

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

-and-

Lorraine Cook and Carolyn Cook

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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

Subject: Prescriptive easements - essential characteristics - change in use - multiple dominant tenements.

Summary: The plaintiffs, owners of separate properties adjoining lands of the defendants, claimed a prescriptive right-of-way over a hauling road crossing the defendants' rural property. The prescriptive use was based on the seasonal harvesting and hauling of wood over the hauling road dating back to the 1960's. The defendants purchased the 20 acre servient lands in 1993, prior to which they were owned for several decades by Tanner.

In 2006, the plaintiffs substantially upgraded the hauling road to accommodate heavy shale truck traffic after discovering shale deposits at the back of their respective 70 acre properties. The defendants objected, maintaining that no right-of-way existed over their lands, and barricaded the hauling road. This ultimately lead to the commencement of this action in early 2009 for declaratory and injunctive relief.

Issues:

- (a) Which lands qualify as dominant tenements?
- (b) Have the plaintiffs met the requirements of establishing a prescriptive easement by continuous, uninterrupted, open and peaceful use of the hauling road as of right for a 20 year period (under the doctrine of lost modern grant)?
- (c) If so, what is the permitted scope of use of the right-of-way?
- (d) What, if any, damages should be awarded?

Held:

- (a) Three properties under the ownership of the plaintiffs (or either of them) qualified as dominant tenements because the right-of-way was of utility and benefit to all three properties and was reasonably necessary for their better enjoyment (even though the hauling road did not physically connect with one of them);
- (b) The plaintiffs were able to establish prescriptive use of the right-of-way, through themselves and their respective fathers, during the 20 year period between 1963 and 1983 for the accustomed use of harvesting and hauling wood over the right-of-way from the back of their respective properties;
- (c) Because the burden on the servient lands cannot be increased without consent, either by a substantial alteration in the character or mode of user of the dominant tenement, the plaintiffs cannot be permitted to use the right-of-way for the passage of heavy shale truck traffic; and
- (d) Neither party presented a sustainable claim of damages but the defendants were awarded nominal changes of \$250 payable by both of the plaintiffs for their acts of trespass in 2006.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THE COVER SHEET.
