

SUPREME COURT OF NOVA SCOTIA
Citation: *Donovan v. Gunn*, 2015 NSSC 339

Date: 20151030
Docket: SYD No. 378962
Registry: Sydney

Between:

Jessie Donovan, Amos Donovan, Ann Marie MacDonald

Plaintiffs

v.

James D. Gunn and Sharon A. Gunn

Defendants

Judge: The Honourable Justice Patrick J. Murray

Heard: December 1, 2, 3, 4, 5, 8, 16, 17, 18, 2014, March 2, 3, 2015,
in Sydney, Nova Scotia

**Final Written
Submissions:** May 4, 2015

Written Decision: October 30, 2015

Counsel: Hugh MacIsaac, for the Plaintiffs
Murray Hannem, for the Defendants
Anna Manley, for the Defendants

By the Court:

Introduction

[1] Bridget Peters was a prominent land owner in the Ingonish Beach, Cape Breton area in the 1920's to the 1940's. In 1946 she deeded a cottage lot to Cecil Donovan. Cecil Donovan built a cottage on the lot and he and his family have had use and enjoyment of their cottage and property since that time, except in recent years when a claim was made against the land that the Donovan family believed to be theirs.

[2] Every deed of land, formally called a Deed of Conveyance, has or is supposed to contain a legal description. It is this description which is intended to describe the location of the land. Where that description places the land "on the ground" usually requires a survey, but not always. It is prudent to obtain a survey to ensure accuracy, but a proper legal description will help eliminate problems, which can occur, in matters of conveyance.

[3] One such problem exists here. The beginning point in the legal description of the Donovan lot starts at the junction of two roads. Specifically, it starts at a stake at the south side of the road leading to the government wharf at the "junction" of the said road with the main highway.

[4] The main highway here is now called the Beach Crossing Road and its location is a matter of dispute between the parties to this action. Because the location of the main highway is in dispute this, in turn, causes the location of the Donovan lot also to be in dispute.

[5] The Donovan's are the wife, Jessie Donovan, son, Amos Donovan, and daughter, Ann Marie MacDonald of Cecil Donovan, who died in 1990. They maintain that they share a common boundary with Mr. Gunn, and prior to him with the Legion, who owned the adjacent property for many years prior to Mr. Gunn purchasing it in 2003.

[6] The Donovan lot is located east of the Gunn lot such that the Donovan's western boundary is the eastern boundary of the Gunn lot.

[7] The Defendant, Mr. Gunn, himself a Nova Scotia Land Surveyor, says that the Donovan lot should be located further to the east on the road leading to the government wharf, by 48 feet, as the Beach Crossing Road is located further east.

[8] Mr. Gunn, argues that a remnant lot remains between the Gunn lot and the Donovan lot, which remnant was not conveyed by Bridget Peters prior to her death in 1951 nor by her husband, Milton Peters prior to his death.

[9] At the heart of this matter is whether the Donovan's share a common boundary line with Mr. and Mrs. Gunn? If so, then there is no remnant lot between the lots and the Donovans will have established their ownership to the lands in question.

Summary of Facts

[10] The Donovan's have owned their cottage since 1946. In 2003 Mr. Gunn purchased the Legion property located west of the Donovans on the "next lot". The Donovan deed has road frontage of 225 feet and water frontage of 174 feet. The Gunn deed has 55 feet of road frontage and 55 feet of water frontage. It has always been considered that the two lots adjoined one another. The Plaintiffs, Jessie Donovan, Cecil's widow, Amos Donovan, Cecil's son, and Ann Marie MacDonald, Cecil's daughter, maintain the two lots do adjoin and have always shared a common boundary with the Legion lot.

[11] Following Mr. Gunn's purchase, he stated based on conversations he had with James (Jimmy) Cooke and Thomas Young that he had reason to investigate whether there was additional land between he and Donovan. According to Mr. Gunn, Mr. Cooke mentioned there had been a right of way between the properties. Mr. Gunn stated that Mr. Young mentioned that the Legion wanted to buy land to their east from Milton Peters and even mentioned "splitting it" with Cecil Donovan.

[12] Mr. Donovan was adamant no such right of way existed. A fabrication he testified in his evidence.

[13] In 2006, Mr. Gunn completed a survey on the Donovan lands and concluded that their western boundary should run "due south by the magnet in 1947". This created a triangular lot between them with 36.25 feet of water frontage.

[14] Prior to completing the survey, Mr. Gunn obtained a deed from Clarence Peters, son of Milton and Theresa Peters. Mr. Gunn believed him to be the lawful heir, and owner of the triangular lot. Mr. Peters himself did not think so, but signed a Quit Claim deed to Mr. and Mrs. Gunn.

[15] Mr. Gunn forwarded a letter enclosing the survey and informing Amos Donovan of his results. This was upsetting to the Donovan family. Mr. Gunn began preparations to build and matters resumed in 2010, beginning with a request by Mr. Gunn to allow roadbed to be built and used by Mr. Gunn to access the triangular piece and complete site work. Permission was granted by Amos Donovan. Mr. Gunn promised to remove the roadbed and return the property to its original condition.

[16] Mr. Gunn then requested an easement in May of 2010. Ann Marie MacDonald wrote a letter to Mr. Gunn in July of 2010 and stated in no uncertain terms, that they were not interested in granting an easement or any other arrangement with respect to the lands.

[17] A series of letters from Mr. Gunn ensued. The Donovans were attending to the care of their elderly mother and did not attend Ingonish as often that year.

[18] Mr. Gunn decided to have a full survey completed by Mr. Lester Tingley. This was completed in May, 2011. The survey showed that the remnant parcel was much larger, containing 48.34 ft. on the road and 86 ft. on the water.

[19] The crux of the problem is that this survey showed a remnant lot, on the ground as being positioned between the Legion lot owned by Gunn and the lot deeded to Cecil Donovan in 1946, and now owned by the three Plaintiffs.

[20] On August 11, 2011, Ann Marie MacDonald wrote a further letter, this time to Mr. Tingley informing him that her family “strongly disagreed” with his survey. Mr. Tingley’s recollection was that he informed Mr. Gunn of this letter, upon receiving it.

[21] The Plaintiff hired legal counsel, who requested Mr. Gunn not to proceed with improvements. Mr. Gunn replied to indicate that the parcel had already been cleared and extensive work had been conducted installing subsurface geo-thermal piping. Given the results of his survey he had not removed the roadbed as earlier promised.

[22] Ultimately, Mr. Gunn used the entire remnant lot to install a geo-thermal piping system to service his new home. This is shown in evidence as Exhibit 11.

[23] The Plaintiffs state the installation is unlawful, as there is no remnant. They maintain they have owned this land since 1946 and Mr. Gunn is trespassing and encroaching upon it. They seek remedies for its removal, damages and costs.

Issues

1. Does the land described in the Plaintiffs deed dated October 15, 1999 recorded in Book 208 at Page 191 include the disputed parcel identified as PID 85154920 and therefore extend to the original boundary of the Legion lot which is described in the deed to James and Sharon Gunn dated June 20, 2003 recorded in Book 233 at Page 929?
2. In the alternative, if the Plaintiffs deed does not include some or all of the disputed parcel has the occupation and use of the said parcel from 1946 to the commencement of this action been such as to entitle the Plaintiffs to an order restraining the Defendants from further entry upon the said lands and to the further remedies applied for in this action?
3. Does the Western Boundary of the Plaintiff's lands run to the shore more or less perpendicular to the Wharf Road or does it run in a southeast direction to the shore?
4. Are the Defendants entitled to relief under the Doctrine of Proprietary Estoppel?
5. Should the Plaintiffs be granted an Injunction requiring the Defendants to: A) Vacate the remnant parcel; B) Remove geo-thermal piping installed in 2011; and C) Return the land to its previous condition?
6. Are the Plaintiffs entitled to damages for Trespass on the said lands?
- 7: What other remedies are available to the Plaintiffs?

Overview

[24] The Beach Crossing Road in Ingonish Beach, Victoria County runs in a north south direction. On the north it meets up with the Cabot Trail Highway. On the south it meets up with Ingonish Harbour and at one time crossed the beach, thus giving it its name.

[25] Much of the lower or southern section of the road is now washed away due to a combination of erosion and storms over the years, especially one that occurred in the early 1980's.

[26] The Wharf Road in Ingonish Beach runs in an east west direction, with the wharf at the western end. The eastern end of the Wharf Road connects with the Beach Crossing Road at the western boundary of the Beach Crossing Road and stops there. Where and how these two roads meet is critical to the outcome of this case.

[27] Bridget Peters owned all of the land south of the Wharf Road between the road and the water. In 1929 she in fact created the Wharf Road by deeding the southern half of the road (a strip 15 feet wide) to His Majesty the King.

[28] The northern half of the Wharf Road was deeded at the same time by Julia Corson (a strip 16 feet wide) to His Majesty the King. Both deeds are recorded, and both deeds were based on a survey prepared on July 23, 1927 by D.H. MacDonald, public land surveyor (the MacDonald plan). The MacDonald plan shows both the Wharf Road and a portion of the Beach Crossing Road (designated on the plan as the "Public Highway" to North Ingonish).

[29] The MacDonald plan is one of numerous plans which are relevant to the issue to be determined by this Court. The Plaintiffs have retained an expert, Mr. Raymond MacKinnon, to establish the validity of their deed. It is Mr. MacKinnon's opinion that no remnant parcel exists. The Defendants expert, Mr. Lester Tingley, gave evidence and prepared a survey and survey report of his own. Mr. Tingley's report is extensive as is that of Mr. MacKinnon.

[30] In addition, two surveys were completed by Paul Harvey, NSLS, and featured prominently in the evidence, they were completed in 1993 and 1995. The Harvey survey's generally accord with the MacDonald plan. The opinion given by Mr. MacKinnon generally accords with the Harvey plans, and in particular, his final plan completed in 1995. Mr. Harvey, however, did not give evidence at the trial whereas Mr. MacKinnon and Mr. Tingley did give evidence.

[31] A plan showing the centre line of the Main Post Road, dated in the year 1902 featured prominently in the evidence given on behalf of the Defendants, Mr. and Mrs. Gunn. Mr. Tingley's opinion as to the location of the main highway accords generally with the 1902 Crown plan, also referred to as the Corson plan.

[32] There is a further plan, the Kidd plan, completed in 1938, this plan is closely related to the MacDonald plan. These plans and further additional detailed documentation including photographs, aerial photographs, additional plans, topographical maps, deeds and abstracts all form part of the evidence in determining the correct location of the main highway and thus, the correct location of the lands of Cecil Amos Donovan, Ann Marie MacDonald and Jessie Donovan as recorded in Book 208 Page 191.

Evidence at Trial

[33] The Plaintiffs called seven witnesses at trial including the Plaintiffs, Amos Donovan and Ann Marie MacDonald. In addition, they called Raymond MacKinnon, as an expert witness, along with James Cooke, Tom Young, and Barbara Matheson. Mr. Cooke, Mr. Young and Ms. Matheson each provided a Statutory Declaration outlining their knowledge on the history and usage of the lands in question.

[34] The Plaintiffs also called, Jeffri Ann MacIntosh, a real estate paralegal. She prepared an Abstract of Title (Ex. 34) of the Donovan lands, the lands of James Gunn, and the disputed lands. This abstract therefore is divided into three parts, A, B, and C.

[35] The following is the summary of evidence of some but not all of the witnesses called at trial. For this decision I have considered the evidence of all witnesses.

[36] The view taken in this matter and the points for viewing provided in Exhibits 4 and 5 were helpful in providing context for this decision.

Jeffri Ann MacIntosh - Paralegal

[37] Jeffri Ann MacIntosh gave evidence for the Plaintiffs. She is a paralegal with 27 years of experience. She has worked side by side with a surveyor during some of that time. She presented an Abstract of Title to the Court for lands “out of” the Crown grant to William Donovan. This grant consisting of 50 acres forms the back title of the property of Bridget Peters. Thus the abstract is for lands in dispute, the Donovan lot and the lands of Mr. Gunn.

[38] She noted that the Crown grant recorded in Book GVC Page 100 extended across the Mill Cove and that it was parcel “B” located west of the beach, that

includes the lands in question, as shown on the Crown Grant plan attached to the Grant, dated December 6, 1880.

[39] She further noted that the root of title or “root document” (A-5) was a Warranty Deed to Jesse C. Peters from Elizabeth Donovan et al, dated July 2, 1910 and recorded September 29, 1910. These lands appeared to be “all the land south of lane between the creek and the beach”. These same lands were then deeded to Bridget Peters by Warranty Deed dated September 8, 1911 and recorded October 10, 1911. In that deed Bridget Peters was described as the wife of Milton Peters.

[40] She noted in A-7 of the abstract that the “first deed out” of the lands south of the road was to Agnes Donovan on March 16, 1946 and that this property adjoins the west side of the legion lot. She gave dimensions for that lot as North Boundary 50’; West 150’, South (shore) 50’ and East 177’.

[41] Included as item A-8 of the abstract was the second deed conveyed by Bridget Peters and Milton Peters to Cecil Donovan, that being a Warranty Deed dated April 29, 1946 and recorded October 20, 1947 in Book HHH Page 395.

[42] This deed is the critical deed in this case, and in particular, its beginning point. The legal description reads as follows:

Schedule A

Beginning: at a stake on the south side of the road leading to the Government Wharf at Ingonish Beach at the junction of said road with the main highway.

Thence: West by North two hundred and twenty-five feet.

Thence: South one hundred and sixty-five feet to high water mark.

Thence: East one hundred and seventy-four feet along the shore to a stake.

Thence: North East one hundred and twenty feet to place of beginning.

[43] Ms. MacIntosh included in the abstract (as item B-2) Mr. Harvey’s plan, Plan #1685, dated March 17, 1995 and recorded October 15, 1995. She included this as it contained the two lots in dispute, the Donovan lot and the Legion lot (now owned by the Defendants), prior to the dispute.

[44] It was further noted in Part C of the abstract for the Legion lot that Bridget Peters died in 1951. This is relevant because the deed to the Legion was not conveyed until 1957, some 11 years after the 1946 deed to Cecil Donovan. The abstract included a statement as to whether Milton Peters had title to convey the Legion parcel.

[45] The Defendants objected at trial to Ms. McIntosh's ability to give this opinion. The issue they said, involved the *Descent of Property Act*, R.S.1954, c. 69, and she was not a lawyer, and she was not qualified. In my ruling, I found Ms. McIntosh to be an experienced paralegal. I therefore allowed her to give evidence of her factual findings and what the normal process in title searching would be, if no Will was found.

[46] It had been earlier noted, item A-9, that Bridget Peters died still owning some land to the south of the road to the wharf and no Will or Administration for Bridget Peters has been found in either of the Victoria or Cape Breton County Registries.

[47] Ms. MacIntosh explained that the normal procedure, in the absence of any documentation or information to suggest otherwise, would be to conclude that Milton did not have title, due to Bridget Peters having children. Those children were noted in A-9 of the abstract. She could not say whether Bridget Peters had a Will. She took additional steps to locate one in the various registries and found none.

[48] In item C-2 Ms. MacIntosh noted that the deed to the Legion was from Milton L. Peters and his wife Theresa Peters, dated August 9, 1957 and recorded 23 years later on June 4, 1980. Milton Peters had therefore remarried. He died in November of 1966 with a Will dated August 3, 1960. In his Will recorded April 30, 1975 he devises land at Ingonish to his wife, Theresa, and his son, Clarence.

[49] The deed to the Cape Smokey Branch 91 Legion conveyed a rectangular lot 55' X 90' with 55' on the "road leading to the Government Wharf at Ingonish Beach". The beginning point is noted to be the North East Corner of lands of Agnes Donovan at the intersection of the road and her lot. This beginning point is not an issue.

[50] In cross examination, Ms. MacIntosh agreed that in spite of there being no Will or deed from Bridget Peters to her husband Milton, he continued to convey property south of the road. These would include the Legion lot and the

conveyance to Lucien Gentile by Theresa Peters in 1983 by Warranty Deed. It should be noted that the David Campbell lot, which is immediately west of Agnes Donovan was conveyed by Milton and Bridget Peters to Flora Belle Campbell in 1949. The Gentile lot is immediately west of the Campbell lot and is the most westerly of the conveyances out of Peters, south of the road to the wharf.

[51] Further, in cross examination, Ms. MacIntosh agreed there was nothing on the Legion deed or the Cecil Donovan deed that would suggest a common boundary between them. She had not noticed the discrepancy between the western line of the Donovan lot as reading 165' and the eastern line of the Legion lot as reading 190'. She wished she had.

[52] Ms. MacIntosh agreed that because she did not find a Will that it doesn't mean there was none. The same thing would apply to any unrecorded deed. No unrecorded deed was found.

[53] In cross examination Ms. McIntosh agreed there would be marketable title to the Legion lot as it has been more than 40 years since the deed was given. *Marketable Titles Act, 1995-96, c.9, s. 1.*

[54] Ms. McIntosh stated she was familiar with remnant lots. In her 27 years, she said it is not uncommon to find a remnant lot, and that they occur even today in subdivisions.

[55] In terms of the description in the Cecil Donovan deed, she did not believe it was prepared by a professional.

[56] Ms. MacIntosh listed six heirs of Bridget Peters in item A-9, one of whom was Bernadette (Peters) Young, born February 7, 1908. Thomas Young and Barbara Matheson, both of whom gave evidence at trial, are two of the children of Bernadette Young. Bridget Peters therefore, was their grandmother.

[57] There are additional relevant items from the abstract that will be discussed. Milton Peter's had a Will. Clarence Peters, Milton and Theresa Peters son, and Theresa were the beneficiaries under Milton's Will.

[58] The deed into James and Sharon Gunn for the Legion lot is contained in item C-5 and the deed to them from Clarence Peters in item C-6.

Evidence of Amos Donovan

[59] Amos Donovan gave evidence concerning his fathers deed, now owned by he and his sister, Ann Marie, and their mother, Jessie. He spoke of his father who worked at the Sydney Steel Plant for 42 years and died of cancer in 1990.

[60] He stated how his father went about owning the property. They were there every year from May until September. It was a seasonal property. Mr. Donovan spoke of the cooperation among the landowners, with his father granting permission to the Legion to use the steps which came down on their property. The Legion in turn, allowed his father to run a waterline over to the Legion building to obtain water, with it being hooked up and shut off each year, as is common with seasonal properties.

[61] He explained further that he and his father “kept up” the property by maintaining the lawn, the siding, and performing general maintenance. He remembered his father cutting a “fire lane” in the early 80’s “on the edge”, meaning the west side of their property, just east of the Legion. He referred to the photos in Tab 1 of Exhibit 3. Mr. Donovan stated this fire break can be seen in the 1989 Aerial photo.

[62] Amos Donovan confirmed the frontage in his father’s deed as 225 feet. He spoke of the driveway on the east side of the cottage as shown on the Harvey plan in 1993 and the MacKinnon plan in 2013. He confirmed that it has been in that location since 1950. He testified his family first camped on the property in a clearing further west of the cottage with a short driveway.

[63] Amos Donovan reviewed all of the properties on the Wharf Road going from east to west, including his own as shown on the Harvey plans, first the 1993 plan. He confirmed the properties were laid out as he knew them growing up. Amos Donovan is now 72 years of age.

[64] Mr. Donovan placed a square around the survey marker at the western boundary of the main highway (Beach Crossing Road) as shown on the 1995 Harvey Survey plan. (Ex. 2, Tab 3) He was of the view that this marker represented the beginning point of their property as described in the 1946 deed to his father.

[65] He stated the original deed to Mr. Gunn in 2003 confirmed that the Legion property abutted his property, he believed that to be correct and what he had

always thought. He stated that Mr. Gunn then changed the direction in 2006, to Magnetic North in 1947. He did not understand why the boundary on one side would change and not the other.

[66] Mr. Donovan testified that a storm in 1983, a North Easter, washed beach rocks up from the ocean. As a result armour stone had been placed “all the way down to Purdy’s corner”, so as to keep the road from washing out. On the east side all that was left was two trees he said, the water having gushed in from the Ocean side.

[67] He testified that his father had shown him the boundary line between them and the Legion, with the Legion steps coming down on theirs, the Donovan property. He testified in some detail about the Legion wanting “easy access” on the bar side of their building. They would back up a truck he said and his father gave them permission to unload the vehicle. His evidence was that the Legion accepted this as the boundary and they accepted that his father owned the land.

[68] In reviewing the surveys, Mr. Donovan admitted he was not a surveyor. He struggled somewhat with them and did his best to answer the questions put to him. He could only agree with what he saw, acknowledging he was not qualified to say more than that. He was consistent and stuck to the width in his father’s deed as being 225 feet of frontage on the road.

[69] The amount of frontage in the Donovan deed is not in dispute. What is in dispute is, where it begins.

[70] Amos Donovan disagreed with Mr. Tingley’s survey. Mr. Tingley he said, appeared to have the roads meeting “half way at the turn”. Mr. Donovan stated that according to the Tingley plan, the western boundary of the road is on the far east side of the main road.

[71] Mr. Donovan stated he knew Milton Peters who was the caretaker at the wharf. He never saw Milton Peters at or near the disputed land between the two properties. Amos was never informed there was additional land there. He stated at one time the lot had been cleared but it grew back.

[72] In terms of Mr. Gunn’s activities, in 2011 Mr. Donovan stated they were not given much time to do anything. He expressed some doubt as to the reason why Mr. Gunn had hired another surveyor. Mr. Gunn stated it was to confirm the common boundary between their properties.

[73] In summary, it was clear to Amos Donovan, from what his father did from time to time and what was shown to him, that their boundary extended over to the eastern boundary of the Legion property. Their property he said was purchased for recreational use. His evidence was that they maintained the property throughout their ownership.

[74] Amos Donovan was asked in cross-examination if he could show on the plan of survey where Mr. Harvey certified the boundaries of this property. Mr. Donovan replied "no", he could not.

[75] In addition, Mr. Donovan was asked whether the distances in his deed changed, even with the triangular piece carved out. Mr. Donovan replied, that they did not change.

[76] Further Mr. Donovan was asked in cross-examination if the Beach Crossing Road has changed or was it in the same position since 1947. Mr. Donovan replied that from personal experience the road hasn't changed since 1947. He stated he had no reason to believe the road as shown in the Harvey plan changed before that.

Evidence of James Cooke

[77] James Cooke is a long time resident of Ingonish. He was born in 1940 and lived there for all of his life except for two stints working in Ontario in 1960 and early 1970. He has had a long association with the Royal Canadian Legion serving as president for 12 years in Ingonish. When the Legion property sold to the Knights of Columbus he served as Chairman of the Council and he was Chairman when the property sold to Mr. and Mrs. Gunn.

[78] Mr. Cooke in his evidence confirmed that the Legion building was very close to the boundary line between the two properties, and that the Legion had permission from Cecil Donovan to go onto the lands owned by Cecil Donovan to unload supplies for the Legion. He confirmed that the Legion in turn gave permission to Cecil Donovan to install a water line from the Legion across his land to his cottage.

[79] He was not aware of anyone else owning property between the Legion property and that of Mr. Donovan.

Evidence of Raymond MacKinnon, NSLS¹

[80] Mr. MacKinnon has been a Nova Scotia Land Surveyor since 1978. For the past 38 years he has made a living surveying. This included six years with the Department of Lands and Forests as an instrument man and surveyor. He has over 120 miles of boundary line maintenance.

[81] Mr. MacKinnon was qualified as an expert by the Court to provide opinion evidence to the Court in regard to the location of boundary lines, the beginning points of parcels of land, the interpretation of legal land descriptions in deeds and the interpretation of survey plans and maps prepared by others.

[82] Mr. MacKinnon provided the following documentary evidence to the Court: i) A survey plan dated May 14, 2013 (revised January 9, 2014); ii) A survey report dated September 17, 2013; and iii) Answers to questions on his report submitted by the Defendant's pursuant to *Rule 55(11)* of the *Civil Procedure Rules* and dated November 22, 2013.

[83] The Survey Report and Plan with attachments are filed with the Court as Exhibits No.'s 35, 36, 37, 38 and bound separately. The bound version was entered as Exhibit 3.

[84] On his plan, Mr. MacKinnon shows the Beach Crossing Road (Wharf Road). In particular, he referenced that the plan contains boundary information regarding lands of the Plaintiffs at 269 Beach Crossing Road and the lands of the Defendants at 279 Beach Crossing Road. The dwellings with their civic numbers are shown on the plan.

[85] Mr. MacKinnon shows the entire Wharf Road in heavy lines to signify boundaries. He shows as the south east boundary of the Wharf Road, the most southern marker as placed by Paul Harvey, of Harvey Surveys. Mr. MacKinnon shows it as S.M. found (for survey marker). The driveway to the Donovan cottage is shown just to the west of the marker and not far from it.

[86] Mr. MacKinnon further confirms the distance when measured in a westerly direction from the Harvey marker, is 224.50 ft from the Harvey marker to the western boundary of the Donovan lot at the road. This is shown on his plan as an

¹ Conclusions reached by Raymond MacKinnon in his report attached as Appendix A

unmonumented point (U.M.P.). This same point is shown by Mr. MacKinnon as the North Eastern boundary of the Gunn property at the Wharf Road. His plan also shows the Gunn dwelling and the approximate location of the “old Legion hall”.

[87] In the “Notes” on his plan, Mr. MacKinnon refers to several plans he relied upon. Before addressing those, I note that the Harvey Plan dated November 15, 1993, completed for Public Works, (showing Parcels A & B (the Wharf Road)) shows a measurement between the Donovan property and the legion property (the same two points mentioned in para. 83) as being 224.67 ft. On the ’93 Harvey Plan it is noted that the call distance in the deed is 225 feet.

[88] On this point, there are a couple of differences between the MacKinnon plan and the Harvey Plan. The ’93 Harvey plan shows unmonumented points, which are later monumented in his final plan completed March 17, 1995. On the 1995 Harvey plan the distance is converted to metric. This it is shown to be 68.479 meters, and with survey markers being placed at the road for both the eastern and western boundaries of the Donovan lot.

[89] In Note 1 of his plan, Mr. MacKinnon refers to Plan No. 86411916. This is Mr. Gunn’s survey plan showing lands of James and Sharon (Gunn) Parcel A, signed by Mr. Gunn on September 27, 2006.

[90] Mr. Gunn is himself an accomplished Nova Scotia land surveyor. He has practiced extensively in the Northern Cape Breton region. While Mr. Gunn was not qualified as an expert by this Court, he holds excellent credentials as a land surveyor.

[91] On Mr. Gunn’s 2006 plan, his distance for the frontage of the Donovan lot, when measured westerly from Paul Harvey’s survey marker is 224.70 ft. He accepts the survey marker of Mr. Harvey as the western boundary of the Wharf Road. On Mr. Gunn’s plan he in fact re-establishes Mr. Harvey’s most southern marker (the norther marker being above it) as it had been “buried”. Mr. Gunn identified it as “S.M. found, #509”. Mr. Harvey’s surveyor number is 509, as confirmed by the evidence at trial.

[92] Mr. Gunn further accepted Mr. Harvey’s S.M. as found on the north western corner of the Donovan lot which in turn represents his (Mr. Gunn’s) north eastern corner of the former Legion lot.

[93] I note here that on the Gunn plan there are markers placed at all four corners of the Gunn lot, as well as the adjoining lots to the east owned by Gregory and Catherine Donovan and David Campbell.

[94] It is apparent that Mr. Gunn has completed extensive survey work in this area. All markers but one (at the north west corner of Campbell lot) are identified by S.M. 494. The evidence at trial confirmed this is Mr. Gunn's surveyor number.

[95] I would note that on Mr. MacKinnon's plan there numerous other markers identified as those of Mr. Harvey.

[96] Mr. MacKinnon further references, in Note 3 the Plan in Book VV, Page 325. This is the plan of D.H. MacDonald, PLS dated July 23, 1927. It is a plan showing the land to be conveyed to Her Majesty the Queen (HMTQ) by H.C. Corson and Bridget Peters. This is the so called "Public Works plan". It is also referred to in evidence as the "Corson plan". This is not to be confused with the 1902 plan dealing with lands that were previously granted, but then reconveyed by HMTQ to Julia Corson in 1942. In this decision the 1927 plan is referred to mostly as the "MacDonald plan".

[97] By deeds recorded in Book VV, Page 345 and Book VV, Page 325, both Bridget Peters and Julia Corson conveyed 15 and 16 foot wide strips to the Crown to form or create the Wharf Road. The MacDonald plan is included in the deed in Book VV, Page 345. It contained the bearings and distances for each of those two descriptions used to convey the lands (in two strips) for the road beginning at the west boundary of the Public Highway to North Ingonish (the main highway or Beach Crossing Road) and extending westerly to Lot 1, known as the Corson Wharf.

[98] The MacDonald plan is of considerable importance and is referred to by Mr. MacKinnon in his opinion and final report. Mr. MacKinnon stated that "the surveyors of the day" located what they thought to be the western boundary of the main highway at the intersection of the Wharf Road.

[99] From time to time the public road known as the Beach Crossing Road is referred to as the Wharf Road and the main highway.

[100] In Note 4 of his plan Mr. MacKinnon confirms that he revised his plan on January 9, 2014 to show the "Public Road". The Court mostly refers to this road as the main road or main highway.

[101] In Note 2 Mr. MacKinnon refers to the “Tingley Plan” as Plan No. 98436562, entitled as a “Plan of Survey showing lands of James Douglas Gunn and Sharon Ann Gunn, signed by Lester Tingley, NSLS on May 17, 2011”.

[102] Mr. MacKinnon therefore shows the Public Road on his plan as located by Mr. Tingley. The Public Road as located by Mr. Tingley is located further east than the Paul Harvey southern survey marker accepted by Mr. MacKinnon as the western boundary of the main highway. This therefore leaves a gap between the “intended” beginning point, as described by Mr. MacKinnon and the western boundary of the Beach Crossing Road (the Public Road is the main highway) as found by Mr. Tingley, NSLS.

[103] In his evidence Mr. MacKinnon often referred to the public highway as located by Mr. Tingley, as the “mathematical” highway or as the “mathematical location” of the main road.

[104] In his opinion Mr. MacKinnon stated that the “mathematical location” was not the best evidence of where the “junction” of the two roads was located, as mentioned in the deed to Cecil Donovan in 1946.

[105] It was Mr. MacKinnon’s opinion that the best evidence of the “intended beginning point” is shown by Paul Harvey and the MacDonald plan.

Evidence of James Gunn

[106] James Gunn gave evidence at trial on behalf of the Defendants. He is himself a Nova Scotia Land Surveyor, with 35 years of experience. Since 2008 he has resided at 279 Beach Crossing Road with his wife, Sharon.

[107] Mr. Gunn gave evidence as to his qualifications, which are impressive. He is a Canada Land Surveyor. Since 1994 he has resided in Ingonish Harbour, prior to residing at his current address. Since 1998 he has conducted practice reviews. Mr. Gunn reviews, audits, and evaluates other surveyors practices. He has served two terms as Executive Director of the Nova Scotia Association of Land Surveyors, among other positions he has held in the field of surveying. He served five years from 1984-89 in the Council of Premiers, as the Cape Breton representative. For 14 years he has served on the Professional Liability Insurance Committee, of the CLS Association. He served as President for two terms on the CLS Association.

[108] In 2003 Mr. Gunn purchased his property on the Beach Crossing Road, it being the former Legion property, from the Friends of Father George Arsenault, Council #9391 Society. The Royal Canadian Legion, purchased the land in 1957 and erected a building upon the lot. The Legion used it continuously from 1957 to 1998 when they transferred it to the Knights of Columbus, known as the Friends of Father George Arsenault Council #9391 Society. In the abstract of title, the deed in 1998 was recorded in Book 194 Page 412.

[109] In the 2003 deed to Mr. and Mrs. Gunn (Tab 15 Exhibit 2), the second course in the legal description refers to “lands now or formerly owned by Cecil Donovan HHH/395” for the Gunn lot. The description of the Gunn lot is as follows:

Schedule A

All that certain lot, piece or parcel of land, situate lying and being at civic number 279 Beach Crossing Road, Ingonish Beach, Victoria County, Nova Scotia and more particularly described as follows:

BEGINNING at a point on the southern boundary of the road leading to the public boat ramp otherwise known as Beach Crossing Road, said road being federally owned and provincially controlled by an agreement registered in book 190, page 413 and point being the northeast corner of lands of Gregory and Catherine Donovan 172/385, said point also being S 04°30'12" E a distance of 1129.52 feet from Nova Scotia Control Survey Monument # 28095;

THENCE N 81°53'55" E following the said southern boundary of Beach Crossing Road for a distance of 55 feet to a point marking the northwest corner of lands now or formerly owned by Cecil Donovan HHH/395;

THENCE S 13°07'06" E for a distance of approximately 137 feet to the ordinary high water mark of South Ingonish Harbour;

THENCE following the said ordinary high water mark of South Ingonish Harbour for an approximate distance of 60 feet to the aforesaid eastern boundary of lands of Gregory and Catherine Donovan;

THENCE N 13°14'25" W following the Donovan Property for an approximate distance of 132 feet to the place of beginning. The above described lot contains approximately 7,400 square feet;

BEING AND INTENDED TO BE the property once owned by the Royal Canadian Legion and conveyed to the Knights of Columbus, Friends of Father George Elmer Arsenault, counsel 9391 and recorded in book 194, page 412, Victoria County Registry of Deeds.

[110] It should be noted from the description (drafted by Mr. Gunn) that the common boundary between Mr. Gunn and the lands of Gregory and Catherine Donovan on the west and the eastern boundary of Gunn have essentially the same bearing, and are parallel. That bearing is S 13° 07' 06" E (and N 13° 14' 25" W) both having a dimension of 137 ft to the ordinary high water mark.

[111] The 2003 deed contains a new description. The original description of the Legion lot in 1957 as recorded in Book 89 Page 98 (Tab 14) is as follows:

Schedule "A"

BEGINNING at the North East corner of land of Agnes Donovan at the intersection of the road leading to the Government Wharf at Ingonish Beach:

THENCE east fifty-five feet (55');

THENCE south one hundred and ninety feet (190') to water of the harbour;

THENCE west fifty-five feet (55') along the shore;

THENCE north one hundred and ninety feet (190') to place of beginning.

[112] The original Legion experienced a fire in the early 80's and a second building was constructed. The deed to Mr. Gunn was signed by James (Jimmy) Cooke, as Chairman, and Thomas Young, as Secretary/Treasurer of the KOC. Mr. Cooke was the former President of the Legion as was Mr. Thomas Young. Both were very familiar with the Legion property, as stated in the Statutory Declarations signed by them in 2011 and included at Tabs 19 and 20 of Exhibit 2.

[113] Mr. Gunn testified that shortly after purchasing the Legion property he met up with Mr. Cooke, while walking with his wife. Mr. Gunn stated that Mr. Cooke, "offered some information". Mr. Gunn testified Mr. Cooke informed him there had been a right of way between the Legion and the Cecil Donovan property and that Mr. Gunn being a surveyor, should look into it, or words to that effect.

[114] According to Mr. Gunn, Mr. Cooke also mentioned, in the same conversation, that the Legion tried to acquire the property next door from Milton Peters and that the Legion even offered to split it with Cecil Donovan.

[115] Mr. Gunn testified that although he “called for” Cecil Donovan at his north east corner (Cecil Donovan’s north west corner) at that time, he would not do it again.

[116] After Mr. and Mrs. Gunn purchased their lot in 2003, the building was left for two years before it was torn down to enable the construction of their new home.

[117] In 2006, Mr. Gunn prepared a survey of the land to the east of the former Legion. On October 5, 2006, three years following his purchase, Mr. Gunn sent a letter to Amos Donovan advising him of this survey. The survey showed a triangular lot between the Legion lot and the Donovan lands, with frontage on Ingonish Harbour of 36.25 feet. The “tip” of the triangle at the road is shown as the north west corner of Cecil Donovan’s property. This point is marked in the Gunn Plan as SM FD 509, with Paul Harvey’s marker.

[118] The Gunn plan in effect added to the water frontage by 36.75 feet. He showed the western boundary of the Cecil Donovan property and placed a bearing of due south by the magnet, in 1947. This is the bearing that Mr. Gunn assigned to the western boundary of the Donovan property. In the letter Mr. Gunn explained:

This is where I believe Milton and your father would have measured on the ground.

[119] Mr. Gunn further attempts to explain the reason for not changing his own boundary(s), between he and John Donovan to the west, stating:

When I did a survey in 2000, long before I knew I would be buying this property, I located many signs of John’s occupying and on the Legion property that supported a perpendicular configuration.

[120] As to Mr. Donovan’s northeast corner, Mr. Gunn states, “I had to replace your northeast corner because it was buried or missing”.

[121] In the letter Mr. Gunn says further, he hopes Amos Donovan “can live with it”, but he is free to get another surveyor’s opinion. In this survey, and on his plan, Mr. Gunn made the decision that Mr. Donovan’s property boundary on the west should be “due south”, instead of perpendicular, thus creating the triangular lot.

The difference is about 14 degrees. I note the 2006 survey shows Mr. Gunn's number #494 on the eastern boundary of his property. Mr. Gunn was uncertain whether he had previously surveyed the Legion property.

[122] According to the notes on the plan, he states in Note 1 that the designation of Parcel "A" originates with the plan, meaning the plan created the triangular lot. Further, in Note 3 Mr. Gunn states that the "Cecil Donovan lot was positioned using measurements contained in the deed and by replacing the magnetic meridian from 1947".

[123] The plan was certified on September 27, 2011 by Mr. Gunn under his own supervision and made in accordance with the *Land Surveyors Act*, 2010, c. 38, s. 1.

[124] The plan was filed at the Registry of Deeds within 2 weeks of the letter to Amos Donovan on October 17, 2006.

[125] Mr. Gunn now admits, in view of Mr. Tingley's survey, that this plan is wrong. Prior to completing the survey Mr. Gunn stated he did obtain a deed from Clarence Peters, son of Milton and Theresa Peters. He testified that Clarence Peters did not think or realize that he had any interest in the property but agreed to sign it, having had independent legal advice. He testified he wanted the transaction to be for \$1.00 so as to avoid having to migrate the property. He did however, pay Mr. Peters expenses to come to Ingonish. Mr. Gunn thought he paid either \$1,000 or \$2,000 to Mr. Peters for his time and travel.

[126] Mr. Gunn testified further as to the following matters:

1. Upon discovering the remnant, he believed it belonged to Milton Peters. He "tracked it down" and discovered only one heir, Clarence Peters.
2. He said he obtained the deed before doing the survey as he didn't want to survey a property he didn't own. So he therefore prepared the description before surveying the property.
3. He said he did not do a title search because he held a certificate of title for the Legion lot and believed they had a common boundary.
4. It is his practice to accept other surveys and he accepted or "held" Paul Harvey's survey at the north east marker but unlike David Campbell's property that he surveyed in 2000, there was no physical evidence for the western boundary of Donovan, so he used the description in the deed which he interpreted as Magnetic south, creating the triangle as Parcel "A".

[127] He therefore confirmed: 1) the evidence of the remnant; and 2) the dimensions of the remnant.

[128] He was asked if he still thinks his 2006 survey is correct to which he replied “yes and no”. It is correct in the sense that the east/west boundary between he and Donovan do not connect, and are separated by 14° but incorrect in that it does not show enough land between the two lots, meaning there is more land than simply the triangular lot.

[129] In 2010, Mr. Gunn resumed his work on the land. He requested Amos Donovan’s permission to enter on the Donovan land to work on the triangular portion. Although Amos was not happy with the activities of Mr. Gunn, he nevertheless gave him permission. Mr. Gunn put down a roadbed in order to place hard rock to reinforce the shore of Mr. Gunn’s property. He promised to remove the roadbed and return the property to its original state.

[130] In a letter dated May 19, 2010, Mr. Gunn requested that he be allowed to leave the roadbed down and further requested an easement, 20 feet by 90 feet as shown in the photo in Tab 24. Mr. Gunn wanted an easement so they could “both” use it.

[131] Amos Donovan’s sister, Ann Marie MacDonald, sent a letter in response (Tab 25). In this letter dated July 28, 2010 she stated they wanted the roadbed removed and the property returned to the original grade, as earlier promised. Ms. MacDonald further stated in the letter that the Donovan family had no interest in providing “any easement” or making “any other arrangement”.

[132] Mr. Gunn’s next letter to the Donovan’s was not until January 7, 2011 (Tab 26). In it he confirmed he had retained Mr. Tingley to “carry out further surveying to confirm the common boundary between our properties”. He stated he would remove any material on their side of the line when the survey was completed. “Nothing else” he said, has been on his mind since he received the letter from Amos’ sister.

[133] Mr. Gunn testified that Mr. Tingley’s survey was completed just prior to the long weekend in May, 2011. It is contained in Exhibit #10, Tab 17. Mr. Gunn indicated that Mr. Tingley surveyed the Donovan lot, the Legion lot, the remnant lot, and the old highway upon which much work had been completed by Mr. Tingley for the federal government in a previous survey.

[134] At Tab 27, there is a letter sent to Amos Donovan by Mr. Gunn dated May 27, 2011. In the letter he stated it is “just as much of a surprise” to him as it is to Amos. He also stated , “Obviously, I didn’t expect it, but it is what it is”.

[135] Mr. Gunn stated the next thing he heard was through Donovans’ lawyer. Ann Marie MacDonald sent a further letter to Lester Tingley on August 11, 2011 advising that she and her brother “strongly disagreed” with the survey he conducted for Mr. and Mrs. Gunn. She advised him they were referring all relevant documents to their lawyer.

[136] Mr. Gunn was asked if Mr. Tingley told him about the letter from Ms. MacDonald expressing their disagreement. Mr. Gunn said that he and Mr. Tingley spoke a lot, but he didn’t recall it coming up. In his direct evidence, Mr. Tingley recalled that he did speak to Mr. Gunn, on the same date. When told that Mr. Gunn didn’t recall, Mr. Tingley stated its possible but it would be “out of character for him not to move on this right away”. Mr. Tingley immediately acknowledged Ms. MacDonald’s letter by his of August 16, 2011 (Ex. 2 Tab 38).

[137] Throughout this time Ann Marie MacDonald had been in contact with the Nova Scotia Land Surveyors Association. She had difficulty with what they perceived to be Mr. Gunn representing himself and him benefiting from his own actions. Mr. Gunn had stated that a surveyor must not advocate for their client.

[138] The remnant lot turned out to be bigger than the lot purchased by Mr. Gunn from the Legion. Mr. Gunn had Mr. Tingley’s survey recorded right away in June 2, 2011, as Document No. 98436562 (Ex.2 Tab 8).

[139] Mr. Gunn did not obtain a new deed from Clarence Peters. He gave evidence that the description used was sufficient to include the remnant parcel. He stated that his surveyor, Mr. Tingley, agreed with him, that the description for the triangular piece included the remnant parcel. The remnant parcel contains 48 feet on the road and 86 feet more or less on the water.

[140] Mr. Gunn further testified as to the following: He reviewed the various survey plans. He said in preparing his survey plan he accepted the Paul Harvey plans, as he had no reason not to accept them. He was asked the reason he changed his opinion on the location of the western boundary of the Donovan lands. He stated it was because of what Mr. Tingley had determined, he accepted his results.

[141] Mr. Gunn stated the 1927 MacDonald plan had “inherent errors” in it and that Mr. Harvey repeated those errors. Mr. Gunn stated that Mr. Harvey did not allow the road to extend easterly to intersect with the main highway. Also, that “last stretch” gave only a plus or minus distance in an easterly direction. The 1938 Kidd plan he said is just a retracement of the 1927 MacDonald plan. He pointed out that the “north arrow” would read 1938, instead of 1927. He said also that the plan contains approximate distances.

[142] In terms of his ethical obligations Mr. Gunn acknowledged a surveyor must be unbiased, make full disclosure, and avoid the appearance of impropriety. He said he was never contacted by his Association in regard to a problem with him or his survey in this matter.

[143] Mr. Gunn was asked about the photos at Exhibit 10, Tab 7. He stated the area between the Donovan cottage and Legion was completely wooded over to the Legion, prior to him building. Poplar trees occupied the space over to the Legion. The only signs of occupation were around the Donovan cottage. Mr. Gunn took it upon himself to cut trees on the remnant parcel, as shown in the photos.

[144] In his May 25, letter enclosing the survey. Mr. Gunn did not explain the survey results, other than “it is what it is”. He testified he would have expected to hear back from the Donovan’s but what he got was, silence.

[145] Having heard no concerns he proceeded forward with work on the remnant parcel. He testified he felt comfortable, that he had his survey and his deed. Mr. Gunn stated a “one liner” from the Donovans is all he needed.

[146] He did receive letters from counsel for the Donovans. The dates of these letters as compared to the invoices, the dates work was commissioned and performed are important matters, in terms of the remedies sought in this case. The evidence suggests the main work in installing the geo-thermal piping on the remnant lot was completed in late August of 2011.

[147] Of the many years the Donovans had occupied their cottage (every year since 1946), 2011 was one year they were unable to do so as frequently as in the past. Jessie Donovan, mother of Amos Donovan and Ann Marie MacDonald, was being transferred to a nursing home. Amos and Ann Marie MacDonald were pre-occupied overseeing that she was properly placed.

[148] In cross examination Mr. Gunn was asked about the three times in the Clarence Peters deed that he referred to Cecil Donovan to the east, including the last paragraph. He said he was under the impression the Donovans owned it, not they occupied it.

[149] Mr. Gunn was asked about “reversing” the normal process when he obtained a deed without a search and prepared a description without a survey. He said the process he followed was not perfect but suited his purposes.

[150] Mr. Gunn was asked why he interpreted south as due south. He said that is what you do if there is no other evidence. If a deed says southerly you “look more”.

[151] Mr. Gunn acknowledged other boundaries to the west were laid out perpendicular and why the exception for the Donovans. He said the other lots were not laid out as described in the deeds but based on long standing occupation. There was no occupation for the Donovan lands.

[152] Mr. Gunn agreed that the other’s “intended” perpendicular lines, but that he concluded that was not the intent of the western boundary of the Donovan lot.

[153] It was suggested to him that there was no evidence of possession to support the boundary he drew as due south and that the use is the same on the property that he acknowledges as the Donovan property. He agreed there was no such evidence of cutting east of the remnant or on remnant, stating there was no use at all since he’s been there.

[154] He was asked about whether Mr. Tingley agreed that the description in the Quit Claim Deed included the new remnant. It was suggested to him that Mr. Tingley’s answer was contrary to Mr. Gunn’s evidence as contained paragraph 21 of his affidavit. Mr. Gunn said he was satisfied with his own recollection of the discussion and also he was “not sure what Mr. Tingley was getting at” as on his plan Mr. Tingley refers to the “underlying deed”.

[155] It was suggested that his letter of October 5, 2006 was presented as fact, but that he never discussed the line with the Donovans, or asked them where it was located. He was asked if he ever asked them, to which he replied, “no”.

[156] He was asked in cross about his promise to remove the roadbed but yet he communicated nothing to them between July 2010 and January of 2011 and when

he did, he was waiting first to complete a survey. He said there didn't seem to be any urgency and he wanted to wait for the results. He said he thought communicated this verbally to Amos, but maybe he didn't, he "didn't remember".

[157] Mr. Gunn was asked why he felt the onus was on the Donovan's after he delivered the survey, when it was him, after 10 months that dropped the "bombshell". He said he expected them to react and they didn't.

[158] It was suggested that the August 11, 2011 letter to Mr. Tingley was something important for Mr. Tingley to tell Mr. Gunn, if they spoke at all. Mr. Gunn said, "All I can say is, I have no recollection".

[159] He was asked about Paul Harvey's marker (#509) at the north east corner of the Donovan property, and it was suggested to him that he was quite satisfied with it and didn't find it unreasonable for that point to be set as the "junction". Mr. Gunn replied that he accepted it at the time, stating that was his opinion at the time.

[160] It was further suggested to Mr. Gunn that despite his familiarity with the property he didn't disagree with Mr. Harvey's marker. Once again he said he had no reason to argue where it was placed at that time, but he now knows of the error in the Harvey survey but that he was not aware of it when he accepted it.

[161] In cross he was asked whether it is strange that Milton Peters would leave a remnant triangle between the two properties without road access. He didn't find that strange at all and stated it happens all the time, adding that water also provides access to a lot.

[162] In his testimony, Mr. Gunn agreed that in the community of Ingonish Beach, it was clearly accepted that the Donovan property extended over to the Legion property, with whom the Donovan's shared a common boundary.

[163] Mr. Gunn stated there were "no lasting signs" of occupation by the Donovan's. He was asked, what about the fire break cleared by Cecil, 50 – 60 feet wide all the way to the shore on the Legion side. He said he wasn't aware. He admitted that Amos Donovan removed the water line from the Legion building when Gunn purchased the property.

[164] It was suggested to Mr. Gunn that before 2006, no one had ever challenged the Donovan's ownership which had been well established by the eastern boundary

of the Legion building. He said he needed to see some physical evidence and saw no evidence on the Donovan property to establish a boundary line.

Evidence of Lester Tingley, NSLS²

[165] Mr. Lester Tingley, NSLS, gave expert opinion at the trial. Similar to Mr. MacKinnon he is a well-respected surveyor. His report contained his extensive curriculum vitae, which includes considerable experience surveying lands in Victoria and surrounding counties. He has completed surveys for government, and was employed as a Right of Way Officer for the Department of Transportation for 20 years.

[166] Mr. Tingley has extensive experience dealing with highways and highway boundaries. He became a Nova Scotia Land Surveyor in 1983.

[167] Mr. Tingley was qualified by the Court to give opinion evidence in regard to highway boundaries, the location of beginning points in deeds and the interpretation of deeds and survey plans.

[168] Mr. Tingley's report(s), his survey plans together with supporting documentation is comprehensive. Exhibit 10 is the Defendants rather thick book of Exhibits. Much of the documentation contained therein pertains directly to Mr. Tingley's survey plan and his two survey reports, a preliminary and final one.

[169] In addition, there are photo's, archived photo's, aerial photographs (some enlarged), a topographical map, various deeds and other plans of survey. In particular there are geo-referenced ("ground thruthed") aerial photographs taken in 1935 and 1953. These have been "overlayed" onto Mr. Tingley's survey plan as a means of adding further proof of his findings. As he says, further "checks" that his opinion is sound.

[170] Significant are the plans attached to the 1942 re-conveyance from Julia F. Corson to HMTK, in Book DDD Page 313 of certain Crown Grants (# 20057 & #20058) that were originally granted in the year 1902. These plans have been entered as separate exhibits (initially through the Plaintiff's expert, Mr. MacKinnon) as numbers 7(A) and 7(B). They are the plans dated in the year 1902.

² Conclusions reached by Lester Tingley in his report attached as Appendix B.

[171] It is clear from reviewing the plan and survey report of Mr. Tingley, that his prior determination of the southern boundary of the Thomas Archibald grant was instrumental in him being able to provide the opinion to James and Sharon Gunn, that a remnant lot exists between their property and the lands of Cecil Amos Donovan, Ann Marie MacDonald, and Jessie Donovan, widow of the late Cecil Donovan.

[172] It was that determination, and in particular, the beginning point of the Archibald Grant at its south east corner that enabled Mr. Tingley to locate a lot much further south (1700') of the Wharf Road, in 2011. The William Donovan lot (which contains the disputed lands) is further south of the Archibald grant. The two grants are separated by the Grant to Margaret Shea (H. Clay Corson).

[173] On February 11, 2011 (Tab 12.11) Mr. Tingley prepared plan No. 5614 entitled "Plan of Survey showing Former Lands of Her Majesty the Queen in Right of Canada". This is referenced in Note 3 on his plan for Mr. and Mrs. Gunn dated May 17th, 2011.

[174] When preparing the Crown plan, Mr. Tingley laid out what he considered to be the location of the Beach Crossing Road, extending from the Thomas Archibald grant on the north to the lot he was asked to locate.

[175] Mr. Tingley shows on his Crown plan, the centre line of the highway shown, which line is represented by one long and two short lines, as illustrated in the plan's legend.

[176] Mr. Tingley further references Mr. Harvey's final plan of 1995 (No. 1685) and two plans of Mr. Gunn, the 2006 plan showing parcel A and the plan showing the lands of David Campbell dated April 17, 2000. Mr. Tingley has "picked up all of the points" or monuments set by Mr. Gunn. There are a total of five markers containing Mr. Gunn's survey number (#494). These are at the shore as well as those on the north west corner of David Campbell and Mr. Gunn's own north west corner.

[177] It appears that Mr. Tingley reported (RE) a marker at Mr. Gunn's NE corner. In addition, and significant for the purpose of this case, Mr. Tingley placed two survey markers, one at the road and one at the road and one at the high water mark, thus establishing a line further east between Mr. Gunn's eastern line and the western line of the Donovan lot. Mr. Tingley has therefore surveyed or found a remnant lot between Gunn and Donovan with road frontage of 48.34'.

[178] Mr. Tingley's opinion evidence given at trial, is that the beginning point in the Donovan deed is 48' further east than shown on the MacKinnon plan. As already stated this is due to the intersection of the southern boundary of the Wharf Road and the western boundary of the main road (Beach Crossing Road) being located that distance, a further (48 ft.) to the east.

[179] By all accounts Mr. Tingley is content with the "lay of the land" on the west side of the Legion lot now owned by Gunn. On his plan Mr. Tingley has Mr. Gunn's eastern boundary for the Legion lot parallel with Mr. Gunn's western boundary. Mr. Tingley has the eastern boundary of the "remnant lot", at a bearing of south by the magnet in 1947, the same bearing that Mr. Gunn had for the eastern boundary of parcel A (the triangular lot) as shown on Mr. Gunn's 2006 survey.

[180] Mr. Tingley's plan references his February 11, 2011 plan which in turn, contained reference to the Crown Grants #'s 20057 and 20058. It should be noted however that it is the 1942 deed from Julia Corson, in which she reconveys four lots back to the Crown, that shows a larger reproduction of the map as contained Grant 20258 and admitted as Exhibit 7(A).

[181] It should further be noted that Exhibit 7(A) is a different plan than the plan attached to either of Grant 20058 or 20057, as is the case with 7(B). Consequently, there appears to be several versions of the 1902 plan.

[182] In addition to Mr. Tingley's plan, there is his survey report. The crux of Mr. Tingley's report (at Tab 12) and his opinion is based on his statement that a "significant piece of information became apparent when considering the beginning point of the Donovan lands". (Page 8 of Tab 12)

[183] In his Survey Report, under the heading "Procedure", was his further statement that "the boundaries of the lot could be linked to the Crown Grant No. 13424" (Archibald), PID #85047397, the link being the definition of the road boundaries as shown on the plans attached to the 1942 conveyance in Book DD page 313 (plan dated 1902).

[184] Mr. Tingley testified that he had already established the boundaries of the Beach Crossing Road while working on a previous file for the Crown. When he was retained by Mr. and Mrs. Gunn, he had already located the main highway known as the Beach Crossing Road, as referred to in the Donovan deed.

Analysis

[185] Mr. MacKinnon stated he was asked to perform three tasks. First, to establish the beginning point of the Donovan property as described in their deed in Book 208 Page 191. Second, to locate and determine the direction of the western boundary of the Donovan lands. Thirdly, to determine if there was a remainder lot between the former Canadian Legion (the Gunn property), and the Donovan lands.

[186] In answer to these questions Mr. MacKinnon stated first, regarding the beginning point, that he believed he found the “intended beginning point”. This was the whole problem, he said. He went on to explain that most deeds have a good beginning point, and possibly the best one to have in a description would be at a point of intersection of two streets; because normally you are able to find the two streets.

[187] In these circumstances Mr. MacKinnon found one road, meaning the Wharf Road according to the best evidence available. The other road he stated is not visible, and could not be physically located. He said it was “washed out long before our lot was created in 1947”. And now you are presented with a description that says, beginning at the intersection of the two roads, he said, “You must ask where is that point?”

[188] Mr. MacKinnon stated you use the best evidence available. For him this was a combination of the MacDonald plan in 1927, when the public road was created, the Kidd plan in 1938, and in addition Mr. Harvey’s work in 1993 and 1995. He acknowledged the actual road or “track” was there before the deeds were created in 1929.

[189] For these reasons Mr. MacKinnon stated he preferred to call the beginning point, the “intended beginning point”. He found Mr. Harvey’s marker and agreed with it. He stated he agreed with it because when Mr. MacKinnon reviewed the 1927 plan and other documentation, he felt Mr. Harvey and the other surveyors had done their due diligence.

[190] On the second question, to locate and determine the direction of the western boundary of the Donovan lands, Mr. MacKinnon stated he did locate and determine the western boundary of the Donovan lands. This is shown on his plan, noting that the distance agrees with and is practically identical to other plans, including that of Mr. Gunn. Mr. MacKinnon’s evidence is that his bearing or angle used for the western boundary of Donovan is the same or very close to the bearings

of those other properties, to the west of Donovan. He stated his practice is to run lines parallel with neighbouring lots. He did not place a marker at the north west corner of the Donovan lot but confirmed the distance at 224.5 ft in a westerly direction from the Harvey marker, identified by Amos Donovan at trial, with a “square”.

[191] The third question was whether there exists a remainder lot. Mr. MacKinnon stated he showed on his plan where the Donovan lot begins and ends. It's clear he said, where it begins and he testified that he has it “going over” to the Gunn property. In other words, it proceeds westerly from the Harvey marker and ends at the “Legion lot”, on the eastern boundary of the former Legion lot, now owned by Mr. and Mrs. Gunn.

[192] Mr. MacKinnon did not believe there was a remainder lot because he found what had to be the beginning point. He found there was not a remainder lot, even though he showed on his plan where Mr. Tingley had positioned it, and where Mr. Gunn had positioned the triangular lot in 2006.

[193] Once again, Mr. MacKinnon admitted it was not the “ideal” beginning point, but the main road is not there and cannot be physically surveyed. It has to be calculated mathematically, he stated.

[194] Mr. MacKinnon referred to the Corson Grant plan of 1902 in stating the road can be determined “mathematically” from that plan.

[195] When one views the MacKinnon plan, it shows that the ordinary high water mark (OHWM) on the Ocean side. His plan shows that the shore is encroaching well within the corridor, due to erosion leaving only land about half way across the corridor on the western side. The eastern side of the actual highway has “disappeared”, up to a point just above and opposite to the driveway below the “old hotel”, near the words “South Bay Ingonish”, on the MacKinnon plan.

[196] I note that a distinction in the opinions of the two expert surveyors is that Mr. MacKinnon states that the main highway has been pushed “inward”, (toward the west) while Mr. Tingley was adamant throughout his evidence, that the highway has not moved or changed its location. Mr. Tingley however, was asked in Question 5C as follows:

5C) Are you able to state as a fact that the Public Road did not move Westward in the vicinity of the Wharf Road either due to erosion or to migration, out of its legal corridor?

A5C) I can state as a fact that **the legal corridor** of the Public Road (Beach Crossing Road) did not move due to erosion or migration north of the road leading to the wharf. (Emphasis added)

[197] In direct, Mr. MacKinnon was questioned at length about the 1927 MacDonald plan, as well as the 1938 plan by Kidd. He explained that the deeds that accompanied the 1927 plan conveyed two (2) strips to form the 31 foot right of way representing the Wharf Road deeded to the Crown. He said he called “Public Works” and asked them to send him “everything they had”.

[198] Mr. MacKinnon noted that the road, for a total distance of 625 feet (more or less) being the southern half deeded by Bridget Peters, and beginning at the western boundary of the main highway and proceeding westerly to the high water mark, veers sharply in a westerly and northerly direction. The northern half of deeded by Julia Corson he said, measures 725 feet and moves in the opposite direction from west to east beginning at the wharf (at a point on the eastern boundary of Lot 1), said point being eight (8) feet northerly from the original high water mark, ordinary tides.

[199] The northern strip of Wharf Road is noted in the preamble of the description to extend “from the east side of Lot No. 1 to the Public Highway”. The last course in the Corson strip states:

...then south seventy nine degrees east (s79°E) two hundred and twenty five feet (225) more or less to the western boundary of the public highway”.

[200] The beginning point in the July 24, 1924 deed from Bridget Peters for the southern strip states:

Beginning at a point on the western boundary of the Public Highway seven feet six inches southerly measured along the said western boundary from the southern boundary of the aforementioned right of way to the Corson Wharf; then westerly and parallel with and 7 foot 6 inches...etc.

[201] The preamble of this deed also states that it extends from the “public highway” to the high water mark.

[202] Mr. MacKinnon agreed that these deeds describe the western boundary of the main highway and mentioned the western boundary of the highway more than once. He confirmed in his evidence that in the descriptions, the authors of the deeds are intending to begin at the western boundary of the public highway.

[203] Mr. MacKinnon further pointed out that the difference between the two measurements of 625 feet and 725 feet, was 100 feet, as the high water mark ends 100 feet from the wharf. He noted that the 625 was also “more or less”. He was asked how the 1927 plan and the deeds with it, helped him determine the beginning point of the Donovan parcel. He said it definitely helped him determine the intended beginning point. His evidence is as follows:

A: When I look at this plan I realize that Paul Harvey had done a survey in 1993, he set markers and tied it to control and his measurements check with what's on this plan. Evidence on the ground in regard to the wharf checks very close with what was shown on this plan and also what was done by Paul Harvey in 1993 and 1995.

Q: Yes.

A: It's the best evidence I have in determining where this western boundary of the public highway is. The best evidence in the sense that this is where everybody thought the western boundary of this public highway was.

Q: Yes.

A: The plan appears later on indicating the mathematical location of it is somewhere's else. But this is the best evidence I have to go by. And other surveyors, like I said before they, I believe that they had done their due diligence. Those numbers are good, they check with Paul Harvey's plan. Paul Harvey did a survey you know 20 years ago. So it's good evidence.

[204] Mr. MacKinnon gave evidence about when “more or less distances” are used. He stated it is common when dealing with boundaries that move, such as a shoreline boundary, or a high water mark boundary.

[205] Mr. Tingley's evidence was to the effect that more or less distances are used when the surveyor is unsure or when it was not surveyed. He stated if a surveyor is measuring on the ground, the exact measurement would be used. For example, on his plan Mr. Tingley determined the 1953 ordinary high water mark from the 1953 aerial photo. He used a measurement of 163 feet from the southern boundary

of the 18 foot right of way as shown on his plan. There was no plus or minus distance for this measurement, but his plan shows an additional 25 feet “more or less” to the current day ordinary high water mark. He shows the high water mark as “approximate”, in front of the Donovan land on his plan. He shows even the remnant lot frontage on the water as 86 ft. “more or less”.

[206] This causes me to consider the fact that the two strips (15 feet and 16 feet) were being deeded to and from a shore lot, being lot 1, the wharf lot and whether D.H. MacDonald in 1927 wished to make allowance (at both ends) for any impact the shore would have on the two distances. This would explain the measurement of 625 ft (more or less) and 225 ft (more or less).

[207] Regardless of the distances used in the description, the governing words based on interpretive principles, in my view would be “to the wharf” or “to the highway”. In this case the Bridget Peter’s conveyance stated “to high water mark” and the Julia Corson conveyance stated “to the western boundary of the Public Highway”.

[208] I simply mention this in terms of whether these two descriptions were intended to extend to the highway as depicted on Mr. Tingley’s plan, the so called mathematical location. The Defendants have argued in their brief that there is little or no evidence to suggest that the highway as shown in the 1927 plan, was not the highway as described in 1902, especially in light of the more or less distances. The Defendants have made a point of arguing that the 1927 plan does not show an eastern boundary for the public highway.

[209] I have considered that perhaps this is what Mr. MacKinnon means when he says the beginning point is “not ideal”. In his evidence Mr. MacKinnon said he put as much information on his plan that he considered relevant, leaving it for the Court to make the ultimate decision on the boundary.

[210] In direct examination Mr. Tingley was referred to Tab 12(1)(i) of the Defendant’s Exhibit #10. This is the Crown grant to Henry Clay Corson and on page three there is a plan attached. Mr. Tingley was asked what relevance that particular Crown grant (# 20057), including the attached plan, had to his findings. Mr. Tingley responded as follows:

That plan, this is it in a nutshell, this where, this is where you get the road. That plan defines the eastern boundary of the Beach Crossing Road with bearings and distances and it’s rather unique in the sense that you don’t

often see a highway boundary defined on a grant plan. That was a big deal to me. That, that located, if you, if you look at that plan Mr. Harvey's bar is on the other side of the road from that.

[211] Mr. Tingley was also asked to illustrate. He responded "sure" and then said:

Mr. Harvey's bar, the southern boundary of the TD Archibald grant is right here.

Okay Leonard Harvey's bar, the one I started from, the one that everyone accepts is located on the east or the western side of that road at the intersection of the western boundary of the highway and the southern boundary of the Archibald grant.

And that point is shown on this plan.

[212] Mr. Tingley's evidence is precise as to the "mathematical" location of the road. He says it is the location of the road and has shown it on his plan as, "To Cabot Trail". In the wording of the H.C. Corson Grant it states following the description:

...not including any public road – which said lots are particularly marked and described in the annexed plan.

[213] The Court must consider whether the 1902 plan was intended to define the road for dedication purposes. I note at one point the road is 60 feet wide and the western boundary of the road crosses a small inlet very near to the southern boundary of the William Donovan grant, at the road. At that point the road is shown as 60 feet (perhaps less because it is not perpendicular), as opposed to the usual 66 feet for a road. (See L-4 on Mr. Tingley's plan of February, 2011 plan for HMTQ, Lot in Book T, Page 23).

[214] In his evidence Mr. Tingley's measurement on the last course in the Donovan deed, going northeast to the place of beginning, was off by 6 feet, meaning it took him an extra 6 feet to get to the western boundary of the main road.

[215] The purpose of the 1902 plan is to illustrate the lots being granted. While the prominent features are the lots, as pointed out by Mr. Tingley, this plan does contain bearings and distances for what appears to be the eastern boundary, but not the western boundary (Exhibit 7B). Presumably, both boundaries run parallel. It

appears there are no bearings and distances for the road, south of the William Donovan grant.

[216] In cross examination Mr. Tingley was asked by Mr. MacIsaac about an answer he gave in connection with the 1927 MacDonald plan. It was question 7(I) in Exhibit 10, Tab 13 which is as follows:

Q: Okay, I'll read out the question. "In view of the foregoing, why would the Federal Crown in 1927 not do an actual measurement rather than an estimate of the final distance 225 feet to the western boundary of the public road? And you're answer?"

A: Do you want me to read that?

Q: Yes, please, yes.

A: My answer to that was, I don't know, can't speak for the Federal Crown surveyors in 1927, however, using more or less distances, not showing the east side of the Beach Crossing Road, not showing the width of public road, the Beach Crossing Road, and using more or less areas makes it look like they didn't complete a survey in the area.

Q: Now, I actually should have had you read the 7(h) one. Would you please read that one as well?

A: Okay, I'll read the question...

Q: Yeah.

A: ...then as well, "Isn't it highly likely that the Federal Crown would at this time be aware of the 1902 plan it had made of the public road, the plan attached to the 1942 Deed? If so, why would it be so difficult to provide an accurate measurement? **A.** I am uncertain as to whether the crown was aware. If they were aware of the 1902 plan it would have been likely that they would've referred to it in the Kidd/MacDonald plans. They did not. It's quite possible the Beach Crossing Road (the portion across the barrier beach) was not visible in 1938.

[217] Mr. Tingley in his report is stating essentially two things: 1) The road as depicted in the 1902, with bearings and measurements is the main road and correct road, in addition to being the "mathematical" road; and 2) The main road has not moved or changed its location.

[218] Mr. Tingley in his evidence confirms that Mr. MacKinnon agrees with his location. In direct examination, Mr. Tingley stated that the main difference between his plan and Mr. MacKinnon's is the point of beginning. Mr. MacKinnon says Mr. Tingley, states that "the point of beginning is somewhere else".

[219] Mr. Tingley further testified that the Donovan lot had to be surveyed in order to give a proper opinion on the remnant. Mr. MacKinnon he says, did not survey the entire Donovan lot or the Beach Crossing Road. Mr. MacKinnon stated in evidence he surveyed what he had to in order arrive at his conclusions.

[220] Once again Mr. Tingley had "no quarrel" with Mr. Harvey except, it appears he did not have a mandate to survey the main highway. Referring to the Harvey plans he states:

...I have no argument with those, it's just that he never finished it, he never surveyed the Beach Crossing Road. That's my opinion of it because if he did, you'd see the gap there.

[221] The gap Mr. Tingley is referring to is the distance 48 feet to the east of Paul Harvey's marker, which "brings" Mr. Tingley to the western boundary of the Beach Crossing Road, from the most southern Harvey marker .

[222] Mr. Tingley visited Mr. Harvey's office and spoke with the survey technician that did the field work. Following that discussion Mr. Tingley was satisfied that "they" (Mr. Harvey's office) had the Corson plan of 1902.

[223] Mr. Tingley's evidence was that of all the plans provided or referred to by the Plaintiffs, no effort was made to survey the Beach Crossing Road in the area east of the Donovan lot. Mr. Tingley stated he was the only one to survey it. He did acknowledge however that while there is "no math" on the MacKinnon plan, Mr. MacKinnon did calculate its location.

[224] In large measure Mr. Tingley's plan is based on the main road not having changed. He does state in answer to question 11(a) that "the Barrier Beach where the road intersects 'is' changed. There has been erosion. The 1902 corridor is not visible to the south, because it's out in the ocean, but it is to the north".

[225] Mr. MacKinnon's opinion is based on the physical road, south of the intersection not being there, and therefore not capable of being surveyed on the ground.

[226] In cross examination Mr. Tingley was asked if in trying to “capture the track” of the Wharf Road, whether the surveyors in 1927, not having the 1902 plan, may have simply “stopped”, where they did because they were “looking at the road” and “believed” they were “at the juncture with the Beach Crossing Road”.

[227] Mr. Tingley replied that, “...it is very possible”. To be fair Mr. Tingley also pointed out in his evidence that if he had stood there on those two “Harvey bars” he would have said, “something is not right here. I would have went digging for more. That is when surveys change, it’s the nature of the business”.

[228] Mr. Tingley in completing his survey report relied heavily on the 1935 and 1953 aerial photographs. He also relied on the 1970 Topographical map which he “geo-referenced” to produce an “overlay”, and he described this plan as “a good representation”. He pointed out that the buildings were “tied in” by conventional survey methods. The significance of the overlay he testified is that the “Legion building” is right on the line. This is how the Defendants obtained the measurements for the hypothetical calculation which they asked be performed by Mr. MacKinnon in regard to the 1970 topographical map. (Eg. Measure 305 feet from legion building to western boundary of highway less 33 feet. From that subtract 225 feet for a net difference of 47 feet)

[229] Mr. Tingley said it was “very easy to make the scale fit”. He acknowledged it was common knowledge that the Legion boundary was “right on the line”.

[230] The 1953 aerial photo allowed him to “pick up” the ordinary high water mark, at the some point north of the Archibald grant, by “GPS”. Mr. Tingley stated he had “tied in the Donovan cottage” when he did the survey for Her Majesty the Queen in 2011 and he “tied in” the old Hotel at the same time.

[231] Mr. Tingley stated matter of factly, that the Donovan deed description “starts at the intersection of the two roads”. He was asked to comment on Mr. MacKinnon’s use of the term “intended beginning point”, as it pertained to the Donovan deed. Mr. Tingley stated he was not familiar with that term.

[232] In that same vein, Mr. Tingley was asked in question 17(a) about his measurement along the gravel surface of the Wharf Road, as opposed to the legal corridor as defined in the 1927 and 1938 plans. In his answer he stated:

I believe... that the people who prepared the Donovan description would have been more likely been able to use the edge of the road but not know where the right of ways were created.

[233] The beginning point in the Donovan deed on Mr. Tingley's plan is the intersection of the corridors of the main road and the Wharf Road.

[234] Mr. Tingley stated he used the aerial photographs to compare visually the present day location of the Wharf Road. Mr. Tingley stated in effect that the southern boundary of the paved surface today, is in the same place as the southern boundary to the road in 1946.

[235] It appears however, that Mr. Tingley did not measure from the paved surface in measuring the western boundary of the Donovan lot but instead the southern boundary of an 18 foot right of way mentioned in the Skinner/Connelly deed in Book 55 Page 34.

[236] In his report he states that the western boundary he shows for the Donovan lot "checks" to within 2 feet (163 vs 165 in Donovan deed). It appears clear he is starting further north than the edge of the pavement.

[237] In paragraph 3 of his report on page 7 he confirms that point, for the distance "south one hundred and sixty five feet to the high water mark, as being 225 feet from the place of beginning". In paragraph 2 of his report he followed the southern edge of the pavement (existing paved surface) having compared the 1947 paved road location on the plan with the geo-referenced photos A-5079-64.

[238] Mr. Tingley gave evidence that the geo-referenced photos and other such comparisons, including the 1970 topographical maps are "little ways" or "checks" to ensure things are fitting, in terms of solving the puzzle.

[239] As he himself has said, aerial photos, enlarged as they are, overlays and topographic maps are provided for demonstrative purposes. In many ways they are a graphic depiction of their contents.

[240] In this case, the topographic map contained the entire centre line of the highway in 1970 below the Wharf Road. It conflicts with the other evidence that the road was not there in 1970.

[241] I viewed and considered the overlays. It is instructive to see how a photo can be combined with a survey. The structures in the photo are "tied in" to assist

in the positioning of things, roads included. For example the “old hotel” and former home of Bridget Peters. I did find these overlays helpful as a guide but they were less clear than other plans.

[242] The archived photos I found helpful for background in connection with the general location of things, back in the day.

[243] In cross examination Mr. Tingley agreed the point of the entire exercise is to correctly position the Donovan lot. For example, if he is in error as to the 1947 Meridian bearing for the western boundary of the Donovan lot, then the entire position of the lot changes.

[244] Mr. Tingley says once again, that Mr. Mackinnon accepted the evidence that surfaced and that Mr. Tingley is in the “right place” with his positioning of the Beach Crossing Road. Mr. Gunn is also aware of this new information, he stated.

[245] In regard to Mr. Harvey, Mr. Tingley concludes that he simply adopted the 1927 and 1938 plans which have more or less distances.

Decision

Issue 1: Does the land described in the Plaintiffs deed dated October 15, 1999 recorded in Book 208 at Page 191 include the disputed parcel identified as PID 85154920 and therefore extend to the original boundary of the Legion lot which is described in the deed to James and Sharon Gunn dated June 20, 2003 recorded in Book 233 at Page 929?

[246] The burden of proof lies with the Plaintiff to establish on the balance of probabilities that the title to their clients land includes all of the land claimed by them. In other words, to prove there is no remnant and that their land adjoins that of Mr. and Mrs. Gunn, and that they share a common boundary.

[247] The opinions of Mr. MacKinnon and Mr. Tingley were thoroughly and professionally presented by these surveyors at trial. Mr. Tingley mentioned “going back 100 years” in an effort to determine the road, and thus the proper beginning point. Mr. MacKinnon stated doing that was unnecessary because the surveyors in 1927 had already determined the road.

[248] The Defendants submit that Mr. Tingley’s location of the main highway is determinative of whether or not the remnant parcel exists and the location of its

boundaries. According to the Defendants, the entire case comes down to Mr. Tingley's location of the main highway and whether it is correct.

[249] I have carefully weighed and considered all of the evidence presented at trial and have come to the conclusion that the opinion of Mr. MacKinnon in these circumstances, is to be preferred.

[250] I have difficulty accepting the 1902 plan as the definitive plan for the road boundary of the main highway. This plan was not mentioned or included in any of the surveys which had been completed in respect of the intersection of these two roads. The surveyors in 1927 (and in 1938) appear to have been unaware of it. Mr. Gunn was not aware of it. Mr. Harvey and Mr. MacKinnon apparently were aware but chose not to give it the weight that Mr. Tingley has given to it.

[251] Mr. Tingley has previously surveyed and determined the same road as recent as 2011. It was a surprise to him that a plan such as the 1902 would exist.

[252] In the grants to William Donovan and Thomas Archibald in 1880, there does not appear to be a road. How well defined the main road was in 1902 is questionable, in my view. The western boundary is shown on plan (7A) as a dotted or broken line and on plan 7(B) as a broken line. These lines appear to be the common boundary of the public road and the eastern boundary of the Donovan and Shea (Archibald) grants.

[253] For a highway to be dedicated there must be both a designation as such on a plan, deed or conveyance and acceptance by the public. Although it was in 1902, the plans attached to the grants in 190057 and 190058 fall short of what I would consider a proper survey.

[254] They are not signed, certified or stamped as an official highway plan. The name J. S. MacLean appears at the bottom of Ex. 7(A). That said a highway may be dedicated in an informal way by simple use by the public. It does appear on a "Crown plan". *Survey Law in Canada*, Carswell 1989.

[255] As stated by Mr. Tingley, normally the plans do not contain bearings and distances as the grant document itself is made for a different purpose. The purpose is to convey grant lots owned by the Crown.

[256] I must consider that the plans attached to the 1942 conveyance (7A and 7B) were recorded some 40 years later and appear to have some differences than those

attached to the grants in 1902. It appears these plans were not well known. (Exhibit #10, Tab 11.2)

[257] In the 1942 re-conveyance the plans referred to the road as “Public” on 7A and the “Main Post Road” on Exhibit 7B . It cannot be said that the plans illustrate the junction of the two roads in question .

[258] Fifteen years prior to the 1942 conveyance, the MacDonald plan was completed in 1927. The intent of MacDonald plan is very clear, to create the Beach Crossing Road; also known as the “Creek Road” and the “Wharf Road”.

[259] Accompanying the plan are two deeds which contain precise bearings and distances except for the reference to “more or less”. I believe too much has been made of the term “more or less”. There is nothing wrong with a measurement in a deed that says more or less. It often means a “caution” or “some slight or unimportant inaccuracy”. (*In re Improvement District Act and C.P.R.*, [1924] 1 D.L.R. 1005)

[260] In the present case, I do not think 225 feet more or less, means 273 feet. It is nonetheless a valid means of describing real property and should not be dismissed, as untenable.

[261] Mr. Gunn, a surveyor with 35 years’ experience, in the description of his own lot when he purchased it from the Legion, stated that the lands immediately to his east were owned by the family of Cecil Donovan.

[262] In addition, the sheer accuracy of the distance between the Paul Harvey survey marker and the eastern boundary of the former Legion lot cannot be ignored. No less than three qualified and experienced Nova Scotia Land Surveyors determined the measurement for the frontage in the Donovan deed to be 224.5 ft., 224.67 ft. and 224.70 ft. from that marker. The deed calls for 225 ft.

[263] This evidence bears directly on the intention of the parties in the 1946 deed to Cecil Donovan. The evidence that Cecil Donovan’s boundary extended over to the former Legion property has essentially been uncontradicted except for Mr. Tingley and Mr. Gunn who were of the view that no physical evidence existed.

[264] Mr. Donovan and his family have held paper title to the property from 1946 to 2006, a period of 60 years, before anyone objected. A land owner is presumed

to be in possession of their property unless it is proven otherwise. *Nemeskeri v. Nova Scotia (Attorney General)*, 115 N.S.R (2d) 271; 125 N.S.R. (2d) 67 C.A., C

[265] This was a recreational property. There are a series of events which occurred over the years which, in my view, confirm a pattern of usage by Mr. Donovan and his family. This pattern of usage shows that they were occupying this cottage property as a normal landowner would. It was necessary for them to have water, they dug a trench. It was necessary for them to protect their property from fire, Cecil Donovan cut a “fire break”.

[266] Amos Donovan gave evidence that the driveway on the eastern side, has been in existence since 1950. That is now a period of 65 years. As stated it has been accepted all along that the legion building was right on the line, on the western side of Donovan and that both properties shared a common boundary.

[267] There is as well the cottage. It has been maintained over these many years.

[268] Barbara Matheson remembered Cecil Donovan with a tractor both in the late 1960's and in the early 1980's. She saw Mr. Donovan doing work on the western side of his property. She stated that Cecil Donovan maintained trees for privacy. She was quite articulate in her evidence and even remembered the size of the lot that her grandfather had remaining and why he held onto it. It was a lot 50 feet wide and had a well on it that never went dry.

[269] As it turned out the Legion deeded 55 feet on the road. When one adds the total distances given on the MacDonald plan (725 ft.) and compares the total combined the deed frontages (approx. 730 feet) there appears to be a difference of five feet. Ms. Matheson it appears may have been more accurate than she realized.

[270] The Plaintiffs' point out that Milton Peters in his Will refers specifically to land on the north side of the Wharf Road but not to the land on the south side of the road. This is telling they submit.

[271] There is the evidence from Tom Young who confirms in his Declaration that Mr. Donovan's boundary came up to the Legion property. No one (except perhaps Mr. Cooke) could be more familiar with the Legion property than Mr. Young, given his various positions with the Legion over the years.

[272] Mr. Young was asked in cross examination if he ever spoke to Mr. Gunn about extra property between the Legion and Cecil Donovan. He said there was a

conversation and that he, Mr. Young, thought that Cecil Donovan had bought a second lot, but it turned out that he only had one deed.

[273] He was asked in cross examination if he indicated to Mr. Gunn the there may have been some land remaining between the Legion and Donovan to which he replied, “no, I never said that no”.

[274] Mr. Cooke was also asked in cross examination whether he recalled a discussion with Mr. Gunn that the Legion tried to acquire the property next door from Milton Peters and that the Legion also offered to split it with Cecil Donovan. Mr. Cooke replied, “no Sir not in my time”.

[275] As well Tom Young is a long time neighbour. He resides himself on the Wharf Road. He is very familiar with all of the properties, and has been for a long time. Like his sister Barbara Matheson, his grandmother was Bridget Peters. Ms. Matheson said her grandparents lived right next door.

[276] For her part, Bridget Peters, was both the grantor in the 1946 deed to Cecil Donovan and the grantor of the lands for the Wharf Road. Both these deeds had the same beginning point.

[277] When the 1946 deed to Cecil Donovan was prepared, Bridget Peters was required to use the same beginning point in the deed for the 15 foot strip she conveyed in 1929 to the Crown. In the circumstances, she would probably have a fair idea as to the location of the south side of the road leading to government wharf, at the junction of the road with the main highway.

[278] The weight of the evidence suggests that in all probability, that location was at or near the marker set by Paul Harvey. There may be some slight differences in the MacDonald Plan compared to that of Mr. Harvey, such as the angle of deflection for the road as it leads down to the wharf.

[279] The Court however accepts the conclusion of Mr. MacKinnon, that the plans are significantly the same in terms of Parcel A. Although Mr. Harvey’s plan shows actual the Beach Crossing Road as curving in a south west direction, the line between the northern and southern survey markers placed by Mr. Harvey is a straight line.

[280] It should also be remembered that the Federal Department responsible for highways (Public Works) in this area, commissioned and accepted the 1995 survey

plan of Paul Harvey as the survey of the Wharf Road, where it intersects with the main road. The Order in Council in accepting the road as laid out, contains a very detailed legal description, signifying the eastern boundary of the Wharf Road where it meets the western boundary of the main road.

[281] A description of the western boundary is included with metes and bounds, bearings and directions, and markers being placed. This OIC was passed in 1997 and has been law now for the past 18 years. The relevant courses read:

Thence seventy five degrees 54 minutes 46 seconds a distance of 68.531 meters to a survey marker situate on a **western boundary of the Beach Crossing Road.**

Thence following the said western boundary one hundred and sixty nine degrees 13 minutes 24 seconds a distance of 9.64 meters to a survey marker. (Emphasis added)

[282] This last course is the distance between the two survey markers shown on Mr. Harvey's plan.

[283] The next course is "Thence 255 degrees 54 minutes 46 seconds a distance of 68.479 meters to a survey marker". This is in fact, the frontage shown by Mr. Harvey for the Donovan lands. The measurement of 68.479 meters when converted to feet is 224.67 ft.

[284] In order to complete this description Mr. Harvey would have had to satisfy himself that he had reached the western boundary of the Beach Crossing Road. Simply put, that is what the Order in Council states. Although the OIC is not quite 20 years old, it is based on a survey plan completed March 17, 1995. The description therefore, is in excess of 20 years.

[285] Further, I note that the legal description in Schedule "A" attached to the Order was checked by Legal Land Surveys on December 11, 1996. In short, this is the type of documentation that one might expect, in relation to the proper dedication of a public road.

[286] In reviewing the 1929 plan and by comparison the description contained in the 1946 Donovan deed, it can be seen that the drafter of the legal description, be it a surveyor, lay person or a person with nautical experience, gave some considerable thought to the description.

[287] First, rather than merely describe the beginning point as the “junction” of the road leading to the government wharf and the main highway, it was decided to have that point marked with a “stake”.

[288] The term “junction” has been judicially considered to mean a “a joining or union, or perhaps, in the secondary sense the point of meeting”, in the context of railway legislation. (*Wilkinson & Marshall v. Newcastle-upon-Tyne Corpn.*, (1902) 18 T.L.R. 332)

[289] I have considered whether the grantor Bridget Peters intended that “junction” would simply be a place or area, with the stake marking the exact point of beginning. In such a case, the junction would be used in the secondary sense and the stake would itself be the primary point of beginning.

[290] Given that the stake is no longer there, the logical choice would be to rely upon the junction as the point of “meeting” between the two roads.

[291] The Defendant, Mr. Gunn’s position is that the legal description in the Donovan deed is not ambiguous and that the description can be interpreted within the four corners of the deed, using Mr. Tingley’s beginning point. In other words, no aids or extrinsic evidence are needed.

[292] In *Goulden v. Nova Scotia (Attorney General)*, 2013 NSSC 253, the law regarding deed interpretation and resolving boundaries was discussed. I have found the following paragraphs to be instructive:

[12] ... In deed interpretation, the question is not the grantor’s subjective intent. Rather, the court is concerned with the meaning of the words used in the deed. That is to say, the question is “what is the expressed intention of the grantor?”...

[13] When the words of a deed are not ambiguous, either in themselves or **when applied to the land in question**, the intention of the original grantor is to be taken from the words of the description in the deed...(Emphasis added)

[14] ...“First, the highest regard had to natural boundaries; Secondly, to lines actually run and corners actually marked at the time of the grant;...

[293] As stated above there can be an ambiguity as applied to the words contained in the description. Secondly, there can be an ambiguity as applied to the lands in question. I do not think there can be much doubt that an ambiguity exists here, when applied to the lands in question.

[294] Never mind that the reference is to a stake which is no longer there, the ambiguity here clearly arises because the beginning point, the point of intersection of the two roads is in dispute. It could not be more in dispute.

[295] In the present case experienced and professional surveyors not only disagree, but have made determinations which have changed (for eg. Mr. Gunn). This matter has made its way to the Court on the basis of there being an ambiguity.

[296] As Mr. MacKinnon said:

Normally you find the intersection of the two roads, and that would normally be considered a good, if not one of the best, beginning points.

[297] The roads here are in the midst of heavy tidal action with an Ocean on the east side and Ingonish Bay on the south and on the west. There is clearly both evidence of erosion and accretion, the latter being land filled in due to tidal action.

[298] Returning to the Donovan legal description, after the beginning point the first course is “west by north 225 feet”. When one looks at the 1927 plan, it can be seen that the roads meet at an angle. West by north was explained as meaning more west than north. The description of this first course appears to be consistent with that angle as shown on the 1927 MacDonald plan.

[299] The next course is simply “south”. The grantor, Bridget Peters, used a similar course in conveying the lands to Agnes Donovan. Mr. Gunn has shown that particular boundary (eastern boundary of Agnes Donovan and western boundary of the Gunn lot). It is not set at “due south magnetic in 1947”. It is set as more or less perpendicular to the Wharf Road as is the eastern boundary of the lands of James and Sharon Gunn.

[300] The third course in the description of the Donovan property proceeds 174 feet along the shore to a stake. Once again the use of a stake would have been deemed prudent in the day. The last course also shows the intent with respect the drafting of the description.

[301] The last course proceeds in a north east direction which is consistent with the 2006 Gunn plan, the Tingley plan and the 1993 plan of Mr. Harvey.

[302] Mr. Gunn and Mr. Tingley said there was no evidence of possession on the western side of Mr. Donovan's property at or near the Legion boundary. There had been a survey marker placed at this point by Paul Harvey. This marker is shown on Mr. Gunn's plan, as earlier noted, Mr. Gunn had his own marker set on the western boundary. Rather than simply view these markers as signifying Mr. Gunn's eastern boundary, the surveyors should have also considered whether these markers were evidence of the Donovan's western boundary. In my respectful view it was wrong to place the marker at due south.

[303] Further, a close examination of the entire legal description of Mr. Donovan's lot reveals that in three of the five courses, the drafter had intentionally created an angle, a fourth course being along the water. If it was intended that the western boundary was to be "due south", it is likely that the description would have read "south by east".

[304] I found the evidence of Amos Donovan to be credible. His father showed him where the boundary was on the Legion side. It was described, as being, "on the edge", where the steps came down onto the Donovan property.

[305] The MacKinnon survey report is not without some question. He mentions a photo (in the 1982-84 period) where Cecil Donovan marked the boundary of his eastern line. The report states it is "close to Paul Harvey's marker". This photo is in the nature of hearsay as Mr. Donovan is deceased. Although the photo was admitted by consent, it should be given less weight.

[306] Also, the evidence of certain witnesses including Amos Donovan and Barbara Matheson confirm that the road location has not changed. In his report, Mr. MacKinnon stated that "the roadway" was probably pushed inward.

[307] In his evidence Mr. MacKinnon explained the difficulty as follows:

The only problem is that one road you can definitely locate... that being the Wharf Road, but the public road you can locate, it's just, it's just the ocean was just too torrential... and I can only assume that the road disappeared too... and we don't know where that road is. I can mathematically locate it and I show it on the plan it agrees with what Mr. Tingley has done also, we both agree on it where it mathematically is, but like, to actually find it, to actually know where it's at when this lot was created, there is no way. And

I think the best evidence we have is the 1927 and 38 plan and they show it and you, there's too much agreement on it as to where that boundary is and then a surveyor comes along 20 years ago and puts a marker in that checks with that was done back in '28 when these deeds were written.

[308] There is ample evidence that since 1902 there has been considerable erosion in respect of the main highway to the point that it has disappeared south of the junction in question, and it has not been physically present to be surveyed. This is consistent with the opinion of Mr. MacKinnon. In the circumstances, his opinion is that the road cannot really be determined because it is not physically there. This provides obvious problems in then establishing where the two roads would meet, thus the need to search for the best evidence available.

[309] Further Mr. MacKinnon spoke about a principle of surveying in determining boundaries as contained in Section 8.28 Survey Law in Canada:

A boundary when surveyed marks not simply the limits of one property but the division between two or more properties. The surveyor must therefore consider the rights of all adjacent owners and must include in his search all pertinent evidence created in surveys of their properties. **In re-surveying boundaries of occupied properties the surveyor should be very cautious about doing anything that would upset the established limits of occupation.** Settled possession, where it can be reasonably be related back to the time of the original survey, may provide the courts with satisfactorily evidence of the original boundary. (Emphasis added)

[310] The above principle is relevant here. In my respectful view, the opinion of Mr. MacKinnon is persuasive because it makes abundant sense. I was not satisfied that the junction of the two roads, shown by Mr. Tingley on his plan as the point of beginning, was known to the parties to the deed in 1946, when the deed to Cecil Donovan was granted. When Mr. Tingley explained his survey of the Donovan lands, I did not find it was entirely clear.

[311] The boundary known to the community and respected by the Legion from 1957 to 1998 is sufficient in my view to determine the western boundary of the Donovan lands.

[312] The eastern boundary of the Donovan lands and the beginning point are in agreement with the Harvey marker as affirmed by Mr. MacKinnon. It is within inches of the 225 feet frontage called for in the Donovan deed. I have concluded that this is "settled possession", which can be reasonably related back to the time

of the MacDonald plan in 1927, when the Wharf Road was established. I find therefore it is satisfactory evidence of the western boundary of the main highway.

[313] For all of the above reasons I find that the Plaintiffs have, on a balance of probabilities established that they have valid documentary title, to the lands described in their deed in Book 208 Page 191, as it is shown on the MacKinnon Plan.

[314] As a result of my finding, there is no remnant lot between the Donovan lands and the lands of James and Sharon Gunn. I find that the survey as prepared by Raymond MacKinnon fairly represents the beginning point and the western boundary of the lands of Amos Donovan, his sister, and his mother.

[315] I therefore conclude that the Plaintiffs' deed dated October 15, 1999 recorded in Book 208 at Page 191 includes the disputed parcel identified as PID 85154920 and therefore extends to the original boundary of the Legion lot which is described in the deed to James and Sharon Gunn dated June 20, 2003 recorded in Book 233 at Page 929.

[316] Mr. Gunn holds no valid deed to any lands east of the former Legion lot as described in 1957. When Bridget Peters passed away in 1951 the law as stated in the *Descent of Property Act* was that any interest held by her in real property would devolve to her children. This is now a moot issue in light of my finding that there is no remnant.

Issue 2: In the alternative, if the Plaintiffs deed does not include some or all of the disputed parcel has the occupation and use of the said parcel from 1946 to the commencement of this action been such as to entitle the Plaintiffs to an order restraining the Defendants from further entry upon the said lands and to the further remedies applied for in this action?

[317] Having found that the Plaintiffs' deed includes all of the disputed parcel, it is not necessary for me to determine this issue.

[318] Issue 3: Does the Western Boundary of the Plaintiffs lands run to the shore more or less perpendicular to the Wharf Road or does it run in a southeast direction to the shore?

[319] Based on the reasons already given in my decision, the western boundary of the Plaintiffs lands shall run more or less perpendicular to the Wharf Road and does not run in a southeast direction to the shore.

[320] I confirm my finding under Issue #1, that the land described in the Plaintiffs deed dated October 15, 1999 recorded in Book 208 at Page 191 includes the disputed parcel identified as PID 85154920.

[321] Therefore, I find that the western boundary of the Plaintiffs lands extends to the original boundary of the Legion lot which is described in the deed to James and Sharon Gunn dated June 20, 2003 recorded in Book 233 at Page 929.

Issue 4: Are the Defendants Entitled to Relief under the Doctrine of Proprietary Estoppel?

[322] The Defendants contend that the Plaintiffs should be estopped from asserting their rights as owners to force removal of the geo-thermal piping already installed on what they contended was the Remnant Parcel.

[323] I have found that there is no remnant parcel and that the Plaintiffs are the owners of the lands on which the installation of the piping was made, as shown on Exhibit #11.

[324] In their post-trial brief, the Defendants set out at page 53, the particulars of the work, including the dates performed, contractors, nature of the work and amount paid. It is clear from this that the bulk of the work was performed from August 22, 2011 to August 26, 2011.

[325] I note also that by far the largest investment, according to the information provided was for the installation of the heat pump. While an estimate was obtained for this on September 14, 2011, it was not installed until March of 2012. This was long after counsel was engaged, with letters being exchanged. That cost was \$16,157.50.

[326] The Defendants submit in their post-trial brief the basis for seeking relief by Promissory Estoppel at page 49:

In the present case, the Defendants did extensive work on the property in 2010 and 2011, when they installed the geo-thermal piping on the Remnant Parcel. At no point during either of these periods of work did the Plaintiffs attempt to assert ownership or stop the Defendants from completing the work. In fact no protest was made by the Plaintiffs until late in the summer of 2011.

[327] The Defendants have further reviewed in their brief the various correspondence with the Plaintiffs, the maintenance work performed by the Defendants, and the “geothermal work”.

[328] In May of 2010 Mr. Gunn asked for and received permission from Amos Donovan to construct a roadbed to access the triangular parcel. Although the Donovans were not happy with Mr. Gunn’s survey of 2006, Amos Donovan granted his permission. In his May 19, 2010 letter Mr. Gunn stated:

I am prepared to remove the portion of this roadbed that falls on your property and restore the land to its original grade if you wish. No problem! We could also leave it there and if I ever needed to use it again I would ask your permission.

[329] As it turned out Amos Donovan did think that the roadbed could be left there, and as Mr. Gunn states, he provided gift cards to the Donovans in appreciation.

[330] It is important to remember that these expenses did not occur until 2011. In 2011, the Donovan family was not able to be in Ingonish very often. As well as matters evolved in respect of Mr. Gunn’s activities, letters were forwarded to him notifying him of their position.

[331] The Defendants have in their briefs set out extensively, the law of proprietary estoppel from the decision of MacAdam, J. in *Ford v. Kennie and Attorney General (NS)*, 2002 NSSC 51, and other authorities. In *Ford*, quoting from *Anger and Honsberger, Law of Real Property*, (2nd Ed. 1985), vol. 2, the court described the doctrine as follows at paragraph 45:

The basic principle is that when a person has been induced by the representation of another to believe that he will obtain some form of right over the other’s land, and has acted on those representations to his detriment, the representor will not be permitted to resile from the position as he represented it to be, after the detriment has been suffered.

[332] The Court also refers to their being no one “universal yardstick” that governs every form of behaviour. Simply put, the conduct to be assessed is what a person had led another to believe, even though it may have been unintended.

[333] Each case therefore must be determined on its own set of facts .

[334] The early permissions by Amos Donovan, rather than being unconscionable, were neighbourly. The facts are that after the easement was requested Ann Marie MacDonald, Amos’ sister, sent a letter to Mr. Gunn dated July 28, 2010. She was responding to his request for an easement. In this letter Mr. Gunn was asked to remove the roadbed and return the property to its original grade. Further she stated “our family has no interest in providing an easement or any other arrangement you proposed...”.

[335] Mr. Tingley’s survey was completed in May of 2011 and provided to the Donovans by Mr. Gunn. I have referred to this earlier in my decision. He said he was surprised but “it is what it is”. In response to this letter, a second letter was sent by Ann Marie MacDonald, this time to Mr. Gunn’s surveyor Lester Tingley on August 11, 2011.

[336] In that letter Ms. MacDonald stated to Mr. Tingley that both she and her brother, Amos Donovan, “strongly disagreed” with his survey and further that they were “referring all relative documents to our lawyer”.

[337] Although Mr. Gunn did not recall, Mr. Tingley’s recollection was that he informed Mr. Gunn of this letter and it stands to reason that he would. Mr. Tingley did not delay in responding to Ms. MacDonald and sent a letter dated August 16, 2011. Mr. Tingley stated he would have spoken to Mr. Gunn before responding. I am satisfied that Mr. Tingley informed Mr. Gunn of the August 11, 2011 letter.

[338] Mr. Gunn was clearly aware of the July 28, 2010 letter because he referred to it in his later letter of January 7, 2011. In that letter he mentioned the roadbed and said there was “little else on his mind”.

[339] For his part, Mr. Gunn proceeded with dispatch once he received the survey from Mr. Tingley. He wasted no time recording it, as was the case with the deed.

[340] From a review of the evidence the only reasonable inference that can be drawn, is that it was Mr. Gunn himself who was making the decisions to move forward.

[341] He had his deed and his survey and he did not think either of them could be challenged. He said this himself. He also said in evidence that all he needed was a “one liner”, and he would have stopped.

[342] Upon receipt of the survey however, he did not hesitate to question Mr. Tingley’s result. He readily accepted the survey, without approaching the Donovans, who he knew had been long time residents.

[343] Mr. Gunn had received more than a “one liner”. He was aware of both letters sent by Ann Marie MacDonald. Even when Mr. Gunn received the letter from Mr. MacIsaac, dated August 31, 2011, Mr. Gunn stated in his September 7th reply that it would be “most inconvenient” if the work was stopped.

[344] The evidence suggests to me that Mr. Gunn had a timetable for completion. While Amos Donovan responded in a neighbourly manner, the Plaintiffs did nothing to induce or lead Mr. Gunn into thinking he could act. It was he who was making the decisions to move forward. He did this in the face of knowing that the Plaintiffs were opposed and strongly disagreed. They wanted no arrangement with him and told him so.

[345] In summary, proprietary estoppel is an equitable remedy. I do not see how it would be equitable in these circumstances to allow the Defendants claim.

[346] I have read the submissions of the Plaintiffs’ counsel at paragraph 346 to 352 of his post-trial brief. I concur with those submissions.

[347] I am not satisfied that the Plaintiff encouraged Mr. Gunn to act to his detriment. On the contrary, they informed him of their opposition. He therefore, proceeded at this own peril.

I am therefore denying the request of the Defendants for relief under the doctrine of promissory estoppel.

Issue 5: Should the Plaintiffs be Granted an Injunction Requiring the Defendants to: A) Vacate the Remnant Parcel; B) Remove Geo-Thermal Piping Installed in 2011; and C) Return the Land to its Previous Condition?

[348] The Plaintiffs have requested an injunction requiring the Defendants to vacate PID #85154920 based on their documentary title.

[349] The granting of injunctive relief is discretionary and the test amounts to whether it is just in all the circumstances to grant the relief.

[350] The rightful owner of the land is entitled to quiet enjoyment, free of encumbrances. The Defendants are clearly encroaching on the lands of the Plaintiffs without their consent.

[351] In these circumstances it is just that the encroachment be removed, and the land returned to the condition it was prior to the Defendants entry.

[352] For these reasons it is my view that the Plaintiffs are entitled to the injunctive relief as requested. In doing so I rely on the authorities provided in the pre-trial and post-trial briefs.

Issue 6: Are the Plaintiffs Entitled to Damages for Trespass on the said Lands?

[353] In all of the circumstances it appears obvious that the Defendants are trespassing on the property of the Plaintiffs. Simply put, the Plaintiffs are the lawful owners of the lands in question, and the Defendants are encroaching on those lands, without the consent of the Plaintiffs.

[354] That in law is trespass.

[355] The Defendants argue in the alternative that the Plaintiffs acquiesced to the work being done by the Defendant when they made no protest while the work was being done and ought to be precluded from making a claim for trespass to land.

[356] The evidence does not support this argument. The Plaintiffs did protest as evidenced by the letters sent by Ann Marie MacDonald and by their counsel in August of 2011.

[357] I therefore cannot agree that the Plaintiffs “sat on their right’s”. They informed the Defendants they wanted no arrangement with them and informed Mr. Tingley that they “strongly disagreed” with his survey, who in turn informed Mr. Gunn.

[358] As Amos Donovan stated, the Plaintiffs had little time to respond, after waiting months for the Defendant’s survey to be completed.

[359] I therefore find that the Plaintiffs have made out their claim in trespass. In reaching this decision I have read and relied on the authorities provided in the pre-trial and post-trial briefs.

Issue 7: What other Remedies are Available to the Plaintiffs?

[360] The Plaintiffs are entitled to the Relief outlined in paragraph 354, of their post-trial brief, with the exception of (b) and (c), which are claimed “in the alternative”.

[361] A Declaration will issue that the Defendants have no title to PID # 85154920, based on the Plaintiffs documentary title.

[362] An Order will issue that the Defendants take whatever steps are necessary to rectify the Property Online data to reflect the Plaintiffs ownership.

Conclusion

Issue 1 - I find that the Plaintiffs deed dated October 15, 1999 recorded in Book 208 at Page 191 includes the disputed parcel identified as PID 85154920 and therefore extends to the original boundary of the Legion lot which is described in the deed to James and Sharon Gunn dated June 20, 2003 recorded in Book 233 at Page 929.

Issue 2 – I find that the Plaintiffs deed includes all of the disputed parcel and therefore it is not necessary for me to determine this issue.

Issue 3 - I find that the western boundary of the Plaintiffs lands extends to the original boundary of the Legion lot which is described in the deed to James and Sharon Gunn dated June 20, 2003 recorded in Book 233 at Page 929.

Issue 4 – The request of the Defendants for relief under the doctrine of proprietary estoppel is denied.

Issue 5 – I find that the Plaintiffs are entitled to an injunction requiring the Defendants to: A) Vacate the remnant parcel; B) Remove geo-thermal piping installed in 2011; and C) Return the land to its previous condition.

Issue 6 – I find that the Plaintiffs have made out their claim in trespass.

Issue 7 – A Declaration will issue that the Defendants have no title to PID # 85154920, based on the Plaintiffs documentary title. An Order will issue that the Defendants take whatever steps are necessary to rectify the Property Online data to reflect the Plaintiffs ownership.

[363] It is unfortunate that Mr. Gunn moved at the pace he did. The Plaintiffs should have been accorded more time and deference when Mr. Gunn approached them to discuss this matter and prior to proceeding with a very expensive outlay of funds in the installation of his geothermal piping and related construction.

[364] I will hear from the parties on the issues of damages and costs.

[365] Order accordingly.

Murray, J.

Appendix A

The Survey of Land between Gunn and Donovan – Lester R. Tingley, NSLS

1. Having prepared the aforementioned survey for Her Majesty the Queen (Public Works and Government Service Canada) and having located the public road that cross Ingonish Beach as part of said survey, a significant piece of information became apparent when considering the beginning point of the Donovan lands (PID No. 85047439) as described in Book 208 Page 194, which reads as follows:

“Beginning: at a stake on the south side of the road leading to the Government Wharf at Ingonish Beach at the junction of said road with the main highway”.

With this point being the point of beginning and there being little or no chance of finding the “stake”, the next issue became the remaining boundaries.

2. *“west by north two hundred and twenty five feet”* – I followed the southern edge of the existing paved surface as I believe this may have been as close to the edge of the 1947 gravel road as I was likely to be able to locate having compared the location shown on my plan with the geo-referenced photo A-5079-64. The 1947 location was taken from the geo-referenced photographs as per the plan references in the tile block. I checked a distance measured from 18 feet south of the southern boundary of land referenced by Book 55 Page 34 to the approximation of the 1953 ordinary high water mark (OHWM) and found it to check favourably, within 2 feet.
3. *“South one hundred sixty five feet to high water mark”* – magnetic south converted to grid and produced south from that point being 18 feet south of lot described in Book 55 Page 34 and on a line running magnetic south 1947 and being 225 feet from the point of beginning. To check to the OHWM (2 feet) was in my opinion quite good, considering the variables.
4. *“East one hundred and seventy four feet along the shore to a stake”* – having taken the OHWM from the above noted aerial photographs a point was determined 174 feet along this line.
5. *“North East one hundred and twenty feet to the place of beginning”* – the point 174 feet along the OHWM was joined with the point of beginning. There is a difference of 6 feet but considering the variables some of which are movement of roads by construction repairs, geo-referenced photographs, erosion/accretion this difference in my opinion is within the range of acceptance.

I found no evidence of use by either party near the common boundary as shown on my plan. I did not interview Cecil Amos Donovan or Ann Marie MacDonald but did enter on to their property during the course of the filed survey to look for evidence of boundaries and make ties to the corners of their cottage (see *Land Surveyors Act*, Chapter 249, revised *Statutes of Nova Scotia*, 1989). It should be noted that the original deed from Milton L. Peters to Cape Smokey, Branch #91, of the Canadian Legion, (Registry Reference Book 84 Page 98 executed August 09, 1957), now the Gunn house lot reads as follows:

*Beginning at the north east corner of land Agnes Donovan at the intersection of the road leading to the Government Wharf at Ingonish Beach:
Thence East fifty –five feet, (55 feet);
Thence south one hundred ninety feet, (190 feet), to water of the harbour;
Thence west fifty-five feet, (55 feet) along the shore;
Thence north one hundred and ninety feet, (190 feet), to place of beginning.*

The deed to Cecil Donovan from Milton and Bridget Peters, Registry Reference Book HHH Page 395 was executed on April 29, 1946 about 11 years and 3 months before the conveyance to the Legion but no mention is made of Cecil Donovan being the adjoiner to the east in the deed to the Legion. The cottage may have been built on the Donovan lot prior to August, 1957.

The above passages describe my approach to locating the lands of Cecil Donovan (Reg. Ref. HHH/395 now Cecil Amos Donovan, Ann Marie MacDonald and Jessie Donovan (Reg. Ref. 208/191)(PID No.85047439).

Summary

Having located the main highway referred to in the Donovan deed, having located the Donovan lot (PID No. 85047439) as noted above and having accepted the location of the of the Gunn house Lot (PID No. 85047447) as per deeds and surveys, I determined there is a remnant parcel of land between the Donovan lot and the Gunn Lot. The location of this remnant parcel was located and marked as per my plan of survey.

I am 99% certain with respect to the conclusion reached above and on my survey plans.

Appendix B

Conclusions – Raymond MacKinnon, NSLS

Certain points have to be emphasized:

1. My clients lot was created back in 1946. The wording at the start of the description “Beginning at a stake” may indicate that this lot was surveyed and that Cecil Donovan (Father of Amos) knew where his lot began. This is an important point because it shows where the intended lot should start.

Cecil Donovan marked out on a photograph (in the 1982-1984 period) where this starting point was. This point is close to where the Paul Harvey survey marker was found.

2. Cecil Donovan also told Amos that their West boundary ran close to the East Side of the old Legion Hall. This checks close with my plan, Jim Gunn’s Plan and Paul Harvey’s Plan.
3. The ocean in Ingonish, like in other areas, has drastically and constantly changed out shore line. This Public Road (at times called Beach Crossing Road) was described by Plan and description in 1902 and this road ran along the shoreline. The road to the Government Wharf was surveyed on July 23, 1927 and the Western boundary of this Public Road or Highway at that time was located.

At this point it has to be mentioned that the 1902 plan and the 1927 plan do not seem to agree. This was probably caused by the failure to locate or find the road in its intended location. As the shoreline and road naturally eroded away, the roadway probably was pushed inland.

In 1946 when Cecil Donovan’s lot is created the best evidence of the West boundary of the public road is this 1927 Plan. Also maybe the Public Roadway in its new location was found.

Now we move Westward along the accepted South boundary of Beach Crossing Road for a distance of 224.4’ (feet) to the North East corner of lands of James and Sharon Gunn as described in Book 233 page 929. This corner agrees with James Gunn corner as shown in his plan registered as No. 86411916 (2006).

Now the question is what direction do we run on when we go south.

In some cases when descriptions call for running South or West, you may interpret this as running Due South or Due West. However after reading other deed descriptions (on the South Side of this road) and after tying in ground evidence along survey lines, I believe the West line of my clients land should run parallel (or close to parallel) to other accepted lines West of us.

In conclusion I believe that there is not a remainder lot between the Canadian Legion and the Donovan Lands.