IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *United Parishes of St. George and St. Patrick v. Guy*, 2005 NSSC 356

Date: 20051230
Docket: S. H. No. 185929
Registry: Halifax

Between:

The Rector and The Wardens of the United Parishes of St. George and St. Patrick
Plaintiff

v.

Daniel G. Guy

Defendant

Judge: The Honourable Justice Allan P. Boudreau

Heard: at Shelburne and Barrington, N.S. on December 6, 7, 8, 9 & 13, 2004 (Final Post Trial Submissions received on April 19, 2005.)

Written Decision: December 30, 2005

Counsel: Alan G. Hayman, Q. C. and Anne E. Smith, for the Plaintiff
R. Dan Harasemchuk, for the Defendant

By the Court:

INTRODUCTION:

[1] The Plaintiff, The Rector and the Wardens of the United Parishes of St. George and St. Patrick ("The Church") alleges that the Defendant, Daniel G. Guy ("Mr. Guy") is claiming a significant portion of their land located at Hartz Point, Shelburne County, Nova Scotia. Mr. Guy's property is adjacent to the Church

property and borders it on the West side. The Church contends the boundary line between the two properties has always been a straight light running in a North and South direction. Mr. Guy contends the eastern boundary line of his property veers to the East some 20 degrees at a point approximately 1460 feet from the shore of Birchtown Bay. This line (The "Hunt Line") was first officially documented in a survey performed by Robert L. Hunt, which plan is dated October 1 - 8, 1971. This disputed line creates a 13 to 14 acre triangular piece of land (The "disputed land") bordering on the North Shore of Birchtown Bay. The disputed land contains a significant amount of shore line, some 1,100 feet, with a rather large and attractive sandy beach. Needless to say, this contested piece of land would have some considerable value in today's shoreline properties market.

BACKGROUND FACTS:

[2] The Church acquired a large parcel of land at Hartz Point, Shelburne County containing over 800 acres, by way of Crown Grant in 1806. There may be a question whether some of the lands granted to the Church in 1806 were previously granted to others; however, in my opinion, this is not material to the present dispute and question to be decided. Suffice it to say that the disputed land is most certainly contained within the original Crown Grant. Over the years, parcels of land have been conveyed or acquired by various individuals from the Church's Crown Grant, which was originally referred to as the "Glebe Lands". The Church conveyed a parcel of land to a Henry Shoultz as early as 1873. This parcel of land contained only a bounds description, and a purported survey by a John Deputy apparently no longer exists.

[3] There were other leases or conveyances from the Glebe Lands dating from

1874 to the early 1900's. In 1892 a parcel of land was conveyed by one Miles Shoultz ("Shoultz") to a N. W. White ("White"). This 50 acre parcel of land had been apparently previously conveyed to Shoultz by the Church, although the Church Deed to Shoultz was registered some four days after the Shoultz Deed to White.

[4] In 1903, White deeded what appears to be the same 50 acre parcel to one Edward C. Acker (The "Acker Land"). **This parcel of land is significant because it is the Acker Land which was eventually conveyed to one William J. Bisbee in 1956 and then, in 2000, to Maria Elizabeth Ortiz and German Alberto Arroyo, the original defendants in this proceeding, and, in 2003, to Mr. Guy, the present defendant.**

[5] The Deed from White to Edward C. Acker described the lands as being bounded as follows:

- On the North by lands of Merritt Goulden
- On the West by Birchtown Harbour or Bay
- On the East by the Glebe Lands
- said to contain 50 acres more or less
- but there is no mention of how the land is bounded on the South.

[6] In 1916 the Church sold the standing timber on the Glebe Lands and described the boundaries as follows:

- On the North by lands of Winslow C. Mackay

- On the East by Shelburne Harbour

- On the South by Shelburne Harbour and Birchtown Bay

- On the West by lands of Edward Acker

[7] In 1935 Edward C. Acker conveyed a parcel of land to Athenas A. Acker with the boundary description as follows:

- On the North by the right of way of the Halifax and South Western Railway and lands of Edward C. Acker
- **On the East and South by Glebe Land**

- On the West by the other lands of Edward C. Acker

- the said lands were also described **as being enclosed in fence** and being occupied by the late Thomas W. Acker as his homestead.

[8] In 1945 Edward C. Acker conveyed the following lands to Alma Albenice Acker described as bounded:

- On the North by the lands of Merrit Goulden

- On the East by the lands formerly of W. C. McKay

- On the South by the Glebe Lands

- On the West by the waters of Shelburne Harbour or Birchtown Bay

- **And further described as being the same lands conveyed to Edward C. Acker by N. W. White in 1903**

[9] In 1956 Alma Acker conveyed the same lands she had received in 1945 to William J. Bisbee Jr. (Mr. “Bisbee”), described as bounded:

- On the North by the lands of Merritt Goulden

- On the East by lands formerly owned by W. C. McKay
- On the South by the Glebe Lands
- On the West by waters of Birchtown Bay
- (Herein after referred to as “the Bisbee Land”)
- **And further described as being the same lands conveyed to Edward C. Acker by N. W. White in 1903**
- and, for the first time, the land is further described as, “which consisted of lots 23 and 24, forming a triangle of land and therefore described by three boundaries”

- the description further excludes the land conveyed by Edward C. Acker to Athenas A. Acker in 1935.

The lots 23 and 24 referred to in the above description appear to be a reference to those lots as shown on a plan found at Tab 2 of Exhibit 2 or at Tab 18 of Exhibit 1.. This document appears to be a plan of lots granted by the Crown in the late 1700's. It does not appear to show the Glebe Lands which were granted in 1806 but lots 20 to 24 appear to be near the Western boundary of the Glebe Lands and running in a straight line north and south. The reference to lots 23 and 24 appears to have been added to the legal description of the Bisbee Land in an attempt to explain why the 1903 conveyance from White to Acker mentioned only three boundaries. In my opinion, the evidence does not support the reference in the deed to Bisbee that the Bisbee Land was ever a part of the above mentioned lots 23 and 24. The Bisbee Land appears to be more to the East, a part of the original Church

Grant instead of a part of Lots 23 and 24. Lot 23 was the Harding property and Lot 24 was referred to as the Brazil property. There was the Goulden property and possibly a Shoultz property between lots 23 and 24 and what later became the Bisbee Land.

[10] Mr. Bisbee was a U. S. citizen who spent part of the year, mostly the summer months, at Hartz Point. This continued from shortly after he acquired the Bisbee property until about 1984. He died in 1986. When Mr. Bisbee purchased the land, it had an existing house on it. He built a new cottage or house closer to the water.

[11] About 1961 Mr. Bisbee retained the services of Errol Hebb ("Mr. Hebb"), a Nova Scotia Land Surveyer ("N.S.L.S.") to survey the land which had been conveyed to Athenas Acker in 1935 and which had been excepted from the land purchased by Mr. Bisbee in the 1956 deed. Mr. Hebb was able to confirm that the Athenas Acker lot, which was by then apparently referred to as the Thomspon lot, was located entirely within the Bisbee property. Mr. Hebb testified that the remnants of the fence referred to in the saving and excepting clause in Mr. Bishbee's deed were still visible and he concluded that the Eastern boundary of the excepted lot was at or near the Western boundary of the Church property. The said excepted lot is described as being bounded on the East and South by Glebe Land; however, it is also described as being bounded on the North by the main highway and on the South by the Western Railway and lands of Edward Acker. In this latter regard, the excepted description is at odds with the 1935 deed from Edward C. Acker to Athenas A. Acker. Nevertheless, the location of this lot excepted from the Bishbee land has been agreed to by all who have attempted to plot its location. Mr. Hebb, N.S.L.S., in 1961, and in 1997, Mr. Hunt, N.S.L.S., in 1971 and in

1991, Lester Berrigan, N.S.L.S., in 1994 and Mark Whynot, N.S.L.S. in 2001. Mr. Hebb testified that he also concluded from his 1961 investigation that the boundary between the Bisbee property and the Glebe Lands ran in a straight north and south direction. He said that Mr. Bisbee did not take any exceptions to his findings, although his retainer had been to survey the location of the excepted lot and not the entire Bisbee property.

[12] In 1971, Mr. Bishbee retained the services of Mr. Hunt to survey his property at Hartz Point. It is during this survey that the contested Hunt Line was established or marked and documented for the first time. The plan of survey was first filed in the Registry of Deeds at Shelburne on August 4, 1972. It appears that some time not too long after the 1971 survey, Mr. Bisbee had the municipal property records changed to reflect the survey.

[13] While Mr. Bisbee was alive, he had his son-in-law Arthur Smith, who was later divorced from his daughter, act as caretaker for the property. Mr. Bisbee died in 1986 and his heirs acquired the property from his estate. The heirs engaged Mr. Hunt to once again retrace the boundaries of the property. A new survey plan was completed in January of 1991 and registered in February of that year.

[14] In 1991, Mr. Hebb was requested by one William Hamilton, an American citizen looking to purchase land, to survey the Glebe Lands. Mr. Hebb testified he did extensive field work but that he did not complete the survey plan due to non payment of his fees by Mr. Hamilton. Mr. Hebb retired and resigned as a N.S.L.S. in December of 1997. Sometime during the year 2000, representatives of the Church contacted Mr. Hebb and the Church agreed to pay him to complete the survey of the Church Lands, which survey had been commenced for Mr. Hamilton

in 1991. Mr. Hebb subsequently completed the plan through and with the assistance of Turner Surveys, the entity which had acquired his surveying business. That plan is signed by Mr. Hebb and dated December 12, 1997. There was considerable evidence and discussion about when Mr. Hebb had officially retired as a N.S.L.S. and why this survey plan is dated December 1997 while his lastest work on the survey was performed in 2000 and 2001. Mr. Hebb explained that he dated the plan in December of 1997 because it was his understanding that his required liability insurance coverage was only valid until the end of 1997. It appears that this evidence was canvassed in order to bring into question the credibility of Mr. Hebb. I find that those concerns were satisfactorily answered by Hebb and that nothing else turns on the dating and signing of the December 12, 1997 plan. It is the factual basis supporting the various survey plans in evidence which is the area of primary concern for the Court.

[15] In November of 2000, the Bisbee heirs sold the Bisbee land to Ortiz and Arroyo. After some eight months of ownership, Ortiz and Arroyo listed the property for sale, and in August of 2001 they entered into an agreement of Purchase and Sale with the present defendant, Mr. Guy. During September of 2001, the Church, through its solicitor, Mr. Hayman, advised Ortiz and Arroyo of the boundary line dispute and demanded a line agreement. By this time, Ortiz and Arroyo had already signed the agreement of Purchase and Sale with Mr. Guy. In September of 2002, the Church commenced the within action and, after the sale to Mr. Guy closed in June 2003, a consent order was issued substituting Mr. Guy as the party defendant. The Church now requests the Court to confirm its ownership of the disputed lands.

[16] At the end of the trial, Mr. Guy moved to amend his defence to formally

plead laches on the part of the Church. Mr. Guy asserted that the evidence disclosed and supported such a defence. The Church objected. After hearing argument I granted the request on the condition that the Church could present additional evidence if it decided to do so. Mr. Guy was resting on the evidence already presented. I also granted both parties the right to file additional post trial briefs. The Church elected not to present additional evidence and the trial was conducted with additional post trial briefs from both parties.

ISSUES:

[17] The main question to be decided is the location of the southern portion of the north/south boundary between the parties respective properties. The northern portion of the boundary line is not in dispute. The dispute only concerns the Hunt Line, first formally or clearly documented or established by the Hunt Survey of 1971. As a result of this dispute, and in order for the Court to answer this main question, several preliminary or ancillary questions have to be answered.

1. What was the historical location of the boundary line?

2. If the historical location of the boundary line was as contended by the Church, has Mr. Guy acquired a possessory title to the disputed land?

3. If the historical location of the boundary line was as contended by Mr. Guy, has the Church acquired a possessory title to the
4. disputed land?

5. If the historical location of the boundary line was as contended by the Church, has the Church been guilty of such laches as to be barred or estopped from now advancing or enforcing its historical title and right to ownership of the disputed land?

ANALYSIS and REVIEW OF THE EVIDENCE:

[18] The first question to be decided is the historical location of the disputed boundary line. This is purely a finding of fact. The overwhelming preponderance of the evidence supports a finding that historically the boundary line between the Church and Bisbee properties was a straight north and south line. The historical documentary evidence commences with the Crown Grant maps in evidence. Two of these maps are found at Tab 18 of Exhibit 1 and Tab 2 of Exhibit 2. A combination of these two maps confirms that the original Crown Grant to the Church had a western boundary bordering on grant lots 20 to 24. Tab 18 shows dotted lines which appear to be lots acquired from the original grant to the Church. William Cox, a long time member of the Church, testified to seeing a blueprint survey plan of the Church property at Hartz Point which showed a straight boundary line with the adjacent properties on the West side. This is a reference to the MacKay plan of 1916 which has since been lost in a Church fire in 1971; coincidentally, the same year Mr. Bisbee obtained the contested 1971 Hunt survey. Mr. Cox said the plan was in a display case at the Church and he was shown it by Mr. Bower, another long time member of the Church. Mr. Cox said the Western boundary line of the Church property was a straight line from the MacKay property to the north and to Birchtown Bay to the south.

[19] The numerous aerial photographs dating from 1927 to 2000 show varying states of growth and use of the property at Hartz Point. While a very few of these could be used to support Mr. Guy's contention that the Hunt Line is the historic line, the vast majority of the photographs support the opposite contention. The ariel photographs show the Bisbee property in various stages of development and it is significant that roads, driveways and structures were all placed on the west side of

the line situated as contended by the Church. These photographs do not show any encroachment to the East of that line.

[20] Mr. Hebb surveyed the Thompson lot for Mr. Bisbee in 1961 and said he found the fence referred to in the documentation. It is significant that the Thompson lot is described as being bounded on the East by the Glebe Lands, although it was later surveyed and found to not lie precisely on the Western boundary of those lands. It is nevertheless very close and would explain the reason that that designation was used back in 1935 when Edward C. Acker conveyed the lot to Athenas A. Acker. The location of the Thompson lot is confirmed by all four surveys in evidence. Mr. Hebb testified that he found evidence, old blazes, fencing, etc., which led him to conclude that the boundary line between the Bisbee and Church properties was indeed a straight prolongation of the boundary line heading south from the MacKay property all the way to the shore of Birchtown Bay.

[21] Moreover, most of the lay witnesses who testified had either heard or been told that the beach on the disputed land was on the Church property or they had no knowledge of who owned the beach. While some local residents had heard the beach referred to as the Acker Beach or the Bisbee Beach, they had no other reason to believe Acker or Bisbee actually owned the beach. I find it was most probably referred to as such because of its proximity to the Acker and, later, the Bisbee property. Some residents accessed the beach by walking through the woods from the Bisbee property.

[22] Mr. Hunt located and blazed his controversial line in 1971, and he did so almost entirely on the basis that that is where Mr. Bisbee told him the line should be. The line is some 1460 feet long and Mr. Hunt testified he only found what he

concluded was one old blaze along that line. Mr. Hunt testified that he did not have or refer to maps such as those found at Tab 18 of Exhibit 1 and Tab 2 of Exhibit 2 when he performed his first survey in 1971. These were apparently not recorded at the time of his survey. He apparently had very little historical data when he plotted the Hunt Line in 1971. Those documents were later available when Mr. Hunt prepared his 1991 survey plan for the Bisbee heirs; however, he apparently did not consider it necessary or he inadvertently did not consult this historical documentation. Mr. Bisbee had not advised Mr. Hunt, in 1971, of Mr. Hebbs survey work in 1961. In my opinion the Hunt survey plan of 1991 and the Mark Whynot survey plan of 2001 do not add any weight to the 1971 Hunt plan; they are basically a retracing of the plan without any significant or indepth research.

[23] Philip Scott testified that he cut wood with his father on the Church lands around 1968. Mr. Scott said he was told by his father that the Western boundary of the Church property was a straight line and that the Church owned the whole point.

[24] The CNR maps or plans such as the one found at Tab 20 of Exhibit 1 also confirm that the historical location of the boundary line between the Bisbee (formerly Acker) property and the Church property was a straight north south line as contended by the Church. Mr. Berrigan, N.S.L.S., in his plan dated March 14, 1994 appears to also accept a straight boundary line between these two properties, however he did not testify and we therefore do not know how he came to note this on his plan.

[25] In the final analysis, on the whole of the evidence, although I have not recited all of the evidence, I am satisfied by the overwhelming preponderance of the evidence that the location of the actual boundary line between the Church and

Bisbee properties at Hartz Point was and continues to be as indicated on the survey plan of the Glebe Lands prepared and signed by Errol Hebb and dated December 12, 1997. I find there is no documentary evidence which could establish, on a balance of probabilities, that the line was as plotted and blazed on the ground by Robert Hunt in 1971 and 1991 or by Mark Whynot in 2001. The Hunt Line was brought about almost entirely on the basis of Mr. Bisbee's say so and there is no evidence to support or indicate why Mr. Bisbee may have been proceeding in that fashion. We know very little about Mr. Bisbee, only that Mr. Smith, his caretaker, described him as a difficult man to be or work with. Mr. Hunt testified that Mr. Bisbee's Deed does not indicate ownership of the disputed land.

[26] The result is that the paper title to the disputed land rests with the Church and not Mr. Guy. Having decided question # 1 in favour of the Church, it will not be necessary to decide question # 3. It is now necessary to decide questions # 2 and # 4.

ADVERSE POSSESSION - (THE LAW)

[27] **Question #2: If the historical location of the boundary line was as contended by the Church, has Mr. Guy acquired a possessory title to the disputed land?**

[28] This is a mixed question of law and fact. This topic was extensively canvassed in a recent case from our court of Appeal in a situation that has similar issues to the present case. There are certainly discoverability overtones to the present case as well as whether Mr. Guy has established all of the prerequisites for adverse possession. On these issues our Court of Appeal gave us a significant

amount of guidance in the case of *Spicer v. Bowater Mersey Paper Co.* [2004] N.S.J. No. 104; 2004 NSCA 39. In the judgment delivered March 16, 2004, Roscoe J. A., writing for the unanimous Court, quoted extensively from the governing authorities on these questions.

[29] Justice Roscoe commenced her review of the governing principles as follows at paragraph 8:

> ¶8 The principles governing the determination of this appeal are questions of law, what the acts of possession were is a question of fact and the application of the principles to the facts is a mixed question of law and fact. As will be developed in more detail later in these reasons, the conclusion reached by the trial judge is, in my view, based on an incorrect legal principle relating to the requirement for exclusivity as one of the elements of adverse possession, and the appeal should be allowed on that basis.
>
> ¶9 Although it is therefore not necessary to deal with the first ground of appeal which raises a question of law, I agree with the trial judge that the discoverabilty principle as developed by the Supreme Court of Canada in cases such as ***Kamloops v. Nielson***, [1984] 2 S.C.
> R. 2, and ***Central Trust Company v. Rafuse***, [1986] 2 S.C.R. 147 does not apply to sections 10 and 11 of the ***Limitations of Actions Act***, R.S.N.S. 1989, c.258.
>
> ¶10 The relevant sections of the ***Limitations of Actions Act***, state:
>
> > 10 No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress
> >
> > or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.
> >
> > ...
> >
> > 13 No person shall be deemed to have been in possession of any land, within the meaning of this Act, merely by reason of having made an entry thereon.
> >
> > **...**
> >
> > 22 At the determination of the period limited by this Act to any person for making an entry, or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished.

¶11 In order to determine whether the trial judge erred in concluding that the respondents had established possessory title, an analysis of the law of adverse possession and in particular the element of exclusivity is required. The following references are helpful in that respect.

¶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. [emphasis added]

¶13 In *Anger and Honsberger Real Property*. 2nd ed., 1985 at p. 1515 the necessary

possession to extinguish title is said to 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". [emphasis added]

¶14 In ***Lynch v. Nova Scotia (Attorney General)***, [1985] N.S.J. No. 456 (T.D.), Hallett, J., as he then was, noted:

> [7] The legal concept which allows a person to acquire possessory title good against the holder of the legal title is based on the premise that a legal owner cannot stand aside and allow a trespasser or co-tenant to make improvements to the property and pay the taxes over many years and then come in and claim it, even though he could see the other was in possession. As a safeguard to the legal owner, the courts have insisted that the possession be of the quality described before the legal owner's title is extinguished; otherwise there could be great injustices if by doing sporadic, unobservable acts on the land a person could acquire possessory title. Hence the care which should be taken by a court before a finding is made that the title of the legal owner to woodland in particular, is extinguished as the acts relied upon are very often sporadic in nature and unobserved by the true owner yet can qualify as being acts that are consistent with the limited use a person who owns land of that nature would make of such land.
>
> 8 As claims for possessory title extinguish the title of the legal owner pursuant to a limitations *Act*, the court should only act on very cogent evidence that proves that the person's possession has been visible, exclusive and continuous possession for the required statutory period. Legal owners should not be dispossessed where land is such that the legal owner would not make a great deal of use of the land, such as wood land, particularly if the claim is made not by a trespasser but by one co-tenant or more against others. Section 12 of the *Limitation of Actions Act* provides that no person shall be deemed to have been in possession of any land within the meaning of the *Act* merely by reason of having made an entry thereon. Where the acts of possession relied upon with respect to wood land are the occasional unobserved cutting of logs and firewood from the property, such acts do not improve the property even though they evidence the intention of one co-tenant to possess it exclusively. It cannot be too strongly emphasized that evidence of possession to extinguish title must be of a quality that has been required by the courts for hundreds of years. Each case turns on its own facts. [emphasis added]

¶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:
>
> > 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. [emphasis added]

¶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.

¶17 In ***Carson v. Musialo***, [1940] 4 D.L.R. 651, [1940] O.J. No. 246 (Q.L.)(C.A.), a case dealing with a small strip of land that the claimant had fenced in with her own land, Robertson, C.J.O. said as follows:

> ... the so-called acts of possession upon which plaintiff relies are no more than a series of petty trespasses to which no owner would be likely to object, and they fall far short of establishing actual and constant possession of the land over any definite period of time.
>
> ... The acts of possession relied upon were not such an occupation of the land as to prevent the owner from entry upon the land at any time he desired to do so.

¶18 In ***Sherren v. Pearson*** (1887), 14 S.C.R. 581 , Henry J. who agreed with the majority, said:

> In all the provinces the law is well settled that acts of trespass cannot amount to what the law requires to give title under the statute of limitations, that is, the ouster of the true owner. An act of trespass in going on the property amounts to a disseisin for a time, but it is not an ouster; what the law requires is an ouster of the owner for twenty years. Numerous acts of trespass only amount to so many acts of disseisin; when a man trespasses on the land the true owner ceases to have full possession for the time being; but the moment the trespass is at an end the trespasser's disseisin is at an end and the complete possession is again in the actual owner. It is therefore required that the party should not only take possession, not only disseise the owner, but that he should continue that dissiesin so as to amount to an ouster, and that ouster maintained for the statutory period. That can only be done by some act of possession not merely by a temporary disseisin, and it must be over every inch of the land of which the party claims possession.
>
> [emphasis added]

[30] Justice Roscoe went on to state her own views as follows:

> ¶22 In this case, the prerequisite that the respondents clearly failed to prove, in my opinion, was that of exclusivity. Possibly, because at the trial the appellant argued primarily that the possession was not open and notorious, or continuous, the trial judge overlooked the requirement that the possession of the trespasser must dispossess the true owner and it is insufficient if the trespasser's possession is merely a possession shared with others during the relevant period of time. Here there was uncontradicted evidence that the respondents did not lock the cabin, that it was open for others to use, was used by other hunters and passers by, without permission of the respondents, and in fact employees of the appellant had been in the cabin on more than one occasion. The use by the respondents of the half acre of land did not in any way interfere with the normal use and occupation of the appellant. The appellant did not abandon the land. The evidence was clear that the appellant's use of the huge tract was to survey or cruise the forest on a routine basis, every five years, to determine the density, variety, and maturity of the trees, and to clear cut large portions of the forest when sufficient growth had been reached. The appellant paid the taxes on the land for all the years in question as well. Nothing done by

the respondents interfered with that use by the appellant or excluded the appellant from the land.

¶23 While I have focused chiefly on the exclusivity issue, and it is not necessary to deal with the other elements of possession, nothing herein should be taken to confirm the finding by the trial judge that the limitation period in this case began to run in 1975 when the respondents first built the camp. Although I do not agree with the appellant's contention that the discoverability rules adopted in contract and tort cases should apply to adverse possession matters, the common law already has a built-in safeguard in these cases in the requirement of proof of "open and notorious" possession. The nature of the required acts would generally bring them to the attention of a reasonably prudent owner. But the protection from undiscovered adverse claims lies in the nature of the required acts of adverse possession, not the so-called discoverability rule. In a case like this, where the lands consist of a vast wilderness not accessible by road, the date the limitation period begins to run may not coincide with the time of the entry by the squatters. Although the cabin was apparently known to other trespassers before 1981, it was not visible from the lake or in aerial photographs. It was when the road was built in 1981 that it became plainly open and notorious. I question whether there was proof by the claimants, by cogent evidence, that the appellants ought to have known of their entry on its land as early as 1975. In my opinion, the evidence in that respect was, at best, dubious.

ADVERSE POSSESSION - (ANALYSIS)

[31] Mr. Guy contends that he and his predecessors in title, in particular the Ackers, Mr. Bisbee and Ortiz and Arroyo have now defeated the Church's title to the property through adverse possession. Part of that argument is that the Church knew of the change in municipal property tax maps showing the disputed property as part of the Bisbee property about 1973. This is based on the Statutory declaration of Mr. Bower found at Tab 29 of Exhibit 1. At paragraph 17, Mr. Bower declared that he became aware of Bisbee's claim around 1973; however, he goes on to say in paragraph 18 that he is not aware of any interest or claim that is adverse to that of the Church. He obviously bases that latter conclusion on his previous statement that the Church has been in open, continuous and exclusive possession of the lands illustrated on the attached CNR map since it was granted by the Crown. There is certainly no evidence that Mr. Bower was aware of any

actual and exclusive adverse possession by Mr. Bisbee.

[32] The evidence discloses that only one or two acts which might be considered as acts of adverse possession were ever perpetrated by Mr. Bisbee, or more precisely, his representative, successors or agents. These were the surveys by Mr. Hunt in 1971 and 1991 and the blazing of the Hunt Line on both those occasions. These would be no more than acts of trespass and there is not one shred of evidence to show any other use or occupation of the disputed lands by Mr. Bisbee or his predecessors or successors. Quite the contrary. Mr. Bisbee constructed all his roads, driveways and structures to the West of the disputed line, as had the Ackers. There is no evidence that Mr. Bisbee cut any trees on the land or otherwise worked the land. Apparently, Mr. Smith who was Mr. Bisbee's caretaker for a number of years, took it upon himself to walk the disputed land on occasion and renew some lines, but this was not at the direction of Mr. Bisbee or to the exclusion of anyone else. Mr. Bisbee or his successors did not in any way exercise any dominion or control over the land at any time, unless one considers the 1971 and 1991 surveys as such. There is no evidence that Mr. Bisbee took any firewood or timber from the disputed property. There is not even any evidence that Mr. Bisbee or his predecessors or his successors used the beach regularly, although they appear to have used it occasionally. People from the community accessed and used the beach on the disputed property, either through the Bisbee or the Church Land, unimpeded by Mr. Bisbee or his predecessors or his successors.

[33] Members of the Church first became aware of the Hunt Line in the late 1980's when they were considering selling the Hartz Point property. It is true that they did not formally challenge the Hunt Line until 2000 or 2001 when they again considered selling the property. It appears that Mr. Bisbee was most probably

paying the property taxes on the disputed land, but I am not satisfied, on a balance of probabilities, that the Church was aware or mindful of this fact. Mr. Guy argues that the registration of the 1971 and 1991 Survey Plans are also acts of adverse possession. In my view, the registration of those plans does not constitute any form of possession, but even if it were considered acts of possession, it does not amount to continuous or exclusive possession such as to oust the true owner. They are merely confirmation of the earlier trespasses. In any event, I have found that the Church was not actually aware of the Hunt Line until the late 1980's, around 1986 or 1988, as testified to by Mr. Cox and others, and as such, the Hunt Line would not have been known to the Church for 20 years or more.

[34] In the final analysis, in all the circumstances of this case, the actions of Mr. Bisbee, or that of his predecessors or his successors, did not and do not, in law, constitute sufficient acts of adverse possession to prove possessory title and to oust the Church, the true owner and paper title holder.

LACHES

[35] **Question #4: If the historical location of the boundary line was as contended by the Church, has the Church been guilty of such laches as to be barred or estopped from now advancing or enforcing its historical title and right to ownership of the disputed land?**

[36] Before proceeding to analyse the defence of laches in the circumstances of the present case, it is both helpful and important to clearly and precisely understand Mr. Guy's position and arguments in this regard. The Church filed its post-trial submissions on the issue of Laches dated March 2, 2005. In those

submissions, the Church went to great lengths to cite authority for the proposition that laches did not apply to the present case. It contended the doctrine of laches could not be used to alter the requirements of sections 10, 13, etc. of the *Limitation of Actions Act*, *supra*, and it cited the recent case of *MacDonell* v. *M & M Developments Ltd.*, (1998), 165 N.S.R.(2d) 115, a decision of our Court of Appeal, in support of its position. In his post-trial submission dated April 13, 2005, Mr. Guy makes it clear that he is in agreement with the Church in this regard. As I understand it, Mr. Guy is contending that he has established at trial, on a balance of probabilities, that his predecessors in title had ousted the Church's title to the disputed portion of the Glebe Lands through the requisite adverse possession for the required continuous period of twenty years or more, and, that because of delay or acquiescence by the Church, its present assertion of its ownership should he barred or estopped. In this regard, Mr. Guy contends that, in view of the alleged laches of the Church, he has either been compromised in his ability to establish his predecessors' adverse possession, or, in the alternative, the court should reduce or lessen the evidentiary requirement to establish such possession.

[37] One aspect of the delay or acquiescence argued by Mr. Guy is based on the allegation that the church was well aware of Mr. Bisbee's claim to the disputed lands in 1968, primarily because there is mention of a possible survey of those lands in a 1968 meeting of the church. It would be a quantum leap to assume or infer that those minutes refer to an adverse claim by Mr. Bisbee. The first Hunt survey and disputed line were not effected until 1971. Moreover, Mr. Scott testified that, in 1968, he was free to cut anywhere on the Church Lands which he testified he understood to include the whole point.

[38] The assertion by Mr. Guy that the evidence establishes more than 20 years

adverse possession by Mr. Bisbee and his successors dating back to 1968 is, with all due respect and for reasons already mentioned, not correct. Similarly, the assertion by Mr. Guy that the evidence establishes adverse possession by Mr. Bisbee's predecessors in title, the Ackers in particular, is not correct. I found, when dealing with adverse possession earlier in my ruling, that there was no such evidence. I, in fact, found to the contrary. No amount of reduction of the evidentiary burden can make up for the absence or lack of evidence.

[39] The only event which could come close to qualifying as an act of delay or acquiescence is the statement made by Mr. Bower in his statutory declaration regarding the change to the municipal property maps which Mr. Bower says he became aware of in 1973. I have also dealt with this issue previously in my decision. There was no evidence that the Church was aware in 1973 that Mr. Bisbee was or may have been paying property taxes on any part of the Church's lands, or that they were mindful of that fact.

[40] As I have stated earlier, the Church became aware of the 1971 Hunt Line in the late 1980's sometime between 1986 and 1988. There can be no question that the Church dragged its feet in failing to deal with the disputed Hunt Line until the year 2000. Since the delay in dealing with the disputed line is only some 12 to 14 years, it cannot constitute the requisite adverse possession to oust the true owner, or barr it from asserting its title.

[41] In my view, the fact that Mr. Bisbee and his heirs may have paid municipal taxes on the disputed land since 1971 or 1972 is not sufficient in these circumstances to trigger the application of the doctrine of laches or equitable estoppel. Significantly more would be required. Moreover, there can be no

question of prejudice or detriment to Mr. Guy personally because he acquired the Bisbee property with the full knowledge of the contest and court action regarding the disputed lands and he agreed to become the party defendant.

[42] Mr. Guy has asked the court to infer that, with the passage of time, several persons who could have been witnesses in these proceedings have passed away, but there is no evidence which indicates that any deceased persons' testimony would have been crucial to Mr. Guy's defence.

[43] In the final analysis, on my findings of fact in this case, there is no evidentiary basis which could satisfy the requirements of a laches or estoppel defence and I must therefore reject Mr. Guy's argument in this regard.

CONCLUSION:

[44] In summary, the Church is entitled to an order confirming its title and ownership of the disputed lands, consistent with Mr. Hebb's December 12, 1997 survey of the north/south boundary line between the Guy and Church lands.

[45] I will hear the parties on the question of costs in chambers at a time and place convenient to all, arranged through my office. I am scheduled to be in Halifax the period January 30 to February 10, 2006.

Boudreau, J.