

SUPREME COURT OF NOVA SCOTIA

Citation: *Livingston v. Cabot Links*, 2018 NSSC 138

Date: 20180611

Docket: Hfx. No. 465452

Registry: Halifax

Between:

Neal Brian Livingston

Applicant

v.

Cabot Links Enterprises ULC

Respondent

Judge: The Honourable Justice Patrick J. Murray

Heard: April 17, 18, 19, 20, 23, 2018, in Port Hawkesbury, Nova Scotia

Written Decision: June 11, 2018

Counsel: Derek A. Simon and Jennie Pick, for the Applicant, Neal Brian Livingston
John A. Keith, Q.C. and John Boyle, for the Respondent, Cabot Links Enterprises ULC

By the Court:

Introduction

[1] This is an Application in Court filed by Neal Brian Livingston. Mr. Livingston seeks a declaration that lands at or near Inverness Beach have been dedicated and accepted for public use. The lands are owned by the Respondent, Cabot Links (“Cabot”), and are located in Inverness, Cape Breton, (“the Town”).

[2] Cabot strenuously opposes the Application and argues it is without merit. Cabot says it purchased the land in good faith from a private landowner, Cape Bald Packers Limited (“Cape Bald”). They had it searched and surveyed. Cabot then had the land rezoned through a public process to permit development of a golf course and now seeks to develop condominiums on the land near the course.

[3] Cabot testified that enhancing access to Inverness Beach, has been an integral part of its golf club development.

[4] The Applicant relies on the affidavit evidence of residents who are familiar with the beach and the lands. He argues their evidence establishes public use of the property over decades, beginning in the 1950’s. He submits the lands have been accepted as a park for recreational use by the public in general.

[5] Cabot submits that Mr. Livingston has been campaigning against the golf course development for some time. Specifically, Cabot says, he is opposed to the development of nine condominiums on the site.

[6] This Application, Cabot says, was filed the day after the Municipality issued the building permits for these condominiums, which are on Cabot lands but also near the beach.

[7] Cabot submits there is no such name as “Inverness Beach Park”, and that such a name was “created” for the purpose of this application.

[8] Cabot has filed a number of affidavits from Inverness residents. The general theme of these is that any use of the lands by the public was sporadic and that there was no organized use.

Background

[9] The Applicant has defined Inverness Beach Park as the lands identified in the Land Registry as Property Identification Number 50023803 (“the lands”). The lands, consisting of 2.62 hectares, are part of a former coal field (Mine No. 1 and 4) in Inverness. The Cabot Links Golf Course sits on top of the former mine.

[10] The year 1954 was a particularly difficult one for the Town. The coal mines had to shut down. What had once been a workforce of 761 had been substantially reduced.

[11] When the mines closed in 1958 the lands were turned over to the Town in two (2) parcels. One was the upper parcel near Central Avenue and the other was the lower parcel near the shore and the beach.

[12] There were a number of ways to get to the beach from Town, which many people used on a daily basis. The main access road is Beach Road 1, which that runs from the main street toward the harbour, in an east to west direction. Cars parked along the road, but also at the end of Beach Road 1.

[13] In December 1968 the Utility and Review Board, UARB issued a decision requiring the Town to dissolve. As part of the Board's Order, the Town would become part of the Municipality of the County of Inverness.

[14] In 1968 the Town deeded the property to the Royal Canadian Legion before dissolution of the Town took effect on December 31, 1968. A year later the Legion deeded the property to the Inverness Development Association, (the "IDA").

[15] These deeds, combined with the vesting of the Town's assets in the Municipality, raised some question as to title between the Municipality and the IDA.

[16] It is significant that the 1969 deed from the Legion to the IDA contained the following recital:

WHEREAS the Town of Inverness conveyed the lands described in Schedule "A" hereto annexed to the Grantor, pursuant to a Resolution duly passed by the Council of the Town of Inverness *with the purpose and intent that the said lands be used and developed for the benefit of the citizens of the Town of Inverness.*

[17] As can be seen, the Town made a point of ensuring the lands would be used for the purpose and benefit of the citizens of Inverness.

[18] The Applicant submits that this resolution constitutes an expressed intent by the Town to dedicate the lands for public use and enjoyment.

[19] The Respondent Cabot says, that is not what is meant by the resolution. Further, it argues that the purpose and intent as expressed in the deed recital is met by its development proposal.

[20] Cabot submits that it purchased the land in 2011 free of any restriction related to its use, which was subject only to zoning. There was no requirement, it says, for its predecessor Cape Bald to offer the land back to the Municipality. This is not a title matter, however some mention will provide useful context.

Brief History of Title

[21] The Applicant provided the affidavit of Cassandra Bannister, which sets out the relevant title background. A brief history in summary form is as follows:

- In 1958 the Province of Nova Scotia deeded the land to the Town of Inverness;
- In 1968 the Town of Inverness conveyed the land to the Royal Canadian Legion;
- In 1969 the Royal Canadian Legion conveyed the land to the Inverness Development Association, with the earlier recital;
- On December 31, 1969 the Town surrendered its Charter and was dissolved;
- In 1986 the Municipality of the County of Inverness conveyed the land to Cape Bald Packers Limited;
- In 1991 a land exchange took place between the IDA and the Municipality whereby the IDA would get the lower half of the coal mining land by Inverness Beach and the Municipality would get the top half near Central Avenue. Also the IDA gave a Quit Claim Deed to Cape Bald dated July 10, 1991;
- In 2011, Cape Bald Packers conveyed the land to Cabot Links Development Inc.;
- In 2013 and 2104 Cabot mortgaged the land for substantial sums to various lenders, including, the Province of Nova Scotia (\$ 8.25 Million) and the Atlantic Canada Opportunities Agency (\$ 5.5 million);
- There were other conveyances to facilitate the building of the golf course such as the deed from Municipality to the IDA in 2006.

[22] It is not alleged that Cape Bald and Cabot took active steps to have the lands dedicated for public use while they owned it. Mr. Livingston contends that the public's use continued after Cape Bald took over the land in 1986, and into the 1990's and 2000's, until Cape Bald sold to Cabot in 2011.

[23] The primary owners for the purpose of deciding whether dedication took place were the Town of Inverness, the Inverness Development Association, and the Municipality of the County of Inverness.

Issue

[24] The sole issue is whether the Applicant has discharged his burden of establishing on a balance of probabilities that the lands have been dedicated for public use as a park and accepted as such by the public.

[25] The parties agree as to the legal test to be applied under the doctrine of dedication. That test was set out originally by the Supreme Court of Canada in *British Columbia v. Bailey (1920)*, 60 S.C.R. 38, and confirmed by Moir, J. in the case of *Frank Georges Island Investments v. Nova Scotia (Attorney General)*, 2004 NSSC 136, at paragraph 38 as follows:

38. According to Duff, J. as he then was, writing for the majority in *British Columbia (Attorney General) v. Bailey*, (1920) 60 S.C.R. 38 (SCC) at p. 53, land may be dedicated to the public if two conditions are satisfied: “first, there must be on the part of the owner the actual intention to dedicate... and second, it must appear that the intention was carried out by the [road]way being thrown open to the public and that the way has been accepted by the public.

[26] This test has been adopted by the Nova Scotia Court of Appeal in *Thomas v. Cottam*, 2006 NSCA 134.

Position of the Applicant

[27] The Applicant says there is clear evidence of intent to have the lands dedicated for public use. This is a factual finding, and Mr. Livingston submits that the affidavit evidence strongly supports an inference that the lands were “thrown open”. (In reviewing the evidence, I will note the affiant’s in parenthesis)

[28] Beginning with Maria Judson’s evidence of the placing of picnic benches in the 1950’s and early 1960’s the land was used by generations of families (Mary Poirier). In addition, there was the expenditure of public funds (Kathleen Poirier) to install picnic tables and playground equipment in 1969. There was always parking, beginning in the 1950’s and 1960’s and including up to present day (Mr. Livingston).

[29] According to the Applicant, on busy beach days there would be numerous vehicles, and more people, visiting the beach. This is all supported by the physical evidence shown in the aerial photos beginning in 1961 and extending into the 1970’s and 1980’s up to present day (Neal Livingston at paragraph 14).

[30] In short, the Applicant says there was open and unobstructed use for a substantial period. The Applicant says facilitating recreational use today is a matter of public necessity.

Position of the Respondents

[31] The Respondent says that Mr. Livingston has not met the burden upon him to satisfy the legal test for dedication. Cabot says there is no clear and cogent evidence that the owners of the lands intended it for public use. The lands were private, as shown by the conveyances to Cape Bald and Cabot without any restriction.

[32] The Applicant is asking that the entire “park” be dedicated for general use by the public. Instead of Inverness Beach Park, the name actually used for this property was the “Cape Bald Property”. The owners, including Cabot, faithfully paid the taxes. The zoning was amended to permit the golf course and Cabot’s intended construction of the nine units.

[33] Cabot’s position is supported by the numerous affidavits, from long time residents of Inverness, many of whom have known the property for their entire lives.

[34] The land as it presently exists is shown in the 1975 aerial photo by the (yellow line) in the report of Mr. Edward MacKinnon at Tab 2. A good portion of the beach area that is claimed for public use is not contained within the existing boundaries.

[35] These affidavits state there was never an organized or consistent pattern of use so as to establish a park. Cabot says this application mainly concerns beach access, which it says it has worked hard to improve.

[36] Cabot therefore submits the Application should be dismissed.

Discussion of the Evidence at Hearing– April 17 – 23, 2018

Neal Brian Livingston

[37] The basic premise of the Applicant’s affidavit evidence is that the use of the lands as recreational gives rise to an inference of dedication. This was the case in ***Gibbs v. Grand Bend (Village)***, [1995] O.J. No. 3709, relied upon by the Applicant.

[38] In his affidavit the Applicant states the lands “served as a parking lot and public park” (paragraph 23).

[39] In addition, Mr. Livingston argues, there are two documents that evidence an express an intention to dedicate: 1) the 1969 Deed; and 2) the 1986 Minutes of the Council for the Municipality. There is also the belief held by the former Warden and MLA, Charles MacArthur, as expressed by Kathleen Poirier, that the lands would “revert” to the Municipality when Cape Bald no longer required it.

[40] The Minutes as contained in Mr. Livingston’s affidavit as Exhibit “B” and dated October 30, 1986, state as follows:

Request from the Cape Bald Fish Packers to purchase a piece of property in Inverness approximately 6.2 acres. It was noted that this Company will be providing at least 10 part-time jobs. Moved by Warden Charles MacArthur seconded by Counsellor Alex Angus MacDonald that this piece of property be sold to Cape Bald Fish Packers with the stipulation that if this Company decide in future years that they no longer require this piece of land that it revert back the Municipality. Motion Carried. I nay.

[41] Warden MacArthur executed the 1987 Deed to Cape Bald along with clerk A.A. Murray on behalf of the Municipality to complete the conveyance. The deed itself contained no restriction or reversionary interest to the Municipality. The deed was a Warranty Deed conveying the right of the Purchaser to “quiet enjoyment of the lands” and to be “free from encumbrance”.

[42] In terms of Mr. Livingston’s evidence, he distinctly remembered being on the lands in July 1978 and accessing the beach. He was with friends and parked on the lands at that time. In

cross-examination he acknowledged he was first there in 1972, but said that memory is not as distinct as 1978, because in 1978 he was there with friends from Halifax and he was building a cabin.

[43] In terms of actual usage by the public, he states at paragraphs 13 and 14:

13. From the time that I began to personally use the Inverness Beach Park, I witnessed its regular use by other members of the public for the purposes of recreation and accessing the Inverness Beach in every season. Some members of the public would park on Inverness Beach Park, and then use a path to access the Beach. Others would arrive on foot from Town, and cross the property to access the Beach.

14. During the summer, the Inverness Beach Park was used steadily. On warm or hot summer days, the use of Beach Road #1 and the Inverness Beach Park would increase. On many days, I would estimate anywhere between 20 – 40 vehicles would be parked on the Inverness Beach Park, and there would be up to a few hundred individuals access the beach via the Inverness Beach Park.

[44] Mr. Livingston's affidavit states that a boardwalk was built in the late 1970's or early 1980's. This is situate on land now owned by the IDA. He said this boardwalk is accessed using Beach Road 1, which allows access to the beach year round. (Paragraph 15 of Livingston)

[45] Inverness Beach has been designated as a public beach pursuant to the *Beaches Act*, R.S., c. 32, s. 1.

[46] In cross-examination the Applicant stated that the beach had become public in 1985, just prior to the sale to Cape Bald. He also indicated there was really no difference between 1978 and 1985 in terms of the public's use.

[47] Mr. Livingston was questioned about the sale to Cape Bald. The evidence showed he made two phone calls to the company, one in 1986 when the company was about to purchase the property, and the second in 2011, when Cape Bald was preparing to sell the property to the Respondent.

[48] The first call is addressed in paragraph 17, where Mr. Livingston confirms he called the head office in New Brunswick. He informed Cape Bald of the public's use of the land for parking, recreation, and beach access. He made a request to the person he spoke with for the company to request a different parcel for purchase from the County. The representative declined his request.

[49] In the second call to Cape Bald, Mr. Livingston said he offered to purchase the property, as part of a group that include Mary (Camus) Poirier, paragraph 26.

[50] Mr. Livingston acknowledged in cross-examination that the deed to Cape Bald contained no reversionary interest. He said this was a significant error. He also knew of the land exchange

(“swap”) involving the IDA in 1991, and acknowledged that it too contained no reversionary interest to the Municipality.

[51] It is clear that a major concern of the Applicant is beach access, as evidenced by Exhibit “A” in his affidavit, wherein he outlines the various points of access.

[52] When questioned by Mr. Keith as to the improvements to access made by Cabot, Mr. Livingston answered that there was no shoreline protection and he had “no idea” whether Cabot made upgrades to the beach/canteen area. He testified that Cabot built a public boardwalk and public trail at the north end of their property, as required by Department of Natural Resources.

[53] In his affidavit, Mr. Livingston discusses the continued use of the park after the sale to Cape Bald “for the purpose of accessing the boardwalk and the Inverness Beach” (paragraphs 20 and 21).

[54] A portion of Mr. Livingston’s discovery evidence was placed into evidence by the Respondent under *Civil Procedure Rule 18.20*. It is evident from his discovery evidence that in terms of the “infrastructure”, the Applicant’s best recollections are from the 1970’s. (Discovery transcript of NBL at page 71 - 72):

Q: We have, so you mentioned teeter totters, do you know when the teeter totters first appeared on the site?

A: I don’t know when they first appeared.

Q: Do you know when they were gone?

A: I don’t know when they were gone.

Q: Did you ever use the teeter totters?

A: I don’t know if I used them, but I remember seeing them quite clearly in the ‘70’s.

Q: Right.

A: I’m not sure I actually sat on a teeter totter.

Q: Do you remember seeing them in the ‘80’s?

A: I’m unclear if they were there in the ‘80’s.

Q: What about the swing set, do you remember seeing the swing set in the ‘80’s?

A: I’m unclear if they were still there in the ‘80’s, but I absolutely remember them being there in the ‘70’s.

Q: So, the teeter totters and swing sets are kind of like the water taps. You have a clear memory from the ‘70’s but you don’t have a clear memory beyond that?

A: Yeah, that’s correct.

Q: Okay. Benches, do you have a clear memory of the benches along the fences in the ‘70’s?

A: No.

Q: Okay. do you have a clear memory of the benches along the fences in the ‘80’s?

A: No, I, my, my I don’t remember the benches. I see the benches in aerial photographs from 1961.

[55] Some of the key evidence for the Applicant is that of the items or equipment placed on the land such as the picnic tables and the playground equipment. This will be discussed in relation to affidavits filed on behalf of the Applicant and as well those filed by the Respondent Cabot.

[56] In particular, there is evidence of Kathleen Poirier who was directly involved with the property and the placement of the equipment under a government grant in the late 1960's. There is also evidence of Mary Poirier, Maria Judson, and others, such as Atilla Tolnai of Montreal, Quebec.

[57] Included in Mr. Livingston's supplemental affidavit are seven (7) aerial photographs dating between 1961 and 2009. These are of varying quality. I admitted all of them in Exhibit B - 1961, 1969, 1975, 1984, 1993, 1999 and 2009.

[58] My earlier ruling excluded some of the enlargements due to poor quality. Others were admitted to illustrate certain of the structures shown thereon.

[59] I shall now turn to the additional affidavit evidence in support of the Application.

Mary Poirier

[60] Mary Poirier was born in 1956 and has lived in Inverness County her entire life. She was married in 1975 and has five daughters, including a set of twins born in 1984. Her children were born between 1975 and 1984.

[61] As a mother she visited the beach with all of her children. She spoke of other families who attended at the beach and made use of the lands, such as the MacKinnons, Campbells, Stewarts, and Millers.

[62] She recalled the "infrastructure" being installed between 1968 and 1970. She remembered when she was 11 years old going to the beach to help a neighbour with her children.

[63] She recalled her father taking her family to the beach to dig clams, play and swim. She would walk the path on the property and play in the field. She remembers this occurring before she was 10, as her father passed away in 1966.

[64] She worked at the hospital between 1976 and 1989. She often went to the beach for lunch with her co-workers. She recalled how it felt to be there "without kids".

[65] Ms. Kathleen Poirier testified in cross-examination that the canteen was built by 1977. Mary Poirier and her co-workers would order lunch at the canteen and "sometimes" eat at one of the picnic tables.

[66] Ms. Poirier expected the beach access to stop when Cape Bald purchased the land but it did not. "They didn't bother us and we didn't bother them", she said.

[67] She also referred to campers at the ‘top of the hill’. This was touched upon in later evidence given by Gary MacInnis who also referred to “the hill”.

[68] Mary Poirier stated after the boardwalk was built the lands would be used to access it. She described an incident where she was stopped by an employee of Cabot, after it became a golf course

[69] The period covered by Ms. Poirier extended to her grandchildren, Melanie Camus (age 21) and Isabel Camus (age 19), who stay with her often. Since they were little she has taken them to the beach.

[70] Ms. Poirier referred to the various amenities including “several picnic tables and a fresh water tap”, and a “swing set, fire pits and other items” (Paragraph 8).

[71] She recalled her children using the “red mud path” directly from the “Inverness Beach Park” for access to the beach.

[72] She felt as if she had “lost a good friend”, referring to her inability to continue to access the lands.

[73] Ms. Poirier is a past member of the IDA. Her affidavit makes no comment as to when the infrastructure disappeared from the property or any involvement of the IDA in having the lands dedicated.

[74] In terms of parking, Ms. Poirier estimated that there would be 10 to 20 people at any given time, “in addition to those who parked there to use the beach.” (Paragraph 19)

[75] She also said people would “go parking” down by the area known as Lover’s Lane. She also said that “campers would park at the top of the hill”.

[76] At paragraph 27 Ms. Poirier described the camping activities as follows:

27. All through the years as far back as I can remember there were camper trailers and tents and people who came and used that site during the summer. Sometimes they had campers and they would put tents on the beach also. The campers often stayed overnight, as it was free camping for them. I can remember people from the United States staying in the Park in camper trailers. The campers would park on the top of the hill on the Inverness Beach Park.

Anna Judson

[77] Ms. Judson was born in 1958 and resided in Inverness for 18 years, until 1976. In her affidavit she attaches as Exhibit “A” photographs taken in 1959 with her parents. The photos show there were benches, a picnic table and a fire pit at or near the beach.

[78] There are also photos from the year 1960 (in Exhibit “B”) taken near the beach and showing once again her parents Nicholas and Theresa Barabas walking along the shore. A wooden rail or bench is shown right at the shore.

[79] In cross-examination Ms. Judson was unsure of how many picnic tables there were or when they were removed. She had not heard the name “Inverness Beach Park” as a child or adult.

[80] She was questioned about the stairs leading down to the beach. She marked their location with an “X”. She also marked a “C” on Exhibit 1 where the canteen was located. She testified that access to the beach improved once the canteen was built. It seemed that “some” overflow parking extended to within the “yellow” boundary on Exhibit 1 at times.

[81] Ms. Judson admitted in cross-examination that her best recollections were up to the year 1976, and beyond that less so.

[82] The benches referred to in the photos appear to be present in the 1961 aerial photos. However, they appear to be located on land now owned by the IDA.

Kathleen Poirier

[83] Kathleen Poirier provided two affidavits in support of the application.

[84] Born in 1952, she has been involved in the community as a volunteer from a young age. She comes from three generations of miners.

[85] Ms. Poirier has a general knowledge of the Town of Inverness and the lands formerly owned by the Town and then by Cape Bald. She testified that the property has been used by the public for many years for recreation, parking and beach access.

[86] Prior to being sold in 1986, she said, the property served as a parking lot and access to the beach. She confirmed that trailers would be parked there “overnight” and tents set up by travellers.

[87] It was Ms. Poirier who as a student in 1969, was involved in the youth initiative program, created to “enhance the area as a park for locals and tourists”. In her affidavit she states:

6. As a student, in or around 1969, I participated in a youth employment imitative (the “Program”), which was created as a result of the usage of the site and to enhance the area as a park (Inverness Beach Park) for locals and tourists. I was employed to assist in building infrastructure to create a camping area/playground in Inverness Beach Park, which was then owned by the Municipality of the County of Inverness.

7. The Program employed about 12 students for the summer months. To the best of my knowledge funding for the Program came from the Federal Government.

8. The Program started by cleaning and clearing of the Inverness Beach Park. Fire pits were installed, picnic tables built and installed and playground equipment built and installed. Fencing was erected parallel to Beach Road. Once the site was completed part of the Program, Adult Initiative Programs and future summer programs was to clean and maintain the area and clean the beach. I was employed the following summer on such a student program. During this time, the area continued to be utilized by locals and tourists who would access the beach, use the playground, camp on the site or picnic there.

[88] Ms. Poirier provided a supplemental affidavit. In it she stated the infrastructure included picnic tables, benches, playground equipment, and fire pits.

[89] Her first affidavit also described her knowledge of, and relationship to, former Warden and MLA Charles MacArthur (at paragraphs 10 – 16). In this regard, Paragraph 14 states:

14. During the time I worked with Charles, and as a friend, a volunteer and his Assistant, I heard him state on several occasions that he realized that residents of Inverness were upset over the fact that the Inverness Beach Park land had been sold and a building constructed on this beachfront property, but in this public and private life he maintained that the Inverness Beach Park would return to the ownership of the County once Cape Bald Packers no longer required it.

[90] In her supplemental affidavit Ms. Poirier attaches a true (enlarged) copy of the 1975 aerial photograph. It was Ms. Poirier who, from her personal knowledge, assisted Mr. Livingston as it pertained to the aerial photos.

[91] On the 1975 photo (Exhibit “A”), one can see that picnic tables, a swing set, and a teeter totter were in place on the lands at that time.

[92] Ms. Poirier’s supplemental affidavit is in support of Mr. Livingston seeking a declaration that the “Inverness Beach Park” (as defined in the application) has been dedicated for public use.

[93] In cross-examination Ms. Poirier confirmed that she had been a member of the IDA from 1989 until 2000. She was aware of the land exchange between the IDA and the County. She said she was surprised by it but was not aware of the what transpired.

[94] She was asked about the Cape Bald transaction and said the sale was made to bring jobs to Inverness with the stipulation that the land would be returned to the Municipality. According to her evidence, no legal action was taken and no one opposed the sale at that time.

[95] In terms of the infrastructure, Cape Bald had bulldozed the property and all but a few picnic tables were removed. They allowed people to park trailers, but there was no more camping. There was the odd trailer and tents in the field along the boardwalk. The use was limited. Ms. Poirier testified that the parking lot was smaller, by about half the size.

[96] In her affidavit, Ms. Poirier stated the infrastructure constructed by the youth initiative “stayed in place until after the purchase by Cape Bald” (Paragraph 9).

[97] Ms. Poirier first stated that she did not know the exact boundaries of the lands sought to be dedicated. In 1969, she said, there were no boundaries, and it was all open and more of a general area.

[98] There was some confusion in her evidence about her knowledge of boundaries as it related to lands and the infrastructure. In re-direct she was asked if the infrastructure discussed in her affidavit was within the proposed development by Cabot. She replied, “all of them were”.

[99] She earlier said she was not aware of the exact boundaries. It became a question of what she knew at the time of signing her affidavit.

[100] Kathleen Poirier testified she wanted to see the “whole area thrown open” for recreational purposes as it had once been when she was a child.

[101] The affidavit of Mr. Tolnai, corroborates Ms. K. Poirier’s evidence with respect to Cape Bald allowing trailers to park on the lands for “a night or two”. This also confirms Mr. Livingston’s evidence that some recreational use continued after Cape Bald purchased. Mary Poirier said “we thought Cape Bald would put the run on us but they never did”.

[102] The aerial photo in 1984, shows that very little remained of the infrastructure before Cape Bald purchased the property. Mr. Keith, in his summation, asked the court to compare the 1975 and 1984 photos and to take notice of the declining use.

[103] Grace MacDonald filed an affidavit on behalf of the Respondent stated there were two picnic tables still there in the 1980’s. A number of others that said there were a couple or a few at different times that did not last that long and were used very little. The 1975 photo shows there were more than a few at that time.

Joe O’Connor

[104] Mr. Joseph O’Connor provided an affidavit on behalf of the Respondent. He is now retired but had been the Director of Public Works from 1975 to 2009 and CAO from 2009 to 2017.

[105] Mr. O’Connor, but for attending university, has been a resident of Inverness his entire life. He is a Professional Engineer and in 1973 he worked as a summer student in Inverness.

[106] During that time he passed over the property for a three (3) week period to attend to work being done on a sewer project located on the adjacent property to the north.

[107] Mr. O’Connor explained the project could have been accessed over the existing line, but it was easier to travel over the road on the subject lands when it was then owned (or claimed) by the Municipality.

[108] Mr. O'Connor was familiar with the lands in question. The focus of his evidence is contained in Exhibit 2, which is the 1975 aerial photograph. He marked a number of locations on Exhibit #2 during his evidence. He identified two "worn-down" areas near the beach that had been part of the lands. P1, he said, was used for parking, but he was not sure about the extent of the parking on P2.

[109] Mr. O'Connor also marked the several roads that were used. He marked as R1 a road that leads to the parking area (P2), which is partly on the lands.

[110] There was, he said, a proposed road (that was never built) to access the shore. He mentioned there were two lines "cut" across the land toward the shore.

[111] Mr. O'Connor said he did attend the beach but not as often as some. He drove by it daily and in the evening would walk or drive down in his car. He did not feel the land was a public park.

[112] Mr. O'Connor was the Director of Public Works during the time Cape Bald purchased the land. In cross examination he was questioned about his attendance at the May 30, 1986, council meeting. He attended the meeting, but not the "in camera" session, where the price for the lands had been reduced.

[113] Generally, apart from the three week session, Mr. O'Connor would "see" the property approximately 3 to 4 times per week.

[114] Mr. O'Connor is familiar with Mr. Ben Cowan-Dewar through meetings with the Municipality and also knows him personally. Mr. O'Connor's wife had been employed in Mr. Cowan-Dewar's home for a number of years.

[115] Mr. O'Connor presented as an even minded individual. He maintained (as stated in paragraph 10) that the Municipality never designated the area as a public park, nor had it been accepted as such by the public. On Exhibit (2) he marked where the sewer project was located as well as the location of the IDA lands at the base of Beach Road 1.

[116] The canteen, he said, was further down (to the south) and not shown on the photo in Exhibit 2. He said that much of the parking had moved there until the paved parking lot was installed recently.

[117] In cross-examination Mr. O'Connor was asked about his discovery evidence. He explained that any difference between it and his evidence at the hearing was because he had checked some the information earlier given to ensure accuracy.

[118] Mr. O'Connor identified the lands as the cross hatched parcel shown in Exhibit "C" of his affidavit, as being the same piece with the same boundaries as shown in yellow in the MacKinnon photo in 1975, being PID 50023803.

[119] In terms of parking he said he was at the beach about 4 or 5 times in the summer. He would see a few cars, 2 or 3, in the evening. Cars would be parked along Beach Road and the entrance way to Cape Bald. He has recently seen the current parking lot full on a busy day.

[120] Mr. O'Connor identified the roads that initially led to the parking area as R2 and R3 on Exhibit 2.

Gary MacInnis

[121] Mr. MacInnis is a long time resident of Inverness (71 years). He attended teachers' college and St. F.X but never missed a summer in Inverness. He is quite familiar with the beach and surrounding area. He gave his evidence via video and was cross examined on his affidavit, which was marked as Exhibit No. 4.

[122] Mr. MacInnis identified the lands as "cross hatched" on the property online map in Exhibit "A". In cross-examination he identified the area where people would park. In the 1950's it was at the "base of the hill" and this he marked as "P 50's". In the 1960's there was some parking "up on the hill", when the cars could get there. This was also marked as "P 60's". He testified that the parking location shifted around due to tides, erosion, and weather. He said the parking area has returned its original location in the 1950's, where the parking lot is today.

[123] In terms of picnic tables, Mr. MacInnis testified there was not a level spot in the entire area. He said there were 2 to 4 picnic tables in the 1970's. He remembered the water tap which he said was built up high (3 ft.) None of these things lasted very long, he said. The Applicant refutes this evidence by referring to the affidavit of Grace MacDonald who said there were two picnic tables there in the 1980's (Paragraph 4 (b) of affidavit).

[124] The parking areas identified by Gary MacInnis on Exhibit 4 roughly correspond with and corroborate those made on Exhibit 2 by Mr. O'Connor. There was never any deterrent from accessing the beach, "that's for sure", he said. He remembered a picnic table or tables being "taken to the dump".

Ben Cowan-Dewar – for Cabot

[125] Mr. Cowan-Dewar is the president and secretary of Cabot Links Enterprise ULC. He arrived in Inverness in 2004 and said the property later became an integral part of Cabot's broader plans to develop a world class golf course. The IDA had made representations that it would secure the property, which initially was not complimentary to the course Cabot was trying to build.

[126] Cabot eventually purchased the property in 2011 directly from Cape Bald. The lands had been thought of as the possible location for the clubhouse, but eventually became necessary for the construction of the permanent hole number seven (7).

[127] Mr. Cowan-Dewar had felt throughout his dealings with the IDA that they were representing the public to an extent, because the association was made up of many local residents, who were members.

[128] In his affidavit Mr. Cowan-Dewar maintains that the Cabot property does not impede public access to the beach and states that Cabot has “actively invested” in public access.

[129] His affidavit states that “the property is not beachfront” and that Cabot “effectively surrendered any access to the shoreline near the property to the organization which it understood represented the local public interest”, referring to the IDA (Para. 21).

[130] Further, his affidavit states that by transferring the parcel shown as area 1 (in Exhibit “K”) to the IDA, Cabot ensured the association had title to all the land upon which the boardwalk was located. There was never any suggestion that the IDA claimed any residual public rights over the remainder of the property (Paragraph 21).

[131] A summary of the evidence given by Ben Cowan-Dewar in his affidavit is as follows:

- (i) Cabot would not have purchased had they known of public rights;
- (ii) The Cape Bald property was zoned marine industrial not recreational;
- (iii) Cabot would not have borrowed huge sums of money had it known of any public rights;
- (iv) Cabot faithfully paid the real property taxes on the property;
- (v) Cabot’s golf course is one of the key drivers of economic activity in Inverness;
- (vi) This litigation was only commenced after the building permits were issued;
- (vii) That these proceedings have undermined the development and caused delay and prejudice to Cabot as the rightful owner of the property;
- (viii) In 2012 Cabot funded 50% of the cost for a development project that included a new parking lot available to the public “area 2” as well an area labelled as 3(a boardwalk), located on Cabot land that extending from Central Avenue to the beach, thus creating for the public a pedestrian link to the beach that had not previously existed on Beach Road 1 (Exhibit K of BCD affidavit).
- (ix) Cabot has also made improvements to the left of area 2 on Exhibit “K”, in that it was completely repaved to improve the main point of access to the beach. The project also included a staircase connected to the Boardwalk, providing a second access point.

(x) That all of these improvements occurred through good faith agreements between Cabot and the various public authorities including the IDA and Eastern District Planning.

[132] On October 3, 2016, the Municipality passed a motion to amend the municipal planning strategy re-designating the property from waterfront development to commercial and an amendment, rezoning the property from waterfront development to commercial tourism. This allows for the private development on the lands by Cabot.

Standing, Governing Principles and Analysis

[133] The Applicant submits the lands were thrown open well before 1987.

[134] He acknowledges that longstanding use alone is insufficient to support the finding he seeks when it is contradicted by other evidence. What is relevant, he says, is the intention at the time the lands are dedicated.

[135] The Applicant, Mr. Livingston, referred in his evidence to “we the public”. He was asked whether he in fact represented the public interest as Applicant. His reply was to the effect that he and other members of the public used the park openly.

[136] It has been acknowledged by Mr. Keith on behalf of Cabot that Mr. Livingston has the right to make this Application and that he has proper standing to do so. That point is not contested by the Respondent.

[137] The IDA was formally served with this Application but did not intervene. Mr. Simon submitted that this, at the very least, means they take no position as an organization.

[138] Many of the Cabot affidavits from residents acknowledge there was parking near the beach in the 1950’s and 1960’s as well as “overflow parking” in the late 1990’s and early 2000’s, during the Fisherman’s Festival. Most, if not all, said the name, “Inverness Beach Park”, was never used and that there were no facilities to accommodate campers or trailers.

[139] Generally these affidavits state that the use of any recreational equipment was short lived. For example, Brenda Anne Campbell, at paragraph 4(b), referred to “two dilapidated picnic tables that were there in the 1970’s”.

[140] The Applicant maintains that these affidavits are replete with the same information. While they are similar in many respects, they allow for certain differences. Each affiant stated their own “exceptions” to describe what use was made of the subject lands. Examples would be the affidavits of Tom Ryan, Jim Ryan, and *John MacIsaac*, at paragraphs 19b, 18b, and 19b respectively.

[141] Tom Ryan’s affidavit reads as follows:

19 To the best of my knowledge, any use by the public of the Property was sporadic. I cannot recall any consistent use of the Property at all, except for:

- a. In the 1960's, the Mayor at the time put in some picnic tables on the Property and stairs going to the water along the beach front near the Property. The stairs were washed away after one season, and the picnic tables only lasted four years at most. During those four years, the picnic tables were infrequently used. In fact, up until 1968 I walked past the Property to the Inverness beach almost every day and never saw anyone using the picnic tables or using the area for other recreational uses, such as camping;
- b. Occasionally people would park in that general area, but that was only possible in certain times of the year as for the rest of the year it was too muddy; and
- c. Occasionally the Property was used for parking if the parking area at the nearby Canteen was full, such as during the annual Fisherman's Festival, which started in the late 1990's, and is held each July.

[142] Essentially all of Cabot's affiants state that the lands have always been considered private property.

[143] Jim Ryan's affidavit, at paragraph 19 – 22, reads:

19. Once the Canteen area to the south of the Property was developed in the 1980's, the Property was used even more infrequently.

20. I have always considered the Property to be private property.

21. I never saw anyone use the Property for other recreational purposes, such as camping. There were no facilities on site for camping or trailers. As far as I was aware, there was never anyone managing the Property as a park, and no signage indicating that a park existed.

22. Until this proceeding, I had never heard anyone use the term "Inverness Beach Park" in reference to the Property.

[144] These paragraphs are typical of the Respondents' affidavits, many of which were not cross-examined upon. The weight of the evidence is that after the canteen was built, use of the so called park declined or was lessened.

[145] The Applicant argues that these affidavits, such as that of Joseph O'Connor (paragraph 19) and Janice Ferguson (paragraph 5) support Mr. Livingston's position. These paragraphs are set out below.

Joe O'Connor

19. To the best of my knowledge, any use by the public of the property was sporadic. I cannot recall any consistent use of the Property at all, except for:

- (a) One summer, in the late 1960's or early 1970's, I recall some students used it for recreational purposes, such as cleaning up the area near the beach; and
- (b) I believe in the early 1970's, picnic benches were put on the Property but I have no recollection of ever seeing any picnickers using the picnic benches.

Janice Ferguson

5. To the best of my knowledge, any use by the public of the Property was sporadic. I cannot recall any coordinated, organized or consistent use of the Property at all, except for:

- a) During the 1960's or 1970's there were picnic benches for three to four years on the Property, but I do not remember people using these picnic benches;
- b) Occasionally the Property was used if the parking area at the nearby Canteen was full, such as during the annual Fisherman's Festival, which occurs in late July each year.

[146] Mr. O'Connor and Ms. Ferguson were both cross-examined, as were Gary MacInnis and Vincent MacMaster. Their position remained unaltered. That is, while there was some use, it was limited. Fewer people parked on the property as time went on, with the possible exception of "overflow parking", which seems to have begun in the late 1990's with the Festival in late July each year.

[147] In terms of Cabot's actions to improve access to the beach, these improvements after the fact are not a substitute or replacement for public use which was previously dedicated. The test remains the same, once the land has been dedicated and accepted, it cannot be "changed back" or returned to private use.

[148] The Court must also consider whether Cape Bald acquiesced in the use of the property so as to allow the Court to draw in inference that it has been dedicated. The evidence is that Cape Bald built and ran a fish transfer business, using the property to store crab traps, load large trucks, and for their own parking.

[149] As the hearing evolved the boundaries of the land sought to be declared for public use by the Applicant seemed to change from what was initially the entire parcel known as PID 50023803. In Ms. Pick's submission on the remedies sought, she indicated the Applicant did not

see the need to restrict use of the golf course but that the construction of condominiums on the property would interfere with public rights. The difference has not been explained by Applicant in evidence.

[150] His counsel submitted the case of *Carpenter v. Smith*, 1951 CarswellOnt 44, to illustrate that a subdivision of land will not absolve or exempt lands otherwise dedicated. There is very little evidence on this point which came “late” in the proceeding.

[151] Kathleen Poirier was asked about boundaries and indicated the infrastructure was located “within all of it”, referring to Cabot’s proposed development. She also said at one point that she was not aware of the boundaries of the subject lands.

[152] It appears from viewing Exhibit “K” of Mr. Cowan-Dewar’s affidavit that the location of the proposed development is closer to the parking areas on which there was substantial evidence. The Applicant has asked the Court to consider the “emergence” of the parking lots. I have compared the lot as shown in Exhibit “G” of Cassandra Bannister, the 1969 aerial photo, and the 1975 photo. Only a portion of the parking lot was within the yellow line on the 1975 photo.

[153] A further comparison of these with the 1990 and 2009 photos shows just how much change and erosion has possibly occurred in this area .

[154] This lends some support to evidence of Mr. MacInnis who said the parking situation has changed over the years. He in fact referred to a third parking lot, P3 located down by MacIssac’s Pond. Without more evidence, perhaps under the purview of expert evidence, the Court is left to speculate on the exact location of the smaller parcel the Applicant seeks to have dedicated, assuming it has changed.

Decision

[155] In this matter the court is faced with evidence of events that occurred many years earlier. The main theme of the application is that the test for dedication and acceptance has been met by longstanding use of the property by the public.

[156] Mr. Livingston submits that the Court should draw an inference that the owners intended to dedicate this parcel for public use. More than an intention, the Applicant must show that the owners carried out that intention by “throwing the lands out to the public” for a substantial period.

[157] It is also necessary that the public accept that this park had been dedicated. For this to occur the use need not have been excessive. (*Foothills (Municipal District No. 31) v. Stockwell*, c1985 ABCA 229) Once it has been dedicated and accepted, the public use cannot be taken away or removed.

[158] The use described by the Applicant (and affiants in support) is largely to gain access to the beach. In the main this was done by travelling to the beach on Beach Road 1, which runs straight down to the beach from Central Avenue, the main street in the Town of Inverness.

[159] There is no question that some structures were placed for use and convenience of those accessing beach. There was no signage to signify the use as public.

[160] There are many affidavits from residents of Inverness that say there was no consistent use and the land was always thought to be privately-owned. Many of these affidavits have been sworn by long time, even lifetime, residents. Of those that testified and were cross-examined, none waived in their belief that there was no public park.

[161] Many of Respondents' affidavits were from people who had a connection to the golf course owned by Cabot. Some affiants, on both side were former members of the IDA. I did not see where this impacted their evidence, on either side.

[162] The IDA has been involved in the development of these lands for quite some time and in fact, confirmed title to Cape Bald by deed in 1991. As a former owner (arguably the rightful owner between 1969 and 1991), this conveyance is quite relevant to the main issue to be decided here.

[163] The other party that claimed ownership was the Municipality. A dedication of the lands as public (or even an intention to do so) would most likely require a resolution of council or at the very least a meeting to create a park for recreational use. The evidence shows there was a resolution, but it was to approve a private sale to Cape Bald. This is contrary to an intention to dedicate the land for public use.

[164] It was obviously the intention of the Municipality to maintain control over future use (as per the stipulation in the 1986 resolution) but the reality is that never came to pass in the deed of conveyance. As has been seen in the caselaw, a municipality, while representative of the public generally is not the same as the public when it comes to applying the doctrine of dedication and acceptance: *Foothills at para. 14*.

[165] There is a difference between land being returned to its owner and that owner dedicating the land. Any intention to dedicate must be followed up with the land being thrown open for public use.

[166] Apart from the picnic tables and playground equipment the evidence of usage is largely that of access to the beach by local residents and visitors such as Mary Poirier and Attila Tonai. There is no question that the Beach itself, is designated as a public beach such under *Beaches Act*.

[167] In *Gibbs* the beach in question ran from its bank to the highwater mark. In the present case the IDA owns land adjacent to the beach which contains the boardwalk used by public to access the beach. Land was deeded to them by the Municipality and Cabot to facilitate this use. (See Deeds of Conveyance referred in Affidavit of C. Bannister at paragraphs 12, 15 for parcels A, B, F, and E.)

[168] In *Lake of Bays (Township) v. 456758 Ontario Ltd.*, [2005] O.J. No. 2712, relied upon heavily by the Applicant, the facts involved a small piece of land with gazebo built on it. The

Court concluded the land had clearly been occupied for a period of 60 years from the 1940's to 2005. There was a single affidavit opposing the Application by a person who had left the area when she was 18 years old.

[169] The land here is in excess of 6 acres. In addition to parking to access the beach, the occupation consists mainly of picnic tables, a teeter totter, and a swing set. The period of occupation was at its height from the late 1960's and into the to 1970's. This is more or less confirmed by Mr. Livingston in his discovery evidence.

[170] Maria Judson said after 1976, she could not really say how long the use continued. According to Kathleen Poirier the structures remained until Cape Bald became owner in 1987. Mr. Livingston stated in his discovery evidence that he clearly remembered the picnic tables in the 1980's.

[171] Most of the Respondent's witnesses said these items lasted only a few years. Gary MacInnis was a helpful witness who in my view displayed no bias. He said a level spot could not be found on the land. He said the picnic tables lasted only a short time due to harsh weather. He recalled one being taken to the dump.

[172] An important question is not only how long the infrastructure remained, but whether it was maintained during that period. There is very little evidence that it was maintained. Ms. Poirier's affidavit spoke about a youth initiative the summer of 1969 and the following summer in 1970.

[173] Mr. Livingston, in the August 16, 2016, article at Exhibit "G", of his affidavit said the picnic tables deteriorated, were never replaced, and were forgotten. By 1984, it seems the use of this equipment had faded, and possibly before then. (paragraph 32 of NBL)

[174] On the evidence, I find as a fact that the playground equipment remained up to 1975 and for indefinite period after that, possibly to sometime in the early 1980's. I further find that by the late 1970's it began to deteriorate and was not maintained.

[175] Eventually it disappeared but for a couple of tables that are visible at the far end of the property in the 1984 aerial photo. In these circumstances the lack of maintenance is telling as it relates to the intention to dedicate the lands as a park.

[176] In *Frank Georges' Island*, Moir, J. referred to use of "leeward side" of the island by sailors for protection versus use of one's land for a roadway. "The former use is expected, the latter use is unusual". Because it is unusual, it is the stuff from which an inference can be drawn about the owners intent. (Paragraph 40)

[177] In the summer of 1969, the owner was still the Royal Canadian Legion, who had been deeded the property the year before. It was around this time that the ownership became disputed.

[178] It is difficult to see how could there be an actual intention by the owner to dedicate land for public use when it was uncertain who the owner was at the time. It has not been established

which owner permitted the infrastructure to be built, but the evidence is it was paid for with federal funds.

[179] Logically, if anyone was aware of whether a parcel of land was dedicated as a public park, it might be the Director of Public Works, especially if they were familiar with and closely tied to the lands throughout the history of ownership.

[180] It stands to reason that the owner, whoever it may have been, permitted the infrastructure to be placed in support of the youth program and permitted the land to be used as such for the benefit of the citizens and visitors to the beach.

[181] As was discussed in *Frank Georges' Island*, this type of use is something that might be expected by a public body. If so, Moir J stated, it can “offer nothing” for an inference of the owner’s intent. Mere leading to believe it (the land) is open is insufficient. Something more is required. (Paragraph 38)

[182] The evidence shows the Municipality later deeded the land privately without restriction. Even if it had made it into the deed, the earlier resolution in 1969 only required that the land be used and developed for the benefit of its citizens. It appears obvious that selling the property to Cape Bald was believed by Warden MacArthur and the Council to be for the benefit of its citizens because it was creating needed employment. As Kathleen Poirier stated, no one objected.

[183] In *Gibbs* the beach was at a public pier at the end of the main road in the village making it a well known and popular resort area (Paragraph 41). There is no question that Inverness Beach has been a well known and popular area known for its beach, especially in summer.

[184] The Applicant relied heavily on the aerial photographs to support his position that the lands were “thrown open”. These photos support the Applicant’s claim, but only for a limited period. On the whole, I find evidence does not satisfy the legal test for dedication.

[185] Even if it did, acceptance by the public is refuted by the numerous affidavits of town residents. Those that were cross-examined held up well and were not shaken. I accept the evidence of long time resident Janice Ferguson, who said there was no set way to get the beach, you travelled down from town and crossed over, depending on where you lived in town. As far as vehicles, the main access points were Beach Road 1 and Beach Road 2, which has been closed.

[186] The weight of the evidence suggests that any use made by the public was with permission but without any more in terms of an intention to dedicate.

[187] There is no question that some amenities were provided on the lands to the benefit of those visiting and accessing the beach from time to time. This included some parking and the use of the recreational equipment. It does not necessarily follow however that the provision of these items demonstrates an intention to dedicate as oppose to for example, tolerance extended by these owners toward visitors to the beach, both local and visitors.

[188] The evidence suggests there was a high level of tolerance by Cape Bald and the Municipality before it, as owners. The Town went a step further in the early and late 1960's to install some recreational equipment, but this is a far cry from an intention to dedicate a 6.2 acre parcel.

[189] Mr. Livingston has referred to the access ramp shown in Exhibit A of his supplemental affidavit as only being accessible through the lands sought to be dedicated. This can be seen on the plan in Exhibit "K" of Mr. Cowan-Dewar's affidavit. It can also be seen on the largest photo at Tab 2 of the MacKinnon affidavit of the 1999 and 2009 photos. I do not think the Application turns on that to any great extent in terms of an intention to dedicate by the owners. If anything it affirms there was a level of tolerance by Cape Bald and now Cabot with respect to use of the boardwalk.

[190] I have attempted to scrutinize the evidence with care to determine whether dedication has been proven on a balance of probabilities. (*Viceversa Developments Inc. Winnipeg (City)*, 2015 MBCA 38).

[191] On balance, I find the evidence does not show a clear intention to dedicate this parcel of 6 acres for public use. The primary use through the years was for parking to access the beach. I accept the evidence of Joe O'Connor and Gary MacInnis, both of whom gave clear evidence as to the parking. It changed over time they said and ultimately returned to where the parking lot is today. This is described at the "base" of the hill at the end of Beach Road 1. This area is no longer contained within PID 50296763.

[192] The secondary or accessory use made was for recreation and enjoyment of beach activities by the placement of picnic tables and playground equipment. The canteen was built by 1977. After that, the use gravitated to the canteen area, after it was built, as stated by Mary Poirier.

[193] Benches for sitting along the beach can be expected while the land was owned or controlled by the Town and its Mayor. The IDA was arguably the owner in the 20 years between 1968 and 1987. There is no evidence of intent by them to dedicate this land even though they were registered owner. On the contrary they were in negotiations and trying to establish a golf course, even before Mr. Cowan-Dewar arrived in 2004, as is evidenced by Exhibit "B" of his affidavit. Whether there was a second agreement is, in my view, a red herring and not directly relevant to the main issue.

[194] I therefore find that the recreational use of Inverness Beach, as described in the evidence offer by the Applicants (and in some cases the Respondents), does not support or found an inference that this piece of land consisting of 6 acres, was dedicated to the public (para. 41 *Frank Georges' Island*). Picnic tables, garbage cans, and fire pits, are movable structures unlike a pier or a gazebo which are more permanent or fixture type structures.

[195] Unlike the situation in *Lake of Bays* the acts of the various owners serve to demonstrate that they considered the land to be theirs. I find they did not acquiesce.

[196] In the result the Application of Mr. Livingston is hereby dismissed.

[197] I will need to hear from the parties with respect to Cost submissions.

Murray, J.