**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Bishop v. Purdy*, 2015 NSSC 364

**Date:** 20151202
**Docket:** Amh No. 430543
**Registry:** Amherst

**Between:**

Evelyn Bishop, Carole Black, Johanne Buchanan, Ruth Craib, Glenn Dodge, Richard Duchesne, Barbara Hines, Scott MacDonald, Careen McNeil, Ken Murray, Jennifer Quesnel, Elizabeth Retallack, Lynn Ryan, Fernand Tardif, Lloyd Trerice

Plaintiffs

v.

Bruce Purdy and Frances Purdy

Defendants

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| **Judge:** | The Honourable Justice A. David MacAdam |
| **Heard:** | August 20, 22, 24 25, 26, 27, 28; December 1, 2015, in Amherst, Nova Scotia |
| **Written Decision:** | December 22 , 2015 |
| **Counsel:** | Leon (Dick) Ryan, representative for the Plaintiffs<br>Douglas Tupper Q.C. and Chris Kierstead, for the Defendants |

**By the Court:**

## Introduction

[1] This proceeding involves a dispute over access to certain shore-front and beach property, and whether a right-of-way exists. The applicants claim a right-of-way across the respondents' property.

[2] Pursuant to an interim injunction dated 13 November 2014, the respondents (the Purdys) were required to remove all obstructions they had placed on the disputed area, and the applicants were permitted to use the area alleged to constitute the right-of-way for pedestrian and emergency vehicle traffic, pending a final determination.

## Background

[3] The applicants are cottage owners on the Amherst Shore, with cottages located on land formerly owned by Percy Brownell, and later by his son, Neil Brownell and his wife Dora. There are about sixty cottages in the area, on which the Brownells farmed before selling it off for cottage properties. The applicants own eight cottage lots between them. The Purdys also own a property in the area, which they bought in 1996, then built a cottage upon in 2008-2009. Their land is

bounded on the north by Brownell Lane (formerly Lane 27); on the south by Percy Brownell lane (formerly Lane 28); on the west by Highway 366; and on the east by the Northumberland Strait. A swamp runs through the area, as well as a stream leading to the water. The area between Brownell Lane and the swamp – known as "the Hill" – is higher-lying than the rest. The lower-lying area is called "the Flats."

[4] The right-of-way claimed by the applicants runs parallel to the Northumberland Strait, over the Purdys' land. The applicants claim the right-of-way in order to access the beach and to create an uninterrupted travel way between two entrances to the highway.

[5] The applicants described the terrain at the bottom of Percy Brownell Lane as a steep, rocky cliff, ten to fifteen feet high. They say cottagers from the flats used Brownell Lane over what is now the Purdy property, the only beach road available to them.

**Use of the alleged right-of-way**

[6] It is undisputed that there was a "tractor cut" used by the Brownells for access to the beach and to the north hill side of their farm. It was also used by the owners of two Hill properties between the 1940s and mid-1960s. In the late 1950s and early 1960s, a new path was made, later known as Brownell Lane. This road,

on the northern part of the Brownell lands, gave access to the two Hill properties. When the new road was built, the respondents say, the tractor cut was no longer used to access the two Hill properties. They say that after 1964 Neil Brownell used the tractor cut sparingly to access his farm on the other side of the property, and for gathering seaweed from the shore in season. The Brownells' use of the tractor cut further declined as they sold cottage lots on the Flats and the Hill in the 1960s and early 1970s. They eventually stopped farming.

[7] The applicants maintain that when he sold the lots, Neil Brownell saved and excepted for himself and all the cottage owners, rights-of-way to and from the beach, to and from the highway, and interconnecting the subdivision. In his affidavit, Mr. Brownell stated that there had been a circumferential road known as Brownell Lane running through the subdivision for over sixty years, running from the highway (Route No. 366) along the northern boundary of the subdivision, turning south and running parallel to the shore (behind the first row of cottages), then turning west and running along the southern boundary of the subdivision, back to the main highway. Although on cross-examination he acknowledged that he did not know what the word "circumferential" meant, his evidence about an uninterrupted road access through the old Brownell farm in effect amounted to evidence that there was a circumferential roadway for cottage owners. He never

suggested that all of the circumferential road was in the same condition, or was used equally.

[8] The respondents say the road does not go all the way around the subdivision. They acknowledge that the portion over their property was a tractor cut used by Mr. Brownell. They also acknowledge that before the early 1960s, this was the only way for lot owners whose property was north of the swamp to access their lots.

[9] The respondents say the declining use of the tractor cut is evident from aerial photographs of the area between 1967 and 2005. They say that by 1985 the tractor cut had almost disappeared. They cite the affidavits of Frances Purdy, Judy Cianci, Lorraine Faulkner, Wallace Furlong, Catherine Topping, Paul Faulkner, Vonda Hansom, Christine Hart, Patrick O'Brien, and David Lennox, in support of their argument that the tractor cut was only used sparingly in those later years by Mr. Brownell to access his farm, and that cottagers rarely used it on foot, and less by vehicle. The respondents maintain that the evidence shows that the use of the tractor cut by Mr. Brownell declined in the 1980s, as he reduced, and eventually stopped, his farming activities. They also say there was little if any use of the path by other vehicles or pedestrians. Thus, by the time the Purdys bought their property in 1996, the cut would have nearly disappeared. These witnesses also

speak of the difficulty of using vehicles in the area due to the swamp, which the Purdys filled in between 1996 and 2005, before they built their cottage in 2008-2009.

[10] Mr. Brownell's evidence was that each cottager on the Flats had a deeded right-of-way to the beach. At some point – he was not certain when – stairs were built, giving some cottages access to the beach, followed later by a more publically accessible set of stairs. (Mrs. Purdy agreed that there were steps at points along the beach, but could not say which cottage properties they belonged to.) Mr. Brownell also gave evidence that he gave "permission" to the cottagers to use any part of his property, including the tractor cut. He said they generally used the tractor cut to get to the beach. The applicants deny that they needed, or specifically received, permission. They say they were using it by acquiescence.

[11] The applicants claim that the tractor cut was used for beach access for more than forty years. They say they accessed the beach over a sixteen-foot right-of-way over what is now the Purdy property. The respondents maintain that the intermittent use of the tractor cut to cross their property is not sufficient reason to "oust their fee simple rights" and burden the property with "unknown rights of passage in perpetuity." They say there is no evidence that they knew of the right-

of-way claim when they bought the property in 1996. The Purdys' deed includes the following:

> SAVING AND EXCEPTING THEREFROM a right-of-way from the southern margin of the first mentioned right-of-way to the northern margin of lands of Lloyd Trerice. The said right-of-way being 16' wide running north and south roughly parallel to the shore of the Northumberland Strait as is presently being used by the cottage owners.

**The Lennox proceeding**

[12] In 2000 a dispute arose when the respondents claimed about fifty feet of water frontage also claimed by their northern boundary neighbours the Lennoxes, leading to legal action by Mr. Lennox. David Lennox had apparently surveyed and staked this as his property. The Purdys and Lennoxes reached a Boundary Line Agreement, dated July 4, 2002. This agreement provided the Lennox property a right-of-way over the Purdy property to Brownell Beach Road "in common with any other persons now having the same right." The respondents say the Agreement did no more than establish the boundary between the Purdy and Lennox properties. They say the right-of-way description is mere "catchall" language, "probably inserted by lawyers." Left unexplained is why "lawyers" would have inserted extraneous and supposedly meaningless language in the Agreement. I am satisfied that this phrase indicates that it is likely that others held the same right, though those people are not identified.

[13] The applicants submit that the respondents' pleadings in the Lennox proceeding show that they knew that the right-of-way across their property and the Lennox property was being used by the cottagers in the subdivision. In their affidavit, the Purdys said they would never have developed their property or built their cottage if they believed that the right-of-way was a road subject to vehicle traffic. However, in their defence and counterclaim in the Lennox proceeding, they pleaded that over time the various rights-of-way from the cottage properties to the shoreline resulted in the dedication of a roadway as a street permitting public use. They also pleaded the *Public Highways Act* and say there was a deemed disposition, so that in law the right-of-way is a public highway.

[14] In their affidavit, the Purdys say they granted David Lennox the right to cross their property in exchange for him confirming that they continued to have access to the beach. The applicants say Mr. Lennox's deed already gave him the right to cross the Purdys property, since it predated the existence of Brownell Lane north. In addition, the Purdys property fronts the shore, so they did not need to use the Lennox property to access the beach.

[15] The dispute over the alleged right-of-way, which apparently started in 2008, escalated in January 2012, when the Purdys blocked the entry and exit with boulders. That June, the applicants removed the boulders, but the Purdys replaced

them, and began to "grass over" the road. The applicants' evidence is that in the fall of 2013, after most cottagers had left, the Purdys had the marsh filled in with rock and fill. They say this was done without obtaining necessary permits from the Department of the Environment, although there was no evidence to establish what, if any, specific permits were required to fill in the swamp. In their own joint affidavit, however, the Purdys say they had the necessary permits, and Mr. Purdy testified to this effect. He also stated that he did not require a permit to fill in the swamp. This could be considered but is not necessarily nconsistent with the statement in their affidavit that they had the necessary permits.

[16] The applicants argue that Mrs. Purdy's testimony was inconsistent and misleading. Her recollection of two meetings with Maggie Pitts, the GIS Analyst and Civic Address Coordinator for the Municipality of Cumberland, differed from Ms. Pitts' version. When asked why Brownell Lane had been changed to Percy Brownell Lane rather than its pre-1980s name of Percy Brownell Beach Lane, she said Mrs. Purdy asked her not to use the word "beach", as it would lead people to believe that it was a road to the beach. Ms. Pitts also stated that if the road had not been grassed over and the boulders had not been placed, she would not have changed the 911 access or the lane names. In an e-mail, she stated that the naming and mapping of roads was intended to reflect vehicular access and current use, in

order to facilitate emergency services by showing what exists "on the ground", and should at least be drivable…". Mrs. Purdy testified that there were signs between Ogden Land and Percy Brownell Lane that said "no exit" and "no ATV's." The applicants argue that those signs would have been for Ogden Lane which did not have another exit point. The applicants argue that the evidence of Ms. Pitts was disinterested and consistent.

[17] The applicants also refer to comments in Maggie Pitts' July 5, 2015, e-mail to Mr. Ryan, where she stated:

> The original mapping of Brownell Lane in the NSCAF shows it as a continuous crescent that runs through the Purdy property. Civic numbers were assigned starting at the northern entrance of Brownell Lane from Highway 366, and increased around the crescent, meeting Highway 366 again to the south. The road mapping appears to have been based on year 2000 aerial photography, and existed in the NSCAF at least as early as 2005. Previously it had also been mapped as a continuous crescent on the Oldham map from the early 1990's. The Oldham mapping series was a provincial mapping initiative on which the NSCAF was built.

[18] Ms. Pitts testified to these comments at the hearing, as well as making reference to previous correspondence and meetings with the Purdys in which "they asked that I write a letter confirming that the ROW crossing their property was not a 911 road. I advised them that there actually was a road mapped across their property, but that it would have been mapped as the property was used at the time, and did not necessarily mean that a road should or shouldn't be there." The

applicants note that the NSCAF mapping shows Brownell Lane crossing the Purdy property.

[19] The respondents say the 911 mapping of the property is irrelevant to the issues in this case. Ms. Pitts said it was not known on what basis the tractor cut was mapped as a 911 route, although she suggested that it may have been based on aerial photographs. After her visit to the site after the Purdys queried its status as a 911 route in 2011, she renamed the roads to the highway as Brownell Lane and Percy Brownell Lane, readdressed the properties, and posted a note to the effect that the route should not be used by 911 responders. The fact remains that the route was identified as a 911 route until the Purdys intervened to have it changed.

**Issues**

[20] The issues may be framed as follows: (1) Was title to Beach Road reserved to Neil and Dora Brownell by the terms of their deed dated December 5, 1996, conveying to the respondents their cottage lot? If so, should the grants of right-of-way in 2011 by the Brownells to two of the applicants be confirmed? In the alternative was a right-of-way to Beach Road reserved to all subdivision residents in the said deed? (2) Are the applicants entitled by prescription to an easement allowing unfettered passage over Beach Road and a strip of land inside the

northern boundary of the respondent's lands? (3) Is Brownell Lane a Public Highway pursuant to provisions of the *Public Highways Act*, R.S.N.S. 1989, c. 371?

**Reserved Ownership or Right-of-Way over Beach Road**

[21] The respondents maintain that the Purdy deed reserved the right to use the right-of-way through the Purdy property to the Brownells alone. The applicants say otherwise, noting, *inter alia*, Mr. Brownell's evidence that his intention was to retain the right-of-way in the deed in favour of all the cottage-owners; evidence that Mr. Brownell pays taxes on Brownell Lane (an allegation vigorously disputed by the respondents) which includes the right-of-way he retained in the Purdy deed; the applicants allege that the right-of-way in the Purdy deed could not be sold as it would negate all of the rights-of-way Mr. Brownells father granted to the applicants and other cottagers in their deeds; and that the road through the Purdys property was there for more than forty years before the Purdys bought the property, and remains there. Accordingly, the applicants say the Brownells own the right-of-way through the Purdys' property and the two later written grants of right-of-way to Carole Black and Fernand Tardif (who are both applicants) should be confirmed as valid.

[22] As noted earlier, the Purdys deed included a provision "saving and excepting" a right-of-way "being 16' wide running north and south roughly parallel to the shore of the Northumberland Straight as is presently being used by the cottage owners." The applicants say the deed was intended to reserve title to the Beach Road to the Brownells, along with a common right-of-way over the road in favor of all the subdivision residents. They say the real question is the route of the right-of-way. The only road to the beach is from Brownell Lane. Mr. Brownell testified that the cottagers on the flats between Brownell Lane and the swamp accessed the beach by way of Brownell Lane, across the right-of-way on the Purdy property that he previously owned, and that it is visible on a 1975 aerial photo. The applicants say this was the intended route of the right-of-way. As a result, they say, Mr. Brownell had to retain ownership of the sixteen-foot portion of Brownell Lane crossing the Purdy's property. Otherwise, all of the rights-of-way to the beach in the applicants' deeds – as well as those of other cottagers on the flats who are not part of this application – would be negated.

[23] Mr. Brownell gave evidence that he has paid taxes on Brownell Lane. The Property Online documents suggest that he only pays taxes on the north part of Brownell Lane. They show the road ending at the foot of the hill by the Lennox property. The applicants say these documents are not a legal description of

Brownell Lane. They say that until Brownell Lane was divided into two roads in 2014, the Property Online description showed it as a continuous road through the subdivision. They argue that the different parts of Brownell Lane – Brownell Lane South, Brownell Lane East, Brownell Lane North, and Cottage connector – are incorporated into what had been known as Brownell Lane from approximately 1980 to 2014. This is the name that the road was identified by in the NSCAF Maps, hence the reason why the tax bill simply says Brownell Lane. The respondents argue that the exhibits confirm that Mr. Brownell was not, in fact, paying the taxes on the tractor cut, but in fact it was the Purdys paying those taxes.

[24] Respondents' counsel suggested that Mr. Purdy paid taxes on the road across the Purdy property. The applicants say this would be so if PID #25427667 (Brownell Lane East) was attached to Mr. Purdy's deed. However, they say, that PID, being for the road across the Purdy property, is attached to Mr. Brownell's deed. Although I am satisfied that the Purdys actually pay the property taxes on the area of the alleged right-of-way, I am not convinced that this is probative of anything. I am not convinced that paying taxes has any direct bearing on the existence or non-existence of a right-of-way, or on the applicants' claim that the Brownells retain title to the right-of-way.

[25] Mr. Tardif's affidavit states that Mr. Brownell told him that the entirety of Brownell Lane has existed and been in use by the cottagers in the subdivision for over sixty years. The applicants note that counsel for the respondents did not challenge this evidence when Mr. Brownell testified. Also, the applicants state in their joint affidavit that "from the time each of us purchased and/or began to use our respective cottages (which for many of us goes back to the 1960's or 1970's) there has been a circumferential road running through the entire Subdivision" (para. 21). Additionally, the applicants say, aerial photographs show Brownell Lane as a continuous road through the subdivision.

[26] The applicants go on to argue that both the applicants' and respondents' expert witnesses agreed that Brownell Lane went throughout the subdivision, but disagreed on the condition of the road going through the Purdy and Lennox properties over the years. The applicants also point to the correspondence from Maggie Pitts.

[27] The applicants say that from 1940 onwards the Brownells sold cottage lots, but did not relinquish ownership of the subdivision roads. These were not dedicated as public roads, but were retained by the Brownells for their own use, and for that of other cottagers in the subdivision, for access to the beach, other cottages, and the highway. As previously noted, the applicants argue that to sell

the right-of-way across the Purdys property would negate the rights-of-way the Brownells provided in the deeds before the Purdys bought their lot in 1996. The Purdys stated in their joint affidavit that they did not discuss the right-of-way with the Brownells before purchasing their property. They also stated that they did not understand the phrase "presently being used by the cottage owners" to mean anything other than that Neil Brownell maintained the right to cross their property with his tractor.

[28] At the hearing Mr. Purdy stated that they did discuss the right-of-way, and that only Mr. Brownell could use it. He also stated that Mr. Brownell was not a "cottage owner", in reference to the phrase "presently being used by the cottage owners." The applicants argue that if he was not a cottage owner, the clause could not be referring to him and his tractor. Mr. Purdy also denied that the applicants, who gave evidence that they had been using the right-of-way, fell within that phrase. The applicants argue that they, and all the other owners, are the "cottage owners" referred to in the deed. They allege that the respondents knew this when they bought their property, but are now attempting to stop the other cottagers from using the right-of-way.

[29] The applicants say Mr. Purdy was evasive, giving evidence inconsistent with his affidavit and changing his evidence depending on the questions. They also say

the respondents' position (and their evidence) is inconsistent with their defence in the Lennox proceeding, which stated that the use of rights-of way from the cottage properties to the shore resulted in the dedication of the roadway as a street for public use. Mr. Purdy denied that the right-of-way in their deed was one of the rights-of-way referred to in the defence, and denied that the right referred to in the Boundary Line Agreement was the right-of-way across his property. However, when referred to schedule B to the Agreement, he agreed that the highlighted area was the right-of-way across his property. He explained that he misunderstood the question.

[30] The applicants say the language of the grant of right-of-way to the respondents is consistent with the Brownells' practice of retaining ownership of the subdivision roads. It indicates that the right-of-way is over roads "owned by the Grantors." The applicants submit that the same interpretation should govern the second clause, so that the part of the subdivision road passing over the Purdys property remains with the Brownells. They argue that the benefit in a grant of right-of-way is generally described by the phrase "together with", and a right-of-way is reserved using the words "subject to." The reservation of land commonly is denoted with the words "saving and excepting." As such, the applicants submit, it is consistent with common usage and the Brownells' past practice to interpret the

clause to mean that the Beach Road lands were to be saved and excepted from the conveyance.

[31] The definitions of “exception” and “reservation” were quoted by Flinn J.A. in *McDonell Estate v. Scott World Wide Inc.* (1997), 160 N.S.R. (2d) 349, [1997] N.S.J. No. 321 (C.A.):

> 13 The terms are defined in *Black's Law Dictionary*, 6th edition, as follows:
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> > Exception. An exception operates to take something out of the thing granted which would otherwise pass or be included. Such excludes from the operation of conveyance the interest specified and it remains in the grantor unaffected by the conveyance.
> >
> > Reservation. A clause in a deed or other instrument of conveyance by which the grantor creates, and reserves to himself, some right, interest, or profit in the estate granted, which had no previous existence as such, but is first called into being by the instrument reserving it; such as rent, or an easement. Reservation occurs where (the) granting clause of the deed operates to exclude a portion of that which would otherwise pass to the grantee by the description in the deed and "reserves" that portion unto the grantor…

[32] Similarly, in Oosterhoff and Rayner, *Anger and Honsberger Law of Real Property*, vol. 2 (1985), the authors state, at p. 931.

> An exception is something which is in *esse* before a conveyance which is excepted from the operation of the deed. A reservation is something which is not in *esse* before a conveyance but which is newly created or reserved out of the land upon the execution and delivery of the deed.

[33] The applicants say the part of Brownell Lane that constitutes the right-of-way under the Purdys’ deed was not newly created, but was part of a road owned by the Brownells that had existed for some sixty years.

[34] If the court rejects their interpretation of the "saving and excepting" clause in their respective deeds, which provided access to the beach as including access over the Purdys' lands, the applicants argue that the deed to the Purdys reserves a right-of-way in favor of all the cottage owners over the Purdys' lands to the roadway, over and adjoining the Lennox lands and also leading to the beach. They say the phrase "as is presently being used by the cottage owners" means that the Brownells intended the right-of-way to be used in common with all cottage owners who had previously used it as of right. (I note that during submissions counsel for the respondents submitted that the applicants' argument that their individual deeds provided a right-of-way was only raised after the evidence, and was raised too late in the application to be considered. I am not satisfied that the deeds provide such rights, so to some extent, it is unnecessary to deal with this objection. However, in the alternative, I would have acceded to counsel's request had it been necessary.)

[35] The applicants add that the respondents' argument that any right-of-way was limited to the Brownells themselves might be supportable if the respondents were *bona fide* purchasers without notice, but they claim that this was not the case. Mrs. Purdy's family had previously owned 100 Brownell Lane. They had spent summers in the area back to 1978, and so (the applicants say) by the time of their purchase they would have acquired an extensive knowledge of the right-of-way use

by all cottage residents, including over Beach Road. Mrs. Purdy denied that the alleged right-of-way was used by the cottage owners, or, at least, denies that it was used with any frequency. Additionally, the applicants point to the 2002 Boundary Line Agreement granting the Lennox right-of-way over Beach Road (referred to as "Extension to Brownell Beach Road" on a plan attached as Schedule "B' to the agreement). The agreement goes on to state that:

> Appurtenant to the Lennox Lands is a right of way for the purposes of access to Brownell beach Road over that portion of the Purdy Lands depicted and shown on the Plan as the "Extension to Brownell beach Road" (the "Extension"). For greater certainty, the Purdys hereby confirm the Lennoxes' right to pass over the Extension in order to gain ingress and egress from Brownell Beach Road in common with any other persons now having the same right. For further clarification, the Purdy's [sic] confirm that they shall not cause or permit to be erected, placed, developed or constructed any barrier, obstruction, fixture or objects(s) whatsoever, whether man made or not, which might have the effect of preventing the Lennoxes or any other persons now having a right to gain access to or pass over the Extension.

[36] The applicants argue that the "other persons now having a right to gain access or pass over the Extension" are the same cottage owners referred to in the Purdy deed. This includes not only the applicants, but all the cottage owners in the subdivision, who they say had been using the right-of-way for well over forty years.

[37] In dealing with the scope of any right-of-way, I am mindful of the comments of Wood J. in *Viehbeck v. Pook*, 2012 NSSC 48:

> [95] The grant of the Beach ROW in the 1971 Deed is clearly for recreational use of the beach, but it does not specify whether access can be by way of motor vehicle. As a result of this, I am required to look at the surrounding circumstances and have done so. I conclude, based upon this review, that it was the intention of the parties to the 1971 Deed that access to the beach by motor vehicle over the Beach ROW would be permitted, and as a result I will grant the application of the Viehbecks for a declaration to this effect.

[38] In respect of the reservation in the deed to the Purdys, it is necessary to consider the credibility of certain witnesses, namely the applicants who testified, the respondents, Mr. Brownell, and Mr. Lennox. In considering the question of credibility, I am mindful of the observations and comments of Justice Theresa Forgeron in *Baker-Warren v. Denault*, 2009 NSSC 59:

> 18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. v. Gagnon* 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. R.E.M.* 2008 SCC 51, para. 49.
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> 19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:
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> > a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: Re: *Novak Estate*, 2008 NSSC 283 (S.C.);
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> > b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
> >
> > c) Did the witness have a motive to deceive;

> d) Did the witness have the ability to observe the factual matters about which he/she testified;
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> e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
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> f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorney* [1952] 2 D.L.R. 354;
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> g) Was there an internal consistency and logical flow to the evidence;
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> h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
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> i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?
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> 20 I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: *R. v. Norman*, (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in Re: *Novak Estate*, *supra*, at para 37:
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> > There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.*, [1996] 2 S.C.R. 291 at 93 and *R. v. J.H.*, [2005] O.J. No. 39, supra).
>
> 21 Ultimately, I have considered the totality of the evidence in making credibility determinations. I have thoroughly reviewed the *viva voce* and documentary evidence in conjunction with the submissions of counsel, and the applicable legislation and case law.

[39] The applicants say David Lennox's evidence was inconsistent and evasive. They note in particular his signature on a 2011 "Petition Against Prohibiting Use of a Section of Brownell Lane/Attempting to Close A Section of Brownell Lane." Signed by various cottage owners, and addressed to the Purdys, the Petition stated:

> It has been brought to our attention that you have been petitioning the County of Cumberland to close a section of Brownell Lane that runs in front and along the side of your property at 125 Brownell Lane, Amherst Shore. This road way has been used by all cottagers since 1962 for travel, beach access and boat launching and is also our 911 Access Road.

> The following cottage owners wish to advise you both once again, that any attempt to restrict our on going use or attempt to close this section will be challenged by all of us, both legally and whatever other means are available to us, as we believe we have every legal right to use this Lane. In closing, we hope you will respect our right to use all of Brownell Lane and maintain a harmonious neighbourhood atmosphere, which has existed among all cottage owners on both sides of your property since 1962…

[40] Having considered the evidence, both testamentary and documentary, including the affidavits, I am satisfied that Mr. Lennox, in his affidavit and testimony in court, is not credible. In his affidavit he stated that "had I known the petition would have been exploited in litigation, I would have been more careful in reading it." The applicants say he did not indicate that he could not, or did not, read it. In testifying, he suggested various reasons for not placing weight on his signature. When questioned about his understanding of the petition, he referred to a history of dyslexia in his family; the applicants submit that he did not say that he was dyslexic. When asked whether he recalled any meetings with the applicants about the petition, he stated that the applicant Fernand Tardif asked him to sign the petition. He said that previously Mr. Tardif had said there would be a petition about 911 access. He also testified that when he signed the petition he was busy preparing for a wedding and did not read it. He denied having had any other meeting with any of the applicants. Carole Black, however, testified that there were three meetings at the Lennox cottage involving Mr. Lennox, his wife Janet

Lennox, Mr. Ryan, Johanne Buchanan, and herself. The meetings were specifically related to the Lennoxes' support for the petition. Mrs. Black said there was an exchange of five documents as well as other information concerning the Property Line Agreement between the Lennoxes and the Purdys. She stated that at the third meeting, Mr. Lennox read and signed the petition.

[41] The respondents say the signatures on the petition should be disregarded as hearsay, to the extent that they are adduced to establish that the signers agreed with the petition. I disagree. The act of signing the petition amounted to a representation by conduct that each of the persons signing agreed with the position being put forward in the petition, nothing more. I do not accept Mr. Lennox's claim that he did not read or understand the petition. Ms. Black stated that there was no indication that Mr. Lennox was pressed for time and that he appeared to read and understand the petition. I accept Mrs. Black's evidence that he read it before signing. Moreover, Mr. Lennox's disavowal of the contents of the petition (in his affidavit and oral evidence) amounts to a concession of his willingness to sign a petition with which he did not agree, or at least, without caring what it said. This does not help his credibility, in my view. I am satisfied that Mr. Lennox was attempting to assist the applicants to maintain access to the beach and the road to the hill, the cottages, and the second access to the highway, by providing materials

from his earlier lawsuit against the Purdys. Sometime between then and signing his affidavit in this proceeding he apparently changed his mind. His evidence is simply not credible.

[42] As to the Purdys' knowledge of the reservation of a right-of-way over their property, Mr. Brownell stated in his affidavit:

> 4. For more than 60 years there has been a circumferential road running through the entire Subdivision. This road commences on the main highway (Route No. 366 – Sunrise Trail) and runs along the northern boundary of the Subdivision, turns south and follows parallel to the shore (behind the first row of cottages), and then turns west and runs along the southern boundary of the Subdivision back to the main highway. This roadway has always been known as Brownell Lane, as shown on the Map.
>
> 5. Ever since my father started selling lots, all cottagers in the Subdivision have always had the right to use the entirety of Brownell Lane, both for pedestrian and vehicular traffic, and, in fact, have consistently used same to access the main road, each other's cottages and the beach.
>
> 6. In the mid 1990s, Bruce and Frances Purdy purchased a cottage lot from myself and my wife, Dora. This lot is on both sides of a portion of Brownell Lane that runs parallel with the shoreline. When I was negotiating with the Purdys regarding the purchase of this lot, I made it absolutely clear to them that their lot would not include Brownell Lane (which I retained) and that all cottagers would continue to have the right to use Brownell Lane. I believe that my deed to the Purdys clearly delineates this arrangement.

[43] Although he acknowledged not knowing the meaning of the word 'circumferential", the statements in Mr. Brownell's affidavit confirm that the cottagers had a right of uninterrupted passage providing two access points to Route 366, one on the south side (the Flats) and the other on the north side (The Hill), and that he informed the Purdys of this. Otherwise there would have been no need to

use the phrase “as is presently being used by the cottage owners.” I am satisfied that Mr. Brownell made it clear to them what the saving and excepting clause in their deed referred to. By accepting the deed and completing the purchase, the Purdys also accepted the burden placed on their property. Mr. Brownell thereby reserved a right-of-way over the Purdys’ property.

[44] The applicants have noted a number of inconsistencies and contradictions in the evidence of Mr. and Mrs. Purdy. I agree with many of these. However, it is their denial of Mr. Brownell’s evidence that he made it clear to the Purdys that he was reserving a right-of-way for use by all the cottage owners that I find most incredible. I accept Mr. Brownell’s evidence that he informed the Purdys of this. As stated by the applicants, the Purdys were not *bona fide* purchasers without notice of the reservation of a right-of-way in favour of Mr. Brownell and the other cottagers. Although Mr. Brownell appears to have believed that he reserved title to the tractor cut, I am satisfied that whatever his intention, he in fact reserved a right-of-way, not title to the tractor cut. Saving and excepting a right-of-way is not saving and excepting title.

**Prescriptive Right-of-Way**

[45] In the alternative, the applicants claim an easement by prescriptive right. In *Miller v. Hartlen*, 2014 NSSC 296, Duncan J. analyzed the law of prescriptive rights with reference to the decision of Murphy J. in *Balser v. Wiles*, 2013 NSSC 278. In *Balser*, Murphy J. cited Macintosh's definition of "easement" in the *Nova Scotia Real Property Practice Manual*, loose-leaf, (Markham: LexisNexis): "An easement is a right one landowner has to utilize land belonging to another and imposes a burden on that land for the benefit of the owner of the land to which the easement is attached" (para. 9). He also noted (at para. 10) the four essential characteristics, as set out in *Anger and Honsberger Law of Real Property*, 3d Edn. (Toronto: Canada Law Book Ontario, looseleaf) at p.17-3:

> (a) There must be a dominant and a servient tenement;
>
> (b) An easement must accommodate the dominant tenement;
>
> (c) The dominant and servient 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.

[46] Murphy J. went on to say:

> 11 An easement can be established through long-time use and enjoyment by one of two means. The first is by the operation of s.32 of the *Limitation of Actions Act*, R.S.N.S. (1989) c.258:
>
> > 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. R.S., c. 258, s. 32; 2001, c. 6, s. 115.

12 The other method for establishing an easement based on use and enjoyment is by application of the doctrine of lost modern grant. The *Nova Scotia Real Property Practice Manual*, *supra*, describes the doctrine of lost modern grant at p.13-95:

> The doctrine of modern lost grant is a judge-created theory which presumes that if actual enjoyment has been shown for 20 years, an actual grant has been made when the enjoyment began, but the deed granting the easement has since been lost. However, the presumption may be rebutted. The doctrine predates and is an alternative to a finding that a right has arisen by prescription. The doctrine is based upon usage, not a real grant.

13 The requirements for establishing an easement under the limitations statute or the doctrine of lost modern grant are the same. In *Mason v. Partridge*, 2005 NSCA 144, at para.18, the Nova Scotia Court of Appeal adopted the following passage from the Ontario Court of Appeal's decision in *Henderson v. Volk*, (1982) 35 O.R. (2d) 379:

> 14. It should be emphasized that the nature of the enjoyment necessary to establish an easement under the doctrine of lost modern grant is exactly the same as that required to establish an easement by prescription under the Limitations Act. Thus, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was continuous, uninterrupted, open and peaceful for a period of 20 years. However, in the case of the doctrine of lost modern grant, it does not have to be the 20-year period immediately preceding the bringing of an action.

14 The claimant must also establish that the use was made without violence, secrecy or evasion, and without consent or permission of the servient owner: Mason v. Partridge, supra, at paras.19-22.

15 In view of the serious consequences for the servient property owner, a prescriptive easement will be found only where there is clear evidence of both continuous use and acquiescence in such use by the owner of the servient property: *Henderson v. Volk*, *supra*, at para. 21.

[47] I also note *Nickerson v. Hatfield*, 2013 NSSC 133, where Coady J. cited *Henderson v. Volk*, and said:

> 46 The provisions interpreted by Justice Cory are substantially similar to sections 32 and 34 of the Nova Scotia legislation. Tidman J. in *Gilfoy v. Westhaver*, [1989] N.S.J. No. 268, 1989 CarswellNS 153, considered these sections and concluded that the period of possession must immediately precede the action. He stated at paragraph 30:
>
> > The major difference in prescription based upon lost modern grant as opposed to the *Limitation of Actions Act* is that the time of usage in order to establish the former must be counted from the outset of use, while in order to establish prescription under the *Limitation of Actions Act* the time usage is counted backwards from the time action is commenced under the Act and it provides for persons who do not oppose the right because of disability.
>
> I am satisfied that the Act requires that the twenty years must immediately precede the bringing of the action.

[48] The applicants say the evidence shows that they and all the other residents have enjoyed continuous, uninterrupted, open and peaceful use of Brownell Lane to access the beach, each other's cottages, and the main road for more than forty years, from the 1960s until 2008, when the respondents raised their opposition to the use of the road. They refer to various evidence, as well as the July 2011 petition, in which the applicants, along with some other cottagers, asserted that Brownell Lane, including the part running along the Purdy property, had been "used by all cottagers since 1962 for travel, beach access and boat launching and is also our 911 Access road."

[49] The respondents object to the applicants' use of the petition for the purpose of establishing usage, claiming that it is hearsay. Except in respect of the signatories who testified, including Mr. Lennox, I agree. As a consequence, except to their signatures acknowledging they agreed with the petition, I give no weight to any assertion of usage by signatories who did not testify at the hearing. However, it should also be noted that there was no evidence, nor any suggestion by counsel, that the respondents sought to cross-examine the signatories to the petition.

[50] The applicants submitted various affidavits in support of their assertion of a prescriptive right. The applicant Fernand Tardif stated in his affidavit that since building his cottage in 1972, he and his family had "consistently used Brownell Lane for various purposes", including family walks, vehicle and foot access to their own and friends' cottages, and access to the beach. He added that for a "number of years" he had transported the children's beach toys, chairs and food coolers to the beach by tractor and cart, as well as taking his children, grandchildren, and great-grandchildren for tractor rides on Brownell Lane (and other cottage lanes) with no problem until the Purdys tried to block Brownell lane in front of their cottage.

[51] Lloyd Trerice, the next-door neighbor of the Purdys, stated in his affidavit that since he bought his two lots in 1969 and 1970, the part of Brownell Lane

running along his land and along what is now the Purdys' land "has been used literally daily (during cottage season) by various cottagers to access the beach, the main road and each other's cottages. The Lane has been used for both pedestrian and vehicular traffic." At the hearing, he added that while he does not use the cottage much in July and August, as he rents it, some renters, particularly those with small children, have used the road in front of the Purdys' lot to access the beach. The respondents say Mr. Trerice's evidence is inconsistent with the degree of use described by other witnesses. He admitted that over the past 35 years he has spent little time at the cottage. They say his evidence should be ignored on account of this alleged overstatement and exaggeration. I have considered this submission and given his evidence the appropriate weight.

[52] Carole Black stated in her affidavit that she spent summers with her family at the cottage beginning in 1962, and that Brownell Lane "was consistently used by all the cottage owners in the Brownell subdivision as a roadway to access the beach, the other roads in the subdivision (and ultimately the main road) and each other's cottages."

[53] There was evidence that for some years there were annual yards sales on the hill and an annual parade in the subdivision, with vehicles, tractors and golf carts that travelled from one end of Brownell Lane to the other. Mrs. Purdy testified that

she could only remember a parade in 2007, but the applicants claim that there were other years that this parade took place and Brownell Lane was used as the travel route.

[54] The Purdys take the position that the evidence of Paul Lumsden, who gave evidence on their behalf as an expert photogrametrist and photo interpreter, should be preferred to the evidence of the applicants' expert, Curt Speight. They say that unlike Mr. Speight, Mr. Lumsden did not go beyond his area of expertise in his evidence, did not speculate, and did not act as an advocate. In particular, they say Mr. Speight simply adopted the applicants' position as to the amount and nature of the use of the tractor cut. They say he agreed on cross-examination that he had no basis to say who had used the path, and for what purpose. By describing the path as being used by "a variety of individuals" for purposes including accessing the beach and travelling from one section to another, they say, he simply adopted the applicants' language. In my view, both experts adopted the factual backgrounds described by the parties on whose behalf they gave evidence.

[55] The applicants say it is clear from aerial photographs taken between 1975 and 2005 that Brownell Lane runs circumferentially through the subdivision, and that it is well-used. Mr. Speight's report noted that "[w]ith the addition of a number of cottages, driveways and the associated traffic, both Brownell lane and

Percy Brownell Lane appear to have been utilized much more than was observed on the previous years of photography" (i.e. pre-1975). While the condition of the section running across the Purdys' property may vary, they say, it does not change the fact that the road is there and was used. The respondents say the declining use of the tractor cut is apparent from the photographs. They say the 1975 photograph shows the highest degree of use, and that every other photograph after that shows a visible decline.

[56] The respondents say the applicants have deeded access to the beach at the end of their respective lanes. Mrs. Purdy stated in the joint affidavit that access to the beach for the applicants on the flats is at the foot of Percy Brownell Lane, which was Brownell Lane until 2014. Other witnesses for the respondents agreed, such as Vonda Hansom, but when questioned as to how she knew this, she said her mother told her. Mrs. Purdy simply said that as far as she knew this was the applicants' beach access. Both Mrs. Purdy and Mrs. Hansom were shown the summary identifying the beach access in each of the applicants' deeds, but could not point to anything in the description to support this conclusion. The applicants maintain that the respondents and their witnesses simply did not know the location of the applicants' beach access.

[57] The applicants say the evidence of both sides at the hearing was that the terrain at the bottom of Percy Brownell Lane was a steep rocky cliff, ten-to-fifteen feet high, and that it was dangerous for cottagers to access the beach by this route. They say cottagers from the flats used Brownell Lane over what is now the Purdy property, the only beach road available to them. Mrs. Purdy said there were steps at points along the beach, but did not know to which cottage properties they were attached. Mrs. Purdy said that from the hill where the Purdys' previous cottage was located, she had never seen anyone from the flats go down Brownell Lane and across the present Purdys' property to the beach. She denied seeing Ken Murray launch his boat at the slipway, as suggested by the applicants. She also denied seeing Paul Howell, a previous cottager on the flats, launch his Sea-Doo from this location. She said the only boats launched at the slipway belonged to cottagers on the hill.

[58] The applicants say the cottage owners used the subdivision roads in the expected manner, season to season (Spring to Fall) and year to year. Ebbs and flows in this use or the lack of winter use, they argue, are insufficient to negate the prescriptive entitlement. They cite *Weingart. v. Bower*, [1965] N.S.J. No. 19 (S.C.T.D.), where Coffin J. (as he then was) said, "[t]he positive evidence of the defendant is that he has been using it each year as occasion has required, and under

the authorities which I have quoted, that is enough to establish the right-of-way provided the time is sufficient, which it is in this case" (para. 75).

**Acquiescence or consent**

[59] The applicants say the respondents – and the Brownells as their predecessors in title – acquiesced in their use of Beach Road, that being the section of Brownell Lane where it passes over the respondent's lands for more than twenty years after the subdivision was established in the 1960s. They also submit that neither the Brownells nor the respondents gave permission or consent to the applicants to use the subdivision roads, including Beach Road, that pass over the respondent's lands. The applicants say that after the subdivision was established in the 1960s, the Brownells and the respondents acquiesced to their open, notorious, continuous, peaceful and unimpeded use of the subdivision roads and Beach Road for over forty years before the respondents' active opposition began, beyond the twenty-year period required for an easement by prescription. This opposition, the applicants say, cannot undermine their prescriptive rights, unless there was a lengthy abandonment of those rights, which had not occurred.

[60] In *Mason v. Partridge*, 2005 NSCA 144, Oland J.A., for the court, discussed the difference between acquiescence and permission for a claimant's passage over

lands. She noted that "absence of consent can be established by evidence of acquiescence or evidence sufficient to raise an inference of acquiescence" (para. 30). She continued:

> [31] The distinction between acquiescence and permission and the importance of acquiescence to a claim by prescription is described by *Gale on Easements* at p. 215 thus:
>
> > The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is "as of right"; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not "as of right". Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence. The positive act or acts may take different forms. The grant of oral or written consent is the clearest and most obvious expression of permission. But there is no reason in principle why the grant of permission should be confined to such cases. Permission may also be inferred from the owner's acts. It may be that there will not be many cases where, in the absence of express oral or written permission, it will be possible to infer permission from an owner's positive acts. Most cases where nothing is said or written will properly be classified as cases of mere acquiescence. But there is no reason in principle why an implied permission may not defeat a claim to use "as of right". Such permission may only be inferred from overt and contemporaneous acts of the owner. (Emphasis by Oland J.A.)
>
> [32] As stated *in Gale on Easements* at p. 207, the element relating to whether the use was "as of right" "... requires one to look at the quality and character of the user and to ask whether the user is of a kind which would be enjoyed by a person having such a right."…

[61] Oland J.A. commented on the question of who, as between the claimant and the land owner, had the burden of showing whether there was acquiescence or consent:

> [45] In my view, the judge also erred in another respect of his approach to the evidence about "permission." As the passage from *Gale* cited in § 35 makes clear, once there is proof of acquiescence in acts of user which are of such a character as to support a claim of right, the claimant has established that the acts were as of right unless the owner points to some "positive acts" on his or her part which either expressly or impliedly grant permission. Here, there was no evidence that the owner, at any time, took any positive steps to prevent the use in question or did anything else from which a grant of permission reasonably could be implied.

[62] The court held that the trial judge "erred in law by failing to recognize that he could infer from use of lands to which an owner acquiesces that such use was "as of right" and sufficient to support a claim of prescription" (para. 51).

[63] As to consent or permission, the applicants say *Miller v. Hartlen* supports the proposition that the respondents bear the burden of proving some "positive acts" on the part of the subdivision developer that expressly or implicitly granted permission for passage over the subdivision roads and the Beach Road. They say the evidence does not indicate that any such request was ever made, or granted. They say Percy and Neil Brownell had been aware that the cottagers used the roads and the Beach Road since the 1960's. In that time, they say, there were no positive acts by the Brownells to limit the cottage residents' ability to travel on the subdivision roads and Beach Road. The applicants say that Mr. Brownell, when asked whether he ever gave the applicants permission to use Brownell Lane, answered "No". However, he also said the applicants had never asked permission to use Brownell Lane. The applicants say there were never any discussions with

Mr. Brownell respecting consent or permission to use Brownell Lane. They say they simply used the road to go to the beach and to visit neighbors on the hill side of the subdivision.

[64] The applicants raise issues of credibility, arguing that the evidence of the Purdys and Mr. Lennox was inconsistent. They say their evidence should be preferred, leading to recognition of a permanent right-of-way by prescription based on the doctrine of lost modern grant and or on the basis of the *Limitation of Actions Act*, as in *Gilfoy v. Westhaver* (1989), 92 N.S.R. (2d) 425 (S.C.T.D.). The Purdys and Mr. Lennox stated that there was never a passable road across the Purdys' property, and if there was one, it was rarely used. However in a previous boundary line dispute between them in 2000 they both claimed that use of various rights-of-way from the cottage properties to the shoreline resulted in the dedication of the roadway as a street, permitting public use.

[65] In *Weingart*, *supra*, the court held that a right-of-way by prescription was established where the dominant tenement holder used it without "active interference" from the servient tenement holder. Similarly, in this case, the applicants say there was no active interference from the Brownells or the respondents until 2012, when the Purdys blocked the road by placing boulders on the road at both ends of their property. The earlier non-interference by the

Brownells, the applicants say, would not constitute the express or implied permission required to negate a claim for an easement by prescription. They cite *Sharma v. Mallet*, 2004 NSSC 258, where the continued use of a shared driveway was in dispute. The court held that casual conversations between the various property owners did not constitute express permission for use of the driveway, which would obstruct an easement by prescription. Boudreau J. said:

> [27] … The evidence convinces me that the owners of both the Mallet and Sharma properties treated the driveway in question as a shared driveway, with none of them having the right to block or deny access to the other. The brief conversations mentioned were no more than politeness or courtesies offered to a neighbour, such as Ms. Sharma letting owners of the Mallet property know when unusual use of the driveway might be made for the moving in and out of tenants. These casual conversations did not constitute express permission from owners of the Mallet property regarding use of the driveway.

[66] The applicants acknowledge that two of them took steps to contact Neil Brownell and have an easement or right-of-way agreement prepared and registered to confirm the rights to the use of the subdivision roads. Prior to this, they say, there had been no permission given, and it was always known that the road and the access to the beach were intended for those who purchased cottages in the subdivision. The applicants refer to *Publicover v. Publicov*er (1991), 101 N.S.R. (2d) 75 (S.C.T.D.), where, under similar circumstances, the applicant later obtained a grant in writing respecting a long-standing prescriptive easement, the court accepted this as "not a request to use the right of way but rather a request to have a

written grant of easement in place so that any question about it would be finally resolved" (para. 24). The applicants say this is what Black and Tardif did by obtaining the grant of right-of-way from the Brownells.

**Conclusion on reservation, prescription, and acquiescence issues**

[67] With respect to the applicants' knowledge of the permission to use the tractor cut, I am satisfied that that they knew they had permission from Mr. Brownell to use the tractor cut both to access the beach and to access the hill side of the old Brownell farm.

[68] The right-of-way reserved in the Purdys' deed permitted Mr. Brownell to continue to grant permission to the applicants to use the right-of-way. I am satisfied that the Purdys knew this and apparently accepted it until around 2008, when the dispute leading to this proceeding first arose. If Mr. Brownell had retained title to the tractor cut, then he would have been continuing to consent to their use. No prescriptive rights would therefore arise. If he had not retained title, then the title-holders, Mr. and Mrs. Purdy, were neither consenting nor acquiescing to the applicants' use of this travel way across their property, certainly well before the commencement of this proceeding in 2014. As such, the applicants would not be exercising rights to enable a claim under the *Limitation of Actions Act*, which

requires the exercise of such rights (for prescription purposes) for the prescribed period until the commencement of legal proceedings in order to have the prescriptive title recognized. Since I have determined that the Purdys have title to the travel way in question, the applicants' claim under the Act fails for this reason. Similarly, in view of their use prior to 1996 with the consent of the Brownells, the claim of lost modern grant also fails.

[69] Since I have found that the applicants' use of the trail over the Purdys' land was by consent and not simply by acquiescence, there is no entitlement by prescription or lost modern grant. As such, the extent of to which the applicants may have used the trail is essentially irrelevant.

[70] On the Gould Plan the Purdys' northern boundary occurs before the location of the access to the beach, based on the boundary agreement between the Purdys and the Lennoxes. However, the 1996 deed precedes this boundary agreement. To the extent that, as of 1996, the Purdy lands may have extended northward sufficiently to include the access to the beach, that is the reserved right-of-way. The right-of-way extends to the northern boundary of the Purdys property acquired in the 1996 deed, but no further. The Purdy-Lennox agreement cannot affect the right-of-way reserved in the 1996 deed. If the Purdys northern boundary is south of the access to the beach, then I make no determination in respect of any

purported right-of-way over the Lennox property. However, on the evidence, I accept that the applicants have accessed the beach and have used the "existing travelled way" noted on the Gould plan. Therefore they have used the right-of-way as a means of ingress and egress. If the applicants do not have legal rights either to access the beach or the road on the hill to Route 366, that is a matter for another time. I do not make any determination of such rights. I simply recognise that they have exercised passage over these roads or lanes and have used them in exercising their rights over the tractor cut on the Purdys' property.

[71] To summarize, I am satisfied that the applicants' use of the roads and the tractor cut was consented to by the Brownells. There was, however, no acquiescence or consent by the Purdys from 2008 onward. The Brownells consented to their use of the tractor cut to access the beach and the road running through the "hill" to the public highway. Mr. Brownell may not have said as much to each of the applicants. However, in the circumstances shown by the evidence he intended them to have this access and the applicants were aware of this. (I note the comments of Oland J.A. in *Mason v. Partridge*, *supra*, respecting inference as an evidentiary basis for acquiescence or consent.) He consented to their use. Also, the wording in the reservation in the Purdys' deed makes it clear he consented to

the cottagers using the tractor cut over the property he eventually conveyed to the Purdys.

[72] All claims by the applicants in which an element is adverse possession or prescriptive use are therefore dismissed.

**Implied Easement**

[73] The applicants submit that a right-of-way can arise from an "implied grant", similar to a prescriptive easement or the doctrine of lost grant. In *Langille v. Tanner* (1973), 14 N.S.R. (2d) 311 (TD), Hart J. said:

> [26] Although there is no express grant of this right-of-way contained in the records of title to the property of the parties to this action, I have no hesitation in reaching the conclusion from the evidence that such a grant should be implied. The dominant tenement is that owned by the defendants and the servient tenement is that of the plaintiff. Whether this result is based upon the doctrine of lost grant or the doctrine of prescription makes little difference since both apply. I am satisfied that the evidence not only raises a presumption of original grant of easement but also establishes open and uninterrupted user of the way by the defendants and their predecessors in title for a period of more than 60 years.

[74] The applicants say their open and uninterrupted use of the way for some 51 years, beginning in the 1960's and continuing to 2011, supports their claim for a continued right-of-way for all the subdivision residents.

[75] In *Condominium Plan No. 7810477 (Owners of) v. Condominium Plan No. 7711723 (Owners of)*, [1997] A.J. No. 1121 (Alta QB), the court said:

> 41 The doctrine of implied grant stems from the equity in the cases. Generally speaking, when the owner of two adjoining lots conveys one of them, he impliedly grants to the grantee all those continuous and apparent easements that are necessary to the reasonable use of the property granted and which are, at the time of the grant, used by the owner of the entirety for the benefit of the parts granted. This doctrine is based in the principle that a person cannot derogate from his own grant…
>
> 42 Upon the severance of a tenement by devise into several parts, not only do rights of way of strict necessity pass, but also rights of way which are necessary for the reasonable enjoyment of the part devised and which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts.

[76] In *Nickerson v. Hatfield*, 2013 NSSC 133, Coady J. confirmed that an implied right-of-way requires that the easement is necessary for the reasonable enjoyment of the tenement being conveyed. He quoted from *Anger and Honsberger's Law of Real Property*, where the authors state:

> A right of way may be created by implication of law where the dominant and servient tenements have been commonly owned and the owner sells and conveys one for an absolute estate therein. There is an implied grant of all easements necessary for the reasonable enjoyment of the tenement conveyed and an implied reservation of an easement of necessity without which there could be no enjoyment of the tenement retained.
>
> A way of necessity may be acquired by an implied grant in favour of the grantee of lands over the lands of the grantor when land-locked lands are granted which are physically inaccessible unless the grantee is permitted to use the surrounding land of the grantor as an approach, and similarly a way of necessity may by implication be reserved to the grantor over the lands of the grantee when land-locked lands are retained. A way of necessity will only be implied where it is actually necessary for the use of the land retained or granted and not where it is for the more convenient enjoyment of the land granted or retained. A way of necessity will be implied where the land-locked parcel is acquired by a devise. The right to a way of necessity will cease when the right is no longer required in order to render the grant or reservation effectual.

[77] There is no implied easement in favour of the applicants. There was no conveyance that would result in an implied grant of easement in favour of the applicants.

**Dedication as Public Highway**

[78] In the alternative, the applicants submit that more than fifty years of use of Brownell Lane through the right-of-way on what is now the Purdys' property has resulted in a roadway for public use by the applicants and other cottage owners in the subdivision. In addition or in the alternative, they say, Brownell Lane is a public highway pursuant to the *Public Highways Act*, R.S.N.S. 1989, c. 371.

[79] The applicants say the evidence established that Brownell Lane, under various names, was used by the cottagers, delivery trucks, garbage trucks, a 911 road and visitors. In *Herman v. Whynot* (1976), 21 N.S.R. (2d) 201 (S.C.T.D.), at paras. 14-15, Hart J. considered whether a road had been "dedicated by the owners of the land to public use" pursuant to s. 10(1)(e) (now s. 11(1)(e)) of the *Public Highways Act*. He cited *DeYoung v. Giles* (1915), 49 N.S.R. 398, where Harris, J., said, at 403:

> The question is whether there has been a dedication and user. This is a question of fact. The intention to dedicate a highway may be openly expressed in words or writing, but as a rule it is a matter of inference. No formal act of acceptance by the public is required, but acceptance may be inferred from public user of the

> way, and the authorities lay it down that open and unobstructed user by the public for a substantial time is the evidence from which a jury may infer both dedication and acceptance.

[80] The applicants also cite *Hynes v. Hynes* (1988), 68 Nfld. & P.E.I.R. 56 (Nfld. S.C.T.D.), affirmed at 79 Nfld. & P.E.I.R. 86 (Nfld. C.A.), where the road in question was used by the public for a number of years and the use was open and unconcealed and therefore a public right-of-way existed.

[81] The applicants say Brownell Lane has been used by the public for many years without obstruction, and without permission being sought from or granted by the Brownells or the Purdys. In their defence and counterclaim in the Lennox proceeding, the Purdys and Brownells stated that "over the years the use of various rights-of-way from the cottage properties to the shoreline resulted in the dedication of the roadway as a street permitting public use" and pleaded the *Public Highways Act*, stating that there had been "a deemed disposition and that in law the right-of-way is a public highway."

[82] The applicants also point to the statement in the Boundary Line Agreement that "[a]ppurtenant to the Lennox Lands is a right of way for the purposes of access to Brownell Beach Road over that portion of the Purdy Lands depicted and shown on the plan as the 'Extension to Brownell Beach Road'", followed by the Purdys' confirmation of the Lennoxes' "right to pass over the Extension in order to gain

ingress to and egress from Brownell Beach Road in common with any other persons now having the same right." The applicants say Schedule B of the Boundary Line Agreement shows the extension to Brownell Beach Road as one of the rights-of-way that the Purdys say is a public highway.

[83] Neither Mr. Brownell nor the Purdys ever expressly or implicitly indicated an intention to dedicate the roads on the old Brownell farm as public roads and there is no evidence the Province of Nova Scotia ever accepted them as public roads. The evidence of usage by delivery trucks, garbage trucks, other service vehicles, as a 911 route, and by visitors to the cottages, does not equate to a public dedication. These are uses for the benefit of the cottage owners, and would thereby qualify as guests or invitees, but this is not a matter of public use. There is no evidence of use by the public at large.

**Configuration and scope of right-of-way**

[84] The applicants say the correct configuration of the Beach Road right-of-way is that shown on the Plan of Survey of Michael Gould, denoted as a sixteen-foot right-of-way on Brownell Lane. It commences at the southern boundary of the respondents' property (where it abuts the Trerice property) near a "Garage" depicted on the plan. It then continues northerly (approximately parallel to the

Northumberland Strait shoreline) until it meets the southern boundary of the Lennox property immediately adjacent to the area shown as "Slip Way Access to Beach" on the plan. The applicants say the aerial photographs, the survey plan overlay, and the circa 1982 Brownell Beach photo, all show "a fairly wide space of worn ground covering the Slip Way lands and also a portion of lands on the northern side of the Respondent's lands between the eastern edge of the Beach Road Right-of-Way section and the shore." The applicants say this was the area used by cottagers to access the beach and also was a vantage point for watching boating regattas, and that it would have a width of ten-to-twenty feet south of the respondents' northern boundary. The applicants (on behalf of all subdivision residents) claim the sixteen-foot-wide Beach Road right-of-way, as well as a strip of land at least ten feet wide between the northern end of the Beach Road right-of-way, easterly along the inside of the respondent's northern boundary to the "Ordinary High Water Mark" as shown on the foregoing plan. They say this strip of right-of-way is consistent with historic use and would allow continued beach access independent of passage over the Lennox family property.

[85] As noted, the applicants seek an unrestricted right-of-way for all subdivision cottage owners over the Beach Road, as well as a strip inside the north boundary of the respondent's property to the Beach. This should include the right for ingress

and egress by foot and by motor vehicle (including vehicles such as golf carts and tractors) for residents and their invitees and service providers (such as delivery people and garbage trucks.) The applicants say this scope is consistent with past use to which owners of the Beach Road acquiesced in for up to sixty years before the respondents objected.

[86] The respondents suggest in their pleadings that the road was a "tractor cut" that did not provide a basis for a vehicular right-of way. The applicants note that in *Langille, supra*, the road in dispute was described as "an old cart road". There the plaintiffs sought to block the defendants from using it, but there was evidence of continuous and uninterrupted usage for more than forty years, with no express consent. Therefore an easement existed, providing for, *inter alia*, an eleven-foot-wide road for passage by foot and motor vehicles for the defendants and their servants and invitees, and an allowance for use by vehicles providing supplies to the defendants. In the instant case, the applicants say, the road has been in continual usage by foot, tractor, and motor vehicle for more than forty years. As in *Langille*, they say, a prescriptive easement should be recognized "despite the rudimentary beginnings."

[87] The applicants also refer to *Viehbeck v. Pook*, 2012 NSSC 48, where the method of use of a granted right-of-way for beach access was in dispute; the

respondents objected to the use of vehicles by the applicants. The grant was for recreational use of the beach, without specifying whether access could be by vehicle. Wood J. considered the surrounding circumstances and held that the parties to the deed intended to permit access to the beach by motor vehicle over the right-of-way (para. 95). The applicants submit that similar reasoning should apply in this case, where there is no express grant describing the scope of the asserted easement. They say the historic use includes, among other things, passing over the portion of the lane in front of the respondent's lot by foot and by motor vehicle, as in *Viehbeck*.

[88] I am satisfied that the court should consider the surrounding circumstances in order to determine the extent of the right-of-way. This is not a matter of ambiguity but simply of determining what the words meant on their face in the circumstances. Having regard to the circumstances, including the Purdys' knowledge that Mr. Brownell was reserving a right-of-way for all cottagers in their 1996 deed, I conclude that there is a right by the applicants to a sixteen-foot access over the Purdy lands to the southern boundary of the Lennox lands, and to the extent access to the beach by the slipway is over the Purdys' lands, access to the beach by this route.

[89] In the event that a right-of-way over Beach Road and the strip inside the northern boundary of the respondents' property is recognized, the applicants say they are willing to pay the cost of any applicable amendment to the Gould survey prepared and registered under the *Land Registration Act*, S.N.S. 2001, c. 6, and also to have prepared any related legal description of the granted rights-of way.

**Conclusion**

[90] The applicants are entitled to use the tractor cut across the Purdys' land in order to access the roads running north on the hill side of the old Brownell farm to highway no. 366 and to access the beach to the extent that this access is on the Purdys' property. This is not a determination of entitlement to either route, to the extent that they may lie on the Lennox lands, but a determination that they have been exercising such access without any finding that they are not so entitled. The route of the tractor cut is shown on the Michael Gould plan and the right-of-way is eight feet on each side of the centered tractor cut crossing the Purdys' property.

[91] Although the applicants also seek additional rights on the Purdys' lands adjoining the beach to watch activity on the beach and in the water, including to park vehicles, such rights are not part of the right-of-way reserved in the deed. As

such, they are restricted to accessing the beach by foot and vehicles but not to park or remain on the Purdy lands.

MacAdam, J.