SUPREME COURT OF NOVA SCOTIA
Citation: *Croft v. Cook*, 2014 NSSC 230

Date: 20140709
Docket: Bwt. No. 306790
Registry: Bridgewater

Between:

David Croft and **Allan Croft**

Plaintiffs

-and-

Lorraine Cook and **Carolyn Cook**

Defendants

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: April 28-30 and May 1 and 2, 2014 at Bridgewater, Nova Scotia

Written Decision: July 9, 2014

Counsel: Counsel for the Plaintiffs - Michael Power, Q.C.
Counsel for the Defendants - Kathryn Dumke

Wright, J.

INTRODUCTION

[1] This is an action by the plaintiffs David Croft and Allan Croft against the defendants Loraine Cook and Carolyn Cook for a declaration that they are entitled to a right-of-way for all purposes over a hauling road located on the defendants' rural property in Lunenburg County. Ancillary to that, the plaintiffs also seek injunctive relief and damages.

[2] The property owned by the defendants (the servient tenement) was acquired by them in 1993. It consists of an area of approximately 20 acres in a more or less triangular shape and fronts on public Highway No. 404 known as the Grimm Road. Its western most boundary is at the intersection of the Grimm Road and public Highway No. 405, known as the Tanner Settlement Road. The defendants' residence is actually located on the Tanner Settlement Road on a lot immediately adjacent to the 20 acre property.

[3] Approximately 284 feet distant from that intersection, there is an entrance from the Grimm Road onto a hauling road which extends across the defendants' property in a generally easterly direction for more than 500 feet before veering to the right (in a southeasterly direction) where it meets the northern boundary line of lands jointly owned by Hilton Croft and Allan Croft (the linked dominant tenement). The hauling road then turns left in an easterly direction running along the northern boundary of this dominant tenement property before it meets the western back boundary of the 70 acre farm property owned by Allan Croft. That

farm property is a long rectangular parcel of land which fronts on Highway 332 along the Lahave River.

[4] Immediately to the north of the Allan Croft farm property is a similarly shaped 70 acre parcel of land owned by David Croft. It should be noted at the outset that the western boundary of the David Croft property abuts the eastern boundary of the Cook property at its southern end. However, the hauling road does not connect to the David Croft property from the Cook property. Rather, it connects only to the property jointly owned by Hilton Croft and Allan Croft (which is vacant land) before extending easterly to the Allan Croft farm property.

[5] All of this is shown on a survey plan prepared by Lester Berrigan, N.S.L.S. dated June 22, 2010 (except the Allan Croft farm property) with annotations he made to that plan in his testimony at trial. No survey plan has ever been prepared of the dominant tenement property owned by Hilton Croft and Allan Croft (other than being shown in part on the Berrigan survey plan as an adjoining property). Mr. Berrigan was able to say, however, that the western boundary of the Allan Croft farm property abuts the eastern boundary of the dominant tenement property which is co-owned by Allan and Hilton Croft. The combination of these two properties provides Allan Croft with access to the hauling road all the way from his farm property to the Grimm Road.

[6] That is the geographical layout of the lands in question. Before getting to the historical use of the roadway, I now turn to a brief description of the Croft family tree and land ownership.

[7] David Croft and Allan Croft are first cousins. Title to their respective 70 acre parcels of land upon which they presently live can be traced back to a 1917 deed from their great-grandfather Josiah Croft to their grandfather Anthony Croft who in turn conveyed these two parcels jointly to his sons Hilton Croft (father of David) and Ivan Croft (father of Allan) in 1944. Hilton and Ivan later exchanged deeds in 1960 whereby each came to individually own their respective 70 acre parcels of land.

[8] Attached to the 1944 deed is an old survey plan which depicts not only the two 70 acre parcels of land under conveyance, but also shows the lands immediately to the west as also being owned by Anthony Croft (which have now been identified as the dominant tenement to which the hauling road connects). That land was devised under the Will of Anthony Croft, probated in 1950, to his sons Hilton and Ivan as tenants in common. Under the Will of Ivan Croft probated in 1989, his half interest was left to his son Allan who, in the result, is presently co-owner with his uncle Hilton.

[9] To complete the title picture in a summary way, Allan Croft acquired title to his 70 acre farm property by way of a deed from his father Ivan in 1985. Similarly, David Croft acquired title to his adjoining 70 acre parcel of land by way of a deed from his father Hilton in 1999. Although they acquired title to those adjoining properties only in 1985 and 1999 respectively, both have lived on these family properties for most of their lives. They now claim a prescriptive right-of-way over the hauling road through the Cook property based on its use by both their family predecessors and themselves.

CHRONOLOGY OF EVENTS BETWEEN THE PARTIES

[10] The defendants purchased their residential property on the Tanner Settlement Road in 1972 which is a relatively small lot abutting the southern boundary of the servient tenement lands which they later purchased in 1993 from the Estate of Tom Tanner. Mr. Tanner, a bachelor who died in 1983, had previously owned the servient tenement lands since the early 1900's. His house and barn were located in a cleared area more in the centre of the property, some distance away from the hauling road. The property was essentially vacant when owned by the Tanner estate between 1983 and 1993.

[11] Prior to his purchase of the Tanner property in 1993, Mr. Cook had only walked over the hauling road on one occasion, which was in 1985 at the invitation of Robert Laffin. In his trial testimony, Mr. Cook described the appearance of the road at that time as being narrow (approximately 8 feet wide) with rutted tracks and crowded with lots of branches. He said there were also a few bushes which had grown up in the middle of the roadway with no sign of recent traffic.

[12] Mr. Cook testified that he walked the roadway as far as it went (which he highlighted on the survey plan). This was the section of the roadway running in an easterly direction which Mr. Cook testified did not then turn in a southeasterly direction down to the boundary of the Croft property. As he put it, “there was no path there that I could see extending down to the Croft property”. He therefore turned in a northeasterly direction up through the cleared fields surrounding the Tanner homestead.

[13] Mr. Cook did not set foot on the hauling road again until the time of his purchase of the property in 1993. At that time, he and his wife observed the roadway extending all the way to the Croft property (the linked dominant tenement) which by then had been cleared cut. The defendants then observed that the roadway had been built up and widened. Its surface was mostly grassy and mossy except that the section that was new to them (closest to the Croft property) was gravelled.

[14] Mr. Cook testified that he never saw anyone actually using the hauling road between 1972 and 1993. However, in or about 1990 (prior to his purchase of the Tanner property) he had observed a significant quantity of cut logs piled up on Grimm Road at the entrance to the hauling road. Although he had not walked the hauling road at that time, he knew that Allan Croft had clear cut the back of his property in 1989. He then assumed that the Crofts had broken through from their property line to build and join a new road with the hauling road as he remembered it from 1985.

[15] Curiously, the defendants made no inquiries about the past use of this hauling road at the time they purchased the property in 1993. They were satisfied from their legal counsel that there was no express grant of right-of-way through any title instrument and appear to have been satisfied by that assurance.

[16] The immediate use the defendants made of their new property was during the following year of 1994 when they restored the Tanner farmhouse, barn and hen house and operated it until the late 1990's as the Tanner Family Farm Museum.

To that end, they regularly used the hauling road to access the cleared fields where these buildings stood.

[17] Nothing of any consequence happened after that until 2006. Prior to that, the defendants saw no use being made of the hauling road other than recreational users of snowmobiles and ATVs which they tolerated. However, Mr. Cook testified that in 2006, David Croft came to his door to inform him that he planned to build a gravel pit road over the path of the hauling road for use by heavy trucks to transport shale from the back end of the Croft properties (the 70 acre parcels) out to the Grimm Road. As it turned out, in the course of gradually clearing his farmland all the way back from Highway 332, Allan Croft discovered a shale deposit very near to the southeast corner of the Cook property (the shale extending to the David Croft property to the north as well). Both David Croft and Allan Croft planned therefore to break up the shale and truck it out over the old hauling road to the Grimm Road because that was a much shorter distance to travel than having to upgrade the farm road on the Allan Croft property all the way from Highway 332.

[18] David Croft made no mention in his evidence of paying a visit to the Cooks to inform them of these plans. I accept Mr. Cook's evidence in this respect, however, that he was so informed of the Crofts' intentions, that he denied the existence of a right-of-way over his property and gave fair warning to stay off of it.

[19] Very soon after that, Mr. Cook heard heavy machinery in the woods behind his home in the direction of the hauling road. He walked to the road to discover that it was being bulldozed for leveling, widening and shaling. He confronted the operator only to be informed that the work was being done at the direction of David Croft and that it would be proceeded with.

[20] Mr. and Ms. Cook then contacted a lawyer who, on September 6, 2006 wrote a cease and desist letter to David Croft (which the latter does not recall receiving). In any event, the letter was ignored and the construction crew proceeded to level the surface of the hauling road, widen it and cover it with shale. Also, a culvert was installed under the roadway about 20 feet in from the ditch running along the Grimm Road. The ditch was then filled in with shale to make the hauling road level with the Grimm Road.

[21] Early on in this process, Mr. Cook, after consulting his lawyer, blocked the roadway with a vehicle and with fallen trees near its entrance from Grimm Road. The result of that was a visit from the RCMP. Mr. Cook says he was ordered to remove the vehicle which he complied with. Mr. Cook's testimony is that he had another conversation with David Croft at the same time to inform him that he did not have a right-of-way over the property and that Mr. Croft insisted that he did. The upgrade of the road then continued and once joined to the Grimm Road, was used for the trucking of shale from the Croft properties to the Grimm Road. The roadway was so used over a period of approximately two weeks (which Mr. Cook said was about 7-8 loads per day).

[22] Mr. Cook testified that in the following summer of 2007, the trucking of shale over the roadway started up again for a duration of approximately three weeks. His response was to again block the roadway with logs and fallen trees near its entrance from Grimm Road and also at the back end of the property near the Croft boundary line where he placed a bunch of junk, including barbed wire, to prevent passage. These obstructions were then moved by the plaintiffs.

[23] In the following spring, Mr. Cook dug up and removed both the culvert near the Grimm Road and the shale fill in the ditch which he then converted to his own use in building a spur road down to the back of his residential property. He also built a new road branching off the hauling road in a northeasterly direction towards the open fields where the Tom Tanner buildings stood, again using some of the converted road building materials.

[24] As a result, the roadway was no longer useable as a connection to the Grimm Road by any type of vehicle after the spring of 2008. This action was then commenced by the plaintiffs in January of 2009.

[25] Before reviewing the evidence of the historical use of the subject roadway, I will first set out the legal principles governing the establishment of a right-of-way by prescriptive use by or on behalf of the owners of the dominent tenement.

THE LAW OF PRESCRIPTIVE EASEMENTS

[26] It is well settled that in this province, an easement by prescription can be acquired in one of two ways, namely, under s.32 of the *Limitations of Actions Act* or under the doctrine of lost modern grant (see, for example, **Mason v. Partridge, 2005 NSCA 144**).

[27] In **Mason**, the Nova Scotia Court of Appeal cited with approval the description of the doctrine of lost modern grant set out in the *Nova Scotia Real Property Practice Manual* authored by Charles MacIntosh as follows (at pg. 7-21):

> ... The [doctrine of lost modern 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.

[28] The Nova Scotia Court of Appeal then went on to confirm the requirements for establishing an easement under either a limitations statute or the doctrine of lost modern grant by citing with approval the following passage from the well-known Ontario Court of Appeal decision in **Henderson v. Volk, 1982 CarswellOnt. 1343**:

> 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.

[29] In the ensuing passage in **Volk** (para. 15), the court added that the enjoyment must not be permissive, i.e., it cannot be a user of the right-of-way enjoyed from time to time at the will and pleasure of the owner of the property over which the easement is sought to be established. The court went on to say (at para. 21) that it is reasonable to require those seeking to rely upon the *Limitations Act* or the doctrine of lost modern grant to establish by clear evidence both the continuous use and acquiescence in such use by the owner of the servient tenement.

[30] It was the issue of acquiescence by the owner of the servient tenement in the continuous use of the right-of-way that was at the forefront of the appeal in **Mason**. In that case, the Court of Appeal ruled that the trial judge erred in law by failing to recognize that he could infer from the use of lands to which an owner acquiesces that such use was "as of right" and sufficient to support a claim of prescription.

[31] In arriving at that conclusion, the Court of Appeal adopted the following passages from *Gale On Easements*, 17th Ed. (London: Sweet & Maxwell 2002) at paras. 31-32:

> 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 added)

> 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."

[32] The Court of Appeal adopted a further passage from *Gale on Easements* which reads as follows (at para. 45):

> As the passage from *Gale* cited in para. 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. . . .

[33] I also refer to the decision of the Ontario Superior Court of Justice in **394 Lakeshore Oakville Holdings Inc. v. Misek** [2010] O.J. No. 4659 which provides an excellent and comprehensive review of the law of prescriptive easements (at paras. 58-98). That decision was affirmed on appeal, cited as [2011] O.J. No. 5431.

[34] For the sake of brevity, I will quote only two paragraphs from the appellate decision which summarizes the criteria for establishing a prescriptive easement as applied in the court below:

204 The motion judge referred to the four essential characteristics of an easement as described by the Master of the Rolls in Re Ellenborough Park, [1956] 1 Ch. 131 (Eng. C.A.):

> (i) There must be a dominant tenement (the property that enjoys the benefit of the easement) and a servient tenement (the property that is burdened);
>
> (ii) The easement must accommodate, that is, better or advantage the dominant land and not merely the owner of the land. It is not enough that an advantage has been conferred to the owner of the dominant property making his or her ownership more valuable or providing a personal benefit to him or her; rather, for there to be an easement, the right conferred must serve and be reasonably necessary for the enjoyment of the dominant tenement;
>
> (iii) Both tenements cannot be in the hands of the same person; and
>
> (iv) The easement must be capable of forming the subject matter of a grant. The following conditions must be met to fulfill this requirement: the rights claimed must not be too vague; the rights claimed must not amount to a good claim to joint occupation of the property in question or substantially deprive the owner of the servient property of proprietorship or legal possession; and the rights claimed must not be ones of mere recreation and amusement. The rights in issue must be of utility and benefit.

208 In addition to considering whether the evidence established the essential characteristics of an easement articulated in Ellenborough Park, the motion judge also considered the following criteria for establishing a prescriptive easement. These criteria apply whether the claim for the easement is based on a limitations statute or the doctrine of lost modern grant:

> (i) Use by permission or license is insufficient to establish a prescriptive easement;
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> (ii) The easement claimant's use must be open and not secret or clandestine;
>
> (iii) There must be evidence that the owner of the servient tenement knew or ought to have known what was happening on his or her land;
>
> (iv) Use permitted by neighbourliness is insufficient to establish an easement by prescription; and
>
> (v) The use of the easement must be uninterrupted for the required prescription period.

[35] As for the last criterion, the Ontario Court of Appeal also recited from one of its earlier decisions that "Uninterrupted user as of right at any point in time will create the prescriptive right under this doctrine [of lost modern grant], provided it was for at least 20 years". (see para. 207).

[36] I would add that the four essential characteristics of an easement set out in **Re Ellenborough Park** were also cited with approval by the Nova Scotia Court of Appeal in **Knock v. Fouillard**, 2007 NSCA 27 (at para. 55).

[37] As with so many prescriptive right-of-way cases, the main controversy here is both the continuous open use of the roadway running across the servient tenement lands and the acquiescence in such use by its successive owners over a 20 year period. What must be first examined therefore is the quality of the evidence which bears upon the nature and degree of the use that was made of the roadway by the plaintiffs and predecessor owners of the dominant tenement lands.

EVIDENCE OF THE PLAINTIFFS

[38] I begin with a review of the evidence of Allan Croft, co-owner with Hilton Croft of the dominant tenement lands linked by the hauling road.

[39] Allan Croft was born in 1955. His earliest recollection of the use of the hauling road was around 1962 or 1963 at which time the dominant tenement lands were jointly owned by Hilton and Ivan Croft. Allan Croft recalls going into the woods with Hilton and Ivan with a tractor and trailer, using the roadway over the Tom Tanner property and passing through a pole gate on the common boundary

line.

[40] Allan Croft described three wood harvesting activities that he participated in with his father and his uncle. One was the cutting and hauling of firewood to be burned at their homes for heat. The second was the cutting and the hauling of logs to be taken to a local mill. The third was the cutting and hauling of Christmas trees for personal and family use.

[41] Mr. Croft described the frequency of these activities between the early 1960's and 1989 (when his father Ivan died) as being once a year for the harvesting of firewood and Christmas trees and perhaps every three to four years for the cutting and hauling of logs (but with annual checks being made for availability of timber).

[42] As earlier referred to, Allan Croft was also gradually clearing the rear of his farm property back towards the Tanner property. In August of 1988, he hired Terry Veniot to clear the remaining part of his farm property at the back. Mr. Veniot, on instructions, took the logs out to the Grimm Road through the hauling road.

[43] Mr. Croft also hired Mr. Veniot in the following summer of 1989 to cut and remove all the trees on the dominant tenement property he co-owned with his Uncle Hilton. Again, Mr. Veniot took the logs out to the Grimm Road through the hauling road with a tree porter. The proceeds of the sale of the logs were split with Hilton Croft. By that date therefore, most of the timber had been cut from the

back of the farm property and the adjacent dominant tenement lands.

[44] Between 1989 and 2006, Allan Croft acknowledged that he made no use of the roadway over the servient tenement lands (although he did say he believed he had to cross it once a year to preserve his right of way status, which he did either on foot or by tractor). However, with the gradual clearing of his farm property, he connected his farm property road to the hauling road somewhere around 2003 or 2004. It was around this time that the shale deposit was discovered at the back of the Croft properties.

[45] It was in 2006 when all the trouble started with the defendants, who by that time had owned the servient tenement lands for some 13 years. The acrimony was triggered by the decision of Allan and David Croft to significantly upgrade the hauling road over the Cook property to the Grimm Road to a standard useable by heavy shale trucks. Because Allan Croft was so busy working his dairy farm, he left it to his cousin David to look after the upgrading of the roadway.

[46] I have already recounted the manner in which Mr. Cook responded to the road construction unilaterally carried out by the plaintiffs in what I would describe as a highhanded manner over Mr. Cook's objections. The acrimony only increased by the Cooks' blocking of the roadway, having it then cleared by the Crofts, only to be repeatedly blocked by Mr. Cook.

[47] I would interject here that Allan Croft also testified to a couple of personal encounters with Mr. Cook where Mr. Cook is alleged to have threatened the life of Allan Croft and that of his cattle if work on the roadway continued. Mr. Cook denied ever making any such threats in his evidence but I conclude on the whole of the evidence that those threats were in fact made. Entirely consistent with that is the calling in of the RCMP by Allan Croft to obtain and to serve on Mr. Cook a formal Notice under the *Protection of Property Act* to stay away from his farm property. Mr. Cook was also found guilty of damaging David Croft's truck in October of 2007 for which he was made subject to a Probation Order.

[48] Allan Croft decided that with the occurrence of all of these acrimonious events, he simply did not want to deal with the situation any more and stopped hauling shale. He was too busy with his farm operation and did not want to see it jeopardized in any way. In the result, Allan Croft made no use of the hauling road from 2006 (or perhaps 2007) up until the present time (this action having been started in January of 2009).

[49] Allan Croft confirmed in his evidence that the basis of his claim of prescriptive use of the right-of-way is the harvesting of wood, along with Ivan and Hilton Croft at least up until 1989, from all three Croft properties. Mr. Croft also confirmed that he never once met or spoke to Tom Tanner prior to his death in 1983 and hence never once asked for permission from Mr. Tanner or anyone else to use the hauling road leading to the Grimm Road.

[50] As for future use, Allan Croft wants to be able to use the right-of-way to transport natural resources and materials derived from the working of his farm property, notably the trucking of shale over this shorter route to the Grimm Road.

[51] I turn now to a review of the evidence of David Croft. He was born in 1952 and has worked as a fisherman. As earlier noted, he acquired his 70 acre property fronting on Highway 332 from his father Hilton in 1999 and admits that the hauling road crossing the Cook property does not actually extend to or connect with his property.

[52] David Croft's earliest recollection of the use of the hauling road dates back to around 1959 or 1960 when he accompanied his father Hilton and his uncle Ivan driving a tractor with a cart. He said the purpose of using the roadway back then was twofold. One was to cut and haul out firewood and the other was to make and repair fences along their back boundary lines (abutting the servient tenement lands). He said they did this every year, harvesting the firewood in the winter time and doing the fence work in the spring time (although it was noted in cross-examination that making fences was not mentioned in his prior discovery evidence). Mr. Croft added that the firewood was historically cut and used for heat in their homes and was done every year until conversion to oil heat at some unknown time.

[53] As for cutting and hauling logs, David Croft testified that he hired a Mr. Arthur Gardiner two or three times to cut wood on his property after its acquisition, between 2000-2006. On one of those occasions, the hauling road was

used to gain access to the property (which was confirmed by Mr. Gardiner in his evidence). David Croft also testified that they kept up the maintenance of the road from time to time by filling in ruts and removing fallen trees.

[54] David Croft further testified that he actually saw a pole gate being built by his father and uncle on the common boundary line where the roadway is located, the purpose of which was to get stray cattle back into their properties. This is consistent with the evidence of Mr. Berrigan who, on inspecting the properties in 2007 when he was commissioned by the Cooks to perform a survey, discovered remnants of barbed wire fencing along the common boundary line on either side of the hauling road but not over or along the roadway itself. Mr. Berrigan, incidently, has measured the width of the roadway as varying between 10 and 13 feet over its entire length (which I deduce from the survey plan is approximately 800 feet).

[55] Apart from those childhood memories, David Croft made only general comments about having used the roadway as a right-of-way lots of times and at all times of the year for 50 years. He said he and his family also used it for hunting and for riding snowmobiles and ATVs. He was not specific about any changes in the nature or extent of use made of the roadway prior to 2006 (except with respect to the hiring of Mr. Gardiner aforesaid). He agreed on cross-examination that the basis of his belief of his right to use the roadway emanated from his father Hilton and uncle Ivan.

[56] I interject here that David Croft also made reference to a conversation with Mr. Cook sometime in the early 2000's when for some reason they checked the property lines together. On that occasion, Mr. Croft attributes to Mr. Cook an acknowledgment of the existence of the right-of-way. I do not accept Mr. Croft's evidence on that point, both because of its vagueness and the fact that it is completely at odds with the posture that Mr. Cook has taken throughout.

[57] David Croft also confirmed that the dispute with Mr. Cook only started in 2006 after he had begun construction of the roadway, including placement of a culvert, to enable its travel by large shale trucks. I need not repeat here the evidence with respect to the repeated blocking of the roadway in response by Mr. Cook or his removal and conversion of the culvert and shale materials for road building. Since that time, the roadway has been unusable for any purpose and David Croft has not since been on it except occasionally on foot.

[58] Like his cousin Allan, David Croft testified that he never once met or spoke with Tom Tanner prior to his death in 1983 and hence was never given permission to use the roadway. Indeed, he considered that the roadway was "ours to use" and wishes to continue its use for purposes of hauling shale and logs from the back of his property to Grimm Road.

[59] I next turn to a review of the evidence of Hilton Croft, who is presently 91 years of age. Because of a medical condition, Hilton Croft was unable to attend the trial to testify. Counsel therefore agreed as a substitute to place in evidence a transcript of his discovery evidence which was taken on October 18, 2010.

[60] The anomaly here is that Hilton Croft is not named as a plaintiff, even though he is a joint owner (with Allan Croft) of the adjacent dominant tenement lands. This is said by counsel to be because of his age and perhaps other personal reasons but clearly, Hilton Croft is not entitled to any declaration of rights by the court without being a party.

[61] In any event, a review of the transcript discloses that Hilton Croft was born in 1923. He recalled that when he was growing up, he went with his father Anthony into the woods and used the hauling road over the Tom Tanner property for hauling "wood and stuff" using horses and oxen with wagons. He described its appearance then as a rough woods road and only the width of a wagon (about 8 to 9 feet). He said they kept the road limbed out to enable its use and went in there in the spring of the year.

[62] Hilton Croft said that he worked on the farm property himself from about 1936 (age 13) until about 1956 (age 33-34) when he went to work in Lunenburg. During that period he himself used the hauling road as a right-of-way and, of course, it was during that time (in 1944) that he acquired a half interest with his brother Ivan in the farmlands fronting on Highway 332 from his father Anthony. His testimony was that during that period, he used the right-of-way to cut and haul firewood in the wintertime.

[63] When asked what he knew about permission to use the right-of-way, Mr. Croft could only speculate that the "older people" must have talked to Tom Tanner about the road because "he never even put up a stink to stop us". He

acknowledged, however, that he didn't really know and although he considered Tom Tanner a good neighbour, he never actually met him in the woods.

[64] It is unfortunate that Hilton Croft was unable to testify at trial because his discovery evidence was unspecific about the use he made of the hauling road after he stopped working the farm in about 1956. Nor, of course, do we have any evidence from Ivan Croft who died in a farm accident in 1989. We are therefore left to pick up with the evidence of Allan Croft and David Croft from the time when they were young boys from about 1960 onwards.

[65] To complete my review of the evidence, I will make brief reference to the testimony of six other witnesses called by the plaintiffs who are longtime community members in that area (ranging between the ages of 56 and 70). All these witnesses attested to their observations (mostly as teenagers) of the existence of a roadway running across the Tom Tanner property all the way to the Croft property at the other end. The roadway was generally described as being just a woods road or an old hauling road with wheel ruts and a hump in the centre, before the road was built up and widened in 2006 to accommodate large shale trucks.

[66] In contrast, defence witness Calvin Laffin (age 66) testified that he spent a lot of time with Tom Tanner as a pre-teen back in the late 1950s. Mr. Laffin described Mr. Tanner as a gentle kind man with a heart of gold. He said the roadway back then was very narrow and in the far section leading to the Croft boundary line, it was just a path and more like a deer trail. He said the roadway

itself only went back to the open fields area on the property.

[67] Consistent with this is the evidence of the defendant Carolyn Cook who, when she walked the roadway in 1993 at the time of purchase, observed it to be more of a trail than a roadway that would accommodate two persons walking side by side. She described its surface then as rocky and mossy.

[68] Finally, it should be noted that the plaintiffs were not permitted to adduce evidence from a surveyor, Kevin Fogerty, interpreting a series of aerial photographs of the area going back several decades because no expert report had been prepared and filed as required by Civil Procedure Rule 55.

IDENTIFICATION OF DOMINANT TENEMENTS

[69] A perplexing question which has arisen in this case is whether the 70 acre parcel of land owned by David Croft meets the requirements of a dominant tenement. As recited earlier, the western boundary of David Croft's property adjoins the eastern boundary of the Cook property. However, the hauling road does not extend to or connect with the property of David Croft. It is obvious therefore that the access to the hauling road by David Croft, and his father Hilton before him, has been through entry on the farm property now owned by Allan Croft.

[70] It will be recalled that the hauling road, once it meets the northern boundary of the dominant tenement lands jointly owned by Hilton and Allan Croft, runs along the northern boundary of that property until it meets the western boundary

of the Allan Croft farm property. The distance between the southwest corner of the David Croft property and the hauling road where it meets the western boundary of the Allan Croft farm property is, according to the Berrigan survey plan, only a very few feet in length. It can be readily inferred that David Croft, and his father Hilton before him, crossed those few feet over the farm property of Allan Croft with consent, in order to access the hauling road.

[71] In post trial briefs requested by the Court on this point, counsel for the defendants argues that a prescriptive easement in the nature of a right-of-way cannot mature to a full right unless it connects the dominant and servient tenements. Drawing by analogy from the recent decision of Justice Hood in **Landry v. Kidlark**, 2014 NSSC 154, it is further argued that unless there is a functional proximity and connection between the dominant and servient tenements, no accrual of rights can take place.

[72] In **Landry**, the Court was there dealing with the question of the necessity for the dominant and servient tenements to be contiguous in the context of a view plane agreement covenant. Justice Hood there stated (at paras. 142-143):

> 142. I conclude it is unnecessary for dominant and servient tenements to be contiguous. No case authority was submitted to the contrary.
>
> 143. In Principles of Property Law, 5th ed. (United States: Thomson Reuters Canada, 2010), Professor Ziff says at p. 408:
>
> > This requirement [that the covenant must not have been intended as just a personal promise] ... means that two properties must be involved. Borrowing from the language of easements, there must be a dominant tenement (the property to be benefited) and a servient one (the burdened property). And as in the law of easements, apart from statute there cannot be a restrictive covenant in gross. It is not essential that the two properties be contiguous, though a functional proximity

> of inexact distance is required: a covenant affecting land in Calgary, cannot be said to benefit lands 300 kilometres away in Edmonton: ...

[73] In the present case, of course, the property of David Croft is contiguous with the Cook servient tenement property. What is not contiguous, or connected between these two properties, is the hauling road itself.

[74] Neither counsel, nor the Court, has been able to find any case authority directly on point. The Court is therefore left to rely on general principles in the law of easements in deciding this issue.

[75] In addition to the helpful overview of the law of prescriptive easements set out in **Lakeshore**, **supra**, I also refer to the Anger & Honsberger text on the *Law of Real Property* (3rd ed.) at sections 17:20.10(a) and (b). It is there stated that an easement must have both a dominant tenement to which the easement is attached and a servient tenement over which the right is granted. Although the dominant and servient lands need not be side-by-side, there must be sufficient proximity to show that the dominant lands are capable of being benefitted by the easement. It is further noted that a right-of-way easement must accommodate and serve the dominant tenement and is reasonably necessary for the better enjoyment of that tenement.

[76] After considering these principles, I have reached the conclusion that the connection between the right-of-way and the dominant tenement need not be an actual physical connection on the ground provided that there is a functional

proximity between them. This further assumes, of course, that the owner of the dominant tenement can lawfully gain access to the right-of-way with the consent or authority from the owner of the intervening lands to be crossed (which appears never to have been an issue in the present case).

[77] I am satisfied, on the facts of this case, that the hauling road running across the Cook property has been of utility and benefit to the property of David Croft. It has accommodated and served the property of David Croft for its better enjoyment. I find that there is sufficient physical proximity and functional proximity between the hauling road and the David Croft property for it to meet the requirements of a valid dominant tenement.

[78] Obviously, the primary dominant tenement here is the lands jointly owned by Hilton and Allan Croft whose northern boundary intersects the hauling road running across the Cook property. The hauling road then extends easterly along the northern boundary of that dominant tenement property until it meets the western boundary of the Allan Croft farm property. Bearing the foregoing legal principles in mind, I also find that the Allan Croft farm property also qualifies as a dominant tenement in this case.

ESTABLISHMENT AND SCOPE OF RIGHT-OF-WAY

[79] First of all, it is necessary to identify a minimum 20 year period during which the requirements for a prescriptive easement have been met, including user as of right.

[80] Clearly, the plaintiffs are unable to demonstrate a use and enjoyment of the hauling road under a claim of right which was continuous, uninterrupted, open and peaceful between 1989 and 2009 (when this action was started). It follows that they are unable to establish a prescriptive easement under the provisions of the *Limitations Act of Nova Scotia*. In order to succeed, therefore, they must establish a prescriptive easement under the lost modern grant doctrine. As noted earlier, uninterrupted user as of right at any point in time will create the prescriptive right under this doctrine, provided it was for at least 20 years.

[81] It is to be remembered that Tom Tanner was the owner of the servient tenement lands for several decades prior to his death in 1983. After his death, his estate owned these lands in a vacant state until 1993 when the property was purchased by the Cooks. There is no evidence whatsoever that the estate representatives knew or ought to have known of the use of the hauling road by the plaintiffs during that period of vacancy. The estate therefore cannot be said to have acquiesced in the use of the hauling road by the plaintiffs as of right during those years.

[82] It follows therefore that the requisite minimum 20 year period for the establishment of a prescriptive easement must predate 1983 when Mr. Tanner died.

[83] Because the discovery evidence of Hilton Croft is not reliable enough standing on its own to establish a prescriptive easement, the case ultimately turns on the strength of the evidence of Allan Croft and David Croft. As noted earlier, Allan Croft's earliest recollection of the use of the hauling road goes back to 1962 or 1963, while David Croft's earliest recollection dates back to about 1960, both as youngsters. It follows that the plaintiffs' best case for establishing a prescriptive easement is during the 20 year period between 1963 and 1983.

[84] There is no question but that the use of the hauling road by the plaintiffs during this period was seasonal in nature with the harvesting of logs and firewood. However, it is well-established in law that with a right-of-way, the requirement for its uninterrupted use can be sufficient if the use was of such a nature, and took place at such intervals, as to indicate to the ordinarily diligent owner of the servient tenement that a right is being claimed.

[85] This principle is well summarized in the Cheshire & Burns text on *Modern Real Property*, 14th Ed. (Butterworths, 1988) at p. 516. It reads as follows:

> In addition to being as of right, user must also be continuous, though the continuity varies according to the nature of the right in question. For instance, a right of way from the nature of the case admits only of occasional enjoyment, and therefore if it is used as and when occasion demands, the requirement of continuity is satisfied. But so far as a discontinuous easement, such as a right of way, is concerned, it is impossible to define what in every case constitutes sufficient continuity of user. Every case must depend upon the exact nature of the right claimed, and all that can be said is that the user must be such as to disclose to the servient owner the fact that a continuous right to enjoyment is being asserted and that therefore it ought to be resisted if it is not to ripen into a permanent right. The user must assert a right, and not be merely dependent for its continuance upon the tolerance and neighbourly good nature of the servient owner.

[86] Although close to the line, I am satisfied on a preponderance of the evidence as a whole that the plaintiffs have met the requirement of continuous, uninterrupted, open and peaceful use of the hauling road for the 20 year period between 1963 and 1983 for the purpose of harvesting and hauling wood. Although it was seasonal in nature, it was used as and when occasion demanded and took place at such intervals as would indicate to the servient owner the fact that a continuous right to enjoyment was being asserted.

[87] That brings me to a consideration of the requirement of acquiescence on the part of the servient owner which is the very foundation of prescription. As noted by the motions judge in **Lakeshore** (at para. 85) the person claiming the easement must show that the owner of the servient land has acquiesced in its use. The latter must have acquiesced, yet not given permission.

[88] It is not easy to tell whether or not there was, in fact, acquiescence in a particular case. Earlier in this decision (at paras. 30-32) I referred to the law on the distinction between acquiescence and permission. I also referred to the finding of the Nova Scotia Court of Appeal in **Mason** that a court can infer from the use of lands to which an owner acquiesces that such use was as of right and sufficient to support a claim of prescription.

[89] For the claim to a prescriptive easement to succeed, there must be evidence that the owner of the servient tenement either knew or ought to have known what was happening on his or her land. That will depend, of course, on the openness of

the use made.

[90] In the present case, I am satisfied that the plaintiffs and their respective fathers were open in their seasonal use of the hauling road such that Tom Tanner would have had a reasonable opportunity of becoming aware of that use. I conclude that Mr. Tanner must have known, or at least ought to have known, of the use being made of the hauling road over his property. There is no evidence whatsoever that Mr. Tanner at any time either objected to such use or committed any acts from which permission to use the hauling road might be inferred.

[91] As stated by the motions judge in **Lakeshore** (at para. 94), "Where the use is notorious and the owner of the servient tenement makes no objection, then his or her acquiescence to use as a right of the dominant tenement can more readily be inferred" (citing **Henderson**, **supra**).

[92] Considering the evidence as a whole, I am prepared to draw the inference that Mr. Tanner, during the 20 year period between 1963 and 1983 at the very least, acquiesced in the seasonal use of the hauling road by the plaintiffs for purposes of harvesting and hauling wood to the extent that such use was as of right and sufficient to support a claim of prescription.

[93] Having thus found that the plaintiffs have met the requirements of establishing a prescriptive right-of-way over the hauling road, it remains to address the permitted scope of use of this right-of-way.

[94] The general rule is that the burden on the servient tenement cannot, without consent, be increased by a substantial alteration in the character and mode of user of the easement beyond the accustomed use established by prescription. By example, I refer to the following passage from the judgment of Justice Cory in **Henderson**, **supra**, at para. 16:

> Further, the nature of the user cannot be changed by the owner of the dominant tenement. As an ancient example, a way used for the passage of carriages cannot be used for driving horned cattle or swine. In the same vein, the user is not entitled to change the character of his land so as to substantially increase or alter the burden on the servient tenant. Nor may the user increase the intensity of his use and thereby alter or increase the burden upon the servient tenement. See, for example, British Railways Board v. Glass, [1965] Ch. 538.

[95] Plainly, the use made of the hauling road by the plaintiffs in 2006-2007 (and which the plaintiffs wish to continue), was of a different kind and for a different purpose than its former accustomed use for harvesting wood with farm equipment. The plaintiffs, without consent, upgraded the hauling road by widening it from approximately 8 feet to a width variation of 10-13 feet, building it up with a bulldozer and surfacing it with shale, and installing a culvert, all to accommodate heavy shale truck traffic. This is well beyond the nature and scope of the accustomed use of the hauling road by prescription. The plaintiffs therefore had no lawful right to upgrade the hauling road as they did, without consent, for use of passage by heavy shale trucks to and from their respective properties. Such unlawful or excessive use of a right-of-way is a trespass on the servient tenement.

DAMAGES CLAIMS

[96] Both the plaintiffs and the defendants have claimed general and special damages against each other in this action. However, very little evidence on damages was adduced at trial as it was not the focus of attention.

[97] Having found that the plaintiffs exceeded their permitted use of the right-of-way by the events of 2006-2007, they are clearly not entitled to recover damages pertaining to road building materials retained by the defendants or loss of profits from interference with the removal of shale deposits from their respective properties. The plaintiffs' claim for damages is therefore dismissed.

[98] As for the defendants, their claim for recovery of the $600 cost of removing the shale fill from the ditch at the entrance to the Grimm Road, placed there by the plaintiffs, is also denied where that fill was converted by Mr. Cook to his own use in building a spur road of his own. However, the defendants are awarded nominal damages of $250 payable by each of the plaintiffs for the acts of trespass committed in 2006-2007. The tort of trespass is, of course, actionable *per se* without proof of special damages.

CONCLUSION

[99] The plaintiffs are entitled to a declaration that they are entitled to use the hauling road crossing the Cook servient lands for the sole purpose of harvesting and hauling wood from the back of their respective properties. Such use is to be

occasional in keeping with the accustomed use of the right-of-way during the prescription period and is further restricted to the use of farm equipment or farm vehicles in the hauling of wood. To be clear, the plaintiffs are not permitted to use the hauling road for purposes of trucking shale deposits from their respective properties out to the Grimm Road. I again observe that David Croft's permitted use of the hauling road will require the consent of the owners of the other two intervening Croft properties to cross their lands to gain access to the hauling road.

[100] Where success has been divided between the parties, I direct that both the plaintiffs and the defendants are to bear their own costs of this action.

J.