SUPREME COURT OF NOVA SCOTIA
Citation: *St. Mary's (Municipality) v. Cook*, 2019 NSSC 374

Date: 20191212
Docket: SAT No. 470771
Registry: Truro

Between:

Municipality of the District of St. Mary's

Applicant

v.

Buddy Cook, Cindy Mildred Cook,
Robert Leo Vernon Cook,
Attorney General of Nova Scotia

Respondent

Judge: The Honourable Justice John A. Keith

Heard: May 10, 2019, in Truro, Nova Scotia

Counsel: Adam Rodgers, counsel for the Applicant Municipality of the District of St. Mary's

Robert Pineo, counsel for the Defendants Buddy Cook, Cindy Mildred Cook and Robert Leo Vernon Cook

Defendant Attorney General of Nova Scotia not participating

BY THE COURT:

INTRODUCTION

[1] Sherbrooke Lake is located beside the Village of Sherbrooke, Municipality of the District of St. Mary's (the "**Municipality**"). A gravel laneway bearing PID No. 35225572 (the "**Laneway**") connects the Village with Sherbrooke Lake.

[2] The lake forms an important part of the Municipality's water supply system. The Laneway has been used by the Municipality and, before that, by the Province for many years to construct and maintain the water supply system.

[3] The Laneway is also used by members of the public, including the Respondents who own property alongside the Laneway and operate a convenience store and gas bar on Highway 7 where the northern end of the Laneway begins.

[4] Robert Kelly owned a small 8' x 8'parcel of land near the southern end of the Laneway, on the shores of Sherbrooke Lake. By Warranty Deed dated June 1, 2017, Mr. Kelly conveyed title to this parcel to the Respondents. Also, on June 1, 2017, and by separate Quit Claim Deed, Mr. Kelly conveyed whatever interest he had in the Laneway to the Respondents.

[5] On November 13, 2017, the Municipality responded to this Quit Claim Deed by depositing documents with the Registrar of Deeds for Guysborough County expropriating the Laneway under Nova Scotia's *Expropriation Act*, R.S.N.S. 1989, c. 156 as amended (the "***Act***").

[6] The Municipality then filed this proceeding under Section 17 of the *Act* to "make a determination respecting the state of title to the land and to order who had a right, estate or interest in the land as at [November 13, 2017] and the nature and extent thereof." The Municipality named the Province as a Respondent in this proceeding as well as Buddy Vernon Cook, his spouse Cindy Mildred Cook, and their son Robert Leo Vernon Cook (collectively, the "**Cooks**").

[7] The Province did not participate in this proceeding and claimed no interest in the Laneway.

[8] The Respondent Cooks do not claim to own the Laneway. Rather, they claim to have acquired, by prescription, a private right of way over the Laneway. Other than the Cooks, and despite public notice, no other person came forward to claim any right or interest in the Laneway.

[9] I am asked to determine who has a right, estate or interest in the Laneway, together with the nature and extent of any such right, estate or interest.

[10] For the reasons which follow, I have determined that the Laneway is a street which vested absolutely in the Municipality and is currently open for unobstructed use by the public pursuant to Section 308(1) of the *Municipal Government Act*, SNS 1998, c 18 as amended (the "**MGA**"). In the event this is in error and provisionally, the Laneway has been thrown open to the public. Through the doctrine of dedication and acceptance, it constitutes a "common and public highway" which vests with the Province under Sections 11(1) and (2) of the *Public Highways Act*, RSNS 1989, c. 371 as amended (the "**PHA**"). In all events, the Cooks may continue to use the Laneway as members of the public. However, they do not have any private right of way (or private control) over the Laneway. Any such private interests would be inconsistent with the existing public nature of the Laneway.

ISSUES

[11] The parties were able to significantly narrow the issues for determination.

[12] The Municipality takes the position that the Laneway is for the public and does not serve any private interests.

[13] By contrast, the Cooks claimed a private right of way and identified that following two lots as the dominant tenements which acquired prescriptive rights over the Laneway:

1. A lot identified as PID No. 35206796 and owned by the Respondent Cindy Mildred Cook. This lot is described in the materials as the "**Store Property**". By Warranty Deed dated April 17, 1982, Cindy Cook (nee Carroll) acquired title to the Store Property from her mother, Lillian Lola Carroll. The Store Property shares a boundary with the Laneway and, indeed, the Laneway is used as an identifying marker in the metes and bounds description for the Store Property. Pausing here, the Store Property is located at the northern end of the Laneway and ends less than half-way down the Laneway; and

2. A second lot identified as PID No. 35225564 and currently owned by the Respondents Buddy Cook, his wife Cindy Cook and their son Robert Cook. This lot is 8' x 8' in size and described in the materials as the "**Small Parcel**". The Small Parcel is located at the southern end of the Laneway near Sherbrooke Lake. The Small Parcel was

> originally part of a large 10' strip of land located on the shores of Sherbrooke Lake. By Deed dated June 28, 1965 and recorded in the Registry of Deeds at Book 39, Page 152, Mr. Kelly acquired this larger parcel of land in 1965 from the Scott Paper Company. By Deed dated March 9, 1971, and recorded at Book 40, Page 133, at the Registry of Deeds, Mr. Kelly conveyed this parcel to the Province but specifically reserved and excluded for himself a small 8' x 8' lot "on which the pumphouse and pipe line right-of-way services the homes of the Grantors [Robert Kelly] and others";

[14] Pausing here, it should be noted that the Respondent Cooks own, in various combinations, three other nearby parcels of land:

1. A lot described in the materials as the "**Back Property**" and bearing PID No. 35206325. The Back Property is located to the immediate south of the Store Property and stands between the Store Property and the Small Parcel. The Back Property shares a boundary with the Laneway. Buddy Cook and Cindy Cook acquired the Back Property in 2005 via an Estate Deed from the Estate of John Hugh MacMillan;

2. A lot described in the materials as "**Property B**" and bearing PID No. 37542750. Property B is located immediately west of the Store Property along Highway 7. It neither has direct access to nor shares a boundary with the Laneway. Buddy Cook and Cindy Cook also acquired Property B from the Estate of John Hugh MacMillan in 2005 via an Estate Deed;

3. A lot described in the materials as "**Property A**" and bearing PID No. 37501640. Property A is adjacent immediately west of Property B along Highway 7. It neither has direct access to nor shares a boundary with the Laneway. The Respondent Robert Cook acquired fee simple title to Property A in 2009.

[15] At the hearing, the Cooks confirmed that they are not claiming easements by prescription in connection with these three parcels described in paragraph 14 above but expressly reserved their right to pursue claims for injurious affection as landowners affected by an expropriation.

[16] The preliminary issue is whether the Laneway vested with the Municipality under the MGA or, alternatively, with the Province under the PHA. If so, the inquiry ends as the Cooks' interest would be subsumed within the public's right

(i.e. there would not be any residual private right of way). If not, a secondary question arises as to whether the Cooks (or any one of them) have acquired a private right of way by prescription over the Laneway as owners of the two parcels of land which they identify as the dominant tenements: the Store Property and the Small Parcel.

BACKGROUND FACTS

[17] The Laneway is unique in a number of respects including:

1. While it has been given a PID number (PID No. 35225572), no party has been able to identify a private owner of the Laneway from the documents registered on title. Then on June 1, 2017, Robert Kelly signed a Quit Claim Deed granting whatever interest he might have in the Laneway to the Respondents Buddy Cook, Cindy Mildred Cook and Robert Leo Cook. On that same day, Robert Kelly signed a Warranty Deed conveying title in fee simple to the same Respondents of a small 8' x 8' lot located on Sherbrooke Lake near the end of the Laneway. It is telling that Mr. Kelly was either unwilling or unable to convey title in fee simple to the Laneway by Warranty Deed. Instead, he signed a Quit Claim Deed, as indicated;

2. Despite having no identified owner on title:

    a) Several homes and at least one existing business (owned by the Cooks) used the Laneway to access their property for years. The Cooks indicate that they have planned to expand their business on the Store Property and also develop the Back Property for commercial purposes; and that they acquired an interest in the Laneway to secure continuing use and further their business plans;

    b) One person who owned land near the Laneway and is of particular interest to these proceedings is Robert Kelly. As indicated, Mr. Kelly conveyed fee simple in the Small Parcel to all of the Respondents (Buddy Book, Cindy Cook and Robert Cook) on June 1, 2017 by way of Warranty Deed. Also, on June 1, 2017, Mr. Kelly also conveyed whatever interest he might hold in the Laneway by way of Quit Claim Deed. The difference is the method of conveyance is obviously significant, as mentioned. Mr. Kelly was either unwilling or unable to

warrant title in the Laneway. Regardless, the Cooks do not claim to own the Laneway in any event. Instead, they argue that as successors in title to Mr. Kelly, they have acquired (as a successor in title) whatever private right of way Mr. Kelly acquired by prescription as owner of the Small Parcel from 1965 forward. At paragraph 15 of the affidavit signed by all of the Respondent Cooks, they state that "we, and our predecessors in title have used the Subject Property openly, peacefully and without permission, interference or interruption since at least 1965". However, I have no evidence from Mr. Kelly. And the evidence of prescriptive rights which might attach to the Small Parcel are limited to that single, broad statement in paragraph 15;

c) The Municipality used the Laneway to access and service its water supply infrastructure located on the shores of Sherbrooke Lake. Indeed, by 1970 and 1973 and as part of the restoration of the Historic Village of Sherbrooke, a new water supply system was constructed. This included a dam and dyke located at the end of the Laneway on the shores of Sherbrooke Lake. It also included a pump house built on the north shore of Sherbrooke Lake. The Laneway was used during construction and the water distribution line ran along the Laneway and into the Historic Sherbrooke Village. On August 14, 1989, the Municipality established a Municipal Sewer and Water Utility and on September 15, 1989, the Province formally turned control of this water infrastructure over to the Municipality. By this time, the process of expanding the system to provide water to the entire community of Sherbrooke had begun. In 2000, a water treatment plant was added to this system;

d) The Municipality frequently uses the Laneway to monitor and maintain the water infrastructure. The Municipality also ensures access by plowing the Laneway during the winter;

e) The Laneway is separately identified in various plans of survey registered in the Registry of Deeds including:

   i. A plan of survey dated August 26, 1973 and prepared by Otto Rosinski, NSLS. This survey was recorded as

37544483 and contains the note "Road to the Lake. Existing Road"; and

ii. A plan of survey dated January 26, 2009 and prepared by Blake Beaton, NSLS for the Respondents Buddy Cook and Cindy (Carroll) Cook was recorded as document number 93337351 in Registry of Deeds. It depicts the Laneway with the notation "Road maintained by the Municipality of the District of St. Marys";

f) The Laneway is described in various deeds dating as far back as 1960 as a "road" leading to Sherbrooke Lake. And it actually served as a boundary for numerous parcels of land located on either side of it – both in terms of creating a physical separation between properties and also as part of the metes and bounds descriptions on the deeds of adjacent properties. Some of these Deeds involve lands currently owned by the Respondents.

STREETS, ROADS AND HIGHWAYS UNDER THE MUNICIPAL GOVERNMENT ACT AND THE PUBLIC HIGHWAYS ACT

[18] The Laneway in question is very clearly a well-defined strip of land which appears to be (and has been used as) a thoroughfare by adjacent landowners, the public, and the Municipality for many, many, years. This is not a case where the essential nature of land has changed or been transformed over time into some form of right of way (public or private). The essential nature of the Laneway as a route has remained consistent for as far back as the evidence seems to allow. For example, as indicated:

1. The size and location of the Laneway suggests an intentional route for use by others. It is long, narrow and connects Highway 7 with Sherbrooke Lake;

2. Nobody can identify an historic owner of the Laneway. Indeed, while the Cooks registered a document on title claiming ownership, they properly conceded that they do not claim to own the Laneway for the purposes of this proceeding. Their claim is for a private right of way, as indicated;

3. The Laneway physically separates parcels of land and has served as a means of egress for the owners of those parcels;

4. The Laneway is expressly identified as a natural boundary in the metes and bounds descriptions of adjacent properties;

5. The Laneway has served as an important access route to Sherbrooke Lake and has been used in that capacity by the Municipality to service its water supply infrastructure, adjacent landowners and members of the public.

[19] In short, the size, shape, location, usage and ambiguous title history are all consistent with a route.

[20] Pausing here, I use the word "route" in an attempt to remain as generic and neutral as possible. It is not the ideal word; however, as will be seen below, the statutory framework around public thoroughfares in Nova Scotia is interlocking, complicated, and made more difficult by using identical words to describe different types of public thoroughfares in different statutory contexts. For example, a "road" or a "highway" could be deemed a "public highway" or "public road" and vest with the Province under the provisions of the PHA. At the same time, a "road" or a "highway" are included within the definition of a "street" in Section 307 of the MGA and could vest with the local municipality under the provisions of the MGA. In addition, the definition of "street" in the MGA encompasses numerous synonyms for a public route, but it does not actually use the word "route" and so this term benefits from a measure of neutrality. Overall, it must be said that the applicable statutory framework would benefit from improved definitions and provisions which help distinguish identical terms which appear in separate but related legislation.

[21] Regardless, the question before me is not so much whether the Laneway is a route but, rather, whether it is a public route (as the Municipality contends) or, alternatively, a private route burdened by various private rights of way (as the Cooks maintain).

[22] I begin with a consideration of public routes in Nova Scotia; and then proceed to assess the related issues of whether the Laneway in this particular case is:

1. A public (as opposed to private) route; and

2. If the Laneway is a public route, does it vest with the Municipality or the Province?

[23] I start with the PHA and will move on to consider the interconnected provisions of the MGA.

[24] The PHA focuses on the word "highway", as the name of the statute suggests. Section 2(f) defines a "highway" in a somewhat self-referential way as "a public highway or public road". Section 3 narrows the scope of the statute by stating that the PHA applies to "all highways within the Province" but excludes "highways" located within the boundaries of a municipality except where expressly provided.

[25] Section 11(1) of the PHA sets out the categories of roads, highways, and allowances that are deemed to be "common and public" highways "until the contrary is shown." It states, in part:

> 11 (1) Except in so far as they have been closed according to law,
>
> a) ….
>
> b) all roads dedicated by the owners of the land to public use;
>
> c) every road now[1] open and used as a public road or highway…
>
> d) ….
>
> shall be deemed to be common and public highway until the contrary is shown.

[26] Turning to the MGA, the focus shifts from public "highways" to the word "streets". Part XII is entitled "Streets and Highways". Section 307 defines the word "street" as follows:

> INTERPRETATION
>
> 307 In this Part, "street" means a public street, highway, road, lane, sidewalk, thoroughfare, bridge, square and the curbs, gutters, culverts and retaining walls in connection therewith, but does not include streets vested in Her Majesty in right of the Province.

[27] Section 308(1) goes on to confirm that "All streets in a municipality are vested absolutely in the municipality." However, Section 308(3) modifies this rule

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[1] Subsection 9(2) of the *Interpretation Act*, RSNS 1989, c, provides, *inter alia*, that the word "now" in an enactment refers to "the time when the enactment comes into force." The Court of Appeal has confirmed that the language of s 11(1)(f) "first appears in the *Public Highways Act* of 1919" and is to be read accordingly: *Frank George's Island Investments Ltd v Shannon*, 2016 NSCA 24, at paras 17-18.

in the case of a "road". It states that no "road", or allowance for a "road", becomes a "street" until either:

1. "…the council formally accepts the road or allowance"; or

2. "…the road or allowance is vested in the municipality according to law."

[28] I do not consider in any great depth the circumstances under which a municipal council "formally accepts the road or allowance" because it is agreed between the parties that no such formal acceptance of the Laneway was made by municipal council. My analysis is therefore limited to when a road or allowance might be vested in a municipality "according to law" under section 308(3) of the MGA.

[29] The relevant statutory framework includes both the PHA and MGA; and they are not especially integrated or cohesive on the issues before me. Part of the problem is that a broad term like "road" is a definition of both a "street" under the MGA and a "highway" under the PHA. Resolving and reconciling these interconnected statutory schemes requires the application of several principles of statutory interpretation, including:

1. The modern principle of statutory interpretation emphasizing the importance of a purposive analysis.

2. A purposive analysis of a legislative text is based on the following propositions:

    a) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.

    b) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text's meaning.

    c) In so far as the language of the text permits, interpretations that are consistent with or that promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

(*Sullivan on the Construction of Statutes, 6th ed.* ("***Sullivan***"), Section 9.3)

3. The most direct and authoritative evidence of legislative purpose is found in formal purpose statements appearing in the body of legislation. (*Sullivan,* Section 9.43)

4. Words in a statute are assumed to bear their ordinary meaning unless and until this assumption becomes untenable (*Sullivan,* Section 3.5)

5. The provisions of related statutes are presumed to work together as part of a functioning whole. Specific statutory provisions are presumed to form a rational, coherent framework consistent with the underlying statutory purpose (*Sullivan,* Section 11.2)

6. If two or more statutory provisions overlap, the courts will reach for an interpretation that gives effect to both. (*Sullivan,* Section 11.12)

7. The courts seek to avoid conflict between legislation, if possible. In *Tabernacle Permanent Building Society v. Knight,* Lord Halsbury said that so long as the Acts under review can "stand together and both operate without either interfering with the other", there was no inconsistency or conflict. (*Sullivan,* Section 11.31)

[30] Turning back to the relevant provisions of the MGA and PHA, I make the following findings, the scope of which is intended to be limited and sufficient only to determine the issues before me:

1. **The purpose of the MGA in the context of this proceeding**: Section 2 states that the purposes of the MGA is, in part, to recognize the specific purposes described in Section 9A. Section 9A states that:

> The purposes of a municipality are to
>
> (a) provide good government;
>
> (b) provide services, facilities and other things that, in the opinion of the council, are necessary or desirable for all or part of the municipality; and
>
> (c) develop and maintain safe and viable communities.

In so far as "streets" in Part XII are concerned, I find that the purpose of the MGA includes, but is obviously not limited to, the ownership,

construction and maintenance of transportation routes creating physical connections within established Nova Scotian communities for the dominant purpose of providing municipal services and developing safe, viable communities.

2. **The purpose of the PHA in the context of this proceeding**: The PHA does not contain a similar section describing its purpose. However, it is clear that the purpose of this statute includes, but is not limited to, regulating the ownership, construction and maintenance of safe transportation routes between or directly through communities. Usually, highways represent a network of major or significant arteries of transportation which create physical connections between established communities across Nova Scotia. These purposes are evident in the PHA. For example:

    a) The term "highway" is the critical concept embedded within the provisions of the PHA and that term has been defined by the *Oxford English Dictionary* as "a main road, especially one connecting major towns or cities";

    b) Until the contrary is shown, the default width of common and public highways under the PHA is relatively large: 20.1168 meters or 66 feet. This suggests a more significant transportation artery. There is no such attempt to define the typical width of a "street" in the MGA;

    c) The Governor in Council may designate "controlled access highways" which are statutorily designed to exclude the sorts of activities normally contained within a community, such as private access roads or driveways, private structures, and commercial enterprises (Sections 21 to 22);

    d) Section 27 of the PHA enables the Minister of Transportation to construct or maintain a highway within the boundaries of a town or city to provide "a direct or more expeditious route for traffic through a town or city" – as opposed to "within" a town or city. (emphasis added).

3. **Defining Streets, Highways and Roads**: For the purposes of this particular proceeding and in a related effort to more clearly

distinguish between the main types of transportations routes described in the PHA and MGA:

a) "Streets": As indicated, the term "streets" is the focus of Sections 307 and 308 of the MGA. "Streets" are inherently and exclusively public in nature. A route that is contained within the boundaries of a municipality and whose dominant purpose is to provide municipal services within an established community, or to facilitate a safe, viable community, constitutes a "street". In the *Nova Scotia Real Property Practice Manual* at §13.2A, Charles MacIntosh defines a "street" as "a road which has a more or less continuous and regular row of houses on one or both sides. MacIntosh's definition of "street" is drawn from *Robinson v Local Board of Barton-Eccles* (1883), 8 App Cas 798 (HL), and *Hutson v Regina (City)*, [1913] 14 D.L.R. 372, [1913] S.J. No. 50 (Sask SC). For present purposes, this definition may be too narrow and somewhat confusing given that a "street" is being defined by reference to a "road".

   In my view, the factors which would bear upon whether a route is characterized as a "street" would include, but would not be limited to, the presence of homes on one or both sides of the route; the extent to which residents rely upon the route to access their homes or community buildings; or the extent to which the municipality relies upon the route to deliver services to its residents;

b) "Highways": As indicated, the term "highways" is the focus of the PHA, as the name suggests. Like "streets", "highways" are inherently public in nature but serve a different purpose. As indicated above, if the dominant purpose of a "highway" is to connect two or more established communities then it would transcend the more local purpose and nature of municipal transportation requirements. Generally speaking, a "highway" would be governed by the terms of the PHA and owned by the Province. There are exceptions although they are not relevant to the issues before me;

c) "Roads": The term "roads" is perhaps the broadest and most ambiguous of terms found in the PHA and MGA. Roads can be

private or public. Moreover, the essential characteristics of a public "road" may encompass either a "highway" or "street". A public "road" may have elements of both a "street" and a "highway", as those terms are defined above. A "road" may serve municipal purposes within an established community similar to a street. Moreover, under Section 308(3) of the MGA, a "road" may become a "street", owned and controlled by the local municipality. At the same time, a "road" may also form part of a broader network of highways located between (and connecting) various communities. The PHA and MGA reflect the broader qualities of a "road" and the fact that a "road" may become a "public highway" or a "street". Under Section 11 of the PHA, a road may be deemed to be a "public and common highway" and yet a "road" might also transition into a "street" under Section 308(3) of the MGA. Moreover, every "road" which was "now open and used" as a public highway is deemed to be a "public and common highway" under Section 11(f) of the PHA. By the same token, a "street" (defined to include a road) is "vested absolutely" in the municipality under Sections 307 and 308(1) of the MGA.

I return to how these various provisions fit together. For present purposes, it is necessary to attempt to define the term "road" in a way which achieves the statutory purposes and, as well, provides clarity as to which "roads" might qualify as "streets" and which "roads" might qualify as a "public and common highway". To that end:

i. A road which might transition into a "street" under Sections 307 and 308 of the MGA must be a transportation route whose public purpose is more in line with that of a street operating within a municipality than that of a highway which connects two or more places within the province;

ii. A road which might be deemed a "common and public highway" under Section 11 of the PHA must be a transportation route whose public purpose is more in line with that of a highway operating between two or more places than that of a street which, for example, predominantly facilitates the provision of municipal

services within an established community. Notably, the doctrine of dedication and acceptance for present purposes appears to apply only in the context of roads which might be deemed "common and public highways" under the PHA (Section 11(e)). Put slightly differently, under the PHA, all roads which have been dedicated to (and accepted by) the public are deemed to be "common and public highways". The statutory regime does not seem to contemplate that "roads" be dedicated to (and accepted by) the public as "streets" under a municipality's control. Instead, "roads" transition into streets in accordance with the provisions of Section 308(3) of the MGA.

4. **Separating "Streets" from "Highways"**: As indicated, there are related statutory provisions in which "streets" become absolutely vested in a municipality (Section 308(1) of the MGA); in which "roads" might transition into "streets" according to law (Section 308(3) of the MGA); and in which a "road" might be deemed to be a "public and common highway" (Section 11 of the PHA). The Court seeks to achieve a statutory interpretation which avoids conflict and better achieves an integrated statutory scheme consistent with the legislative purposes. I reconcile these various statutory provisions as follows:

   a) A route which possessed all of the characteristics of a "street" when Section 145 of the *Towns Act*, RSNS 1967, c 309 (the "***Towns Act***") came into force and certainly by 1998 when its successor statute, the MGA, came into force. Under either statute, this street vested absolutely with the municipality (Section 308(1)).

   b) Moreover, a "road" which would previously have been considered a public highway under the PHA but whose public purpose was more in line with that of a "street" also became a "street" and vested absolutely with the municipality as of 1967 and 1998 at the latest. This is because any such vesting would have occurred "according to law" under the *Towns Act* and would certainly have occurred under Section 308(1) of the MGA, consistent with Section 308(3);

c) These statutory conclusions coincide with the jurisprudence developed under the predecessor provisions to Sections 307 and 308: Section 145 of the *Towns Act*, RSNS 1967, c 309. Section 145 reads:

> All public streets, roads, lanes, sidewalks, thoroughfares, bridges, squares, parks and public grounds, all public sewers, drains and ditches, and all public wells in the town, are hereby vested absolutely in the town, and insofar as is consistent with their use by the public, the council shall have full control over the same.

In *Seimac Ltd. v Wood* (1987), 80 N.S.R. (2d) 366, 1987 CarswellNS 316 (SCTD), where the dispute involved the status of a sixteen-foot strip of connecting land in Bedford, Rogers, J. concluded that there had been a public right of way, which vested in the Crown by virtue of the 1917 *Public Highways Act* (at paras 24 – 32). Rogers, J. held that the effect of s 145 of the *Towns Act* was to vest the strip in the town upon incorporation. (at paras 33 - 35)

Rogers, J. concluded that a private easement was inconsistent with the town's ownership interest:

> 43 It is hard to accept that such language will permit a private right-of-way or easement to cut down the Town's power to deal with its streets in any way consistent with the *Public Highways Act* and the *Towns Act*. The words "vesting" and "vesting absolutely" in my opinion effectively operates to confer absolute and indefeasible title in fee simple to the Town - not subject to a possible prior existing private right-of-way. The legislation in both instances was intended clearly to give the Crown and then the Town full control over its streets, free of any past encumbrances there might have been. It would be awkward, complicated and I suggest, unthinkable for a duly incorporated town not to have unrestricted use and control of its public thoroughfares and to be continually concerned over any previous private easements that may have existed in those streets.
>
> 44 *Black's Law Dictionary*, revised 4th ed., p. 1730 defines "vested":
>
> Fixed; accrued; settled; absolute. Having the character or giving the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. [Emphasis added.]

> Similarly, in *Kesme Food Services Ltd v Kentville (Town)* (1988), 89 NSR (2d) 376, 1988 CarswellNS 79 (SCTD), an issue arose as to whether the municipality could close a street, or whether that power belonged exclusively to the Minister pursuant to Section 19(1) of the PHA, which provided that "[t]he Minister may close any highway or any part of any highway to all traffic or to any class or classes of traffic for such time and from time to time as he deems expedient." In concluding that the Minister did not have such power in the circumstances, Tidman, J. implicitly accepted the town's argument that the street in question was "within the boundaries of the Town" and "therefore that under the provisions of s. 145 of the *Towns Act*, Webster Street is owned by the town and it has power to close the street by virtue of s. 162 of the Act, where it authorizes the town to "stop up the streets"." (at para 9)

d) A route which possessed the characteristics of a "highway" (i.e. was now open and used as a highway) was deemed to be a "common and public highway" as of 1919 when the first public highways legislation came into effect (*Frank George's Island Investments Ltd v Shannon*, 2016 NSCA 24, at paras 17 - 18).

[31] Applying these principles to the facts of this case, I conclude that:

1. The Laneway was a "street" as of 1998 and therefore vested absolutely with the Municipality under Section 308(1). The Laneway has all the essential elements of a street as of that date. In particular:

   a) It was thrown open to the public for as long as memory serves and, during that time, had no identifiable private owner;

   b) It had a clearly defined location consistent with a public street and was actually used in the metes and bounds descriptions of neighbouring lots as a means of establishing boundaries;

   c) There were houses and businesses developed on both sides of the Laneway and the owners of these properties used the Laneway to access their property;

   d) It did not connect established communities within a broader transportation network but, rather, terminated at Sherbrooke

Lake and was used as a means of connecting to Sherbrooke Lake;

e) The municipality has used the Laneway for decades to operate and maintain critical components of the municipal water supply.

2. Provisionally, if the Laneway was a private "road" (without any identified private owner), I conclude that it transitioned into a "street". Thus, under either the *Towns Act* or Sections 308(1) and (3) of the MGA, it would have vested absolutely with the municipality according to law. Certainly by 1998, the Laneway was thrown open to the public and accepted by the public for time beyond memory, as indicated above.

3. The Cooks maintain a right to use the Laneway as they have in the past as members of the public but do not have private rights (or a private right of way) over the Laneway.

On this final point, I make the following concluding observations regarding the three parcels of land that are owned by some or all of the Respondents and border on the Laneway:

a) **Small Parcel located at the end of the Laneway on the edge of Sherbrook Lake**: The Cooks failed to adduce sufficient admissible evidence to demonstrate that a private right of way attached to the Small Parcel. They have only owned this parcel since 2017. As such, the evidence to prove a private right of way by prescription would have to either come from the prior owner (Robert Kelly) or such other evidence as might satisfy the evidentiary burden. I have no evidence from Mr. Kelly. The main piece of information in evidence on this issue is found in the March 9, 1971 deed where Mr. Kelly retains ownership of the Small Parcel when conveying the larger, surrounding parcel of land to the Province. That deed indicates that there was a pump house on the Small Parcel at that point in time, but I have no evidence to indicate, for example, whether that pump house still exists or how often the Laneway was used to service the pump house;

b) **Back Property located just north of the Small Property**: The Back Property is also adjacent to the Laneway. However, the Respondents do not allege that the Back Property is a dominant tenement for the purposes of asserting prescriptive rights over the Laneway and do not offer any specific evidence with respect to the historical use of the Laneway in connection with this property except to attest that this property "was used in conjunction with the convenience store operations, specifically for the storage of goods and equipment." The specific details are unclear. Regardless, any such use would have only begun when they acquired the property in 2005. As such, insufficient time has passed to establish prescriptive rights;

c) **Store Property located immediately north of the Back Property**: The Cooks offer the following evidence in respect of this land. They say:

i. The Store Property is used as a gas bar and convenience store;

ii. The Laneway has been used in conjunction with the Store Property for customer parking and access since approximately 1982 (i.e. when Cindy Cook acquired the property from her mother, Lillian Carroll).

[32] Had it been necessary and provisionally, I find that there was sufficient evidence to ground a claim for prescriptive rights over the Laneway but limited to customer parking in respect of the Store Property only. However, again, given my conclusions above, it is unnecessary to address that issue further.

Keith, J.