Docket No.: CA 164990
Date: 20010125

NOVA SCOTIA COURT OF APPEAL

[Cite as: Boudreau v. Boudreau, 2001 NSCA 15]

Bateman, Flinn and Cromwell, JJ.A.

BETWEEN:

BRIAN BOUDREAU and his wife, ROBIN BOUDREAU, KEVIN BOUDREAU and RONALD BOUDREAU

Appellants

- and -

RONALD JOSEPH WAYNE BOUDREAU and MARY BOUDREAU

Respondents

REASONS FOR JUDGMENT

Counsel:	Frank L. Elman, Q.C., for the appellants Michael A. Tobin, for the respondents
Appeal Heard:	January 19, 2001
Judgment Delivered:	January 25, 2001
THE COURT:	Appeal dismissed with costs and disbursements per reasons for judgment of Flinn, J.A.; Bateman and Cromwell, JJ.A. concurring.

FLINN, J.A.:

[1] This is an appeal from the decision of Associate Chief Justice MacDonald of the Supreme Court in which he decided that the respondents have a right-of-way over a “well travelled and well recognized” driveway which runs in a northeasterly direction from the properties of the respondents, over the properties of the appellants, to the Grove’s Point Highway.

[2] The trial judge made this determination notwithstanding the submissions of the appellants, at trial, that the right-of-way had been conveyed by the predecessor in title (Amedee Boudreau) to the appellant, Sharon Boudreau, before the purported grant of right-of-way to the respondent, Mary Boudreau. The trial judge decided that the right-of-way had not been conveyed to Sharon Boudreau as alleged. He decided that an exception and reservation clause contained in the deed from Amedee Boudreau to Sharon Boudreau, which provided as follows:

> Excepting and reserving, to the Grantee, his heirs and assigns a right-of-way along the existing driveway.

contained a patent ambiguity; and that "the drafter inadvertently inserted the word 'grantee' when 'grantor' was intended." As a result, Amedee Boudreau did not convey the right-of-way to Sharon Boudreau, rather, he excepted out of the conveyance a right-of-way over Sharon Boudreau's property. The trial judge rectified this deed accordingly.

[3] In my opinion, in coming to these conclusions, the trial judge made no error of law which would warrant this court interfering with his decision. As a result, this appeal should be dismissed.

[4] However, the order giving effect to the trial judge's decision, which had been prepared by counsel for the respondents, does not, in two respects, properly reflect that which the trial judge decided:

> [1] The order, wrongly, purports to vest title to the existing roadway in the respondents. What the respondents were seeking in this action, and what the trial judge decided was that the respondents had a right-of-way, only, over the existing roadway. The

respondents did not claim, nor did the trial judge grant, the fee simple interest in the roadway to the respondents.

[2] The order makes no provision for rectification, which the trial judge granted, of the deed from Amedee Boudreau to Sharon Boudreau.

[5] I would propose that the order dismissing this appeal reflect those changes to the trial judge's order.

[6] I make two further comments on the appellants' submissions before this court.

[7] Firstly, counsel for the appellants focused his oral submissions on s. 18 of the **Registry Act** which provides as follows:

> Effect of failure to register instrument
>
> 18 Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting the title to the same land, be ineffective unless the instrument is registered in the manner provided by this Act before the registering of such subsequent instrument.

[8] Counsel for the appellants claim that the appellants had no actual notice of any grant of right-of-way to the respondents before the appellants' respective deeds were registered. Since the

respondents' deeds were registered after the appellants' deeds, the respondents have no right-of-way claim.

[9] In order for the appellants to succeed in this claim, the burden is on them to bring themselves clearly within the provisions of s. 18 of the **Registry Act**. There must be proof of valuable consideration, and proof of lack of notice. See **Winter v. Keating and Gillies** (1977), 24 N.S.R. (2d) 644 and the cases cited therein (affirmed on other grounds (1978), 24 N.S.R. (2d) 633). See also **Fort Garry Trust Co. v. Sutherland & Sutherland** (1980), 59 N.S.R. (2d) 298 (N.S.S.C.). It is clear from a review of the proceedings before the trial judge that the appellants did not discharge that burden.

[10] Secondly, the issue as to what rights Sharon Boudreau, her heirs and assigns, obtained over the roadway in question, from the northeast side of Lot 85-2 to the Groves Point Highway, is not before us, and I express no opinion on that issue.

[11] I would therefore dismiss this appeal. I would order the appellants to pay to the respondents their costs of this appeal which I would fix at $1,500. plus disbursements.

Flinn, J.A.

Concurred in:

Bateman, J.A.

Cromwell, J.A.