NOVA SCOTIA COURT OF APPEAL
Citation: ***Hatfield v. Mader***, 2012 NSCA 66

Date: 20120613
Docket: CA 333604
Registry: Halifax

Between:

Linda Hatfield

Appellant

v.

Darren Mader and Susan Mader

Respondents

Judge(s):	Oland, Beveridge and Farrar, JJ.A.
Appeal Heard:	December 5, 2011, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Oland, J.A.; Beveridge and Farrar, JJ.A., concurring.
Counsel:	Linda Hatfield, appellant in person (re fresh evidence) Cynthia M. Scott, for the appellant (on the merits) Vincent A. Gillis, Q.C., for the respondents

Reasons for judgment:

[1] This appeal concerns a property dispute between family members. The respondents, Darren and Susan Mader, sought a declaration that, through the possession and use by their predecessor in title, Darren's father George Edward Mader, certain land outside the boundaries of property deeded to him had been occupied adversely to the interests of the legal owner. Darren's aunt, the appellant, Linda Hatfield, is the legal owner of the disputed land.

[2] After a lengthy trial, Justice Cindy A. Bourgeois granted the Maders the declaration they sought and other relief which will be discussed later. Ms. Hatfield appeals. For the reasons which follow, I would grant her appeal.

Background

[3] The late Guy and Mary Mader had ten children, including Linda Hatfield and George Edward Mader ("Eddie"). Guy and Mary's homestead property on the Mira Road in Cape Breton Regional Municipality is a considerable size, encompassing some 30 acres. The property is a long and narrow rectangle that stretches from the Mira Road back into undeveloped woodland. Guy and Mary's house is near the road.

[4] In the 1960's, his parents allowed Eddie to place a small house on their property, behind their home. In 1970, Eddie built a bungalow behind Guy and Mary's home, in a slightly different location but still generally behind his parents' home. Mary deeded him the property on which the new home was constructed. The legal description in the deed dated April 30, 1970 reads:

> ALL and singular that certain piece, parcel or tract of land situate being and lying off the Eastern side of the Sydney - Louisbourg Highway, at Mira Road, in the County of Cape Breton, Province of Nova Scotia which may be more particularly bounded and described as follows: -
>
> BEGINNING at a point on the North Western boundary of lands conveyed by Guy R. Mader to Mary Ann Mader by deeds dated September 7th, 1962, and registered in the Registry of Deeds Office, Sydney, N.S. in Book 706 Page 737, said point being North Easterly a distance of three hundred and ten (310') feet from the point of intersection formed by the North Western boundary of lands of the aforesaid

Mary Ann Mader with the Eastern boundary of the aforesaid Sydney - Louisbourg Highway;

THENCE N 64˚ 00’ E, along the North Western boundary of lands of Mary Ann Mader, a distance of one hundred and fifty (150') feet to a point;

THENCE S 26˚ 00' E, a distance of one hundred and fifty-six (156') feet to a point on the North Western boundary of a sixty-six (66') foot wide Proposed Street leading to the Sydney - Louisbourg Highway;

THENCE S 64˚ 00' W, along the North Western boundary of the aforesaid Proposed Street, a distance of one hundred and fifty (150') feet to a point;

THENCE N 26˚ 00' W, a distance of one hundred and fifty-six (156') feet to the point of beginning.

Together in common use with others having a similar right the use of the above mentioned sixty-six (66') foot wide Proposed Street which runs along the South Eastern boundary of the above described lot in a South Westerly direction to the Eastern side of the Sydney - Louisbourg Highway.

[5] Thus the property deeded to Eddie measures 150 feet by 156 feet, and is almost square in shape. It has an area of 23,400 square feet. Since an acre comprises 43,560 square feet, the property is considerably less than an acre. The deed gave Eddie and his successors in title the use of a 66 foot strip which ran from the road past his parents’ home to Eddie’s property. The importance of the size of his property and the grant of the right of way by deed will become apparent later in this decision.

[6] Guy Mader passed away in the late 1970's. Mary continued to reside in their home. By a deed granted by Mary in 1988, Linda Hatfield became a joint tenant with her mother. Mary lived at the homestead until her death in 2006. Ms. Hatfield then became sole owner of the homestead property except, of course, the piece previously conveyed to Eddie.

[7] Eddie lived in his home at 1919 George Street, also known as the Mira Road, until his death in 2005. His property was then initially held by all his children. Eddie’s son, Darren Mader, and Darren’s wife Susan Mader

(collectively, “the Maders”) were deeded the property in November 2006. They moved there the following April.

[8] After becoming the owners of Eddie’s property, the Maders discovered that the 1970 deed to Eddie conveyed a much smaller piece of property than what they believed he owned and, in their view, had always occupied. The issues around the ownership of the portions which extend substantially beyond the deed boundaries led, most unfortunately, to a severe deterioration of the relationship between the Maders and their children, and Ms. Hatfield. There were numerous highly charged confrontations, frequent calls to the police, erection of fences, and accusations of harassment, trespass and property damage. The description of the situation by one of the parties as a “nightmare” is not an exaggeration.

[9] In the proceeding below, the Maders sought:

(a) a declaration of possession and usage of the claimed lands adverse to the interests of the legal title owner Ms. Hatfield, pursuant to the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258;
(b) a permanent injunction preventing Ms. Hatfield from entering upon the claimed land; and
(c) damages against her for alleged acts of trespass and for emotional distress.

[10] According to Ms. Hatfield, any use made by Eddie of the claimed lands was with the express agreement of their mother, Mary, and consequently was not adverse. She counterclaimed against the Maders, alleging trespass, intentional damage to her property and conduct intended to intimidate and harass her, and for removal of a septic system which services the Maders’ home.

[11] Over 14 days of trial, the judge heard testimony from the Maders, Ms. Hatfield, and a number of family members. These included children of Guy and Mary such as William Mader, Sr., Dorothy Trenholm, and Elaine Mader; children of Eddie Mader, such as Wesley Mader and Gregory Mader, his wife Jeanie Mader and his children Kristen Mader and Mitchell Mader; Darren’s nephew William Mader, Jr.; and Jane McMullin, spouse of Eddie’s son Jeff Mader. Neighbours Kevin Elworthy and Frank Gaudet, land surveyors Horace R. Lovell and Michael Astephen, friends, workers and other people in the area also gave evidence. In her decision, the trial judge summarized the testimony of witnesses.

[12] The exhibits entered by agreement included:

(a) aerial photographs depicting Guy and Mary's homestead property and the Maders' property in each of 1969, 1971, 1983 and 1993. Each was enlarged and overlaid with a Plan of Survey prepared by Kenneth C. Cormier, N.S.L.S. dated September 27, 2007;

(b) an Agreement to Resolve Matters Re: Criminal Charges dated November 24, 1988 (the "Criminal Charges Agreement");

(c) a 1989 Lease between Mary Ann Mader and Linda Hatfield as Lessors and Edward Wesley Mader as Lessor (the "Wesley Lease"); and

(d) three survey plans, namely:

(i) Plan Showing Certain Detail on Lands of Mary Ann Mader dated December 19, 1988 prepared by Horace R. Lovell, N.S.L.S. (the "Lovell Plan");

(ii) Plan of Survey Showing Certain Boundaries, Lands of, Mary A. Mader and Linda Hatfield dated June 15, 1992 prepared by Wayne D. Harvey, N.S.L.S., N.L.S., C.L.S.; and

(iii) Plan of Survey Showing Lands of George Edward Mader dated June 10, 2005 prepared by Michael J. Astephen, N.S.L.S. (the "Astephen Plan")

[13] In her decision, the judge set out the law of adverse possession. She observed that a credibility assessment was necessary since there was conflicting evidence on a number of facts central to the determination of this dispute. She stated at ¶ 106 that:

> After considering the totality of the testimony, the evidence presented on behalf of the Plaintiffs was far more credible and compelling than that of the Defendant.

[14] The judge found the evidence of neighbours Frank Gaudet and Kevin Elworthy "particularly credible". With regard to the evidence of Guy and Mary's children, she stated:

> [108] I also accept the evidence of William Mader Sr. and Dorothy Trenholm as outlined above. Given their ages, they were in a better position to be aware of activities and arrangements taking place on the Mader homestead, than younger siblings Linda or Elaine relating to what Eddie was given, or how the land was occupied in the early years. Specifically, I accept Mrs. Trenholm's evidence that she was present when her parents advised Eddie that they intended to convey to

> him “one acre”. The actual deed description, measuring 156 feet x 150 feet, is significantly less than an acre in size. [Emphasis added]

[15] After recounting how Ms. Hatfield and Elaine Mader’s testimony conflicted with that of others, the judge stated at ¶ 111:

> The Court, given the above, as well as various other inconsistencies, must view the balance of Ms. Hatfield's evidence with great caution.

She found the Maders to be “credible witnesses” regarding the exchanges with Ms. Hatfield, and stated at ¶ 113 that where their evidence regarding events and interactions conflicted with that of Ms. Hatfield, she preferred their testimony.

[16] The trial judge then proceeded to make factual findings regarding the use Eddie had made of the disputed lands, as well as regarding his home’s septic system which extends beyond his deeded boundaries, the three property surveys, Mary Mader and Ms. Hatfield’s payment of property taxes, the right of way, and Mary Mader and Ms. Hatfield’s actions on the disputed lands:

> [114] Based upon the evidence, I find that from 1970 until his death in 2005, Eddie continuously expended significant effort in developing and maintaining not only the property described in his deed, but several areas beyond those boundaries. In particular, I find that Eddie with the assistance of his sons, built a lawn area in the front of his home. The aerial photographs clearly show that this area was not grassy, but rather rough terrain, particularly after the building of the home in 1970. This area was developed into a well maintained lawn, extending to a fence erected by his mother, which was later replaced by a row of shrubs. I find that Eddie mowed up to this line, which was recognized by him, his mother and Ms. Hatfield as the boundary between their respective properties, notwithstanding the metes and bounds description in his deed. I accept that Linda Hatfield has in the past, acknowledged the fence/shrub line to be the boundary, and maintained this view until after Eddie's death in 2005.
>
> [115] I further find that Eddie, commencing in 1970, consistently utilized the land behind his home. This included reclaiming a portion of the swamp by placing fill, and effectively expanding the area of lawn. Eddie after developing the lawn out of what was previously a hayfield, kept it mowed and maintained to the edge of the swampy area. On occasion he utilized this rear lawn for a garden, and when finished in this location, the open ground would be re-seeded, and reclaimed as lawn. He continued this usage, uninterrupted, until his death. I reject the evidence of Linda Hatfield that she mowed in this rear area, stored

wood there, or utilized it in any fashion consistent with exercising ownership during Eddie's lifetime.

[116] The septic system servicing Eddie's home ran, in part, across this rear lawn area. I find that there was no plan on Eddie's part to ever relocate the system entirely within the confines of his deeded lot. In fact, I find it more probable than not, based on the evidence before me, that Eddie was unaware of the discrepancy between what was described in his deed, and what he occupied. Given the nature of the weeping tile and septic outflow pipe, I find that the ongoing and uninterrupted placement of this infrastructure, effectively prevented the use of the rear lawn for any other type of usage.

[117] I have considered the three surveys entered into evidence which took place during Eddie's lifetime. I am not satisfied that these would have made the discrepancy in the deed description and what was being occupied obvious to an individual untrained in matters of property measurement and description. I further reject that the commission of these three surveys would constitute acts of possession or ownership by Mary Mader or the Defendant over the claimed lands. These surveys were for purposes other than addressing the bounds of Eddie's land.

[118] I have also considered that Linda Hatfield, and her mother before her, likely paid the property taxes on the areas in dispute. The Court is aware that in some instances, the payment of taxes may be a determinative factor in an adverse possession claim. In this instance, I find that it is not. Ms. Hatfield has been paying taxes on a parcel of land described as being approximately 30 acres in size. The size of the disputed areas are extremely small components to the taxed area. As is most readily seen in the photographic evidence, the areas in dispute are quite small, yet very important to the parties. I find there was no conscious determination by either Mary Mader or Linda Hatfield that they were paying taxes on these small areas as a sign of ownership. No evidence was presented to the Court whether such made a material difference to the size of their tax bill. In those circumstances, I cannot view the paying of property taxes on these areas by Ms. Hatfield or her mother as defeating Eddie's adverse possession.

[119] The Court heard evidence regarding the existence of a 66 foot right of way running from the Mira Road to the rear of the Mader homestead. The driveway leading to Eddie's home was purported to be within this right of way, although it was described as being only 15 to 20 feet in width. Other than the right of way being used as a reference relating to the boundary of Eddie's lot, the Court was provided with no further evidence as to the creation of the right of way. I find that Eddie had, since 1970, and likely since 1960, the unfettered and consistent use of a much narrower driveway from George Street, extending to his

> property, and further back into the undeveloped back area of the Mader homestead. This was despite his usage of the right of way not being specified in his deed. Eddie did not have exclusive use of the driveway however, it was used by Mary Mader, Linda Hatfield and others on a regular basis until access was limited in recent years by Ms. Hatfield. The same cannot be said however, about the area falling between Eddie's deeded boundary and the driveway. Eddie made use of that area in several respects, namely building a circular driveway, locating a shed, building and maintaining a grassy lawn, and erecting a clothesline pole. I find Eddie consistently occupied and maintained this area, commencing in 1970, and used it as part of his property, to the exclusion of others, and in particular his mother and Ms. Hatfield. I reject the assertion of the Defendant that Eddie was permitted to use this area with his mother's express permission. I find that he used it as he wished, and in a manner suggesting to all that observed his actions, that he owned it.
>
> [120] Given the family relationships involved, Mary Mader and Linda Hatfield would have had ample opportunity to traverse across the disputed areas, both to visit with Eddie, and for other purposes - such as going for a walk. I find however, that such conduct would not have been intended to be exerting their ownership over the property, nor serve to interrupt the adverse possession of Eddie Mader in any of the disputed areas. [Emphasis added]

[17] The judge concluded that the Maders had successfully met the burden of proof required pursuant to the *Limitation of Actions Act*, and for a declaration that they are entitled to possess, as against Linda Hatfield, the land described in ¶ 121 of her decision. She also granted the Maders:

(a) a permanent injunction prohibiting Ms. Hatfield or others at her direction from entering upon those lands, except with the express permission of the Maders;
(b) an order that certain fences be removed by Ms. Hatfield within 60 days; and
(c) an order that Ms. Hatfield pay the Maders general damages of $2,500 for acts of trespass.

She ordered Darren Mader to pay his aunt general damages of $100 for a single act of trespass and property damage. The judge held that Ms. Hatfield had not met the standard of proof regarding other alleged acts of vandalism and damage on her property.

[18] The trial judge's decision on the merits is reported as 2010 NSSC 261. In a separate decision, the judge awarded costs of $28,000 plus disbursements against Ms. Hatfield. Ms. Hatfield appeals her order dated February 9, 2011. That order was stayed pending the determination of this appeal.

The Issues

[19] The appellant distilled the numerous grounds of appeal listed in her Notice of Appeal into three issues. She argued that the trial judge:

1. erred in law in failing to apply relevant principles of adverse possession as they relate to application to the *Limitation of Actions Act* to the evidence and facts as she found them;
2. erred in failing to identify or consider material facts and evidence in determining whether the respondents had established a claim of adverse possession; and
3. incorrectly applied the required standard of "very cogent" or "very persuasive" evidence in her findings of fact and credibility as they relate to the claim of adverse possession.

The Standard of Review

[20] In *McCormick v. MacDonald*, 2009 NSCA 12, Saunders, J.A. explained the standard of review applied by the court on an appeal from a decision of the trial court:

> [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] In *Spicer v. Bowater Mersey Paper Co.*, 2004 NSCA 39, Roscoe, J.A. for this Court reiterated at ¶ 7 the relevant standards of review in a case involving a claim of adverse possession as set out in *Dauphinee v. Fralick Estate,* 2003 NSCA 128:

[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. (2d) 269 at ¶ 41 to 43.

The Fresh Evidence Motion

[22] Ms. Hatfield was represented by counsel at the hearing of her appeal. However, she herself presented her motion for the admission of fresh evidence. She urged that the material submitted met the test in *Palmer v. The Queen,* [1980] 1 S.C.R. 759 at p. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[23] The material sought to be introduced at appeal included documents which, according to Ms. Hatfield, her trial lawyer possessed prior to trial but did not bring forward. It also included documents Ms. Hatfield discovered after the trial which pertained to the Maders' migration of their property pursuant to the *Land Registration Act*, S.N.S. 2001, c. 6 in December of 2006. That migration was done by a lawyer other than the Maders' lawyer at trial, and never brought to the attention of the trial judge.

[24] Ms. Hatfield was represented by counsel at trial. On her appeal, she cannot admit into evidence material that was clearly available at trial, but which her counsel chose not to introduce. Quite simply, such evidence does not satisfy the first criteria of the *Palmer* test.

[25] Nor can the material with respect to the migration of the Maders' property be accepted as fresh evidence. Had due diligence been exercised, it could have

been discovered prior to trial. In any event, even if admitted now, it would not be relevant to the disposition of the appeal.

[26] For these reasons, the motion to adduce fresh evidence is denied.

Analysis

[27] Ms. Hatfield made it clear that her appeal of the judge's decision does not turn on or depend on the findings of credibility. Rather, she urges that the judge erred by overlooking or misapprehending material evidence and by misapplying the law on adverse possession.

The 1988 Documents and the Lovell Plan

[28] I will begin with the appellant's arguments alleging that the judge failed to appreciate the evidence regarding events around 1988. According to the appellant, this evidence clearly demonstrates that the Maders could not show the necessary minimum 20 years of open, notorious and continuous possession of the disputed lands to establish adverse possession.

[29] The judge heard evidence of a dispute over an alleged gift of land by Mary Mader to her grandson, Wesley Mader. Eddie was Wesley's father. That dispute led to the Criminal Charges Agreement, the Lovell Plan and the Wesley Lease. According to the appellant, the judge's decision is "deafeningly silent" with respect to any analysis of material events in and around 1988. She says that that evidence negates several of the judge's key findings of fact and shows errors in her assessment of relevant evidence and her understanding or application of important principles of law. According to the appellant, it is conclusive in disposing of the Maders' claim of adverse possession. With respect, I am unable to agree.

[30] Before examining the evidence, I observe that none of the parties takes issue with the judge's statement of the law of adverse possession and the operation of the *Limitation of Actions Act* as set out in ¶ 96 to ¶ 104 of her decision. The judge cited Nova Scotia case law which approved the test set out in Anne Warner La Forest, *Anger and Honsberger: The Law of Real Property*, loose-leaf, 3rd Edition (Canadian Law Book: Toronto, Ontario, 2011) at pages 29-21 and 29-22:

> The possession that is necessary to extinguish the title of the true owner must be "actual, constant, open, visible and notorious occupation" or "open, visible and continuous possession, known or which might have been known" to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is "equivocal, occasional or for a special or temporary purpose".

and stated that the requisite duration of possession is a continuous 20 years. She also considered the law regarding the sufficiency of possession which I will address later in my decision.

[31] I turn then to the circumstances which gave rise to the dispute about land towards the back of the homestead property, and the written agreements and survey plan which the appellant urges clearly broke the continuity of any 20 year period of possession by Eddie and the Maders who claim through him.

[32] Wesley testified that in 1984 he started a business repairing heavy machinery in the back portion of his grandmother's property, beyond Eddie's house. One day, Mary Mader saw him outside working on equipment and he was told to see her. His evidence continued:

> I went up to her house and she said, 'I see you working on equipment. If your grandfather was around he would want you to have a shop,' so she give me an acre of land, which was on the north - north - northern side of the - the swamp. ... And I - I built a shop on it in, like I said, '85 or '86.

[33] Mary never conveyed any land beyond Eddie's home to Wesley. Nor was title quieted, nor was an application to quiet titles ever made. Part of Wesley's explanation as to why there was no conveyance is:

> It was my grandmother. You didn't think you had to at the time. I was busy with the business and, you know what, it's your family so you just say, you know what, it's mine.

[34] According to Wesley, the dispute over his alleged ownership of that land started after Linda Hatfield's return from Ontario. According to Ms. Hatfield, her mother was concerned about the noise, speed and dust from all the traffic going by her door to Wesley's garage. Wesley testified that his father Eddie defended his interests, and Eddie's partner, Raylene MacDonald, likely got involved in the

arguing. In any event, the dispute about Wesley's use and the noise and dust it was causing got out of hand, and criminal charges were laid. This led to the Criminal Charges Agreement and the Lovell Plan.

[35] The Criminal Charges Agreement dated November 24, 1988 reads in part:

> RE: CRIMINAL CHARGES HATFIELD AND MADERS
>
> AGREEMENT TO RESOLVE MATTERS
>
> As a result of an ongoing land dispute between Linda Hatfield and Mary Mader and Wesley Mader and Edward Mader and Raylene MacDonald, there has been Criminal Charges laid by private prosecution and by R.C.M.P.
>
> That to avoid this the Parties agree to voluntarily enter into Peace Bonds and to drop all assault charges on the condition that:
>
> ...
>
> 2. All parties are permitted to use the 66 foot right-of-way to the lands presently owned or used.
>
> 3. That Wesley Mader not be interferred with his present use of the back property although the ownership to the said land is presently in dispute. That Linda Hatfield, Steve Hatfield and Mary Mader will not harass, annoy, or interfere physically with this use.
>
> 4. That this agreement does not restrict or limit any other legal or civil remedy with respect to this land and shall not constitute a waiver or any right they have had or may acquire.
>
> ...
>
> That this Agreement is privileged and shall not be used as evidence in any subsequent legal proceedings dealing with title to such lands.

[36] Under the heading "CONSENTED AS TO FORM AND CONTENT" at its bottom, each of Ms. Hatfield, Mary Mader, Wesley, Eddie and Raylene MacDonald signed the Criminal Charges Agreement.

[37] According to Linda Hatfield, the dispute surrounding Wesley's use of the back portion of the Mader homestead led to a discussion with Eddie about his septic field and claims by Eddie and Wesley to the lands behind Eddie's property line. She testified that she called in Horace Lovell to "reaffirm the boundaries between the back of my brother's house and down to Wesley's garage". She wanted markings to show

> . . . where the boundary lines were, the points of Eddie's property and his markings of the area that we could because of that time I didn't have a plan showing exactly where Eddie's lands were situated. I knew where the boundaries were, but I wanted it marked out in an area.

[38] Ms. Hatfield testified that she gave Mr. Lovell instructions "to reassert our boundary lines." She acknowledged, however, that the surveyor did not put any survey markers in the ground. Her evidence was that when the Lovell Plan was completed, she gave a copy to her brother Eddie.

[39] The Lovell Plan dated December 19, 1988 depicts a portion of the Mader homestead property, stretching from the Mira Road to beyond Wesley's garage. Eddie's property as shown accords with his deed description; that is, it measures 156 feet by 150 feet. Mary's home, a shed and a line of trees on her property, and Eddie's home on his property, are shown as outlines. The 66 foot right of way which extends from the eastern boundary of Eddie's property to the eastern boundary of the homestead property is identified. Sheds are outlined on the right of way. Beyond Eddie's property, there are drawings of a few grasses, perhaps to denote the swamp and, beyond them, the outline of a garage measuring 40 feet by 24 feet.

[40] Horace Lovell testified that he was asked "to locate certain features, certain items" and as examples referred to "power lines and such" and "other things, corrugated iron pipes, that sort of thing". He was also asked to note the garage and the right of way as features of interest. As to the context in which he was asked to do the work, the surveyor recollected that he was to provide some "facts as to what was on her property and what was not on her property" and that apparently there "was an issue ... with the property further back", there was "friction." To do the survey plan, he referred to deeds and two other survey plans. According to Mr. Lovell, "the scope of my survey was not actually to do the boundaries of her property".

[41] The dispute over lands allegedly given by Mary to Wesley also resulted in the Wesley Lease. Mary Mader and Linda Hatfield leased the premises at Mira Road described in its attached Schedule "A" to Wesley Mader for a certain term for the purposes of Mader's Construction. The Wesley Lease gave Wesley the right to use the driveway leading to that business and, among other things, provided for the purchase of the building by the lessors if Wesley decided not to remove it from the property when the lease terminated.

[42] The appellant argues that the Criminal Charges Agreement, the Lovell Plan, the Wesley Lease and the testimony before the judge about the events in 1998 and 1999 surrounding them amount to conclusive evidence that the Maders cannot establish 20 years of continuous adverse possession from 1970, when Mary deeded property to Eddie. She adds that the hiring of a surveyor to walk the lands to conduct a survey amounted to an unambiguous exercise of ownership by Mary Mader and Linda Hatfield. The appellant also points out that the judge made no finding that Ms. Hatfield's evidence that Eddie received the Lovell Plan with his property clearly depicted in accordance with this deed description was incorrect or not credible, and argues that the judge erred when she found in ¶ 116 of her decision that it was more probable than not that Eddie was unaware of the discrepancy between his deed description and what he occupied.

[43] I have carefully considered the evidence, including the two written documents, the Lovell Plan and the testimony of witnesses at trial, concerning the dispute over the alleged gift of land to Wesley. With respect, that evidence is not sufficient to refute Eddie's uninterrupted possession for a 20 year period.

[44] I begin by observing that the interpretation of both the Criminal Charges Agreement and the Wesley Lease is complicated by the Schedule "A" attached to those documents. Those Schedules "A" are identical. They are the same as the Schedule "A" in the 1988 Warranty Deed from Mary Mader to Mary Mader and Linda Hatfield. That is, Schedule "A" appears to be the entire original Mader homestead property. It does not except out the 1970 grant to Eddie, which was completed long before the 1988 dispute and the signing of the Criminal Charges Agreement and the Wesley Lease.

[45] The Wesley Lease purports to lease to Wesley the lands in its Schedule "A". There was no evidence of any intention to lease him the entire homestead property for a term of years for $500 a year. Indeed, both Wesley and Linda Hatfield gave evidence to the contrary. In any event, Eddie was not a party to the Wesley Lease. As a result, that document cannot be relevant or helpful to any claim of possession through him.

[46] I turn then to the Criminal Charges Agreement which Eddie did sign. The same Schedule "A" is attached to it. However, nowhere does the Criminal Charges Agreement itself refer to any Schedule "A". The import of that legal description of the homestead property is unclear.

[47] The preamble to the Criminal Charges Agreement refers to an "ongoing land dispute" between Ms. Hatfield, Mary, Wesley, Eddie and Raylene MacDonald. According to its Clause 3, the disputed uses and land were not any claimed by Eddie, but rather pertained to the land at the back of the homestead property then used by Wesley:

> 3. That Wesley Mader not be interferred with his present use of the back property although the ownership to the said land is presently in dispute. That Linda Hatfield, Steve Hatfield and Mary Mader will not harass, annoy, or interfere physically with this use.

[48] If the Criminal Charges Agreement does not concern Eddie's property or any claim by Eddie to land outside the property deeded to him, why then was he a signatory? The answer might be found in the record and the document itself. According to Ms. Hatfield, when she and Mary were on the way towards the back of the homestead property to see Wesley about the traffic going by the door, Eddie hit his mother with his fist. Both Ms. Hatfield and Wesley testified that Eddie had actively participated in the arguments that gave rise to the Criminal Charges Agreement which is entitled "AGREEMENT TO RESOLVE MATTERS." Its preamble speaks of the parties agreeing to voluntarily enter into peace bonds and to drop assault charges. Eddie may have signed as one of the parties involved in the unpleasantness.

[49] Furthermore, Clause 2 speaks of "All parties" having the right to use the "66 foot right-of-way to the lands presently owned or used." The Criminal Charges Agreement did not state who owned or used the right of way. It simply permitted

all signatories to use the right of way. Mary Mader and Ms. Hatfield would thus be reassured of access to the back of the homestead property. As a signatory, Eddie would be reassured that access to his home, in accordance with the grant of that right of way in the deed to him, would not be challenged. Finally, Wesley would be reassured of access beyond his father's property to the garage and his construction business.

[50] So in my view, the Criminal Charges Agreement dealt with the dispute at issue in 1988, namely, what - if anything - did Wesley own. At that time, 20 years would not have passed since Mary deeded land to Eddie in 1970. It is also noteworthy that the document makes no mention of any claim by Eddie of ownership or use of lands beyond his deeded boundaries. As with the Wesley Lease, I do not consider the Criminal Charges Agreement as helpful or relevant in either supporting or refuting the Maders' claim of adverse possession to land outside their deeded boundaries through Eddie Mader.

[51] That brings me to the Lovell Plan. Does conducting a survey amount to evidence of possession and dominion by an owner sufficient to repel a claim of adverse possession?

[52] Conducting a survey has been considered evidence of an act of possession by someone claiming possession contrary to the interest of the person holding paper title. However, it is usually viewed as weak evidence of possession. See, for example, *Wood v. LeBlanc* (1904), 34 S.C.R. 627, where the claimants had at different times cut trees and carried on lumbering operations on parts of the land. Davies, J. held at p. 632 that "isolated and intermittent acts of possession relied on, such as surveys and lumbering in the winter months" did not amount to possession which would extinguish the true owner's title. In *United Parishes of St. George and St. Patrick v. Guy*, 2005 NSSC 356 at ¶ 32, Boudreau, J. considered and rejected the conduct of two surveys and the blazing of a line, apparently the only evidence of possession, as sufficient evidence of use or occupation to the disputed lands by a claimant.

[53] It is also significant that the Lovell Plan was not a boundary survey. The extent and quality of the work that went into it was largely limited to a review of deeds and other plans. Mr. Lovell had no first-hand knowledge of the boundaries, did not conduct any research, and did not measure or mark the boundaries in

surveying the land. As indicated by its title, “PLAN SHOWING CERTAIN DETAIL ON LANDS OF MARY ANN MADER”, the Lovell Plan simply illustrated what the parties were talking about at the time and what the surveyor could verify on the ground.

[54] The jurisprudence shows that generally the conduct of a survey, an intermittent act, can be considered as evidence of possession or dominion by a claimant, but it is not strong evidence. It would follow that a survey would also constitute evidence of possession and domination by the true owner. Again, generally it would not be accepted as strong evidence and less so where it did not establish boundaries. The hiring of Mr. Lovell to attend on the land and prepare the Lovell Plan would not, of itself, amount to determinative evidence of an unambiguous exercise of ownership over the disputed lands by Ms. Hatfield.

[55] Ms. Hatfield testified that she gave Eddie a copy of the Lovell Plan, which depicted his property in accordance with his deed description. She argues that, from looking at that survey, Eddie would have appreciated the extent of his deeded property, there was no evidence that he was unable to do so, and the judge erred in stating at ¶ 117 of her decision that she was not satisfied that the Lovell Plan and two other surveys undertaken during Eddie’s lifetime, would have made the discrepancy between the deed description and what was being occupied “obvious to an individual untrained in matters of property measurement and description.” However, even assuming that Eddie received the Lovell Plan, there was no evidence of any formal acknowledgement by him which would stop the running of time. The *Limitation of Actions Act* reads in part:

> **Acknowledgment of title**
>
> 17 Where any acknowledgment of the title of the person entitled to any land . . . has been given to him, or to his agent, in writing, signed by the person in possession . . . , then such possession, . . . shall be deemed, according to the meaning of this Act, to have been the possession . . . at the time of giving the same and the right of such last-mentioned person, or of any person claiming through him, to make an entry . . . , or bring an action to recover such land . . . , shall be deemed to have first accrued at, and not before, the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given. [Emphasis added]

[56] Neither of the written agreements that arose out of the 1988 dispute can be considered a valid acknowledgement by Eddie of his mother and Ms. Hatfield's title. Eddie did not sign the Wesley Lease. The Criminal Charges Agreement, which Eddie did sign, pertains to the use of the lands claimed by Wesley.

[57] The appellant argued forcefully that these documents and the Lovell Plan provide irrefutable and sufficient evidence that the 20 year period commencing with the deed to Eddie in 1970 had been interrupted. For the reasons set out above, I would reject her submission.

[58] I will come back to the Criminal Charges Agreement in my considerations regarding Eddie Mader's septic system.

The Uses Made of the Disputed Lands

[59] According to the appellant, the trial judge failed to identify other material facts and evidence. I need only address two arguments which are intertwined, namely whether the trial judge overlooked the actual family history and relationships between the parties as they related to ownership, and whether the judge erred in applying the criteria to establish adverse possession when considering the uses of the disputed lands which Eddie made.

[60] I begin by reiterating that the judge correctly cited the law on adverse possession in her decision. Her decision explained:

[96] The law of adverse possession is well settled. The often referred to test is described in LaForest, Anger and Honsberger *The Law of Real Property*, 3rd Edition (Canadian Law Book: Ontario, 2006) at pages 29-16 and 29-17:

> The possession that is necessary to extinguish the title of the true owner must be "actual, constant, open, visible and notorious occupation" or "open, visible and continuous possession, known or which might have been known" to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is "equivocal, occasional or for a special or temporary purpose".
>
> ...
>
> [103] Anger and Honsberger, *The Law of Real Property, supra*, describes factors which should be taken into consideration when determining the sufficiency of possession at page 29-19:
>
> > Whether there has been sufficient possession of the kind contemplated by the statute is largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute. Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonable be expected to follow with a due regard to their own interests, are factors to be taken into account in determining the sufficiency of possession.
>
> [104] In ***Ezbeidy v. Phalen*** (1957), 11 D.L.R. (2d) 660, this Court described the nature of required possession in the following oft-quoted passage:
>
> > [18] 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 with the different circumstances and physical conditions of the property possessed.

[61] In *Spicer*, this Court reviewed what must be proven to establish adverse possession against a true owner. Roscoe, J.A. referred, among other sources, to the

same passage from *Anger and Honsberger, The Law of Real Property,* that the trial judge here quoted in her ¶ 96. *Spicer* also referred to other authorities:

> [12] What must be proven in order for a squatter to establish adverse possession as against a true owner was clearly stated by MacQuarrie, J. in **Ezbeidy v. Phalen** (1958), 11 D.L.R. (2d) 660 (N.S.S.C.) at p. 665:
>
> > ... 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: *cf. Lord Advocate v. Lord Lovat* (1880), 5 App. Cas. 273.
>
> In *Des Barres v. Shey* (1873), 29 L.T. 592, Sir Montague Smith, delivering the judgment of the Judicial Committee, said, p. 595:
>
> > 'The result appears to be that possession is adverse for the purpose of limitation, when an actual possession is found to exist under circumstances which evince its incompatibility with a freehold in the claimant.'
>
> Cf. Halifax Power Co. v. Christie (1915), 23 D.L.R. 481, 48 N.S.R. 264.
>
> What the person in adverse possession gets is confined to what he openly, notoriously, continuously and exclusively possesses. Possession of a part is not possession of the whole as between an actual possessor and an actual 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 with the different circumstances and physical conditions of the property possessed.

...

[15] Whether the possession was exclusive of the true owner's possession was an issue dealt with by MacDonald, C.J.T.D. in **National Trust Co. v. Chriskim Holdings Inc.** [1990] P.E.I.J. No. 32(Q.L.), where he said:

> The term "exclusively" refers to the possession of the adverse claimant being exclusive to the true owner. The Supreme Court dealt with the term "exclusive" in *Ocean Harvesters Ltd. v. Quinlan Bros. Ltd.*, [1975] 1 S.C.R. 684, 5 Nfld. & P.E.I.R. 541, 44 D.L.R. (3d) 687. At p. 544, Dickson, J. stated:
>
> > *Exclusive* possession by the tenant is essential to the demise and the statute will not operate to bar the owner unless the owner is out of possession. In an early judgment of this Court, *Gray v. Richford* (1878), 2 S.C.R. 431, at 454, Strong, J., quoted Baron Parke in *Smith v. LLoyd*, (1854), 9 Ex. 562, to this effect:
> >
> > > There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute.
> >
> > and added, p. 455:
> >
> > > In short, the Statute has no application, except so long as the title and possession are separate, when the possession is in the rightful owner Statutes of Limitation are not required.
> >
> > The same thought had been expressed a few years earlier by Erle, C.J., in *Allen v. England* (1862), 3 F & F 49 at p. 52, in these words:
> >
> > > <u>But in my judgment every time Cox (the land owner) put his foot on the land it was so far in his possession, that the statute would begin to run from the time when he was last upon it</u>.

[16] In **Deadder v. North Kent Development** (1979), 34 N.S.R. (2d) 386, Morrison, J., as he then was, found that the plaintiffs had not established adverse

possession because among other things their possession was not exclusive. He said:

> 67. In the first place, I am unable to conclude that the possession of the lands was exclusive to the plaintiff inasmuch as the true owner and his successors were from 1951 until 1963 living on the land in question and indeed occupying their own home on the disputed lands. Certainly this would not constitute exclusive possession of the land as against the true owner. The land was in the actual occupation and possession of the true owner. Consequently, the acts of possession exercised by the plaintiff and her agents were not exclusive.
>
> ...
>
> [20] From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession. [Emphasis added by Roscoe, J.A.]

[62] What uses, according to the trial judge, did Eddie make of the disputed lands, that established adverse possession? These were:

a) the development and maintenance of a lawn in front of his home, in an area between ornamental shrubs and bushes planted not by Eddie, but by Ms. Hatfield, on the homestead property and his southern boundary according to his deed;
b) the reclamation of a portion of the swamp behind his home by placing fill, and the expansion and maintenance of the lawn which he also used for a garden on occasion. The septic system servicing his home ran across this rear lawn; and
c) the building of a circular driveway, the placement of a shed, the development and maintenance of a grassy lawn and the erection of a clothesline pole in an area between his deeded eastern boundary and a driveway 15 to 20 feet wide.

[63] I will first consider Eddie's activities described in (c). As explained earlier in my decision, the deed from his mother to Eddie expressly provided him with a right of way together in common use with others of a "sixty-six (66') foot wide Proposed Street." This same right of way was recognized in the Criminal Charges Agreement signed by, among others, Eddie, Mary Mader and Ms. Hatfield.

[64] The right of way appears on the Astephen Plan, a boundary survey Wesley Mader commissioned in 2005. Surveyor Michael Astephen testified at trial that he placed markers on the corners of Eddie's property.

[65] The Astephen Plan shows Eddie's property measuring 150 feet by 156 feet, in accordance with the 1970 deed from Mary Mader. The distance between the length of its eastern boundary and Frank Gaudet's western boundary is 66 feet. Within that distance are a driveway closer to the Gaudet boundary than Eddie's deeded eastern boundary and, projecting from that driveway to Eddie's house, a driveway loop. Most of that loop is within the 66 foot wide right of way.

[66] The Astephen Plan makes note of other surveys, including the Lovell Plan. Interestingly, it refers to a Plan by John S. Pope, N.S.L.S. dated September 9, 1968. This would have been prepared prior to the deed to Eddie. Dorothy Trenholm testified that around 1970, they needed to get a survey of the land Eddie owned for him to get a mortgage. However, the Plan prepared by Mr. Pope was not tendered at trial.

[67] Despite the clear reference to the grant of the 66 foot wide right of way in Eddie's deed, the trial judge stated and concluded:

> [119] The Court heard evidence regarding the existence of a 66 foot right of way running from the Mira Road to the rear of the Mader homestead. The driveway leading to Eddie's home was purported to be within this right of way, although it was described as being only 15 to 20 feet in width. Other than the right of way being used as a reference relating to the boundary of Eddie's lot, the Court was provided with no further evidence as to the creation of the right of way. I find that Eddie had, since 1970, and likely since 1960, the unfettered and consistent use of a much narrower driveway from George Street, extending to his property, and further back into the undeveloped back area of the Mader homestead. This was despite his usage of the right of way not being specified in his deed. Eddie did not have exclusive use of the driveway however, it was used by Mary Mader, Linda Hatfield and others on a regular basis until access was

> limited in recent years by Ms. Hatfield. The same cannot be said however, about the area falling between Eddie's deeded boundary and the driveway. Eddie made use of that area in several respects, namely building a circular driveway, locating a shed, building and maintaining a grassy lawn, and erecting a clothesline pole. I find Eddie consistently occupied and maintained this area, commencing in 1970, and used it as part of his property, to the exclusion of others, and in particular his mother and Ms. Hatfield. I reject the assertion of the Defendant that Eddie was permitted to use this area with his mother's express permission. I find that he used it as he wished, and in a manner suggesting to all that observed his actions, that he owned it. [Emphasis added]

[68] As the judge observed, the right of way was used in the deed description to establish his eastern boundary. However, there is no missing "evidence as to the creation of the right of way." The deed from Mary Mader to her son granted him a 66 foot right of way. That easement provided Eddie with access from the road over the homestead property to his house and, importantly, provided his parents with the only access to the extensive lands beyond Eddie's house.

[69] The judge failed to appreciate this clear and uncontradicted evidence. This failure affected her findings as to the significance of the uses Eddie made of the right of way. For example, Eddie developed a driveway loop to his house. However, driving, turning and parking vehicles are all consistent with uses of a 66 foot wide "Proposed Street." Nor does grassing part of the right of way prevent the use of the right of way by others. Later in my decision, I will address the shed Eddie placed on the right of way and his clothesline poles.

[70] At this point, I will incorporate another aspect of this case, namely, the family history and relationships between family members as they related to ownership. The judge's analysis refers to the existence and relevance of family relations very briefly and only at ¶ 120 of her decision:

> [120] Given the family relationships involved, Mary Mader and Linda Hatfield would have had ample opportunity to traverse across the disputed areas, both to visit with Eddie, and for other purposes - such as going for a walk. I find however, that such conduct would not have been intended to be exerting their ownership over the property, nor serve to interrupt the adverse possession of Eddie Mader in any of the disputed areas. [Emphasis added]

This mention of family relationships does not begin to capture the dynamics of the Mader family in relation to the homestead property and the uses made of it by them.

[71] After she was widowed in the late 1970's, Mary Mader continued to live at the homestead property until her passing in 2006. Linda Hatfield is the youngest of Guy and Mary's children. When the trial was heard, she was 53 years old. With the exception of late fall 1985, five to six months in 1995, and some five months in 1997, when she was out west, she has always lived at the homestead. For some six years ending in 1994, she and one of her sisters ran a bakery, Kountry Kitchen Katering, out of the basement of Mary's house. Ms. Hatfield did the housework, the yard work and cared for her mother.

[72] There was frequent contact between Mary Mader and Ms. Hatfield, and Eddie. Ms. Hatfield gave evidence that this was almost daily. Eddie's daughter-in-law, Jeanne Mader, testified that it was nothing to go visit him and Eddie would be at the homestead, and that Ms. Hatfield and Eddie saw and spoke with each other "many times a week".

[73] The judge indicated that the Court must view Ms. Hatfield's evidence "with great caution" in view of inconsistencies with the evidence of other witnesses. Since it is not clear exactly which aspects of her evidence attract this caution, I will quote from the transcript of the evidence given of William Mader, Dorothy Trenholm and Kevin Elworthy. In ¶ 108 of her decision, the judge accepted the evidence of William and Dorothy, the two eldest of Guy and Mary Mader's ten children. She also characterized the evidence of Mr. Elworthy as "particularly credible".

[74] In summarizing the testimony of William Mader and Dorothy Trenholm, the judge recounted what each of them understood to have been the extent of Eddie's land and the uses he made of it. She accepted Dorothy's evidence regarding the size of the land her parents intended to grant to her brother Eddie:

> [108] I also accept the evidence of William Mader Sr. and Dorothy Trenholm as outlined above. Given their ages, they were in a better position to be aware of activities and arrangements taking place on the Mader homestead, than younger siblings Linda or Elaine relating to what Eddie was given, or how the land was occupied in the early years. Specifically, I accept Mrs. Trenholm's evidence that

> she was present when her parents advised Eddie that they intended to convey to him "one acre". The actual deed description, measuring 156 feet x 150 feet, is significantly less than an acre in size. [Emphasis added]

[75] Dorothy testified that she was there when Guy and Mary were discussing giving land to Eddie and that it was "an acre of land". Ms. Trenholm described how Eddie mowed down to the shrub line beyond his deeded boundaries, "And all back of his house, the sides, everywhere. The whole thing's mowed", and "the whole acre was kept up."

[76] It is unclear why the judge believed it was necessary to state that she accepted Dorothy Trenholm's evidence that Eddie was to receive an acre of land and then that the deed conveyed much less. Whatever Guy and Mary may have said in considering a gift of land to Eddie, and whatever some of his siblings and others understood he owned because he maintained the extensive lawn, the fact remains that what his parents actually granted to Eddie was the parcel measuring 150 feet by 156 feet set out in the deed. The deed description is unmistakable. It is not one of the classic Nova Scotian descriptions which commences "Beginning at a rock on the high water mark ..." or "Beginning at a pine tree marked with an X ...". Rather, it is a metes and bounds description which stipulates distances and directions. If the judge's determination that Eddie acquired more than what he was conveyed was influenced by Dorothy's evidence that her parents intended to grant Eddie an acre, and the evidence of others as to what they thought he owned, she erred in principle.

[77] I return to the evidence as to family history and the uses and ownership of land. William Mader, the eldest of Guy and Mary's children, testified:

> A. Yeah. Dad bought that property in '47, I think, and they built a new house on it and Mom and Dad lived there the rest of their lives.
>
> Q. Right. And they would, you know, use that land – it was basically a farmland, but also your dad operated a construction business from there?
>
> A. Yeah, him and Eddie.
>
> Q. Right.
>
> A. Him and Eddie were into it, yeah.

Q. Okay. And so they and other members of the family would use the land in whatever way you could, I'm sure.

A. Yeah. There was never any questions.

Q. Right. And it was not just Eddie, but for you or other family members as well.

A. Yeah. Yeah. Oh, yeah. We could use it just as we wanted to. [Emphasis added]

[78] Family members used the homestead for commercial purposes. Guy and Eddie ran a construction business. Mary Mader allowed her grandson, Wesley, to construct a garage to run a business further back in her property. As I recounted earlier, Wesley explained that there was no conveyance because "it's your family." As well, two of Mary's children, one of whom was Ms. Hatfield, ran a bakery from the homestead for years.

[79] According to William Mader, his parents gave Eddie his property - there was no money exchanged as they were trying to help Eddie out. His evidence included the following:

Q. Sure. And your parents – Eddie wasn't the only one of your family that they tried to help over the years, I'm sure.

A. Oh, well, dad went crippled and he couldn't do much help, but - - -

Q. No.

A. - - - any time he could help, he would help.

Q. But you were all welcome on the land, were you not?

A. That's right. There was never any questions about going on the property.

Q. Right. And no difficulties getting permission from your mom or your dad if you wanted to be on the property at any time.

A. We never asked permission for nothing.

Q. ‘Cause you knew you were welcome.

A. We were welcome any time.
[Emphasis added]

[80] William Mader gave evidence that if he wasn’t using his backhoe, he would park it in the driveway which ran within the right of way for two or three days at a time. Other people parked there as well. He testified “Nobody ever said anything. Whatever we wanted to do, we did, and there was no questions.”

[81] William Mader also testified how family members cut wood on his parents’ property:

Q. And so you think that Darren and others, Eddie and others would have cut some wood on your mother and father’s land?

A. Yeah.

Q. Yeah. And other family members would do the same.

A. Yeah.

Q. Your Mom and dad wouldn’t object to that.

A. <u>They had no problems helping the family out</u>.
[Emphasis added]

The respondent Darren Mader confirmed under cross-examination that he got wood off his grandmother’s land, knowing it was her land, without asking Mary Mader for permission.

[82] In describing how the family used the homestead, William Mader also spoke of the pigs that he, Eddie and his brother-in-law owned for a while and kept in a shed:

Q. And your parents didn’t mind that you had the pig up there.

A. No, no. <u>Nobody said anything. Everything was do what you want to</u>.

Q. Do what you want. And that - - -

A. That's the way it was.
[Emphasis added]

[83] William Mader testified that for some 30 years, he plowed the snow from the driveway on the homestead property for his mother and Eddie. His evidence regarding Eddie mowing grass included:

Q. Yeah. You say your mom always would comment that Eddie kept his land so nice and neat.

A. Yeah.

Q. And probably she would be aware that he helped her out in her home, too.

A. Oh, yeah. If he could do it, he would help mom out. Yeah.

Q. And he would mow around – like when he was able, he would mow around parts of her land that he knew were her land.

A. Yeah. Probably, yeah. If he felt like it, yeah, he'd probably mow some of her land, too, if he felt like it, I would say.
[Emphasis added]

[84] Both William Mader and Dorothy Trenholm testified that William and Eddie had a garden on what they understood was Eddie's land. She testified that "Oh, yes" the brothers had shared their produce with their mother, Mary Mader. In regard to the right of way, she gave evidence that "They parked everywhere when the family was around". Asked about picking mayflowers and berries, Dorothy elaborated:

A. We all went out back. Didn't matter which one of the family it was. We all went out back.

Q. Itt [*sic*] was your mother's property. She let you do that.

A. It was mom's property and dad's property and we were welcome to go wherever.
[Emphasis added]

[85] Kevin Elworthy lived on or near the property adjacent to Ms. Hatfield's and the Maders' property his whole life. He testified:

> Q. Now, Ed's occupation of this land that you say he occupied, was it exclusive to him?
>
> A. He used it and mowed it and went on it, and that's basically all I can say.

[86] His evidence included the following regarding her children helping Mary Mader:

> Q. ... Have you ever observed Ed Mader, you know, trying to help his mom around with her property?
>
> A. Yeah, on occasion. Yeah.
>
> Q. Right.
>
> A. It's fair to say all the brothers and Linda helped their mother out as she was aging.
>
> Q. And even before she was very elderly - - -
>
> A. Yeah.
>
> Q. - - - they both would have helped.
>
> A. Yeah, all of - - the whole family basically helped out.

and also:

> Q. You have no reason to think that Ed would not want to help his mom if she needed some - - parts of her property mowed that required mowing. You have no reason to think he wouldn't do that.
>
> A. No. Like - - -
>
> Q. No. If it was part of the cultivated part of her land, you have no reason to think that Ed wouldn't assist with that?
>
> A. No. There - - if I saw Ed mowing, it was more down around his mother's house per se.

> Q. Okay. Down around his mom's house.
>
> A. M'hm. And Billy, their brother, Billy did a lot of the mowing with his ride-on for her at that time. It was a little blue Ford mower.
> [Emphasis added]

[87] The judge did not mention any of this evidence regarding family relationships and the uses made of the homestead property by members of the Mader family. What it showed is a family dedicated to helping each other and their widowed, aging mother in many ways, including maintenance of the homestead property. Judy Wile, who was called by the respondents, over a period of seven or eight years visited Ms. Hatfield two or three times a week and attended family gatherings such as Christmas and Easter. Asked if Eddie and Ms. Hatfield tried to help each other, she testified:

> A. Oh, yes. They sort of - - it was like communal. They sort of shared.
>
> Q. Communal sort of assistance in whatever they needed in terms of living at the house within such close proximity.
>
> A. Yeah, the - - -
>
> Q. They'd co-operate with each other.
>
> A. Yeah. Not only Eddie, but Billy and Eddie's sons and - - -
>
> Q. Sure. That was consistent with the way the family lived and interacted with each other - - -
>
> A. Yes.
>
> Q. - - - for them to try to help each other in terms of maintenance of property, for example?
>
> A. Yes.

[88] Over many years, family members made various uses of the homestead property. It was treated as communal or shared property. Permission was usually

not sought, but assumed. With the exception of the extreme events in 1988 regarding Wesley's use of land towards the rear of the homestead which escalated into criminal charges, the many and different uses made of the homestead were never reduced to written agreements.

[89] At ¶ 96 and ¶ 103 of her decision, the judge quoted extracts from *Anger and Honsberger, The Law of Real Property* which state that possession which was "equivocal" is not sufficient to establish adverse possession. The authorities which she set out also emphasize that possession must be considered with reference to the particular circumstances of each case. Here, the judge failed to take into account the evidence pertaining to a close-knit family; the generosity of Guy and Mary to their children and grandchildren; the history of uses, both commercial and personal, made of that property by family; the children's belief that they could do as they wished on that land and often did not seek permission; and the assistance in many forms which her children provided to Mary. The judge did not take into account, in the words of William Mader, "the way it was." In failing to do so, the judge erred in her application of the law of adverse possession.

[90] It is clear from the evidence that Eddie took great pride in maintaining the property around his home. He enjoyed landscaping and spent hours creating and tending the lawns. However, in the context of this particular family's history and the evidence as to the uses by its members of the homestead property and how they helped each other, building lawn, creating a driveway loop to his home, and mowing the grass beyond his deeded boundaries did not amount to unequivocal possession by Eddie.

[91] In addition to Eddie's maintenance of the grass, the judge relied on two other matters to base her finding of adverse possession. The first relates to Eddie's clothesline, and the second to a shed. The clothesline stretched between a pole behind his house and well within Eddie's deeded property, and a pole within the right of way. The judge's review of the witnesses' testimony does not include many references to the clothesline poles. In ¶ 21 of her decision, the judge summarized the testimony of Susan Mader, that both poles were "cemented into the ground." In her ¶ 89, she recounted that Pat Mitchell, Greg Mader's teenage son who was in grade 6 when his grandfather Eddie passed away, testified that Eddie mowed behind his property only to the clothesline poles.

[92] Eddie Mader had been a heavy equipment operator at the Sydney airport. In the late 1980's he brought a shed from the airport and placed it behind his house, on the right of way. The shed rested on its own weight; there was no excavation for a permanent foundation. Greg Mader, one of Eddie's sons, testified that in later years, his father, he and Ms. Hatfield purchased a ride-on mower for their respective uses. That mower was kept in the shed.

[93] Again, when placed in the context of the evidence regarding this family and their uses of the homestead, the testimony regarding the clothesline pole and the shed on the right of way are not sufficient to establish Eddie's unequivocal possession of the right of way.

[94] The judge also erred in principle by reversing the onus of proof. The law is clear that it is the claimant who hears this burden. For convenience, I repeat here from *Spicer*:

> [20] From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession.

[95] However, the judge's recounting of the evidence includes passages such as these:

> [42] Mrs. Trenholm further testified that until recent years, she had a close relationship with her sister Linda, having spent considerable time at the family home assisting with the care of their mother Mary Mader. Never was she aware that either her mother, or Linda Hatfield viewed the property being occupied by Eddie as being owned by them. Further, she had never heard any indication that there was a concern about the placement of Eddie's septic system.
>
> [45] Mr. Elworthy indicated he had no reason to believe that Linda Hatfield or Mary Mader owned any of the property which he had viewed Eddie occupying and using. He testified that he had never seen either Mary Mader or Linda Hatfield using the property in question in a fashion which would suggest they

> owned it. Further, Mr. Elworthy testified that he had never seen Linda Hatfield mow any of the disputed land, except within the last few years, following Eddie's death. He recalled that while in highschool, he had asked Eddie permission to travel across Mader property in order to access a woodlot. Permission was granted by Eddie for Mr. Elworthy to travel across the property in a truck. This was described as being on Eddie's back lawn, close to the edge of the swamp. [Emphasis added]

[96] In her analysis, the judge reasoned:

> [115] I further find that Eddie, commencing in 1970, consistently utilized the land behind his home. ... I reject the evidence of Linda Hatfield that she mowed in this rear area, stored wood there, or utilized it in any fashion consistent with exercising ownership during Eddie's lifetime.
>
> ...
>
> [120] Given the family relationships involved, Mary Mader and Linda Hatfield would have had ample opportunity to traverse across the disputed areas, both to visit with Eddie, and for other purposes - such as going for a walk. I find however, that such conduct would not have been intended to be exerting their ownership over the property, nor serve to interrupt the adverse possession of Eddie Mader in any of the disputed areas.

[97] It was the Maders who had to provide very cogent evidence that Eddie's use satisfied all the criteria for adverse possession, including exclusivity. Whether or not Dorothy Trenholm was aware if the true owners viewed the property that Eddie occupied as theirs was of no consequence for the legal test. Nor did it matter whether Mary Mader or Ms. Hatfield used or mowed the land to which they had legal title. Nor did they have to prove that their activities on their own property disrupted Eddie's possession of lands that others thought he owned. Nor did they have to show that their conduct was intended to exert their ownership rights.

[98] Rather, it was always the Maders who had to prove that Eddie's activities had met all the criteria to establish adverse possession. This, on what the judge herself accepted in her ¶ 120, they did not do. The evidence showed that Mary and Ms. Hatfield frequently walked on, around and over the disputed lands. These walks included frequent visits to Eddie's home. Under cross-examination, the respondent Darren Mader acknowledged that he had never witnessed his father Eddie telling Mary Mader or Ms. Hatfield not to come or walk across the disputed

land. None of the witnesses testified that the legal owners had ever been excluded from any part of their lands. As *Spicer* explained at its ¶ 20, every time the true owner set foot on her own land, she was in possession and the person claiming adverse possession was not.

[99] Here, the claimants did not prove the requisite exclusion of the true owner from the disputed lands. They succeeded at trial because the judge erred by reversing the onus of proof for adverse possession.

[100] I turn then to the septic field for Eddie's house. The judge heard testimony from several witnesses regarding its location and repairs made to it around 2000. Her decision on this aspect of the Maders' claim to the disputed lands reads:

> [112] A critical determination to be made is whether Eddie placed his septic system across his parents' property with their permission, and with the express agreement that it would be removed and placed within the deeded bounds of his lot. I cannot accept Ms. Hatfield's evidence that such an agreement ever existed. None of Eddie's children, his friend Mr. Gaudet, nor his older siblings were aware of any such arrangement. If such an agreement existed, I would have fully expected it to have been documented in 1988 when serious conflict arose between Eddie, his mother, and Ms. Hatfield. Although other aspects relating to the properties were reduced to writing at that time, nothing was specified about the septic system. Further, Ms. Hatfield was aware of Eddie undertaking work on the system in 2000. She did not raise the alleged agreement then, nor at any time during the remainder of Eddie's life. Further, despite being aware that Eddie's children were considering selling the house following his death in 2005, she did not raise with them that the system would need to be moved. She did not raise the issue regarding the placement of the septic system until July of 2007, after the Maders had moved into the home, and after she and her sister had found a variety of documents in her mother's trunk.

[101] The evidence regarding the exact location of the septic system was not precise. Eddie’s son, Greg Mader, testified that the system largely consisted of a tank located roughly 15 to 20 feet from the back of Eddie’s house and well within his deeded boundaries, and a line bed, one straight line running west to east 130, 150 feet. Other witnesses gave somewhat different descriptions as to the direction of the pipe, the end of which is now difficult, if not impossible, to see. It is not surprising that, in granting the Maders a declaration, the judge described the rear line thus at ¶ 121:

> b) To the rear of their property, that area from their deeded line to a point within the swamp being 5 feet beyond the end of the outflow pipe of the septic system. This rear line shall start at the edge of the traveled portion of the existing roadway and run northwesterly in a straight line until it intersects with the Elworthy line;

and, in the following paragraph, directed the Maders to arrange for a surveyor to prepare a plan depicting the content of her decision. Although none of the witnesses described more than a line bed or outflow pipe extending beyond Eddie's deeded boundaries, the judge granted adverse possession of lands across almost the entire width of the homestead property on the basis of that part of the septic system.

[102] The judge gave several reasons for rejecting Ms. Hatfield's evidence that there had been an express agreement between her parents and Eddie that he would eventually move his septic system from their property and place it fully within his boundaries. First, the judge observed that none of Eddie's children, Mr. Gaudet or Eddie's older siblings were aware of such an agreement. When the septic system was installed, Eddie's children were between one and nine years old. His sons testified that they did not know of any agreement between their father and his parents. The judge preferred their evidence to that of Ms. Hatfield who was then 15 and still living at home when Eddie received his deed and built his home. William Mader and Dorothy Trenholm had left home, and Mr. Gaudet was living in the Prairies around that time. However, the judge is correct that they too testified that they were unaware of an agreement that the septic system would be moved.

[103] A second reason given by the judge related to the events in 1988. Earlier in my decision, I reviewed the heated dispute regarding Wesley Mader's use of a portion of the homestead property that lay beyond his father's home. My examination of the Criminal Charges Agreement and other evidence led to the conclusion that the focus of the documents signed at that time was not Eddie's property or any claim he may have made to land outside his deeded boundary, but Wesley's claim to the use and ownership of the land on which the garage for his business was situated. As a result, the judge's statement regarding a serious conflict in 1988 "between Eddie, his mother, and Ms. Hatfield" and her reliance on the fact that no document was entered into then regarding Eddie's septic system to support the claim of adverse possession to lands on which it is located, are not well-founded.

[104] Finally, the judge pointed out that Ms. Hatfield had not objected when repairs were made to the septic system in 2000, and did not do so for several years thereafter. Those repairs consisted of replacement of the tank within the deeded boundaries and hooking it up to the remainder of the system. At trial, Ms. Hatfield explained that she did not object in 2000 because she had too much to do caring for her mother, Mary Mader who was seriously ill. Only after Mary died in 2006 and the Maders took possession of Eddie's home in 2007 did she decide to act.

[105] The judge gave reasons for rejecting Ms. Hatfield's testimony that because of his limited finances at the time, his parents gave Eddie permission to install his septic system over their land and he agreed that in time, all of it would be contained on his property. While, as I have pointed out, there are weaknesses in her reasons, I cannot say that she misapprehended the evidence regarding any such agreement to such an extent that her rejection of any permission warrants appellate intervention.

[106] I must therefore consider whether the Maders established adverse possession for the septic system components beyond Eddie's deeded boundaries. This, of course, takes me back to the law. Was there the requisite open, visible and continuous possession known to the owner and to the exclusion of the owner for the statutory period of 20 years? Was the possession more than equivocal, occasional or for a special or temporary purpose? Was it exclusive?

[107] The extension of the line bed or pipe of the septic system onto the homestead property was known to Mary Mader and Linda Hatfield since its installation in 1970. It has been in the ground for more than 20 continuous years. The judge found that it was there without the permission of the true owner. This use of the property amounts to possession for a permanent, rather than any temporary or special purpose. Furthermore, this possession and use are considerably less equivocal than the grounds maintenance and other aspects identified earlier. However, the true owners were not excluded from the lands in which the outlet pipe ran. Again, the Maders have not established all requirements for adverse possession arising from the placement of parts of the septic system beyond Eddie's deeded boundaries.

Disposition

[108] I would allow the appeal.

[109] Should Ms. Hatfield require the Maders to remove all parts of their septic system from her property, the Maders are to be given a reasonable time not exceeding six months from her written demand to do so. If the appellant should make such demand, she is to allow the respondents and workers and equipment engaged to do that work to go onto the land to do the necessary work without interference. Following any removal of the sewer system, the respondents are to leave the land in a reasonably tidy state. Should the respondents pursue that work diligently yet it cannot be completed within that time, and the parties themselves cannot agree to an extension, we would retain jurisdiction to hear any application for an extension, including any award of costs.

[110] The parties shall remove the clothesline pole, shed and any obstructions or articles from the right of way.

[111] The decision below was stayed pending the outcome of this appeal. The judge awarded the respondents cost of $28,000 plus disbursements and certain general damages. If any general damages or costs were paid to the respondents, those monies should be returned to the appellant. I would order the respondents to pay the appellant trial costs of $28,000 plus disbursements, and costs on the appeal of $5,000 plus disbursements.

[112] Before closing I feel it must be said that in light of the long history of familial cooperation and close relations described at trial, it is unfortunate that the parties were not able to reach a settlement of their differences long before a trial, let alone an appeal. These differences appear to have arisen out of a genuinely held misunderstanding as to what land had originally been conveyed to Eddie Mader and the legal consequences that flowed from that belief. It is never too late to mediate what needs to be done arising out of this decision in order for these parties to normalize their relations and live in close proximity and harmony. I encourage them to do so.

Oland, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.