

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Burrell v. Nova Scotia (Attorney General), 2004 NSSC 249

Date: 041126

Docket: SN 105675

Registry: Sydney

Between:

Lawrence D. Burrell

Plaintiff

- and -

The Attorney General of the Province of Nova Scotia

Defendant

- and -

2095891 Nova Scotia Limited

Defendant

D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: June 7-10, 2004 in Sydney, Nova Scotia

Written Decision: November 26, 2004

Counsel: Nicholas Lenco for Lawrence Burrell
Donald MacLennan for the Attorney General of Nova Scotia
H.F. MacIntyre, Q.C. for 2095891 Nova Scotia Limited

By the Court:

[1] Lawrence Burrell claims title, pursuant to the *Quieting of Titles Act*, to lands off Kings Road in Sydney River. 2095891 Nova Scotia Limited claims title to part of the same lands, over a part of which they have a deeded right-of-way. The Company also disputes the granting of a certificate of title to Lawrence Burrell for the remaining lands.

ISSUES

1. Should Lawrence Burrell be granted a certificate of title to the lands?
2. Should 209859 Nova Scotia Limited be granted a right-of-way over all the lands adjacent to those over which it has a deeded right-of-way?

FACTS

[2] The lands which Lawrence Burrell claims, although not formally subdivided, are separately assessed and identified. Both are listed as “owner unknown”. One parcel is immediately behind the lands owned by Lawrence Burrell; the other is beside it and runs back from Kings Road to lands owned by 205891 Nova Scotia Limited. The Company has a deeded 15 foot wide right-of-way over the latter lands. For ease of reference, I will refer to the parcel over which the Company has a 15 foot right-of-way as “Parcel A” and the lands behind the Lawrence Burrell lands as “Parcel B”.

[3] Lawrence Burrell claims possessory title to both parcels commencing from the time in 1963 when his brother, Harry Burrell, obtained title to a lot measuring 40 feet by 100 feet, which contained a small neighbourhood store with attached living accommodations and a warehouse type building. The store is shown in a photo (Exhibit 4) taken in 1973. More recently, Lawrence Burrell has built a newer building on his lands. The warehouse burned down in approximately 1986.

[4] The Company runs a building supply business on its lands and has built a warehouse and fence which encroach substantially onto Parcel B.

[5] Parcels A and B and a larger lot now owned by the Company were at one time owned by Arthur Dwyer. He conveyed lands to the Company’s predecessor in title, Lake of the Woods Milling Company, retaining title to Parcels A and B and granting a 15 foot wide right-of-way to Lake of the Woods over Parcel A.

[6] Lawrence Burrell testified that his brother, Harry, bought his land in 1963 from Lena Dwyer, the wife of Arthur Dwyer and lived in the attached apartment. Lawrence Burrell said he worked in the store after school in the 1960's until 1965, although he did not live there. He testified that after Harry sold the store property his father owned it from 1971 until his death in 1983. Thereafter, his mother owned it, although the store did not operate after the end of 1984.

[7] While his father owned the property, Lawrence Burrell and his brother, George, operated the store from 1973 to 1977. Lawrence Burrell testified he was in Ontario from late 1970 or early 1971 until the spring of 1973 when he returned to run the store with George. When their partnership dissolved, Arthur Burrell, Lawrence Burrell's father, then operated the store with some help from Lawrence until his death in December 1983. During this time, Lawrence Burrell said he drove a taxi. Lawrence Burrell testified he kept the store open for almost a year after his father's death.

[8] Lawrence Burrell testified that, in the early 1960's, the store was open year round but, later in the 1960's, it closed after Christmas until April. He said Harry and his family lived in the apartment until 1972, then George moved in in 1973 and he moved in with him. Later his father lived there. After his father's death, George and another brother lived there. Lawrence Burrell said they sold lobster periodically and George sold Christmas trees. Later still, his mother lived there with his brothers, George and Billy.

[9] Lawrence Burrell testified that the warehouse was used for storage and lobster was cooked in it. He said it had a rear exit to Parcel B. He testified that lobster traps, tables and some lumber were stored behind the warehouse on Parcel B and that lobster was cooked there and there was a garbage can for burning trash near the brook.

[10] Greg Burrell, who was born in September, 1957, testified that his family moved to the apartment behind the store when he was 5 or 6. He testified that Arthur Dwyer lived with them. He said he lived there until he was 13 or 14, in the early 1970's. He said he also lived with his grandparents around 1967 and later in Ontario. He testified he was 14, 15 or 16 the year he went to school in Ontario. He believed it was around 1973.

[11] Greg Burrell testified his father ran the store and his mother worked there too, but it was closed in the winter. He worked there too. He testified about the storage in the warehouse but said it had no rear exit to Parcel B. He said the land behind the warehouse was used for storage of plywood and tables, a rhubarb garden and a burning area. He said the tables were stored fairly close to the warehouse, as were the lobster traps. He said his father built picnic tables behind the warehouse too.

[12] David Gillis, who was born in 1946, testified about his knowledge of the uses of Parcels A and B. He is one of the owners of the defendant Company which runs a building supply store. The Company has a deeded right-of-way across Parcel A and a warehouse and fence on Parcel B.

[13] He testified his father did business with the flour company and he worked for his father. The main entrance to his business, and previously to the flour mill, is from Kings Road using the right-of-way. He testified there was enough room on the right-of-way for two trucks to pass.

[14] David Gillis testified he is responsible for maintaining the right-of-way, including plowing it in winter. Before that, the flour company and his father did the work, according to his testimony.

[15] He testified that over the years he saw little activity, including storage, on land behind the Burrell warehouse. He said after he began to operate his business there in 1983 he began to fill the gully, which by then had dried up. He said he believed he had a discussion with Arthur Burrell who gave him his blessing. He said after he began to fill the gully no one tried to stop him.

[16] He also said that he had a discussion with Lawrence Burrell about buying Lawrence Burrell's land. He testified that Lawrence Burrell told him his lot was 40' x 100'.

[17] David Gillis testified that after he filled the gully he "took the liberty" of storing lumber there but only fenced the lands for security after the Burrell warehouse burned. He testified no one objected to him erecting the fence.

[18] David Gillis testified that the first structure on Parcel B was built in the 1980's. It was a pole barn, which is poles with a roof and tarped walls. He said he

closed it in later in the early 1990's. The building permit for the pole barn (Exhibit 6) shows that Gillis Building Supplies was proposing to build a warehouse on lands then owned by the Ogilvie Flour Mill Co. Ltd. adjacent to the “owner unknown” lands which have been referred to herein as Parcel B. The structure is shown on the portion of the plan attached to the application for building permit as “proposed open air storage”. The permit requires 2.0 metre setbacks on all sides. It was issued on November 6, 1990.

[19] David Gillis admitted he took a chance building on land that was not his but no one challenged him at that time. It is clear from the building permit that it was granted for construction of a structure on what are now the Company’s lands, not on Parcel B.

[20] David Gillis testified that the Burrells gravelled the right-of-way a few times but that it was mostly done by Ogilvie Flour and then by him. He said the Burrells parked beside their building. He said that on a few occasions the driveway was barricaded by bricks at the end nearest the back of the Burrell property. He did not object because it kept people out at night. He said he first learned of any claim to Parcel B after 1996, after Mrs. Burrell died.

THE LAW

[21] Section 3 (1) of the *Quieting of Titles Act*, R.S.N.S. 1989, c. 382 provides:

Right of action for certificate of title

3 (1) Any person who claims a property right in land may commence an action in the Trial Division of the Supreme Court or in the county court of the district in which the land lies for a certificate of title under this Act.

[22] The court’s powers are set out in s. 12 of the *Act* as follows:

Certificate of title after trial

12 (1) Where, after the trial or determination of all issues of law and fact between the parties, it appears that a party claiming a certificate of title is entitled to some property right in the land, whether it is the property right claimed or not, the court or a judge may order that a certificate of title be issued to the claimant for the property right to which the claimant has been found entitled.

[23] The burden of proof is not disputed by the parties. It is a heavy burden to rebut the presumption that the holder of the paper title is in possession of the whole of the lands.

[24] In this case, although the lands are assessed as “owner unknown”, it is not disputed that title is held by the heirs of Arthur Dwyer, who died in 1966. No heirs have been found.

[25] In *Mack v. Meldrum et al* (1992), 115 N.S.R. (2d) 159 (N.S.S.C.), Glube, C.J.T.D. (as she then was) said at para 12:

[12] When a person has paper title to land and occupies any part of it, the law provides that the person who is in possession of a part is regarded as being in possession of the whole unless it can be shown that another person is in actual physical possession of some part of that property to the exclusion of the true owner.

[26] To obtain title by adverse possession, as Lawrence Burrell claims here, he must establish actual possession, which is exclusive, continuous, open and notorious for a period of 20 years.

[27] In *Conrad v. Nova Scotia (Attorney General) et al* (1994), 136 N.S.R. (2d) 170 (C.A.), Jones, J.A. dealt with the acts necessary to dispossess the owner of a large parcel of unimproved land, in that case, woodland. He quoted from *Wood v. LeBlanc* (1904), 34 S.C.R. 627 (S.C.C.) at para. 25:

... The nature of the possession necessary to do this in the absence of colourable title was fully considered by this court in the case of **Sherren v. Pearson** 14 Can. S.C.R. 581. It was there decided that isolated acts of trespass committed on wild lands from year to year will not, combined, operate to give the trespasser a title under the statute.

In the carefully reasoned opinions of the judges in that case statements on the point are made which do not seem to leave the matter open to any doubt. Chief Justice Ritchie formally approved of the law as laid down in **Doe d. DesBarres v. White** 3 (N.B. Rep.) 595 and at p. 585 goes on to say:

To enable the (trespasser) to recover he must show an actual possession, an occupation exclusive, continuous, open or visible, and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose.

THE SURVEY EVIDENCE

[28] Surveys were completed for both parties: one by Carl MacDonald (Exhibit 1, Tab 23) for Lawrence Burrell and several by Stewart Setchell for the Company. At trial, Mr. Setchell admitted that the plan which is Exhibit 8 could be misleading. I therefore disregard it. A plan done by Mr. Setchell was submitted with his expert's report (Exhibit 1, Tab 25) but, at trial, counsel for the Company said they rely instead on a third plan which is Exhibit 9. Both surveyors testified.

[29] The Attorney General of Nova Scotia is always a named party in Quieting of Titles applications. His counsel appeared at the commencement of the trial and advised that the Attorney General would take no part in the trial of this matter. The position of the Attorney General of Nova Scotia, as set out by its counsel, Donald MacLennan, is that the Department of Transportation for the Province of Nova Scotia could accept the Kings Road street line at either location shown on the plans prepared by Messrs. MacDonald and Setchell. It is clear from the plans that the travelled way of Kings Road is some distance from the street line locations shown on both plans.

[30] The principal difference between the positions of the two surveyors is the location of Kings Road. The street line shown by Carl MacDonald on his plan runs through the building owned by Lawrence Burrell. The plan shows the fence and part of the Company's building encroaching on the Lawrence Burrell lands at the rear of his lot.

[31] Using a different street line location, the Setchell plan (Exhibit 9) shows only a small part of the Company's fence encroaching on the Lawrence Burrell lands, but none of the building.

[32] Carl MacDonald, N.S.L.S., testified he placed a Survey Marker at his street line and established his point of beginning for the Lawrence Burrell lot from that. He said he referred to the 1945 deed from Cameron to Dwyer which referred to a distance of three hundred feet to the Dwyer lands from the C.N.R. right-of-way. He said there was a distance of four hundred feet from the C.N.R. lands to the highway, leaving one hundred feet, the depth of the Lawrence Burrell lot.

[33] Although there is an Iron Bar at the corner of the Lawrence Burrell building, he did not rely upon it because, in his view, it was put there “as a convenience” since there was a substantial piece of land between the original Kings Road and its existing location. It was his opinion it was put there “to clear the building”.

[34] The 1969 Department of Transportation plan (Exhibit 1, Tab 14) refers to “Old Road 1932” and that road location does not run through Lawrence Burrell’s store. Mr. MacDonald said he placed little reliance on it because it did not refer to any surveys or measurements and there was nothing to show the proper scale.

[35] On cross-examination, he agreed that what is “on the ground” is more important than measurements in a deed if there is a conflict between the two. He said he used what he determined to be the original street line because it agreed with the deed distances.

[36] However, he did not have the plan which he said shows the original street line. He said he would ordinarily start with the street line but could not here because there was no evidence of it.

[37] Stewart Setchell, N.S.L.S., did four plans of the subject area: one in 1984 for Mr. Gillis when the lands were still owned by Ogilvie Flour (Exhibit 11); a 1997 plan for the purpose of negotiations with the Department of Transportation; a revision of the 1997 plan in 1998 (Exhibit 8) and Exhibit 9, a further revision of the 1997 plan in February 2003. It is the latter upon which the Company now relies. He said the plan which is attached to his expert’s report (Exhibit 1, Tab 25) accurately shows the southeast corner of the Lawrence Burrell building.

[38] Mr. Setchell’s notes to Exhibit 9 refer to the Department of Transportation plans from 1969 and 1971 (Tabs 14 and 15 respectively). The former refers to “old road 1932”. His notes also refer to the Verner plan (Exhibit 12) which shows the street line clearing the Lawrence Burrell building. He testified that he found the Iron Bar shown on his plans when he was preparing his 1984 plan.

[39] In his opinion, the street boundary is where the Iron Bar was found, which is a location used since 1959. Since the beginning point in the description in Lawrence Burrell’s deed is the “west side of the road from Sydney to St. Peter’s”, he said he would start by determining that line. He therefore concluded that the Iron Bar marked the street boundary.

[40] On cross-examination, he testified that he did not place the street line running from that Iron Bar to the one adjacent the Dairy Queen property. This would have resulted in the street boundary running through the store. He testified he did not do this because the Department of Transportation plans did not show it doing so. He explained that the Iron Bar is not shown on the Department of Transportation “strip plans” because Department of Transportation does not show survey markers. He said however that the “strip plans” do show encroachments.

[41] I accept the street line shown on the Setchell plan (Exhibit 9). Mr. Setchell relied upon Department of Transportation information (Exhibit 1, Tabs 14 and 15). Mr. MacDonald, on the other hand, referred to “the original line” but provided no substantiation for the location of that line. The line accepted by the Department of Transportation since approximately 1959 does not show the building on the Lawrence Burrell lot encroaching on the street line. I therefore conclude that the best information about the street line location is reflected on the Setchell plan (Exhibit 9). He did his own research and based his opinion upon his research. Mr. MacDonald, on the other hand, relied upon a plan which is not in evidence prepared by Earl Verner. He did not speak to Mr. Verner. Exhibit 12 is a survey of the property southeast of the Lawrence Burrell property, prepared by Earl Verner in 1983. It does not show the street line running through the store on Lawrence Burrell’s lands.

[42] Mr. Setchell testified, as did Mr. MacDonald, that the last thing you rely upon in doing a survey is the distances called for in a deed. However, I am satisfied from the evidence that Mr. MacDonald relied heavily upon the deed distances running from the C.N.R. line. This reliance resulted in the location of the rear lot line of the Burrell lands running through the building on Parcel B and the street line at Kings Road running through the Burrell store/ apartment. I am satisfied neither is correct.

[43] Because of the competing claims and the differing uses in dispute, I will deal with each parcel separately.

Parcel B

[44] Lawrence Burrell claims title in fee simple to Parcel B. The Company has a warehouse partly on its lands and covering virtually all of Parcel B. As well, the Company has erected a fence around two sides of its warehouse, encroaching, as I

have said above, on the Burrell lands. The evidence is clear that the fence was erected only in 1987.

[45] Lawrence Burrell testified he and his family always used Parcel B in conjunction with the lands they owned. It was vacant land which he testified had a gully or brook running through it. Greg Burrell testified that, when his father bought the property in 1963, Arthur Dwyer lived with them until his death on March 15, 1966 (according to Exhibit 3).

[46] At trial, I asked counsel for further submissions on the issue of whether acts could be adverse to the possession of the true owner of the lands, Arthur Dwyer, when he was living with the family of Harry Burrell, through whom Lawrence Burrell claims. Both counsel provided further written submissions.

[47] Counsel for Lawrence Burrell submits that there should be no inference drawn that Arthur Dwyer consented to the occupation of Parcel B by the Burrells. He submits that, if there is any evidence from which an inference should be drawn, it is that Arthur Dwyer stood by and watched his land being used by the Burrells.

[48] Mr. Lenco, for Lawrence Burrell, refers to *Blair v. N.S. (A.G.)* (2001), 190 N.S.R. (2d) 383 (N.S.S.C.) as support for his submission. However, since that case dealt with joint tenants and tenants in common, which was not the relationship of the Burrells with Arthur Dwyer, I do not find that case helpful.

[49] Mr. Lenco also refers to s. 13 of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 27 in support of his submission:

13. No person shall be deemed to have been in possession of any land, within the meaning of this Act, merely by reason of having made an entry thereon.

I conclude that section does not deal with the position of an owner such as Arthur Dwyer but a trespasser.

[50] Mr. MacIntyre, for the Company, submits that the fact that Arthur Dwyer lived with the Harry Burrell family brings into question the exclusivity of possession by the Burrells, which is one of the elements required to oust the title of the true owner.

[51] Arthur Dwyer lived on the very lands in conjunction with which Lawrence Burrell says Parcel B was used. That being the case, then Arthur Dwyer himself should be considered to be in the same position as the Harry Burrell family when he lived with them.

[52] In *Spicer v. Bowater Mersey Paper Co.* 2004 NSCA 39, Roscoe, J.A. said at para 19:

19 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 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.

[53] I conclude that any possession of Parcel B from 1963 to 1966 by members of the Burrell family was not inconsistent with Arthur Dwyer's possession of Parcel B.

[54] I therefore conclude that possession could not be adverse to Arthur Dwyer, the true owner of the lands, while he was living with the person through whom Lawrence Burrell claims, that is, his brother, Harry Burrell. Arthur Dwyer lived on the lands which Lawrence Burrell claims Parcel B was used in conjunction with. Therefore, the period of adverse possession could only commence upon the death of Arthur Dwyer in March of 1966.

[55] Lawrence Burrell and Greg Burrell testified about various uses that were made of lot B. These include a rhubarb garden, storage behind the Burrell warehouse, cooking lobster and burning garbage. Lawrence Burrell did not testify that he or his family paid taxes on Parcel B.

[56] If the rhubarb garden existed for the full twenty year period on Parcel B, Lawrence Burrell could acquire title to only that portion of the lands on which the garden was located. Greg Burrell's evidence was that the rhubarb was planted immediately behind the warehouse. He also testified that it was a small rhubarb patch for family use only and the rhubarb sold in the store was purchased in

Coxheath. I accept that evidence. Because the warehouse was not in existence at the time the surveys were done, its exact location is not known. However, there are photographs which show the fence and rhubarb. These are the first two photographs at Tab 12 of Exhibit 1. I have concluded above that the fence encroaches on the Burrell lands. Since the rhubarb is adjacent to the fence, I am not satisfied that the small rhubarb patch was on Parcel B in any event.

[57] Lawrence Burrell testified that lobster crates, tables and other items were stored at the rear of the warehouse. He testified this storage occurred on Parcel B. Greg Burrell's evidence was that there was no door at the rear of the warehouse as Lawrence Burrell testified there was. It is also not entirely clear, as I have stated above, where the warehouse was located in relation to the rear boundary of the Lawrence Burrell lands. I am therefore not satisfied that any storage which may have occurred extended beyond the Lawrence Burrell lands. Similarly, if picnic tables were built behind the warehouse, it is not clear that this was done on parcel B. In any event, this activity was sporadic and for a limited time.

[58] Lawrence Burrell also testified that members of his family cooked lobster on Parcel B. I cannot conclude that such an activity is sufficient to give Lawrence Burrell possessory title to all of Parcel B as he claims. Lawrence Burrell's testimony was that the cooking of lobster on Parcel B did not begin until 1969. Furthermore, the cooking of lobster on the lands was seasonal. Accordingly, the entry on Parcel B for that purpose is more akin to a trespass than an action which assists Mr. Burrell in his claim for possessory title of all of Parcel B.

[59] Lawrence Burrell also testified that members of his family burned their garbage and garbage from the store in a garbage can on Parcel B and that this was a year-round activity. He said it occurred much less in the winter, particularly when the store closed in the winter. His evidence and that of Greg Burrell was that the store was closed in the winter after Arthur Burrell took over operation of the store in 1971. Lawrence Burrell testified that, after his father died in 1983, he ran the store for approximately one year, that is until 1984. It then closed. Since I have concluded above that the period of adverse possession could not begin until 1966, the burning of garbage did not continue for a period of twenty years. Even if such an act continued for twenty years, it is not such as to dispossess the true owner but is more in the nature of a trespass.

[60] To oust the true owner, the possession “must not be equivocal, occasional or for a special or temporary purpose” (as quoted in *Conrad, supra*).

[61] Furthermore, the person claiming adverse possession gets title only to the part of the lands claimed of which he is in actual possession. In *Rafuse and Rafuse v. Meister* (1979), 32 N.S.R. (2d) 217 (C.A.), Pace, J.A. said at para 29:

What the person in adverse possession gets is confined to what he openly, notoriously, continuously and exclusively possesses. Possession of a part is not possession of the whole as between an actual possessor and an actual owner.

[62] The use of the land was sporadic and for specific purposes. Cooking lobster was seasonal and for a limited number of years. The location of a trash can and occasional burning of garbage was a limited use as well. Both uses could be characterized as trespasses.

[63] I am not satisfied the rhubarb patch or the storage of lobster crates and tables was on Parcel B, nor that picnic tables were built on it.

[64] Even if I were satisfied that the combined usages about which Lawrence Burrell and Greg Burrell testified were sufficient to give possessory title, I must be satisfied that the acts continued for the full period of twenty years, beginning in 1966. If I am wrong with respect to the period 1963-1966, I must consider the usage from 1963 on.

[65] Greg Burrell testified that he lived on the lands now owned by Lawrence Burrell from 1963 to 1970. Lawrence Burrell testified that he was away from 1970 or 1971 until 1973 at which time he returned to run the store with his brother, George. Although he did come home one summer for approximately two weeks, he could not testify about the use of the lands during the 2 ½ to 3 ½ year period when he was away from Nova Scotia. Evidence of use of the lands during that period would have to come from another source. The only other witness with respect to the use of the lands was Greg Burrell. He testified he was away in Ontario during a school year, that is, from September to June, in either 1971-1972 or 1972-1973. That overlaps with the time period Lawrence Burrell was away. Therefore there is no evidence about the use of the lands during a part of the twenty year period, regardless of whether it commences in 1963 or 1966.

[66] Furthermore, Lawrence Burrell testified about his actions when David Gillis began to build the fence in 1987. He testified that he measured 100 feet (the depth of the lands, which were then his mother's) and concluded the fence did not encroach on her lands. This is evidence of Lawrence Burrell acquiescing in the fencing of Parcel B. The present action was not even commenced until 1997, ten years after the fence was erected.

[67] The onus of proof is strict in cases such as this. The person claiming title by adverse possession must prove he and his predecessors in title have been in

actual possession and occupation exclusive, continuous, open or visible, and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose. (quoting from *Doe d. DesBarres v. White* quoted above in *Conrad*).

[68] In *Rafuse*, Pace, J.A. said at para. 35:

35 In the present case the respondents acts of possession were slight and sporadic and fell far short of the possession necessary to establish their claim of adverse possession or to invoke the operation of the statute.

[69] In this case, the acts were also slight and sporadic and, as well, seasonal.

[70] Lawrence Burrell's claim for a Certificate of Title to Parcel B is therefore dismissed. The Company is not claiming a Certificate of Title for Parcel B. It has erected a fence and a building on Parcel B, actions which this court does not condone. Where the fence encroaches on Lawrence Burrell's lands, as I found above, it must be removed.

Parcel A

[71] Parcel A is vacant land with a driveway on it. It is shown on the photos at Exhibit 1, Tab 12.

[72] The Setchell plan (Exhibit 9) shows the "Owner Unknown" lands and also shows the extent of the travelled way. I conclude that the difference among the areas shown on the three Stewart Setchell plans, 3,040; 3,071; and 3,263 square feet, is as a result of the changes to the street line. Exhibit 9 shows Parcel A to be 22.7 feet wide at the street line. I accept that distance. The deeded right-of-way is 15 feet in width.

[73] Until approximately 1986, there was a warehouse type building on the lands now owned by Lawrence Burrell. The corner of that building is shown in the photo which is Exhibit 4. Lawrence Burrell and his nephew, Greg Burrell, testified that one of the doors of that warehouse opened out onto Parcel B. This is substantiated by the fact that the travelled way shown on the Setchell plans has a “jog” in it, narrowing at the location where I conclude the warehouse was originally located.

[74] Both parties initially claimed title in fee simple to all of Parcel A. At trial, counsel for the Company said it is claiming only a right-of-way over the travelled way on Parcel A beyond the 15 feet for which it already has a deeded right-of-way. Although counsel for Mr. Burrell at trial said his client was claiming only a right-of-way over all of Parcel A, correspondence after trial confirmed Mr. Burrell’s original position that he is claiming title in fee simple to all of Parcel A.

[75] I must consider the use to which Parcel A has been put over the years. When I do so, I must recognize that the usage to which it could be put by its true owner is restricted by the deeded 15 foot right-of-way. Certainly the Company and its predecessor in title used the deeded 15 foot right-of-way. It is clear to me from the plans, photos and testimony that they used the entire 15 foot right-of-way. The Company claims a right-of-way over the entire travelled way shown on Exhibit 9.

[76] The evidence of David Gillis, the president of the Company, is that he could recall driving a truck to the lands he now owns and meeting and passing an oncoming truck on the travelled way. He also testified that the flour company and then his father and he maintained the right-of-way.

[77] It is also clear from the evidence that Lawrence Burrell and his predecessors in title used the right-of-way after 1963 for access to their lands. The photo at Exhibit 4 shows Lawrence Burrell’s car parked facing towards Kings Road. I conclude from that and from his testimony that the Burrell family drove in over the right-of-way and Parcel A and parked beside their building. I accept this to be so. I also accept that they left the parking area in front of the store for store customers.

[78] Lawrence Burrell testified that he and his father and brother fixed potholes on the travelled way. He also testified they blocked it on some occasions in the evenings and on weekends, when the business operating on what are now the

Company's lands was closed, in order to prevent others from using the right-of-way to access lands on an adjacent street.

[79] The acts of Lawrence Burrell and his predecessor in title must be assessed in light of the existence of the grant of the 15 foot right-of-way. The parcel is, as I have found, only 22.7 feet wide at Kings Road, narrowing at the point where the warehouse once stood. What acts could dispossess the true owner, whose rights were limited by the right-of-way he had granted, a right-of-way which was in constant use by its grantee and successors in title?

[80] I conclude that one of the few things that could be done would be to prevent others from entering the lands when the right-of-way was not in use by its grantee. I accept that Lawrence Burrell and his predecessors on occasion blocked Parcel A and prevented access to it when previous owners at the adjacent business were not using it. This was confirmed by the evidence of David Gillis, who said he recalled it being barricaded on a few occasions in the early morning when he arrived to use the right-of-way.

[81] On those occasions, Lawrence Burrell's predecessors treated the lands as theirs; however, I cannot conclude that this continued for the full period of twenty years necessary to give them title to all of Parcel A. There is no evidence that Lawrence Burrell and his predecessors blocked off Parcel A continuously for twenty years whenever the Company and its predecessors were not using it. In fact, I am satisfied this was done only occasionally and irregularly.

[82] Furthermore, I conclude that the travelled way in fact used by the Company and its predecessor in title extended beyond the 15 feet granted originally by Arthur Dwyer to Lake of the Woods Milling Company. I accept the evidence of Mr. Gillis that two trucks could meet and pass. The photos at Exhibit 1, Tab 12 show the extent of the travelled way as it was in 1997 and 1998.

[83] I did not allow opinion evidence to be given by Lawrence Burrell to interpret the aerial photographs he submitted into evidence. I concluded at trial that interpretations of such photographs must be given by an expert in geomatics. However, those aerial photographs are of some use in showing the extent of the travelled way at various times, especially where *viva voce* testimony confirmed the extent of the travelled way. In Exhibit 1, Tab 2, the enlarged photo, taken in 1969, shows the roadway running by the Burrell store/apartment and the warehouse and

running back to the Lake of the Woods building. The enlarged photo at Exhibit 1, Tab 3, taken in 1971, also shows the extent of the travelled way where it begins at Kings Road, narrowing as it passes the Burrell warehouse building and widening again towards the flour mill building.

[84] From all the evidence, *viva voce* and photographic, I conclude that the extent of the travelled way has changed little over the years. During the years when the store was operating and members of the Burrell family lived in the apartment, there was some restriction on the width of the travelled way. I accept the evidence of Lawrence Burrell and the evidence in the photo at Exhibit 4 that cars owned by members of the Burrell family were parked beside the store/apartment. This would have restricted the width of the travelled way at that point. As I have concluded above, however, there is no evidence about the use of Parcel A by Lawrence Burrell's predecessors in title for a portion fo the required twenty year period.

[85] Neither surveyor showed the distance between the Burrell building and the boundary of Parcel A. However, I conclude that, for cars to be parked beside the Burrell building, they had to be parked in part on Parcel A. Accordingly, I cannot conclude that the Company has established the travelled way shown on the Setchell plan (Exhibit 9) has been in existence at that location for the required twenty years. I conclude that the travelled way closest to the Kings Road location more closely follows the boundary of Parcel A, as shown on Exhibit 9, from the Kings Road street line to the rear of the Burrell building. I am satisfied, however, that the extent of the travelled way from that point back is as shown on Exhibit 9. This conclusion eliminates the encroachment of the travelled way on the Burrell lands.

[86] Based upon the evidence of David Gillis, I am satisfied that the Company has established that it used lands beyond the deeded 15 foot right-of-way as a right-of-way for the required period of twenty years. It is entitled to a Certificate of Title for a right-of-way over the portion of Parcel A described above.

[87] There was a gap in the evidence of Lawrence and Greg Burrell for a portion of the required twenty year period, as I discussed above with respect to Parcel B. Accordingly, I am not satisfied that Lawrence Burrell is entitled to a right-of-way over any portion of Parcel A.

CONCLUSION

[88] The claim of Lawrence Burrell is dismissed. The Company is entitled to a Certificate of Title for a right-of-way over an additional portion of Parcel A.

[89] The Company is entitled to its costs from Lawrence Burrell. If the parties cannot agree on costs, I will accept written submissions.

Hood, J.