SUPREME COURT OF NOVA SCOTIA

Citation: Shea v. Bowser, 2011 NSSC 450

Date: 20111205
Docket: Hfx. No. 348548
Registry: Halifax

Between:

James David Shea, Linda Shea

Applicants

v.

Loyal F. Bowser, Wendy Lynn Bowser

Respondents

Judge: The Honourable Justice Peter P. Rosinski.

Heard: October 18, 20, 2011, in Halifax, Nova Scotia

Counsel: D. Mark Gardiner, for the Applicants
Myra Jerome, for the Respondents

By the Court:

Introduction

[1] The purchase of beautiful ocean frontage land can provide years of enjoyment for family and friends. When the initial cost does not include a survey and title certification establishing the existence, validity and location of the means of access to such a property, it is often the case that litigation ensues. This is one such unfortunate case.

[2] In the absence of a compromise between the parties herein, one of them, long acquainted with the lands in question, will lose their argued claim to the lands in issue. In this case, that party is Mr. and Mrs. Shea.

Background

[3] The Sheas' purchased three oceanfront lots at Pleasant Point, Halifax County, between 1971 and 1972. These lots all appear to have originated from a larger lot granted by Howard and Maizie Williams to Gladys Bowser, which deed is produced as Exhibit "E" to the sworn November 23, 2010 Shea affidavit. That

indenture is dated February 11, 1925 and purports to be registered March 16, 1944.

[4] It is to be noted that it is not certified to be a copy of a deed registered at the Registry of Deeds, and that there appear no handwritten signatures from any of the purported participants in the creation of the deed or swearing of the oath therein anywhere.

[5] Specifically the three lots purchased by the Sheas are:

1. PID #40058158 [by warranty deed dated September 5, 1972 from Gladys M. Bowser and registered October 6, 1972; known as the "sheep pen"];

2. PID # 40058307, for which there is no registered deed in evidence before me [see para. 7, Shea affidavit sworn November 23, 2010] but which had previously been conveyed by Gladys Bowser to Carl Conrod and his wife by deed August 5, 1963 [being Exhibit "G" to the aforesaid affidavit], being registered July 28, 1964, and thereafter apparently subsequently deeded to the Sheas "in or around 1971" [known as Lot A]; and

3. PID # 40058513 conveyed by warranty deed September 30, 1971 from Lester Smiley and registered October 8, 1971 [known as Lot B].

[6] Wendy and Loyal Bowser received their property at Pleasant Point from the widowed Mary Anna Bowser by warranty deed dated July 17, 1985 and registered July 26, 1985 - see Exhibit #2 to the Bowser sworn affidavit dated September 13, 2011. An overview of their property in relation to the property of the Sheas can be seen on the copy of a survey plan filed herein as Exhibit 1, and reproduced as Exhibit 1 to the Bowsers' affidavit.

[7] Mary Anna Bowser was the wife of Frederick Bowser [mother and father respectively of Loyal Bowser]. Frederick Bowser had received that same property from his mother, Gladys nee Slaunwhite/Bowser/Smiley by an undated deed from 1967, which witness oaths were sworn February 15, 1968, and was registered on March 31, 1969 - a plan attached thereto [though not certified by a Nova Scotia land surveyor] is also registered and appended to the deed which appears as Exhibit "F" to the Sheas' affidavit sworn November 23, 2010.

The dispute concerns access to Lots A, B and the sheep pen

[8] The Sheas have made application to this court for a declaration that they have a right of way over the property/driveway of Loyal and Wendy Bowser from the Ostrea Lake Road to what is shown on various survey plans as the "old main road", which would then allow them access thereon to Lot A, B and the "sheep pen" lot.

[9] The Sheas claim they have such a right-of-way either:

> a) By virtue of an express grant of a right-of-way in the deeds they received when they purchased these properties; or
>
> b) by virtue of prescriptive rights, being either:
>
> > (i) Pursuant to s. 32 of the *Limitation of Actions Act* having openly and notoriously and continuously for 20 years immediately preceding this litigation used the right-of-way they claim herein to access their properties; or
> >
> > (ii) pursuant to the doctrine of lost modern grant, which allows for their having openly and notoriously and continuously for 20 years, not necessarily immediately

preceding this litigation, used the right-of-way they claim herein to access their properties; or

c) by virtue of the Doctrine of Way of Necessity to the sheep pen lot since that deed contains no express grant of right of way.

[10] The Bowsers' respond that the Sheas have not placed sufficient proof before this court to establish that **as against them** there was an express grant of right-of-way for the Sheas benefit, nor have they at any time met the requirements for entitlement to such a right-of-way claimed by prescriptive rights or by way of necessity.

[11] The Bowsers suggest that the Sheas used an extension of what is referred to as "right-of-way 300" [ROW 300] as shown on the above referred to plan [Exhibit #1 herein] as the means to access their properties initially, and that after the early 1980's when the Slaunwhites [Lois] refused to continue to allow them to access their property over what is identified as the extension of ROW 300, and sometimes referred to as "the travelled way", the Bowsers allowed the Sheas for a time, to access their properties over the Bowser lands [which are also generally shown located on Exhibit #1-a plan dated September 4, 1991].

[12] The Sheas have conceded that there is no express grant of right-of-way to the "sheep pen" lot. Consequently, they argue that according to the equitable doctrine of way of necessity they should have a right-of-way to that lot independent of any right-of-way to Lot A or B.

Is there sufficient evidence of an express grant of right-of-way?

[13] As stated in the Law of Real Property, (third edition) Anger and Honsberger, Canada Law Book [October 2011] by Anne Laforest at para. 17:20.30:

> A positive easement allows the dominant landowner to do something in relation to the servient lands. While a wide array of positive easements have been recognized by the courts, and more and varied kinds may be recognized in the future, one of the most common positive easements is the right-of-way... A private right-of-way is an easement which permits the owner of the dominant tenement to pass over some defined portion of the servient tenement in order to gain access to or egress from the dominant tenement for some purpose connected with the better enjoyment of the dominant tenement... The owner of the servient land may exercise all other rights of ownership not inconsistent with the right-of-way and may exclude those not entitled to the easement.
>
> A right-of-way may be created by any of the methods described previously [by statute, express grant or reservation, implied grant or reservation, prescription [where this is not precluded by statute] or propietary *estoppel*]. The nature and extent of the right-of-way created by an express grant depends on the proper construction of the language of the instrument creating it [citing *Knock v.*

Fouillard 2007 NSCA 27 (2007) 252 NSR (2d) 298 (CA)]. The following rules apply in interpreting the instrument:

1. The grant must be construed in the light of the situation of the property and surrounding circumstances, in order to ascertain and give effect to the intention of the parties.

2. If the language of the grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant.

3. The past behaviour of the parties in connection with the use of the right-of-way may be regarded as a practical construction of the use of the way.

4. In case of doubt, construction should be in favour of the grantee.

Where the instrument of grant does not specify the way, the grantor may assign a way so long as it is reasonable. If the grantor assigns an unreasonable way, the grantee may select the most direct and convenient way so long as the use of it will not unreasonably interfere with the enjoyment of the servient tenement.

[14] The essential characteristics of an easement are noted at para. 17:20.10 of Anger and Honsberger:

a) There must be a dominant and a servient tenement;

b) an easement must accommodate the dominate tenement;

> c) the dominant and servient tenement owners must be different persons; and
>
> d) a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

[15] ...and at para. 17:20.10(d):

> Other requirements which are frequently included under this heading include:
>
> > a) One cannot grant an easement over the land of another person;
> >
> > b) every easement must be created by one of the recognized methods;
> >
> > c) there must be a capable grantor and a capable grantee;
> >
> > d) the right must be reasonably definite [the document will not be set aside for vagueness unless after the application of legal reasoning and legal analysis, it is impossible to decide the meaning that should be given to the document].

[16] At para. 17:20.20(c) footnote 11, Ms. Laforest notes that: "A reservation is to be distinguished from an exception. A reservation is something which does not exist before a conveyance, but which is newly created or reserved out of the land on the execution and delivery of the deed. An exception is something which is

already in existence before a conveyance and which is excepted from the operation of the deed... See however *Gibbs v. Grand Bend Village* (1995) 49 RPR (2d) 157 (Ont CA) where the distinction is made by one of the three judges between a reservation of a limited right, such as an easement, and an exception which retains the grantor's title in the excepted lands."

[17] Furthermore, at para. 17:20.60 Anger and Honsberger it states:

> "An easement may be extinguished by operation of law, express release, or implied release... At common law an easement will be extinguished by **operation of law** where:
>
> a) The purpose for which it was created comes to an end;
>
> b) the period for which the easement was created terminates;
>
> c) the right is abused; or
>
> d) the same person comes to own the dominant and servient lands in fee simple.
>
> ... **A release by the owner** of the dominant land to the owner of the servient tenement will extinguish an easement. In order to be effective at law, an express release of an easement must be by deed, although a verbal agreement may be valid in equity...

> An **implied release** may occur through abandonment or prescription. Extinguishment of an easement will occur when the holder of the easement acts in such a way as to indicate an intention to abandon the easement or so as to create an *estoppel*. However, if the easement was acquired by a grant or if the title to it was perfected, it is immaterial whether there has or has not been enjoyment of the easement for long periods of time. Easements so acquired can rarely be extinguished in any manner other than by express release or by circumstances so cogent as to preclude a *quasireleasor* from denying the release. Discontinuance of use of an easement is not in itself abandonment but only evidence from which abandonment may be inferred. Other circumstances may indicate that there was an intention to abandon and, unless such intention exists, there is no abandonment. Whether there was an intention to abandon the use of the easement is always a question of fact. If there has been non use of an easement for a very long time, that in itself may be *prima facie* evidence of an intention to abandon it. Furthermore, if the duration of non-use has been equivalent to the period of use, a court will presume that an express release of the easement which cannot now be proved was made before the period of non-use commenced... Their release will be implied if the owner of the dominant tenement permits the owner of the servient tenement to do an act of a permanent nature on the servient tenement which necessarily prevents the future enjoyment of the easement. Failure to keep a right-of-way in sufficient repair does not amount to an implied release. An easement may be extinguished by prescription, based on the same rules that are used for the creation of an easement through prescription.

[18] In the case at Bar, no abstract of title was presented to the court, which would show the chain of title for Lot A, Lot B (and the claimed easements), and the "sheep pen" lot. Some evidence was presented from which inferences could be drawn as to the origin and continued existence of the claimed easements for Lots A and B.

[19] There was also no survey plan to show the extent of the property Gladys Bowser received by deed dated February 11, 1925 and the subsequent divisions of that property as they relate to the present dispute.

[20] Thus the court is left with a less than complete picture of the origin and extent of the right-of-way claimed by the Sheas.

[21] Nevertheless, I will examine the evidence presented to determine if the Sheas have demonstrated, on a balance of probabilities, that they are entitled to the benefit of an express grant of a right-of-way over the lands of Loyal and Wendy Bowser.

[22] The Sheas argue that the 1925 deed to Gladys Bowser included the "sheep pen", Lot A and Lot B **as well as** the lands presently owned by Loyal and Wendy Bowser. I note that the survey plan, [Exhibit #1 herein] makes mention just above ROW 300 the following:

> "Note - for previous survey of this area see plan showing Lot A in a subdivision of lands of George Slaunwhite? Gladys Bowser dated April AD 1973."

[23] It would appear therefore, that the extent of Gladys Bowser's property could have included the area surrounding ROW 300 at some time, which does not necessarily mean however that it was part of the deed of property granted to her in 1925.

[24] The Sheas argue that from the 1925 deed lands, Gladys Bowser then deeded property to Frederick Bowser, which description [Exhibit "F" to the November 23, 2010 sworn affidavit of the Sheas] makes specific reference to the 1925 deed. The Sheas argue that their 3 lots and the Bowser's property therefore all originate from the 1925 lands conveyed to Gladys Bowser. As noted, the deed from Gladys Bowser to Lester Smiley [Lot B] is not in evidence, but the deed from Lester Smiley to Sheas is in evidence. Moreover, the deed from Carl Conrod and wife to Sheas is not in evidence [Lot A], but the deed from Gladys Bowser to the Conrods is in evidence.

[25] Notably the 1925 deed [Exhibit "E" to the November 23, 2010 sworn affidavit of the Sheas] reads in part:

> "Reserving therefrom to the use of the said Howard Williams the privilege of a seaweed pile on the place known as the sheep pen. **Also the privilege to use the**

> **road from the new road apart the house to the old road.** A fishing privilege on the Naufft's Point so-called. The privilege on beach to haul wood and seaweed to the said Gladys Bowser."
>
> [My emphasis]

[26] Correspondingly, in the 1967 deed to Frederick Bowser, there was included in the description:

> "Saving and excepting from the above described lot that portion that lies within the limits of the old main road, **also reserving any rights previously granted for use of the road to the shore**."
>
> [My emphasis]

[27] This is the servient tenement over which the Sheas claim their right of way passes.

[28] The location of the right of way claimed by the Sheas is central to this litigation. A question that must be asked is whether "the road from the new road apart the house to the old road" in the 1925 deed is intended to have been included in the reference "reserving any rights previously granted for use of the road to the shore" in the 1967 deed?

[29] A key consideration in locating the 1925 "road" is which house is referred to as "the house" in that deed? Other considerations are where was the "road" *vis-à-vis* the house, and where were the "new road" and "old road"?

[30] As evidence of their dominant tenement status *vis à vis* the Bowsers' property, the Sheas point to the deed in which Gladys Bowser conveyed Lot A to Carl Conrad and his wife, who ultimately conveyed the same property to Mr. Shea [which unfortunately was not put in the evidence before me] according to Mr. and Mrs. Shea's affidavit of November 23, 2010. Lot A is described in the Conrod deed [Exhibit "G" to November 23, 2010 Shea affidavit] in part:

> Lot A according to a survey and plan made by HK Wedlock provincial land surveyor showing subdivision of lands of Gladys Muriel Bowser, Pleasant Point, Halifax County, Nova Scotia, September 8, 1962, and Lot A with these reservations - access by private right-of-way only, dated February 11, 1963 was approved by the Halifax County Planning Board, and **the privilege to use Gladys Muriel Bowser's road leading apart her house to Lot Number A at all times, and also help to maintain this road at all times."**
>
> [My emphasis]

[31] Again one must ask where is "Muriel Bowser's Road" and is there any evidence that the Sheas helped to maintain any roads at Pleasant Point at anytime?

[32] Similarly, as evidence of their dominant tenement status *vis à vis* the Bowser's property, the Sheas point to the fact that Lot B was conveyed from Gladys Bowser to Lester Smiley and thereafter from Lester Smiley to Mr. Shea [the deed from Gladys Bowser to Mr. Smiley is also not in evidence before me]. In the deed from Mr. Smiley to Mr. Shea [Exhibit "H", November 23, 2010 affidavit Sheas] the description reads in part:

> **"Together with the perpetual privilege to use Gladys M. Bowser's road leading past her house and also help to maintain same.**
>
> The above described lot being approved as Lot B by the Halifax County Planning Board on September 28, 1966, subject to access by private right-of-way only. Being the same lands and premises as conveyed in a deed in writing made between Gladys M. Bowser and Lester E. Smiley and recorded at the office of the Registrar of Deeds at Halifax, Nova Scotia in Book 2164 at page 628."
>
> [My emphasis]

[33] Again one must ask where is "Muriel Bowser's Road" during the period 1970 - 1972, and is there any evidence that the Sheas helped to maintain any roads at Pleasant Point at any time?

[34] Moreover, the evidence suggested [para. 3(a) Bowser affidavit and *viva voce* evidence Loyal and Wendy Bowser] that:

> Gladys Slaunwhite grew up in Pleasant Point; married a Bowser; then married Lester Smiley; and lived to be about 100 years old, passing away in about 2006. Loyal Bowser, her grandson, testified that she lived in at least three different houses at Pleasant Point, so it becomes difficult to ascertain the location of "Gladys Bowser's house" at any given time, and correspondingly, "Gladys Bowser's road".

[35] I also acknowledge that the Bowsers state in their affidavit that: "the homestead or childhood home property of Gladys Muriel Bowser (nee Slaunwhite) is subject to ROW 300" - paras. 10(b) and 23(a) affidavit, and that it was identified by them as the house nearest to the "old main road" on the Slaunwhite lands in the 1991 survey plan [Exhibit #1 in the hearing]. However, when Gladys Bowser lived there, and specifically whether she lived there in 1925 is not clear from the evidence.

[36] On the other hand, none of the survey plans or sketches in evidence refers to any particular structure as "Gladys Bowser's house" or any drawn path or roadway as "Gladys Bowser's road". Mr. Shea testified that he had visited his properties "each year" since 1971. It seems odd that given the proximity of these relevant properties, and his suggested frequent visitations, that he did not know and/or did

not make greater efforts to discover where Gladys Bowser's "road" and " house" were located. I note that he received the sheep pen property directly from her in 1972, and she continued to live in Pleasant Point until her death in about 2006.

[37] There are no statutory declarations from the Slaunwhites, Gladys Bowser [who was still signing deeds in 1998 - see para. 14 and Exhibit "P" to the November 23, 2010 Shea affidavit - after the 1995 face to face confrontation between Mr. Shea and Wendy Bowser over the right-of-way's location], or even the Sheas children, who allegedly used the right-of-way and were the source of complaint by Lois Slaunwhite which led to her refusal to allow them continued passage over her lands to access their properties [ie. via the "travelled way" being as I understand it, an extension of ROW 300 as it appears on the 1991 survey plan Exhibit #1].

[38] I note that the Sheas engaged numerous counsel from 1998 onward (including Kent Rodgers, Les Doll, Peter Crofts and Mr. Gardnier of late - para. 25 Bowser affidavit). They were not without the benefit of legal advice during those years.

[39] Mr. Shea testified that the only sketch that shows a right-of-way over the Bowsers lands [Exhibit "S" to the November 23, 2010 Shea affidavit] is a right-of-way in favour of Douglas Walker, cousin to Loyal Bowser, dated November 28, 2005. While Mr. Shea has a receipt [para. 9 and Exhibit "E" Rebuttal Affidavit, the Sheas swore October 12, 2011] "for the survey of the 'new' right-of-way that I, David Shea had commissioned pursuant to my agreement with the Respondent, Wendy Bowser, as referenced at para. 16 of our original affidavit" [ie. in 1995], that receipt is also dated November 28, 2005, and refers to the work done by G.R. Myra N.S. L.S. as:

> "Re: **proposed easement** - lands of Loyal and Wendy Bowser - Ostrea Lake Road, Pleasant Point, Nova Scotia - Easement Plan." [My emphasis]

[40] Mr. Shea acknowledged in his rebuttal affidavit of October 12, 2011, at para. 9 that:

> "After 1995, when we reached a verbal agreement to relocate the right-of-way on the Respondents property, the Respondents from time to time would allege that all I really had was their permission to use the way, and not a Right of Way."

[41] Ultimately by agreement July 13, 2006 [Exhibit "S" to Shea affidavit November 23, 2010], the Bowsers granted Douglas Walker, their cousin, a right of way over their lands, as shown in the plot plan that Mr. Shea paid G. R. Myra to

create dated November 28, 2005. They deny having ever made any agreement to relocate the right of way claimed by Sheas, which is consistent with their position that the location of any right of way in favour of the Sheas is not on their property.

[42] Unfortunately, the court did not have the benefit of the knowledge of Douglas Walker or G.R. Myra N.S.L.S. as to the circumstances that surrounded this "new" proposed right of way.

[43] The Sheas in their rebuttal affidavit (para. 7) stated that:

> [aerial photo Exhibit "Q" shows] ... the approximate location of ROW 300, but continued at that time (1974) all the way to the Old Main Road. As stated we only used that path to our properties on a few occasions when we had company as at that time, that way (over the Slaunwhite property) was in better shape to bring company down. We always asked Lois Slaunwhite for permission..."

[44] If, as the Sheas claim, there was frequent usage by Sheas of the Bowser property as access to their lots over almost all the years 1971 to 1995, I am therefore left wondering why Mr. Shea "approached" Wendy Bowser "in or around 1995 ...and advised her that I had a deeded right of way over her property", [para. 16 November 23, 2010 affidavit]. He also stated that he agreed to the Bowsers changing the location of the existing right of way:

> "...So long as I could have the location of the new right of way surveyed with a new right of way agreement that we could register... the Respondents proceeded to have the new right of way location developed and I had it surveyed by G.R. Myra Surveying Ltd. When I gave Wendy Bowser notice with the survey that I wanted to have a new right of way agreement to register... she proceeded to inform me that I didn't have a right of way and that she was no longer agreeable to giving me a new right of way..."

[45] I therefore also wonder why, if the old right of way was obstructed by the Bowsers since 1995 [para. 21, Shea affidavit, November 23, 2010] and they refused a new right of way, there is an interval from 1995 to 2005 before the "proposed easement" plot plan that Mr. Shea says he paid for, is completed?

[46] Moreover, why does Douglas Walker physically create the new right of way, yet Mr. Shea pays the surveyor's bill showing its location on the Bowser property? The answers to these questions are not clear from the evidence. The evidence available however, paints a picture of the Sheas having infrequently accessed their properties, over more than one access route, and that the Sheas were unsure of where any right of way they were otherwise legally entitled to use was located.

[47] The Bowsers stated that: "We did not move any road. We extended our driveway to meet the "old main road" so that our cousin, Douglas, could go on his ATV to visit his Sand Lot" - para. 17 Bowser affidavit.

[48] The Sheas acknowledge at para. 20 of their November 23, 2010 affidavit that:

> "Until the mid 1980's, we could access our properties quite frequently over the spring, summer and fall and had a small camp on it for our family's enjoyment. Since the mid 1980's, we used the properties less frequently but a year has not gone by where we have not accessed our properties";...
>
> **And** [in response to para. 3 of the Bowser affidavit stating that Lois Slaunwhite in the early 1980's refused to allow Sheas to access their lots over the old "travelled way" [ROW 300 extension] anymore]...:
>
> > "... it is absolutely false that we used the so-called "ROW 300" to access our properties. We used this route on a few occasions only. The comments attributed to Lois Slaunwhite are not true."
>
> (Para. 2 Shea's rebuttal affidavit October 12, 2011.)

[49] It only came out in testimony at the hearing, that sometime before 2001, the Sheas summer camp (built before they purchased Lot A and as shown on Exhibit "J", Shea November 23, 2010 affidavit) had been burned down by the Sheas. There was no evidence or suggestion that it was rebuilt.

[50] Interestingly, hearing Exhibit "J" is a September 8, 1962 survey plan of Lot A, which shows a road access from the George Slaunwhite property to the "old main road" immediately across from the "summer camp" on Lot A. The

subdivision approval notes in handwriting: "access by private right of way only". Hearing Exhibit "K", a 1966 plan of Lot B, contains similar wording. No plan shows any drawn right of way or evidence of a right of way as claimed by the Sheas. Therefore, there is only one plan that shows a road, consistent with an access to the shore area and the Sheas' properties. Exhibit "J" clearly shows a road from the Slaunwhite property to the "old main road", which if followed across that road would directly lead to Lot A. I accept that if the dominant and servient tenements are separated by a public road, that would not prevent an otherwise validly constituted easement - *Ross v. Hunter* (1882) 7 SCR 289 and *Petipas v. Myrtle* (1913) 11 DLR 483 (NSCA).

[51] Mr. Shea testified that the two houses shown on the 1991 plan [Exhibit #1 at the hearing and Exhibit #2 to the Bowser affidavit] belonged to George and Lois Slaunwhite until they sold the property to the MacDonalds in 1991.

[52] Wendy Bowser circled on Exhibit "C" [aerial photograph from 1982] and initialled "GS" the house of George and Lois Slaunwhite. She similarly circled and initialled "WB: the house in which Gladys Bowser lived before deeding it to Frederick Bowser in 1967 and then by his wife, Mary Ama Bowser in 1985 to Loyal and Wendy Bowser.

[53] As that Exhibit “C” shows, there are two parallel roads from the Ostrea Lake Road that intersect perpendicularly the “old main road”. The Sheas claim that the road leading to Loyal and Wendy Bowser’s house is the express right of way they claim, and that it can be seen to extend all the way to the “old main road”.

[54] The Bowsers claim that the extension of, what is identified on the 1991 plan of Kenneth Robb N.S.L.S. as, “ROW 300" was physically in existence and can be seen on the aerial photograph as passing by George Slaunwhite’s house and intersecting the “old main road”. This old “travelled way”, they say, is the location of the express right of way, if any, granted to the Sheas, and consistent with the intersection of the “old main road” by the road from the Slaunwhite [Gladys Bowser homestead] property shown in hearing Exhibit “J” [1962 survey plan].

[55] The Sheas point out that Gladys Bowser did live in the Loyal and Wendy Bowser house. Hence they say that the most reasonable location for an express right of way “apart” or “past” her house is on the Bowser’s property.

[56] The Bowsers argue that Gladys Bowser’s (nee Slaunwhite) homestead property [i.e. George Slaunwhite house seen in Exhibit #1 plan], was more likely

the house referred to in the deed to Frederick Bowser in 1967, since that description was repeating the right, “previously granted, for use of the road to the shore” contained in the 1925 deed which read: “privilege to use the road from the new road apart the house to the old road”. ROW 300 is closer in proximity to the Shea lots, and actually provides more direct access to those lots, than would the Bowser property. It may also be, that Gladys Bowser granted shore access to persons other than the Sheas over the Bowsers’ property, hence the general reference to “reserving any rights previously granted...”.

[57] Moreover, if one looks at the Frederick Bowser lands shown as they were on plans in 1966 [hearing Exhibit “K”] and 1967 [Exhibit #2 to Bowser affidavit and registered with the deed into Frederick Bowser] it is clear that they do not show any right of way or road to the shore. I bear in mind that this is not, by itself, determinative since the plans were created for limited purposes.

[58] Nevertheless, based on all the available evidence which I accept, I cannot conclude on a balance of probabilities that the interpretation of the 1967 deed reference to “any rights previously granted for use of the road to the shore” is a reference to a right of way on the Frederick Bowser property in favour of the Sheas. Even the photos that Mr. Shea took [para. 19 November 23, 2010

affidavit] “in or around 1995 depicting the location of the “old” right of way close to the Respondent’s house” do not show a right of way leading to the shore.

[59] At most, they show, on one day, the condition of the Bowsers’ property, and specifically a tire tracked grass area which location in relation to the “old main road” cannot be precisely identified.

[60] In a significant way, the credibility of the witnesses, their honesty and/or reliability are at issue here.

[61] Mr. Loyal Bowser testified that he (in contrast to the Sheas and Wendy Bowser) had lived at Pleasant Point all his life, albeit in several locations which he identified in court. He knew the area and inhabitants well.

[62] He was adamant in his testimony that the driveway on the Frederick Bowser property never extended to the old main road - at most it was a footpath used to access the beach area.

[63] He was also adamant that the he had not seen the Sheas before 1995, which, would be unusual if, the Sheas were crossing his property each year as they claimed, since the early 1980's, and he had lived there continuously since 1967.

[64] I found Mr. Bowser to be a credible witness. While he had trouble with dates at times, such lapses in memory are as a result of his very limited education in my opinion, and not any attempt on his part to only give answers that were favourable to his own interests.

[65] It appears that the aerial photos for the years 1964, 1974, 1982, 1992 and 2003 are of limited assistance in determining whether the Sheas have shown that they have an express grant of a right of way over the Bowser’s lands. I remind myself that in 1995 the Bowser’s landscaped their property, which materially affected the likelihood that thereafter one could still see a right of way, presuming that a visible one had been previously present.

[66] Given the evidence provided, the lack of such an explicit claim that they did so by the Sheas, and the fact that the “old main road” is a gravel path [see Exhibit #1] and has been for many years, I conclude that the Sheas did not access their camp directly by car. My sense of the evidence is, and I so find, that they parked

their car and walked the remaining distance to get to their camp on Lot A. I also find that the Sheas did not frequently access their properties after the early 1980's. Some time before 2001 they burnt their camp down on purpose.

[67] While in the 1974 and 1982 photos **both** the old “travelled way” (extension of ROW 300 - the Slaunwhite drieway) and the Bowsers’ driveway, if notionally extended as a path, appear to intersect the “old main road”, by 1992 it is difficult to say whether either still did.

[68] My sense of the evidence is that the Sheas were not certain of the location of their access route to their properties; they did not have a survey done to locate any right of way they claimed; and consequently when occasionally accessing their lots, they did so over both the old “travelled way” (extension of ROW 300) - the Slaunwhite property; and over the path that the Frederick Bowser family used to access the shore.

There is no express grant of a right of way over the Bowsers’ property

[69] I have heard from Mr. and Mrs. Shea by their affidavits and *viva voce* testimony. They assert an express grant of a right of way over the Bowsers’

property. I am not convinced that the Sheas, based on all the evidence, that I accept, have shown it is more likely than not that such a right of way exists in the location claimed by the Sheas.

[70] I say this because:

1. I found much of their evidence not to be corroborated (yet it could have been):

   a) There was not one plan that shows a right of way through the Bowsers' property;

   b) there is not one ground level photograph of the Bowser property evincing the physical hallmarks of a travelled right of way;

   c) There is no clear evidence by witness testimony or statutory declaration or otherwise regarding where Gladys Bowser lived between 1924 and 2006, nor what house is the "house" referred to in her 1925 and 1967 deeds; nor what "road" is intended to be referred to in the 1925 and 1967 deeds or in the deeds into the Sheas.

2. Although the Bowsers argued that the deed from the Williams into Gladys Bowser in 1925 is questionably valid since it is not a certified copy, and the “signatures” are all typed in, the execution date and registration date purportedly being in 1925 and 1944 - nevertheless I will apply the presumption of regularity to this document as it is said to be a “true copy” [para. 5, November 23, 2010 Shea affidavit] and would be therefore registered, and in compliance with *The Registry Act* RSNS 1923 c. 144 as amended, ss. 25 - 39.

3. I do not have the benefit of a relevant Abstract of title or survey plan; nor a certified copy of the deeds from Carl Conrod into the Sheas, [Lot A] or for the conveyance by Gladys Bowser to Lester Smiley [Lot B];

4. Before 2007 the Sheas had had their right of way registered as in relation to servient tenement PID # 40591240 [Slaunwhite’s property) and then changed the servient tenement to PID # 40058349 (Bowsers’ property), on June 26, 2007 - see Exhibit #1A herein, being a Form 6A Corrected Certificate of Legal Effect completed by Kent W. Rodgers. No explanation was offered for this correction by Mr. Rodgers. The Sheas suggested it was a mere mistake in the first instance without elaborating.

5. Exhibit “J” to the Sheas’ November 23, 2010 affidavit (a 1962 plan) shows a road accessing the “old main road”

from the Slaunwhite property just across the "old main road" from Lot A where the summer camp was located. This tends to be more consistent with that road being the "road" referred to in the 1925 deed [and consistent with an extension of the ROW 300] and subsequent references as applicable. That road is **not** on the Bowsers' property.

6. I found Wendy Bowser to be a credible witness. She was familiar with Pleasant Point and Gladys Bowser since 1975 when she began dating Loyal Bowser. While I appreciate that both she and Loyal have an interest in the outcome, I did not get the sense that they were advocating while testifying to any extent that would cause me to question their credibility.

7. I accept her evidence that, once the Slaunwhites refused to let the Sheas cross their property in the 1980's that (the Sheas having accessed their lots much less frequently thereafter) the Bowsers did allow the Sheas to cross their property (park their car) to access their lots, even after 1995. The Bowsers testified that they had not "met" the Sheas in person before 1995, and I infer that thereafter the Sheas had the Bowsers' informed ongoing permission or had telephone or written contact which formed the basis of the permission the Bowsers gave the Sheas to cross their land, and which they ultimately withdrew (about six months ago, she testified) - see para. 11(c) and (d), 16(a) and 20(c), 23(d) Bowser affidavit.

8. By their own evidence, the Sheas rely, for their express grant of right of way for Lot A, on a deed from Conrods to them, not in evidence, and therefore of less weight as a factual matter in my view - (Exhibit “G”, Shea affidavit, November 23, 2010 being the apparent predecessor deed);

9. Though the Sheas claim to have express grants of right of way to Lot A and B via deeds, the Lot B deed [Exhibit “H” Shea affidavit, November 23, 2010] and inferentially the Lot A deed [see predecessor deed Exhibit “G” Shea affidavit, November 23, 2010] both require them as grantees to “help to maintain” said Gladys Bowser’s roads, yet there is no evidence they once sought to do so, or actually did so.

10. Given all the gaps and anomalies in the evidence presented by the Sheas, I cannot have confidence in their evidence. I specifically find that where their evidence conflicts with that of the Bowsers, I accept the Bowsers evidence. It is the Sheas’ burden to show on a balance of probabilities that they have a right of way. Based on all the evidence, I am not satisfied that they have done so.

Right of Way by Prescription or Necessity?

[71] In his Nova Scotia Real Property Practice Manual, supra C. W. MacIntosh, Q.C. states under the heading, ‘Easement by Prescription”:

> An easement is created by grant, whether express, implied or presumed. An easement which is the subject of a presumed grant is one created under the doctrine of prescription. The criteria for establishment of a prescriptive easement were adopted from the civil law and are of ancient origin. The use must be “*nec vi nec clam, nec precario*”. In modern terms this means that the use must be neither violent, nor secret, nor permissive.
>
> Before an easement will arise by prescription, the claimant must show use “as of right”, meaning enjoyment of the land as if he were the true owner. The use must be open, adverse, notorious and continuous and not secret. A prescriptive easement will not arise if the use has been with the permission of the owner.
>
> The establishment of an easement by prescription is distinguishable from the acquisition of possessory title by adverse possession under s. 9 of the *Limitations of Actions Act*. The adverse use of an easement does not result in dispossession or extinguishment of the owners title to the piece of land. Further, the adverse use of the easement must be for the benefit of the adjacent land, whereas adverse possession does not depend for its existence on other land which will benefit.
>
> In Nova Scotia, prescriptive easements may arise in two ways: under the doctrine of lost modern grant or under s. 32 of the *Limitations of Actions Act*. The former is a judge created theory which presumes that if actual enjoyment has been shown for 20 years, an actual grant had been made when the enjoyment began, but the deed granting the easement has since been lost. However the presumption may be rebutted. [*Rose v. Trustee of Krieser* [2002] O.J. No. 2014 [CA]].
>
> Section 32 of the *Statute of Limitations* [RSNS 1989 c. 258 as amended] is as follows:
>
>> 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 layperson, 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 a full period of 20 years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such 20 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 40 years, the right thereto shall be deemed absolute and indefeasible, until it appears that the same was enjoyed by some consent or agreement expressly given, or made for that purpose by a deed or writing.
>
> ...

A claim under this section is based on 20 years adverse use. This statutory provision was enacted as simpler alternative to, but not a replacement for, the lost modern grant. In many cases both methods applied, but the latter may be relied upon where evidence required to prove a prescriptive title is defective... [the 20 year period in s. 32] exists because of the English common law which provides that a grant of easement would be presumed if the enjoyment could be shown to have existed since time immemorial, which meant 1189... it should be noted that prescription at common law is not available in Nova Scotia, where legal memory does not go back to 1189. After 40 years, the easement is deemed to be “absolute and indefeasible” and cannot be defeated by abandonment, non-use or interruption. Section 32 of the Act is to be read together with s. 34 which reads as follows:

> 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 to be in interruption within the meaning of said to 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.

Section 32 operates only when there is litigation; in order to establish a prescriptive right, an action must be brought. Pursuant to section 34, the relevant period of use must immediately precede the bringing of the action. Section 34

also states that the period of use must be without "interruption". Interruption means that the claimant has been obstructed from using the easement and not mere discontinuance of the use. As with the doctrine of adverse possession of land, the required period of use need not run in favour of one person. Use by successive owners of the dominant tenement for the 20 years will support a claim for easement by prescription.

A right of way may commence as a right of necessity or by permission, but may over time ripen into an indefeasible right by subsequent prescriptive use.

A claim under this section, based upon 20 years usage can be met and defeated by any one of the common-law defences, namely:

a) The right claimed lacks one or more of the characteristics essential to a valid easement;

b) the right in question, although enjoyed for the limitation, is prohibited by law, such as because a grant would be *ultra vires* the grantor;

c) the use was not as of right, that is it was forcible, or secret, or enjoyed with permission whether written or oral. Permission negatives a claimant's assertion that he was "as of right" and constitutes a real defence to the claim.

Section 7.2 - pgs. 7 - 41 to 7 - 43 [also discussed at section 13.4H].

[72] Regarding a prescriptive easement pursuant to s. 32 of the *Statute of Limitations*, the evidence in the case at Bar does not support the claim by the Sheas that they used it over the Bowsers' property, in an open, adverse, notorious and continuous manner in the 20 years prior to the commencement of this litigation.

[73] I'm specifically not satisfied on a balance of probabilities that the Sheas made it clear to the Bowsers by their actions and/or words, that they claimed a right of way over the Bowsers' property until 1995, nor that the Sheas continuously used the claimed right of way over the Bowsers' property.

[74] Moreover, I also find that the Bowsers gave specific permission, which they later withdrew, to the Sheas to cross the Bowsers' land to access the Shea lots.

[75] Insofar as the doctrine of lost modern grant is concerned, a 20 year period of neither violent, nor secret, nor permissive use of an easement as claimed by the Sheas over the property of the Bowsers, is also not established on a balance of probabilities, for the same reasons.

Doctrine of way of necessity

[76] In Nova Scotia Real Property Practice Manual, C. W. MacIntosh, Q.C. discusses the "creation by doctrine of way of necessity" of rights of way - see s. 13.4(I). There MacIntosh notes:

> A vendor is presumed to convey to his purchaser a lot which the latter can access. If a grantor sells a lot to a purchaser which is landlocked, and retains for himself land between the lots sold and the road, there is deemed to be a grant of a way of necessity over the remaining lands of the grantor, whereby the grantee may reach his lot... A right of way of necessity is presumed to have been created when land is sold which is inaccessible except by passing over the adjoining land of the grantor. The grant of a right of way of necessity is presumed when land is severed by sale so that one portion is inaccessible except by passing over the other portion. The doctrine is based on public policy that land should be used and not rendered useless. The doctrine will be applied to provide a right of way to a property owner even if he has means of access to the lot by water [citing *Hirtle v. Ernst* 110 NSR (2d) 216 per Nathanson, J.].

[77] In *Hirtle*, Justice Nathanson was faced with a plaintiff purchaser whose land was inaccessible except through two roadways neither of which was a public highway, and through the waters of a lake. Justice Nathanson found that a grant of right of way of necessity was presumed when the land was severed so that one portion was inaccessible except by passing over the other portions. He felt specifically that water access was not considered to be the same as access over adjacent land, and that that was especially so where the water access was not as of right, or where it would be contrary to law.

[78] Justice Nathanson extensively referred to the text writers and jurisprudence regarding rights of way of necessity. He concluded:

> It would seem to appear from the foregoing statements quoted from various texts that a fundamental requirement of a right of way of necessity is the existence of absolute inaccessibility giving rise to an absolute necessity for access. In my opinion, that is too

> broad a statement. It will be noted that the statements quoted from the texts refer to lots which are landlocked. There ought to be no doubt that the general statement at the beginning of this paragraph does apply to landlocked lots, but there is reason to believe that it does not necessarily apply to lots which border on or are partly surrounded by water.

[79] He ultimately concluded after reviewing Canadian, British, and American cases as follows:

> Few, if any, or the foregoing cases, especially the American ones, are binding upon me. Nevertheless, I consider them to be very persuasive. They appear to be capable of being accommodated within the framework of a unified philosophy. They provide reasonable and practical solutions.
>
> The cases which have been cited indicate that the doctrine of right of way of necessity has been continuing to evolve over the years and has evolved to the stage where a number of statements of principle can be added to the traditional conception of the doctrine:
>
> > 1. The doctrine of right of way of necessity is based on public policy - that land should be able to be used and not rendered useless [citations omitted];
> >
> > 2. Although they can be no right of way of necessity where there is an alternative inconvenient means of access, the requirement of an absolute necessity or a strict necessity has developed into a rule of practical necessity [citations omitted];
> >
> > 3. Water access is not considered to be the same as access over adjacent land... That is especially so in cases where the water access is not as of right or would be contrary to law... Where access is not available for transportation of things needed for reasonable use of the land to be accessed... Where the water access does not have transportation facilities for carrying on the ordinary and necessary activities of life to and from the land... Or where the

> water is not navigable or usable as a highway for commerce and travel...".

[80] In *Dobson et al. v. Tulloch et al.* (1994) 17 OR [3rd] 533, affirmed by endorsement "in view of the findings of fact made by the trial judge" - 33 OR (3d) 800 (Ont. CA), Justice Pardu had to decide a claim for easement made in circumstances where the property was landlocked except for a small portion that abutted a non-navigable river. He stated:

> I do not think it can be said boldly that where a property owner has access to water, an implied grant of apparent accommodations such as an easement is automatically defeated, or even that an implied reservation or grant of an easement of necessity is unavailable. Water access for example, to a small inland lake encircled by private landowners does not give any access.

[81] On this point he concluded:

> Without attempting to formulate a general test as to when access to water will defeat an easement of necessity... The ability to travel some distance from waterfall to shoal on water abutting property does not, without more, constitute access to otherwise landlocked property.

[82] In the case at Bar, I must consider the state of access to each of the lots at the time of the conveyances to the Sheas. Lester Smiley conveyed Lot B to the Sheas on September 30, 1971; according to the Sheas' November 23, 2010 affidavit

[para. 7], the Conrods conveyed Lot A to the Sheas “in or around 1971"; Gladys Bowser conveyed to the Sheas the sheep pen lot on September 5, 1972.

[83] Therefore any evidence relating to the state of access to each of these lots between 1971 in 1972 must be closely examined.

[84] Both Lots A and B purportedly have express grants of right of way to allow access to them. While I have concluded that the location of these grants of right of way have not been established on a balance of probabilities to pass across the land of the Bowsers, I have specifically refrained from saying where in my opinion such express grant of right of way is located. The only arguable alternative location based on the evidence presented to me is ROW 300, however without having the owners of that/those properties as parties to this proceeding, it would be wholly inappropriate for me to pronounce upon their property rights.

[85] Nevertheless, in the deeds conveying Lots A and B to the Sheas, both contain express grants of right of ways, and thus I cannot conclude that at the time of their granting, a right of way of necessity was acquired by an implied grant of a right of way, presumed to have been made on the basis that the lots were inaccessible except by passing over the adjoining land of the grantor, committing a

trespass upon the land of a stranger, or in some other fashion, though inconvenient but not impossible.

[86] As to the sheep pen lot, its description does not contain an express grant of right of way from Gladys Bowser to the Sheas. I might note that although the sheep pen lot was surveyed August 3, 1972 and that survey was the basis of the warranty deed description conveying that lot to the Sheas, it is unclear whether the sheep pen lot is actually part of the lands conveyed to Gladys Bowser in 1925 by Howard and Maisie Williams.

[87] Certainly, in 1972, no express grant of right of way was contained in the deed to the Sheas. Can the Sheas then rely on the equitable doctrine of way of necessity as a basis to access the sheep pen lot?

[88] Arguably they can access the sheep pen lot from Lot A which is contiguous with the sheep pen lot. As shown on the survey plan attached to the deed [Exhibit "I", November 23, 2010 Shea affidavit] it also shows the "old main road" as 20 feet wide though "not maintained for over 40 years". The width of the road and the surrounding geography suggests that it was likely at one point in time, and possibly still was in 1971 - 72, a public road. Certainly as late as 1967, the

description of the Bowsers' property as received from Gladys Bowser included the reference: "Saving and excepting from the above-described lot that portion that lies within the limits of the old main road...".

[89] Moreover, bearing in mind the analysis and reasoning of the law in *Hirtle*, by Justice Nathanson, and *Dobson* by Justice Pardu, it would seem to me that from the aerial photograph in 1974 that the sheep pen lot is readily accessible by water as it fronts on the Atlantic Ocean. While understandably courts will be reluctant to rely on water access as the only means of access to property bordering water, in the case at Bar, it is merely another means of possible access to the sheep pen lot and therefore undermines a claim of "practical necessity" as referred to by Justice Nathanson or, as referred to in terms of the traditional requirement for "absolute necessity" of access.

[90] I note here as well that while Lot A and Lot B were approved by the Halifax County Planning Board [see the plans being Exhibit "J" and "K" in the hearing], on the basis of them having "access by private right of way only", there was no such approval given for the sheep pen lot. Moreover, if there is to be a way of necessity deemed in favour of Sheas from the grantor of the sheep pen lot, there is no basis to so bind the Bowsers' property since they acquired their property in

1967 from Gladys Bowser, and hence in 1972-72 she could not be considered to have given a way of necessity over lands that no longer belonged to her.

[91] I'm not satisfied on the evidence presented that, on a balance of probabilities, an implied grant of a right of way (of necessity) has been made out in favour of the Sheas regarding the sheep pen lot *vis à vis* the Bowsers' property.

Conclusion

[92] In their Notice of Application in Chambers, the Sheas requested that this court declare that they have a right of way across the lands of the Bowsers based on an express grant and/or in the alternative prescriptive rights, including the doctrine of lost modern grant, as well as a mandatory injunction, a permanent injunction, damages and costs.

[93] I have concluded that on none of the claimed basis are the Sheas entitled to a declaration of a right of way across the lands of the Bowsers' [PID #40058349] in order to access their three properties [PID #40058307, 40058513, and 40058158]. Consequently, none of the other relief claimed by the Sheas needs to be addressed by me.

[94] In their November 16, 2011 submission, the Bowsers have requested that the court order that the migrated land registration burdens placed on the Bowsers' PID #40058349 by the Sheas be ordered removed at the express expense of the Sheas.

[95] I am prepared to sign an Order to that effect which will contain a deadline of January 6, 2012, for this to be done and I will require the Bowsers to draft an order to that effect.

[96] The Sheas have requested an opportunity to make separate submissions on costs. I will receive the Bowsers' submissions on costs by December 13, 2011 and the Sheas' submission by noon, December 19, 2011.

J.