Date: 20011219
Docket No.: CA 172340

NOVA SCOTIA COURT OF APPEAL

[Cite as: Gould v. Edmonds 2001 NSCA 184]

Glube, C.J.N.S.; Freeman and Saunders, JJ. A.

BETWEEN:

SUSAN DALE GOULD

Appellant

- and -

CLINTON J. EDMONDS and BARBARA EDMONDS

Respondents

REASONS FOR JUDGMENT

Counsel:	George W. MacDonald, Q.C. and Jane O'Neill for the appellant Douglas W. Lutz and Janet Stevenson for the respondents
Appeal Heard:	December 4, 2001
Judgment Delivered:	December 19, 2001
THE COURT:	Appeal allowed with costs as per reasons for judgment of Freeman, J.A.; Glube, C.J.N.S. and Saunders, J.A. concurring.

FREEMAN, J.A.:

[1] This is an appeal from the Supreme Court of Nova Scotia's dismissal of the appellant's claim to determine property rights, including location of the boundary line, between her summer cottage property and the residential lot of the respondents, her adjoining neighbours. The appellant was found liable on the counterclaim to $1,000 damages for trespass.

[2] The appellant, Susan Dale Gould, claims to a so-called "occupation boundary" established more than 20 years earlier by her predecessors in title and marked on the ground as the delineation between her mowed lawn area and the unmowed edge of the respondent's property. It was considered the boundary and respected as such by owners of the property from 1975 to 1997. The respondents, Clinton and Barbara Edmonds, claim to the survey line referred to in the descriptions of both deeds, which lies several feet to the west of the occupation boundary. Their dispute has been marked by intransigence and ill-will.

The Properties

[3] Both residential lots front on St. Margaret's Bay at Seabright, Halifax County, Nova Scotia, the shore of which forms their southern boundary. The orientation is southwest-northeast, but for convenience I will adopt the device of the trial judge, Justice Tidman, who treated the boundary as running north and south with Gould's on the west and Edmonds' on the east.

[4] The eastern sideline of the property of the respondents is a public highway known as the MacDonald Point Road. Access to the cottage property occupied by Mrs. Gould and her husband, James Gould, is by a driveway situated on a deeded 50 foot right-of-way across the northern portion of the Edmonds' property which runs westerly from the highway for 72.8 feet, then swings to the southwest for 101.6 feet to join the eastern sideline of the appellant's property. The right-of-way has been described as "boomerang-shaped." It is not in controversy in this appeal. The northern corner of the right-of-way is also the northern corner of the Edmonds' property.

[5] The driveway describes a sharp curve and at its extreme western end strays outside the deeded right-of-way and encroaches slightly on property claimed by the respondents as part of their house lot. The Edmonds also claim part of the graveled

parking area used by the Goulds at the end of the driveway.

[6] While the highway affords access to the eastern side of the Edmonds' property, they prefer to use the eastern end of the driveway and approach their residence from the north. Their right to do so is not in dispute. Their garage was built within the limits of the right-of-way by a previous owner, and is embraced within the sweeping curve. Mrs. Gould has dropped her claim respecting its encroachment on the right-of-way.

[7] At the heart of the issue are the two lines, roughly 156 feet long, the survey boundary and the occupation boundary, running in a general southerly direction from the vicinity of the parking area and converging near the shore at a marker buried under a wharf constructed by a predecessor in title to the Edmonds.

[8] The more westerly is the surveyed line by which the two lots were originally subdivided from one another in 1964, which has recently been renewed by a surveyor engaged by the respondents. This is the boundary asserted by the Edmonds. It would include parts of the driveway, parking lot, and the Goulds' lawn as part of the Edmonds' property, effectively cutting off the Goulds' access over the driveway in its present location.

[9] The other, the "occupation boundary," lies easterly, or on the Edmonds' side, of the surveyed line. Created by the junction of the lawn area mowed and maintained by Mrs. Gould and her predecessors and rougher growth on the Edmonds' property, it is clearly visible on the ground for most of its length. The Edmonds and their predecessors sometimes had a garden near the mowed line. At its northern end it extends a few feet beyond the mowed lawn through an area overgrown with alders and brambles to meet the southern sideline of the deeded right-of-way. In this area the Goulds' acts of occupation would have been limited to trimming back the bushes to accommodate vehicles using the driveway and parking area. The disputed portions of the driveway and parking area would be on the Goulds' side of this occupation line except for a very small area "clipped" from the corner of the Edmonds' house lot by the driveway. Mr. Gould estimated the size of the "clipped" area as about one square foot.

[10] Four spruce trees on the Gould lawn, roughly midway between the parking area and the shore, form a line about a foot to the west of the survey line and a fifth grows just east of it. The trial judge, Justice Gordon Tidman, concluded from

aerial photographs in evidence that they had been planted between 1964 and 1973. During that period, until 1975, both properties were owned by William and Bonnie Gimby and had not yet been divided by conveyance. The trees do not appear to play a defining role in the boundary question.

[11] A wooden stake was found at the northern end of the surveyed line marking the northwestern corners of both the Edmonds' property and the deeded right-of-way. The surveyed line originally ran southerly from that stake to the lost metal marker on the shore; the wharf encroachment is not in issue in these proceedings. A low wall of railway ties runs from the wharf northerly over the Edmonds' property to a point perhaps 50 feet south of the deeded right-of-way. This wall plays no part in the boundary dispute but owners of the Edmonds' property seem to have been content to allow the land lying to the west of it to remain generally in a more natural state, which forms a clearly visible contrast with the mowed area claimed by the appellant.

[12] A power line runs southwesterly from a power pole on the highway limits near the northeastern corner of the Edmonds' property across the deeded right-of-way and the Edmonds' property just south of the right-of-way to a power pole on the Edmonds' land in an unimproved, or "wild", area overgrown with alders and wild roses. From that second power pole, aerial utility lines run to the Edmonds' and Gould residences. The overhead lines and the power pole, which presumably were put in place considerably more than 20 years ago to serve the cottage on the Gould property, are not in issue.

The Dispute

[13] When Mrs. Gould and her husband contemplated renovations to their summer cottage on their property they obtained permission from the then owners of the Edmonds' property, Robert Bruce Stailing and his wife, to bury the utility line from the second power pole to their property. The work was not done until November, 1998. The Goulds neglected to seek permission from the Edmonds, who purchased their property August 6, 1997. A conduit to hold utility lines was buried across the Edmonds' land from the second power pole to the Gould property. This necessitated cutting a route through the alders and brambles.
[14] The Edmonds were outraged, claiming the damaged shrubbery had served as a partial screen between the properties. After a telephone call and visit to the Gould residence by Mr. Edmonds, Mr. Gould accepted full responsibility for any

harm done to the Edmonds' property and agreed to remedy it, but Mr. Edmonds brought action against the contractor involved. Letters and e-mails between the parties, including Mr. Gould, document a rapidly degenerating level of civility. Mr. Edmonds drove a metal spike into the driveway with metal cables extending from it following what he considered to be the boundary lines to prevent the Goulds' access to their property. He drove a post into the triangular area between the lines now in issue, which the Goulds had mowed and maintained as part of their lawn. It soon became evident that the entire boundary between the properties, including the parking area and driveway, was in dispute. Mrs. Gould brought action against the Edmonds on February 16, 1999 claiming legal or possessory title to the land west of the occupation boundary. The Edmonds counterclaimed for trespass and were awarded $1,000 damages at trial for the buried utility conduit. That award is not seriously in issue in this appeal.

[15] The Edmonds began mowing the lawn area in the triangle between the lines. Counsel for the Goulds says he counted a dozen such occurrences in 1999. The Edmonds refused to stop despite written requests by the appellant's counsel that the status quo be maintained until the matter could be settled by the court. Mrs. Gould moved for an injunction which was granted by Justice William Kelly.

[16] In his order Justice Kelly defined the area in dispute as "the area generally to the west (sic - east?) and the northeast of the line of spruce trees, and to the southwest of the 'occupation boundary' as marked on the attached sketch . . . and labelled on the Sketch as 'Lawn.'" He ordered:

> Until further Order of this Court, the Plaintiff and the Defendants, their agents and guests, shall not enter nor leave objects in or on the area in dispute, except to the extent the Plaintiff or her agent may continue the normal mowing and maintenance of the area in dispute.
>
> The Plaintiff and the Defendants, their agents or guests shall not expand any current activities now carried out on their respective properties, including gardening, onto the area in dispute.
>
> The Defendant shall not interfere with or impede the access of the Plaintiff, her guests, agents, or any other person, or vehicle, lawfully entering the Plaintiff's property by way of the existing gravel road which forms part of the area in dispute.
>
> The Defendants shall not interfere with the Plaintiff, her guests, agents or any

> other person lawfully entering the Plaintiff's property from parking their vehicles in the gravel area currently used for parking which forms part of the area in dispute.

[17] The area in dispute described by Justice Kelly appears to have been accepted by counsel at the time of the injunction. The appellant submits that at trial Justice Tidman did not accurately describe the area in dispute and considered it to include a "wild area" to which the appellant could not establish a claim of adverse possession. Counsel's factum states:

> With respect, the Trial Judge misapprehended the description of the area in dispute. It does not include a "wild area" but includes only the area of the driveway, the parking area and lawn area.
>
> Mr. Rhuland described a "wild area" in his testimony that he referred to as a place where he occasionally picked berries. However, when the exhibits to which Mr. Rhuland was referring are examined, it is clear that this area is to the north of the occupation boundary on the Edmonds property.
>
> Mrs. Gould does not claim nor has she ever made a claim to this part of the property.
>
> While this issue is not germane to the appeal as the "wild area" does not form part of this claim, for clarity, the Trial Judge's erroneous description and misunderstanding of the evidence should be kept in mind.

[18] With respect to the appellant's counsel, the extension of the occupation boundary to the sideline of the deeded right-of-way, as asserted on the appeal, does appear to include a narrow fringe of the undergrowth along the eastern edge of the parking area and driveway. While the size seems negligible, it could only be determined by a further precise survey. This appears to be the "wild area" referred to by the trial judge. Any problem is eliminated by accepting that the occupation boundary claimed by the Goulds meets the eastern edge of the parking area, which connects with the driveway, and follows the eastern edge of the driveway to the deeded right-of-way, allowing a sufficient width on the sides for trimming back the undergrowth. While the Gould witnesses all testified to believing the boundary was a straight line, what they believed to be the occupation line was clearly not the survey line. They did not appear to address their minds to the area between the southern sideline of the deeded right-of-way and the stake at the northern tip of the survey line. A crook such as I have proposed just south of the deeded right-of-way would be necessary to reconcile the two lines.

The Survey Line

Mr. Edmonds engaged J. Forbes Thompson to survey the boundary and a plan dated June 14, 2000, was prepared by Mr. Thompson which depicted the survey line, the edge of the grass area or lawn referred to as the occupation line, and the other relevant features of the properties, a copy of plan is attached. Mr. Thompson consulted plans prepared when the property, then owned by Hubert Skinner, was first subdivided into three lots, A-1, A-2 and B-1, in 1964, and when lots A-1 and A-2 were consolidated into one lot, AX, in 1975. Lot AX is now the Edmonds' property and Mrs. Gould owns lot B-1. The 1964 and 1975 survey descriptions are the descriptions in the present deeds. Mr. Edmonds, an engineer with some surveying experience, agreed with the survey line established by Mr. Thompson on the basis of observations he had made himself prior to engaging a surveyor.

[19] After reviewing the evidence, Justice Tidman was satisfied that the survey line was correctly located. He concluded:

> Accordingly, I find that the area in dispute is part of the Edmonds lot and thus can only be successfully claimed from the Edmonds by adverse possession.

[20] I agree that Justice Tidman correctly identified the survey line established on the subdivision of the lots and the subsequent consolidation of lots A-1 and A-2 into lot AX and used in the property descriptions. Any claim of the appellant to land east of the survey line must be found in possession.

[21] One factor considered by Justice Tidman was a sketch by a surveyor engaged by Mrs. Gould, a Mr. Conn, who was not called as a witness. His sketch did not show the surveyed line. Justice Tidman drew an adverse inference against the plaintiff that, had Mr. Conn been called, he would have agreed with the survey line established by Mr. Thompson. While this may be so, the survey line is not material to the "occupation line" by which Mrs. Gould claims to define her property and seeks to prove by other means.

The Occupation Line

[22] Justice Tidman reviewed and summarized the evidence of all relevant witnesses, which I will review here, in the context of the history of the two properties. Owners of the Gould property since October, 1975 and of the

Edmonds' property since July, 1976, prior to the conveyance to the Edmonds in 1997, gave evidence for the appellant.

[23] In 1975 William and Bonnie Gimby owned lots AX and B-1 in the Hubert J. Skinner subdivision. Despite subdivision approval in 1964 the two lots had never been sold separately until the Gimbys sold lot B-1 to Cynthia Street by deed dated October 2, 1975. Prior to that date the Gimbys used the cottage on the Gould property as a summer cottage and occupied both lots. Access was by way of what was referred to as the "old driveway", which lay considerably closer to the present Edmonds' home than the present driveway principally situated on the deeded right-of-way.

[24] Mrs. Street conveyed the title to her husband Philip Street on their divorce in 1987. He owned the property until it was conveyed to Mrs. Gould as of April 20, 1990. She and her husband have occupied it as a summer cottage ever since, actually residing there several weeks a year. The evidence of Dr. Street and the Goulds established an unbroken history of ownership and occupation of the property as essentially a seasonal dwelling from October 2, 1975 to the present time. The Streets, and then Mrs. Gould, had owned the property for 23 years when the trouble began with the Edmonds in late November, 1998. The period of the Street/Gould ownership and occupation of the property as a seasonal residence was not interrupted and the lawn was kept mowed.

[25] The Gimbys sold lot AX, the present Edmonds property, to George Rhuland and his wife Lois MacGregor by deed dated July 16, 1976. The Rhulands completed the house the Gimbys had begun and lived there until selling to Bruce and Anne Stailing by deed dated September 18, 1986. In 1976 Mr. Rhuland built the present driveway used as access by the Goulds and Edmonds and closed the former driveway which ran closer to his house. The Stailings built a wharf and lived on the property until they sold to the Edmonds by deed dated August 6, 1997.

[26] Justice Tidman summarized part of Dr. Street's evidence as follows:

> Mr. Street says that when his wife purchased the property he and Mr. Gimby walked part of the boundary line between the two properties. He says that the southeast corner of his wife's property was marked by a pile of stones inside of which was a pin. He says that the pile of stones was later covered by cement around the time the Stailing wharf was built in 1987. At that time he thought part of the entrance to the wharf may have encroached on his property. He says that

he understood the property line to be located to the east of the row of spruce trees and along the eastern end of where Gimby had mowed the grass. Mr. Street marked that line on the 1981aerial photograph (Exhibit 3), which is consistent with where the Goulds claim the occupational boundary is located. . . .

Mr. Street says that he understood that the property boundary was a straight line between the stake he found in the wooded area to the stake in the pile of stones at the high water mark of MacDonald's Cove. He says that both he and the Gimbys may have mowed the grass in the disputed area, but he believed the eastern edge of the mow line denoted the boundary line and he considered the disputed area to be his own.

Mr. Street says that he is not sure what he did on the disputed property in 1975 but that he may have mowed the grass once in that area. He says when his wife first purchased the property he used the former driveway across the Edmonds lot as access to his cottage, but in and after 1976, when he thinks Rhuland built the new driveway over the 50 foot right-of-way, he used the new driveway as access to his cottage and also used the parking area shown on the 1981 aerial photo (Exhibit 3) where a vehicle is shown to be parked which is partly on the Edmonds lot.

After Mr. Rhuland built the new driveway he told Mr. Street that it appeared that the driveway "clipped " the corner of Mr. Rhuland's property, meaning that the driveway may cross over the Rhuland lands corner adjacent to the south sideline of the right-of-way. Mr. Street says they agreed to leave the driveway as it was constructed and says he did not think they were changing the boundary by discussing the encroachment. He says that since he later thought that Mr. Stailing may have encroached on his lot when the wharf was built, in his view, the encroachments were "tit for tat".

. . .

Mr. Street says that in the early years he and Mrs. Street fixed up the cottage and spent part of the summers there and attended sometimes in the winter up to 1990 when he lived there for 8 or 9 months. He says he directed tenants who rented the property from time to time to mow the grass to the end of the grass line he considered the boundary line. He says the grass in the disputed area was natural and to his knowledge was never seeded or sodded.

On the 1981 aerial photo Mr. Street pointed out the parking area he and his tenants used (where the parked vehicle is shown), part of which extends across into the Edmonds lot.

In summary, Mr. Street says that his family's use and the use by his tenants of the disputed area between 1976 and 1990 consisted of mowing part of the disputed

> area, parking on and driving over part of the disputed area and that from time to time his children may have played there and he and his family may have walked there. None of the Street tenants gave evidence.

[27] Apart from noting that Dr. Street walked the boundaries with Mr. Gimby the trial judge's summary did not refer to the following passage:

> Q. . . . Prior to purchasing the property, did you walk the property? Have an idea where the boundaries were on the property?
>
> A. Yes, I had a general idea. We walked some of the property.
>
> Q. What was your general idea if any of the boundary that would separate your property from the Gimby property?
>
> A. Could you repeat that question, please?
>
> Q. What was your understanding of where the boundary line would be between your property and the Gimby property?
>
> A. Well, that part - - that's the part we walked the most. I mean, that's the part to which we paid the most attention.
>
> Q. Can you tell the Court what you understood the boundary line to be?
>
> A. Well, it was where Gimby had mowed.

[28] Dr. Street then located that mowed line on the 1981 aerial photograph consistently with where Mr. Rhuland and the other witnesses placed it.
[29] Mr. Rhuland's evidence, as summarized by the trial judge, was consistent with Dr. Street's.

> . . . In 1976 Mr. Rhuland built the driveway over the 50 foot right-of way. He says that Mr. Street contributed to the cost of construction of that part of the driveway that was on the Street property. The top or eastern portion of the right-of-way provided an access to the Rhuland property and the whole of the driveway from the MacDonald's Point Road provided access to the Gould, then Street, cottage.
>
> On Exhibit #3 Mr. Rhuland marked what he considered to be the boundary line between the two properties also consistent with the Gould claim. Mr. Rhuland says the line ran an estimated 6 to 8 feet east of the row of four spruce trees.

> On direct examination Mr. Rhuland says there was a mowed line near the disputed area the eastern edge of which he considered the boundary line. On cross-examination he was not certain that the mowing line was there when he acquired the property, but says that the mowing line was there some timer (sic) later on.
>
> He says the boundary was a straight line and he knew that it extended northerly from his southwest corner to a stake. He says he was aware that there was a stake set marking the northwest corner of his property, but he does not recall ever seeing it.
>
> He says that he vaguely remembers talking to Mr. Street about the driveway he built having clipped the corner of his own property. He says when he built the driveway there were rocks and a low area at the western end of the driveway and for expense considerations he built the driveway around those areas as a result of which he says the driveway may have "clipped" his own property. He says he doesn't recall where the boundaries of the 50 foot right-of-way were located. He says where the "clipping" of his lot may have occurred was in an area he considered waste land and since its use by Street did not interfere with his use it was okay with him. He says that he took the same attitude toward the parking area if it did, in fact, encroach on his property.
>
> Mr. Rhuland says that his residence was located some distance from the boundary line and he did not make much use of the property in the area of the boundary line. He says he sodded a lawn area around his house which was far from the boundary line. He says that most of the land in dispute consisted of wild growth and the only use he made of it was to occasionally pick wild berries there.

[30] It is noteworthy that the line Mr. Rhuland drew on Exhibit 3 to show the occupation boundary running from the shore along the edge of the mowed area, with which the other witnesses agreed, extended to the vicinity of the deeded right-of-way. That is, he would have considered the end of the driveway and the parking area to be entirely on the Gould property, apart from the corner of his house lot which he might have "clipped." That is consistent with Mr. Gould's estimate of the clipped area as a foot square.

[31] The evidence of Robert Stailing, as summarized by the trial judge, complemented the evidence of Dr. Street and Mr. Rhuland:

> Mr. Stailing acquired the Edmonds lot from Rhuland and MacGregor by deed dated July 16, 1986 and conveyed it to the Edmonds on August 6, 1997. Mr. Stailing and his wife used the property as their permanent residence.

Mr. Stailing says that Mr. Rhuland pointed out the boundaries to him at the time he purchased and he believed the boundary line between the two properties to be about where Mr. Rhuland placed the line on Exhibit 3 which, again, coincides with what the Gould's claim to be the occupational boundary. Mr. Stailing described the line as being where the mowed area of the Street property met the unmowed rough area of his lot. He says he did not have the property surveyed.

Mr. Stailing says the Streets were rarely at their property when he was there, but he says they were friendly with two of the Street tenants, Jim MacMillan and one Mr. Whitehead and that MacMillan and Whitehead used the parking area as pointed out by all the other witnesses on the 1981aerial photo. He says the Streets and Goulds maintained the mowed area between the line of spruces and the rough area of his lot which is part of the disputed area.

He says Mr. Gould mentioned to him that the wharf he constructed on his property may be encroaching on the Gould property. He says he had a good social relationship with the Goulds and they could and did use his wharf and swimming pool.

He says for a couple of years he kept a garden in the rough area near the boundary line between the properties, but like Mr. Rhuland, he says that was not an area of his property for which he had not much (sic) occupational use. He noted the garden was replanted on the Edmonds' property when he was there recently.

He says that Mr. Gould planted the lone Austrian pine tree shown in the rough area on Exhibit 5, the Thompson Conn sketch. Mr. Stailing also says that he believed the boundary line between the properties was a straight line.

Mr. Stailing says he showed the boundary line to Mr. Edmonds at the time he sold the property to him in 1997. He says he told Mr. Edmonds that the edge of the rough area was the boundary line which is located near the railway ties shown on Exhibit 5. He says that he did not tell anyone that the row of spruce trees delineated the boundary.

He says that Mr. Gould discussed with him the possibility of burying the overhead wires that crossed both properties which he thought was a good idea. He says in order to do so, it would have been necessary for Mr. Gould to cross over onto his property.

[32] The evidence of Mr. and Mrs. Gould agreed with that of their other witnesses but was more concisely summarized as follows:

Both Mr. and Mrs. Gould say they were told the east end of the mowed area delineated the boundary line between the two properties and that during the whole

> of the time they have owned the property they mowed the grass in the disputed area and used the existing driveway and the parking lot shown in the 1981 aerial photo. The Goulds say the property was for the most part used seasonally, as a summer cottage, but occasionally was used at other times. They say that to their knowledge neither the Stailings nor the Edmonds mowed the grass in the disputed area until the Edmonds started mowing the grass there in 1998 after the dispute arose.

[33] The Edmonds' evidence was that Mr. Stailing pointed to the line of spruce trees as the boundary, and that Mr. Stailing did not tell them that the mowed area of grass indicated the boundary line. Counsel for Mrs. Gould invited the trial judge to resolve the conflict between the evidence of Mr. Stailing and the Edmonds by making a finding adverse to the Edmonds' credibility. The trial judge declined, considering that all witnesses were credible. In any event, in my view, the Edmonds' evidence was not relevant on the point because the 20 year period relied on by the appellant had run before the Edmonds purchased their property. The trial judge made the following findings relevant to credibility:

> It is clear that all of the adjoining property owners who gave evidence with the exception of the Edmonds, considered the boundary line to be the east line of the mowed area and its extensions northerly and southerly. It is implicit in my acceptance of the Thompson survey that I find those owners were mistaken as to the location of the common boundary line.

[34] This finding will be considered further below.

[35] He considered that:

> . . . All of the discrepancies in the evidence of the parties, in my view, may be attributed to misunderstandings or a natural tendency to colour events in ones own favour rather than as deliberate attempts to mislead the court.
>
> I found the evidence generally of both Mr. and Mrs. Edmonds to be straightforward and believable, as I, similarly, found the evidence of all the witnesses for both sides. I believe that the witnesses attempted to recall and relate events as accurately as they could and in doing so, for the most part, were expressing their honest beliefs.

The Trial Judge's Analysis

[36] Justice Tidman correctly identified the issue at law as "whether the acts of possession of the Goulds and their predecessors in relation to the disputed area are

sufficient to satisfy the plaintiff's claim of adverse possession." He stated:

> The plaintiff, as I understand the claim, does not seek a declaration of ownership of the lands. In order to do so the action should properly be brought under the *Quieting of Titles Act*. The plaintiff, however, is entitled at law, as she does here, to seek declaratory relief that the Edmonds' right to claim the land in dispute has been extinguished under the provisions of the *Limitation of Actions Act*, R.S.N.S. 1989. . . .

[37] He cited ss. 10, 11 and 22 of the **Act** with his own emphasis:

> 10. No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.
>
> 11. In the construction of this Act the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter mentioned, that is to say:
>
> > (a) where the person claiming such land or rent, or some person through whom he claims, has, in respect to the estate or interest claimed, been in possession or in receipt of the profits of such land, or in receipt of such rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;
>
> 22. At the determination of the period limited by this Act to any person for making an entry, or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished.

[38] He cited **Ezbeidy v. Phalen** (1957), 11 D.L.R. (2d) 660 for the principle that the person claiming to extinguish title of another by adverse possession has the burden of proving "an actual adverse occupation first which is exclusive, continuous, open and notorious, and after that has been proved, the position is that the owner is disseised and the other person is in possession."

[39] He also cited **Kanary v. Nova Scotia and MacDonald** (1985), 70 N.S.R. 1 in which MacDonald, C.C.J. stated at § 8:

> During the 20 year period required by statute, there may be a series of true owners who have been dispossessed and, conversely, there may be a series of trespassers who, adverse to one another and to the rightful owner, take and keep possession of the land in a succession of various periods, each less than, but in total exceeding on the whole, 20 years and thereby the rightful owner is barred from regaining possession, and he loses his title.

[40] Justice Tidman began his analysis with the following summary:

> . . . Although I have found that they (the plaintiff's witnesses) were mistaken as to the actual location of the boundary line their evidence indicates that, at least for part of the time period of the Rhuland and Street ownership, the Gould lot owners occupied part of the land in dispute. The Streets and their tenants, and after that the Goulds, mowed a patch of grass in the area in dispute. They also say, and which I accept, that since 1976 the Goulds and their predecessors parked their motor vehicles within the disputed area and also continuously used the driveway in its present location which cross over the Edmonds' property.

[41] He considered that part of the disputed area claimed by Mrs. Gould was wild land north of the mowed area on which Mr. Rhuland occasionally picked wild berries. He stated:

> In that case, at best, the plaintiff can lay claim by adverse possession to only those irregular shaped areas of the land in dispute upon which she and her predecessors have actually encroached.

[42] He then asked himself "Were the acts of possession relied upon by the plaintiff unequivocally adverse as they must be in order to establish ouster of the defendants." He stated:

> Both Mr. Rhuland and Mr. Stailing say that if the Goulds or their predecessors were encroaching on their property they had no objection to the encroachment.
>
> They all also agreed that the driveway into the Gould lot may have "clipped" the Edmonds lot, but neither Mr. Rhuland nor Mr. Stailing objected to the so-called "clipping". Neither did Mr. Rhuland consider that he was agreeing to a change in the boundary line between the properties by acknowledging that he had no

> objection to his neighbours use of the "clipped" area.
>
> . . . If one has permission to use anothers property the resultant use cannot be characterized as "adverse". In my view, the owners by consenting to the use of the property did not consider they were dispossessed to the contrary as stated both Rhuland and Stailing said that at no time did they consider they were changing or agreeing to a change in the boundary between the properties.

[43] Justice Tidman referred to correspondence between solicitors at the time Mrs. Gould bought her property in which it was noted that the road could be moved entirely onto the right-of-way "if the owners of Lot A-2 object to an encroachment by the roadway." He stated:

> Since no further action was taken to verify the "clipping", I can only assume that the Goulds accepted the property on the basis that they may be encroaching and that it would be possible to verify the encroachment. Nothing further was done between that time and the present to verify the encroachment. It has now actually been verified and the present owners of the encroached upon property do not consent to the encroachment.
>
> In those circumstances neither can I find that the Goulds dispossessed their neighbours of their property.

[44] Justice Tidman referred to **DeAdder v. North Kent Development** (1979), 34 N.S.R. (2d) 386 as a case in which the alleged acts of possession were neither adverse nor exclusive. That case was specific to its own facts as to possession and I do not find it helpful to the present analysis.

[45] Justice Tidman said that in his view the possessory acts of the Goulds and their predecessors were "committed not to the exclusion of the true owner, but with the consent of the true owner, and thus were not adverse, nor, as in *Deadder*, were they exclusive." He stated:

> The use the Goulds and their predecessors made of the lands in dispute may more properly be described as "neighbourly possession". It, at least tacitly, was consented to by the neighbours. Neighbourly possession is not adverse.
>
> Additionally, I do not accept as proven that the Goulds and their predecessors mowed all the grass in the disputed area for more than a twenty year period.
>
> Mr. Street says that he and Mr. Gimby may have mowed the grass in the disputed area. Mr. Street purchased in 1975. It is not clear for how long a period or where

> Mr. Gimby may have mowed. It is clear however that Mr. Gimby did not mow beyond July 1976 when Mr. Rhuland acquired the property. Mr. Rhuland, on cross-examination, admitted that he was not certain the mowing line was there when he acquired the property but that it was there at some time later on. Accordingly, I cannot find that the Goulds and their predecessors exclusively occupied the lands in dispute for the required twenty year period. . . . Even if I were to accept that the Edmonds' claim of ownership was not made until the dispute arose in late 1998, I still could not find that such possessory acts were exclusive since late 1978.
>
> When one views the aerial photograph of the properties in those approximate times it appears evident to me that it would be difficult to say that the mowing line of the Gould property did not change. In the mid-seventies the photos show that the wild growth areas in relation to the mowing lines were not so well defined as is the case today. Therefore, I am unable to accept Mr. Street's evidence, particularly as an owner who often rented the premises to others who maintained it, that the mowed line never changed.

[46] Justice Tidman summarized his conclusions:

> Although the driveway and the parking area have been used exclusively by the Goulds and their predecessors for over a twenty year period, that use has been with the express or implied consent of the owner and thus was not adverse.
>
> I cannot accept as proven by the plaintiff's evidence of usage that the mowed area as now defined was exclusively occupied by the Goulds or their predecessors for the required period of twenty years.
>
> The wild area I find was never occupied by the Goulds or their predecessors and thus no valid claim against it can be made by the Goulds.
>
> . . .
>
> Under all the circumstances outlined, I find that the plaintiff has not established a valid claim by adverse possession and thus would dismiss her action against the defendants.

[47] He allowed the Edmonds' counterclaim for trespass and awarded $1,000 damages for attempting to bury the utility line.

Analysis on Appeal

[48] The standard of review in civil matters was stated as follows by McLachlin, J. (as she then was) in this frequently quoted passage from **Toneguzzo-Norvell**

(Guardian *Ad Litem* of) v. Burnaby Hospital, [1994] 1 S.C.R. 114 at p. 121:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it. . . . (Authorities omitted). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

[49] In my view the trial judge erred in law in not applying the doctrine of mutual mistake, which appears to have been raised at trial but not argued as thoroughly as it was on the appeal. As a result, he determined the character of Mrs. Gould's possession of the property in dispute by using the wrong legal principle, concluding that Mrs. Gould had not established a claim to all land west of the occupation boundary by adverse possession. He considered that her use of this property was "neighbourly possession" with consent of her neighbours which did not give rise to a claim of adverse possession, and that her use of the driveway and parking areas was with the express or implied consent of the owner and thus not adverse. Applying the law appropriate to circumstances involving mutual mistake makes it apparent that the trial judge arrived at these critical conclusions by ignoring or misunderstanding relevant evidence. The error is not only palpable but it is overriding in the sense that it is an essential element of the rationale for his whole decision.

[50] What the trial judge failed to consider was that Mrs. Gould was not a trespasser seeking to gain ground at the expense of her neighbours, but that she had good reason for believing the property she occupied was hers. She or her predecessors had been put into possession of it by the lawful owner, who thereby dispossessed himself. An owner cannot consent to the use of property he does not consider to be his. The circumstances are those of mutual mistake.

[51] In my view the trial judge either misapprehended the evidence of the Gould witnesses or set the test too high in finding that he could not "accept as proven by the plaintiff's evidence of usage that the mowed area as now defined was exclusively occupied by the Goulds or their predecessors for the required period of twenty years." The time period was proven with some precision, there was no

evidence of any interference with their occupation, no entry or action hostile to their claim, and their acts of possession, principally mowing, were consistent with the possessory acts of any owner in possession of a seasonal residence. The test of Mrs. Gould's possession in the present circumstances was whether she displayed the outward signs of exclusion normally associated with an owner's proprietorship.

[52] Among the authorities relied on by the appellant, to be further considered below, is **Bacher v. Wang**, [2000] O.J. No. 3146 in which Nordheimer, J. stated at § 24 and 25:

> . . . [T]he respondent relies on *Elias v. Coker*, [1990] O.J. No. 982 (Dist. Ct.) where Lang D.C.J. said, at p. 10:
>
> > When a claim for adverse possession centres on a piece of land as small as the one in issue here, the claimants must show continuous use of every inch.
>
> I make two observations with respect to the above quotation. First, it is clear that the words used cannot be taken literally since it is virtually impossible to use "every inch" of any piece of property "continuously". Secondly, the *Elias* case dealt with the situation where the claimant of the property could fairly be characterized as a trespasser, that is, a person who occupied the property with knowledge that it belonged to someone else. The authorities draw a very sharp distinction between cases where the claimant is a trespasser and cases, such as the one before me, where the claimant occupies the property in the mistaken belief that it is hers only to find out many years later that the legal title to the property actually belongs to someone else. In the latter cases, the requirements for actual possession are less rigidly applied.

[53] In **Jeffbrett Enterprises Ltd. v. Marsh Bros**., [1996] O.J. No. 1995 (Gen. Div.) Crane, J. stated at § 52:

> I am of the opinion that there is no requirement that the dispossessor have the subjective intention to dispossess and exclude the true owner. If such a subjective element was required, cases of mutual mistake would not qualify for dispossession under the Limitations Act. The applicable test is whether or not the alleged dispossessor has displayed the outward signs of exclusion we normally associate with an owner's proprietorship over a piece of land. In other words, has the dispossessor staked out his turf and said to the world by his actions "this is my land!" If he has and the true owner has not responded for ten years, the owner loses the right to say "No! Its my land-get off!"

[54] The edge of the mowed area was respected as the boundary between the Gould and Edmonds lot from 1975 until 1997 by all owners of the lots during that period. Its location was clearly and consistently located in the evidence of Dr. Street and the Goulds, Mr. Rhuland and Mr. Stailing by reference to aerial photographs and the Thompson survey sketch. Their evidence is too clear and consistent for the trial judge to have meant they were mistaken as to the location of the occupation boundary, or the occupation and uses made of the properties on both sides of it.

[55] I must assume the trial judge meant they were mistaken if they believed the occupation boundary was the boundary described by the survey description in their deeds. They were clearly mutually mistaken on this point.

[56] As noted above, the trial judge erred at law in failing to apply the doctrine of mutual mistake as it applies to claims to property by possession. Before examining that doctrine, it may be useful to consider in greater detail how the appellant came to be in possession of the property she claims.

[57] Her predecessor in title, Dr. Street, a psychologist on the staff of Saint Mary's University, was placed in possession of the mowed area by the true owner when he and his wife bought what is now the Gould lot and its cottage from Mr. Gimby in 1975. The key evidence was that Dr. Street and Mr. Gimby walked the property before the purchase and Mr. Gimby showed him that the boundary was the edge of the area which he mowed. While Mr. Gimby knew what he intended to convey to the Streets, he was mistaken if he believed the boundary line in the deed description coincided with what he pointed out to Dr. Street on the ground. Dr. Street accepted it without engaging a surveyor. He acted on what he had been told in his occupation of the property and relied on it in his relations with Mr. Rhuland. That was the boundary he pointed out when he conveyed the property to Mrs. Gould.

[58] Until he conveyed the cottage lot to the Streets, Mr. Gimby owned both lots and occupied the cottage. While it may be presumed he limited his mowing activities to the lawns of the cottage, he was entitled to mow as much of either lot as he chose. The line he mowed to in an easterly direction is now the occupational boundary, the edge of what he indicated to Dr. Street to be the cottage lot. Both lots were his to sell; in principle, he could have sold as much or as little of either as he wished. Dr. Street understood that what he bought extended to the line he was

shown by Mr. Gimby, the owner.

[59] What occurred is that Mr. Gimby, as he had the right to do, put the Streets in possession of the cottage property east to the mowed line. At the same time he dispossessed himself of everything west of the mowed line, and let Dr. Street know he was doing so. This significant event, capable of raising equities, occurred just prior to October 2, 1975, the date of the Gimbys' deed to Cynthia Street, then Dr. Street's wife. That was the date on which the possession of Mr. Gimby and his successors in title was discontinued pursuant to s. 11(a) of the **Limitation of Actions Act.** It would not have been equitable for Mr. Gimby to have represented the mowed line to prospective purchasers before the sale and then, after the sale was completed and he had his money, to disavow his representation and insist on a boundary location less favourable to the purchasers than what he told them before they bought and paid for their lot. He never attempted to do so, and when he sold his remaining lot he referred Mr. Rhuland to the occupation boundary. That was the line Mr. Rhuland drew to show his boundary on the 1981 aerial photograph, Exhibit 3, running from the shore to the vicinity of the right-of-way.

[60] The parking area shows in its present location in aerial photographs as early as 1964. It is split by the survey line. There is no evidence that Mr. Gimby told Dr. Street he was only selling half of the parking lot. That would not have been his intention after putting the Streets into possession of everything west of the occupation line. The entire parking lot, as well as the end of the driveway connecting with it, would have been included in the Street property. All witnesses agreed the occupation boundary was a straight line as it was, more or less, south of the deeded right-of-way. The Streets used the parking lot as though they owned all of it because Mr. Gimby gave them that understanding. Mr. Gimby was then not in a position to grant them permission to use it, and they could not have understood they were using it only with his consent. Having made his bargain with the Streets, Mr. Gimby could hardly have reclaimed half of the parking area.

[61] Mr. Gimby sold the remaining lot to Mr. Rhuland the next year, in 1976. Mr. Rhuland immediately changed the location of the driveway to what was by then the Street cottage because the old one was too close to his house for his liking. He located it on the deeded right-of-way north of his property, building it in a sweeping arc to connect with the Streets' parking area which, in accordance with his understanding of the occupation boundary which he drew on Exhibit 3, he believed to be entirely on the Street property. The end of the curving driveway

would also have been entirely on the Street land, except for where he told Mr. Street it might have "clipped" the corner of his own lot.

[62] He had engaged Dr. Street in the project to the extent that Dr. Street contributed to the cost of the portion that was on his own land, and Dr. Street personally spread a ten-ton load of gravel. Apart from mentioning the "clipping" Mr. Rhuland appears to have said nothing more about it. He considered the area he clipped to be waste land. Dr. Street did not object; had he insisted the driveway be relocated it would have involved extra expense for Mr. Rhuland. It seems clear that Mr. Rhuland, having worked out the relocation of the driveway satisfactorily to himself and Dr. Street, had no intention of enforcing his strict legal rights with respect to the small portion of property he had clipped. In fact neither he nor his successors prior to the Edmonds ever did so. If he had, he might have been met with an equitable argument.

[63] Equities favouring Mrs. Gould appear to be in the background both with respect to the bargain made by Mr. Gimby and Mr. Rhuland's driveway project. The explanation of proprietary estoppel by Lord Denning in **Crabb v. Arun District Council**, [1976] 1 Ch. 179 (C.A.) at pp. 187-188, recently applied by Cromwell, J.A. in **Maritime Telegraph and Telephone Co. v. Chateau LaFleur Development Corp**. 2001 NSCA 167, might have given her a basis for resisting dispossession from any part of the disputed area while the limitation period was running. Equitable considerations became moot when the limitation period expired.

[64] Mr. Rhuland would not and could not have given the Streets or the Goulds permission to use the parking area and the disputed portion of the driveway because he considered that they owned everything to the west of the occupation boundary. The mowed line marking the occupation boundary was as clear as a fence over most of its length. The parking area and the driveway were on the ground for all to see. Mr. Gimby, Mr. Rhuland and Mr. Stailing are presumed to have known that if they are out of possession of real property for 20 years, and another person is in possession, any title they might once have claimed will be lost by adverse possession. None made any effort to dispossess the Streets and the Goulds, nor any entry to their property save for friendly visits between neighbours.

[65] As between the Rhulands and Stailings on the one hand and the Streets and the Goulds on the other, concepts of consent and encroachment (except for the

clipped area) would have been completely foreign. Each set of owners considered they were occupying only property they owned, and each considered the other set was doing the same thing.

[66] Mr. Gimby was not called as a witness and so was not among those Justice Tidman found to be in error with respect to the boundary between the two lots. But it was Mr. Gimby who showed the Streets and the Rhulands the boundaries of the properties he was selling them. He created a boundary which did not agree with the deed descriptions, but which remained undisturbed for more than 20 years. He was the author of the mutual mistake shared by all his successors in title until the present dispute.

[67] The trial judge was clearly correct in finding the Goulds, Dr. Street, Mr. Rhuland and Mr. Stailing were all mistaken as to the location of the true boundary. The appellant argues that in the present circumstances, "if there is a continuous and mutual mistake as to the location of the property boundaries, a claim for adverse possession will be made out." She cites C.W. MacIntosh, Q.C., *Nova Scotia Real Property Practice Manual* (1988) at p. 7-9:

> . . . The present statement of the requirements (for a successful claim to ownership by adverse possession) is that 'possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous. If any one of these elements is missing at any time during the statutory period, the claim for possessory title will fail.' However, where there is a mutual mistake and both parties are under a misapprehension as to the location of the boundary between their properties, the requirement for "adversity" is not applicable. (Appellant's emphasis.)

[68] This quotation was included in pre-trial arguments before the trial judge. On appeal the appellant supported this statement with a considerable amount of helpful authority, chiefly from Ontario, where we were informed by her counsel the **Limitations Act**, R.S.O. 1990, C.L. 15 differs from that of Nova Scotia only in that the limitation period applicable to land is ten years rather than 20. The appellant's position is that:

> . . . [T]he trial judge is attempting to enforce the requirement of "adversity" in a claim involving mutual mistake. This amounts to an error of law.

[69] The authorities relied on by the appellant included the following: **Teis et al. v. Corporation of the Town of Ancaster** (1997), 35 O.R. (3d) 216 (C.A.) was

chiefly concerned with the test of inconsistent use, that is, that a claimant must show an intention to exclude the true owners from possession by using the land inconsistently with intended uses by the true owners. The test was not stressed as an issue in this appeal but Laskin, J.A., was concerned that it could defeat the claim of a person who mistakenly believed himself to be the true owner, and therefore could not intend to exclude the true owner. He stated at pp. 225-226:

> . . . [I]f a claimant were required to show inconsistent use when both parties were honestly mistaken about the true boundary line, the claimant could never make out a case of adverse possession. Such a result would offend established jurisprudence, logic and sound policy.
>
> . . .
>
> It makes no sense to apply the test of inconsistent use when both the paper title holder and the claimant are mistaken about their respective rights. The application of the test would defeat adverse possession claims in cases of mutual mistake, yet permit such claims to succeed in cases of knowing trespass. Thus applied, the test would reward the deliberate squatter and punish the innocent trespasser. Policy considerations support a contrary conclusion. The law should protect good faith reliance on boundary errors or at least the settled expectations of innocent adverse possessors who have acted on the assumption that their occupation will not be disturbed. Conversely, the law has always been less generous when a knowing trespasser seeks its aid to dispossess the rightful owner.
>
> . . .
>
> [I]n cases of mutual mistake, even requiring the claimant to show an intention to exclude the owner from possession . . . is problematic. It might be asked: "How could the applicants intend to dispossess the true owner when they believed . . . that they were the true owners?" (per Moldaver J. in *Wood*, supra, (*Wood v. Gateway of Uxbridge Properties Inc.* (1990) 75 O.R. (2d) 769) at p. 778.) The answer is provided by Blair J.A. in *Masidon,* at p. 575:
>
> > The appellant's occupancy of the land was not justified by any suggestion of colour of right or mistake as to title or boundaries. Occupation under colour of right or mistake might justify an inference that the trespasser occupied the lands with the intention of excluding all others which would, of course, include the true owners.
>
> In other words, in cases of mutual mistake the court may reasonably infer, as indeed I infer in this case, that the claimants, the Teises, intended to exclude all others, including the paper title holder, the Town.

[70] This principle has been applied in Nova Scotia. In **Logan v. Smith, MacLeod and MacLeod** (1984), 64 N.S.R. (2d) 234 (N.S.S.C.T.D.) Burchell, J. stated at p. 237:

> . . . I agree with the submission for the defendants that a specific intention to exclude the true owner is not a necessary element in the acquisition of possessory title and that one may acquire such title while under a mistaken impression that one is himself or herself the actual legal owner.

[71] Continuing with Ontario authorities the appellant referred to the judgment of Southey, J. in **Lewis v. Romita**, [1980] O.J. No. 2806 at § 33:

> The weight of authority appears to me to be that that possession that would otherwise be adverse but which is enjoyed under an agreement made under a mutual mistake of facts as to the boundary between properties, is sufficient adverse possession to bring into operation the provisions of The Limitations Act.

[72] In **Arnprior (Town) v. Coady**, [2001] O.J. No. 1131 (S.C.J.) Aitken, J., after citing authority, stated at § 48:

> . . . [T]he test of inconsistency applies only in situations where the person seeking to establish adverse possession is a trespasser. The test does not apply in circumstances where the person in possession is operating under the honestly held belief that he or she is the rightful owner of the property. Nor does it apply where the legal owner and the person in possession are operating under a mutual mistake as to title or boundaries. Time runs for the purpose of establishing adverse possession notwithstanding possession by reason of a mistake.

[73] The following were cited by reference as cases that "dealt with mutual mistake and held that adverse possession is established when the parties are mistaken about the true boundary": **Beaudoin et al. v. Aubin et al.** (1981), 33 O.R. (2d) 604 (H.C.J.); **Wood v. Gateway of Uxbridge Properties Inc.**, [1990] O.J. No. 2254 (Gen. Div.); **Campbell v. Nicholson**, [1997] O.J. No. 747 (Gen. Div.); **Fazio v. Pasquariello**, [1999] O.J. No. 703 (Gen. Div.); **Bacher v. Wang**, [2000] O.J. No. 3146 (S.C.J.); as well as **Keil v. 762098 Ontario Inc**. (1992), 91 D.L.R. (4th) 752 (Ont. C.A.).

[74] I am satisfied that in the circumstances of the present case the appellant has proven, as against the respondents, adverse possession for a period in excess of 20 years, and that pursuant to the **Limitation of Actions Act** the right of the

respondents to make entry or bring an action to recover possession has been extinguished to all property claimed by the appellant west of the occupation line, which I would define as running from a survey marker now concealed by a wharf on the shore of St. Margaret's Bay in a generally north or northwesterly direction following the line to which the appellant and her predecessors in title mowed the lawn of her cottage property along the unimproved western edge of the respondents' residential property to the point where it meets the parking area, then following the eastern and northern edge of the parking area and the driveway used by the appellant to the southern sideline of the deeded right-of-way, so-called, thence westerly following the southern boundary of the deeded right-of-way to the survey line marking the western end of the right-of-way. By the edge of the parking area and driveway I mean to include an area of sufficient width to take in not only the traveled area and any shoulders, but to allow for reasonable maintenance, snow clearing and the trimming of shrubbery.

Disposition

[75] I would allow the appeal and, saving only the award of damages for trespass with respect to burial of the utility line in the amount of $1,000 payable by the appellant to the respondents, set aside the order of Tidman, J. dated the 25th day of January, 2001. That order, to the extent that it dissolved the injunction ordered by Kelly, J. July 18, 2000, was stayed by the order of Flinn, J.A. dated July 19, 2001, pending further order. I would order the injunction of Kelly, J. to be dissolved.

[76] I would declare that any rights of entry, ownership or possession of William and Bonnie Gimby and their successors in title, including the respondents, has been extinguished to the west of the occupation boundary above defined.

[77] I would grant a permanent injunction as follows:

* The respondents, their agents or guests, shall not enter nor leave objects in or on the mowed area or driveway or parking areas.

* The respondents shall not interfere with or impede the access of the appellant, her guests, agents, or any other person, or vehicle, lawfully entering the appellant's property by way of the existing driveway from the MacDonald Point Road to the appellant's property.

* The respondents shall not interfere with the appellant, her guests, agents or any other person lawfully entering the appellant's property from parking their vehicles in the gravel area currently used for parking.

* Save with the express permission of the appellant, the respondents shall not enter nor interfere with any part of the appellant's property.

[78] I would confirm the judgment on the counter-claim that the appellant be liable to the respondents for $1,000 damages for trespass plus $55 pre-judgment interest.

[79] The respondents sought to dispossess the appellant using deliberately offensive self-help tactics, thereby committing trespass. The respondents' conduct went well beyond what was necessary to assert their claim, causing the appellant needless distress and substantially diminishing her enjoyment of her property for a period of years. I would assess damages for trespass payable by the respondents to the appellants in the amount of $5,000.

[80] I would disallow the appellant's claims for aggravated and punitive damages.

[81] I accept as the trial costs the $8,850 plus disbursements fixed by the trial judge, which I would order paid by the respondents to the appellant, together with any costs previously paid by the appellant to the respondents. The appellant shall have her costs on the appeal which I fix at $3,500 plus disbursements, together with costs of $2,000 plus disbursements for a Chambers application relating to removal of a fence constructed on the appellant's property in defiance of an injunction.

Freeman, J.A.

Concurred in:

Glube, C.J.N.S.

Saunders, J.A.