NOVA SCOTIA COURT OF APPEAL
Citation: ***Kimbrell v. Goulden***, 2006 NSCA 102

Date: 20060921
Docket: CA 238212
Registry: Halifax

Between:

Michael L. Goulden

Appellant

v.

James Kimbrell and Betty Kimbrell

Respondents

Judges:	Cromwell, Oland & Hamilton, JJ.A.
Appeal Heard:	April 5, 2006, in Halifax, Nova Scotia
Held:	**Appeal allowed per reasons for judgment of Hamilton, J.A.; Cromwell and Oland, JJ.A. concurring.**
Counsel:	Martin Dumke, for the appellant James Kimbrell, for the respondents (self-represented)

Reasons for judgment:

Facts:

[1] This appeal concerns the respondents', James and Betty Kimbrells', right to cross a parcel of land near Carleton Village, Shelburne County, Nova Scotia to get to their land from the public highway. Michael L. Goulden, the appellant, blocked their access in 1998 in essence alleging in his counterclaim that the Kimbrells were trespassing over his land. The Kimbrells claimed a prescriptive right of way.

[2] Both parties drafted their own pleadings and represented themselves at the trial conducted by Justice Hiram J. Carver of the Nova Scotia Supreme Court, as he then was. The judge accepted that the ownership of the land crossed by the Pit Road was uncertain, but for the purpose of this action only, found the Kimbrells had the right to use the Pit Road to access their land. He dismissed Mr. Goulden's counterclaim for trespass and ordered him to remove the blockade. Mr. Goulden appealed that decision and was represented by counsel on appeal. Mr. Kimbrell represented himself and Mrs. Kimbrell on appeal.

[3] Reference to the plan attached hereto as Schedule "A" is necessary to understand the facts. The road shown on the plan entitled "Road to Pit" is the road Mr. Goulden blocked to prevent the Kimbrells using this road to get to their land which is shown on the left of the plan. This road is hereinafter referred to as the Pit Road. The road shown on the plan as being to the north of the Pit Road, hereinafter called the "old" road, was found by the judge to have been in existence in 1964 and to have been "open for use by the persons such as the Rapp and the Mahoney [predecessor in title to the Kimbrells] families without interruption," before the Pit Road was built in 1970/71. The unhatched land at the bottom of the plan is currently owned by Mr. Goulden. The land at the top of the plan is currently owned by Joseph MacDonald. The land between the lands of Mr. Goulden and Mr. MacDonald crossed by the Pit Road is the land the Kimbrells argued may be owned by Mr. MacDonald. Mr. Goulden claimed he owned this land and that the Kimbrells were trespassing when they used the Pit Road, although one of his grounds of appeal relies on the uncertainty of ownership raised during trial.

[4] Mr. MacDonald was not a party to this action. There is no indication in the record that he received notice of it or was aware of it.

[5] George Egbert Hamilton and later his son, Preston Lamont Hamilton, were predecessors in title to the lands now owned by both Mr. Goulden and Mr. MacDonald. Mr. Goulden's land was conveyed to him by warranty deed dated February 24, 1983, which deed described the land as being five or six acres in size. This conveyance was confirmed by quit claim deed dated June 8, 1999 describing the land as being 12.98 acres. There was no reservation of a right of way in either of these deeds in favour of the Kimbrells' land.

[6] The Kimbrells' land was formerly owned by Ida Elmira Mahaney. It was conveyed to them by deed dated November 6, 2000. There was no right of way granted in this deed.

[7] The transcript of the trial makes it clear the judge did not consider the fact that there were conflicting claims to title of the servient tenement relevant to the case before him. During the trial he repeatedly stopped Mr. Goulden from bringing forward evidence that Mr. Goulden owned the land crossed by the Pit Road. One example is the following:

THE COURT:	But right now, we're dealing with whether there was a right-of-way there, regardless of who owns it.
MR. GOULDEN:	Yes.
THE COURT:	You know. And if you own it, you know, that's what this lawsuit is about. And if you don't, well then somebody will have to have, if they ever survey it out, and it belongs to somebody else, then there may be another case.
MR. GOULDEN:	O.K.
THE COURT:	I don't know. But right now, it's, the lawsuit is between you and you and it's over a piece of land that's alleged to be yours. O.K. So, but that's all we're interested in. We're not interested in title to land.

[8] The evidence given by the many witnesses as to the use or non use of the Pit Road between 1970/71 when it was constructed and 1998 when it was blocked by Mr. Goulden was conflicting. There was evidence that the Kimbrells' predecessor in title, Mrs. Mahaney, had authorized people to cut wood for her and for their personal use, to hunt and to pick berries on her land by driving over the Pit Road

and that they did so several times each year for 26 years until Mr. Goulden blocked their access.

Decision

[9] In his November 17, 2004 decision the judge accepted that the ownership of the land which the Pit Road crosses was disputed and stated in his reasons that for this action **only** he accepted the land was owned by Mr. Goulden:

> . . . **there appears to be some dispute where the north line of [Mr. Goulden's] land intersects with the land formerly of Gerald DeMing, later of Rodney Williams and now of Joe MacDonald**. However, **for this action only** where the [Kimbrells] have sued [Mr. Goulden] and Ronald Dearman, a land surveyor, has placed the north line of Mr. Goulden to the north of the disputed road, **I am prepared to accept the disputed roadway runs over land of [Mr. Goulden]**.
>
> (Emphasis mine)

[10] He also noted that Mr. Goulden had no objection to the Kimbrells using the Pit Road on foot. His objection was to their use of vehicles:

> As will appear from the defendant's Defence and from speaking to the Defendant at the opening of the trial, he is not objecting to anyone travelling the dispute[d] road on foot but objects to its use by vehicular traffic.

[11] He set out the law relating to prescriptive rights of way and made a finding with respect to the change in the location of the road in 1970/71:

> If one establishes uninterrupted usage of a road way for a period of 20 consecutive years or longer, then based upon the doctrine of lost modern grant the presumption is raised the right-of-way had a legal origin. This presumption may be rebutted by those opposing the right to use the property.
>
> Gale on Easements (14 Ed) Pg. 141 states:
>
> "Although the Lords do not expressly discuss the general question to what evidence is admissible to rebut the presumption of lost grant, the effect of their judgement is to affirm the opinion of Thesiger and Cotton L.J.J. It follows that the presumption cannot be displaced by merely showing that no grant was in fact made; the

> long enjoyment either estops the servient owner from relying on such evidence or overrides it when given, and the court will make any possible presumption necessary to give that long enjoyment a legal origin ..."

Usage of the roadway by the person claiming title by possession and/or under the Statute must be open, continuous, unobstructed and **without permission of the landowner**.

I find the old road as depicted on [the attached plan], that ran just to the north of DeMing's house was open for use by the persons such as the Rapp and the Mahaney families without interruption. These roads have to be tacked together as it was only moved to convenience the DeMing family. **Consent by all was required**. No rights should be lost by the parties formerly using the old road. I find because this road was so close to the entrance of the DeMing home, where dust entered from the passing gravel trucks they wanted it moved. **Through agreement between the respective land owners a new road was constructed to replace the old road.** This new road became known as the "Pit" Road.

(Emphasis mine)

[12] Two pages later in his decision the judge concluded:

I find Manley Goulden, who cut wood on Ida Mahaney's property with her permission, and the Rapp family had open, continuous and unobstructed use of the "Pit" Road from 1971 to 1998. **They were travelling without permission from any land owners.** The "Pit" Road was only a switch for convenience to the DeMings with none of the parties losing any rights they had to travel the old road unobstructed. These rights on the old road also belonged to Ida Mahaney to reach her wood lot.

. . .

I therefore find the plaintiffs have a right to use the road way known as the "Pit" Road by foot and by vehicle leading from the west side of the Shore Road to the East line of their property, formerly owned by Ida Mahaney. The width of this road shall be the width that existed when the "Pit" Road was constructed in 1971 to replace the old road.

I order the Defendant to remove the rocks and any obstructions he placed there blocking the "Pit" Road by December 15, 2004. Should he not remove the above obstructions, the Plaintiffs are permitted to remove same, the cost of which will be borne by the Defendant.

(Emphasis mine)

[13] Following the judge's retirement from the court, the order giving effect to his decision was approved by Justice Charles E. Haliburton. It provided:

> (1) The Plaintiffs have the right to use the road way known as the "Pit" road by foot and by vehicle from the west side of the Shore Road to the East line of their property, formerly owned by Ida Mahaney. The width of this road shall be the width that existed when the "Pit" Road was constructed in 1971 to replace the old road.
>
> (2) The Defendant is ordered to remove the rocks and any obstruction he placed there blocking the "Pit" Road by December 15th, 2004.
>
> (3) Should the Defendant fail to remove the above obstructions, the Plaintiff is permitted to remove same, the cost of which will be borne by the Defendant.
>
> (4) The Plaintiff's claim for monetary compensation for grief alleged to be caused by the Defendant is hereby dismissed.
>
> (5) The Defendant's Counter Claim is dismissed with no costs.
>
> (6) The Plaintiff shall be entitled to costs and disbursements when taxed.

These costs and disbursements have not been taxed.

Standard of Review

[14] The applicable standard of review is set out in **Mason v. Partridge** (2005), 237 N.S.R. (2d) 252 (C.A.):

> [15] In **Creager v. Provincial Dental Board (N.S.)**, [2005] N.S.J. No. 32; 230 N.S.R. (2d) 48; 729 A.P.R. 48 (C.A.), Fichaud, J.A. summarized standards of review from decisions of the courts thus:
>
> > "[14] Appeals from decisions of courts on points of law are reviewed for correctness. An error of law which is extractable from a mixed question of fact and law similarly is subject to the correctness standard. Factual matters, including inferences, and mixed questions of fact and law with no extractable error of law

> are reviewed for palpable and overriding error. **Housen v. Nickolaisen**, [2002] 2 S.C.R. 235, at paras. 8, 10, 19-25, 31-36 ..."

[16] This court discussed the concept of palpable and overriding error in **Flynn v. Halifax (Regional Municipality) et al.** (2005), 232 N.S.R. (2d) 293; 737 A.P.R. 293; 2005 NSCA 81, as follows:

> "[14] Palpable error was clearly and simply described recently by the Ontario Court of Appeal in **Waxman v. Waxman** (2004), 186 O.A.C. 201; O.J. No. 1765 (Q.L.):
>
> > '[296] The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: **Housen** at 246 [S.C.R.]. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
> >
> > '[297] An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: **Minister of National Revenue v. Schwartz**, [1996] 1 S.C.R. 254; 193 N.R. 241, at 281 [S.C.R.].
> >
> > . . . . .
> >
> > '[300] ... the "palpable and overriding" standard applies to all factual findings whether based on credibility assessments, the weighing of competing evidence, expert evidence, or the drawing of inference from primary facts. ...'''

Issues

[15] Mr. Goulden argued that the judge erred by refusing to admit certain evidence he referred to, by not considering or giving the proper weight to the evidence before him with respect to permission, by not applying the correct law with respect to permission, by finding that continuous use of the Pit Road was established and by finding that a prescriptive right of way had been created where the evidence at trial raised uncertainty as to whether Mr. Goulden owned the land crossed by the Pit Road. No issue was taken with the judge's dismissal of the parties claims for damages.

Analysis

[16] Mr. Goulden's first argument was that the judge erred by refusing to admit certain evidence such as a statutory declaration of a person who was not available for cross-examination and the surveyor's testimony as expert evidence. He agreed it was within the judge's discretion to refuse to admit this evidence. He argued however that since Mr. Goulden had represented himself at trial, the judge should have allowed him to introduce this evidence regardless of whether it was hearsay, whether it was in the appropriate form or whether appropriate notice had been given. Once admitted, he argued the judge should have given it the weight it deserved.

[17] The appellant has not satisfied me that the judge erred by refusing to admit the evidence he referred to. The fact Mr. Goulden chose to represent himself does not give him *carte blanche* to introduce into evidence anything he wishes, in any form or without adequate notice. To condone such an approach would be to condone havoc in the court room.

[18] I would dismiss this ground of appeal.

[19] Mr. Goulden's main argument at the hearing was that the judge erred by not considering or giving the proper weight to the evidence before him with respect to whether Mr. Goulden's predecessors in title had given permission to the Kimbrells' predecessors in title.

[20] The evidence he referred to in support of this argument included the statutory declaration of Norine Wildman, dated November 6, 2000. He argued that since this statutory declaration was sworn at the time the land was conveyed to the Kimbrells and that since it referred to many facts relating to the title to their land, but was silent with respect to the existence of a right of way, the judge should have inferred from this that there was no prescriptive right of way. Mr. Goulden also referred to the deed conveying the land to the Kimbrells and argued that because it does not contain a grant of right of way, this suggested that none existed. He referred to the deed conveying the land to Mr. Goulden and argued that the absence of a reservation of a right of way in that deed also suggested no right-of-way. He referred to a lawyer's letter to Mr. Goulden dated March 12, 1998 on behalf of a number of persons who wished to use the Pit Road after it was blocked by Mr. Goulden. He argued that the reference in the letter to those people always having used the Pit Road "with consent" and offering to pay $500 for the grant of a right-of-way for its use should have led the judge to infer that there was no prescriptive right-of-way.

[21] Mr. Goulden's argument was that his predecessors in title had given permission to the Kimbrells' predecessors in title to use the Pit Road, thus precluding the creation of a prescriptive right of way. He argued that Preston Lamont Hamilton gave permission to Mrs. Mahaney to use the Pit Road in 1970/71 when it was constructed, that his permission died with him in or about 1980 and that since 20 years had not elapsed from the time of his death until Mr. Goulden blocked the road in 1998, no prescriptive right of way had arisen.

[22] The finding of whether permission was given is a question of fact: Jonathan Gaunt and Paul Morgan, *Gale On Easements*, 17th ed. (London: Sweet & Maxwell, 2002) at 216. Hence for the appellant to succeed on this argument he must prove that the judge made a palpable and overriding error in finding that no permission had been given.

[23] In effect what the appellant is asking us to do is to substitute our assessment of the evidence for that of the judge. That is not the function of this court. While none of us may have drawn the same inferences as the judge, it is not for us to interfere with his inferences and findings of fact unless he committed palpable and overriding error. There was evidence before the judge from which he could conclude that no permission had been given by Mr. Goulden's predecessors in title to the Kimbrells' predecessors in title to use the Pit Road. There is nothing to

indicate he did not consider the particular evidence the appellant highlighted on appeal. The judge is not required to refer to every piece of evidence in his reasons. The appellant has not satisfied me that the judge made a palpable and overriding error in drawing the inference that the appellant's predecessors in title had not given the Kimbrells or their predecessors in title permission to use the Pit Road.

[24] I would dismiss this ground of appeal.

[25] Mr. Goulden argued that the judge erred in the law he applied with respect to permission in determining that a prescriptive right of way had arisen. He argued that the judge's explanation at one point during the trial of the necessary elements to establish a prescriptive right of way suggested a prescriptive right of way could arise even if Mr. Goulden's predecessors in title gave permission to the Kimbrells' predecessors in title:

> . . . It would not be a public road . . . it's like if you have a, if you have a main road and then off of that you have leading a side road and on that side road there are many people's property and if they've used it over a period of years to get into that property, then they acquire, whether it's by consent or otherwise, by the fact that they use it, over a period of 20 years, they get what are called prescriptive rights. So, but it's not turning, no matter [what] decision I make, it's not turning this road into a public road.

[26] Even if a correct interpretation of these comments by the judge is that a prescriptive right of way can arise following consent of the owner of the servient tenement, of which I am not convinced, the judge's reasons for his decision make it clear he recognized that no right of way would arise on the facts before him if Mr. Goulden's predecessors in title had given permission to the Kimbrells' predecessors in title to use the Pit Road:

> Usage of the roadway by the person claiming title by possession and/or under the Statute must be open, continuous, unobstructed and **without permission of the landowner**.

[27] He applied this law to the facts as he found them and found no permission had been given:

> I find Manley Goulden, who cut wood on Ida Mahaney's property with her permission, and the Rapp family had open, continuous and unobstructed use of the "Pit" Road from 1971 to 1998. **They were travelling without permission**

> **from any land owners.** The "Pit" Road was only a switch for convenience to the DeMings with none of the parties losing any rights they had to travel the old road unobstructed. These rights on the old road also belonged to Ida Mahaney to reach her wood lot.

[28] The appellant has not satisfied me that the judge misapplied the law with respect to permission. I would dismiss this ground of appeal.

[29] The appellant also argued that the judge erred in finding that there was sufficient use of the Pit Road by the Kimbrells' predecessors in title to be continuous as required for a prescriptive right-of-way.

[30] This is a question of mixed fact and law, weighted on the factual side, with the standard of review being one of palpable and overriding error.

[31] In R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, 3rd ed. (London: Stevens & Sons Limited, 1966), at 841 it states:

> The claimant must show continuity of enjoyment. This is interpreted reasonably; in the case of easements of way it is clearly not necessary to show ceaseless user by day and night. User whenever circumstances require is normally sufficient, provided the intervals are not excessive. A claim which clearly fell on the wrong side of the line was where a right of way had been exercised only on three occasions at intervals of 12 years.

[32] The appellant has not satisfied me that the judge made a palpable and overriding error in finding that there was continuous use of the Pit Road by the Kimbrells' predecessors in title giving rise to a prescriptive right of way. The concept of continuity varies with the circumstances. It must be considered in relation to the use made of the land. Here the evidence indicated that use was seasonal and occurred several times each year to cut and haul wood, hunt and pick berries.

[33] I would dismiss this ground of appeal.

[34] The appellant's final argument, set out in his factum but not stressed at the hearing because he felt the land ownership issue was a 'red herring', was that the judge erred in finding that a prescriptive right of way had been created where he was uncertain whether Mr. Goulden owned the land crossed by the Pit Road. I am

satisfied the question of who owned the land crossed by the Pit Road was not a ‘red herring’.

[35] As stated in paragraph 9 this decision, the judge accepted that the land crossed by the Pit Road was owned by Mr. Goulden **only** for the purpose of this action because of the evidence before him that it may be owned by Mr. MacDonald. While the judge frequently prevented Mr. Goulden from presenting evidence as to the ownership of the land, there was evidence that the land was owned by Mr. MacDonald:

Gary Wayne Rapp testified:

> MR. GOULDEN: If Gerry gave consent to have the road moved, he must have thought he owned the land?
>
> A. As far as, as far as I know he did, he owns the land yeah.
>
> Q. So do you say that where the road is he still owns or was on him?
>
> A. I always was to believe that that was Gerry DeMing's land there, yes.[Gerry DeMing is a predecessor in title to Mr. MacDonald]

Brian Ricky Rapp testified:

> MR. GOULDEN: And I believe Everett Hall was probably the one who made up the Declaration?
>
> A. Everett Hall requested it. Gerry Demings ever, only wanted to go on the site
>
> Q. Right. And Gerry maintained that he owned further south?
>
> A. Yes.
>
> Q. Do you believe that I own that land?
>
> A. No.
>
> Q. You never believed that I owned that land?
>
> A. I believe the line is where you and Faught put it.

...

MR. GOULDEN: But you say that Joe owns that land now?

A. It's a disputed piece of land, Mike.

Q. Well, Joe's not disputing it?

A. He hasn't yet I guess but.

Clifford Van Buskirk testified:

MR. GOULDEN: O.K. When we're talking about where the road is, do you feel that that road is over Joe MacDonald's land or my land?

...

A. I think it belongs to Joe MacDonald, yes.

[36] There was also evidence from Brian Ricky Rapp and Clifford Van Buskirk that Mr. MacDonald had given permission for others to use the Pit Road. During questioning Mr. Goulden even suggested he had heard of written consent but had not seen it.

[37] The Kimbrells were seeking recognition of a prescriptive right of way. A right of way is an interest in land which permanently affects the rights of property of the servient and dominant tenements. If indeed Mr. MacDonald was the owner of the servient tenement, his property rights would be affected by the creation of an easement. As noted, the evidence before the judge alerted him to Mr. MacDonald's potential claim, but he was given no notice of the action.

[38] Moreover, the creation of an easement generally requires the involvement of the landowners of the dominant and servient tenements:

Gale, supra, 4-50, at 198:

As it is essential to the existence of an easement that one tenement should be made subject to the convenience of another, and as the right to the easement can exist only in respect of such tenement, the continued user by which the easement

> is to be acquired by prescription must be by a person in possession of the dominant tenement. Moreover, as such user is only evidence of a previous grant - **and as the right claimed is in its nature not one of a temporary kind, but one which permanently affects the rights of property in the servient tenement - it follows that by the common law such grant can only have been legally made by a party capable of imposing such a permanent burden upon the property - that is, the owner of an estate of inheritance. Further, in order that such user may confer an easement, the owner of the servient inheritance must have known that the easement was enjoyed, and also have been in a situation to interfere with and obstruct its exercise, had he been so disposed.** His abstaining from interference will then be construed as an acquiescence.
>
> (Emphasis mine)

Also at p. 199, 4-51:

> According to the common law, all prescription presupposes a grant, and . . . the general rule is that, to establish a prescriptive title to an easement, the court must presume a grant of the easement by the absolute owner of the servient tenement to the absolute owners of the dominant tenement.

[39] The essential elements that must be met to establish a prescriptive right of way are set out in C.W. MacIntosh, *Nova Scotia Real Property Practice Manual*, (Markham: LexisNexis Canada, 1988) at the beginning of section 7.2:

> An easement is created by grant, whether express, implied or presumed. An easement which is the subject of a presumed grant is one created under the doctrine of prescription. The criteria of establishment of a prescriptive easement were adopted from the civil law and are of ancient origin. The user must be "nee vi, nee clam, nee precario (sic) [nec vi, nec clam, nec precario]." In modern terms this means that the user must be neither violent, nor secret, nor permissive.
>
> Before an easement will arise by prescription, the claimant must show user "as of right," meaning enjoyment of the land as if he were the true owner. The use must be open, adverse, notorious and continuous and not secret. A prescriptive easement will not arise if the use has been with the permission of the owner.

[40] A person claiming a prescriptive easement must generally prove the owner of the servient tenement acquiesced in the use made by the owner of the dominant tenement but did not give permission; **Dalton v. Angus & Co. [1881-85**] All ER 1

(HL). The difference in the concepts of acquiescence and permission is dealt with in **Mason v. Partridge**, supra:

> [31] The distinction between acquiescence and permission and the importance of acquiescence to a claim by prescription is described by **Gale on Easements** at p. 215 thus:
>
> > "The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is 'as of right'; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not 'as of right.' Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence. The positive act or acts may take different forms. The grant of oral or written consent is the clearest and most obvious expression of permission. But there is no reason in principle why the grant of permission should be confined to such cases. Permission may also be inferred from the owner's acts. It may be that there will not be many cases where, in the absence of express oral or written permission, it will be possible to infer permission from an owner's positive acts. Most cases where nothing is said or written will properly be classified as cases of mere acquiescence. But there is no reason in principle why an implied permission may not defeat a claim to use 'as of right.' Such permission may only be inferred from overt and contemporaneous acts of the owner." (emphasis in original)

[41] As noted in **Dalton v. Angus & Co.**, supra, (at page 30), "the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rests upon acquiescence." Given that acquiescence by the owner is a critical element, the question of who is the owner cannot be irrelevant as the judge appears to have thought. How can one prove the owner of a servient tenement acquiesced or did not give permission if the owner of the servient tenement is not firmly identified in the action? How can one assume, for the purposes of a case, that a certain person is the owner of a servient tenement? Whether or not the actual owner of a servient tenement acquiesced or gave permission are central issues in the determination of whether or not there was an easement. Although there is some authority for the view that acquiescence may be imputed; **Capar v. Wasylowski and Wasylowski** (1983), 21 Man. R.(2d) 194

(Q.B.) at ¶ 23 there must be a finding that the owner of the servient tenement acquiesced or did not give permission, suggesting that generally the owner of the servient tenement must first be identified. The ownership of the servient tenement is a particular concern in this appeal where witnesses testified that Mr. MacDonald owned the land and gave permission to use the Pit Road.

[42] No cases were provided, nor have I been able to find any cases, where a conditional prescriptive right of way of the kind that was found by the judge to exist has been recognized.

[43] In light of the remedy sought by the Kimbrells, a prescriptive right of way, Mr. Goulden's counter claim in trespass, and the specific nature of the evidence before the judge clearly indicating a dispute as to the ownership of the servient tenement, including one survey not introduced into evidence that apparently showed Mr. MacDonald as the owner and the evidence that Mr. MacDonald had given permission for others to use the Pit Road in 1998, I am satisfied the judge erred by continuing the trial and making the decision he did without notifying Mr. MacDonald of the proceeding. The particular evidence before the judge cried out for notice to Mr. MacDonald to enable him to present his position on any ownership interest he had in the servient tenement and to allow him to testify on the issues of acquiescence and permission in particular. By finding that the Kimbrells had proved a prescriptive right of way over the Pit Road in the absence of notice to Mr. MacDonald the judge erred.

[44] Accordingly I would allow the appeal and order a new trial after notice to Mr. MacDonald. I would also order costs of the appeal in the amount of $1,500, together with disbursements as agreed or taxed, payable by the respondents to the appellant.

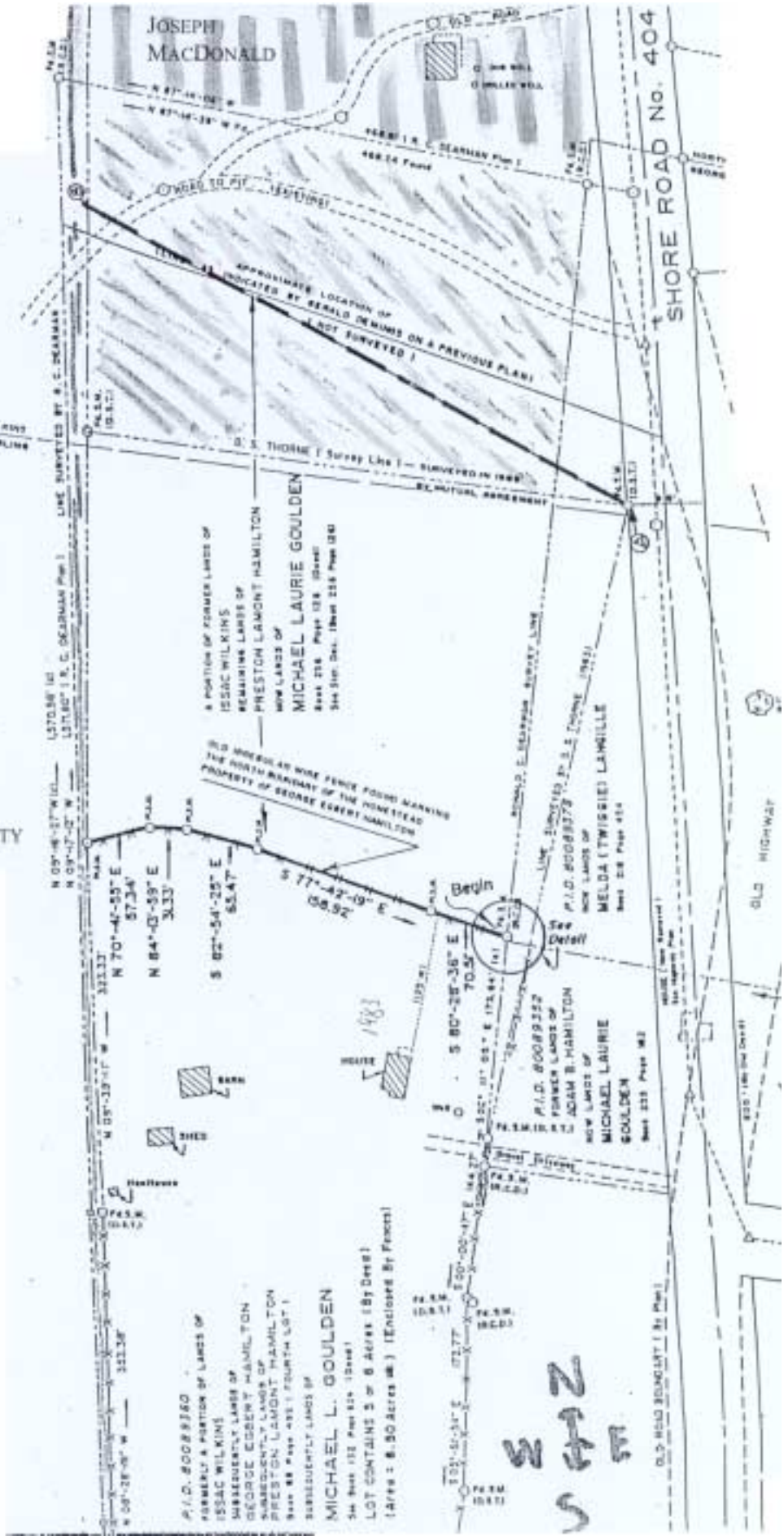
Hamilton, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.

SCHEDULE "A"


JOSEPH MACDONALD
SHORE ROAD No. 404
IDA MAHANEY
JAMES AND BETTY KIMBRELL
MICHAEL LAURIE GOULDEN
PRESTON LAMONT HAMILTON
ISAAC WILKINS
MICHAEL L. GOULDEN
Begin
See Detail
N 70°-47'-55" E 57.34'
N 84°-03'-59" E 34.33'
S 82°-54'-25" E 65.47'
S 77°-42'-19" E (58.92')
S 80°-28'-36" E 70.5'
S 22 1/2 E