<u>**IN THE SUPREME COURT OF NOVA SCOTIA**</u>
Citation: Boudreau v. Pellerine, 2010 NSSC 188

Date: 20100505
Docket: 292004
Registry: Antigonish

Between:

David J. Boudreau

Plaintiff

v.

Ernest Pellerine, Charles Daniel Pellerine, Godfrey Adrian Pellerine, Eugene Abraham Pellerine, Robert Pelrine, Placide John David, Louise Casey, Michael Duquette, Victor David, Attorney General of the Province of Nova Scotia, Duncan J. Bellefontaine and Robert Bellefontaine

Defendants

DECISION

Judge: The Honourable Justice Douglas L. MacLellan

Heard: April 12th, 13th, 14th, 15th & 16th, 2010, in Antigonish, Nova Scotia

Counsel: Hugh MacIsaac, for the plaintiff

J. Gregory MacDonald, QC, for the defendants, Ernest Pellerine, Charles Daniel Pellerine, Godfrey Adrian Pellerine, Eugene Abraham Pellerine and Robert Pelrine

James C. MacIntosh, for the defendants, Placide John David, Louise Casey, Michael Duquette, Victor David, Duncan J. Bellefontaine and Robert Bellefontaine

By the Court:

[1] The plaintiff, David J. Boudrean, claims by originating notice (action) that he is the owner of certain lands at Port Felix, Guysborough County, Nova Scotia, based on the concept of adverse possession. He requests that he be granted a Certificate of Title in Fee Simple to lands pursuant to the ***Quieting of Titles Act***.

[2] The land in question is a lot containing 116 acres more or less as described in Schedule "A" of a Crown grant made to Joseph David and Simon Pelraine dated July 3rd, 1857.

[3] The Plaintiff obtained a deed to the lot in September 1986 from two descendants of one of the original owners of the land granted by the Crown.

[4] In February 2008 the plaintiff commenced his action under the ***Quieting of Titles Act*** and he has complied with all of the requirements required under that statute. As a result of the publication of his claim in the local newspaper a number of the defendants came forward and were added to the action.

[5] At the start of this trial it was agreed by all counsel that the plaintiff and all of the defendants have standing to claim a part ownership of the said property based on their ancestors or on deeds from descendants of the two original owners.

[6] The abstract of title presented with the claim of the plaintiff indicates that there were no deeds recorded during the period from 1857, the date of the original Crown grant, to 1986 when the plaintiff recorded his deed of the property from two individuals claiming to be heirs at law of the late Joseph David and Simon Pellerine.

[7] Based on the agreement between counsel here it is not necessary for me to determine if in fact all the parties involved in the action are in fact heirs at law of the original grantees of the land.

[8] Counsel agree that the issue to be determined is whether the plaintiff can prove that he has been in adverse possession of the said property for at least 20 years prior to the commencement of his action.

[9] It is also agreed that the plaintiff must show that his possession of the property was open, notorious, exclusive and continuous, and therefore the limitation of actions would apply and the defendants as part owners of the property cannot maintain an action to put them back in possession of the property.

Background Facts

[10] The plaintiff became familiar with the property here because his father, Patrick Boudreau, owned a 40 acre lot located on the south boundary of the 116 acre lot. Both lots are located on Second Lake or Sand Lake in a remote area of Guysborough County. The lot here is an L-shaped lot which is abounded on the east and north by Crown land. The southern boundary is part Crown land and the rest by the plaintiff's father's former property. The plaintiff was deeded that 40 acre lot by his mother after his father died in 2006.

[11] The other boundary of the lot is now also claimed by the plaintiff based on a deed he obtained from persons who had an interest in that property.

[12] In 1969 the plaintiff testified that he built a cabin located on the southwestern corner of the lot involved here. He said that was so he could use it for fishing on the lake and hunting the woods surrounding the cabin. He said he was aware that the cabin was not on his father's land and was in fact located on the adjoining lot to the north.

[13] He used the cabin until 1984 when the cabin roof caved in after a storm and it could not be used. During the period after building the cabin the plaintiff also dug a well near the cabin. In 1986 the plaintiff investigated with the County of Guysborough whether he could get a deed to the 116 acre lot. He became aware that it was still owned by the heirs at law of the original grantees. He therefore arranged to find two persons claiming to be heirs at law and got a deed to the property. He recorded the deed and started to take possession of the lot. His view was that since he had a deed and nobody else was using the property that he was in fact the owner.

[14] He contacted the County of Guysborough and was placed on the assessment rolls and began to receive tax bills. Records introduced at trial show he was

assessed for taxes starting in 1988. The plaintiff testified that in fact he started paying taxes in 1987 and that the county records only go back 20 years.

[15] The plaintiff then contacted the Crown through the Department of Lands and Forests and requested that he be given permission to build a road over Crown lands so that he could access the 116 acre lot. That process took some time but eventually resulted in his getting that permission in May 1988. During that process the plaintiff entered into a partnership agreement with Cecil Cashin to share the cost of the construction of the road. The agreement between them provided that Mr. Cashin could use the road once constructed and the plaintiff would not sell the land he owned without Mr. Cashin's permission.

[16] The construction of the road involved a considerable amount of time and finances which were shared equally between Mr. Cashin and the plaintiff. It was finished in the spring of 1989.

[17] At that point the plaintiff and Mr. Cashin began their plan of developing and using the 116 acre lot and the plaintiff's other three lots in the area. The total amount of land he was claiming at that point was 356 acres made up of his father's

40 acre lot, the 116 lot in issue here and two lots on the north and the south, each containing 100 acres.

[18] They started a Christmas tree project which lasted for about five to seven years but resulted in failure because of a number of problems with growing trees suitable for Christmas trees. They also started cutting pulp on all four lots.

[19] Over the course of the years between 1989 and 2000 they removed about 2,000 cords of pulp from the four lots and approximately 800 cords of pulp from the 116 acre lot.

[20] That process involved the cutting of the pulp by both the plaintiff and Mr. Cashin and then they engaged a contractor to haul the pulp to an area where it could be loaded on a large truck to be taken to the pulp mill. The pulp once cut would be transported by a vehicle called a porter.

[21] I heard a lot of evidence about how the plaintiff cut the pulp off the lots and I have seen aerial photographs of the lots during the years 1971, 1986, 1991, 1997 and 2007. Those photographs show how the road, which originally ran from the

highway over the Crown land to the edge of the 116 lot, was extended so that lot was harvested and then beyond that lot to the other lots owned by the plaintiff.

[22] During the period prior to 2008 the plaintiff and Mr. Cashin were also involved in a silviculture program which was intended to reforest the area cut over. They received funding from government programs to do that. They also received funding for the roads they built on all the lots claimed by the plaintiff. They did not receive funding for the road over the Crown land.

[23] When the plaintiff built the road over the Crown land he was allowed to install a gate at the public highway to stop people from travelling over it to the 116 acre lot. He had a lock placed on the gate. The Department of Lands and Forests approved that procedure.

[24] In December 2007 Mr. Cashin received a call from one Duncan Bellefontaine, who asked him to provide a key to the lock to the road gate. Mr. Bellefontaine was claiming that he had an interest through his ancestors in the 116 acre lot.

[25] Mr. Cashin did not provide Mr. Bellefontaine with the key and Mr. Bellefontaine later obtained a key from the Department of Natural Resources officials and he testified that he and his son then entered through the Crown road to the 116 acre lot where they proceeded to cut a number of cords of pulp. It was removed from the area. As a result of that action by Mr. Bellefontaine this action resulted.

[26] Cecil Cashin testified that he has been friends with the plaintiff for many years. He used to go to the plaintiff's cabin between 1969 and 1984. He said he shot his first deer at the cabin in 1970.

[27] He said that he is part owner of another cabin located on the 40 acre lot to the south of the lot involved here. He now owns it in partnership with Patrick Casey.

[28] He said that in 1987 he and the plaintiff entered into an agreement to build a road into the plaintiff's three lots located on Second Lake (Exhibit 1, Tab 14). He said that the plaintiff had approached him to become involved a commercial

operation on his lots and was proposing that they approach the Crown to get permission to build a road so the pulp could be removed from these lots.

[29] He said that after he signed the agreement he went onto the lots and noted that the plaintiff had already been doing some work on the lots at that time, and in particular a small Christmas tree lot. He said that they decided to approach the Department of Lands and Forests for permission to build the road, but prior to getting that permission they did some basic work on the 116 acre lot. The Christmas tree operation continued until about 1991 or 1992. It never resulted in any commercial success.

[30] Mr. Cashin said that by 1999 or 2000 all the pulp cutting was finished on the lots and that the plaintiff then applied for and obtained funding to do silviculture work on all of the lots including the 116 acre lot.

[31] He said that during all the time he worked with the plaintiff harvesting pulp from all the lots he was never approached by any of the defendants to object to that work being done.

[32] He said that in December of 2007 Duncan Bellefontaine approached him about getting a key to the lock on the gate. He said that after that approach he visited the lot on a regular basis and did not observe any cutting by Mr. Bellefontaine until January 4th, 2008, when he saw Mr. Bellefontaine and his father cutting pulp next to the road. He said that a couple of days later he saw them removing loads of pulp from that area.

Defendant's Evidence

[33] Brian Michael Duquette testified. He is one of the defendants in this action and it is acknowledged he has a claim to the land in question based on being an heir of one of the original owners. He indicated that the plaintiff told him at one point that he, the plaintiff, owned the land and that his father had given it to him.

[34] He said that for the last five years he has entered onto the 116 acre lot for the purpose of hunting, snaring rabbits and cutting lobster rings. He said after the plaintiff built the road over land he went to the property to have a look.

[35] On a cross-examination Mr. Duquette said his conversations with the plaintiff about his deed was in 1988 or 1989. He said when he drove into the lot he saw the plaintiff cutting pulp on the lot. He said that the plaintiff was driving a porter at that point. He said that the plaintiff told him to stay off the property.

[36] Patrick Casey is also a defendant and it is acknowledged that he has an interest in the lot based on a conveyance from his wife of her interests as an heir of the original owners. Mr. Casy is 68 years old and has lived in Port Felix for the last ten or 12 years. He formerly lived in Halifax.

[37] He said he used to go to the lot with his father in law and in fact in 1974 became a part owner of a camp on property which was formerly a part of the plaintiff's father's 40 acre lot. That cabin is located just to the south of the 116 acre lot. Cecil Cashin is the other present owner of that camp.

[38] He said he used to access that camp by travelling from Port Felix over old hauling trails and by using the river. He said that after 1990 they would travel to the camp by way of the road built by the plaintiff and Mr. Cashin.

[39] He said the plaintiff told him he had purchased the 116 acre lot from the County of Guysborough.

[40] Mr. Casey said that in 2006 he fixed up his old camp and started using it more often. It had not been used for about 17 years because one of the part owners at that time had drowned in the lake.

[41] He said at one point the plaintiff told him he couldn’t use the road he had built over the Crown land to get to his camp.

[42] Mr. Casey said that he was aware of the pulp harvesting done on the lot but that he felt that there was not much silviculture work after the pulp harvesting was completed.

[43] Mr. Casey said that he beached his small boat on the shore of Second Lake on the 116 acre lot. He said that in 2007 he cut a trail down to the shore so he could bring his boat in to that spot.

[44] Mr. Casey said that the plaintiff told him in 1997/1998 that he had a tax deed to the land. He said he found out in 2005 from his half brother, Duncan Bellefontaine, that what the plaintiff said about a tax deed was not true.

[45] He said that when he found that out he asked the plaintiff's wife for a key to the lock on the road gate. He said she told him that the plaintiff wanted $100.00 for a key.

[46] On cross-examination Mr. Casey said that prior to his moving back to Port Felix in 2000 he used to walk into the lot on the plaintiff's road. That was when he asked the plaintiff if he owned the property. He said that it was at that point that the plaintiff told him that he had bought it from the County of Guysborough.

[47] He said he didn't do anything to challenge the plaintiff's use of the property because he didn't have any interest in property until his wife deeded her interest in it to him.

[48] He said that in 2004 or 2005 he asked the plaintiff's permission to go over the lot to get to his camp. He said the plaintiff told him he could use it but that he

would have to talk to Cecil Cashin. He said Mr. Cashin told him that he could walk over the land but not to use vehicles. He said that was in 2007 or 2008.

[49] Duncan Bellefontaine is a defendant here and has an interest in the lot as an heir to one of the original owners. He is 53 years old and has always lived in Port Felix. He said that in 2006 his father, Duncan C. Bellefontaine, gave him a quit claim deed to his interest in the 116 acre lot. His father is an heir of one of the original owners of the lot.

[50] Mr. Bellefontaine said he was aware that the plaintiff did a lot of work on the lot and that in fact he worked for him doing silviculture work on the lot. He said that he always assumed that the plaintiff had title to the lot but that in 2006 he had a title search done and discovered that the plaintiff had only a partial interest based on a deed from two heirs of the original owners.

[51] He said that when he discovered that he decided to enter onto the property to assert his claim. He did that on the advice of his lawyer who had advised him that he was entitled to cut wood on the property. He said in January 2007 he and his father went around the locked gate on the road and travelled onto the lot where at a

point some distance from the road near Mud Lake they cut four wheeler loads of firewood which they took out on the road. They stopped at that point because of the weather conditions. He said that later in 2007 he contacted the Department of Natural Resources about getting a key to the lock on the gate. He was told to contact Mr. Cashin. He said he did that in December 2007 but that Mr. Cashin did not agree to give him a key. He said he got a key from DNR and in late 2007 or early 2008 went onto the land and took ten one tonne truckloads of pulp off the property. He said that would be about five cords of pulp. He said during that cutting Cecil Cashin came to observe what they were doing and was aware of it.

[52] Mr. Bellefontaine said that during the period prior to his finding out that the plaintiff wasn't the full owner of the property he would go on the property to hunt and to set rabbit snares.

[53] He said that in 2008 he asked the County to bill him for the taxes to the lot and that he paid taxes for the tax year 2008.

[54] Mr. Bellefontaine acknowledged on cross-examination that the plaintiff cut about 80% of the wood on the lot during the years he worked there after 1989.

[55] Victor David is 66 years old and lives near Port Felix. He came back to Guysborough County in 1981 after being in the Armed Services.

[56] He has an interest in the property as an heir of one of the original owners.

[57] He said that during the 80's he used to hunt on the lot. He said that everyone in the community did that. He said people used the property for snowmobiling and to get to the lakes in the area. He said a number of people had camps on the lake and people would travel from one camp to the other. He said he visited the plaintiff when he had a camp in the area and in fact stayed overnight a couple of times.

[58] He said that in 1984 he talked to the plaintiff about cutting wood on the land around the camp and that the plaintiff refused him permission to do so.

[59] He said that in 1993 he met the plaintiff on the road into the property and that the plaintiff told him to get off the property.

[60] He said that he assumed when he saw the plaintiff cutting pulp on the lot that he owned it because he had been told by the plaintiff's father that he had given land in that area to his son, the plaintiff.

[61] He also said he didn't object to the plaintiff's use of the land because he wasn't aware that he himself had an interest in the land.

[62] All the other defendants except Ernest Pellerine have not testified. Mr. Pellerine's evidence was not an attempt to establish acts of possession towards the lot during the 20 year period in question here. I understand all the defendants to take the position that the plaintiff has not proven adverse possession to oust their claim to ownership of the lot.

The Law

[63] The ***Quieting of Titles Act*** provides:

> "**Certificate of title after trial**

12(1) Where, after the trial or determination of all issues of law and fact between the parties, it appears that a party claiming a certificate of title is entitled to some property right in the land, whether it is the property right claimed or not, the court or a judge may order that a certificate of title be issued to the claimant for the property right to which the claimant has been found entitled.

Possession for twenty years

(2) Where it appears that the plaintiff or the plaintiffs predecessors in title have been in possession as owners or part-owners for twenty years prior to the commencement of the action and during that time a person, whether or not the persons whereabouts are known, has or may have an interest in the lands forming the subject-matter of the action and such person has not received any benefit, paid any expenses or exercised any proprietary rights in respect to said lands, the judge may order subject to subsection (3) that the interest of such person vest in the plaintiff.

Payment into court

(3) Where the judge finds that a person, other than the plaintiff, has an interest in the lands, the judge shall determine the value of that interest and shall direct that the plaintiff pay into court such amount, for such period and on such conditions as will secure the interest of such person."

[64] The ***Limitation of Actions Act*** provides as follows:

"**Action respecting land or rent**

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.
>
> **Effect of entry on land**
>
> 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.
>
> **Claim extinguished**
>
> 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."

[65] This action was started in February 2008. By this action the plaintiff claims that any rights to the land in question held by the defendants have been extinguished because the plaintiff as a co-owner of the property has occupied the property in circumstances that was open, notorious, continuing and exclusive for a period of 20 years and that therefore the defendants cannot now enforce their right as part owners to re-enter or take possession of the land.

[66] Counsel for all the parties have provided me with a number of cases dealing with the issue of adverse possession situations.

[67] In ***Rafuse and Rafuse v. Meister***, [1979] N.S.J. No. 566, the Nova Scotia Court of Appeal set out the law as established by the case law when at paragraph 29 Pace J.A. said:

> "In Ezbeidy v. Phalen (1958), 11 D.L.R.(2d) 660, MacQuarrie, J., at p. 665 stated:
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> '...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.
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> In Des Barres v. Shey (1873), 29 L.T. 593, 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.'
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> Cf. Halifax Power Co. v. Christie (1915), 23 D.L.R. 481, 48 N.S.R. 264.
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> 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.
>
> Where the contest is between the true owner on the one hand and a person having colour title on the other hand, that is, a person having a claim which is good on the face of it, such as a prior unregistered deed, that person has a much lighter burden to discharge than a mere squatter, because he always has the mental attitude, or is presumed to have it, which is a necessary ingredient to possession. He does not have to prove that discontinuous acts are not simply disjointed acts of trespass as a squatter must show, and in this case possession of a part is constructive possession of all the land comprised or covered by his colour of title: cf. Lessee of Cunard v. Irvine (1853), 2 N.S.R. 31."

[68] In ***Conrad v. Nova Scotia (Attorney General) et al.*** (1994), 136 N.S.R.(2d) 170, the Nova Scotia Court of Appeal once again dealt with the issue. In that case Jones, J.A., said:

> "**[25]** In **Sherren v. Pearson** (1887), 14 S.C.R. 581 and **Wood v. LeBlanc** (1904), 34 S.C.R. 627 the Supreme Court of Canada dealt at length with the type of possession necessary to extinguish the title of the true owner. In **Wood v. LeBlanc**, Davies, J., stated at p. 633:
>
>> '... The nature of the possession necessary to do this in the absence of colourable title was fully considered by this court in the case of **Sherren v. Pearson** 14 Can. S.C.R. 581. It was there decided that isolated acts of trespass committed on wild lands from year to year will not, combined, operate to give the trespasser a title under the statute.

In the carefully reasoned opinions of the judges in that case statements on the point are made which do not seem to leave the matter open to any doubt. Chief Justice Ritchie formally approved of the law as laid down in **Doe d. DesBarres v. White** 3 (N.B. Rep.) 595 and at p. 585 goes on to say:

> 'To enable the (trespasser) to recover he must show an actual possession, an occupation exclusive, continuous, open or visible, and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose.

And in another place he says,

> the trespasser to gain title must as it were "keep his flag flying over the land he claims".'

Strong, J., and Fournier, J., concurred. Taschereau, J. (now the Chief Justice of this court, said (pp. 594-595)):

> 'The fact that the wrongdoer or trespasser supposes he has a claim or title to the land does not alter the character of his acts. His unfounded belief cannot diminish or destroy the legal claims of the true owners or deprive them or their right to treat him as a wrongdoer in entering on their land. The effect to be given to repeated entries upon the land, or acts of user or possession, depend largely upon the nature of the property. What might be sufficient evidence in the case of cultivated lands to go to a jury would not constitute any evidence in those of wilderness lands. If the property is of a nature that cannot easily be protected against intrusion, mere acts of user by trespassers will not establish a right.

> Owners of wilderness or wooded lands lying alongside or in rear of other cultivated fields are not bound to fence them or to hire men to protect them from spoliation. The spoiler, however, does not by managing without discovery even for successive years to carry away valuable timber, necessarily acquire, in addition, title to the land.
>
> The law does not so reward spoliation.'

Henry, J., said (p.592):

> '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 disseisin 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 land of which the party claims possession.'

Now, in my judgment, the possession necessary under a colourable title to oust the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed but only when and while there is that part occupation. And before it can be extended it must exist and is only extended by construction while it exists. It may be that a person with colourable title engaged in lumbering on land would be held while so engaged and in actual occupation of part to be in the constructive possession of all not actually adversely occupied even if that embraced some thousands of acres within the bounds

> of his deed. But it is clear to my mind that if and when such person withdraws from the possession of the part by ceasing to carry on the acts which gave him possession there he necessarily ceases to have constructive possession of the rest. His possession in other words must be an actual continuous possession, at least of part.'"

[69] In ***Lynch v. Lynch*** (1985), 71 N.S.R.(2d) 69, Hallett, J., of the Nova Scotia Supreme Court (as he then was) dealt with a claim based on adverse possession in a conflict between siblings who each had inherited an interest in the property in question. He said:

> "**[6]** There are certain basic principles that must be applied where a party seeks to establish a possessory title against co-tenants.
>
> > 1. The holder of the legal estate in land is deemed to be in possession until he is dispossessed by another going into possession.
> >
> > 2. The title of the holder of the legal estate is not extinguished until the expiration of twenty years from the time the person claiming the possessory title first went into possession; if the holder of the legal title is outside the province, the period is forty years.
> >
> > 3. It is a question of fact whether a party claiming possessory title has exercised acts of possession with respect to the lands of a kind sufficient to extinguish the title of the legal owner.
> >
> > 4. The acts of possession relied upon must be such that they constitute proof that the possession was actual, continuous, open, notorious, visible, exclusive and adverse for the statutory period, be it twenty or forty years.

These words are not an idle litany but describe in detail the nature of the possession that can ripen into a possessory title.

5. The burden of proof is on the person seeking to extinguish the title of the legal owner to prove acts of possession that are capable of extinguishing title considering the nature of the lands and other circumstances.

6. Section 10 of the **Limitation of Actions Act**, R.S.N.S. 1967, c. 168 and amendments thereto, specifies when the time starts to run against the legal owner that can lead to extinguishment of his title. When time begins to run depends on the legal circumstances associated with the entry by the person claiming the legal owner's title has been extinguished. Title is extinguished pursuant to section 21 of the **Act** which provides:

> '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.'

7. The exclusive possession of one or more tenants in common is sufficient to extinguish the title of the other tenants in common if for the required statutory period. If more than one tenant in common is in possession for the required period, that possession is exclusive vis-à-vis the other tenants in common whose interests are thus extinguished. This is so because of the provisions of section 14 of the **Act** which provide as follows:

> 'Where any one, or more, of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or

> their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them.'

> 8. While the nature of the land and nature of the acts performed thereon are factors to consider, including the payment of taxes by the person in possession, each case turns on its own facts and before a court should order that the title of the legal owner has been extinguished pursuant to the **Act**, the evidence must establish acts of possession that clearly prove that the legal owner's title has been extinguished. Cases like **Kirby v. Cowderoy**, [1912] A.C. 599; 5 D.L.R. 675, where the only act of possession was payment of taxes, cannot be applied to every factual situation.

> **[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 wood land, 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."

[70] In ***Duggan v. Nova Scotia (Attorney General)*** (2004), 222 N.S.R.(2d) 229 Moir, J., of this court canvassed the issue of adverse possession claims. He commented on the general approach to the issue and said:

> “[107] General Approach - Some authorities have emphasized the consequence of depriving the true owners of their title, as Justice Hallett did in Lynch v. Nova Scotia, [1985] N.S.J. 456 (TD) at para. 8 when he required very cogent evidence of visible, exclusive and continuous possession. In some circumstances, courts have emphasized the practical object of the Quieting of Titles Act when possession has been proven, as Justice Hallett did in Bowater Mersey Paper Co. v. Nova Scotia, [1987] N.S.J. 170 (SC, TD) affirmed [1988] N.S.J. 84 (SC, AD) at para. 12. Possessory title plays a mundane role in land use throughout this province. In urban settings, where in years gone by subdivisions were laid out without the precision of modern surveying, one might find, as Mrs. Dempsey did, that the total area of all legal descriptions in a city block exceed the actual size of the block: Dempsey v. J.E.S. Developments Limited (1976), 15 N.S.R. (2d) 448 (SC, TD) affirmed N.S.R. (2d) (SC, AD). Even with precise surveying, sensible people will tolerate some shifting of boundaries by use. The Limitation of Actions Act and the law of possessory title permit neighbourhoods to peaceably determine boundaries. In rural areas, where a grant of land made in another age may not have been found to have had much value, whole neighbourhoods will depend on possessory title not only to enforce boundaries created by use and tolerance, but to establish their very titles. We have seen some of that in this case with some of the established lots along the highway. So, the law concerning extinguishment of title by adverse possession involves some balance between respect for the interests of true owners and the practicality of land uses inconsistent with documentary title.”

[71] During the course of counsel’s submission in this case the Court made counsel aware of the case of ***Spicer v. Bowater Mersey Paper Co.***, [2004] N.S.J. No. 104, in which Roscoe, J.A., of the Nova Scotia Court of Appeal allowed an appeal from a decision of Haliburton, J., of this court in which he granted a certificate of title to the plaintiff based on possession of a camp located on lands owned by the defendant. She indicated, and I quote paragraph 20:

> “**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."

Findings of Fact

[72] I conclude based on the evidence I have heard in this case as follows. (1) I reject the evidence of Duncan Bellefontaine when he testified that in January 2007 he and his father went onto the lot in question and in the course of 45 minutes took a small quantity of firewood from the area some distance from the road. I do so because I find it surprising that if he was intending to create some form of claim to the property that he would not take the wood from an area close to the road so that it would be observed that he had taken that action.

[73] I also note that Mr. Bellefontaine in December or January of the following year when he did remove pulp actually asked Cecil Cashin for a key to enter the road before he did any cutting. At that time he cut next to the road and in an open manner.

[74] Mr. Bellefontaine’s evidence was a bit confusing on when the second entry onto the land was done. He first suggested it was before Christmas 2007, but then seemed to agree that it might have been in early 2008.

[75] Based on Cecil Cashin’s evidence about how he came to find out about Mr. Bellefontaine going on the property and the fact he checked the lot after December 14th, 2007, I conclude that Mr. Bellefontaine did not enter the property to cut pulp until early January 2008.

[76] I therefore find that the 20 year limitation period should start as of the end of December 2007 meaning that it must extend backwards to December 31st, 1987, to encompass 20 years. Therefore the plaintiff must establish adverse possession for the period including 1988 up to and including the entire year of 2007.

[77] (2) I find that during the period between 1969 when the plaintiff first built a camp on the property until he acquired a deed to the property in September 1986 he did not possess the lot in a manner that would establish adverse possession. During that period his camp was on a small portion of the property and use of the

property was minimal. He cut a small amount of firewood for use at the camp. At that point he did not have any paper title to the property.

[78] I do, however, conclude that once he acquired a deed to the property on September 22nd, 1986, he set out specifically to establish a claim by possession. He started telling people that he owned the property. He started making contact with officials of the Crown to get permission to build a road over Crown land to the property. In October 1987 he wrote the Minister of Lands and Forests (Exhibit 1, Tab 23) indicating that he had been trying to get a lease over Crown lands since April 1987. He arranged to be billed for the taxes on the lot starting in 1987 and he paid the taxes on the lot up to the present time except for the year 2008 when Mr. Bellefontaine asked the County to bill him.

[79] I accept the plaintiff's evidence that after he obtained a deed in September 1986 that he started doing some work on the property. That work was not extensive, however, it did reflect his intention to possess the lot and was very much like a person would do on a remote barely accessible woodlot.

[80] In March 1987 he entered into a written agreement with Mr. Cashin about the construction of the road into the lot and their respective rights if Mr. Cashin paid for half of the costs of the road.

[81] In May 1988 the plaintiff was granted a permit to build a road over Crown land to reach the lot. He then proceeded to have the road constructed and it was finished in the spring of 1989.

[82] I conclude that based on the evidence presented by the plaintiff about the work he did on the lot that he was in possession of the lot in question as of January 1987. This evidence of possession certainly became much more substantial after he built the road into the lot, however, I find that he already had the intent to possess prior to that date and did exercise acts of possession which would qualify as possession of the lot as that term is defined by the cases.

Argument

[83] The plaintiff argues that his actions of dealing with the land from 1986 when he acquired an interest in the property by the deed shows that he intended to possess the property to the exclusion of the other co-owners. He says that the other co-owners cannot now assert a claim to possession of the property because of Section 22 of the ***Limitations of Actions Act***.

[84] The defendants as co-owners of the lot argue firstly that the plaintiff's possession was not of a kind that would extinguish their right to the land. They also argue that during the 20 year period prior to January 2008 a number of them went on the property and made use of the property which actions would in effect stop the plaintiff's possession claim. Counsel points to the evidence of Pat Casey who said he beached his boat on the property and cut a trail from the road to the beach to carry the boat to the beach area. Counsel refers to the evidence of Victor David who said he walked on the property on a regular basis and that he used it for recreational purposes.

[85] Counsel asks the Court to consider that Michael Duquette exercised acts of possession as a co-owner when he used the property for hunting, snaring rabbits and cutting lobster rings.

[86] Counsel for the defendants relies on the evidence of Duncan Bellefontaine who testified that he cut some firewood on the property in January 2007.

Issues

[87] The two most central issues in this case are as follows:

(1) Has the plaintiff established adverse possession as that term is defined by the case law over the 20 year period prior to December 2007?

(2) Have any acts done by any of the defendants interfered with the plaintiff's chain of possession during that period of time?

Findings

[88] (1) I am satisfied based on the evidence that I have heard that the plaintiff has established that he was in actual possession of the entire 116 acre lot as of January 1987. During the period after 1989 the plaintiff did a considerable amount of work to remove 800 cords of pulp from the lot in question. Heavy equipment was used to do that and it would be clear to the entire world that he was exercising possession to the lot. After all the pulp was removed he then proceeded to enter into agreements to do silviculture to rejuvenate the property. I am satisfied that all these acts would establish adverse possession to the other owners.

[89] (2) The second issue is whether the co-owners of the property, the defendants, did anything during the period in question to interfere with the plaintiff's claim based on adverse possession. In the ***Spicer v. Bowater Mersey*** case the suggestion is that an owner simply has to step back on the property to extinguish an adverse possession claim.

[90] I would note that in the ***Spicer*** case the Court was dealing with a claim by a stranger against an owner. That is not the case here. It was also not a claim under the ***Quieting of Titles Act***.

[91] The Newfoundland Court of Appeal in the case of ***Matchless Group Inc. (Re)***, [2002] N.J. No. 252, dealt with the issue of what is required by a co-owner to extinguish a claim for possession. Roberts, J.A., said at paragraph 19:

> "**19** Furthermore, the reclaiming of possession by an owner out of possession requires an intent to do so. Simple entry on the land is not enough. I refer to number 9 of the Wickham principles, at pp. 482-483:
>
> > '9. In cases where the distinction between acts of trespass and acts of possession is obscure, one must look for an animus possidendi.
> >
> > Few of the cases come to grip with the matter of animus possidendi. It is not easy to find a place for it in this subject.
> >
> > It is discussed in the case of Littledale v. Liverpool College, [1990] 1 Ch. 19, at page 23. Lindley, M.R., commented in this manner:
> >
> > > "...and possession by the plaintiff involves an animus possidendi - i.e., occupation with the intention of excluding the owner as well as other people. The evidence that the plaintiffs never had any such intention is extremely strong. The correspondence shows that until quite recently they only claimed a right of way. Even when they commenced this action they claimed a right of way and no more. It was only at a later stage that they claimed the ownership of the strip. When possession or dispossession has to be inferred from equivocal acts, the limitation with which they are done is all-important: see Leigh v. Jack [(1879), 5 Ex. D. 264]."

> This philosophy is echoed in the case of Stevens v. Skidmore, [1931] 2 D.L.R. 467, where Raney, J., at page 471 stated:
>
> > "Discontinuance of possession, under the section, is a question of fact, compounded of intention and action. The intention is of no consequence if the action is definite and unequivocal; but when dispossession (in this case, discontinuance of possession) is to be inferred from equivocal acts, the intention with which the acts are done is all-important: Banning on Limitation of Actions, 3rd ed., p. 93."
>
> I think it can be fairly said as a corollary to this principle that when the owner reclaims possession by entry, unless his acts are unequivocal, an animus possidendi must be shown.
>
> Under section 11 of the Act [Limitation of Actions (Realty) Act, R.S.N. 1970, c. 207], an entry does not necessarily mean possession. When the nature of the entry is in doubt, the animus must be made out.'"

See also ***Earle Estate v. Finn***, [2008] N.J. No. 65.

[92] In this case the acts of entry by Patrick Casey, Victor David and Michael Duquette on the property were in no way done with an intention to possess the property. All of them were aware that the plaintiff was exercising acts of

possession by building a road into the property and the roads on the property to extract the pulp to be cut there.

[93] When Patrick Casey cut a trail from Mr. Boudreau's road to the beach to launch his small boat he did so only for the purpose of getting his boat to the shore and not to establish his claim to the lot. When Victor David walked the property or hunted there his acts were not acts of asserting his right to possess. When Michael Duquette did the same there was no evidence he had the intention to establish rights by possession.

[94] The situation with Duncan Bellefontaine is a bit different. His only significant acts of what would be considered possession were two incidents. The first he says was in January 2008 when he said he cut a small amount of firewood on the property.

[95] I have already concluded that I am not satisfied that that event happened. However, even if it did I do not find that it would be an equivocal act of possession by a co-owner. He said he cut in an area away from the road, therefore meaning that his cutting would not be easily observable by Mr. Boudreau.

[96] In ***Bellefontaine v. Nova Scotia (Attorney General)*** (1992), 114 N.S.R. (2d) 202, Chief Justice Glube, as she then was, found that:

> "I find that by someone cutting small amounts off the lands on occasions (if anyone did) does not amount to an exercise of proprietary rights nor does it amount to sufficient acts to oust the possessory claim by the plaintiff. I accept the evidence of the plaintiff's witnesses and find that Gerald Bellefontaine did not cut in the late 70's as claimed and at earlier times he was only seen hauling wood out of the roads, but was not seen cutting."

[97] I do find, however, that when Mr. Bellefontaine in January 2008 entered onto the property by opening the gate and proceeded to cut a number of loads of pulp on the property that was an action intended to displace any person who was claiming title by possession. Mr. Bellefontaine at that point was saying to Mr. Boudreau and to anyone else that he was exercising his right to be on the property and to harvest pulp from it.

[98] It was at that point that Mr. Boudreau had the right to ask for a certificate of title to the property so that he could stop Mr. Bellefontaine from continuing to cut pulp on the property.

Conclusion

[99] I find that the entries onto the property by the defendants did not constitute acts of possession so as to interfere with the plaintiff's claim of adverse possession. I reject the suggestion that the recreational use of the land by Mr. Casey, Mr. David or Mr. Duquette were enough to assert their claim to ownership as against the co-owner, the plaintiff.

[100] Section 12(2) of the ***Quieting of Titles Act*** provides that a co-owner's interest in land can be extinguished if for 20 years that person:

> "...has not received any benefit, paid any expense or exercised any proprietary right in respect to the said land..."

[101] I conclude that the entries onto the land by the three defendants indicated were not an exercise of proprietary rights to the land.

[102] I am satisfied that for 20 years prior to January 2008 the plaintiff has established that he was in possession of the lot in question to the exclusion of all

others including the defendants and the other co-owners of the property and therefore is entitled to a certificate of title under the ***Quieting of Titles Act***.

[103] I award costs to the plaintiff.

J.