NOVA SCOTIA COURT OF APPEAL
Citation: *Dauphinee v. Fralick Estate*, 2003 NSCA 128

Date: 20031202
Docket: CA 189114
Registry: Halifax

Between:

Harvey Dauphinee and Joseph C. McDonald

Appellants

v.

Gary Meade and Beverly DeWolfe,
Executors and Trustees of the Estate of the
late Beatrice Fralick

Respondent

Judges:	Glube, C.J.N.S.; Cromwell and Oland, JJ.A.
Appeal Heard:	September 19, 2003, in Halifax, Nova Scotia
Held:	Appeal allowed with costs per reasons for judgment of Oland, J.A.; Glube, C.J.N.S. and Cromwell, J.A. concurring.
Counsel:	Brian J. Hebert, for the appellants Jeanne E. Desveaux, for the respondent

Reasons for judgment:

[1] Pursuant to the provisions of the *Quieting of Titles Act*, R.S.N.S. 1989, c. 382 as amended, the late Beatrice Fralick claimed a certificate of title certifying that she is the owner of certain lands adjacent to her residential property in Upper Tantallon, Nova Scotia. Justice Simon J. MacDonald of the Supreme Court of Nova Scotia determined that she had established adverse possession of a portion, but not all, of those lands for the requisite statutory period and granted her a certificate of title for those portions. This is an appeal of his decision.

[2] Beatrice Fralick passed away after the trial was heard in September 2002. Her executors and trustees represent the deceased respondent in this appeal.

[3] It is necessary to briefly set out some of the background to this litigation and to summarize the decision of the trial judge. In doing so, I will refer to the plan prepared by Granville Leopold dated December 14, 2001 attached as Schedule "A" to my decision. This plan shows Lot A and Parcel Y which together comprise Lot A-Y being lands conveyed to Beatrice Violet Fralick, and Parcel X, Parcel Z, Lot B and other lands all conveyed to Harvey C. Dauphinee and Joseph C. McDonald. The Leopold plan was entered as an exhibit at trial and several witnesses wrote upon it in the course of their testimony.

[4] The respondent, Beatrice Fralick, and the appellant, Harvey Dauphinee, were sister and brother. In 1962 their mother conveyed the lands shown as Lot A on the Leopold plan to the respondent. The deed described that lot as measuring 60 by 100 feet and the respondent had it surveyed at that time. She and her husband had started living on that land a few years before she obtained title and she continued to reside there until the trial. In 1999 the respondent purchased from the Province of Nova Scotia lands shown as Parcel Y on the Leopold plan. That parcel is situate between Lot A and Highway No. 3. Together Lot A and Parcel Y form Lot A-Y.

[5] In 1968 the mother conveyed lands adjoining Lot A to her son, Harvey Dauphinee. Those lands included Parcels X and Z shown on the Leopold plan. As can be seen from the Leopold plan, the property deeded to that appellant surrounded that deeded to the respondent on three of its four sides. He conveyed those lands to himself and Joseph C. McDonald in 1995. For many years Mr. Dauphinee, and subsequently he and Mr. McDonald, paid the property taxes for the

property deeded to Mr. Dauphinee and assessed to him and then them. As Mr. McDonald did not participate in the trial or on the appeal, for simplicity I will refer to Mr. Dauphinee as the appellant and to this property as the appellant's property during the remainder of this decision.

[6] In March 2000 the appellant created a rock wall on his property. This wall ran along the eastern boundary of the respondent's Lot A-Y. The following February the respondent claimed Parcels X and Z, both portions of the appellant's property by deed, under the *Quieting of Titles Act*. Parcel X lies between the northern boundary of her property and the Little East River. Parcel Z runs adjacent to the eastern boundary of her property and extends from the old highway boundary back to the same river.

[7] At trial, the applicant/respondent's claim to Parcels X and Z was based on mutual mistake and adverse possession. The trial judge rejected her submissions that she had had an honest mistaken belief that her land went to the water, finding that according to her evidence she knew she had a lot measuring 60 by 100 feet and the 1962 survey she obtained showed those dimensions. His decision on the issue of mutual mistake has not been appealed.

[8] In considering the claim for adverse possession, the trial judge referred to and quoted from several authorities setting out the law. These included *Ezbeidy v. Phalen* (1958), 11 D.L.R. (2d) 660 (N.S.S.C.); Anger and Honsberger**,** *Law of Real Property***,** (2nd Ed. 1985) Vol. 11; *Lynch v. Nova Scotia (Attorney General)***,** [1985] N.S.J. No. 456 (C.A.); *Beck v. Nova Scotia (Attorney General)*, [1984] N.S.J. No.172 (S.C.). The extracts he quoted pertained to matters such as the burden of proof, the need to prove an actual adverse possession which is exclusive, continuous, open and notorious, the regard to be paid to the nature of the land in dispute, whether the acts of possession were of a kind sufficient to extinguish the title of the legal owner, and when time starts to run against the legal owner and how long is required to extinguish title.

[9] The trial judge then stated that the decision involves an evaluation of the evidence of several witnesses and that "immediately the matter of credibility comes to the forefront." He referred to the discovery evidence of the respondent submitted by agreement because of her serious illness and his attendance at her residence with counsel when the appellant's counsel completed his questioning of

her. He found from her testimony that she acquired a lot measuring 60 by 100 feet by deed in 1962 and that the land was surveyed at the time of the conveyance.

[10] The trial judge then considered the evidence of the six witnesses called by the respondent to prove acts of possession necessary to obtain ownership by adverse possession. He commented on the testimony of three, describing Maureen Cyr as "very believable" and Edgar Fralick as "a good and sincere witness" and Marjorie Burchell's evidence as consistent with that of others as to the use of the land. The trial judge expressly rejected the appellant's evidence of a gravel pit and his use of equipment on Parcels X or Z and that he had told the respondent or anyone else to get off the land. He found that the appellant would have seen the use made of the lands by the respondent and stated that his occasional use of the back lands to walk through would not constitute a break in the respondent's exclusive possession and occupation of Parcels X and Z.

[11] The trial judge stated in his decision:

> [30] The witnesses called, all testified about the use of the trailer that was placed on the land in the area where the rock wall now exists. There were markings made on the plan by the witnesses where these items were, as they testified. Some of them varied but there is no question in my mind that they were on the parcels as claimed by the plaintiff, but not necessarily marked in the exact same locations. The witnesses said they played in the area as claimed and the grass was cut there.
>
> [31] I am satisfied that when one considers the nature of the type of land as shown in the photos and other exhibits, the use of which the plaintiff and her witnesses did with the land was consistent with what it could be used for. I find the rights exercised over the lands were incidental to ownership with the intention of possession. I am satisfied from the evidence the acts of the plaintiff and others such as using the lands for parking, picnicking, gardening were acts of possession. They were open notorious and continuous, at least since the plaintiff acquired the property in 1962. I conclude this from the overall totality of the plaintiffs' witnesses.
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> . . .
>
> [35] The acts of the plaintiff and her family, as testified to by Mr. Patrick Probert and others all show and satisfy me the use put to portions of parcels "X" and "Z" are those that would be normally done by persons who would be claiming adverse possession of the land. I find on the

> evidence the occupation was not seasonal or occasional. I am satisfied on the balance of probabilities the plaintiff has proven her claim to parts of parcel "Z" and parcel "X". I find that Mrs. Fralick was in open, visible, continuous, exclusive and adverse possession of that land around their house contained in parcel "X" and "Z" which I will describe later on in this decision. I find the title to said lands which I describe owned by Harvey Dauphinee and Joseph C. MacDonald (sic) have been extinguished with respect to that property.

[12] The trial judge did not extend the respondent's title to Parcels X and Z in their entirety as she had claimed. He went on to state that it was "obvious" that not all of those parcels were used by her, her family and her friends. With regard to Parcel X which extends north from the respondent's property to the Little East River, he stated:

> [37] The plaintiff's claim to parcel "X" as shown on the Leopold Plan from the evidence, as I said, does not satisfy me that all the lands as claimed by the plaintiff to the Little East River met the test required for possessory title. I am not satisfied that all the lands behind lot "AY" or in other words to the north of lot "AY" were, in fact, used by the plaintiff in the manner required. I am satisfied, however, a portion of that land was used and it was used for a play area, the grass was cut, it was cleared and it was obvious all the land was in fact used by Mrs. Fralick. . . .

The trial judge then set out the portion of that parcel for which the respondent had succeeded in proving her claim on the balance of probabilities. He stated that "[f]or the same reasons" he was satisfied that she had proven possessory title to a portion of Parcel Z.

[13] The dimensions of Parcels X and Z as originally claimed by the respondent were not shown on the Leopold plan. Using the scale provided on it, I have estimated some measurements. Even if they should not be exact, these estimates provide helpful information. Parcel X as claimed was roughly rectangular and approximately 35 feet deep along its eastern boundary. After the trial a surveyor prepared a plan showing the portions of Parcels X and Z as delineated in the trial judge's decision. An excerpt of the plan of survey showing Parcels X & Z revised March 21, 2003 prepared by Frank Longstaff, N.S.L.S. is attached as Schedule "B". As shown, the portion of Parcel X allowed by the trial judge is triangular in shape and its eastern boundary is ten feet deep. Parcel Z as claimed is a strip measuring some 18 feet along the highway which widened to some 25 feet along

the Little East River. The portion of Parcel Z the trial judge determined had been acquired by adverse possession is a strip ten feet wide throughout running along the eastern boundary of Lot A-Y.

Grounds of Appeal

[14] The appellant raises the following grounds:

1. Whether the trial judge acted on a wrong principle or misapprehension of material evidence in finding that the respondent was in actual and complete occupation of the land claimed for a continuous period of 20 years; and

2. Whether the trial judge erred in admitting into evidence certain photographs at trial.

[15] I will deal first with the second ground of appeal. The appellant submits that the evidence regarding certain photographs on which the trial judge relied was so vague, particularly as to the date when taken and the location depicted, that they should not have been admitted. However, at trial the objection his counsel made to the admission of the photographs was hardly forceful. After counsel for the appellant stated that he had a problem knowing when photographs were taken, counsel for the respondent confirmed the trial judge's assumption that she would be asking the witness shown the photograph if she was depicted in it and if she knew when it was taken. Appellant's counsel agreed with this and the examination of that witness proceeded. The trial continued with various witnesses, including the respondent, asked to testify regarding the photographs. The admissibility of the photographs was never challenged again. In short, the appellant concurred at trial to their admission and it is difficult to fault the trial judge in these circumstances.

[16] Moreover, it is not necessary that I decide whether the photographs should have been excluded from the evidence. It is apparent that while evidence pertaining to them was considered, the trial judge did not consider that evidence as solely determinative or in isolation. In ¶ 31 of his decision, he spoke of the nature of the type of land "as shown in the photos and other exhibits" and later that it was obvious "from the photographs and from the evidence" that the respondent, her family and friends had not used all of Parcels X and Z. Even if the trial judge had

erred in admitting the photographs, and I am not deciding that he did so, his decision was based on the totality of the evidence and not the photographs.

[17] I will now consider the appellant's argument on the first ground of appeal which alleged that the trial judge acted on a wrong principle or misapprehended the evidence in making his determination.

[18] The standard of review as set out by McLachlin, J. in *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital***,** [1994] 1 S.C.R. 114 at p. 121:

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

[19] Where it is alleged that a trial judge erred in fact, a court of appeal is not to interfere unless there is a palpable and overriding error. An error is palpable if it is one that is plainly seen or clear. However, an error will not be considered to be an overriding one unless, in the context of the case as a whole, it is sufficiently serious as to be determinative in the assessment of the balance of probabilities with respect to that factual issue. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at ¶ 1 to 5 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at ¶ 78 and 80.

[20] If it is alleged that the trial judge failed to consider relevant evidence, the appellate court will be justified in reconsidering the evidence if, but only if, the omission is material. An omission to consider evidence is only material if it gives rise to a reasoned belief that it is one which affected the judge's conclusions. See *Delgamuukw*, supra at ¶90 and *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 at ¶ 15.

[21] Where the alleged error is one of mixed law and fact, such as in the application of a legal standard to the evidence, the standard of review depends on the circumstances. If it is shown that the judge reached his or her conclusion on the basis of the application of an incorrect legal principle or through the mis-

characterization of a legal standard, then the standard of review is correctness. See *Housen*, supra, at ¶ 26 to 27 and 33.

[22] If the court of appeal, applying the correct standard of review, finds reviewable error on the part of the trial judge, it must then address the question of what relief to grant to the appellant. The court may allow the appeal and direct a new trial, allow the appeal and give the judgment which might have been made by the trial court or, in exceptional cases, dismiss the appeal if it is clear that the appellant would inevitably fail even if the error or errors had not been made. See *Civil Procedure Rule* 62.23 and *Moore v. Economical Mutual Insurance Co.* (1999), 177 N.S.R. (2^{d}) 269 at ¶ 41 to 43.

[23] The appellant does not submit that the law cited by the trial judge in the decision was incorrect or incomplete. His argument involves a detailed review of the evidence as to the type, extent and location of activities carried out on Parcels X and Z, their commencement and duration, and any consent by either the parties' mother or by the respondent. In his factum, the appellant continues:

> In reviewing the evidence as a whole, it is difficult to distinguish the use of Parcel X and Z as determined from the Learned Trial Judge from the use and occupation of the other portions of Parcel X and Z as claimed by the Respondent. In fact, there is more evidence of use on other areas of Parcel X and Z on the Leopold Plan. With the greatest respect, viewed in this light, the decision appears to be arbitrary.

He also argues that the evidence was not the very cogent evidence of visible, exclusive and continuous possession for the required statutory period required to dispossess legal owners where the land is such that the legal owner would not make a great use of it and that there had been no evidence of improvement of those parcels to support the underlying rationale of the doctrine of possessory title as set out in *Lynch*, supra.

[24] With respect, I am of the view that the trial judge erred in principle, misapprehended the evidence, and drew erroneous conclusions from the evidence. He clearly misapprehended the evidence relating to the acts of possession relied upon by the respondent at trial and these misapprehensions, taken together, are overriding and determinative of his assessment of the balance of probabilities on

this issue. In addition, the trial judge erred in his application of the legal principles to the facts in ways which demonstrate errors of law. He erroneously concluded, for example, that acts of possession which did not occur on the claimed lands, or acts committed on them prior to the respondent's ownership, or acts of parking by third parties without evidence that they were done under the direction of the respondent could, in law, constitute acts of adverse possession in the circumstances of this case. In my view, these errors require that the trial judge's decision be set aside.

[25] I begin by observing that deciding the respondent's claim founded on adverse possession was not a matter dependant to the extent identified by the trial judge on determining the credibility of various witnesses. In his decision, he devoted two lengthy paragraphs as to the factors on which an assessment of credibility is to be made. However, it is clear in reviewing the record that the evidence of the witnesses who testified on behalf of the respondent claimant and the appellant did not present evidence that was directly contradictory on major points. Rather, as the appellant submits, the question was whether the respondent had presented sufficient, detailed evidence to support her claim of adverse possession. In this regard, I would note that there is no finding by the trial judge that the appellant is not credible. While he rejected certain of the appellant's evidence, he made no comment as to other significant aspects such as the appellant's evidence that he sold the trailer to the respondent's husband and placed it on Parcel Z 12 to 14 years ago.

[26] As the trial judge correctly stated, for the respondent's claim to succeed she had to establish open, notorious, continuous and exclusive possession of the lands claimed for the requisite period. Here that statutory period was the 20 years preceding March 2000 when the appellant's rock wall blocked any future use of his lands to the east of the respondent's Lot A-Y.

[27] His quotation from *Lynch*, supra, demonstrates that the trial judge was aware that the acts of ownership by the respondent could not be incidental nor occasional. A legal owner, such as the appellant who acquired title to lands including Parcels X and Z by deed, is not to be deprived of his property lightly. The passage the trial judge quoted from *Lynch*, supra, includes the following:

> The legal concept which allows a person to acquire possessory title good against the holder of the legal title is based on the premise that a legal owner cannot stand

> aside and allow a trespasser or co-tenant to make improvements to the property and pay the taxes over many years and then come in and claim it, even though he could see the other was in possession. **As a safeguard to the legal owner, the Courts have insisted that the possession be of the quality described before the legal owner's title is extinguished; otherwise there could be great injustices if by doing sporadic, unobservable acts on the land a person could acquire possessory title.** Hence the care which should be taken by a Court before a finding is made that the title of the legal owner to woodland in particular, is extinguished as the acts relied upon are very often sporadic in nature and unobserved by the true owner yet can qualify as being acts that are consistent with the limited use a person who owns land of that nature would make of such land.
>
> **As claims for possessory title extinguish the title of the legal owner pursuant to a limitations Act, the Court should only act on very cogent evidence that proves that the person's possession has been visible, exclusive and continuous possession for the required statutory period.** Legal owners should not be dispossessed where land is such that the legal owner would not make a great deal of use of the land, such as wood land, particularly if the claim is made not by a trespasser but by one co-tenant or more against others. Section 12 of the Limitation of Actions Act provides that no person shall be deemed to have been in possession of any land within the meaning of the Act merely by reason of having made an entry thereon. Where the acts of possession relied upon with respect to wood land are the occasional unobserved cutting of logs and firewood from the property, such acts do not improve the property even though they evidence the intention of one co-tenant to possess it exclusively. **It cannot be too strongly emphasized that evidence of possession to extinguish title must be of a quality that has been required by the Courts for hundreds of years. Each case turns on its own facts.** [Emphasis added]

[28] In ¶ 30 of his decision, the trial judge referred to the use of the trailer, testimony by witnesses that they played “in the area as claimed” and that grass was cut out there. In ¶ 31 he also mentioned uses of the land for parking, picnicking and gardening. While the trial judge referred to the evidence of some witnesses, his decision does not include any detailed analysis of the testimony he heard as to the uses made of the disputed lands, the location of such uses, or when such activities took place and for how long.

[29] When the trial judge did recount the evidence, it is apparent that he misapprehended various aspects. For example, he stated that Maureen Cyr whom he described as “very believable” had testified that as a child she had played “on the lands in question,” namely Parcels X and Z. The record shows that she only

testified to playing in “the yard” without any reference to those parcels, leaving open the possibility that her play area was close to the respondent’s house and within the boundaries of the property deeded to the respondent. In addition, the trial judge stated that Ms. Cyr had testified that she saw the grass being cut on both parcels for years. She did not do so but only stated that the respondent kept a grassy area on Parcel X. He noted Ms. Cyr’s testimony about digging up worms to go fishing. However, if as she testified she was born in 1951 and dug worms and went fishing in the Little East River when she was 11 to 13, this use would have been between 1962 and 1964 when the lands in dispute still belonged to the respondent’s mother. As a result, her actions could not be adverse to the interests of the appellant.

[30] The trial judge significantly misapprehended the evidence pertaining to the trailer. Maureen Cyr testified that the respondent had kept a little travel trailer on Parcel Z for more than ten years. Two others of the witnesses for the respondent, Edgar Fralick and Marjorie Burchell, could not say how long the respondent had kept a trailer. The respondent’s son, Patrick Probert, testified that his mother would often go to sit in the trailer, that he and his brother had parties there, and that it was moved to another location in the early 1980's.

[31] In her discovery evidence, which was entered by consent, the respondent herself testified that her husband bought the trailer from her brother, the appellant. The transcript of her discovery examination reads in part:

> MR. GOSINE Do you know where the trailer came from?
>
> A. Yes, it came from my brother. My husband bought it. I was working and I didn’t know nothing about it.
>
> Q. How much did your husband pay for it?
>
> A. I do not know. I just heard he said he had [inaudible] for 200 - - $2,000 I think it was.
>
> Q. Do you remember when he bought it?
>
> A. No, I do not know. I was working.
>
> Q. Do you remember approximately when, how many years ago?

A. 20 years ago, I guess.

Q. When you had your lot surveyed by Mr. Bates - -

A. Right.

Q. - - do you remember the dimensions of your lot?

A. Beg your pardon?

Q. Do you remember how big it was, the dimensions in feet?

A. It was 60 by a hundred.

In ¶ 32 of his decision, the trial judge stated: "I further accept and find the trailer was placed on parcel "Z" when Mrs. Fralick had the land surveyed by Mr. Bates and that was in 1962." (Emphasis added) It appears he came to this conclusion from Mrs. Fralick's response of "Right" in the course of the question regarding the dimensions of her lot as surveyed by Mr. Bates. His finding that the trailer was situate on Parcel Z in 1962 is incorrect. Her interjection did not relate to the acquisition of the trailer at all but was an acknowledgement of the fact of the survey.

[32] As demonstrated, the trial judge's finding that the trailer was on Parcel Z in 1962 was directly contradictory to the testimony of the respondent herself. It was unsupported by any other evidence. Moreover, whether as the respondent testified the trailer may have been purchased 20 years before her 2002 discovery examination or, as the appellant testified 12 to 14 years before the trial that year, whatever use was made of the lands in dispute in relation to the trailer would not have been continuous through the 20 year period before March 2000 required to prove adverse possession.

[33] As will be seen later in this decision, the evidence regarding the trailer was important for establishing the appellant's claim.

[34] There was no evidence that the respondent made any substantial or permanent improvements to the lands in dispute. As the trial judge indicated, the

evidence related to playing, grass cutting, gardening and picnicking. Patrick Probert, the respondent's son, testified to skipping and throwing rocks on Parcels X and Z when he was a child, that there was a worm bed near the garden, and that he and his mother cut the grass on both parcels. Other witnesses testified that the respondent kept a grassy area and cut the grass on Parcel X. Alan McNeil, the respondent's nephew, testified that he helped cut the grass on both parcels beginning in 1977 or 1980 until six or seven years before the trial.

[35] Witnesses also testified that the respondent planted flowers and kept a garden on Parcels X and Z, although only some indicated where. The respondent herself testified that she had planted lilac bushes and flowers near the river but did not say when or how long. Although she apparently marked a hand drawn diagram during her testimony, that diagram was not introduced into evidence so it is impossible to tell where she had planted on either Parcels X or Z.

[36] There was also evidence of a picnic table and picnics on the lands claimed, although witnesses differed as to the location of the picnic table. The respondent testified that she had bought a picnic table between ten and 20 years and a screen tent between 15 and 20 years before 2002, but did not indicate where they were located on Parcels X or Z. The appellant testified that the picnic table and tents were placed on Parcel Z within the past 15 years and that the parties and picnics only took place after he had placed the trailer on Parcel Z. Even if the respondent's own evidence as to the picnic table is accepted, it is doubtful whether the picnicking and other uses made of the lands in relation to the picnic table was continuous for the requisite 20 year period.

[37] Much of the evidence at trial related to the use of Parcel Z for parking and the trailer. I will deal first with that concerning parking. The respondent herself did not testify as to the use of any portion of Parcels X or Z for parking. However, other witnesses gave evidence that she parked her vehicle right next to her house. As the Leopold plan shows more than sufficient space for one car between the house and the eastern boundary of the land deeded to the respondent, it can reasonably be inferred that she parked within Lot A-Y.

[38] Maureen Cyr testified that the respondent's driveway used to be wider and that she parked beside the respondent's car beginning some 35 years ago. Patrick Probert also described a large driveway which he shovelled although he did not say when he did so. Marjorie Burchell testified that when she visited the respondent a

few times, she parked on Parcel Z. Edgar Fralick's evidence was that since 1975 he went regularly to the respondent's house to get drinking water from an outside tap and to visit. He indicated that he parked on Parcel Z. Alan McNeil who worked for the school board testified that from 1977 to 2000 he used to take the school bus and park on Parcel Z whenever he stopped for coffee or tea with his aunt. He never saw anyone else park on that parcel.

[39] None of the witnesses testified that the respondent directed or allowed him or her to park on Parcel Z. The respondent did not testify that she told anyone to do so or that he or she could do so. In these circumstances, the parking by those witnesses does not constitute acts which support her claim to ownership of the disputed property.

[40] In his decision, the trial judge stated that the law of adverse possession is best summarized in *Ezbeidy*, supra. At p. 665, MacQuarrie, J. stated:

> . . . where there is a contest between a person who claims by virtue of his title, as the defendant does here, and a person who claims by long adverse possession only, such as the plaintiff must rely on here, there is first of all a presumption that the true owner is in possession, that the seisin follows the title. This presumption is not rebutted or in any way affected by the fact that he is not occupying what is in dispute. In order to oust that presumption it is necessary to prove an actual adverse occupation first which is exclusive, continuous, open and notorious, and after that has been proved, the position is that the owner is disseised and the other person is in possession. **If that person who is in adverse possession continues openly, notoriously, continuously and exclusively to exercise the actual incidents of ownership of the property, that possession in time ripens into title.**
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> **Possession may be roughly defined as the actual exercise of rights incidental to ownership as such, that is, the person who claims to be in possession must exercise these rights with the intention of possessing.** Where a man acts toward land as an owner would act, he possesses it. The visible signs of possession must vary within the different circumstances and physical conditions of the property possessed. (Emphasis added)

[41] The fact that parking occurred is not of itself sufficient to constitute an act of possession. MacIntosh, J. in *Tobias et al. v. Nolan* (1986), 71 N.S.R. (2d) 92, considered the "sufficiency" of acts of possession at p. 113:

> As to what constitutes sufficient acts of possession, the Ontario Court of Appeal in Brown v. Phillips et al.(1953), 42 D.L.R. (2d) at p. 42 described the requirement as follows:
>
> > The right of action for the recovery of land accrues only when the conduct of the wrong-doer on the land in question is such that the owner thereof is prevented from enjoying that measure of physical possession of which land of the character of the land in question is capable. **In other words, the conduct of the wrong-doer must be such that the owner is excluded from his land**. Consequently, any degree of possession by the wrong-doer which does not prevent the owner from enjoying some use of the land (whether or not such conduct may be sufficient to create some easement in favour of the wrong-doer) will not, even if continued for the statutory period, extinguish the title of the real owner.
> >
> > **Possession may be roughly defined as the actual exercise of rights incidental to ownership as such, that is, the person who claims to be in possession must exercise these rights with the intention of possessing.** Where a man acts toward land as an owner would act, he possesses it. The visible signs of possession must vary within the different circumstances and physical conditions of the property possessed. (Emphasis added)

[42] Here there was no evidence that the respondent conducted herself to exclude the appellant, the legal owner by deed, by herself parking on his property or by directing or permitting anyone else to park on the portion of the driveway that extended onto his property. The only evidence was that people parked there. The trial judge made no finding other than "the acts of the plaintiff and others such as using the lands for parking . . . were acts of possession." I need not determine whether the parking could be seen to be acts of possession by the witnesses. It is sufficient that parking by third parties does not constitute an act of possession by the respondent. Consequently the evidence of parking in the circumstances of this case could not support her claim for adverse possession and by taking it into account, the trial judge erred.

[43] Earlier in this decision I referred to the evidence regarding the location and use by the respondent of a little travel trailer on Parcel Z. Witnesses placed it at

various locations within Parcel Z. However the evidence does not firmly establish that it was used for the requisite 20 year period and, as shown earlier, the trial judge misapprehended the evidence and drew an erroneous conclusion when he found that the trailer had been placed on Parcel Z in 1962.

[44] Finally, a review of the evidence and his decision does not disclose any basis for the trial judge's partitioning of Parcels X and Z. For example, the witnesses showed the location of the picnic table, garden, trailer and parking throughout the entire width of Parcel Z. The trial judge referred to their markings in his ¶ 30 when he noted that the locations for the same item varied. However, by dividing the two parcels as he did, the trial judge effectively excluded much of the evidence of witnesses on whom he said he relied and did so without providing any reasons.

[45] Although the trial judge did not refer to the deck of the respondent's house in his decision, I considered whether the narrow, triangular piece of Parcel X he allowed might relate to it. According to the Leopold plan a corner of the deck extends onto Parcel X. However the evidence does not support his delineation of Parcel X. The respondent testified she did not know when it was built. Maureen Cyr gave evidence it was put on within the last ten years and Granville Leopold estimated the same period. Again, ten years is insufficient to establish adverse possession.

[46] When the evidence pertaining to parking, the trailer and the picnic table are excluded, the acts of possession by the respondent which remain relate to playing, the worm bed and grass cutting. In my view, having in mind the nature of this particular property, the totality of this evidence does not constitute the "very cogent evidence that proves that the person's possession has been visible, exclusive and continuous possession for the required statutory period" required according to *Lynch*, supra for a claim for possessory title to extinguish the title of a legal owner.

[47] Having found reviewable error, the question becomes what order the court should make in disposing of the appeal. This requires us to assess the nature of the errors in light of the record as a whole and to exercise our discretion under *Civil Procedure Rule* 62.23 to either direct a new trial or to dismiss the claim for adverse possession. In my view, we should take the latter course.

[48] I would allow the appeal. I would reverse and set aside the order and certificate of title dated April 14, 2003. The respondent shall repay the costs awarded at trial and shall pay costs of $2,000. inclusive of disbursements to the appellant.

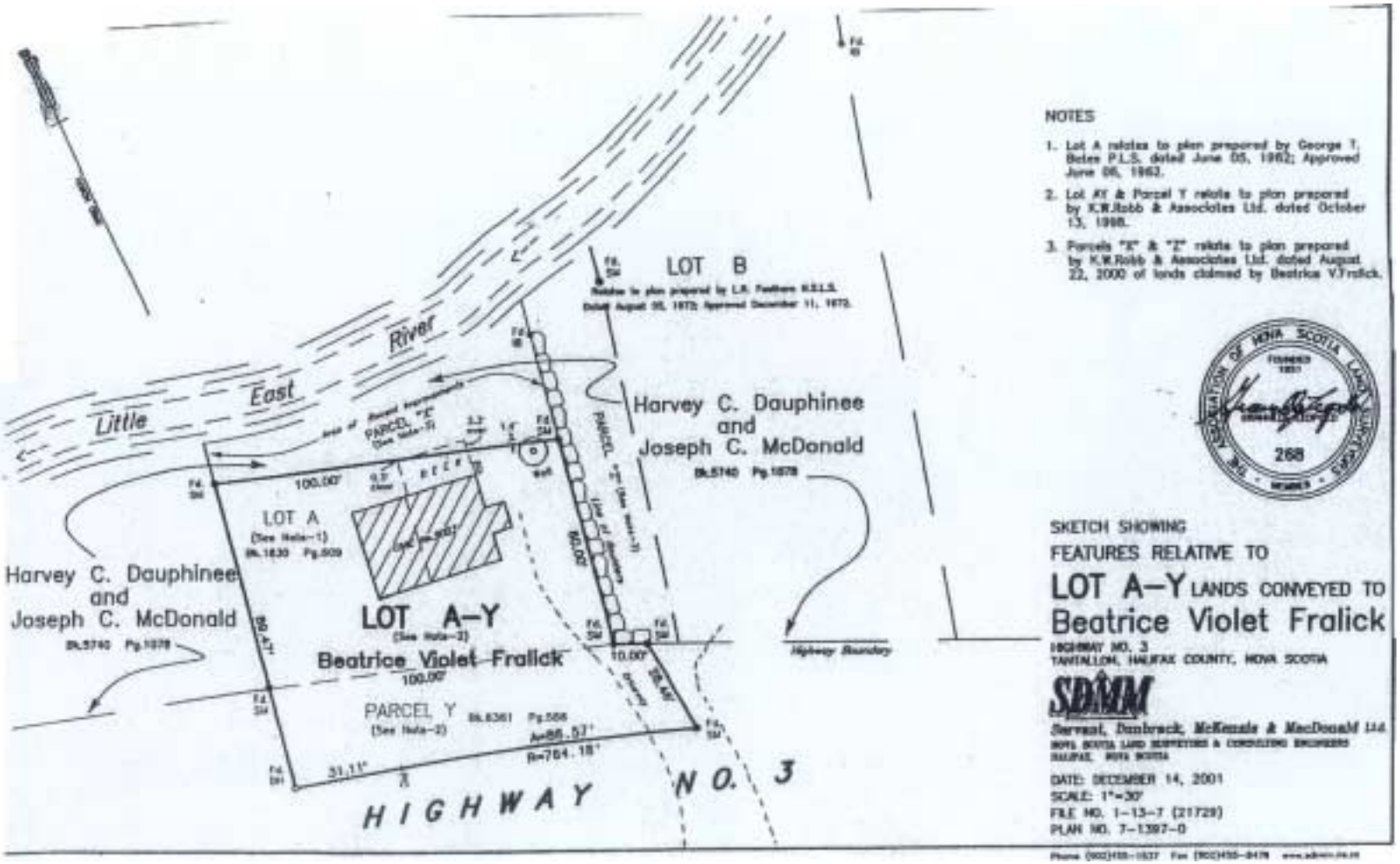
Oland, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.

SCHEDULE "A"



NOTES

1. Lot A relates to plan prepared by George T. Bates P.L.S. dated June 05, 1962; Approved June 06, 1962.
2. Lot AY & Parcel Y relate to plan prepared by K.W.Robb & Associates Ltd. dated October 13, 1998.
3. Parcels "X" & "Z" relate to plan prepared by K.W.Robb & Associates Ltd. dated August 22, 2000 of lands claimed by Beatrice V.Fralick.

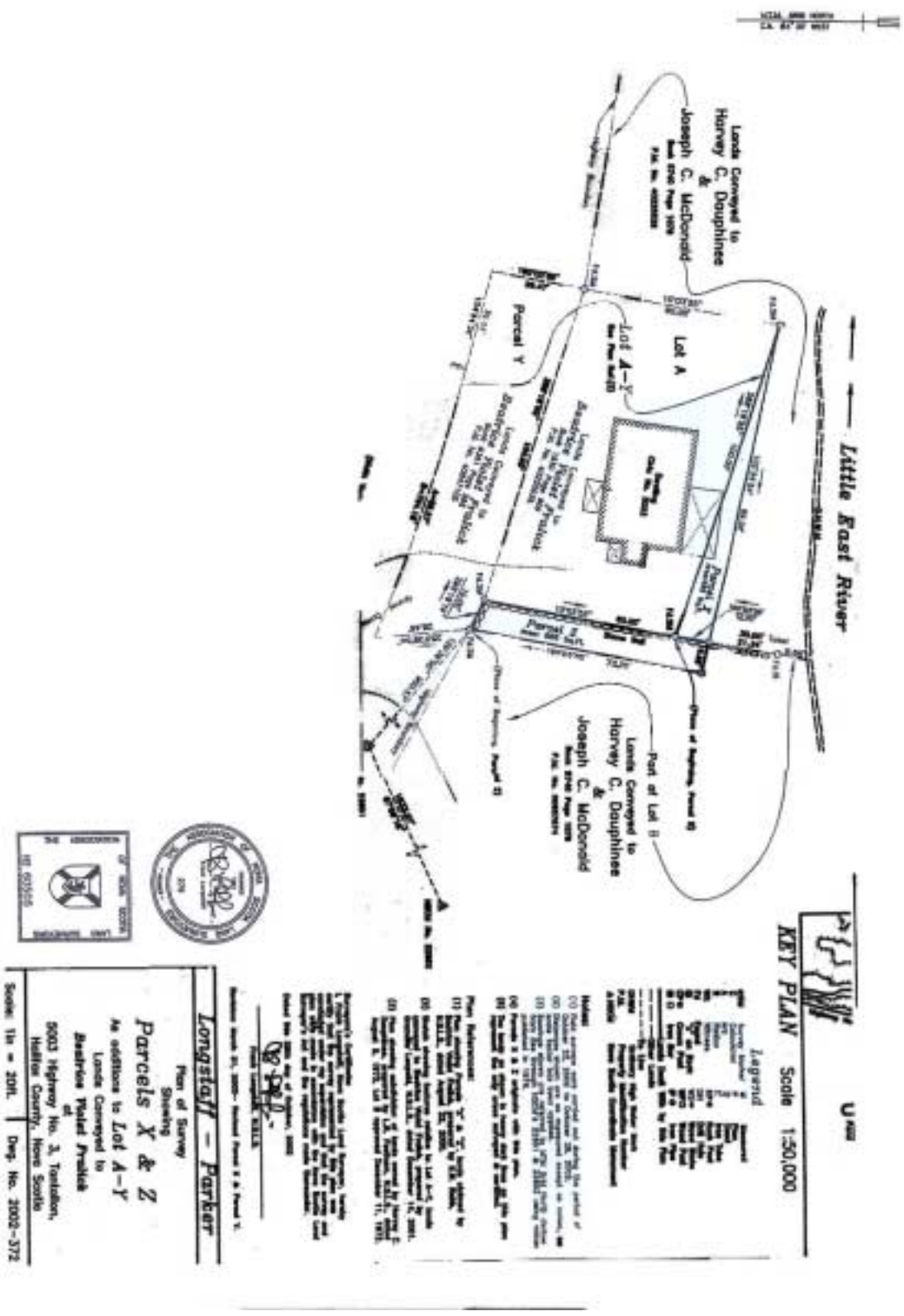
SKETCH SHOWING
FEATURES RELATIVE TO
LOT A-Y LANDS CONVEYED TO
Beatrice Violet Fralick
HIGHWAY NO. 3
TANTALLON, HALIFAX COUNTY, NOVA SCOTIA

SDMM
Servant, Denbrock, McKenzie & MacDonald Ltd.
NOVA SCOTIA LAND SURVEYORS & CONSULTING ENGINEERS
HALIFAX, NOVA SCOTIA

DATE: DECEMBER 14, 2001
SCALE: 1"=30'
FILE NO. 1-13-7 (21729)
PLAN NO. 7-1397-0

Phone (902)455-1837 Fax (902)455-8478 www.sdmm.ns.ca

SCHEDULE "B"


Little East River
Lands Conveyed to
Harvey C. Dauphinee
&
Joseph C. McDonald
Lot A
Lot A-Y
Parcel Y
Parcel Z
Beatrice Violet Prokick
Lands Conveyed to
Harvey C. Dauphinee
&
Joseph C. McDonald
Part of Lot B
KEY PLAN
Scale 1:50,000
Longstaff – Parker
Plan of Survey
Showing
Parcels X & Z
As additions to Lot A-Y
Lands Conveyed to
Beatrice Violet Prokick
at
9003 Highway No. 3, Tantallon,
Halifax County, Nova Scotia
Scale: 1in = 20ft.
Dwg. No. 2002-372