

SUPREME COURT OF NOVA SCOTIA
Citation: *Langille v. Penney*, 2017 NSSC 133

Date: 20170529
Docket: BWT. No. 448023
Registry: Bridgewater

Between:

Bedford Reid Langille, David Charles Campbell, Sharon Joan Campbell, Stanley
R. Sutherland, Barry Vernon Sutherland, Heather Ann Emmett, Scott Cullan and
Rose Marie Hatt

Applicants

and

Jacob Frederick Penney

Respondents

and

Registrar General of Land Titles

Intervenor

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Judge: The Honourable Justice C. Richard Coughlan

Heard: January 17, 2017 in Bridgewater, Nova Scotia

Final Written Submissions: February 17, 2017

Written Decision: May 29, 2017

Subject: Real property – *Land Registration Act* – overriding interests –
correction of parcel register

Summary:

Jacob Frederick Penney purchased land at Middle New Cornwall, Lunenburg County. The deeds to the applicants contained reference to a right-of-way to Caribou Lake over part of the land purchased by Mr. Penney. The right-of-way was used to launch boats into the lake. Mr. Penney's

predecessor in title knew there was a laneway to the shore of the lake which was called a common right-of-way and that the applicant Bedford Reid Langille used it to put his boat in the lake. In the process of registering Mr. Penney's property under the *Land Registration Act* the right-of-way to the lake was omitted. Prior to purchasing the land Mr. Penney saw a plan of survey which contained a notation "Laneway to Shore". When he occupied the property Mr. Penney knew there was a narrow, overgrown road down the shore lot to the lake. The applicants seek a declaration they have rights-of-way over Mr. Penney's land. Mr. Penney opposes the application.

Issue: Are the applicants entitled to a declaration they have a right-of-way to Caribou Lake and to have the parcel registers for the respondent's properties corrected to include the right-of-way.

Result: The applicants have express grants of right-of-way to the lake as set out in their deeds. The right-of-way is an easement or right-of-way that is being used and enjoyed and therefore an overriding interest as defined in s. 3(1)(k) of the *Land Registration Act*.

The parcel registries for the respondent's properties will be corrected to include the right-of-way to Caribou Lake.

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

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Counsel: Ian R. Dunbar and Robert Mroz for the Applicants
Brent H. Silver and Hillary Brannen for the Respondent
Ryan T. Brothers for the Intervenor

Coughlan, J.

[1] Jacob Frederick Penney purchased land at Middle New Cornwall, Lunenburg County. The deeds to the applicants contained reference to a right-of-way to Caribou Lake over part of the land purchased by Mr. Penney. The right-of-way was used to launch boats into the lake. Mr. Penney's predecessor in title knew there was a laneway to the shore of the lake which was called a common right-of-way and that the applicant Bedford Reid Langille used it to put his boat in the lake. In the process of registering Mr. Penney's property under the *Land Registration Act* the right-of-way to the lake was omitted. Prior to purchasing the land Mr. Penney saw a plan of survey which contained a notation "Laneway to Shore". When he occupied the property Mr. Penney knew there was a narrow, overgrown road down the shore lot to the lake. The applicants seek a declaration they have rights-of-way over Mr. Penney's land. Mr. Penney opposes the application.

[2] The facts are as follows:

[3] In 1972 Arnold Barkhouse and Hazel Barkhouse conveyed real property at Middle New Cornwall, Lunenburg County, Nova Scotia to Fay Robar. The deed contained the following grant of right-of-way:

TOGETHER with a Right-of-Way for the Grantee in common with the Grantors and other users at all times and for all purposes leading from the public highway to the shore line of Cariboo Lake,

[4] In 1971 Arnold Barkhouse and Hazel Barkhouse conveyed real property at New Cornwall, Lunenburg County, Nova Scotia to Reginald S. Sutherland and Janice Barkhouse and in 1972 to Eugene Barkhouse.

[5] A plan of properties at “Carbou Village” and subdivision of property of Eugene O. Barkhouse and Bryon B. Barkhouse located at Middle New Cornwall, Lunenburg County, Nova Scotia was prepared by Ronald G. Wentzell Land Surveyors Limited and approved by the Lunenburg County District Planning Commission.

[6] An agreement dated April 21, 1983 between Eugene O. Barkhouse, Byron B. Barkhouse, Reginald S. Sutherland, Janice Barkhouse, Raymond Clyde Hatt, Rose Marie Hatt, Bedford Reid Langille, Verbena R. Campbell and Fay Robar was recorded at the Registry of Deeds at Bridgewater, Nova Scotia on May 30, 1983 in Book 326 at page 374 as no. 4462. In the agreement the parties agreed the above mentioned plan of survey accurately showed their respective properties as marked with their respective names, namely:

Lot No. 1: Reginald S. Sutherland

Lot No. 1A: under conveyance to Reginald S. Sutherland

Lot No. 2: Eugene O. Barkhouse

Lot No. 2A: under conveyance to Eugene O. Barkhouse

Lot No. 3: Janice Barkhouse

Lot No. 3A: under conveyance to Janice Barkhouse

Lot No. 4: shown as lands of James F. Ritchie but now conveyed to and owned by Raymond Clyde Hatt and Rose Marie Hatt

Lot No. 5: Bedford R. Langille

Lot No. 5A: under conveyance to Bedford R. Langille

Lot No. 6: Shown as lands of John D. Campbell and Verbena R. Campbell and now owned by Verbena R. Campbell, widow of John D. Campbell

Lot No. 7: Bedford R. Langille

Lot No. 8: Fay Robar

Lot No. 8A: under conveyance to Fay Robar

Lot No. 8B: under conveyance to Fay Robar

Lot marked Eugene O. Barkhouse and Byron B. Barkhouse with an area of 68,600 square feet

[7] In deeds dated April 21, 1983 to Reginald S. Sutherland, Raymond Clyde Hatt and Rose Marie Hatt, Verbena R. Campbell, Janice Barkhouse and Bedford Reid Langille from Byron Bernard Barkhouse and Eugene Oswald Barkhouse the following words were present:

TOGETHER WITH a perpetual, free and uninterrupted right-of-way in common with others for all purposes over Lot 8B as shown on the Plan hereinbefore referred to; the said Lot No. 8B being a strip of land along the boundary line of lands of Edmund R. Saunders and extending to the shore of Caribou Lake.

[8] A deed to Fay Robar from Byron Bernard Barkhouse and Eugene Oswald Barkhouse dated April 21, 1983 contained the following reservation of right-of-way:

The aforesaid Lot No. 8B being subject to a perpetual, free and uninterrupted right-of-way in common with others for all purposes over Lot No. 8B as shown on the Plan hereinbefore referred to; the said Lot No. 8B being a strip of land along the boundary line of lands of Edmund R. Saunders and extending to the shore of Caribou Lake.

[9] Subsequently, Fay Robar reconfigured her property at Middle New Cornwall into Lots R and 10 as shown on a plan of survey showing Lot "R" and Lot "10" property of Fay Robar at Caribou Lake District of Middle New Cornwall, Lunenburg County, Nova Scotia by Becker & Wentzell Survey's Ltd. dated December 17, 1991, and approved by the Lunenburg County District Planning Commission. The approval subdivided Lot 8B to create Lots 9 and 10 and then

consolidate existing Lots 8 and 8A with new Lot 9 to create Lot R. The plan of survey contains a notation that “Lot 10 is approved as an undersized, non-development lot under Section 31 of the Subdivision Regulations”. The plan of survey also has “Laneway to Shore” marked on Lot 10.

[10] It appears Fay Robar conveyed Lots R and 10 to Arnold Wilbert Robar. Arnold Wilbert Robar conveyed Lots R and 10 to himself and Karen Ann Faulkenham as joint tenants. The right-of-way to Caribou Lake is not reserved in the deed to Arnold Wilbert Robar and Karen Ann Faulkenham.

[11] Arnold Wilbert Robar and his wife Karen Ann Robar, formerly Karen Ann Robar, lived on the property acquired from Fay Robar from 1992 to 2010. Karen Ann Robar knew the laneway to the shore of the Lake was a right-of-way which was always called a common right-of-way. Ms. Robar testified and I accept that she knew Bedford Reid Langille used the laneway to put his boat in and get the boat out of the lake. Ms. Robar said she had not often seen Mr. Langille use the laneway.

[12] Arnold Wilbert Robar and Karen Robar sold Lots 10 and R to Jacob Frederick Penney in 2010. In the application to register the land pursuant to the *Land Registration Act S.N.S. 2001 c.6 (LRA)* their solicitor did not include the right-of-way to the shore of the lake. The deed from Mr. and Ms. Robar to Mr. Penney did not reserve the right-of-way to the lake.

[13] Prior to purchasing the property from Mr. and Ms. Robar, Mr. Penney reviewed the survey plan by Becker & Wentzell Survey’s Ltd. dated December 17, 1991, mentioned above, which contained the words “Laneway to Shore”. Mr.

Penney was aware, when he moved into the property, there was a narrow overgrown road down the shore lot to the lake.

[14] Since 1983 until 2012, Bedford Reid Langille has every summer used the right-of-way to Caribou Lake to launch and retrieve his eighteen foot inboard/outboard boat. He used various four wheel drive trucks to launch and retrieve his boat. Mr. Langille maintained the rights-of-way contained in his deed, including the laneway to Caribou Lake, by purchasing and leveling gravel on the rights of way and clearing them of grass and debris such as fallen branches. In 1983 Mr. Langille removed bushes from the laneway to the lake with Fay Robar's permission.

[15] In May 2012, Jacob Penney, in a conversation with Mr. Langille, denied Mr. Langille had a right-of-way to Caribou Lake but allowed Mr. Langille to launch his boat. In 2014, Mr. Langille provided gravel which Mr. Penney placed on the two rights-of-way, including the right-of-way to the lake. In 2015, Mr. Langille used the right-of-way to launch his boat into Caribou Lake.

[16] Every year between 1994 and 2015 Scott Cullen, who moved to Middle New Cornwall in 1994, used the right-of-way to Caribou Lake to launch and retrieve his boat using four wheel drive vehicles. At various times between 1994 and 2010, Mr. Cullen trimmed grass on the laneway using his ride-on mower and weed whacker. At various times between 1994 and 2010 the base of the laneway washed out in the spring and Mr. Cullen and Bradford Reid Langille filled in the base of the laneway with rocks and gravel.

[17] When Arnold Wilbert Robar and Karen Ann Robar conveyed their property at Middle New Cornwall to Jacob Frederick Penney they were represented by Gordon L. Graham a lawyer who applied to register or “migrate” the property pursuant to the *Land Registration Act*. In June 2012 it was brought to Mr. Graham’s attention he had not included the right-of-way to Caribou Lake in the parcel description at the time of migration. After reviewing his title search, Mr. Graham informed Mr. Penney’s lawyer he intended to correct the parcel registers to include the right-of-way to Caribou Lake. Mr. Graham was informed by Mr. Penney’s lawyer that Mr. Penney would not consent to have the parcel registers corrected. Mr. Graham then wrote to the Registrar General of Land Titles requesting the Registrar General correct the parcel registers by adding the right-of-way to Caribou Lake. The Registrar General did not exercise his discretion to correct the parcel registers.

[18] The applicants brought this application in court pursuant to Section 35 of the LRA for a declaration they hold express or implied rights-of-way over Mr. Penney’s properties with metes and bounds to be determined by the court and correction of the parcel registers. Jacob Penney contests the application. The Registrar General of Land Titles was added as an intervenor.

[19] The first issue to be addressed is whether the applicants or their predecessors in title were granted the right-of-way they ask be added to the parcel registers of Mr. Penney’s lands.

[20] As stated above, in the 1972 deed to Fay Robar the grantors included a right-of-way from the public highway to Cariboo (sic) Lake.

[21] The deeds to the applicants or their predecessors in title dated April 21, 1983 contained the following words:

TOGETHER WITH a perpetual, free and uninterrupted right-of-way in common with others for all purposes over Lot No. 8B as shown on the Plan hereinbefore referred to; the said Lot 8B being a strip of land along the boundary line of lands of Edmund R. Saunders and extending to the shore of Caribou Lake.

[22] The applicants who were not grantees of the April 21, 1983, deeds are the grantees of deeds which contained the same grant of rights-of-way as contained in the April 21, 1983 deeds.

[23] The deed to Fay Robar dated April 21, 1983 contained the following reservation:

The aforesaid Lot No. 8B being subject to a perpetual, free and uninterrupted right-of-way in common with others for all purposes over Lot No. 8B as shown on the Plan hereinbefore referred to; the said Lot No. 8B being a strip of land along the boundary line of lands of Edmund R. Saunders and extending to the shore of Caribou Lake.

[24] The governing principles as to how a conveyance is to be interpreted were set out in **Knock v. Fouillard** 2007 NSCA 27 where Fichaud J.A., in giving the Court's judgment stated at para. 27:

In the interpretation of a conveyance it is important to recall three governing principles:

(a) First, it is unnecessary to use a particular incantative word of "grant." The *Conveyancing Act*, R.S.N.S. 1989, c. 97, s. 10(2) says that a conveyance "does not require ... any special form of words." LaForest, *Anger and Honsberger, Law of Real Property* (3rd ed. - looseleaf, Canada Law Book) vol. 2, para 17:20.20(b) says:

It is not necessary to use the word "grant" or any other particular words to create an easement by deed, so long as the words used show an intention to create an easement which is recognized in law. Where, on the face of the deed there appears a manifest intention to create an easement, that intention will be given effect if the words of the deed can bear that construction.

To the same effect: *Halsbury's Laws of England* (4th Edition), vol. 14, para 50. The question is whether the deed's words show an intent that there be a right-of-way not conditioned on prescriptive rights.

(b) Second, to ascertain whether the words show this intent, the court should construe the document as a whole, if possible giving meaning to all its words. The *Conveyancing Act*, s. 11(1) says: "A conveyance shall be read as a whole and if it contains contradictory provisions the later provisions shall be effective." Fridman, *The Law of Contract* (5th Edition), p. 457 says:

The contract should be construed as a whole, giving effect to everything in it if at all possible.

No word should be superfluous (unless of course, as happened in one instance, it is truly meaningless and can be ignored).

This principle applies to the interpretation of a deed: *Anger and Honsberger*, para 25:40. *Gale on Easements* (Sweet v. Maxwell, 17th ed.) para 9-14 says:

In the case of an express grant the language of the instrument must be referred to. The court will have regard to the conveyance as a whole, including any plan that forms part of it, even though the plan is not mentioned in the parcels or is said to be for identification purposes only.

In *Wheeler v. Wheeler* (1979), 25 N.B.R. (2d) 376 (C.A.), the deed's text granted a remainder interest to an individual who was not identified as a grantee in the deed's premises. The court (para 5) cited this principle - construction as a whole - to uphold the conveyance of the remainder. Here, the 1993 deed does not identify Mr. Knock as a "grantee," but the schedule contains the wording concerning the right-of-way. The court must try to give meaning to that wording. The words are not shelved just because they appear in the schedule.

(c) Third, the court's first task is to determine whether an unambiguous intention is manifested objectively by the words of the deed, not by the parties' subjective wishes, motives or recollections. The primary source is the document, not the psyche. *Fridman*, p. 15 states:

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions ...

Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed and if so, upon what. This is especially true where a document containing their agreement has been prepared and signed by the parties. If the plain wording of the document reveals a clear and unambiguous intent, it is not necessary to go further.

In the process of interpretation, a court may not utilize the parties' subjective wishes, motives or intent to alter the unambiguous and objectively manifest intent in the deed's wording. *Fridman*, pp. 443-4 and cases cited; *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 at p. 518-520; *Bauer v. Bank of Montreal* (1980), 110 D.L.R. (3d) 424 (S.C.C.) at p. 432; *Anger v. Honsberger* para 17:20.30(a) quoted below at para 60.

[25] I find the words in the April 21, 1983 deeds to the applicants or their predecessors in title, objectively interpreted, manifest an unambiguous intention that the grantees of the deeds have a right-of-way to Caribou Lake. This finding is supported by the reservation in the deed of the same date to Fay Robar.

[26] Justice Fichaud went on in **Knock v. Fouillard**, *supra*, to set out the essential elements necessary for an easement stating at para. 55:

Gale on Easements, para 1-07 lists the four essentials for an easement, stated by the Court of Appeal in *Re Ellenborough Park*; *Re Davis*, [1956] Ch. 131:

1. There must be a dominant and a servient tenement.
2. An easement must accommodate the dominant tenement.
3. Dominant and servient owners must be different persons.
4. A right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.

[27] In the April 21, 1983 deeds to the applicants or their predecessors in title:

1. The dominant tenement is the grantees' lands, now the applicants' lands, and the servient tenement is Lot 8B.

2. The easement accommodates the dominant tenement, the applicants' lands.
3. The dominant tenement owners were the applicants or their predecessors in title now the applicants. The servient tenement owner was Fay Robar now Jacob Frederick Penney.
4. A right-of-way as described in the deeds is capable of forming the subject matter of a grant.

[28] I find the applicants have express grants of right-of-way to the shore of Caribou Lake as set out in their deeds.

[29] The approach a court should take to determine the extent of a right-of-way by express grant was addressed by Fichaud J.A., in **Knock v. Fouillard**, supra, in which he stated at para. 60:

Absent a direction from the words in the deed, the court may draw assistance to resolve ambiguity from the surrounding circumstances at the time of the deed's execution. *Anger and Honsberger*, para 17; 20.30(a) summarizes the approach to determine the extent of a right-of-way by express grant:

... The nature and extent of a right-of-way created by an express grant depends on the proper construction of the language of the instrument creating it. The following rules apply in interpreting the instrument: (1) The grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect of the intention of the parties. (2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant. (3) The past behaviour of the parties in connection with the use of the right of way may be regarded as a practical construction of the use of the way. (4) In case of doubt, construction should be in favour of the grantee.

See also: *Laurie v. Winch*, [1953] 1 S.C.R. 49, at p. 56; *Gale on Easements*, para 1-123, 9-15.

[30] In this case the language is clear the right-of-way is over Lot 8B for access to Caribou Lake.

[31] Section 73(1)(e) of the LRA provides:

73(1) “Notwithstanding anything contained in this Act, the following interests, whether or not recorded or registered, and no other interests, shall be enforced with priority over all other interests according to law”

...

(e) “an easement or right of way that is being used and enjoyed”

[32] An “overriding interest” is defined in section 3(1)(k) of the LRA as an interest referred to in subsection 73(1).

[33] The Supreme Court of Canada addressed how statutory interpretation should be undertaken. In giving the Court’s judgment in **Rizzo & Rizzo Shoes Ltd. (Re)** [1998] 1 S.C.R. 27 Iacobucci J., stated at para. 21:

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “*Construction of Statutes*”); Pierre-Andre Cote, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and intention of Parliament.

[34] Based on their ordinary meaning and grammatical sense, section 73(1)(e) means what it says: a right-of-way that is being used and enjoyed is an overriding interest which is to be enforced over all other interests according to law whether or not it has been recorded or registered.

[35] Is such an interpretation in accord with the scheme of the LRA, its object and the intention of the Legislature?

[36] In discussing the LRA in **Nova Scotia (Attorney General) v. Brill**, 2010 NSCA 69, Fichaud J.A., in giving the Court's judgment wrote at paras. 162, 163 and 165:

162. By s. 20, "a parcel register is a complete statement of all interests affecting the parcel". This is subject to the exceptions expressly noted in the *LRA*, such as overriding interests and challenges to the contents of the parcel register that may be resolved by the Registrar General and the Court. By s. 6, the Crown is bound, as is everyone. . .

163. The *LRA* involves the mirror, curtain and insurance principles of land title systems. These mean, respectively, that the register should accurately reflect the title, the register is the only source of title information, and there is indemnity to those who suffer a loss because of a flaw in the land registration system. *Anger & Honsberger*, para. 30:40.30. MacIntosh, *Nova Scotia Real Property Practice Manual*, para. 16-2.

165. I agree that the parcel register under Nova Scotia's *LRA* would have *in rem* effect against the world, including the Crown, subject to the exceptions expressly prescribed in the *LRA*. . .

[37] The LRA provides there are exceptions to a parcel register being a complete statement of all interests affecting a parcel. Consequently, interpreting section 73(1)(e) in its ordinary and grammatical sense is in accord with the scheme and object of the LRA and the intention of the Legislature which include providing certainty in ownership of interests in land subject to exceptions set out in the Act.

[38] I found the easement to Caribou Lake was used by Bedford Reid Langille from 1983 to 2012, he maintained the right-of-way by purchasing and leveling gravel on the right-of-way and clearing it of debris. In 2014 Mr. Langille provided gravel which was placed on the right-of-way to the lake. Mr. Langille also used the right-of-way to the lake in 2015. I found every year between 1994 and 2015 Scott Cullen used the right-of-way to Caribou Lake to launch and retrieve his boat from the lake. At various times between 1994 and 2010 Mr. Cullen would trim grass on the right-of-way and maintained it.

[39] I find the right-of-way to Caribou Lake described in the deeds to the applicants is a right-of-way that is being used and enjoyed and is an overriding interest which may be enforced in accordance with section 73(1)(e) of the LRA.

[40] The applicants seek an order pursuant to section 35 of the LRA recognizing their rights-of-way and for the correction of the parcel registers of Jacob Frederick Penney's properties at Middle New Cornwall, Lunenburg County, Nova Scotia being PID No. 60211802 and PID No. 60211810.

[41] Section 35 of the LRA provides:

35 (1) A person who objects to and is aggrieved by a registration in a parcel register may commence a proceeding before the court requesting a declaration as to the rights of the parties, an order for correction of the registration and a determination of entitlement to compensation, if any.

(2) Subject to Section 92A, and unless otherwise ordered by the court, the following are parties to any proceeding pursuant to this Section:

- (a) all registered owners of the parcel in question
 - (i) at the time of the registration objected to, and
 - (ii) at the time that the proceeding is commenced; and

(b) the person aggrieved.

(3) A person commencing a proceeding pursuant to this Section shall provide written notice, at the time the proceeding is commenced, to all interest holders appearing in the parcel register.

(4) The court shall determine the rights of the parties according to law, subject to the following principles:

(a) the person aggrieved may have the registration corrected;

(b) any correction of the registration shall preserve the right to compensation of a person who obtained a registered interest from a registered owner who registered the interest objected to; and

(c) the court may, where it is just and equitable to do so, confirm the registration.

(5) Where the court corrects the registration objected to, but the correction of the registration cannot fully nullify the effects of the registration, or where the court determines that it is just and equitable to confirm the registration, the court shall determine which of the parties suffered loss by reason of the registration and order

(a) that any party who suffered loss be compensated in accordance with subsection (7) and Sections 85 and 86; or

(b) payment of damages by one party to another.

(6) In determining whether it is just and equitable to confirm the registration objected to, the court shall consider

(a) the nature of the ownership and the use of the parcel by the parties;

(b) the circumstances of the registration;

(c) the special characteristics of the parcel and their significance to the parties;

(d) the willingness of any of the parties to receive compensation in lieu of an interest in the parcel;

(e) the ease with which the amount of compensation for a loss may be determined; and

(f) any other circumstances that, in the opinion of the court, are relevant to its determination.

(7) A registered owner is not entitled to compensation or to retention of any of the benefits of a registration made in error unless that owner

- (a) believed that the registration was authorized by law;
- (b) had no knowledge of the facts that made the registration unauthorized; and
- (c) gave consideration for the registered interest or detrimentally relied upon the registration. *2008, c. 19, s. 15.*

[42] In determining whether an order to correct the registration of the parcel registries is just and equitable, I am to consider the factors set out in subsection 35(6) of the LRA.

(a) The nature of the ownership and the use of the parcel by the parties:

Much of Lot 8B which is subject to the right-of-way to Caribou Lake is now Lot 10 shown on the plan of survey by Becker & Wentzell Surveys Ltd. dated December 17, 1991, which is an undersized non-development lot.

The applicants have used the right-of-way since 1983 to launch boats into the lake. The applicants have also maintained the right-of-way.

(b) The circumstances of the registration:

The applicants were not involved in the registration of the properties in question. It was an oversight that the right-of-way to the lake was not included when the properties were registered pursuant to the LRA.

(c) The special characteristics of the parcel and their significance to the parties:

Much of the property upon which the right-of-way is located (Lot 10) is an undersized lot which cannot be developed. This limits the use Mr. Penney can make of the land. The applicants use the right-of-way as access to the lake to launch their boats.

(d) The willingness of any of the parties to receive compensation in lieu of an interest in the parcel:

There is no evidence concerning this factor.

(e) The ease with which the amount of compensation for a loss may be determined:

There is no evidence concerning this factor.

(f) Any other circumstances that, in the opinion of the court, are relevant to its determination.

Karen Ann Robar who along with her husband Arnold Wilbert Robar sold the properties in question to Mr. Penney, knew the laneway to the lake was a right-of-way which was called a common right-of-way. Karen Ann Robar knew Bradford Reid Langille used the laneway to launch his boat and remove it from the lake.

Prior to purchasing the property Mr. Penney reviewed the plan of survey dated December 17, 1991 which showed a “Laneway to Shore” on Lot 10. Mr. Penney was also aware when he moved into the property there was a narrow, overgrown road down the shore lot to the lake.

[43] The easement to the lake is a right-of-way that is being used and enjoyed and therefore an overriding interest pursuant to section 73 of the LRA.

[44] Considering all of the evidence I find the applicants have an express right-of-way over Lot 8B to the shore of Caribou Lake as set out in their deeds and the parcel registers for the properties of Jacob Frederick Penney at Middle New Cornwall, Lunenburg County, Nova Scotia PID No. 60211802 and PID No. 60211810 will be corrected to include the right-of-way to Caribou Lake.

[45] If the parties are unable to agree I will hear them on costs and how the right-of-way is to be described with certainty in the order.

J.