NOVA SCOTIA COURT OF APPEAL
Citation: ***McCormick v. MacDonald***, 2009 NSCA 12

Date: 20090130
Docket: CA 294010
Registry: Halifax

Between:

Roger Mark McCormick and Angela Louise McCormick

Appellants

v.

John William MacDonald and Lorraine Marie MacDonald

Respondents

Judges:	Roscoe, Saunders & Fichaud, JJ.A.
Appeal Heard:	November 25, 2008, in Halifax, Nova Scotia
Held:	Appeal allowed in part per reasons for judgment of Saunders, J.A.; Roscoe and Fichaud, JJ.A. concurring.
Counsel:	Stephen Kingston & Ian Dunbar, for the appellants Peter Lederman, Q.C. & Jeanne Archibald, Q.C., for the respondents

Reasons for judgment:

[1] A dispute arose between neighbouring cottage owners over a 10 foot wide strip of land leading to the shore of Pugwash Harbour.

[2] Claims and counterclaims were commenced alleging ownership, or right-of-way, or entitlement to damages and injunctive relief for trespassing.

[3] Surveyors were hired who presented their findings in court, augmented by the recollections of various descendants and others aligned with the competing chains of title.

[4] After a trial before Nova Scotia Supreme Court Justice Arthur J. LeBlanc the plaintiffs were found to have established title to the portion of land in dispute, together with an acquired right-of-way crossing the defendants' land to the shore. The defendants' counterclaim seeking damages for alleged trespass was dismissed.

[5] For the reasons that follow I would allow the appeal in part, set aside the trial judge's order and replace it with an order which gives effect to the following conclusions and directions.

Background

[6] To orient the reader I will outline, in general terms, the layout of the land in dispute and the lots abutting, as well as the chains of title through which the respective parties claim ownership. Greater detail may be found in the trial judge's decision now reported at **2007 NSSC 29**.

[7] The McCormick (appellant) and MacDonald (respondent) properties lie adjacent to one another in a cottage subdivision near Pugwash, Nova Scotia, in an area known as Mitchell's Beach. The families are long time neighbours and were, until this dispute emerged, long time friends.

[8] In order to establish one's bearings, one might imagine a rectangular shaped piece of paper, with its long sides running left to right, and with the compass directions being more or less: North (top), South (bottom), West (left), and East (right). The shore line to the Pugwash Harbour would lie to the top of the page.

The Pugwash River Road, also known as the Bergman Road, would lie to the south, or bottom of the page. The appellants' lot fronts the shore line of the harbour and lies to the west (left) of the respondents' shore lot.

[9] The parties could not agree on the location of the boundary line between their properties, or whether a right-of-way to the shore had ever been established. These two questions were central to the present litigation.

[10] As I will now explain, this case concerns the ownership and right-of-way over a small strip of cottage property, generally said to be 10 feet in width. This tiny parcel is obviously considered to be of substantial importance to the appellants Mr. & Mrs. McCormick and to the respondents Mr. & Mrs. MacDonald. The dispute blossomed in 2002 when the appellants moved their shed on to the disputed parcel. This prompted competing claims of ownership and access to the shore by the respondents and others who were said to have regularly walked over this strip of land to the beach from both the shore lots and the back lots in behind. All of the beach front lots have a very steep cliff on the north boundary and the McCormick's have a set of stairs on their property which others in the area used for accessing the beach.

[11] The MacDonalds commenced this action and claimed a right-of-way over this ten foot wide parcel of land (the parcel) that separates their land from the McCormick property to the west. The MacDonalds sought a declaration of their alleged right-of-way over the parcel, which they claimed to have used in gaining access to the beach.

[12] In addition, the MacDonalds sought to confirm the western boundaries of their property according to a 2002 survey prepared by Mr. Jerry Borden, N.S.L.S. (the Borden survey) as well as obtain an order preventing the McCormicks from obstructing the alleged right-of-way and from encroaching on their property.

[13] The McCormicks denied that the MacDonalds enjoyed a right-of-way over the parcel. The McCormicks counterclaimed for a declaration setting the eastern boundaries of their property according to a 2004 survey prepared by Mr. Lyndon Crowe, N.S.L.S. (the Crowe survey), and sought an injunction to prevent the MacDonalds from trespassing on their property.

[14] Where the line between the two properties ran to the shore, and whether the respondents enjoyed a right-of-way to the beach, became the two principal issues on which this protracted litigation ensued.

[15] After a two day trial LeBlanc, J. reserved judgment. In a written decision dated January 30, 2007 he allowed the (respondent) MacDonalds' claim and dismissed the (appellant) McCormicks' counterclaim.

[16] The trial judge dealt with costs in a subsequent decision dated January 10, 2008 now reported at **2008 NSSC 6**. No appeal is taken with respect to the costs award.

Issues

[17] The following issues are raised in the appellants' notice of appeal alleging errors on the part of the trial judge:

1. in fact and law in determining that a portion of the appellants' property had been previously conveyed to a predecessor in title to the respondents

2. in law in his application of the doctrines of constructive possession and adverse possession to the circumstances of the present case

3. in fact and law in finding that the respondents hold a prescriptive right-of-way over the appellants' property.

[18] In terms of relief, the appellants ask that the judgment at trial be reversed and that this court declare:

(a) that the boundaries of the MacDonald and McCormick properties shall be as depicted on the plan of survey of Lyndon Crowe, N.S.L.S. dated February 9, 2004;

(b) that the MacDonalds have no right-of-way over the McCormicks' lands, either for the benefit of themselves or for others;

(c) that the appellants shall receive their costs, both of this appeal and of the trial below.

[19] Before addressing the merits of this appeal I will first consider the appropriate standard of review for each of the issues the trial judge was asked to decide.

Standard of Review

[20] The standard of review to be applied when evaluating a lower court's decision for error, is well known. Findings of fact, or inferences drawn from those facts are reviewed on a standard of palpable and overriding error. Matters involving pure questions of law are subject to a correctness standard. Where a distinct legal issue can be isolated from a challenged question of mixed fact and law, then the standard applied to that extricated issue will also be one of correctness. Otherwise the same palpable and overriding measure is invoked. **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235.

[21] As this court observed in **McPhee v. Gwynne-Timothy**, 2005 NSCA 80:

> [33] On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed fact and law are said to fall along a "spectrum of particularity." Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error.

[22] The appellants say the present appeal involves one question of "pure" law relating to the proper interpretation of the deed, and other ancillary questions of mixed law and fact. I agree with their submission and will discuss the appropriate standard to be applied when addressing the three principal issues identified by the appellants ("the McCormicks"). For convenience I will restate the issues which the appellants have framed as three rhetorical questions:

(i) Did the trial judge err in fact and law in determining that a portion of the appellants' property had been previously conveyed to a predecessor in title to the respondents?

(ii) Did the trial judge err in law in his application of the doctrines of constructive possession and adverse possession to the circumstances of the present case?

(iii) Did the trial judge err in fact and law in finding that the respondents hold a prescriptive right-of-way over the appellants' property?

Analysis

[23] Before explaining what I take to be the critical error made by the trial judge it will be necessary to describe in somewhat more detail the location of the relevant parcels of land, as well as the conveyances which led to their acquisition.

[24] The MacDonalds (respondents here/plaintiffs at trial) owned two lots in an area known as Mitchell's Beach, a cottage subdivision near Pugwash, Nova Scotia. The MacDonalds' "shore lot" lies along the banks of Pugwash Harbour, while their "back lot" is landlocked, lying inland of the shore lot. The McCormicks (appellants here/defendants at trial) own a lot on the shore to the west of the MacDonalds' shore lot. The lots are accessible from the Bergman Road, also known as the Pugwash River Road, by way of a lane known as the "Mitchell and Burnside Right-of-Way" (also called the "Burnside Right-of-Way" and "Elm Tree Lane"). The Bergman Road splits into a "T" in the vicinity of the parties' boundary line, with the crossbar of the "T" comprised of lanes running behind the shore lots. After providing this description of the layout, the trial judge summarized the gist of the parties' competing claims. For ease of reference I will here substitute "respondents" or "MacDonalds" for "plaintiffs", and "appellants" or "McCormicks" for "defendants."

> [3] The (respondents/MacDonalds) allege that their shore lot and the (appellants/McCormicks') lot are separated by a ten-foot-wide right-of-way running to the shore, which they claim has existed since the subdivision was established. They claim that the right-of-way has been used by occupants of the subdivision to access the shore for more than twenty years. The (respondents/MacDonalds) allege that the (appellants/McCormicks) blocked

> access to the right-of-way and removed the stairs that led from it down to the beach. They say this was done over the protests of the (respondents).
>
> [4] The (appellants/McCormicks) deny that a right-of-way exists between their lot and the (respondents/MacDonalds') shore lot. They deny that any grant was ever made or that any such right-of-way has been used by the occupants of the subdivision to access the shore in this location for a period of more than twenty years. They allege that, despite their requests, the (respondents/MacDonalds) trespassed upon their lands. . . . They deny encroaching upon the (respondents/MacDonalds') shore lot, or claiming any part of it as their own. They add a counterclaim for trespassing.
>
> [5] The (respondent/MacDonalds) seek a declaration that the right-of-way exists for the benefit of themselves and other occupants . . . by express or implicit grant or by virtue of prescriptive easement. The declaration they seek would also set the western boundary of their shore lot where they allege it to be. . . . The (appellants/McCormicks) seek a declaration as to the location of the boundary, as well as a declaration that no right-of-way exists over their lands. . . .

[25] To deal with the matter before him the trial judge correctly observed that he would have to establish the boundary between the parties' properties, and determine the existence or non-existence of a right-of-way.

[26] Before considering the trial judge's answer to those points, it will be helpful for me to describe, summarily, how each side traced their respective chain of title.

History of Properties

[27] The MacDonald and the McCormick properties originated from the subdivision of properties once owned by John Burnside ("Burnside") and Thomas Mitchell ("Mitchell") lying between the Bergman Road and the Pugwash Harbour. In the late 1940's Mr. Burnside and Mr. Mitchell agreed to subdivide their properties to be sold as cottage lots. It appears that no legal survey was undertaken at the time of that subdivision.

[28] As I have already explained the MacDonald and McCormick properties are bounded on the south by a dirt road and on the north by Pugwash Harbour. The MacDonald property borders a relative on the east, and the McCormick property borders a relative on the west. Both properties border the parcel in dispute on their remaining side.

McCormick Property

[29] The appellants' original property originated from lands owned by Burnside.

[30] In 1947, Burnside sold a portion of his property to Maurice Crawley – beginning 100 feet northwest from the Burnside-Mitchell boundary line. In 1951, Burnside sold the property between the Crawley lot and the Burnside-Mitchell boundary to Ethel Best. The Best lot was described as beginning at the northwest line of Thomas Mitchell marked by a stake on the bank of Pugwash Harbour.

[31] The Crawley and Best lots were subsequently acquired by Augustine MacKenzie, and were reconfigured into two new lots.

[32] One of the two "new" lots was sold to Roger Ray McCormick and Virginia McCormick (the parents of the appellant Roger Mark McCormick) in 1971. The lot was described as beginning at the "northwesterly line of Thomas Mitchell." The remaining "new" lot was sold to Mattie Ouderkirk, also in 1971. That lot was described as beginning 75 feet northwest from the "northwesterly line of lands of Thomas Mitchell." As it turned out, an error was discovered when the descriptions in these two "new" lots were found to have been mistakenly reversed. The unintended mix-up was corrected by a rectification agreement executed as between Roger and Virginia McCormick and Mattie Ouderkirk in September, 1972.

[33] In 1991 Ms. Ouderkirk conveyed her lot to Roger and Virginia McCormick. They in turn conveyed that lot to the appellants in August 2001.

MacDonald Property

[34] The MacDonald property originated from lands owned by Mitchell. It is currently comprised of two lots, which are divided into a "back" lot and a "shore" lot by a dirt road that originated as a deeded right-of-way.

[35] In 1960, Mitchell sold the back lot to Roderick MacDonald (the father of the respondent John William MacDonald). It was described as "beginning at a point on the south side of shore right of way next [to] Burnside right of way."

[36] The shore lot was sold by Mitchell to Gerald Hatherley in 1949 (the "Hatherley Deed"). It was described as follows:

> That certain lot . . . situated on the west side of Pugwash harbour . . . beginning at an iron post on the banks of the shore ten feet east of the line between Thomas E. Mitchell and property owned by John D. Burnside and running in an easterly direction along said shore bank for a distance of fifty three feet to a post. thence in a southerly direction for a distance of one hundred feet to a post on side of the right of way. thence turning westerly along side of said right of way for a distance of sixty six . . . to a post. thence turning northerly for a distance of one hundred feet to the place of beginning. . . .

[37] The northwest corner of the shore lot was accordingly 10 feet from the Mitchell-Burnside line. The result is that Mitchell retained a 10 foot strip – the parcel currently at issue – between the shore lot and the Mitchell-Burnside line.

[38] In 1955, Mr. Hatherley conveyed the shore lot to Edward Mac Donald, a relative of the respondents. Edward MacDonald died in the mid-1970's and the shore lot passed to his wife, Betty MacDonald.

[39] In 1977, Mrs. MacDonald sold the shore lot to Roderick MacDonald. He cleared the lot (and the parcel) and placed a trailer near the lot's southeast corner.

[40] Roderick MacDonald died in 1985, and title to both the shore lot and the back lot passed to his daughters, Ellen MacAulay and Lorraine MacDonald. Mrs. MacAulay surrendered her interest in both properties to Lorraine MacDonald in 1996.

Purchase of residual Mitchell Lands

[41] In or about 2000 the appellant Roger Mark McCormick began construction of a new cottage on the former Ouderkirk lot.

[42] The new cottage had a fixed foundation and during construction Mr. McCormick asked a surveyor to verify that the foundation did not encroach on other properties. As a result of this inquiry, Mr. McCormick became aware of the residual Mitchell lands – the 10 foot strip constituting the parcel – running between the MacDonald shore lot and the McCormick property.

[43] In 2002 Mr. McCormick contacted Dennis Mitchell, the great-grandson of Thomas Mitchell, to inquire about the parcel. The parcel had passed between generations of Mitchells, along with several other properties. Dennis Mitchell had been deeded the parcel by his father, and had been aware of its existence for some time. He believed his family had retained it in order to ensure access to the beach.

[44] In September 2002, Mr. Mitchell sold the parcel to Mr. McCormick. Mr. McCormick then consolidated it with his existing property (the former Ouderkirk lot), combining Lot 1 (his original property) and Lot A (the parcel) to form Lot 1-A as described in the Crowe survey. The consolidated properties were described as:

> . . . BEGINNING at the northwesterly corner of lands of Lorraine MacDonald on the banks of Pugwash Harbour; THENCE southwesterly along the western boundary of Lorraine MacDonald's property 100 feet to a stake; THENCE northwesterly 60 feet or to lands of Roger and Virginia McCormick; THENCE northeasterly 100 feet to the Pugwash Harbour; THENCE along the bank of Pugwash Harbour 60 feet to the place of beginning. . . .

[45] Mr. McCormick moved his shed onto the parcel after he had received the deed from Dennis Mitchell. The respondent Mr. MacDonald then sought legal counsel, who sent a registered letter to Mr. McCormick asking him to remove the shed. Both parties obtained surveys, and the present action was commenced by the MacDonalds in 2004.

[46] With this background, I will now discuss the trial judge's placement of the boundary between the McCormick property and the MacDonald shore lot, and his answer to the question whether the disputed parcel was subject to a right-of-way (as alleged by the MacDonalds) and, if so, its extent and location.

[47] Accordingly, I turn to a consideration of the first issue.

 # 1 Did the trial judge err in fact and law in determining that a portion of the appellants' property had been previously conveyed to a predecessor in title to the respondents?

[48] As should now be apparent, the boundaries between the properties will depend in large part on the location of the Mitchell-Burnside line. The McCormick

deed placed the northeast corner of their original property at the line. The MacDonald deed placed the northwest corner of their shore lot 10 feet from the line. Accordingly, the parcel was bounded on the west by the Mitchell-Burnside line, and on the east by the MacDonald shore lot.

[49] The Borden survey (upon which the respondents relied) assumed that an iron tube identified by Mr. MacDonald was the southwest corner of the shore lot. Mr. Borden placed the Mitchell-Burnside line 10 feet from that iron tube. As a result, according to the Borden survey the shore lot had a southern frontage of 70.48 feet, whereas the MacDonalds' deed granted only 66 feet.

[50] Mr. Borden testified that the post which would have marked the northwest corner of the shore lot at the time of the Hatherley deed would now be over the bank due to erosion. He admitted on cross-examination that the Hatherley deed referred to the northwest corner being 10 feet east of the Mitchell-Burnside line but did not refer to the placement of the southwest corner relative to the Mitchell-Burnside line.

[51] The Crowe survey (upon which the appellants relied) references discussions with Roger Mark McCormick and his father, who both believed that the iron tube was the southeast corner of the former Ouderkirk lot, now owned by the appellants. Mr. Crowe stated that the main disagreement between himself and Mr. Borden was whether the iron tube marked the southeast corner of the original McCormick lot or the southwest corner of the MacDonald shore lot.

[52] Mr. Crowe determined that placing the Mitchell-Burnside line where the Borden survey suggested it lay would leave a remnant strip of land between the Mitchell-Burnside line and two other cottage properties to the south, including the MacDonald back lot. Those properties had been sold as abutting the Mitchell-Burnside line, and Mr. Crowe did not believe that a remnant Mitchell property existed between those properties and the line.

[53] In argument, counsel for the respondents stressed that the original effort at subdividing by Messrs. Mitchell and Burnside which began with their conveyancing in the 1940's was done without any professional surveying input, which might then explain the lack of precision in certain respects. While this may be true, it would not absolve the trier of fact from subjecting those instruments to a

proper legal construction and interpretation. Further, such short comings were recognized and addressed by Mr. Crowe when conducting his investigation and preparing his report (see for example, ¶ 21 of the decision under appeal).

[54] The trial judge preferred and accepted the survey evidence presented by Mr. Crowe on behalf of the appellants, to that offered by Mr. Borden on behalf of the respondents, for the placement of the Mitchell-Burnside line. He found, commencing at ¶ 87 of his decision:

> [87] As between the two surveys, and the evidence of the surveyors, I accept that of Mr. Crowe over that of Mr. Borden. Mr. Crowe's research, including reviewing aerial photographs of the development of the subdivisions created by Mr. Burnside and Mr. Mitchell and plotting the occupation of the properties by the various landowners in order to establish the correct boundary line.
>
> [88] Mr. Borden's research was less detailed, and his analysis of the location of the boundaries did not take into account the original boundary between the Burnside and Mitchell properties. . . .

It is clear that the trial judge found the extensive field work, investigation and analysis conducted by Mr. Crowe to be more compelling. The record provides ample reasons as to why the trial judge would prefer the conclusions presented by Mr. Crowe. Especially convincing were the calculations made by Mr. Crowe and the importance he attached to his findings on the ground, including the location of a significant elm tree. These references are captured in the trial judge's decision at for example ¶ 26-29:

> [26] Mr. Crowe also referred to aerial photographs of the subdivision from 1948 and 1954. The 1948 photograph showed no evidence of cottage lots. The 1954 photograph, however, "showed the development of several lots in the Burnside area, as well as the emergence of the traveled Burnside right of way. Apparent lines of occupation can be seen, in the area running southwest from the elm tree, as well as along the Southeast side of ... Lot 1." He calculated a line through the two iron tubes found around the Burnside/Mitchell line, extending southwest, which "passed 3 feet more or less to the Northwest" of the centre of the elm tree. He noted that this was "in close agreement" with the deed description that located it "5 feet more or less north of an elm tree." He extended this line to the shore and created a transparency which, when overlaid on the 1954 photograph, "coincides with 1954 lines of occupation running southwest from the elm tree, and along Lot 1 at the shore."

[27] Mr. Crowe calculated that the three lots along the shore on the Mitchell side of the line "fit very well, using their deed dimensions, between this calculated line and the evidence shown on the plan found around other David Murray MacDonald lots to the Southeast. The resulting line between the David Murray MacDonald lot and the Daniel Angus and Gladys MacDonald lot also coincided with a "well established hedge found there." I note that neither Mr. Borden nor Mr. Crowe could offer any definitive evidence as to whether the hedges on the David MacDonald and Daniel MacDonald properties were intended to be boundaries between the properties, or between the Daniel MacDonald lot and the plaintiffs' property.

[28] These findings, Mr. Crowe wrote, "further confirmed" the location of the line he had calculated as that of the original Mitchell/Burnside line. It did not, however, resolve the discrepancy caused by "the fact that there is more land than called for by deed between evidence found to the west of Lot 1A , and evidence found to the East of Lot 1A." The difference between the calculated and deed distances on the southern boundary of Lot 1 amounted to 9.7 feet. This discrepancy, he wrote, is "impossible to overcome, as there will be more land than called for by deed somewhere here no matter what the outcome of a boundary survey is." He suggested that the situation arose:

> when the first lot in the Burnside area was sold in 1947, that being ... the 200 foot wide Crawley lot. It was described as beginning at a point 100 feet from the Mitchell boundary. The 100 foot remnant was then deeded in 1950 to Olwyn Ethel Best. It is my opinion that the 100 foot distance from the Mitchell boundary in the Crawley deed was not measured with the same degree of care or accuracy as was applied to the measurement of the lot boundaries themselves, and that this discrepancy was then carried forward when the remnant was sold to Best.

[29] By contrast, on the Mitchell side of the line, "no relationship to the Burnside/Mitchell line is defined by deed until the original MacDonald lot was sold as being 10 feet away from the line, 10 feet being an easier distance to measure with accuracy than 100 feet." Mr. Crowe did not refer to any supporting surveying principle for this conclusion. Presumably, the greater the distance, the less accurate the measurement. However, I place no reliance on this criteria.

There was a sound basis for the trial judge’s adoption of Mr. Crowe’s findings and I see no reason to intervene.

[55] The trial judge went on to find that the boundary line between the MacDonald and McCormick properties had not been varied by agreement or conduct. Nonetheless, he concluded:

> [100] I accept that Thomas Mitchell intended to retain access the beach. However, he sold a parcel to Mr. Hatherley with the southwest and northwest corners identified by an post and an iron post, respectively. I am satisfied that the piece of land that was transferred by Dennis Mitchell to the defendants was partly included in the lands sold by Mr. Mitchell to Mr. Hatherley in the conveyance of 1949. To the extent that Thomas Mitchell claimed he owned lands within these boundaries and attempted to retain a piece of land to allow access to the beach when he made the 1949 conveyance, in my view this failed and his successors in title could not later convey them to the defendants. (Underlining mine)

[56] Justice LeBlanc then determined that the parcel had, in effect, been subsumed by the MacDonald shore lot. He did so by jointly applying the doctrines of constructive possession and adverse possession. He first found that by being in actual occupation of a portion of the land described in the deed, the MacDonalds were in constructive occupation of the remaining portion of their lands as shown on the (previously rejected) Borden survey. He also found that the MacDonalds had occupied a portion of the parcel for sufficient time so as to displace Dennis Mitchell by December, 1998, by operation of the **Limitation of Actions Act**.

[57] LeBlanc, J. summarized the respondents' position regarding the claimed right-of-way as follows:

> [112] The parties agree that there was no express grant of a right-of-way. However, the plaintiffs claim, the evidence shows that the strip of land leading to the shore was regarded as a right-of-way, and used as one without permission of the Mitchells or Mrs. Ouderkirk, from the mid-1960s. They suggest that Raymond Davis's cutting of the grass should be regarded as an attempt to assert a right to use the right-of-way. Similarly, when Mr. MacDonald and Mr. Davis assisted Roger McCormick in building the stairs to the shore, they assumed that the purpose of the stairs was to allow access to the shore from an existing right-of-way. Neither Mrs. Ouderkirk nor Roger McCormick took physical steps to prevent the use of the alleged right-of-way.

[58] LeBlanc, J. found that this evidence established that the MacDonalds enjoyed a five foot wide prescriptive right-of-way over the former Ouderkirk lot:

> [119] I conclude that the path used by the plaintiffs and their predecessors in title was clearly on the Ouderkirk property. This use of this path commenced before she became the owner of the abutting property. According to the plaintiffs and Mr. Davis, the path was in use in the 1960s, when the property was owned by Mrs. MacKenzie. It is clear that the use of this property continued after she sold it. There is no evidence that Mrs. Ouderkirk took any steps to prevent Roderick MacDonald and his successors in title from using this path to the shore. This started shortly after Roderick Macdonald erected his cottage on the rear lot. They continued without interruption until 2002 when Mark McCormick placed obstructions on the property.
>
> [120] Although the plaintiffs and the witnesses who testified on their behalf testified that they used the Mitchell right-of-way to get to the shore, I am satisfied, based on the location of the boundary, that the path in question was on the Ouderkirk property, not on the Mitchell property.

[59] In my respectful opinion the trial judge erred in concluding that the parcel of land conveyed by Dennis Mitchell to the appellants in 2002 had been previously conveyed to the respondents as part of the shore lot. In particular he erred by first, arbitrarily and incorrectly fixing the northwest corner of the shore lot without reference to the Hatherley deed, and second, in mistakenly fixing the remaining boundaries of the shore lot after incorrectly interpreting the Hatherley deed. When I say "arbitrary" I use the word in the sense that the trial judge reached a conclusion that was unsupported by proper reasoning and which, upon analysis is seen to be legally incorrect.

[60] It is trite law to observe that the interpretation of a deed to determine its legal effect is a question of law. In **Alberta Giftwares Ltd. v. The Queen**, [1974] S.C.R. 584 at p. 588, Ritchie, J. stated:

> . . . in my opinion in constructing a will, deed, contract, prospectus or other commercial document, the legal effect to be given to the language employed, is a question of law . . .

[61] While the construction of a deed is a question of law, to the extent that a deed must be interpreted in the context of facts and factual inferences, its review may also raise questions of mixed fact and law. If a trial judge fails to consider relevant evidence, or makes palpable and overriding errors in finding the facts, or drawing inferences from those facts, this court will intervene. As Hallett, J. A. observed in speaking for this court in **Metlin v. Kolstee**, 2002 NSCA 81:

> [70] The interpretation of a deed is a question of law. If a trial judge has incorrectly interpreted a deed a court of appeal should interfere.
>
> [71] If findings of fact made by a trial judge are clearly unfounded or result from a misunderstanding of the evidence or a failure to consider relevant evidence an appeal court will interfere (**MacPhail v. Desrosiers et al.** (1999), 170 N.S.R. (2d) 145; 515 A.P.R. 145 (C.A.) and **Toneguzzo-Norvell et al. v. Savein and Burnaby Hospital**, [1994] 1 S.C.R. 114; 162 N.R. 161; 38 B.C.A.C. 193; 62 W.A.C. 193).

[62] In my respectful view the trial judge erred in arbitrarily and incorrectly fixing the location of the northwestern boundary of the MacDonalds' shore lot in a manner contrary to the Hatherley deed.

[63] Thomas Mitchell deeded the shore lot to Gerald Hatherley in 1949 as follows:

> . . . beginning at an iron post on the banks of the shore ten feet east of the line between Thomas E. Mitchell and property owned by John D. Burnside and running in an easterly direction along said shore bank for a distance of fifty three feet to a post. . . .

[64] The Hatherley deed expressly placed the northwest starting point of the shore lot 10 feet east of the Mitchell-Burnside line, beginning at an iron post. That iron post was not found by either surveyor – Mr. Borden speculated it was lost over the bank due to erosion.

[65] Both surveyors plotted the western boundary of the shore lot according to its position relative to the Mitchell-Burnside line. The Borden report states:

> . . . I located the original boundary line, referred to in deeds as the Mitchell/Burnside line, at the rear of the shore lots, as being 10 feet from the iron pipe pointed out by Mr. MacDonald as per his deed. . . .

[66] Mr. Crowe testified as follows:

> A. . . . I'd come to an opinion as to where the original Burnside Mitchell boundary was. So that gave me the Mark and Angela McCormick lot, consisted of two pieces, one was on the Mitchell Burn - - one was on the Burnside line and

> the other was on the Mitchell line - - the Mitchell side of the line. So then I had to try to drive (sic "derive"?) where the east boundary of this second little strip or parcel was. So I went to the deed for the Lorraine Marie and John William MacDonald shore lot
>
> . . .
>
> Q. And what did you do with that?
>
> A. It begins at a point -- it begins a point on the bank of the shore, . . . That wording is ten feet easterly of the line between Thomas Mitchell -- Thomas E. Mitchell and [inaudible] Burnside. . . . So I established the point being -- and that boundary as being 100 feet in off the right-of-way and ten feet off the Mitchell Burnside line.

[67] The trial judge accepted Mr. Crowe's placement of the Mitchell-Burnside line, and rejected the rival placement advanced by Mr. Borden. Having done so, however, he declined to accept Mr. Crowe's boundaries for the shore lot and, instead, accepted the boundaries as set by Mr. Borden.

[68] The trial judge also expressly determined that the iron tube was the southwest corner of the shore lot. This was the starting point selected in the Borden survey. The Crowe survey, however, places that tube directly on the Mitchell-Burnside line.

[69] The trial judge then established the western boundary for the shore lot by extending a line from the iron tube to a point at the shore, parallel to the Mitchell-Burnside line. The result is that the western boundary of the shore lot, as found by the trial judge, tracks the Mitchell-Burnside line, notwithstanding that the description of the lot in the Hatherley deed begins 10 feet from that line.

[70] The only conclusion therefore is that the judge arbitrarily fixed the northwest corner of the shore lot without reference to the very clear directions contained in the Hatherley deed.

[71] The principles applicable to the interpretation of the deed were considered by this court in **Metlin v. Kolstee**, supra, beginning at ¶ 65:

> [65] In his decision, after reviewing the evidence, the trial judge referred to the principles applicable to the interpretation of a deed as set out in **Saueracker et al.**

v. Snow et al. (1974), 14 N.S.R. (2d) 607; 11 A.P.R. 607; 47 D.L.R. (3d) 577 (T.D.); **McPherson et al. v. Cameron** (1866-69) 7 N.S.R. 208, and **Humphreys et al. v. Pollock et al.**, [1954] 4 D.L.R. 721. Justice Coughlan stated in 37-39 as follows:

> [37] The general principles applicable to the interpretation of a deed are set out by Jones, J. (as he then was) in **Saueracker et al. v. Snow et al.** (1974), 47 D.L.R. (3d) 577 at p. 582:
>
> > . . . The general principles applicable to the interpretation of a deed are set forth in paras. 13 and 24, 5 C.E.D. (Ont. 2d), pp. 488-90 and 497-8, as follows:
> >
> > > 13. Construction. - General Rule. The Court must, if possible, construe a deed so as to give effect to the plain intent of the parties. The governing rule in all cases of construction is the intention of the parties, and, if that intention is clear, it is not to be arbitrarily overborne by any presumption. The intention of the parties is to be gathered from the sense and meaning of the document as determined in the first place by the terms used in it, and effect should, if possible, be given to every word of the document. Where, judging from the language they have used the parties have left their intention undetermined, the Court cannot on any arbitrary principle determine it one way rather than another. Where an uncertainty [still remains] after the application of all methods of construction, it may sometimes be removed by the election of one of the parties. The Courts look much more to the intent to be collected from the whole deed than from the language of any particular portion of it.
> >
> > . . .
>
> [38] The relative importance to be given to various items in the interpretation of a deed is well settled. In **McPherson et al. v. Donald Cameron** (1866-69), 7 N.S.R. 208, Dodd, J., in giving the judgment of the Court, stated at p. 212:
>
> > ... The question is how he is to get there, for neither the course nor distance given in his grant will take him there,

> without the alteration of one or the other. The general rule to find the intent where there is any ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake;
>
> . . .
>
> [66] These statements correctly set out the general principles to be applied in interpreting descriptions of land as spelled out in a deed. As a general rule the intent of the parties to a conveyance is to be gathered from the words of the document. If there is an ambiguity, the common sense rules as quoted by the trial judge from **McPherson et al. v. Cameron**, supra, are generally to be applied. When courses and distances clash preference to one, rather than the other, will depend on the circumstances. . . . (Underlining mine)

[72] A clear and unambiguous deed should be given its plain meaning. As Fichaud, J.A. observed in **Knock v. Fouillard**, (2007) 252 N.S.R. (2d) 298, commencing at ¶ 27:

> [27] In the interpretation of a conveyance it is important to recall three governing principles:
>
> . . .
>
> (b) . . . the court should construe the document as a whole, if possible giving meaning to all its words. . . .
>
> This principle applies to the interpretation of a deed: Anger and Honsberger, ¶ 25:40. Gale on Easements (Sweet v. Maxwell, 17th ed.) ¶ 9-14 says:
>
> > In the case of an express grant the language of the instrument must be referred to. The court will have regard to the conveyance as a whole, including any plan that forms part of it, even though the plan is not mentioned in the parcels or is said to be for identification purposes only.
>
> . . .
>
> (c) Third, the court's first task is to determine whether an unambiguous intention is manifested objectively by the words of the deed,

> not by the parties' subjective wishes, motives or recollections. The primary source is the document, not the psyche.
>
> . . .
>
> In the process of interpretation, a court may not utilize the parties' subjective wishes, motives or intent to alter the unambiguous and objectively manifest intent in the deed's wording.

[73] When the words of a deed are not ambiguous, either in themselves or when applied to the land in question, the intention of the original grantor is to be taken from the words of the description in the deed. No further rules of interpretation are required. **Herbst v. Seaboyer**, (1992) 137 N.S.R. (2d) 5 (C.A.).

[74] The Hatherley deed states that the northwest corner of the shore lot is located "at an iron post 10 feet from the Mitchell-Burnside line." Both Mr. Mitchell and Mr. Hatherley are long deceased. The only evidence of their intentions is to be found in the written document, which is clear and unambiguous.

[75] No evidence was presented at trial to support that the northwest corner should be placed elsewhere. To the contrary, the respondent John MacDonald testified at trial that he had reviewed his deed and believed that his shore lot was separated from the McCormick property by ten feet.

[76] Given the clear language of the Hatherley deed, and having already accepted Mr. Crowe's placement of the Mitchell-Burnside line, the trial judge erred in placing the northwest corner of the shore lot where he did. He should have placed it 10 feet from the line – as per the deed.

[77] Having erred in fixing the northwest corner of the shore lot without regard to the clear wording contained in the Hatherley deed, I would also find that the trial judge erred in fixing the remaining boundaries of the shore lot by incorrectly interpreting the Hatherley deed, or by looking beyond it when deciding this issue.

[78] As noted earlier, the trial judge determined that the deed for the MacDonald shore lot encompassed the parcel in dispute. He found that the iron tube pointed out by Mr. MacDonald was the southwest corner of the shore lot. Various witnesses had expressed their belief that the MacDonalds owned the land to the

east of that tube. The trial judge also noted that the Hatherley deed described the southwest corner of the shore lot as being marked by an iron post.

[79] In my respectful opinion the trial judge erred in his interpretation of the Hatherley deed for several reasons. First, he erred in attaching weight to the subjective recollection of witnesses as regards the boundaries of the shore lot. In this case those recollections were irrelevant. This is particularly so where the conveyance between Mitchell and Hatherley took place in 1949 – and the MacDonalds were not parties to that transaction. As stated in **Knock**, supra, at ¶ 33:

> I agree that a court may migrate from the deed's words to extrinsic evidence to consider whether either the deed is invalid on a vitiating ground recognized by law or it should be rectified . . .

Here the respondents did not seek to rectify or vitiate their deed – to the contrary they relied upon their deed. There was therefore no basis upon which the trial judge could consider extrinsic evidence. As stated in **Knock**, supra, at ¶ 27:

> (c) . . . the court's first task is to determine whether an unambiguous intention is manifested objectively by the words of the deed, not by the parties' subjective wishes, motives or recollections. The primary source is the document, not the psyche.

[80] Second, if Mitchell's intent was apparent from the wording of the Hatherley deed, then the trial judge erred in failing to give effect to that intent. After all, he expressly found that Thomas Mitchell intended to retain a portion of land between the MacDonald shore lot and the Mitchell-Burnside line:

> [100] I accept that Thomas Mitchell intended to retain access to the beach. . . .

[81] This obvious intent is apparent in the Hatherley deed. Mitchell intended to reserve land in the conveyance, as illustrated by the fact that he did not place the boundary of the shore lot on the Mitchell-Burnside line. Instead, he placed it away from the line. The respondents did not lead evidence of any contrary intention of Mitchell or of Mr. Hatherley. In fact, the respondents' claim was premised on the fact that the parcel divided their land from the McCormicks – their dispute was not as to the existence of the parcel, but as to its location, which they believed was

further to the west than the McCormicks did. The parcel is present in both the Borden and Crowe surveys.

[82] Finally, the judge erred by disregarding the distances set out in the Hatherley deed in calculating the boundaries of the shore lot. As stated in **Knock**, supra, all words in a deed should be considered when interpreting the conveyance. No words ought to be thought of as extraneous. If the southwest corner of the MacDonald shore lot were marked with the iron tube (as found by the trial judge) then the southern boundary of the shore lot would be longer than the distance specified in the deed.

[83] I suspect the judge fell into error when he was prepared to accept the Crowe survey as properly establishing the location of the boundary line between the original Mitchell and Burnside properties, but then decided to rely upon the Borden survey to establish the line between the appellants' and the respondents' cottage lots. The two surveys were in direct conflict.

[84] After accepting the placement of the original Mitchell-Burnside line as having been plotted accurately by Mr. Crowe, it could only logically follow then – upon a proper interpretation of the Hatherley deed – that the 1949 conveyance from Thomas Mitchell to Gerald Hatherley conveyed a parcel of land that *commenced* on the bank of the shore "ten feet east" of that line. Thus, Thomas Mitchell reserved to himself the resulting10 foot strip to the shore line.

[85] This 10 foot parcel was located to the east of the existing McCormick property. This 10 foot strip was ultimately acquired by the appellants in 2002 from Dennis Mitchell (great-grandson of Thomas Mitchell). Dennis Mitchell had received this parcel from his father, after it had passed through the ownership of his grandfather and great-grandfather.

[86] In my opinion Mr. Crowe accurately plotted the appellants' lands as consisting of the 50 foot wide parcel from the original Burnside grant (Lot 1) and the 10 foot strip from the Mitchell property (Parcel A), collectively known and plotted on his survey as Lot 1A, which then corresponded to the properties consolidated by the appellants in 2002.

[87] With respect, I think this critical error on the part of the trial judge led him to mistakenly say at ¶ 91 and 100:

> [91] . . . I find that the land sold to the defendants by Dennis Mitchell is within the boundaries of the plaintiffs' shore lot, to the extent that the lot was included in the land conveyed to Mr. Hatherley in 1949.
>
> . . .
>
> [100] I accept that Thomas Mitchell intended to retain access the beach. However, he sold a parcel to Mr. Hatherley with the southwest and northwest corners identified by an post and an iron post, respectively. I am satisfied that the piece of land that was transferred by Dennis Mitchell to the defendants was partly included in the lands sold by Mr. Mitchell to Mr. Hatherley in the conveyance of 1949. To the extent that Thomas Mitchell claimed he owned lands within these boundaries and attempted to retain a piece of land to allow access to the beach when he made the 1949 conveyance, in my view this failed and his successors in title could not later convey them to the defendants. (Underlining mine)

[88] For all of these reasons I would find that we are obliged to reverse the decision of the trial judge concerning the boundaries of the MacDonald shore lot, and that we ought to now confirm the proper boundaries are as depicted in the Crowe survey.

[89] I will now turn to a consideration of the second issue.

 # 2 Did the trial judge err in law in his application of the doctrines of constructive possession and adverse possession to the circumstances of the present case?

[90] After establishing (erroneously in my view) the boundary of the respondents' shore lot, the trial judge then applied the doctrines of constructive and adverse possession to find that Thomas Mitchell and his successors in title were no longer entitled to possession of their remnant parcel.

[91] After mistakenly fixing this boundary line, the trial judge's application of the doctrines of constructive and adverse possession was also incorrect. In my respectful view the judge's error in his interpretation and treatment of the Hatherley deed, then led him astray when he thought it appropriate to invoke the doctrines of constructive and adverse possession.

[92] An essential prerequisite to a claim of constructive possession is that the claimant be able to rely on colour of right, that is by having some paper title, albeit a defective paper title. It is not the deed or other instrument which gives title, but rather the claimants' *bona fide* belief of holding title coupled with the adverse possession under it for the requisite period of time, with colour of right. The paper title, though defective, may then define the boundary of the legally effective title by adverse possession.

[93] In **Mason v. Nova Scotia (Minister of Justice)** (1999), 176 N.S.R. (2d) 321 (C.A.), this court stated:

> [31] In Anger and Honsberger, **Real Property**, 2nd Ed., Oosterhoff and Rayner, 1985, the bases for a claim based on colour of title are correctly set out as follows:
>
> > The rule as to constructive possession differs according to whether the claimant has documentary title or colour of title or is a trespasser without colour of title. Where a person having paper title to land occupies part of it, he is regarded in law as being in possession of the whole unless another person is in actual, physical possession of some part to the exclusion of the true owner. To constitute colour of title it is not essential that the title under which the party claims should be a valid one. It is not the instrument which gives the title, but adverse possession under it for the requisite period, with colour of title. A claim asserted to property under the provisions of a conveyance, however inadequate to convey the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under colour of title, and one which will draw to the possession of the grantee the protection of the **Statute of Limitations**, other requisite of those statutes being complied with.
> >
> > The person relying upon the doctrine of constructive possession must enter under a real, bona fide belief of title.
> >
> > . . .
> >
> > A person having clear documentary title may have constructive possession of all land conferred by the title but, if he has not clear documentary title, his possession is limited to such part of the land

> as is proved to be in his actual possession and in that of those claiming through him.
>
> As a general rule, when a person having colour of title enters in good faith upon land, as where it is proposed to be conveyed to him as purchaser or intending purchaser under what he believes to be good title, he is presumed to enter according to the title, his entry is co-extensive with the supposed title and he has constructive possession of the whole land comprised in the deed. (Underlining mine)

This quoted authority from Anger and Honsberger has not changed: see Anne Warner LaForest, Anger and Honsberger, *Law of Real Property*, 3d ed. (Aurora, Canada Law Book, 2008), page 29.22-23. See as well Donald Lamont, *Lamont on Real Estate Conveyancing*, 2d ed. (Toronto: Thomson Canada, 2008) at p. 6-22 and C.W. MacIntosh, *Nova Scotia Real Property Practice Manual* (Markham: LexisNexis, 2008) at 7-11(4), 7-11(5).

[94] Since paper title is an essential element of constructive possession – only a party with paper title to land can claim constructive possession; the constructive possession is limited to the property described in the deed. **Wood v. LeBlanc** (1904), 34 S.C.R. 627 (S.C.C.) at ¶ 47-51. Here too the respondents' claim would fail because they did not have a paper title.

[95] Neither would the respondents be entitled to claim constructive possession of the disputed parcel merely because they believed that their deed encompassed the parcel. The extent of a deed is not altered by the subjective belief of a party: see **Knock**, supra. In **Duggan v. Nova Scotia (Attorney General)** (2004), 222 N.S.R. (2d) 229 (S.C.), the plaintiffs' deed showed a depth of 775 feet, but they claimed they owned land beyond that. Moir, J. found that their claim of constructive possession was limited to the distance shown on their deed. See as well **R. B. Ferguson Construction Ltd. v. Nova Scotia (Attorney General)** (1989), 91 N.S.R. (2d) 226 (C.A.).

[96] In any event the respondent John MacDonald testified to his belief that his shore lot was separated from the appellants' property by 10 feet. Given that declaration, he could hardly be heard to assert a *bona fide* belief that his shore lot encompassed the impugned parcel.

[97] In summary, I have described how the trial judge erred in law in interpreting the Hatherley deed and in fixing the boundaries of the shore lot to include the parcel. This led him to a second error in law in applying the doctrine of constructive possession when the disputed parcel was not encompassed by the relevant deeds. Thomas Mitchell's intent was to exclude the parcel from the Hatherley deed, as reflected in the deed's description. The respondents never held paper title to any portion of that parcel.

[98] The trial judge also appears to purportedly justify his (erroneous) conclusion that the respondents had met all essential prerequisites for constructive possession, by some tangential reference to the nature of the respondents' occupation, later concluding that such occupation was enough to establish in law, adverse possession. This can be seen, for example, in the trial judge's remarks at ¶ 107:

> It is my view that . . . the plaintiffs and others authorized by them exercised actual, constant, open, visible and notorious occupation to the exclusion of the owner. They did this to the extent required by the statute and in my view it was not possession which was equivocal, occasional or for a special or temporary purpose.

[99] Here too I think the trial judge was mistaken. The fact is that the respondents never asserted a claim of adverse possession in their statement of claim, whether as originally filed or as amended. No notice of contention was filed by the respondents in an attempt to uphold the trial judge's decision for other reasons. It may be that the trial judge's reference to the legal criteria typically linked to adverse possession was only made in the context of the claim for constructive possession. Be that as it may, it will not be necessary for me to comment on the matter further, as I would reverse the trial judge's establishment of the location of the boundary line between the properties, for the reasons already stated. I will now address the last issue raised by the appellants.

3 Did the trial judge err in fact and law in finding that the respondents hold a prescriptive right-of-way over the appellants' property?

[100] At trial the parties agreed that there had never been an express grant of a right-of-way. However, the respondents argued that the strip of land leading to the shore was always regarded as a right-of-way, and used as one without permission of the Mitchells, or their successors in title, from the mid-1960's. This use – they

said – had not been interrupted, thereby entitling them to claim prescriptive title to a right-of-way based on counting back for over 20 years. The appellants argued that the respondents and their predecessors in title had not established a continuous use of the alleged right-of-way for a period in excess of 20 years. They also claimed that any use of this land to access the beach was only with their consent, and was not adverse.

[101] The trial judge found that the respondents had established a prescriptive right-of-way over the former Ouderkirk lot (now owned by the appellants). He said:

> [119] I conclude that the path used by the plaintiffs and their predecessors in title was clearly on the Ouderkirk property. This use of this path commenced before she became the owner of the abutting property. According to the plaintiffs and Mr. Davis, the path was in use in the 1960s, when the property was owned by Mrs. MacKenzie. It is clear that the use of this property continued after she sold it. There is no evidence that Mrs. Ouderkirk took any steps to prevent Roderick MacDonald and his successors in title from using this path to the shore. This started shortly after Roderick Macdonald erected his cottage on the rear lot. They continued without interruption until 2002 when Mark McCormick placed obstructions on the property.
>
> [120] Although the plaintiffs and the witnesses who testified on their behalf testified that they used the Mitchell right-of-way to get to the shore, I am satisfied, based on the location of the boundary, that the path in question was on the Ouderkirk property, not on the Mitchell property.
>
> . . .
>
> [121] I find that the path to the shore was a pedestrian path with a width of no more than five feet. . . . While they mowed the land to the west of the Burnside–Mitchell line, they made no other improvements. They simply used it to get to the shore.

[102] In argument at the hearing counsel for the appellants conceded that he did not challenge the factual findings of the trial judge on this issue. It was acknowledged that none would invite our intervention on the basis of palpable and overriding error. **Housen**, supra. However, in the appellants' submission, the facts as found by the trial judge would not, in law, be of sufficient weight to establish a right-of-way by prescription.

[103] After carefully reviewing the record and counsels' submissions, I would not disturb the trial judge's conclusion that the respondents had established a prescriptive title to a right-of-way over the appellants' lands bearing the dimensions as he determined, namely a "pedestrian path" . . . "with a width of no more than five feet" to the shore, commencing at the southeast corner of the McCormicks' lot as shown on the Crowe plan (see order of Justice LeBlanc ¶ 2).

[104] In coming to this conclusion I am satisfied that the trial judge identified the correct legal principles and made no error in his application of those principles to the facts. On this final issue the analysis required of the judge essentially involved matters of mixed fact and law. Such questions with no readily extractable error of law are reviewed on a standard of palpable and overriding error. **Housen**, supra; **Wilmot v. Ulnooweg Development Group Inc.**, 2007 NSCA 49. Absent an easily isolated error of law – which is not apparent to me – the judge's conclusions are owed considerable deference. The appellants' complaint that the trial judge failed to give sufficient weight to certain evidence which they say reflected nothing more than a neighbourly practice among residents tolerating passing over one another's property, is very similar to the sufficiency of use argument advanced in **Kimbrell v. Goulden**, 2006 NSCA 102. There, in responding to such an argument, Justice Oland commented at ¶ 29-30:

> [29] The appellant also argued that the judge erred in finding that there was sufficient use of the Pit Road by the Kimbrells' predecessors in title to be continuous as required for a prescriptive right-of-way.
>
> [30] This is a question of mixed fact and law, weighted on the factual side, with the standard of review being one of palpable and overriding error.

[105] I would respectfully adopt the same response in this case. For all of these reasons I would not disturb the trial judge's finding that the respondents had established, by prescription, a right-of-way to a five foot pedestrian path over the appellants' lot to the shore.

Conclusion

[106] I would allow the appeal in part and set aside the trial judge's order following trial which purported to establish the boundary between the appellants' and the respondents' lands, and which concluded that the respondents had:

> . . . established possessory title to the lands which were initially conveyed by Thomas Mitchell to Gerald Hatherley, identified as PID 25146150, the south west corner of which is shown on a Plan of Survey of Lands of John William MacDonald and Lorraine Marie MacDonald prepared by Jerry L. Borden, N.S.L.S., dated July 15, 2003, and filed in the Registry of Deeds at Amherst as Plan no. 75260670. The western boundary of these lands can be established by extending the boundary line from the southwest corner of the lot as depicted in the Borden plan parallel to the Burnside-Mitchell line.

I would direct that the boundaries of the MacDonald and McCormick properties shall be as depicted on the plan of survey of Lyndon Crowe, N.S.L.S. dated February 9, 2004, with the result that the appellants are recognized as being the true and rightful owners of the parcel in dispute in this appeal.

[107] I would dismiss the appellants' appeal concerning the right-of-way over their lands, and uphold the trial judge's finding that the respondents had established, by prescription, a right-of-way to a five foot pedestrian path over the appellants' property to the shore, commencing at the south-east corner of the McCormicks' lot as shown on the Crowe plan (see order of Justice LeBlanc ¶ 2).

[108] As success is divided I would not disturb the trial judge's award of costs at trial, and I would order that each side bear their own costs on appeal.

Saunders, J.A.

Concurred in: