999 in the second last line of paragraph 33 is a typographical error and should be 1991 which is when Margaret Nelson conveyed her interest to Wendy and Leo Roode.

[15] The majority of the evidence concerning adverse possession related to the location of a vegetable garden maintained by Margaret Nelson and, subsequently, by the Roodes, between the mid 1970s and 2006.

[16] The trial judge accepted the evidence of the Roodes that they and their family had used a path across the Johnston lot to access the beach since they built their cottage in 1967. In 2006, a construction company was hired by landowners in the area to place rock at the edge of the beach to protect against erosion. The Roodes were not part of this group and did not contribute to the cost of the work. In order to access the beach area with their trucks, the construction company built a road that varied somewhat from the original beach path. The trial judge found a prescriptive right of way had been established over that route:

> [51] The defendants did not provide authority that changing of a portion of an existing right of way interrupts or extinguishes the users existing right.
>
> [52] The straightening of the path did not constitute an obstruction that was adverse to the plaintiffs. The intention in carrying out the rockwork was to protect the beach and not to interfere with the plaintiff's usage. The plaintiffs continued to use the altered path following the construction work.
>
> [53] In this case the evidence supports a finding that there was continuous, open and unobstructed use of the original pathway as altered from 1967 to 2012

> by the plaintiffs and predecessors. No permission was ever requested nor is there any evidence of permission expressed or implied. The usage was with the knowledge of Archibald Baird, Gordon Johnston and the defendants as owners from time to time of the adjacent lands. The inference to be drawn is that there was acquiescence on the part of the owners at the time.

Issues

[17] The Notice of Appeal dated December 19, 2018 alleges that the trial judge made the following errors in law:

1. admitting double hearsay and relying on it for the truth of its content to establish the claim;
2. finding 19 years of possession by the Roodes could extinguish the title of the registered owners (the Johnstons);
3. finding possession based on "mutual mistake" (which was not pleaded, in circumstances where the registered owner was not a party to the mistake); and
4. allowing 6 years of use to change the path of the prescriptive right of way claimed.

[18] I prefer to reorganize the issues and group them as follows:

1. Shared Mistake as to the Boundary
2. Adverse Possession
3. Consecutive Periods of Possession
4. Right of Way

Standard of Review

[19] The role of an appellate court is not to retry a case or to provide its own assessment of the evidence. It should only intervene where it can be shown that the trial judge erred in law or made a palpable and overriding error in finding the facts. Where the trial decision involves mixed findings of fact and law, without an extricable question of law, the palpable and overriding standard will apply (*Cook v. Podgorski*, 2013 NSCA 47 at para. 12).

[20] In this case the judge's conclusions with respect to the applicable legal principles will be evaluated on a standard of correctness. His factual findings and

the application of the law to those findings will be subject to the palpable and overriding error standard.

Analysis

Shared Mistake as to the Boundary

[21] The trial judge concluded that the owners of the Nelson and Johnston properties mistakenly believed that the boundary was 50 feet further north than it actually was. He said this erroneous understanding continued until the 1996 survey commissioned by Glen Johnston showed the true boundary location.

[22] The trial judge does not explain the evidentiary basis for his conclusion that there was a shared mistake with respect to the boundary location that continued until 1996. It was not an issue that was argued by the parties at trial. Although the plaintiff did adduce the testimony of Margaret Nelson about the conversation with her husband, this was only for the purpose of showing her belief in the boundary location.

[23] The trial judge also referred to the legal description in a December 2, 1971 deed from Archibald Baird (who conveyed the Nelson property to them) conveying lands to the west of the Nelson lot. It described the parcel being conveyed as bounded only by Nelson on the east which would be consistent with the Nelson lot extending a further 50 feet. From this the trial judge inferred that Baird believed the Nelson lot extended this additional distance.

[24] Baird conveyed the Johnston property to Ina Johnston by deed which was also dated December 2, 1971, and there is no evidence that she or her son, Glen, believed the boundary was located as now alleged by the Roodes. The Johnstons' knowledge on this issue was simply not addressed in evidence or argument. In my view this was an error; however, I need not consider its potential impact on the trial decision given my conclusion on the other appeal issues.

[25] Even if there was a misunderstanding with respect to the boundary location, the question remains as to what impact that should have on the adverse possession analysis. In *Cook v. Podgorski, supra*, this Court summarized the principles applicable to adverse possession claims as follows:

> [49] It will be useful to remind ourselves of the relevant principles before turning to their application to the facts:

(1) The law presumes the legal owner to be in possession; i.e., that seizin follows title. This presumption is not compromised because the owner is not in actual occupation, (*Ezbeidy v. Phalen*, (1957), 11 D.L.R. (2d) 660 (N.S. T.D.) approved in *Fralick* at ¶ 40);

(2) To oust the legal owner, it is necessary to establish actual adverse occupation which is exclusive, continuous, open and notorious for the requisite period of 20 years, (*Fralick*, ¶ 40);

(3) The conduct of the possessor must be that of an owner which would exclude the true owner from the land, (*Brown v. Philips et al*, (1963), 42 D.L.R. (2d) 38, (Ont. C.A.) approved in *Fralick*, ¶ 40);

(4) A possessor may have constructive possession of more than what he occupies if he has colour of title - i.e., a deed - whether or not the deed is valid, (*MacDonald v. MacCormack*, 2009 NSCA 12 (N.S. C.A.), ¶ 93). Otherwise, he can only claim what he actually occupies;

(5) To claim constructive possession, the adverse possessor must have a bona fide belief that he has title, (*MacDonald v. MacCormack*, ¶ 94);

(6) But there can be no constructive possession based on the possessor's belief where his deed does not include the land over which possession is claimed, (*MacDonald v. MacCormack*, ¶ 95; *Mason v. Nova Scotia (Minister of Justice)* (1999), 176 N.S.R. (2d) 321 (N.S. C.A.), ¶ 31 to 33; *R. B. Ferguson Construction Ltd. v. Nova Scotia (Attorney General)*, (1989) 91 N.S.R. (2d) 226 (N.S.C.A.); *Rafuse v. Meister*, (1979) 32 N.S.R. (2d) 217 (N.S. C.A.) at ¶ 22-25; *Wood v. LeBlanc*, (1904), 34 S.C.R. 627 (S.C.C.)).

(7) The type of possession required varies with the nature of the land:

> Whether there has been sufficient possession of the kind contemplated by the statute is largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute. Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to their own interests, are factors to be taken into account in determining the sufficiency of possession.
>
> Anger and Honsberger, *Law of Real Property*, 3rd Ed., §29:60.80.

And for a very useful history and summary of applicable principles, see *Brill v. Nova Scotia (Attorney General)*, 2010 NSCA 69 (N.S. C.A.), ¶ 127-155.

[26] Courts require claimants to prove an intention to exclude the true owner as part of showing that possession is "adverse". However, in cases of mistake as to boundary location, the authorities have held that this may be inferred (see *Gould v. Edmonds*, 2001 NSCA 184). The existence of such a mistake does not change the other requirements for a claim of adverse possession. For example, in *Pepper v. Brooker*, 2017 ONCA 532, the parties were mistaken about the location of the boundary between cottage properties. The trial judge made a finding that the plaintiffs had intended to exclude the true owners; however, that did not avoid the necessity of proving the other elements of adverse possession including actual exclusion of the owner. The Ontario Court of Appeal said the following:

> [35] Applying *Teis*, the trial judge reasoned that because the parties were mutually mistaken about the boundary between Lots 3 and 4, he could "draw the inference that the Peppers intended to occupy parts of Lot 4…with the intention to exclude all others, including the owner Mr. Brooker."
>
> [36] This finding was not challenged on appeal. However, I pause to observe that this finding – an intention to exclude – appears to be at odds with the evidence. No one, and certainly not Mr. Brooker, was prevented from using the road and steps to access the shoreline. This ought to have led the trial judge to conclude that the Peppers had failed to establish an intention to exclude.
>
> [37] But even assuming that finding can stand, there exists a more fundamental problem. An intention to exclude the true owner of a property is just one part of the adverse possession equation. An adverse possession claimant must succeed in his or her intention by achieving effective exclusion from the property, even in cases of mutual mistake: *Shennan v. Szewczyk*, 2010 ONCA 679, 96 R.P.R. (4th) 190.

[27] The trial judge indicated that, generally, adverse possession requirements are less rigidly applied in situations of mistake; however, he did not explain what this meant for the case before him. An examination of the evidence may provide some insight.

Adverse Possession

[28] The elements of a claim for adverse possession were summarized in some detail by this Court in *Cook*. A more concise description is found in the earlier decision of *Spicer v. Bowater Mersey Paper Co.*, 2004 NSCA 39:

> [20] From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. They must also prove

> that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession.

[29] According to para. 33 of the trial decision, the acts carried out by the Nelsons and Roodes which establish possessory title were mowing grass, parking vehicles, utilizing a horseshoe pit, planting bushes, and creating and maintaining a garden. The specific evidence relating to these acts of possession merits review.

[30] Margaret Nelson, who owned the property from 1967 until 1991, said that she did not recall the Johnstons mowing grass north of her garden. She also said her family used a push mower but did not mention how often or where they mowed on the Johnston property. Her daughter, Wendy, who received title in 1991, testified that the Johnstons had not cut grass on the area claimed but did not say that she or her family had done so. Wendy's husband, Leo, who started going to the property in 1986 or 1987, said that he had mowed on the disputed lot "quite a few years ago". Bonnie Nelson, the daughter of Margaret and sister of Brenda and Wendy, said that at the time of trial, the area in question was usually mowed by "Brenda or Joshua" but, when she was younger it was mainly the Johnstons that did so.

[31] There was evidence about cars and trailers being parked from time to time in the area being claimed by the Roodes. The evidence was limited to identifying the owners of various vehicles shown in several photographs taken in 1988-89. Glen Johnston testified some belonged to his friends. Margaret Nelson said that Wendy and her children parked on the "front side up towards the garden" practically every weekend. Wendy and Leo Roode identified several cars and trailers which they said belonged to family and friends and were parked on the lands which they claimed. They did not provide any information with respect to their use of the area for parking beyond what was depicted in the photographs taken in the late 1980s. With respect to whether the Johnstons or others parked in the area, Leo Roode said:

> Q. The Johnstons have had people parked on that area in the last 20 years?
>
> A. What in the disputed piece of land?
>
> Q. Yes.
>
> A. They might have; I couldn't tell you for sure. There's people coming and going all the time.

…

Q. Okay. Are you able to say over what time period people would have parked there?

A. I couldn't tell you. As long as I've been going over there, people would - different people parked different places.

Q. They did that without your permission?

A. Well usually it was family or people like that that come over. So we didn't actually give them permission, they just parked wherever there was an opening.

…

Q. Okay. You never tried to keep anybody who was there visiting the Johnstons from parking on that piece?

A. No, I never did.

[Appeal Book pages 440-442]

[32] The horseshoe pit was shown in a few photographs and was identified as being on the lands claimed by the Roodes. There was no evidence as to who built or maintained the pit or for what period of time. Wendy Roode recalled that it was used by members of her family as well as the Johnston family. Her sister, Bonnie, said:

Q. And in that general area there's also been evidence about horseshoes being played somewhere closeish to the garden; does that sound safe to you?

A. Yes.

Q. Okay. And there's also been mention of clotheslines being in that sort of area?

A. Yes.

Q. Okay. Would you say it's safe to say that a lot of people would have been coming and going in that area?

A. Where the garden…

Q. Like either for…

A. …is?

Q. No, where the horseshoes…?

A. Oh, where that is?

Q. Yeah.

A. Yeah, they would play horseshoes and that.

Q. Okay. And fair to say when everyone was playing horseshoes, it was an open game, whoever wanted to come play of the neighbours could come play?

A. Yes.

Q. Okay. So that would probably include the Dickeys, your family, the Johnstons?

A. Yes.

[Appeal Book pages 521-522]

[33] Margaret Nelson started gardening at her cottage in 1975. She testified that the garden was removed in the 1990s. Wendy Roode said that the last year for the garden was 2006. There was significant evidence at trial about the extent to which the garden encroached on the Johnston property and for what period of time. The evidence indicated that any encroachment did not extend 50 feet beyond the Nelson lot but the exact distance was unclear. Witnesses marked the garden area on various photographs and used reference points like a utility pole to describe its location. The trial judge described the garden encroachment as being on the "northwest portion" of the land being claimed (this is obviously intended to be the southwest portion since that was the area abutting the Roode property).

[34] There was also evidence that other people, including the Johnstons, were on the area claimed from time to time. The above references to evidence with respect to the horseshoe pit and parking provide examples. In addition, Margaret Nelson said:

Q. Okay. Now, what I understand is that relations between you and Gordon Johnston - Johnston were always good - you got along?

A. Yes, we did.

Q. Okay. He would come over to the horseshoe pit as well?

A. Yes, he would.

Q. Okay. You never excluded him from it?

A. Never.

Q. You never kept him off the property at all?

A. No.

Q. Okay. So if he wanted to set foot on that second 50 feet you're claiming, you never told him he couldn't be on it?

A. No, we never told him he couldn't be on it. No.

Q. Okay.

A. He was welcome on our property anytime.

Q. Okay. So I gather he came onto your property right up until 1980 - '87 when your husband died?

A. Yes.

Q. And he died about the same time himself?

A. Yes, they did.

Q. Okay. But there was never a time between when his wife, Ina, bought the property behind you and 1987 when you ever told Gordon he wasn't allowed on the property?

A. No, he was welcome to come over.

Q. Okay. Never a time that you told his wife, Ina, she wasn't allowed on the property?

A. No.

[Appeal Book pages 222-223]

[35] The trial judge found that the Roodes had established possessory title to a 50' x 102' parcel. This would have required "very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous" (*Spicer, supra,* at para. 20). The possession must also have extended to all portions of the land claimed.

[36] With respect to the requirement for exclusivity the court in *Pepper, supra* said:

> [33] The critical issue is whether the Peppers' modifications to the disputed lands on Lot 4 effectively excluded Mr. Brooker from possession of those parts of his property. Although the trial judge found that the Peppers *intended* to exclude "all others, including the owner Mr. Brooker", he failed to find that the Peppers had *effectively* excluded Mr. Brooker from the property. There was no evidence to support the claim that they had effectively excluded him, nor anyone else for that matter. The evidence suggests the opposite. This is fatal to the Peppers' claim.

[37] Here the trial judge did not make an express finding of exclusive possession with respect to the 50' x 102' lot being claimed although this could be implicit in his conclusion that adverse possession had been established. Such a finding is one of mixed fact and law and, therefore, will not be set aside absent a palpable and overriding error.

[38] The evidence of possession outside of the area of the garden and shrubs consisted of lawn mowing, parking and a horseshoe pit. The testimony about

parking and horseshoes does not include any element of exclusivity, people in the area were free to use the areas for the same common purposes. Occasional grass mowing is not exclusionary in nature and, in this case, was done by members of both the Nelson and Johnston families from time to time. The very limited activity outside the garden area was acknowledged by counsel for the Roodes during his closing submissions:

> Now, sort of the northern half of that 50 foot strip is pretty much unusable for anyone because it's got Richard Roode's right-of-way running right through it. Not to mention an NSP easement running through it.
>
> So to the extent that they did activities on the other side of that, it's conceded they are minimal, but nonetheless were there.
>
> [Appeal Book pages 829-30]

[39] In my opinion, it was an error for the trial judge to have found adverse possession beyond the garden and shrub area because of the absence of a sufficient evidentiary basis. The Roodes did not prove the required degree of possession of the entire 50' x 102' area for the requisite period. This error affected the trial outcome which makes it palpable and overriding. In these circumstances the finding of adverse possession beyond the garden and shrub area cannot be sustained.

Consecutive Periods of Possession

[40] The appellant argued that any possessory interest acquired by Margaret Nelson could not be combined with possession by Wendy and Leo Roode unless there was an express conveyance of that interest in their deed. The position is clearly wrong in law. This issue was dealt with by the Supreme Court of Canada in *Nelson (City) v. Mowatt*, 2017 SCC 8 where the Court said:

> [18] As to that test, the elements of adverse possession, all of which must be present to trigger the running of the limitation period against the "true owner", are explained by Professor Ziff in *Principles of Property Law* (6th ed. 2014), at p. 146. In brief, the act of possession must be "open and notorious, adverse, exclusive, peaceful (not by force), actual (generally), and continuous" (*ibid.* (footnote omitted)). Significantly for this case, the adverse possessor who successfully obtains title need not always be the same person whose adverse possession triggered the running of the limitation period; successive adverse possessors can "tack" on to the original adverse possession, provided that the possession is continuous in the sense that there is always someone for the true

> owner to sue (*Anger & Honsberger Law of Real Property* (3rd ed. (loose-leaf)), by A.W. La Forest, ed., at §28:50).

[41] Similar conclusions can be found in *Handley v. Archibald* (1899), 30 S.C.R. 130 and *Babbitt v. Clarke* [1925] 3 D.L.R. 55 (Ont. C.A.) aff'd [1927] 2 S.C.R. 148.

[42] In this case there was no break in the possession between Margaret Nelson and the Roodes and so the cumulative period of occupation can be considered as was done by the trial judge.

Right of Way

[43] The evidence is clear that the Nelson family, and others in the area, crossed the Johnston lot to get to the beach for many years. The path was well defined. In 2006, a number of landowners decided to have rock placed on the shore to provide protection from erosion. The contractor's trucks created a road to the shore in the course of their work. It generally followed the original path however there was some deviation. The original path was not straight and the road was.

[44] After the construction of the new route the landowners, including the Roodes, used it to access the beach. The residual portion of the original path which veered off the road as one approached the shore became grown up and impassable.

[45] The location of the original path was not depicted on any survey. Witnesses marked their recollection of it on the exhibited survey plans and on some of the aerial photographs. The route depicted in this fashion had significant variation among the witnesses. Wendy Roode estimated the distance between the beach ends of the original path and 2006 road to be 10 to 12 feet.

[46] The trial judge took a view of the property and, as is indicated in comments during closing submissions, was shown the location of the original and new routes to the beach. In his decision, he described the 2006 work as having "straightened and widened" (para. 47) or "relocated" (para. 50) a "portion" of the original path.

[47] At trial, the position of the Roodes was that, because they and the Nelsons had accessed the beach through the Johnston property since 1966, they had a prescriptive right to continue doing so over the post-2006 road or, alternatively, over the original path. The trial position of the Johnstons was that whatever rights had been acquired over the original path were lost because that route was not in use at the time the action was started. As for the post-2006 road they said the 20 year

prescriptive period had not been established as of 2012. According to the Johnstons, the Roodes had no right to cross their property to access the beach.

[48] On appeal, the Johnstons acknowledged that a prescriptive right of way existed but said it was over the original path. They submit that the trial judge was wrong to find a right of way over the 2006 road because the court cannot change the location of a right of way. They rely on the decision of this Court in *Shea v. Bowser*, 2016 NSCA 18. According to the Johnstons the Roodes have the right to follow the 2006 road until it reaches the point where the original path diverges and then they must follow that route to the shore.

[49] In *Shea v. Bowser*, the judge heard evidence and determined the location of a right of way that had been granted by deed. There was evidence that this route had become impassable and a new road had been built in a different location. The application judge decided that it was in the "interests of justice" that the right of way be declared to be located over the new road. This Court set aside that decision for the following reasons:

> [14] It will be clear from the applicable common law rules I will set out that absent abandonment, extinguishment, or mutual agreement by the parties to relocate, an express grant of ROW cannot simply be declared to exist elsewhere from its intended location. To do so flies in the face of clearly established principles.
>
> [15] The task of the application judge was to determine the location of the deeded ROW, not to create a new one. Although relocating the ROW may seem fair and practical, these considerations do not determine the outcome.

[50] The common law rules which were applied are found at paragraphs 23 to 28 of the decision:

> [23] A right-of-way is a limited and exceptional right. Generally speaking, a right-of-way, including its location, is defined by the grant of that right-of-way and by the circumstances surrounding it. (See *Halsbury's Laws of England*, 4th ed., vol. 14, at p. 26.) Once the location of the right-of-way has been decided, neither the dominant owner nor the servient owner may unilaterally change its location. There might be some limited exceptions to this general rule; however, none apply to this case. (See *Gormley v. Hoyt*, [1982] N.B.J. No. 365 (C.A.); *Wells v. Wells* (1994), 132 N.S.R. (2d) 388 (N.S.S.C.); *Deal v. Palmeter*, 2004 NSSC 190 (N.S. S.C.); *Heslop v. Bishton*, [2009] EWHC 607 (Eng. Ch. Div.).)
>
> [24] Factors such as overgrowth, increased cost and effort to open a new way, and the existence of the alternate way are not a basis upon which the common law

> allows a court to move the location of a right of way "in the interests of justice." (See *Gormley*; *Deal; Halsbury's*, p. 77.)
>
> [25] A dominant owner has ancillary rights which allow for the reopening of a right-of-way, even in circumstances where it has been rendered impassable. (See *Halsbury's*, at pp. 10-11.) In this case, the remedy available to the dominant owner through the common law is to repair or reconstruct the road over the current right-of-way.
>
> [26] A right-of-way acquired through express grant may be altered through abandonment or agreement. (See *West High Development v. Veeraraghaven*, 2011 ONSC 1177 (Ont. S.C.J.).) Absent these circumstances, which do not exist in this case, or applicable legislation, courts cannot themselves alter the location of a right-of-way, nor will they allow either party to unilaterally do so. (See *Gormley.*) This is so even if a failure to relocate leads to unequitable consequences for one or both of the parties. (See *Deal*.)
>
> [27] Property law has its own particular, and at times rigid, set of rules. Courts uphold these rules even though that might result in overturning what may otherwise be a fair result and of benefit to both parties. (See *Gormley; Deal; Crowther v. Shea,* 2005 NBCA 97 (N.B. C.A.).)
>
> [28] As the application judge did not have the authority or jurisdiction to relocate the ROW, I would allow this ground of appeal. For relief, the appellants ask this Court to declare the ROW to be in the original location. In my view, this is an appropriate case to grant such relief. The record supports this relief, particularly given that the application judge made this factual determination before he erred in ordering the ROW be in another location.

[51] These principles indicate that the route over which the Roodes obtained a prescriptive right of way cannot be altered without agreement of the Johnstons. No such agreement was in evidence and, therefore, the right must be exercised over the original path and not the post-2006 road to the extent that these differ. It was an error in law for the trial judge to conclude that the alteration in 2006 entitled the Roodes to use that route to the shore.

Conclusion and Disposition

[52] I am satisfied that the trial judge made a palpable and overriding error in finding adverse possession of the area beyond the garden and shrubs because of the lack of evidence of exclusive possession by the Nelsons and Roodes. There is, however, an evidentiary basis for his conclusion that the garden and shrubs encroached on the Johnston property.

[53] In my view, the appropriate disposition with respect to the adverse possession issue is to allow the appeal, set aside the declaration of title for the 50'

x 102’ lot and replace it with one for the garden and shrub area. Although the location of this land could have been sent back to the trial judge for further determination, I believe the cost to the parties of doing so can, and should, be avoided. The trial judge found that the garden was located on the southwest (mistakenly referred to as the northwest) portion of the Johnston property. In addition, the evidence from the trial indicates that the area over which adverse possession was exercised extends from the Johnston/Roode boundary to the southern edge of the graveled path shown on the plan found at Tab 1 of Exhibit #2 [Appeal Book Page 919]. This was essentially conceded by counsel for the Roodes in his trial submissions. This area is what should be included in the certificate of title.

[54] With respect to the right of way, I would also allow the appeal but declare that the Roodes have a right of way to the shore over the Johnston property along the route of the original path. This was acknowledged by counsel for the Johnstons on appeal.

[55] The order issued December 5, 2018 and Certificate of Title dated December 19, 2018 should be set aside and a new certificate prepared for issuance by the trial judge.

Costs

[56] The Johnstons have been partially successful on appeal and, in my opinion, should receive a modest award of costs which I would fix at $4000 inclusive of disbursements. They also want the trial costs to be set aside; however, their trial position was that there was no right of way to the beach and no adverse possession by Roode and Nelson. Even with the disposition on appeal, they were essentially unsuccessful on both of these issues and so I would not interfere with the award of trial costs.

Wood, C.J.N.S.

Concurred in:

Bryson, J.A.

Hamilton, J.A.