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NOVA SCOTIA COURT OF APPEAL

[Cite as: MacNeil v. Chisholm, 2000 NSCA 31]

Glube, C.J.N.S.; Chipman and Cromwell, JJ.A.

BETWEEN:

KEVIN CHISHOLM Appellant	)	William R. Burke for the appellant
- and -	)	Respondent Stephen O'Neill not appearing
STEPHEN and LINDA MacNEIL Respondents	)	Respondent Linda MacNeil in person
	)	Appeal heard: January 21, 2000
	)	Judgment delivered: February 16, 2000

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Chipman, J.A. concurring.

CROMWELL, J.A.:

I. Introduction:

[1] Goodfellow, J. granted a certificate of title to Stephen and Linda MacNeil (respondents on appeal) for a peninsula of land at Ironville, Cape Breton. The judge found that the MacNeils had established possessory title and that Kevin Chisholm (the appellant) had not established documentary title to the same property. Mr Chisholm appeals both aspects of the judge's decision.

[2] The peninsula in question is shown on Schedule "A", which is a much reduced copy of the survey prepared by Russell MacKinnon, N.S.L.S., on behalf of the appellant. The land included in the trial judge's certificate is approximately the hatched area which includes the peninsula and an area at its base. The property is bounded by Route 223, a brook as shown on the survey and by another piece of property, shown solidly shaded on Schedule "A". The boundaries of this solidly shaded area were the subject of litigation in the early 1980's which resulted in a certificate of title for this parcel being granted to Mr. Chisholm by Justice Hallett in 1983.

[3] The MacNeils paid Gerald and Edith Mosher $30,000.00 and received a deed dated August 30, 1986, purporting to convey the peninsula and an area at its base. It was not disputed at trial that the MacNeils did not thereby acquire documentary title to the property. Their claim for a certificate of title depended on their establishing adverse possession for 20 years prior to the commencement of their proceeding in August of 1993. This in turn depended on their being able to show that those through whom they

claimed, whom I shall loosely refer to as the Moshers, had exercised sufficient acts of possession prior to the beginning of the MacNeils' activity on the peninsula.

[4] The appellant, Mr. Chisholm, claimed in the earlier proceedings before Justice Hallett that he had paper title to the peninsula through a 1903 deed from John Andrew Lynk to John A. MacDonald. As I will discuss in somewhat more detail later, Justice Hallett found that the peninsula was not included in the descriptions found in that chain of deeds. As noted, Mr. Chisholm was awarded a certificate of title for the land solidly shaded on Schedule "A".

[5] In the present proceedings, Mr. Chisholm sought a declaration or certificate of title for the lands claimed by the MacNeils and opposed their claim based on possession. Mr. Chisholm did not assert a claim based on possession.

II. The Issues Raised on Appeal:

[6] The 11 grounds set out in the Notice of Appeal are distilled to three in the appellant's factum:

> 1. Did the Learned Trial Judge make a palpable and overriding error on the evidence before him and reach a conclusion which is not supported on a review of the evidence heard at trial?
>
> 2. Did the Learned Trial Judge err in law in failing to rule on whether **Chisholm v. Edward W. Mosher** 1982 (sic), S.N. 02384, May 5th, 1983, was *res judicata* and then relying on that decision in drawing his own conclusions?
>
> 3. Did the Learned Trial Judge err in law in his interpretation of the

Marketable Titles Act?

[7] The first issue addresses the judge's finding in favour of the MacNeils' possessory title while the other two issues concern the paper title issue.

III. Standard of Review:

[8] Finding facts and drawing evidentiary conclusions from them are roles of the trial judge, not the Court of Appeal: see **Toneguzzo-Norvell v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at 121. An appellant cannot challenge a trial judge's findings of fact simply because the appellant does not agree with them: **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 at paragraphs 88 and 90. Findings of credibility are "... eminently a matter for the trier of fact." : see A.W. Mewett, *Witnesses* (1991) at page 11 - 3.

[9] The judge, as the trier of fact, must sort through the whole of the evidence and decide which to accept and which to reject so as to piece together the more plausible view of the facts. Many considerations properly influence this decision, including the nature of any unreliability found in a witness's testimony, its relationship to the significant parts of the evidence, the likely explanation for the apparent unreliability and so forth. The trial judge may find that some apparent errors of a witness have little or no adverse impact on that witness's credibility. Equally, the judge may conclude that other apparent errors so completely erode the judge's confidence in the witness's evidence that it is given no weight.

[10] Making these judgments is the job of the trial judge and the Court of Appeal generally should not substitute its own judgment on these matters. An appellant alleging an error of fact must show that the trial judge's finding is clearly wrong. Not every error in findings of fact permits appellate intervention. As Lamer, C.J.C. said in **Delgamuukw**, supra at para 88:

> ... it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. **The error must be sufficiently serious that it was 'overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue'.** (emphasis added)

Where credibility is in issue, only errors that fundamentally shake the appeal court's confidence in the trial judge's findings of fact justify appellate intervention.

IV. Analysis:

1. Paper Title:

[11] The crux of the paper title claim was that Mr. Chisholm had two chains of title. One was through a 1977 deed to him from the heirs of Hughie Johnston and the other was through what was referred to at trial as the Donaldson Tax Deed. The issue with respect to both chains was whether the descriptions in the relevant deeds included the subject lands. The trial judge rejected Mr. Chisholm's claim for paper title because the subject lands were not within the descriptions found in these deeds.

[12] With respect to the Johnston chain (or what I will refer to as the 1977 description), the key question is whether these words in the description include the

peninsula:

> THENCE continuing northerly in the same straight line to a point on the shore of Barrachois Pond;
> THENCE proceeding easterly, and following along the course of the shoreline to the western line of lands as described by Deed from Andrew Lynk to John A. MacDonald, registered at Sydney, in the Registry of Deeds, in Book 117, Page 794;

[13] It is Mr. Chisholm's position that the portion of the description which I have just set out begins at the point labelled D on Schedule "A", proceeds to point E, then follows the shore easterly around the first point, then the peninsula and then meets the boundary of the lands conveyed by Lynk to MacDonald which were the subject of the proceedings before Justice Hallett.

[14] The trial judge rejected this interpretation of the 1977 description and found that there was "... far too much uncertainty and vagueness" in the description. The judge noted that the plotting of the description advanced by Mr. Chisholm includes a point as well as the peninsula and passes several other obvious landmarks but that the description does not refer to them. He also noted, as the surveyor Mr. MacKinnon conceded, that the description as he plotted it does not follow north, south, east and west courses as referred to in the deeds.

[15] The other chain, as noted in the appellant's factum, is through the 1972 Donaldson Tax deed. The appellant's position, in essence, is that the words "northerly by Barrachois Pond" in the description include the peninsula. The trial judge found that he was not satisfied that "... any portion of the property described in the tax deed

encompasses any portion whatsoever of the land in dispute."

[16] I see no error in the trial judge's rejection of the interpretations of these descriptions relied on by Mr. Chisholm. The descriptions are vague and fail to refer to obvious landmarks. The judge did not err in concluding that it is a reasonable inference that if the point and peninsula were included, these distinctive and obvious features (among others) would have been referred to.

[17] The description on the 1977 deed refers to the western line of the lands described in the Lynk to MacDonald deed. However, the date of the description, of course, precedes by several years the 1983 decision by Justice Hallett in **Chisholm v. Mosher** (1983, SN No 02384) which plotted those lands as shown in the solidly shaded area on Schedule "A". It cannot be assumed that the line settled by Justice Hallett's decision is the line to which the author of the description in the 1977 deed intended to refer or, for that matter, that the lands were, in fact, contiguous as the description assumed. Justice Hallett, in his 1983 decision, was unable to make a determination as to the exact boundaries of the land conveyed by Lynk to MacDonald. As noted, in the proceedings before Justice Hallett, Mr. Chisholm relied on the Lynk to MacDonald deed as including the peninsula as well as most of what is referred to as the base of the peninsula. The 1977 deed now relied on by the appellant in claiming the peninsula was not relied on by him in his claim to the peninsula in the litigation before Justice Hallett although he had received that deed several years before.

[18] Two legal points were advanced to challenge the trial judge's conclusions on the paper title issue.

(a) *Res judicata*:

[19] The submission on this point is that the trial judge erred in relying on the reasoning of Justice Hallett in **Chisholm v. Mosher**, (1983) SN No 02384 because this reliance amounted to the inappropriate application of *res judicata*.

[20] The crux of the issue before Justice Hallett was whether the words "... eastwardly along the shore or waters aforesaid to where a small brook enters upon the [Barrachois] Pond ..." extended out around the entire peninsula. Justice Hallett concluded they did not. Part of his reasoning was that, had the peninsula been included, it would have been referred to specifically: see his reasons at p. 7. In the present case, the trial judge was impressed by similar reasoning when attempting to determine whether the 1977 deed included the peninsula. It is argued that this is a wrong application of *res judicata*.

[21] In my view, this submission should be rejected. *Res judicata* is concerned with situations in which a party is prevented from leading evidence which contradicts a final and binding determination of an issue in previous proceedings. It is not concerned with a judge relying on persuasive reasoning in previous decisions, a process which is fundamental to the common law. In this case, the trial judge found persuasive the reasoning which had also been persuasive to Justice Hallett; i.e., it was unlikely that a

description which included the peninsula would not refer to this obvious geographic feature. This is not an improper use of the doctrine of *res judicata*. It is a proper use of the common law method of reasoning.

(b) **Marketable Titles Act**:

[22] The appellant submits that the trial judge erred in his interpretation of the **Marketable Titles Act**, S.N.S. 1995 - 96, c. 9 in that he failed to find that the appellant had paper title through the Donaldson Tax Deed. Section 6(2) of that **Act** states, essentially, that in the absence of challenge within 6 years of its registration, a tax deed "... conveys an absolute and indefeasible title in fee simple **to the land described** in the tax deed ..." (emphasis added). The trial judge, as noted, found that he was not satisfied that "... any portion of the property described in the tax deed encompasses any portion whatsoever of the land in dispute". The statute only protects the title of land described in the deed. If, and as the trial judge found, the description does not include the subject lands, the statute does not assist the appellant.

(c) Conclusions concerning paper title:

[23] In my view the judge did not err by deciding that the descriptions in the relevant deeds do not include the subject lands. The vagueness of the descriptions and their failure to refer to obvious landmarks amply support his conclusions on this issue. He did not misapply the doctrine of *res judicata* or err in his interpretation of the **Marketable Titles Act**.

2. Possessory Title:

[24] The appeal in relation to the possessory title challenges the trial judge's findings of fact. Counsel for Mr. Chisholm submits that the judge made "palpable and overriding" errors on the evidence and reached a conclusion which is not supported by the evidence. Three main points were advanced which, while inter-related, may be conveniently analyzed individually.

(a) The evidence of the Pennys, Mr. MacNeil and Mrs. O'Handley:

[25] The trial judge relied particularly on the evidence of Kevin Penny, Roberta Penny, Mary O'Handley and Stephen MacNeil in concluding that the MacNeils had discharged the onus of proving that they, or those through whom they claimed, had been in adverse possession for at least 20 years prior to the commencement of the proceeding in August, 1993. The heart of the submission is that such reliance was an error because the evidence was manifestly unreliable. It is argued that this testimony is so internally inconsistent and so at odds with the aerial photographic evidence that it does not reasonably support the conclusions reached by the trial judge.

[26] The witnesses in this case who testified to activity on the peninsula were called upon to give their recollection of events 25 years and more prior to the trial. It is hardly surprising that this evidence contained many contradictions, with witnesses contradicting each other and, at times, themselves. Out of all of this, the trial judge had to piece together the more probable view of events in relation to the issue of what acts of possession by the MacNeil's predecessors had occurred as of August, 1973.

[27] The trial judge found Mrs. Penny's testimony to be particularly credible because she was able to relate her evidence of activity on the peninsula to the ages of her children. Her youngest child was born in July of 1972. The trial judge accepted her evidence that there was a first building on the peninsula in 1968 and that there was a make shift roadway permitting access. He also concluded that these would not necessarily be visible in the aerial photos.

[28] Counsel for the appellant put much emphasis on alleged inconsistencies between the judge's findings and the aerial photographic evidence. The crucial question before the judge was whether the MacNeils proved that their predecessors on the land had engaged in sufficient acts of possession starting not later than the summer of 1973. The most relevant photographs were taken in 1969, 1971 and 1975, it being clear in the 1969 and 1971 photographs that there was little visible evidence of human activity and in the 1975 photographs that there was considerable visible evidence of activity on the subject property.

[29] It is submitted that the 1969 photo shows Mrs. Penny's evidence relating to, and the trial judge's finding of, activity in 1968 to be erroneous. There are two reasons that this submission cannot be accepted. First, the trial judge was not obliged to accept Mr. MacKinnon's interpretation of the photos and it is clear that he did not. It is not a "palpable and overriding" error for the judge to have concluded that acts of possession of the sort he found to have been in place in 1968 may not have been apparent in the aerial photograph. Second, even if this were an error, it is not of such overriding

importance to put in doubt the judge's conclusion on the key factual question of what acts of possession had been established to have occurred as of August, 1973. As noted, before a trial judge's conclusion on a matter of fact may be set aside on appeal, it must be sufficiently serious that it was overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue: see **Delgamuukw**, supra, at para 88. In light of the evidence which the trial judge obviously accepted relating to acts of possession in and around 1972, the alleged error would not be of that character.

[30] The trial judge recognized the difficulties in the evidence with respect to specific dates. He noted that it was impossible for him to be "absolutely specific" as to when the MacNeils' predecessors began engaging in acts of adverse possession. He was impressed by Mrs. Penny's evidence which related to significant acts of possession prior to the birth of her youngest child in 1972. The trial judge also attached significant weight to the evidence of Stephen MacNeil who testified to the extent of apparent possession and use of the peninsula in 1972, a date he linked to the Canada - Russia hockey win in that year. The assessment of credibility is a matter for the trial judge to determine, and I see no error justifying appellate intervention in his decision to accept this evidence.

[31] The trial judge also accepted parts of the evidence of Mrs. O'Handley despite her obvious confusion on certain points. Mrs. O'Handley related her recollection of the old road and little cottage to the age of her granddaughter which would place it 30 years

prior to the trial. The trial judge was alive to the difficulties with Mrs. O'Handley's evidence but accepted this aspect of her testimony. He has not been shown to have erred in doing so.

[32] The photographs were of virtually no help in relation to the question of how long after 1971, or how long before 1975, the extensive activity shown in the 1975 photos commenced. The trial judge recognized this and considered the significant amount of often conflicting testimony about activity at the crucial time. He also recognized that the photographs are open to more than one interpretation and that they would not necessarily show all relevant activity on the land. There is no error permitting appellate intervention in this regard.

(b) The evidence of the surveyor, Mr. MacKinnon:

[33] It is submitted that the trial judge disregarded the evidence of the surveyor, Mr. MacKinnon. It is self-evident from a review of the judge's reasons that this is simply not the case. The judge reviewed Mr. MacKinnon's evidence in detail and referred to it repeatedly in his reasons. The fact that the judge did not accept all of his evidence does not mean he disregarded it. The judge's duty was to assess this and all of the evidence and decide what weight it should be given. This is precisely what the judge did. A different assessment might be made of the evidence; that is not the question before us. The question is not whether the trial judge's findings are the only ones supported by the evidence but whether he erred in reaching the conclusions he did. In my view, he did not.

[34] The crucial period of August, 1973 was bracketed by aerial photographs taken in 1971 and 1975. The 1971 photos showed very limited, if any, human activity. Mr. MacKinnon testified as to the extensive activity evident in the 1975 photos. He then testified as follows:

> Q. You can't say what went on ... based on the photographs you...
> A. Between '71 ...
> Q. Between '71 and '75.
> A. On the photographs no. (emphasis added)
>
> .....
>
> **THE COURT:** From the photographs you can't tell what is shown in 1975 as to when that happened.
> A. That's right.
> Q. Early in 1975, the day before the photograph.
> A. I would say within the year because that's eh ... it looks like fresh excavation there. The whiter it is the more fresh. Unless you are dealing with let's say a lot of rock clay and then it would show up in a color photograph as reddish, you know. (emphasis added)

[35] The trial judge did not err in being skeptical about Mr. MacKinnon's professed ability to say the work evident in the 1975 photo had been done within the year. As the judge pointed out:

> ..... MacKinnon acknowledged that one has to be very careful in interpreting aerial photographs and he further acknowledges there are differences between the 1969 photograph and the 1971 photograph. He further admits that you cannot tell what went on between the 1971 aerial photograph and the 1975 aerial photograph. I conclude from my observation of him that his opinion that what took place likely occurred within the year prior to 1975 is a real speculation on his part and a searching or a reaching for any thing consistent with his conclusions. (emphasis added)

[36] The trial judge was unimpressed by Mr. MacKinnon's evidence relating to his

visit to the peninsula in 1974. Given the obvious difficulties with Mr. MacKinnon's testimony on this point, it was certainly open to the judge to give it no weight and he did not err in deciding to do so.

(c) The evidence of Mr. Chisholm:

[37] Counsel submits that the trial judge failed to assess Mr. Chisholm's overall credibility to determine whether his evidence was consistent with the reasonable probabilities raised by all of the evidence. However, a review of the judge's reasons for judgment shows that he addressed his mind to the credibility and weight of the evidence of the witnesses, including Mr. Chisholm, and made specific comments and findings with respect to those matters. It is wrong to suggest that the judge failed to assess Mr. Chisholm's overall credibility or that the judge based his assessment of Mr. Chisholm on one element only to the exclusion of others. This is manifestly not the case.

[38] I will give an example to illustrate the problems with Mr Chisholm' s evidence. Mr. Chisholm testified in chief as follows:

> Q. Okay so when did you eh, ...what was your first involvement with the peninsula?
> A. Sometime eh, okay I didn't have any initial involvement with it. Okay sometime later there was eh, when Mr. Mosher moved in he started a development and the talk was ...
> Q. No you can't say what the talk was. I am interested in what did you do and see?
> A. Okay what I did and saw, was that he was clearing the place right out and he had a little branchlets off the main road and to me it was highly suggested that he was going to put in a trailer park.
> Q. Now when did you see this?
> A. I can't recall exactly but it would be eh, I know for a fact it was sometime after eh, about May 20th of 1974.
> Q. Why do you say after May 20, 1974?
> A. I happen to have a field notebook here that showed when I started the survey

and who was with me and all that sort of stuff.

In cross-examination, his evidence was as follows:

Q. So when then do you say Mosher first went on the property?
A. As best I can figure it would be in the eh ... okay wait now, there's two questions here. He may have gone on previously by boat, but the first time that he came ...
Q. I am asking you though in your knowledge.
A. I know but the eh ... okay, according to the best that I can figure it would probably be in late May or early June 1975.
Q. You said this morning in your direct evidence when you were responding to that, I have it in my notes, after May of 1974.
A. Oh no, I said this morning that I knew as of May 74 he was definitely not there. I would have known if he was there. (emphasis added)

Thereafter, portions of Mr. Chisholm's discovery evidence were put to him as follows:

MR. MURRAY: Okay, the question was at paragraph 15:

> "That didn't affect the peninsula?
> Answer. Um, let's see I know at the time or I suspect at the time what he was up to that he was, because the peninsula was not occupied at the time, when he first moved there. It was only occupied starting in 1974 and he was a small contractor who was looking for places to put up buildings, and he wanted to get that peninsula. So when Mr. Mosher moved in in the summer of 1974, ..."

Do you recall giving that answer Mr. Chisholm?
A. Yeah I think that was in the context though, that eh, I knew from my eh, previous field notes that he absolutely wasn't there prior to May of 1974. Okay and I knew that the earliest he could have been there would have been the summer of 1974. I know what I said and I think I was wrong there. .....
MR. MURRAY: And again, the next paragraph on page 29. The question was:

> "No, Mr. Mosher said he moved in and occupied since 1958, Mosher is saying he's occupied it since 1958, I just make that.
> Answer: Oh yes, I am directly contradicting you when I say that, I am well aware of his claim and I am well aware of September and the summer of 1974 when he first moved in and he put that road in there okay."

Do you recall giving that answer, or did you say that?
A. Yes, give me a second now.
Q. Fine.
A. Yeah I think I must have said that yes.
Q. Yes okay. On page 32 I asked you a question here at paragraph 20 and the question was:

> "And you say the year he constructed that was ..."

Referring to the driveway off the Long Island Road. And your answer was .. what was the answer shown here?
A. The answer shown there is 74.

Q. 1974.
A. Yes.
Q. And lastly on page 35, what is your evidence is it 74 and was your answer 74, I know for an absolute fact it wasn't there in 73 okay and I do know that it was there in 75 and as best that I can recall it was the summer of 74 that that was put in. That was your answer?
A. Yes sir. (emphasis added)

In re-examination, he testified as follows:

A. Okay I bought the Andrew and Donald Lang property early in mid summer. And then out of curiosity I just wanted to see this peninsula, so one fine evening I drove out to go for a walk on it and I couldn't get there, so I definitely, it was definitely inaccessible in 73, no question.
Q. Now my learned colleague goes on to say eh, let's see this is on page 38 of my booklet which would be 35 of his. He says "I know absolute, ... is that the driveway you've marked on the plan. 74 or later. Right."
A. Yeah.
Q. And that's your answer?
A. Yeah.
Q. 74 or later.
A. Right.
Q. What is your evidence, is it 74. And you say 74, I know for an absolute fact it wasn't therein 73, okay. And I know it was there in 1975 as best as I can recall. You say it was the summer of 74 that it was put in. Now why ... what ...
A. Okay I am rock solid on '73 that there was nothing there and I am rock solid on May of 74 that it was not there.
Q. Now why do you say that you're rock solid May of 1974.
A. I am very confident of that because I do know from my specific you know field notes, okay when I was cutting that line with Donaldson and Charlie Johnstone and Randy O'Handley that it was definitely and unquestionably not there then okay. So I stand very solidly on the 74 at that time.
THE COURT: Are the field notes in the list of documents.
MR. BURKE; No.
A. I get them in my hip pocket here.
Q. No.
A. Okay so anyway I am absolutely certain of May 4, 1974 that's when I started the cut line and I think it was about May 20 okay that I eh completed most of the work on it.
THE COURT: I am not sure he can refer to his notes.
MR BURKE: No, no. And then you say as best as I can recall it was the summer of 74 that it was put in.
A. Okay, I do know that it was not there in May, I do know it was there in 75, but I wasn't necessarily back and forth down below all the time okay and then when it appeared there, it ... I couldn't specifically recall being there in the fall to show that it was or wasn't. And I guess I was perhaps impressed by Mosher's eh, ability to make things move quickly. So I know it was there in '75 but I think the context in which I said that it was the earliest it could have been there would have been the summer of 74, and perhaps I just got a little bit careless beyond that and so on, because from what you read, okay, I started off saying it was the summer of 74 or later okay. And then I sort of you know backed that well it was the summer of 74 okay but eh ... in retrospect I would have to retract that or admit

> that I made a mistake or whatever it is. But I certainly have no basis for saying that he was there in the summer of 74.
> Q. Is there anything else that you would add to, wanted to explain the questions that were raised by my learned colleague in this discovery transcript?
> A. No just that 74 thing, I am pleased that I had an opportunity to address that, there is nothing more I can think of there.
> Q. Thank you that is all the questions. (emphasis added)

[39] Findings of credibility are for the trial judge. In light of these (and other) difficulties in Mr. Chisholm's testimony, the trial judge did not err in concluding that "Mr. Chisholm is lacking in credibility in many areas" or in deciding that he would attach "... no strength or weight in any evidence of Mr. Chisholm one way or another with respect to the presence of Mr. Mosher in exerting ownership to the peninsula prior to 1974."

(d) Conclusions concerning the trial judge's findings:

[40] In light of the evidence presented, it is hardly surprising that it is not self-evident what, in fact, happened on the peninsula in the summer of 1973. The trial judge found that it was more likely than not that sufficient acts of adverse possession had occurred. The role of this Court is not to decide what evidence we would accept based on our review of the transcript, but to determine whether the trial judge made errors justifying appellate intervention. In my view, he did not. I would not disturb the trial judge's conclusion that adverse possession was established from, at least, August of 1973.

(e) The extent of the adverse possession:

[41] Although not raised in the issues set out in the appellant's factum, counsel addressed oral argument to point 6 in the Notice of Appeal. The submission is that

even if the MacNeil's have established adverse possession of the peninsula, they have not done so with respect to the portion of the base of the peninsula included in the certificate of title granted by the trial judge.

[42] I would reject this argument. Evidence of adverse possession must be evaluated in light of the nature of the property under consideration. Absent fences, boundary markers and the like, the question of the exact extent of the possession may be difficult to resolve. Here, there was some evidence of acts of possession at or near the base of the peninsula (depending on exactly how "the base" is defined). No one else with paper title or a possessory claim to the land in question had come forward. There was little to assist the judge in fixing a boundary that was both precise and practical. He selected as boundaries on one side the line as found by Justice Hallett, on another, a brook and finally, a public road. These appear to be the closest precise and practical boundary lines to the land possessed. The only realistic alternative would have been to draw a line somewhere around the development at the foot of the peninsula for which no legal description and no natural definition exists.

[43] As Justice Hallett noted in **Bowater Mersey Paper Co. Ltd. v Nova Scotia (Attorney General) and Peck** (1987), 80 N.S.R. (2d) 229 (T.D.), aff'd (1988), 83 N.S.R. (2d) 162 (N.S.S.C..A.D.), where property is woodland, there is evidence of possession for the requisite period and no other person has a stronger claim, the **Quieting of Titles Act**, R.S.N.S. 1989, c. 382 should be applied in a practical way so as to achieve

its purpose as a mechanism to quiet titles.

[44] In my view, the trial judge took the only practical course open to him. I do not think he erred in the circumstances of this case.

(f) Conclusions respecting possessory title

[45] In my view, the trial judge did not make any error justifying appellate intervention in concluding that the MacNeil's had established possessory title.

3. Other Matters:

[46] Appended to the written argument signed by counsel for the appellant is an affidavit of the appellant which was not in the record before the trial judge. Attached to the affidavit is material described as a "thorough analysis of the Decision of the Honourable Mr Justice Goodfellow ...". This Exhibit to the affidavit, or Schedule, as it is referred to in the material, consists of over 200 single spaced pages and tables in which the appellant purports to identify 386 errors made by the trial judge, to classify them as to whether they are pivotal, significant or minor, and to opine as to whether the error favours the plaintiff (sic) or the defendant. In addition, the "analysis" includes a document entitled "Statistical Aspects of Decision in McNeil and McNeil versus Chisholm, Douglass L Grant Ph.D., Professor of Mathematics, University College of Cape Breton". That document contains the following opinion :

> As a result of these analyses, the author would reject the hypothesis that there is an absence of bias in this decision and that these results happened by random chance alone. Instead, the author would accept the alternative hypothesis that

there was bias, and that that bias was in favour of the plaintiff.

[47] No where in the grounds of appeal or in the written argument signed by counsel is there any allegation of bias on the part of the trial judge. No application to adduce fresh evidence was made and no mention of the allegation of bias made in this material was referred to in counsel's oral argument until in response to direct (and repeated) questioning by the Court.

[48] The inclusion of this material at Tab C of the factum was improper. To the extent it contained new evidence not in the record, the appropriate application ought to have been made if counsel intended to rely on it. Moreover, an allegation of judicial bias must not be left hanging in the air. Of course, counsel has a duty to fearlessly advance every properly arguable point on behalf of a client just as the Court has the duty to carefully evaluate every proper argument made by counsel. It is improper to include material making this sort of allegation and then ignore it in the submissions made to the Court. When questioned, counsel seemed to think that he was free to make his own submissions and differentiate them from submissions advanced by his client. This demonstrates a lack of understanding of the role of counsel.

[49] Counsel defended inclusion in the factum of the "analysis" performed by his client on the basis that it was really in the nature of additional specific submissions on the factual and legal errors allegedly made by the trial judge. I cannot accept this characterization of the material. In addition to anything that could fairly be called proper

argument, it includes statements of matters of fact not found in the record, as well as explanations, statements of motivation, etc. that are not simply an analysis of the findings of the trial judge.

[50] Put in simple language, the submission advanced in the “analysis” is that so many errors were made by the judge favouring the plaintiffs that he must have been biased in their favour. The alleged errors fall mainly into three categories: typographical errors and misstatements of detail, errors occasioned by not accepting Mr. MacKinnon’s interpretation of the aerial photos and finally errors flowing from the judge’s acceptance of the evidence of the MacNeils’ witnesses instead of the appellant’s. As I have said earlier, the judge made no error in not accepting Mr. MacKinnon’s evidence or in accepting the evidence he did. As for typographical errors and misstatements of detail, no reasonable person knowledgeable about the relevant circumstances could think these constitute evidence of bias.

[51] This point was improperly advanced, inappropriately sought to be supported by material not properly in the record and is, in any event, without merit.

V. Disposition:

[52] I would dismiss the appeal. Even though the MacNeil’s are self represented on this appeal, I would nonetheless order Mr. Chisholm to pay their costs fixed at 40% of the costs awarded at trial (i.e., 40% of $3,675 = $1470) plus disbursements incurred

on the appeal.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Chipman, J.A.