IN THE SUPREME COURT OF NOVA SCOTIA
Citation: MacDonald v. McCormick, 2007 NSSC 29

Date: 20070130
Docket: ST No. 234849
Registry: Truro

Between:

John William MacDonald and Lorraine Marie MacDonald

Plaintiff(s)

v.

Roger Mark McCormick and Angela Louise McCormick

Defendant(s)

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	June 8th and 9th, 2006, in Truro, Nova Scotia
Written Submissions:	June 26, 2006 and December 28, 2006.
Counsel:	Peter Lederman, Q.C., for the plaintiffs Jerome T. Langille, for the defendants

By the Court:

INTRODUCTION

[1] This proceeding arises from a dispute between neighboring property owners regarding the existence and location of a right-of-way and the location of the boundary between their respective lands.

BACKGROUND AND PLEADINGS

[2] The plaintiffs own two lots in an area known as Mitchell's Beach, a cottage subdivision near Pugwash, Nova Scotia. The plaintiffs' "shore lot" lies on the shore of Pugwash Harbor, while the "back lot" is landlocked, lying inland of the shore lot. The defendants own a lot on the shore to the west of the plaintiff's shore lot. The lots are accessible from the Bergman Road, also known as the Pugwash River Road, by way of a lane known as the "Mitchell and Burnside Right-of-Way" (also called the "Burnside Right-of-Way" and "Elm Tree Lane"). The Bergman Road splits into a "T" in the vicinity of the parties' boundary line, with the crossbar of the "T" comprised of lanes running behind the shore lots.

[3] The plaintiffs allege that their shore lot and the defendants' lot are separated by a ten-foot-wide right of way running to the shore, which they claim has existed since the subdivision was established. They claim that the right-of-way has been used by occupants of the subdivision to access the shore for more than twenty years. The plaintiffs allege that the defendants blocked access to the right-of-way and removed the stairs that led from it down to the beach. They say this was done over the protests of the plaintiffs.

[4] The defendants deny that a right-of-way exists between their lot and the plaintiffs' shore lot. They deny that any grant was ever made or that any such right-of-way has been used by the occupants of the subdivision to access the shore in this location for a period of more than twenty years. They allege that, despite their requests, the plaintiffs trespassed upon their lands. The defendants agree that they removed the stairs to the beach, after having their property surveyed in 2004. They deny encroaching upon the plaintiffs' shore lot, or claiming any part of it as their own. They add a counterclaim for trespassing.

[5] The plaintiffs seek a declaration that the right-of-way exists for the benefit of themselves and other occupants of the subdivision, by express or implicit grant or by virtue of prescriptive easement. The declaration they seek would also set the western boundary of their shore lot where they allege it to be. They also request an order preventing the defendants from "obstructing access to the right-of-way and from encroaching upon their shore lot." The defendants seek a declaration as to the location of the boundary, as well as a declaration that no right-of-way exists over their lands. They ask for a permanent injunction preventing the plaintiffs from entering upon their lands.

ISSUES

[6] There are two principal issues: the determination of the boundary line between the plaintiffs' and defendants' properties, and the existence or non-existence of a right-of-way.

EVIDENCE

Deeds to the respective properties

[7] It is necessary to review briefly the history of the various lots with which this proceeding is concerned, as described in the deeds. The lots now occupied by the parties originate in deeds from J.D. Burnside and Thomas Mitchell, and their successors in title, beginning in the 1940s. Although there is no specific evidence from the original owners – i.e. Mitchell and Burnside – it appears from the deed history that they decided to subdivide their lands lying between Pugwash Harbor and the Bergman Road.

[8] The plaintiffs' shore lot originates in a grant from Thomas and Greta Mitchell to Gerald Hatherley in 1949. The deed described a lot "beginning at an iron post on the bank of the shore ten feet east of the line between Thomas E.

Mitchell and property owned by John D. Burnside...". The line ran east 53 feet along the shore bank, to a post, then south 100 feet to another post, this one on the "side of the right of way." This would be the dirt lane running parallel to the shore. Finally the line ran west 66 feet along the right-of-way to a post, and north 100 feet back to the iron post. The property is in the shape of a rough rectangle, wider on the inland end than on the shore end. The deed included a right-of-way to the Pent Road (which is to the east of the property) and the use of a right-of-way "along aforesaid Thomas E. Mitchell and John D. Burnside line" to the Bergman Road, "in common with others."

[9] The lot that now comprises the plaintiffs' back lot also originated in the Mitchell lands. In 1960 Mr. Mitchell transferred a lot to Roderick MacDonald, the father of the plaintiff Mrs. MacDonald. The boundaries began "at a point on the south side of shore right of way next the Burnside right of way," and then, "following said Burnside right of way in a South west direction" for 100 feet to a post; then east 100 feet, parallel to the shore right-of-way, to a post; then north 100 feet to a post on the side of the shore right-of-way; and finally west 100 feet to the first post. The result was a rough square. The grant included "use of said right of ways in common with others."

[10] Mr. Hatherley transferred the shore lot to Edward MacDonald in 1955. Roderick MacDonald subsequently obtained that lot as well, from Edward MacDonald's widow, Betty MacDonald. The shore lot and the back lot were later offered to the plaintiffs by Ellen MacAulay, the sister of the plaintiff Mrs. MacDonald, who shared title with Mrs. MacDonald after their father's death.

[11] The evolution of the defendants' property is more complicated. In 1947 John D. Burnside and his wife Jessie P. Burnside deeded a lot to Maurice Andrew Crawley. This lot began at a wooden stake on the westerly shoreline of Pugwash Harbor, one Hundred Feet northwest of "the northwesterly boundary line of lands of Thomas E. Mitchell." It ran northwest along the shore of for 200 feet, to a wooden stake, southwest 100 feet to another stake, then southeast, parallel to the shore, 200 feet to a stake, and then northeast to the beginning point. The conveyance also included a right-of-way to the Pugwash River Road.

[12] The Crawley lands lay some distance to the northwest of the Mitchell-Burnside line. In 1950 Mr. Burnside transferred a parcel between the Mitchell and Crawley properties to Olwyn Ethel Best. This property began at a stake on the

Harbor bank “at the north-westerly line of Thomas Mitchell”, then ran successively 100 feet southwest, northwest, southeasterly (*sic*.) and along the Harbor bank to the beginning. This deed included a right-of-way to the Pugwash River Road. While Ms. Best acquired land from Mr. Burnside, there is no direct evidence of a transfer of land to Ms. Best from Mr. Crawley. However, the deed from Alda Mackenzie to Mrs. Ouderkirk refers to a conveyance from Ms. Best to Eva Wood of a portion of the land eventually conveyed to Roger and Virginia McCormick. The lands involved in the initial transfers are indicated on the plan of survey prepared by Lyndon K. Crowe on behalf of the defendants, dated February 9, 2004.

[13] The lot owned by Olwyn Ethel Best, after going through several owners, was later divided and sold by Alda Seaman MacKenzie, with one parcel going to Mattie Ouderkirk and another to Roger and Virginia McCormick. The McCormicks, who are the parents of the defendant Mr. McCormick, obtained Mrs. Ouderkirk’s lot in 1991. This lot begins “on the Northwesterly line of Thomas Mitchell marked by a stake on the bank of Pugwash Harbor”, then runs southwest along that line, 100 feet to a stake, then northwest fifty feet to a stake, northeast 100 feet to another stake, and fifty feet along the bank to the beginning. Also

included is “the use of a private lane or right-of-way along back of said lot” to the Pugwash River Road (i.e. the Bergman Road).

[14] Roger and Virginia McCormick transferred the former Ouderkirk lot to the defendants in 2001. In 2002 the defendants obtained a strip from the Mitchell property from Dennis Mitchell, the great-grandson of Thomas Mitchell. They consolidated this strip with their existing property. The result was that their property was described as beginning “at the northwesterly corner” of the MacDonald property, then running southwesterly along the MacDonald line 100 feet to a stake, thence “northwesterly 60 feet or to lands of Roger and Virginia McCormick” (i.e. the line of the former Crawley property), then 100 feet northeasterly to the Harbor, then 60 feet back to the beginning. The principal difference in the two descriptions is that, instead of running 50 feet from the Thomas Mitchell line, the defendants’ lot was now described as running 60 feet from the plaintiffs’ line.

Survey Reports

[15] Each party placed in evidence a surveyor's report accompanied by a plan of survey. The plaintiffs retained Jerry L. Borden, N.S.L.S., while the defendants' report was prepared by Lyndon K. Crowe, N.S.L.S.

The Plaintiffs' Survey

[16] Mr. Borden walked the plaintiffs' property with Mr. MacDonald, who told him that he and his wife had owned the property since 1984, but had visited it "many times" before that, when it was owned by Mrs. MacDonald's father, Roderick MacDonald. Mr. MacDonald identified an iron pipe at the "southwest corner of his shore lot" which he said had "always been considered to be the corner of the shore lot...." Mr. Borden wrote that Mr. MacDonald told him that "a 10 foot wide right of way" abutted the western boundary, running to the shore, "which was used by the cottagers to get to a set of stairs leading to the beach." He was told that Mr. McCormick had blocked this right-of-way with a shed and planted "a few small trees" on the plaintiffs' property. Mr. MacDonald also showed him iron pipes at the "northeast and southeast corners of his back lot."

[17] Mr. Borden went on to review the evidence of occupation and the deeds of the respective lands, locating the original boundary line – the "Mitchell/Burnside line" – ten feet from the iron pipe pointed out by Mr. MacDonald. This resulted in a frontage of 124.89 feet for the McCormick lands, just short of the deed distance of 125 feet. This excludes the 10-foot-wide strip acquired by the defendants from Dennis Mitchell. He concluded that the line lay slightly south of an elm tree, not north of it as indicated by a deed for a property further inland that Mr. Borden's company had surveyed for Robert R. Matthews in 1995. He wrote that Kenneth Chesnutt (who owns land along Elm Tree Lane on the other side of the Bergman Road) and Mr. Matthews agreed that the line "was not as per deed but in fact was slightly to the south of the elm tree."

[18] The Mitchell/Burnside line gave Mr. Borden the course of the plaintiffs' shore lot's western boundary. He located the eastern boundary by reference to the deed and to an iron pipe at the southwest corner. The resulting frontage of the MacDonald shore lot was 70.48 feet, compared to the 66 feet stated in the deed. He noted that "in comparing the occupation with the deed descriptions in the other neighboring properties the difference was found to be similar. Using this solution

for the [plaintiffs'] lot left all the other shore lots substantially correct widths (as called for in the deed)."

[19] Mr. Borden surveyed the plaintiffs' back lot using field evidence, which, "except for the boundary next to the shore lane" compared to the deed description. He made the western boundary of the back lot parallel to the Mitchell/Burnside line, not on the line itself, because "the description only calls for the Mitchell/Burnside right of way" and he had not located any "documented evidence ... of an agreement between Mitchell and Burnside."

[20] In the course of conducting his survey, Mr. Borden determined that 125 feet, measured from the point which he determined to be the correct location of the Mitchell–Burnside line, would result in a shed owned by Roger and Virginia McCormick being within the boundaries of their own property. However, using the line established by Mr. Crowe (see below), he found that the shed would be placed over the boundary of the property. Roger McCormick offered no evidence that their property was wider than 75 feet, which is the width of the lot they acquired from Mrs. Best. Mr. Borden also noted that a hedge and a clothing pole that he identified as lying at the southwest corner of the Roger and Virginia McCormick

lot was a precise match to the southwest corner as indicated by the deed. Mr. Crowe was not cross-examined on these points, but did not offer any explanation for the apparent discrepancy.

The Defendants' Survey

[21] Mr. Crowe's survey report describes the series of deeds and transfers that resulted in the current landholding situation in the subdivision. He considered it apparent that "no legal surveying was performed at the time of original subdivision" in the 1940s and 1950s. He concluded that the defendants' lands consist of a 50-foot wide parcel from the Burnside property (Lot 1) and a 10-foot strip from the Mitchell property (Parcel A), collectively known as Lot 1A. These would correspond to the properties consolidated in 2002. On the Mitchell side, he determined that all of the lots remained in the same configuration as when they were sold.

[22] Mr. Crowe located "an old iron tube stub, with a newly placed survey marker beside it ... in the vicinity of the Burnside/Mitchell line on the north side of the traveled access road, in the area between the McCormick and MacDonald

properties.” Roger and Mark McCormick told him that they believed this tube marked the corner of the original McCormick lot. They also believed that it lay on the Burnside/Mitchell line. This appears to be the same tube that Mr. MacDonald identified as the southwest corner of the plaintiffs’ shore lot. Mr. Crowe found another tube to the southwest, along the lane leading to the shore, and commented that “[t]wo tubes in close proximity to each other, indicating possible conflicting evidence at that location, were found to the southeast, on the northeast side of the traveled way running parallel with the shore.”

[23] Mr. Crowe stated that reconciling the documents with evidence found in the field “revealed that there appeared to be more land on the ground between evidence found to the west of Lot 1A, and evidence found to the East of Lot 1A, than what was called for by the deeds.” More conflicts emerged upon a review of Mr. Borden’s notes, particularly with respect to “the status of the iron tube found in the area of the Burnside/Mitchell line on the north side of the access road.” The plaintiffs believed that this marked the corner of their shore lot, not the Ouderkirk–McCormick lot, as the defendants believed. Mr. Crowe continued:

> The Borden plan also showed a survey marker from a 1995 survey located further to the Southwest, on the opposite side of the Bergman Road, as being located on,

> and evidence of, the former Burnside/Mitchell line. Further investigation of that survey showed that this boundary was agreed on at the time of the 1995 survey, and that a prior 1968 deed ... called for the Burnside/Mitchell line to be 5 feet more or less north of an elm tree. A large (2 foot diameter) elm tree was located in the area of this corner. It is believed to be the same tree as called for in the 1968 deed, and is situated northwesterly of (i.e. on the wrong side of [by 1968 deed call]) the boundary established in 1995. This elm tree is also shown on our plan.

[24] Mr. Borden's report, Mr. Crowe wrote, indicated a "remnant strip of Mitchell land between the Burnside/Mitchell line, and the two cottage lots on the Mitchell side of the line along the right of way." He went on:

> The MacDonald deed calls for this boundary as 'following said Burnside right of way', while the d'Entremont deed calls for this boundary as 'along the Eastern boundary of the aforesaid right-fo-way' (sic), the right of way being referred to in the prior paragraph as the 'Mitchell-Burnside right-of-way'. It is my interpretation of these deeds that there should be no remnant of Mitchell land here, and that these lots were sold as adjoining the Burnside-Mitchell line.

[25] Mr. Crowe went on to refer to questions arising "as to the status of the road way referred to as the Burnside right-of-way, or Mitchell-Burnside right-of-way (now known as Elm Tree Lane)." While some lots in the Mitchell subdivision use this right-of-way "for access", such as the Mitchell-Hatherley conveyance, he could find no deeded right-of-way from Burnside to Mitchell or to subsequent owners on the Mitchell lands. He considered it possible that prescriptive rights had

been established. I infer that there was no conveyance from Burnside to Mitchell of any land along Elm Tree Lane.

[26] Mr. Crowe also referred to aerial photographs of the subdivision from 1948 and 1954. The 1948 photograph showed no evidence of cottage lots. The 1954 photograph, however, “showed the development of several lots in the Burnside area, as well as the emergence of the traveled Burnside right of way. Apparent lines of occupation can be seen, in the area running southwest from the elm tree, as well as along the Southeast side of ... Lot 1.” He calculated a line through the two iron tubes found around the Burnside/Mitchell line, extending southwest, which “passed 3 feet more or less to the Northwest” of the centre of the elm tree. He noted that this was “in close agreement” with the deed description that located it “5 feet more or less north of an elm tree.” He extended this line to the shore and created a transparency which, when overlaid on the 1954 photograph, “coincides with 1954 lines of occupation running southwest from the elm tree, and along Lot 1 at the shore.”

[27] Mr. Crowe calculated that the three lots along the shore on the Mitchell side of the line “fit very well, using their deed dimensions, between this calculated line

and the evidence shown on the plan found around other David Murray MacDonald lots to the Southeast. The resulting line between the David Murray MacDonald lot and the Daniel Angus and Gladys MacDonald lot also coincided with a "well established hedge found there." I note that neither Mr. Borden nor Mr. Crowe could offer any definitive evidence as to whether the hedges on the David MacDonald and Daniel MacDonald properties were intended to be boundaries between the properties, or between the Daniel MacDonald lot and the plaintiffs' property.

[28] These findings, Mr. Crowe wrote, "further confirmed" the location of the line he had calculated as that of the original Mitchell/Burnside line. It did not, however, resolve the discrepancy caused by "the fact that there is more land than called for by deed between evidence found to the west of Lot 1A , and evidence found to the East of Lot 1A." The difference between the calculated and deed distances on the southern boundary of Lot 1 amounted to 9.7 feet. This discrepancy, he wrote, is "impossible to overcome, as there will be more land than called for by deed somewhere here no matter what the outcome of a boundary survey is." He suggested that the situation arose:

> when the first lot in the Burnside area was sold in 1947, that being ... the 200 foot wide Crawley lot. It was described as beginning at a point 100 feet from the Mitchell boundary. The 100 foot remnant was then deeded in 1950 to Olwyn Ethel Best. It is my opinion that the 100 foot distance from the Mitchell boundary in the Crawley deed was not measured with the same degree of care or accuracy as was applied to the measurement of the lot boundaries themselves, and that this discrepancy was then carried forward when the remnant was sold to Best.

[29] By contrast, on the Mitchell side of the line, “no relationship to the Burnside/Mitchell line is defined by deed until the original MacDonald lot was sold as being 10 feet away from the line, 10 feet being an easier distance to measure with accuracy than 100 feet.” Mr. Crowe did not refer to any supporting surveying principle for this conclusion. Presumably, the greater the distance, the less accurate the measurement. However, I place no reliance on this criteria.

OTHER EVIDENCE

John MacDonald

[30] The plaintiff John William MacDonald was 73 years old at the time of trial. He is retired from the Canadian Armed Forces. He and the other plaintiff, his wife Lorraine MacDonald, have two children, Greg and Janice.

[31] Mr. MacDonald testified that in 1960, while he was stationed in Summerside, P.E.I., he spent his one-month vacation leave helping his father-in-law, Roderick MacDonald, build a cottage on the back lot. Each summer thereafter, he and his family would spend at least two weeks at the cottage with his in-laws. In 1967 he was posted to Europe for three years. In 1974 he was posted to Debert, Nova Scotia. From then he spent every weekend at the cottage and the entire two weeks with his family. Since his retirement he and his wife spend each summer at the cottage.

[32] Mr. MacDonald said that after Edward Macdonald died, his widow did not use the shore lot between 1960 and 1977. She sold it to Roderick MacDonald in 1977 and the plaintiffs' son Greg bushwhacked and cleared the shore lot. Mr. MacDonald stated that from the time Roderick MacDonald erected his cottage on the rear lot, he used the path to the shore. He became aware of the path as a right-of-way in the early 1960s. He claimed that Thomas Mitchell had left a 10 foot wide right of way to the shore when he sold the original shore lot to Mr. Hatherley in 1949, because this deed's western line was ten feet from the Burnside –Mitchell line.

[33] Mr. MacDonald testified that once his father-in-law purchased the shore lot from Betty MacDonald, he placed his trailer on it on weekends and eventually began to leave it there for the summer. He also constructed a horseshoe pit on the shore lot, with the box located near the two trees shown on the Borden plan. He would go to the beach by going around the trees. He added that he mowed the path or right-of-way, including cutting around the edge of the trees on the path. The only maintenance required on the shore lot is to mow it. He would mow his lot and made one pass beyond the trees.

[34] For many years no one discussed the ownership of the 10-foot strip. The ownership or use of the land was not discussed when the steps to the beach were replaced. The steps going down to the beach, which Mr. MacDonald described as old and rickety, were replaced around 1991. The steps were used by all of the children in the area, including Mr. MacDonald's children and the Ouderkirk and Davis children. Roger McCormick had purchased the Ouderkirk property. Each resident (McCormick, MacDonald and Davis) paid $80.00 to purchase materials for the steps, which Raymond Davis and his two sons constructed. The steps were put in place each spring and removed each fall.

[35] Mr. MacDonald stated that around 2002 or 2003 Roger Mark McCormick informed him that the width of the two McCormick properties was 135 feet rather than 125 feet.

[36] Although the path or right-of-way was the way to the beach, the plaintiff Mr. MacDonald also used the steps on Daniel MacDonald’s property, to the southeast of the shore lot. Daniel Mac Donald was concerned about the children's safety and feared that they might injure themselves on his steps. He eventually stopped placing the steps.

[37] Mr. MacDonald said he would cut around the edge of the trees. He stated that Raymond Davis also mowed the area he referred to as the Mitchell lot. I note that by “the edge of the trees,” Mr. MacDonald was referring to the path used to access the beach.

[38] Mr. MacDonald said that a few years ago, Mark McCormick raised the question of the southwest corner stake on the shore lot. He told Mr. MacDonald that he had driven his – that is, Mr. MacDonald's – "stake" down because he, Mr. McCormick, was afraid his children would tumble over it. Until a few years ago

there was no discussion as to the use or ownership of the path between the parties, or between the plaintiffs and Roger McCormick. Mr. MacDonald stated that the apparent falling-out or disagreement resulted from Raymond Davis attempting to maintain the path, with the outside toilet being placed on the path after Ellen MacAulay – Roderick MacDonald's daughter – told Roger McCormick to remove it from its location around the trees. Despite placing the outside toilet on the path, it was possible to access the beach, but Mr. McCormick also placed a lighthouse and flowers in an attempt to block the passage to the beach.

Lorraine MacDonald

[39] Mrs. MacDonald is a plaintiff in the proceeding. She is the wife of the other plaintiff, Mr. MacDonald. She testified that when her father, Roderick MacDonald, acquired the back lot, her husband was in the Armed Forces. Once the cottage was erected, they would spend two or three weeks there each summer with her parents, until 1967, when Mr. MacDonald was posted to Europe, where the family remained for three years.

[40] In 1974 Mr. MacDonald was posted to Debert, and they stayed in the cottage for five or six weeks until they relocated to Debert. After that, they went to the cottage each summer, spending two or three weeks at a time, as well as going on weekends. After Mr. MacDonald retired in 1983, they would spend the entire summer at the cottage. This continued until her parents passed away in 1984 and 1985. After that, Mrs. MacDonald and her sister became the owners of both lots, and her sister transferred her title to the plaintiffs in 1996.

[41] Mrs. MacDonald said her brother-in-law, Brian MacAuley, cleared the shore lot in the mid-1970s. She placed a trailer on the lot in 1978 or 1979. Once the lot was cleared, it was mowed by Raymond Davis and others, including her husband and son.

[42] Mrs. MacDonald stated that before her parents acquired title to the shore lot, she and her children would leave the cottage, cross the lane and go down the path that was regarded as a right-of-way, to the steps leading to the beach. At times they would also use Daniel MacDonald’s steps, on the southeast side of the shore lot, but usually it was the steps on the northwest. She described the steps as very rickety, and said the bank was cut out for the steps and, in some places, there were

no steps and it was necessary to walk on the rocks to get to the beach. She said Mrs. Ouderkirk did not have steps on the property, and that they were only built in the late 1980s or early 1990s, with everyone chipping in to cover the cost of materials. She was not involved in any discussions about the steps.

[43] Mrs. MacDonald identified the iron pin on the Borden survey as the one referred to in the deed. She said her father told her that an iron post marked the southwest corner of the shore lot. She never discussed the pin, or the location of the southeast corner, with Mrs. Ouderkirk. She said her father told Mrs. Ouderkirk to move her outhouse under the trees, out of the right-of-way. She also said her father told her that there was a tree marking Mrs. Ouderkirk's southeast corner, which was later cut down by the defendants when they started building their new cottage, which is located closer to the lane, He told her that the tree was located immediately behind Mrs. Ouderkirk's cottage.

[44] Mrs. MacDonald stated on discovery that she used Daniel MacDonald's steps (and others) to access the beach, without mentioning the so-called "Mitchell right-of-way" steps. She maintained at trial that on discovery she was not asked whether she had used the latter.

Roger Mark McCormick

[45] Mr. McCormick is a defendant. He and his wife, Angel Louise McCormick (the other defendant) acquired their property from his parents, Roger and Virginia McCormick, in 2001. Mr. McCormick said he believed when they acquired the property that the former Ouderkirk property extended to the trees, where her outhouse was located, as was the iron post or stake at the back of the property. He would mow the grass to this line. Around 1990 he bought a tractor lawn-mower, with which he or his father would mow out to the stake, and sometimes beyond. On other occasions, he said, Mr. MacDonald would mow the area on the edge of the two lots. He said that whoever mowed first would mow beyond the tree.

[46] Mr. McCormick said the steps to the beach were not complete, and were on Mrs. Ouderkirk's property. He said he also used the steps from Freeman Coulter's lot, to the west, which broke under his weight, as well as Daniel MacDonald's, to the east of the plaintiffs' lot. He said no one objected to anyone else's use of their steps. He said the new steps were built in 1993 or 1994, when his daughter was

about three years old and Mrs. McCormick became concerned about the condition of the steps. He was not involved in the construction of the steps.

[47] Mr. McCormick said the construction of his cottage began in 2000, on the spot where Mrs. Ouderkirk had kept her trailer. The defendants later acquired the additional parcel from Dennis Mitchell, after finding that his foundation had to be four feet from the line. He said the Mitchell parcel was being mowed, but was not used for anything else. This ten-foot strip was consolidated with the existing 50-foot-wide lot. The shed was moved to the back, and a large spruce tree was cut down to provide a view of the area where the children swam. He said the spruce tree was also unsightly, having branches on one side only.

[48] Mr. McCormick recounted finding the stake that he struck while mowing, and showing it to Mr. MacDonald. It was just east of the shed. He said he did not tell Mr. MacDonald that he had pounded in “your” stake, as the plaintiffs claim. He simply told Mr. MacDonald that he drove it in order to avoid hitting it with his mower.

Roger McCormick

[49] Roger McCormick is the father of the defendant Mr. McCormick. In 1971 he acquired a property to the west of Mrs. Ouderkirk's property, from Alda Seaman MacKenzie. Due to an accidental mix-up of the legal descriptions, it was eventually necessary to rectify his and Mrs. Ouderkirk's deeds.

[50] Mr. McCormick stated that he knew where the boundaries to the back lot were. He referred to the two stakes in the area where Elm Tree Lane turns into the lane leading (east) to the Pent Road. One stake is on the north side of the road. He became aware of the stake shortly after he purchased the property, while speaking to Mrs. Ouderkirk in her yard. She claimed that she had bought a piece of land from Mitchell but had to give it back. He had no further discussions with her concerning the land, but knew that she was unhappy with the situation. I am satisfied that the evidence of this conversation is hearsay and that it does not meet the threshold of reliability.

[51] Mr. McCormick said he built an outdoor toilet, and Mrs. Ouderkirk had her own toilet, which was located in the trees. He indicated on a map the areas where the toilets were placed and the area where Mrs. Ouderkirk parked her car.

[52] Mr. McCormick said that he and Mrs. Ouderkirk had agreed that if one of them decided to sell their property, the other would be offered the property first. No one in her family, apparently, was interested in buying her property. He acquired Mrs. Ouderkirk's land in 1991. After that, he and his family used the property, and there were no boundary issues. Everyone mowed the grass, including himself, and a new toilet and driveway were installed. He said the now-disputed parcel (as shown on the plan of survey) was in the same state as it had been since 1971. Nothing was done with other than mowing by Mr. McCormick, his son Mark McCormick and the MacDonalds. A friend of Mrs. Ouderkirk would also mow the area, as well as her son and son-in-law. He said he did not see Raymond Davis mowing the area, but he would not doubt that Mr. Davis had done so.

[53] Roger McCormick said that sometime between 1993 and 1995 he raised with Raymond Davis the possibility of sharing the cost of putting in steps going to the beach. Mr. Davis replied that he was going to put in his own steps. Mr.

McCormick reminding him that the steps had to be on his own property. Several days later they spoke again, and Mr. Davis agreed that they should share the cost of new steps. These steps were constructed not far from the location of the original steps. They came off the property acquired from Mrs. Ouderkirk. While the steps were being built, Mr. McCormick said, there was no discussion of whose land they would be on, nor was there any discussion of a right-of-way. He said the steps were removed two or three years before trial.

[54] The residents of the three cottages in the area used the new steps, and would cross the property to get to them. Daniel MacDonald also began using these steps, rather than his own, walking down the road from his property. Roger McCormick said the residents of the area traditionally got along very well. However, when Mark McCormick began to build his cottage, problems arose. The steps were removed.

[55] Roger McCormick said the iron bar on the north side of the right-of-way (i.e. the dirt road leading from Elm Tree Lane to the Pent Road) disappeared.

Dennis Mitchell

[56] Dennis Mitchell is the great-grandson of Thomas and Greta Mitchell. In 2002 he conveyed a parcel of land to Mark and Angela McCormick. This parcel was located to the east of the existing McCormick property. He had received this parcel from his father, after it had passed through the ownership of his grandfather and great-grandfather. He said he had been aware of the property since he was a teenager, through family discussions, and because his family used it to go to the beach. He said it had been retained by the family for that purpose. He had heard different views as to the size of the lot. He knew the lot was located near the bottom of Elm Tree Lane, leading to the beach. He was unaware of any markers on the property. He maintained that there was no right-of-way to the beach.

Janice MacDonald

[57] Janice MacDonald, the plaintiffs' daughter, was 50 years old at the time of trial. She lives in Truro, but said she visits her parents at Pugwash Harbor every weekend during the summer, and spends an additional two weeks' holiday there. She recalled going to her grandfather's cottage with her parents when she was younger. She remembered being at the cottage when it was being built in the early

1960s, and remembered her parents placing a trailer on the shore lot in the mid-1970s.

[58] When visiting her grandfather's cottage starting in the early 1960s, Ms. MacDonald said, she would frequently go to the beach by the path identified as lands of Thomas Mitchell, which were eventually transferred to the McCormicks by Dennis Mitchell. She said this path was also used by the Ouderkirk and Davis children. Before her parents acquired the shore lot, Ms. MacDonald said, she would follow the path to the steps after leaving the cottage. While she agreed that her grandfather had acquired the shore lot in 1977, she believed that her parents' trailer had been placed there at an earlier date. She recalled Raymond Davis, her father and her brother mowing the path. Although she could not recall Mrs. Ouderkirk mowing it, she thought it would have been done by her children.

[59] Ms. MacDonald remembered the right-of-way as being where the spruce trees stood. She would use the steps at the end of the right-of-way to go down to the shore, although she used other steps as well, depending on where she was. She described the right-of-way steps as being in poor condition and not continuous. On occasion she would have to go down backwards.

Greg MacDonald

[60] Greg MacDonald is the plaintiffs' son. He was 46 years old at the time of trial. He testified that he frequently visited his grandparents, with his parents, at Pugwash Harbor. After the family returned from Europe, where his father had been stationed, they would be at the cottage one or two weeks each year. He said he began going to the property more frequently after having his own children. From the mid-1980s, he spent his summers at the cottage with his children.

[61] Mr. MacDonald identified the plaintiffs' shore lot on the Borden survey plan, and stated that he understood that the right-of-way abutted the southwest corner of the lot. He described the right-of-way as being 10 feet wide. He said he frequently took this path to the beach starting in the 1960s. There were always steps leading down to the beach, which were also used by the McCormick, Ouderkirk and Davis children. He said he did not know who owned the right-of-way, but that it was always referred to as the "Mitchell right-of-way." He also used other steps to get to the beach, which he said was never an issue.

[62] Mr. MacDonald testified that in the mid-1970s he bushwhacked the shore lot, after which it became a grassy lot, which he mowed. Before he cleared it, it was impossible to walk through it. He would also mow the path of the right-of-way, giving it, he said, “one mower-swipe” to the west of the trees shown on the Borden survey. He said the path was also mowed by Raymond Davis, Roger McCormick, and his father. He said whoever was mowing an adjoining lot would mow the path.

[63] Reviewing a 1967 photograph, Mr. MacDonald said a path was visible, and that it was the path he would have used. He said he would go to the beach by the most direct path, and, if the family was at the trailer, he would cut across the shore lot to the path and go west of the trees. Viewing a photograph taken in 1975, he agreed that the steps were in front of the Ouderkirk property, and explained that this was the easiest place to locate them, as there were bushes or trees at the foot of the right-of-way. Mr. MacDonald said Mrs. Ouderkirk’s toilet (outhouse) was placed in the trees so as to avoid blocking the path to the shore.

[64] Mr. MacDonald stated that the hedge between the shore lot and Daniel MacDonald’s lot (to the southeast) appears to be a boundary line between the two

properties, but he was unsure whether the boundaries of other properties were similarly marked by hedges. He could not say categorically whether the “southwest corner” pin was on his parents’ property or on the former Ouderkirk property, but said this property had not been conveyed to anyone by Mr. Burnside when the iron pin was set.

Ellen MacAulay

[65] Ellen MacAulay is Roderick MacDonald’s daughter and a sister of the plaintiff Mrs. MacDonald. She lives in Pugwash. She said she frequently visited the cottage property owned by her parents in the 1960s. She said that upon her parents’ death, the two lots became the property of her and her and Mrs. MacDonald. She subsequently transferred her interest to the plaintiffs.

[66] Ms. MacAulay said the shore lot was bushwhacked by her husband. When this was finished, she said, the plaintiffs placed their trailer on the property, and were allowed to leave it there for the summer months. No permanent building was constructed on the shore lot. She said her mother, and others, maintained the right-of-way by mowing the grass. She went to the beach quite often after her parents

acquired the back lot in the 1960s, as did her mother, although her father, being disabled, did not. She said that once the shore lot was bushwhacked, she would cut across it to go to the beach.

[67] Ms. MacAulay said the steps were on the right-of-way and that her children, and others, used the steps to get to the beach. She said new steps were installed in the late 1980s. She and Lorraine MacDonald contributed funds for the construction of new steps; she could not say whether this was before or after Roger McCormick acquired the Ouderkirk property. At the time the steps were installed, she said, the right-of-way was not an issue.

[68] While she had usually used the Mitchell path to get to the beach, Ms. MacAulay agreed that she had used other steps as well, such as those located on the properties of Daniel MacDonald, and others.

Alan Davis

[69] Alan Davis is Raymond's Davis's son. He was 50 years old at the time of trial. He said his parents obtained a lot from Mr. Mitchell in the mid-1960s. This

lot was located immediately to the southwest of the plaintiffs back lot. He believed that the right-of-way was over the parcel of land that was eventually transferred to the defendants by Dennis Mitchell in 2002. He said he used this strip to access the beach; he believed it ran straight down to the bank, and would walk to the west of the spruce trees, then down the stairs. He said other members of his family did the same. Mr. Davis acknowledged that he had also used other peoples' steps to get to the beach, and said he was never denied access by anyone. He said his father mowed the path from the time he was a teenager, and still did so after Roger McCormick acquired the Ouderkirk property. After Roger McCormick acquired the Ouderkirk property, Mr. Davis, his brother and his father built a new set of steps to access the beach. Both Mr. McCormick and Mr. MacDonald contributed to the cost of materials. Mr. Davis testified that there were no discussions regarding the ownership of the parcel of land in question, which he believed to be a right-of-way.

Kenneth Chesnutt

[70] Mr. Chesnutt is the grandson of Mr. Burnside. He presently owns lands that were originally part of the Burnside properties, to the northwest of Elm Tree Lane.

He said the Burnside lots are to the west, and the Mitchell lots to the east, of Elm Tree Lane. He also stated that the elm tree to the south of the Bergman Road was on his property. This was inconsistent with the description in the Mitchell deed, which provided that the boundary was five feet north of the elm tree.

[71] Mr. Chesnutt acknowledged that he was not alive at the time of the original subdivision, and that he did not have any immediate knowledge of the location of the right-of-way. He stated that the right-of-way was the width of a vehicle, perhaps eight feet, but there was no road actually constructed. He said the Mitchell–Burnside boundary was not fenced, and the discussions between Mitchell and Burnside were not documented. He agreed that Elm Tree Lane, the path presently used as a right-of-way, is more on the Burnside than the Mitchell side.

[72] When he sold land to Robert Matthews, Mr. Chesnutt said, they consulted with a surveyor and agreed on a boundary line, with a survey marker on the southwest side of the Bergman Road. He said they agreed to locate the boundary south of the elm tree, but did not discuss the effect this might have on the cottage lots.

Hearsay evidence

[73] Several items of apparent hearsay evidence are submitted in support of the plaintiffs' claim. The basic rule of hearsay is that "[a] statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated": Cross, *Evidence*, 4th edn. (London: Butterworths, 1974), p. 6. Put differently, an out-of-court statement is normally not admissible for the proof of its contents. The law has been modified in the last two decades by the development of a principled approach to the admissibility of hearsay, which was described in these terms by Roscoe J.A. in *R. v. Forrayi* (1997), 162 N.S.R. (2d) 241 (C.A.):

> [39] Recently in *R. v. Hawkins (K.R.) and Morin (C.)*, [1996] 3 S.C.R. 1043 ... at paragraphs 67 and 68, Lamer, C.J., and Iacobucci, J., in joint reasons for the plurality of the court said that *R. v. Khan (A.)*, [1990] 2 S.C.R. 531 ... and [*R. v. Smith (A.L.)*, [1992] 2 S.C.R. 915], signaled the beginning of a "modern principled framework for defining exceptions to the hearsay rule". They continued:
>
> > "Under this reformed framework, a hearsay statement will be admissible for the truth of its contents if it meets the separate requirements of 'necessity' and 'reliability'. These two requirements serve to minimize the evidentiary dangers normally associated with the evidence of an out-of-court declarant, namely the absence of an oath or affirmation, the inability of the trier of fact to assess the demeanor of the declarant, and the lack of contemporaneous cross-examination.
> >
> > "Consistent with the spirit of this modern approach, the twin requirements of 'necessity' and 'reliability' must always be applied in a flexible manner ...."

[74] The proposed hearsay evidence includes a hand-drawn diagram and a page of a note signed by Greta J. Mitchell. These items were given to Dennis Mitchell by his father, who apparently received them from Mildred Mitchell. Both suggest that the road leading to the shore was on the Mitchell-Burnside boundary.

[75] The plaintiff Mrs. MacDonald and her sister Ellen MacAulay said they were told by their father that the southwest corner of the shore lot abutted the right-of-way to the shore. Mrs. MacDonald said he also told her that he told Mrs. Ouderkirk to put her outhouse in the trees in order to get it off the right-of-way. Ms. MacAulay testified that her father told her that the iron pin (referred to in the Borden survey) marked the southwest corner of the shore lot. There is some outside confirmatory evidence. This includes the reference in the deeds (for instance, the Hatherley deed) to the iron post at the northwest and southwest corners of the property. The deed to Mrs. Best does not refer to any marker on the southeast corner.

[76] Kenneth Chesnutt stated that the subject of the boundary would come up in his family once in a while. He said he heard his grandmother, Priscilla Burnside, say more than once that the right-of-way to the shore from the Bergman Road (Elm

Tree Lane), was composed of land of which half came from each of the Mitchell and Burnside properties. Mr. Chesnutt's grandmother died when he was 17 years old. There is some relevant outside evidence, including documents held by Dennis Mitchell and the fact that Thomas Mitchell granted a right-of-way to Mr. Hatherley without any apparent authorization or consent by Mr. Burnside.

[77] The parties agree that Mr. Chesnutt's evidence meets the criterion of necessity, given that the declarant is dead. As to reliability, the plaintiffs argue that Mr. Chesnutt has no reason to favor one party, and that his evidence is corroborated by the documents originating with the Mitchell family, which were created before the current dispute arose and which only incidentally contain relevant evidence. They also suggest that the Priscilla Burnside statement could be admitted as a declaration against interest.

[78] The defendants, while acknowledging its admissibility, note that the statement attested to by Mr. Chesnutt has not been tested by cross-examination and is not supported by independent evidence. As such, they say it should receive little weight. They argue that the diagram and note originating with Dennis Mitchell should not be admitted, given their uncertain origin. Although the defendants say

there is no evidence as to the source of these documents, the note is signed by Mrs. Mitchell.

[79] It appears that the parties agree on the admissibility of Mr. Chesnutt's evidence, with any uncertainties as to reliability going to its weight. The evidence of the plaintiff Mrs. MacDonald and Ms. MacAulay has some support from other evidence. The documents adduced by Dennis Mitchell also have some indicators of reliability. I am prepared to admit each item of hearsay evidence, while according them no weight with respect to the issue of the location of the boundary; this evidence will receive weight only with respect to the matter of what Messrs. Burnside and Mitchell thought about the boundary.

FINDINGS OF FACT

[80] I make the following findings of fact:

> 1. There was no transfer of ownership by Thomas Mitchell or his successors in title to anyone claiming an interest in any right-of-way.
>
> 2. The plaintiffs' shore lot was conveyed by Thomas Mitchell to Gerald Hatherley in 1949, with the inclusion of a right-of-way from the Bergman Road along the Mitchell-Burnside line.

3. Thomas Mitchell and his successors in title did not authorize the plaintiffs or their predecessors in title to use their land to access the shore.

4. The plaintiffs, their predecessors in title, and persons authorized by them, as well as others used a strip of land as a footpath (not a vehicular path) to the shore from 1960 until 2002, with the exception of a three-year period between 1967 and 1974 when the plaintiffs were in Europe and absent from Nova Scotia.

5. Raymond Davis, the plaintiffs, Greg MacDonald, the defendants and Roger McCormick mowed the path alleged to be a right-of-way, which was not capable of any other maintenance, until the defendants placed items on the path after acquiring a deed to the remaining ten-foot parcel from Dennis Mitchell.

6. If the Crowe boundary determination is correct, Roger McCormick's shed will be over the boundary of his property.

7. There was no conveyance of land from John Burnside to Thomas Mitchell of any portion of Elm Tree Lane.

8. The steps used from 1960 until 2002 as part of the alleged right-of-way to the beach were located on or adjoining the Ouderkirk property.

LAW AND ARGUMENT

The surveys and the boundary line

[81] The plaintiffs criticize the methods used by Mr. Crowe in his survey. He reviewed the development of the subdivision with reference to aerial photographs and traced the Mitchell-Burnside line from the elm tree beyond the Bergman Road. The plaintiffs suggest that he "applied a standard of precision and a degree of thought that was totally absent when the original lots were laid out." It is more likely, they argue, that

> the original farmer subdividers placed the iron pipes themselves and measured the sides of the lots by pacing them off.... [E]ven if Crowe is correct in placing the Burnside Mitchell line where he does, after a painstaking and meticulous professional assessment of the plans, photographs and evidence on the ground, there is every reason to believe that the original subdividers did not take the same care when they did their work.

[82] Among the results of Mr. Crowe's assessment, the plaintiffs note, is that the western sides of the plaintiffs' shore and back lots do not line up; they are off by ten feet.

[83] The defendants argue that Mr. Crowe's evidence regarding the placement of the boundary on the line of occupation between the original Mitchell and Burnside properties (as shown on the 1954 aerial photograph) was unchallenged. They

submit that there is no documentary evidence of an agreement to create a right-of-way, and point out that the 1960 deed from the Mitchells to Roderick MacDonald refers to the "Burnside right-of-way." They say both survey plans show the right-of-way to be almost entirely on former Burnside property, as does the 1954 aerial photograph. As such, they argue,

> while there may have been some discussions regarding the right-of-way being over the boundary line between the Mitchell and Burnside properties it has always been physically located almost exclusively on the former Burnside property.

[84] The iron pipe that Mr. MacDonald identified as the southwest corner of the plaintiffs' lot was taken by the defendants and Mr. Crowe to be the southeast corner of the defendants' lot. The defendants argue that the deed referred to the Mitchell–Burnside line as lying ten feet from the northwest corner, not the southwest. They also say that Mr. Borden's use of the survey marker puts the line being on the wrong side of the Elm Tree, according to the 1967 deed from Thomas and Greta Mitchell to Ronald and Mildred Mitchell as well as the 1954 aerial photograph.

[85] Mr. Borden, surveying for the plaintiffs, worked from iron pipes which, assuming they marked the corners of the shore lot, provided a width for the shore lot that about four-and-a-half greater than in the deed (70.48 feet, compared to a

deed description of 66 feet). He considered this an adequate match. The defendants note the discrepancy, however, and say that this approach results in the lot of David MacDonald, to the east of Daniel MacDonald being 80 feet rather than 75. David MacDonald's other two lots (moving east), however, have very little discrepancy between the description (160 feet) and the distance between the iron pins (160.41 feet). Another problem with the Borden survey, according to the defendants, is that it results in the boundary line between Daniel MacDonald and David MacDonald not following a spruce hedge, which they submit is "the obvious line of occupation."

[86] The defendants say the discrepancies in the Borden survey can be resolved by accepting the boundaries in the Crowe survey, using the iron pin as the southeast corner of the original McCormick lot (i.e. the Ouderkirk lot) although they acknowledge that this leaves extra land on the Burnside side of the line.

[87] As between the two surveys, and the evidence of the surveyors, I accept that of Mr. Crowe over that of Mr. Borden. Mr. Crowe's research, including reviewing aerial photographs of the development of the subdivisions created by Mr. Burnside

and Mr. Mitchell and plotting the occupation of the properties by the various landowners in order to establish the correct boundary line.

[88] Mr. Borden's research was less detailed, and his analysis of the location of the boundaries did not take into account the original boundary between the Burnside and Mitchell properties. He also relied on a 1995 survey by his company in respect of Mr. Matthews's property. The boundary on the southwest side of the Bergman Road was established by agreement between Mr. Matthews and Mr. Chesnutt, with the boundary shifted from five feet north of the elm tree to three feet south of it. I am not satisfied that, apart from the agreement between Mr. Matthews and Mr. Chesnutt, the proper boundary line could have been established at that location. Mr. Borden's reference to additional supporting evidence leaves me in doubt that he located the boundary line at a point southwest of the Bergman Road.

[89] I am satisfied that the technically correct placement of the boundary line is as found in the Crowe survey. This does not resolve the issue however. It is necessary to consider whether there has been any agreement or conduct that requires that the technically correct line should not be given effect.

[90] A boundary line can be established by agreement or by conduct. Customarily, such an agreement would be reduced to writing. Writing is not necessary, however, if it is established that there was an agreement between the parties, and an alteration of one party's position so as to prevent the other from disputing the line. This would be characterized as a conventional line. Having concluded that the Crowe survey establishes the correct boundary between the original Mitchell and Burnside properties, I also accept that Messrs. Mitchell and Burnside could act on the basis that the line was in the location described in the Borden survey. That said, there is no evidence that there was any agreement to alter the location of the boundary line.

[91] Despite the fact that there does not appear to be a conventional line, I find that the land sold to the defendants by Dennis Mitchell is within the boundaries of the plaintiffs' shore lot, to the extent that the lot was included in the land conveyed to Mr. Hatherley in 1949.

[92] The plaintiffs claim that the evidence of usage of the alleged right-of-way supports their position on the location of the boundary. They refer to the 1972

correspondence between the solicitor D.A. Fairbanks, acting for Betty MacDonald, and Mrs. Ouderkirk and Mrs. Mitchell, as "original evidence that there was a dispute over the so-called right-of-way to the shore." The correspondence suggests that Mrs. MacDonald, who owned what is now the plaintiffs' shore lot, was asserting a right-of-way to the shore. According to the plaintiffs, "the evidence supports the conclusion that everyone believed the land to the east of the iron post to be the MacDonald shore lot." They say the right-of-way was never thought to lie to the east of the iron post. This is consistent with the evidence of Mr. Davis that his father cut grass in the area to the west of the trees – which, while still standing, were outside the Mitchell property – in order to keep the right-of-way cut. It is also consistent with the evidence of Greg MacDonald, which I accept, that the land owned by Betty MacDonald did not allow access to the beach until he bushwhacked it.

[93] The defendant Mr. McCormick stated on cross-examination that before having a survey done, he too believed that the plaintiffs owned the land to the east of the iron post. The discovery that there was a strip of land between the former Ouderkirk lot and the plaintiffs' shore lot was a recent one, he said, and led him to buy the ten-foot strip from Dennis Mitchell and to have a survey done. The land in

question appears to be included in the deed from Thomas Mitchell to Gerald Hatherley, which describes the lot as starting at an iron post.

[94] While it appears that there is no agreed or conventional line that differs from the line identified in the Crowe survey, it is necessary to consider whether the plaintiffs have acquired a right by way of adverse possession.

Adverse possession

[95] The plaintiffs submit that they and their predecessors in title "occupied and used" the shore lot for "a period long in excess of twenty years." They argue that this brings them under section 10 of the *Limitation of Actions Act*, which provides:

> 10 No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same. [Emphasis added.]

[96] The plaintiffs say the occupation and use consisted of clearing and maintaining the land, mowing the grass and placing a trailer on the lot. Even if, as I have found, the survey evidence does not support their view that the iron post is

the southwest corner of their shore lot, they submit that there is sufficient evidence of possession to establish possessory title to the entire lot, including the area claimed by the defendants.

[97] The plaintiffs note that Roger McCormick regarded the land to the east of the iron post as being part of the shore lot, and argue that "[s]ince there was no permanent structure on it, the only thing to do with it was to mow it," which they did. As a result, even if the ten-foot strip is located where the defendants claim, the plaintiffs' view is that any rights are extinguished by the passage of time and the operation of section 10 of the *Limitation of Actions Act*.

[98] The plaintiffs also maintained the lawn to the east of the iron post. If the strip is where the Crowe survey proposes, the "issue is whether the cutting of grass on this property since sometime after 1977 and having a horse-shoe pit on a small portion for a few years is sufficient adverse possession for a claim for possessory title to extinguish the title of a legal owner." The defendants suggest that it is not, relying on *Dauphinee et al. v. Fralick Estate et al.* (2003), 219 N.S.R. (2d) 238 (C.A.).

[99] Gerald Hatherley originally acquired title to a parcel of land approximately 66 feet wide along its southern boundary. According to the Crowe survey, a portion of the lot originally described in the Hatherley deed is included in the land sold by Dennis Mitchell to the defendants and is included in the instrument of subdivision. It is that portion of the defendants' land that is also included in the deed of the plaintiffs that remains to be resolved.

[100] I accept that Thomas Mitchell intended to retain access the beach. However, he sold a parcel to Mr. Hatherley with the southwest and northwest corners identified by an post and an iron post, respectively. I am satisfied that the piece of land that was transferred by Dennis Mitchell to the defendants was partly included in the lands sold by Mr. Mitchell to Mr. Hatherley in the conveyance of 1949. To the extent that Thomas Mitchell claimed he owned lands within these boundaries and attempted to retain a piece of land to allow access to the beach when he made the 1949 conveyance, in my view this failed and his successors in title could not later convey them to the defendants.

[101] I am satisfied that Mr. Hatherley and his successors in title, including the plaintiffs, had this portion of the land in question as part and parcel of the lands

originally conveyed in 1949. Between 1949 and 1977, the land was not used by anyone. It remained in its original state while Mr. Hatherley owned it. He sold it to Edward MacDonald, who used it infrequently. There is solid evidence that Betty MacDonald did not use it after Mr. MacDonald passed away.

[102] The situation changed after the property was acquired by Roderick MacDonald in 1977, from Betty MacDonald. Either Mr. MacDonald or Mr. McAulay, or both, cleared the land. The plaintiffs placed a trailer on the shore lot and remained there throughout the summer months. Either the plaintiffs or the MacAulays occupied the property until it was transferred to the plaintiffs in 1996. There is no contradictory evidence on this point. The plaintiffs occupied their trailer in the manner any summer residents would, using it as a summer residence. The plaintiff Mr. MacDonald built a horseshoe pit on the westernmost portion of the shore lot. He said he used it for about seven years and then removed it because of the beachfront was eroding and he lost interest. The plaintiffs, Greg MacDonald and the McAulays mowed the shore lot as necessary during the period in question. Nothing else was done with the land, as it was not capable of anything else.

[103] From 1977 until 2002, at least, these lands were continuously occupied by the plaintiffs, and prior to them, by Mrs. McAulay and Roderick Macdonald, their relatives and predecessors in title. I also find that the plaintiffs and their predecessors in title did not occupy these lands with the consent of the true owner.

[104] By being in lawful occupation of a portion of the parcel of land described in the deed, the plaintiffs and their predecessors in title were in constructive occupation of the remaining portion of the lands within the boundaries as shown on the Borden survey. I refer to Anger and Honsberger's *Law of Real Property*, 3d edn., vol. 2 (looseleaf), pp. 29.22-23 (emphasis added):

> The rule as to constructive possession differs according to whether the claimant has documentary title or colour of title, or is a trespasser without colour of title. Where a person having paper title to land occupies part of it, even where that title is defective, that person is regarded in law as being in possession of the whole unless another person is in actual, physical possession of some part to the exclusion of the true owner. To constitute colour of title it is not essential that the title under which the party claims should be valid one. It is not the instrument which gives the title, but adverse possession under it for the requisite period, with colour of title. A claim asserted to property under the provisions of a conveyance, however inadequate to convey the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under colour of title, and one which will draw to the possession of the grantee the protection of the limitations legislation, other requisites of those statutes being complied with.
>
> The person relying upon the doctrine of constructive possession must enter under a real, *bona fide* belief of title.
>
> **…**

> The possession necessary under a colourable title to bar the title of the true owner must be just as actual, open, exclusive, continuous and notorious as when claimed without colour of title, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed but only when and while there is such partial occupation. [Emphasis added.]

[105] If the Mitchells were interested in, or intent upon, acquiring possession of the parcel of land in question, they had to do so within 20 years from 1977, if not earlier. I do not base this decision on any occupation which occurred between 1949 and 1977; rather, I base it on the occupation which occurred between 1977 and 2002.

[106] Whether there has been sufficient possession of the kind contemplated by the statute is largely a question of fact to be decided on a review of the evidence. In *Law of Property*, at p. 29.19, the authors write:

> 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.

[107] It is my view that Roderick Macdonald, Mrs. McAulay, the plaintiffs and others authorized by them exercised actual, constant, open, visible and notorious

occupation to the exclusion of the owner. They did this to the extent required by the statute and in my view it was not possession which was equivocal, occasional or for a special or temporary purpose.

[108] The nature of the occupation and possession must be suited to the character of the property. A summer cottage or trailer property will not likely be occupied during the winter months. As such, the failure by the MacDonalds and the McAuleys to occupy the land during this period would not interrupt their continued adverse occupation and possession of the land.

[109] According to the authors of *Law of Property*, at pp. 29.16 and 29.18:

> The effect of the Statutes of Limitations is that, if an owner who is kept out of possession does not make an entry or bring action to recover possession within the statutory period, not only is the remedy barred at the end of the period, but the right of property is simultaneously gone.... [A]t one time the law distinguished between a right of possession and a right of property, and earlier statutes of limitations merely barred the remedy to record concession but did not distinguish the right of property. The present statute completely ends of those distinctions and, when the true owner's remedy is gone, so is his title.
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> * * *
>
> A court of equity will not grant a decree confirming the title to land claimed by possession under the legislation or restrain by injunction a person from selling the land to another. The general discretion that exists in courts to grant a declaration of right is to be exercised with great care and jealousy and is not to be exercised to confirm a title to land claimed by possession under the limitations legislation. However, the possessor is, in the discretion of the court, entitled to a declaration that the defendant owner's right to possession of, and title to, the lands in question is extinguished....

[110] As a result, according to the *Limitation of Actions Act*, Dennis Mitchell lost the right to recover the lands by December 1998.

The existence of a right-of-way

[111] The plaintiffs argue that the evidence supports their contention that there is a right-of-way leading to the shore to the northwest of their shore lot. They refer to the Fairbanks correspondence as evidence that local residents were passing over what Mrs. Ouderkirk regarded as her land in the early 1970s. These documents are not offered for the truth of what is stated in them, but rather to show Mrs. MacDonald's state of mind. The plaintiffs also point to the evidence of Alan Davis and the plaintiffs' children as going to this fact.

[112] The parties agree that there was no express grant of a right-of-way. However, the plaintiffs claim, the evidence shows that the strip of land leading to the shore was regarded as a right-of-way, and used as one without permission of the Mitchells or Mrs. Ouderkirk, from the mid-1960s. They suggest that Raymond Davis's cutting of the grass should be regarded as an attempt to assert a right to use

the right-of-way. Similarly, when Mr. MacDonald and Mr. Davis assisted Roger McCormick in building the stairs to the shore, they assumed that the purpose of the stairs was to allow access to the shore from an existing right-of-way. Neither Mrs. Ouderkirk nor Roger McCormick took physical steps to prevent the use of the alleged right-of-way.

[113] The plaintiffs therefore claim prescriptive title to a right-of-way based on counting back for over 20 years. They argue that Mr. McCormick's action in placing of a shed on the area claimed as the right-of-way in 2002 should not interrupt that period, as it was never acquiesced in by the plaintiffs.

[114] The plaintiffs refer to sections 32 and 34 of the *Limitation of Actions Act*:

> 32 No claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated and where such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of twenty-five years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given, or made for that purpose by deed or writing.

* * *

> 34 Each of the respective periods of years, mentioned in Sections 32 and 33, shall be deemed and taken to be the period next before some action or proceeding wherein the claim or matter to which such period relates, was, or is, brought into question and no act or other matter shall be deemed an interruption within the meaning of the said two Sections, unless the same has been submitted to or acquiesced in for one year after the party interrupted has had notice thereof, and of the person making or authorizing the same to be made. [Emphasis added.]

[115] The plaintiffs cite *Gilfoy v. Westhaver* (1989), 92 N.S.R. (2d) 425 and *Mason v. Partridge,* 2003 NSSC 254, as authority on how prescription may be established. In *Gilfoy,* Tidman J. said, at para. 31:

> Usage of the roadway, in either case, must be open continuous, unobstructed, and without permission of the landowner. The plaintiffs usage of the route of the roadway was open, unobstructed, and without permission of the landowner from the time construction of the road commenced in 1955 until the commencement of this action in 1987. Although I accept that obstructions such as gates, parked vehicles and signs such as "no vehicles" or "no trespassing" were from time to time placed on the roadway they did not at any time stop the usage of the roadway by the plaintiffs nor did the defendants ever inform the plaintiffs that the gates or parked vehicles were intended to interfere with their use of the right-of-way or that the signs applied to them. As stated in *Gale on Easements* (14 Ed.) at page 154, "a person asserting an interruption must prove that some notice other than the mere existence of a physical obstruction was given to the person interrupted".

[116] The plaintiffs submit that this case is close to these facts. The defendants submit that, on the evidence, the plaintiffs and their predecessors in title have not used the alleged right-of-way continuously for a period in excess of twenty years.

[117] The defendants also argue that any use of this land to access the beach was by consent and not adverse. I am satisfied that this was not the case. As in *Mason v. Partridge*, [2005] N.S.J. No. 452 (C.A.), the evidence does not show that there was consent.

[118] I am satisfied that the boundary line between the former Mitchell and Burnside properties accords with that set out in the Crowe survey. The property of Mrs. Ouderkirk, which she acquired from Alda Seaman MacKenzie and which was subsequently sold to Roger McCormick and was transferred by him to the defendants, abutted the Mitchell line.

[119] I conclude that the path used by the plaintiffs and their predecessors in title was clearly on the Ouderkirk property. This use of this path commenced before she became the owner of the abutting property. According to the plaintiffs and Mr. Davis, the path was in use in the 1960s, when the property was owned by Mrs. MacKenzie. It is clear that the use of this property continued after she sold it. There is no evidence that Mrs. Ouderkirk took any steps to prevent Roderick MacDonald and his successors in title from using this path to the shore. This started shortly after Roderick Macdonald erected his cottage on the rear lot. They

continued without interruption until 2002 when Mark McCormick placed obstructions on the property.

[120] Although the plaintiffs and the witnesses who testified on their behalf testified that they used the Mitchell right-of-way to get to the shore, I am satisfied, based on the location of the boundary, that the path in question was on the Ouderkirk property, not on the Mitchell property. Roger McCormick did not prevent anyone from using this right-of-way to the shore. There is no evidence that Mrs. Ouderkirk took any steps to prevent anyone from using this path to the shore. She raised the issue in an exchange of correspondence in the early 1970s, but there is no evidence that this led anywhere. She was informed by Betty MacDonald that she had a right to the shore. She took no further steps to resist the claim by Roderick MacDonald and his successors in title to a right to cross this path as a means of accessing the shore. The plaintiffs' children also used his path to the shore from at least 1974, after the family returned from Europe and Mr. MacDonald was subsequently transferred (with the family) to Debert, Nova Scotia.

[121] I find that the path to the shore was a pedestrian path with a width of no more than five feet. Any suggestion that it was ten feet wide is not supported by

the evidence. Certainly Mr. Mitchell never provided a right-of-way to the shore for the plaintiffs. The plaintiffs and predecessors in title never entered the path with a vehicle. While they mowed the land to the west of the Burnside–Mitchell line, they made no other improvements. They simply used it to get to the shore.

[122] Is the use of the path sufficient to establish a prescriptive right? The evidence is that it was used every year. Although the plaintiffs were not present between 1967 and 1974, the path was also used by Mr. Davis, and he maintained it during this period. It was used by Roderick MacDonald from 1960 until his death. He did not go to the beach, but his wife and children did. When the plaintiffs returned from Europe they were not immediately posted to Nova Scotia, but they returned to the province in 1974, and from that year until 2002, almost 28 years, they and persons authorized by them used this path as a means to get to the shore. This was primarily in the summer months; the path was not in use in the winter. However, the use of the path was continuous, open, uninterrupted and unimpeded. In my opinion, that is sufficient to establish a prescriptive right according to section 32 of the *Limitation of Actions Act*.

[123] To the extent that Thomas Mitchell did retain any land to the southwest of the iron posts in the Hatherley deed, that too would be subject to the right-of-way.

CONCLUSION

[124] The Court has not been provided with full abstracts or certificates of title regarding the conveyances of the properties involved in this proceeding, particularly as regards any Crown grant. As such, I note that nothing in this decision affects any Crown claims or any prescriptive rights in Elm Tree Lane.

[125] The plaintiffs have established title to the lands which were initially conveyed by Thomas Mitchell to Gerald Hatherley. The southwestern and northwestern corners were fixed by Mr. Mitchell at the time of the conveyance. Although the northwest corner iron post was not located by Mr. Crowe or by Mr. Borden, by extending the boundary line from the southwest corner, parallel to the Burnside-Mitchell line, the western boundary of the plaintiffs' lands can be established. The land within these boundaries (that is, to the east of this line) was effectively conveyed to Mr. Hatherley.

[126] Additionally, I find that the defendants and their predecessors in title failed to make any entry to recover possession of any portion of the plaintiffs' lands which Mr. Mitchell intended to retain, but which was occupied by the plaintiffs and their predecessors in title. Therefore the plaintiffs are entitled to retain possession, and have their title confirmed, with respect to the area depicted as the shore lot on the Borden plan of survey, by virtue of adverse possession and the operation of the *Limitation of Actions Act*.

[127] Thirdly, the plaintiffs have acquired a right to pass over the defendants' lands, for themselves and persons authorized by them, by use of a footpath of five feet in width, in order to access the shore. This pathway commences at the southeast corner of the defendants' lot, as depicted on the Crowe plan of survey, on the north side of the dirt lane, and crossing the defendants' land to the shore.

[128] It shall be the parties' responsibility to determine the technical description for the location of the line in accordance with these reasons and to carry out any necessary registrations or rectifications.

[129] The defendants' counterclaim is dismissed.

[130] If the parties are unable to agree as to costs, they may provide written submissions within thirty days after the release of this decision.

J.