IN THE SUPREME COURT OF NOVA SCOTIA

Citation: MacDougall v. Nova Scotia (Attorney General),2008 NSSC 88

Date: 2008/03/28
Docket: S. Sn. 280422
Registry: Sydney

1992

IN THE MATTER OF: An application by JOSEPH FARRELL, IAN MCDOUGALL, LISA FARRELL, JANICE MCDOUGALL, LESLIE MACDONALD AND STEPHEN FARRELL to be added as defendants in the proceeding within; and

IN THE MATTER OF: An action under the Quieting Titles Act, R.S.N.S. 1989, C.382

Between:

David Louis MacDougall

Plaintiff

v.

The Attorney General of the Province of Nova Scotia,
Stan MacIsaac, Verna MacIsaac, and Patricia Kunze

Defendants

Judge: The Honourable Justice A. David MacAdam

Heard: December 3, 4, and 5, 2007, in Sydney, Nova Scotia

Final Written Submissions: December 13, 2007

Counsel: Donald G. Peverill for the Applicants
Paul Chaisson for the Defendants/Respondents
(Stan MacIsaac and Verna MacIsaac)

By the Court:

[1] The Applicants, Joseph Farrell, Ian McDougall, Lisa Farrell, Leslie MacDonald, Janice McDougall and Dr. Edward Stephen Farrell, are the owners of four lots located at or near the shore of the Bras d'Or Lakes in Big Pond, Cape Breton, Nova Scotia. The four lots are accessed by a small roadway known as Lil' Dan's Lane. This roadway leads from Nova Scotia trunk highway No. 4 to the shore of the Bras d'Or Lakes.

[2] Lil' Dan's Lane was the subject of a Certificate of Title issued pursuant to the *Quieting Titles Act* R.S.N.S. 1989, c. 382 (herein the "Act"), in respect of a proceeding commenced in 1992 and concluded by Consent Order in 1996. The parties in that proceeding consented to an Order which was signed by the Honourable Justice Walter Goodfellow, (herein "Justice Goodfellow's Order"), following which a Certificate of Title was issued to the Defendants, Stan MacIsaac and Verna MacIsaac (herein respectively "S. MacIsaac" and "V. MacIsaac") for the lands containing Lil' Dan's Lane. Notwithstanding the Certificate of Title, the Applicants, or their predecessors in title, continued to use Lil' Dan's Lane to access their lots. By letter dated December 2nd, 2005 some of the Applicants were

advised by a solicitor acting on behalf of S. MacIsaac and V. MacIsaac that they were no longer permitted to use Lil' Dan's Lane.

[3] At issue is whether the Applicants, or any of them, are entitled to have the quieting of titles proceeding re-opened in order to file a notice of a claim to the use of Lil' Dan's Lane to access their lots.

Background

[4] The Plaintiff, David Louis MacDougall, (herein "MacDougall") commenced an action under the then *Act* claiming title to lands that included a lot along the shore of the Bras d'Or Lakes, but also lands containing Lil' Dan's Lane. The Defendants, S. MacIsaac and V. MacIsaac, responded in a Statement of Defence and Counterclaim for a Certificate of Title over a large tract of land which encompassed lands being claimed by MacDougall. Subsequently, the MacIsaacs amended their claim for Certificate of Title to include only the portion of the MacDougall claim that related to the lands fronting on the Bras d'Or Lakes. Their amended claim did not include the land containing Lil' Dan's Lane. Also joined as a Defendant to the proceeding initiated by MacDougall was Patricia Kunze.

[5] In an Affidavit deposed to on August 22, 1994, S. MacIssac stated:

> **THAT** from the time of my birth on 5 November 1949 until approximately June of 1959, I lived with my mother, father and brothers on the property until my mother's death, at which time I moved from the property to my aunt's home, which is located in the same vicinity as the property of Alex A. MacIsaac;
>
> T**HAT** throughout the years to follow I was a frequent visitor to the property in question for purposes of swimming, picnicking, bonfires and other activities;
>
> **THAT** not only myself, but my brother, Frank, also used and controlled the property to the shores of the Bras d'Or Lakes;

[6] Counsel for MacDougall, on his Application for directions filed a supplementary memorandum in which she stated:

> During Chambers, the Defendants suggested that the adjoining land owners of Mr. MacDougall were the same adjoining land owners of Patricia Kunze and the MacIsaacs. This is simply not the case. The Defendants' lands border in some areas on lands owned and claimed by David MacDougall, and other parties of the Defendants' land are bordered by other property owners. It is essential that these land owners receive notice of the action.
>
> In addition, as the Defendants have made Counterclaims, it is essential that each advertise in the Cape Breton Post the specific property description which each claims in its Certificate of Title pursuant to the mandatory provisions of the Quieting Titles Act. As the Defendants have different property descriptions, the advertisement of each Defendant must be separate and apart.

[7] Counsel for the Defendants, in respect to the proposed Order for Directions, indicated:

> In relation to Clause 2(b), certainly all the Defendants can provide is a statement outlining conflicting property rights that they have knowledge of.

[8] In a Memorandum dated September 13, 1994, addressed to Counsel for the Plaintiff and Counsel for the Defendants, Justice Frank C. Edwards noted:

> Clause 2(b) - - should require the Defendants to outline the conflicting property rights of which they are aware or ought to be aware.

[9] The underlining of the word "ought" appears in the Memorandum of Justice Edwards. By Order dated September 20, 1994, Justice Simon J. MacDonald, (herein "Justice MacDonald's Order") in directing that the Defendants should file an amended Defence and Counterclaim, ordered:

> **THAT** Patricia Kunze, Stan MacIsaac and Verna MacIsaac shall file with their Counterclaim the following:
>
> (a) a statement of the owners and occupiers of the adjoining lands, if they can be ascertained, whether the Counterclaimants or such other person is or claims to be in actual or constructive possession

> of the land, and in whose name it is assessed for city, town, municipal or other local right to taxes pursuant to Section 5(1)(b) of the Quieting Titles Act;
>
> (b) a statement outlining all conflicting property rights or claims with respect to the real property in dispute pursuant to Section 5(1)(c) of the Quieting Titles Act of which the Defendants are aware or ought to be aware;

[10] The Notice of Claim signed by the Prothonotary on September 26, 1994, in respect to the Claim of Certificate of Title for S. and V. MacIsaac, included a lot containing 1.6 acres more or less, along the shore of the Bras d'Or Lakes and reserving and excepting thereout the lands claimed by the Defendant, Patricia Kunze, and the lands deeded to or claimed by Charles Libbus. The claim did not include the lands on which Lil' Dan's Lane is located.

[11] Neil F. McMahon, then Counsel on behalf of MacDougall, filed an Affidavit dated January 12, 1993, in which he referenced an Order granted by the Honourable Murray J. Ryan, J.C.C. on June 24, 1992 (herein "Judge Ryan's Order") wherein the Plaintiff was ordered to:

> forthwith advise the owners of the various lands which adjoin the property which is the subject of this action that they may intervene in this action by mailing to them by registered mail a true copy of the Statement of Claim and a Notice of

> Right to Intervene together with a plan attached thereto outlining the lands which are the subject of this action and a true copy of the Notice of Claim.
>
> (the names of the landowners and their addresses to which the aforesaid notices and other documents are to be mailed being as set out in Schedule "A" attached to said Order.)

[12] Mr. McMahon further deposed that he caused to be mailed to the persons named in Judge Ryan's Order at their addresses copies of the Statement of Claim filed by MacDougall together with all schedules and exhibits, the Plan of Survey, a copy of the Notice of Right to Intervene and a copy of the Notice of Claim. Among the persons to whom Mr. McMahon deposes to having mailed these documents were the Defendants, S. and V. MacIsaac, Joseph Hajjar and Ruth Hajjar, Patricia Kunze, John MacDougall and Loyola C. MacDougall. In addition to annexing a copy of the Registered Mail Booklet containing the Canada Post stamps indicating the documents were accepted by Canada Post for delivery, Mr. McMahon further deposed:

> **THAT** by the aforesaid order granted herein by the Honorable [sic] Murray J. Ryan, J.C.C. on 24 June 1992 the Plaintiff was further ordered to:
>
> > cause to be inserted in the Cape Breton Post, a daily newspaper published at Sydney, in the County of Cape Breton, Province of Nova Scotia, four (4) advertisements of his claim for a Certificate of Title, such advertisements to be in the form set out in Schedule

> "B" to this Order together with the description of the property contained therein, which form of advertisement and property description are hereby approved as meeting the requirements of the Quieting Titles Act with respect to public advertisement of the Plaintiff's claim. Such advertisements to be published weekly for four (4) weeks before 31 July 1992.
>
> **THAT** I did cause to be inserted in the Cape Breton Post on 29 June 1992, 6 July 1992, 13 July 1992 and 20 July 1992 advertisements of the Plaintiff's claim and attached as Exhibits "4", "5", "6" and "7" respectively to this my affidavit are true copies of portions of the pages of the Cape Breton Post for those dates on which said advertisements appeared.

[13] Effectively the Notices referenced in the MacMahon Affidavit are the only Notices or advertisements in relation to any claim including the lands that contain Lil' Dan's Lane. There were apparently no advertisements or notices given with respect to the initial counterclaim by S. and V. MacIsaac when they claimed the larger tract of land which would have included Lil' Dan's Lane. It is only after they amended their counterclaim so as to only seek a Certificate of Title for the lot bordering the Bras d'Or Lakes that they advertised notice of their claim and forwarded notices to the two abutting land owners.

[14] The proceeding between MacDougall, as Plaintiff, and Patricia Kunze and S. and V. MacIsaac, as Defendants, was settled pursuant to Justice Goodfellow's Order. In the settlement, the Plaintiff's action was dismissed and the Defendants S.

and V. MacIsaac were entitled to a Certificate of Title to a number of lots, one of which included the lands containing Lil' Dan's Lane. The Defendant, Patricia Kunze, was entitled to a Certificate of Title for lands which she was claiming. Counsel for the Defendants, in forwarding the Order dismissing the Plaintiff's action and awarding the Certificates of Title, indicated the Plaintiff had agreed to provide a Quit Claim Deed to one of the counsel in trust for both Defendants, in addition to acknowledging his agreement that the Defendants be issued their respective Certificates of Title.

[15] The effect of these transactions and orders is that the claim by MacDougall for the lands containing Lil' Dan's Lane was dismissed and the Defendants S. and V. MacIsaac obtained a Certificate of Title for this land, notwithstanding they were not claiming such a Certificate of Title. Also, the only notices or advertisements in respect to any claim to the lands containing Lil's Dan's land were those outlined in the MacMahon Affidavit. No such notice or advertisement in respect to the lands containing Lil' Dan's Lane were made or forwarded for or on behalf of S. and V. MacIsaac.

The Applicants

[16] The Applicants, Joseph Farrell and Ian McDougall, claim on the basis of ownership of two lots located on the west side of a 12 foot right-of-way which itself lies to the west of Lil' Dan's Lane. In an Affidavit filed in this Application, Ian McDougall deposed that he, with his brother-in-law, Joseph Farrell, purchased the two lots in November 2006. Although his Affidavit is silent as to whom he purchased the property from, Counsel for S. and V. MacIsaac suggest it was the Hajjars. Counsel for the Applicants, in a written submission of December 13, 2007, references notices to the Hajjars as being relied upon by the Respondents, adding that this notice did not say "... to any person that a claim was being made to prevent parties from using an access road. All that these notices would convey to an abutting land owner were the dimensions of the lots being claimed by the Plaintiff." Whether Counsel is acknowledging the statement by counsel for S. and V. MacIsaac that the owner of the MacGregor and Farrell lands as at the time of the quieting of title application were the Hajjars is unclear. Nevertheless, what is clear is that the Hajjars were given notice and in fact, responded by communicating with the Court, confirming they had received notice. Speculation by Counsel for the Applicants that they were not aware the access road was being claimed is, first of all, speculation, and secondly, not an obligation on the part of a party seeking a

quieting of title. The obligation is to forward notice of the claim, and there is nothing in any of the Orders, nor in the *Act* itself, requiring further information on the effect of the claim on the person receiving notice. With respect to Ian McDougall and Joseph Farrell, there is no evidence that their predecessor in title did not receive notice and, in fact, it would appear on the basis of the written submissions of counsel that indeed they did receive notice.

The Second Applicants

[17] Ian McDougall, Lisa Farrell, Leslie MacDonald, and Janice McDougall claim on the basis of their ownership of a lot abutting the east side of the lands containing Lil' Dan's Lane. At the time of the quieting of titles application the lot was owned by their parents, John and Loyola McDougall. As appears from the MacMahon Affidavit, notice was forwarded to John McDougall and Loyola C. McDougall at a civic address in Sydney, Nova Scotia. Ian Gregory McDougall, in his Affidavit, deposed that he is a co-owner of this lot, having purchased the property in August 2006 from his parents, adding that at the time he understood access to the properties fronting the Bras d'Or Lakes was by Lil' Dan's Lane. His Affidavit then continues:

> THAT I have used the road now known as Lil' Dan's Lane, in common with the owners from time to time of the various lots which are shown and marked with an 'X' in Exhibit 'A' to this my affidavit, and also with the defendant MacIsaacs, and their predecessors in title, for all of my life, with earliest memories from about 1970, on;
>
> THAT there has never been any interference with use by myself or my family members of the road now known as Lil' Dan's Lane of which I was aware, until December, 2005, when the MacIsaacs first fully asserted their claim to some of the neighbouring land owners.

[18] Lisa Farrell, one of the four tenants in common with Ian McDougall, Leslie MacDonald, and Janice McDougall confirmed the purchase in 2006 of the lot from her parents, John and Loyola McDougall. Her Affidavit, dated April 16, 2007, then continues:

> 9. THAT my parents had a summer cottage, later converted to a full home that they constructed on the lot which is PID No.: 15330350, in 1969, one year after the lot was purchased;
>
> 10. THAT my parents and my siblings accessed the summer house on a regular basis throughout the summers of 1969 to 2006 by using the road that is now called Lil' Dan's Lane and there was and is no other means of access to the property.
>
> ...

> 12. THAT the other intended defendants and myself are applying to reopen this proceeding in order to be added as defendants to try the question of whether the owners of the various lots marked ‘X’ have any rights to the use of Lil’ Dan’s Lane;
>
> 13. THAT I am aware of the continued use of road now known as Lil’ Dan’s Lane by all of the owners of the various lots marked ‘X’ which had cottages, or campers thereon from 1968 through 1996 when the MacIsaac’s Certificate of Title was granted. I am also informed by the late Thelma Joseph, and do verily believe that she and her husband Sam Joseph used their lot, which is PID No.: 15330285 from 1957 to 1996, and beyond;

[19] Also filed is a Statutory Declaration of John W. McDougall and Loyola C. McDougall. Their declaration refers to the purchase of their lot on the Bras D’or Lakes and having been advised by the Vendor that the roadway which travelled from their lot to Trunk 104 was considered to be a shared roadway for the use of the owner, as well as a number of other owners who had summer homes situated immediately adjacent to the roadway. The declaration advises that their land was purchased in 1968 and that in or about 1970 they began constructing a summer home, which was completed within a year. The declaration then continues at paras. 6-11:

> THAT following the construction of our summer home we, together with our family, have used our summer home each and every year to this date and that our use generally extends over the period of May through September each year on a full-time basis.

> THAT in addition to using our summer home during the aforesaid time period, we have always customarily traveled to our Land through the fall and winter months for the purpose of short visits and the security of our property.
>
> THAT for many years through the 1970's, 1980's and 1990's, the roadway was regularly graveled and graded generally at the request of one or more of the aforesaid property owners to the current Municipal Councillor for the area.
>
> THAT we recall after requests having been made to Councillors Donald MacIsaac and, more recently, Ivan Doncaster, the Municipality would provide the necessary gravel and grading services over the full length of the roadway and that this was, as previously noted, done on a regular and continuous basis.
>
> THAT we further recall through the 1970's and 80's personally engaging Hector Morais of Big Pond to provide the grading and gravel over all and portions of the roadway and that the costs of this would be shared amongst various land owners who own lands adjacent to and used the roadway.
>
> THAT we recall recently in the year 2000, after completing extensive renovations to our cottage, we had personally engaged V. Curry & Sons and Cyril MacPherson to provide gravel and grading to the lower half of the roadway leading to our summer home. The costs of such labour and material were paid by us.

[20] The declaration continues by recalling that McDougall, who he understood was the person who acquired the lands containing Lil' Dan's Lane, located a trailer near the shores of Bras D'or Lakes, and together with his family had resided in the travel trailer for several weeks for approximately four to five summers. His statutory declaration recites that McDougall and his predecessor in title as the owner of the lands containing Lil' Dan's Lane, did not object to the use of the

roadway by all the other adjacent property owners, nor themselves, during the summers. To their recollection it was not until December 2005 that they were aware of any challenge to their use of the roadway and this was communicated in a letter dated December 2, 2005 from a solicitor acting on behalf of S. and V. MacIsaac. The declaration adds that they have continued, since receipt of the Notice, to access their cottage openly, notoriously, and continuously, however with the continued objections of S. and V. MacIsaac. The declaration further continues, at paras. 19-21:

> THAT we have been advised by our solicitor, A. Robert Sampson, that a proceeding under the *Quieting of Titles Act* had taken place in the 1990's which included, in part, the roadway.
>
> THAT we have been further advised that in connection with that proceeding there had been an Affidavit filed with the court suggesting that we had received, by way of registered mail, notice of the proceeding.
>
> THAT we did not receive any registered letter in relation to any Quieting of Titles application involving the lands adjacent to our own and in particular the roadway and further state that the first time we were made aware of this proceeding was in early 2006 after receiving the solicitor's letter on behalf of Stanley and Verna MacIsaac and consulting with our lawyer.

[21] John W. McDougall, in testifying, reiterated that he has no recollection of receiving notice of the quieting of titles proceeding and was not aware a claim for a

Certificate of Title was being made with respect to the lands containing Lil' Dan's Lane, so as to deprive him, and his successors, of access along Lil' Dan's Lane to their lot.

[22] Clearly, however, in view of the MacMahon Affidavit, it appears the Notice directed by Judge Ryan's Order was forwarded by Registered Mail to John McDougall and Loyola C. McDougall.

The Third Applicant

[23] The third Applicant is Dr. Edward Stephen Farrell. In a Statutory Declaration dated October 26, 2006, Dr. Farrell says he purchased his lot about May 1981. His lot is located to the east of the lots owned by the children of John McDougall and Loyola McDougall and therefore does not abut Lil' Dan's Lane, nor the lands claimed in the Certificate of Title issued to S. and V. MacIsaac. Dr. Farrell declares that at the time he acquired his lot, it abutted a roadway which ran from Trunk 104 to the shores of Bras d'Or Lakes and that he was advised by the vendor that it was considered to be a shared roadway/right-of-way for the use of the owner, who at that time he believed to be McDougall, as well as a number of

other owners who had summer homes situated immediately adjacent to the roadway/right-of-way. He declares that following the purchase he and his family used the property each and every year and that such use generally extended over the period of May through the fall months, “generally residing there on a full time basis during the months of July and August”. He says they also customarily travelled to their land in the fall and winter months for the purpose of short visits and the security of the property. His declaration continues at para. 8:

> THAT to the best of my knowledge and belief through the 1970's, and I have personal knowledge through the years 1980's and 1990's, the roadway/right-of-way was regularly graveled and graded generally at the request of one or more of the aforesaid property owners and that the work was carried out by and under the direction of the Municipality.

[24] Dr. Farrell continues by recalling that in the 1980's, and for several years after acquiring his land, a gate existed at the top of the roadway/right-of-way where it abutted the No. 4 highway and, with the exception of the summer months of July and August, the gate was kept locked, and each of the property owners had their own key to the lock to gain access to the roadway/right-of-way. He also recalls McDougall situating a trailer on the lands near the shores of the Bras d’Or Lakes and periodically he and his family using the trailer during the summer months. He further declares that during the time that McDougall and his predecessors owned

the roadway, “the use of the roadway/right-of-way by all of the other adjacent property owners, including myself and my family and invitees, remained at all times open, notorious, continuous, and without interruption until on or about December 2005.”

[25] His declaration continues by stating that until December 2005, his use was without any interruption or notice from anyone. The first objection to his use was a letter dated December 2, 2005 received by one of his neighbours from a solicitor acting on behalf of S. and V. MacIsaac. He says, since being advised of this letter, he has, with his family, continued to use the roadway/right-of-way to access their cottage “openly, notoriously, and continuously”. The declaration then continues at para 17:

> THAT I have been further advised that prior to being advised by my solicitor of this Quieting of Titles action, I had never received any formal or informal notice of such proceedings nor was I aware that any such proceedings had taken place in connection with the adjacent lands, then owned by David MacDougall and the MacIsaacs, which I now understand included, in part, the roadway/right-of-way.

[26] It is undisputed that Dr. Farrell, apart from the advertisement published on behalf of MacDougall in respect to his claim, received no notice of either the MacDougall claim or the claim by S. and V. MacIsaac.

Issue

[27] At issue, is whether this quieting of title proceeding should be re-opened in order to add the Applicants as Defendants for the purpose of determining their right, if any, to use the travel way known as Lil' Dan's Lane in Big Pond, Nova Scotia.

The *Quieting Titles Act*

[28] The relevant provisions of the *Quieting Titles Act* include the following:

> **Statement of claim and plan**
>
> **5 (1)** The statement of claim shall contain a concise statement of the facts on which the plaintiff bases the claim and of the nature of that claim, and in particular shall set out
>
> ...
>
> (c) all the property rights that the plaintiff admits to exist other than the right that the plaintiff claims and all such claims to property rights that the plaintiff knows of but does not admit,

...

Effect of registered certificate of title

16 (1) A certificate of title, when it has been issued and registered pursuant to the *Land Registration Act* or the *Registry Act* in the registration district in which the land lies, is binding and conclusive upon all persons, including the Crown, and whether named in the action or not, and, except as is herein otherwise provided, the same is not liable to be attacked or impeached at law by any person whomsoever: the title mentioned in the certificate shall be deemed absolute and indefeasible on and from the date of the certificate as regards the Crown and all persons whomsoever, subject only to any charges, encumbrances, reservations, exceptions or qualifications mentioned in the certificate, and is conclusive evidence that every application, notice, publication, proceeding, consent and act that ought to have been made, given and done before the granting of the certificate has been made, given and done by the proper person.

...

Fraud

17 (1) Any person who claims to have been deprived of any property right by the certificate of title, may apply to the court or a judge, within one year after the registration of the certificate in the registry of the district in which the land lies, to have the certificate set aside on the ground that it was obtained by fraud.

(2) The court or judge, if satisfied that the certificate was obtained by means of a false representation known to be false by the plaintiff or the plaintiff's agent or by a wilful withholding of material facts or evidence by the plaintiff or the plaintiff's agent, may set aside the certificate of title.

Argument

The Applicants

[29] Counsel for the Applicants asserts it is a natural corollary of a judicial ascertainment of rights that they be based on a fair representation of the rights of all persons concerned. Reference is made to s. 5(1) (c), requiring disclosure in the Statement of Claim of all claims to property whether admitted by the Plaintiff or not. Counsel references s. 7(2), requiring an application for directions in respect to service on the Attorney General and all parties. In Counsel's written submissions, he refers to Practice Memorandum No. 12, at Clause 3 (c), to the effect that due to the complexity of some applications and time limits of the Chambers Judge, " ... substantial reliance must be placed on representations of all counsel." The submission then makes reference to Clause No. 3 (b), stipulating that the Memorandum filed on the application should list not only the abutters but, "other persons with any possible interest in the application." In the submission of Counsel it is the duty of every claimant to protect the rights of other persons who have even possible interests in the application.

[30] Counsel references the paper prepared by David P.S. Farrar for a program of the Continuing Legal Education Society of Nova Scotia, on January 19, 1993,

outlining Chambers practice in respect to applications for certificates of title under the *Act*. The author discusses the pre-hearing Memorandum, including the requirement to:

> list those persons who may have an interest and confirm that your order provides that they be sent notices of right to intervene with a copy of the plan (with property marked in red). List them even though you hope your action will ultimately wipe them out. They have a right to be heard and the judge wants them to know this.

[31] The Applicants refer to what are allegedly errors of the Court, including the supposition that Judge Ryan, in issuing the Ryan Order, was not advised "... there were 15 land owners who accessed their property over lot 1 in the Plaintiff's application." Applicant's Counsel further speculates that if the Plaintiff's solicitor had advised the Court of the persons who accessed their lots using Lil' Dan's Lane, Judge Ryan would have ordered these lot owners served. Why this would be an error on the part of Judge Ryan, if this is Counsel's suggestion, is unclear.

[32] Counsel surmises that there were other stages at which, if the Plaintiffs had been forthright in advising the Court concerning the persons who used Lil' Dan's Lane to access their property, the form of notice ordered would have been different. Applicant's Counsel refers to the Memorandum to Court by Counsel for

the Plaintiff, in respect to what notice the Defendants (herein the Respondents on this Application), should have been required to give in respect to their counterclaim for a certificate of title. However, the Memorandum on behalf of the Plaintiff is to the effect that notice should be given to the landowners who bordered the property on which Ms. Kunze and S. and V. MacIsaac were claiming their respective certificates of title, and not necessarily to persons who accessed their lots using Lil' Dan's Lane. The submission of Counsel continues:

> The respondents Stan & Verna MacIsaac had been claiming under their counterclaim a certificate of title to PID No. 15330228, a property of some 80 acres, which borders on all of the properties which are along Lil' Dan's Lane. In what was an obvious effort to avoid giving notification to all of these lot owners, the MacIsaacs had their surveyor prepare a new plan of land claimed in this proceeding, approximately 1.6 acres. The MacIsaacs claim was thus amended to include only the portion of lands claimed by David MacDougall which the MacIsaacs were disputing.

[33] Counsel observes the Order for Directions contained in Justice MacDonald's Order provided, in respect to the counterclaim S. and V. MacIsaac that they were to file a Statement outlining all conflicting property rights or claims with respect to the property, and to advise the owners of the various lands that adjoin the property, which was the subject of the proceeding that they may intervene. It is acknowledged that, apart from the advertisements in the Cape Breton Post, no notice was forwarded to any of the adjoining property owners. They rely,

however, on the MacMahon Affidavit as indicating that the adjoining property owners did receive notice of the proceeding in which there was a claim for a certificate of title on the lands containing Lil' Dan's Lane, albeit the claim was by MacDougall, rather than by S. and V. MacIsaac.

[34] Counsel's submission references a transcript of a portion of the evidence by the surveyor who had prepared the plan used by MacDougall in his application for a Certificate of Title and surmises that it should have been apparent to the presiding Judge that the owners or occupiers of the lots on the beach, which had an undeveloped right-of-way to the highway, were in fact using the travelled portion of Lil' Dan's Lane, and should therefore have inquired as to whether notice had been given to these lot owners. Again, speculation by Counsel is not evidence and certainly is not a basis on which to set aside the Certificate of Title granted pursuant to Justice Goodfellow's order. The submission continues by acknowledging there was no particular reason for the presiding Judge to have had the lakeside dwellers in mind as users of the road, but "he certainly should have recognized that the contiguous lot dwellers had a potentially significant interest". The onus placed by Counsel on the presiding Judge presumes knowledge, absent local knowledge, that would have to be generated through the materials filed by

counsel. These so-called errors of the Court are the omissions or failures that are protected by s.16(1) of the *Act*.

[35] There is, however, Justice MacDonald's Order, and the directions by Justice Edwards that persons who they were aware, or ought to have been aware, had conflicting property rights, should be notified of the claims by S. and V. MacIssac. Having regard to the admitted Affidavit evidence of S. MacIsaac concerning his knowledge of the history of this property, as well as the Statutory Declaration of John and Loyola McDougall, as well as the other Affidavit evidence filed in this Application, I am satisfied that S. and V. MacIsaac were aware, or certainly should have been aware, that various of the lot owners, including the Applicants, used Lil' Dan's Lane to access their cottage lots. To the extent S. MacIsaac gave evidence to the contrary, it is simply not credible, having regard to his Affidavit deposing that he was a frequent visitor to the property in question, and that he and his brother, Frank, had used and controlled the property to the shore of the Bras d'Or Lakes.

[36] What is clear, however, is that this Application is by the Applicants and not by the other owners of lots that were accessed by means of Lil' Dan's Lane. It is

not for Counsel for the Applicants to speculate on their knowledge of either the proceeding initiated by MacDougall or the counterclaim by S. and V. MacIsaac and Ms. Kunze, and whether they acquiesced, consented or simply accepted the nature of their applications. The Applicants' success or failure rests upon whether they are able to sustain a right to intervene in this proceeding based on their knowledge or lack of knowledge of the proceeding which resulted in a Certificate of Title for the lands containing Lil' Dan's Lane being granted to S. and V. MacIsaac. Whatever failures, if any, that occurred in respect to the other lot owners is, absent their own application to intervene and reopen the proceeding, foreclosed by s. 16(1), as well as, by their absence from participation in this Application.

[37] As noted earlier, in his Affidavit Ian McDougall deposed that he and his brother-in-law, Joseph Farrell, purchased their two lots in November 2006. As such, there was no requirement or obligation on the part of either the MacDougalls, or S. and V. MacIsaac, to provide either he or his brother-in-law notice of this proceeding. Although he does not, in his Affidavit, identify the vendor of the two lots, in their written submission, Counsel for S. and V. MacIsaac states it is Joseph and Ruth Hajjar who were provided notice of the MacDougall claim by registered

mail, as appears from the McMahon Affidavit. Whether this is correct or not, it is clear there is no evidence on this Application that the owner of the property purchased by Ian McDougall and Joseph Farrell in November 2006 did not receive notice of the proceeding in which there was, in due course, a Certificate of Title issued for the lands containing Lil' Dan's Lane. As such, their Application to reopen the proceeding and to be added as intended Defendants is dismissed.

[38] The Application by the Applicants whose title was obtained from John and Loyola McDougall in 2006 is similarly dismissed. On the evidence, particularly the McMahon Affidavit, notice was forwarded to John and Loyola McDougall by registered mail pursuant to directions in Judge Ryan's Order. Although another notice was not forwarded by S. and V. MacIsaac on their application, it only related to the lands along the Bras d'Or Lakes and not to any claim for title to the lands containing Lil' Dan's Lane. Although John McDougall deposed and testified that he did not receive the notice, there is no obligation in the *Act* nor in the Order for Directions that the Applicant for a Certificate of Title must establish that notice is received by the persons to whom it is directed to be given. The requirements of the *Act* and the Order for Directions are met by the forwarding by registered mail of the appropriate notice. If it were otherwise, and it was necessary to establish

that all persons had received notice, the *Act* would be virtually ineffectual in resolving titles. Although S. and V. MacIsaac did not give notice, they were not at that time claiming the lands on which Lil' Dan's Lane is located. The only claimant to the lands containing Lil' Dan's Lane was MacDougall and Counsel on behalf of MacDougall had forwarded the required notice as called for under the *Act* pursuant to Judge Ryan's Order for Directions. The present applicants who received title from John and Loyola McDougall can stand in no better position, and therefore their Application is also dismissed.

[39] The only remaining Applicant, Stephen Farrell, purchased his property in 1981 and, although not abutting Lil' Dan's Lane, used it as the means of access to his cottage lot during the summer months and on occasion in the fall. His Statutory Declaration, dated October 26, 2006, recites his purchase of the property, his understanding as to his entitlement to use the roadway known as Lil' Dan's Lane in common with other land owners, and his use of the roadway during the summer months, and in the fall and the winter on occasion, as a means of accessing his lot. He also deposes to the regular gravelling and grading of the road by the Municipality and the location of a gate that was kept locked with keys provided to each of the cottage owners to enable them to access their lots over Lil' Dan's Lane.

He deposes that the gate was installed in the 1970's and that the practice of keeping it locked remained until one of the lot owners began residing there on a full time basis. He further deposes that the first time he was aware of any objection to his use of the road, as well as use by adjacent property owners, was when a neighbour received a letter dated December 2, 2005, from a solicitor acting on behalf of S. and V. MacIsaac. He deposes that he had used the roadway without interruption until December 2005.

[40] He further deposes that although he did not personally know S. and V. MacIsaac through the 1980's, he believed the parties to the quieting of titles proceeding would have been aware as a matter of common knowledge,

> ... that the roadway/right-of-way was considered by all of the property owners using the same as well as many general community members, to be a common/shared roadway whereby each were entitled with the right to continue to use the roadway/right-of-way and did in fact use the roadway/right-of-way openly, notoriously, continuously and without any interruption.

[41] His declaration concludes, at paras. 19 and 20:

> THAT I recall meeting the MacIsaacs sometime in the early 2000's and had spoken to them on a number of occasions as a result of meeting them by chance in the area and at no time did either Stanley or Verna MacIsaac mention or suggest in any way any issues involving the roadway/right-of-way and in particular any

> suggestion that I, together with my family, or anyone else for that matter, did not have the right to use the roadway/right-of-way.
>
> THAT it was not until seven years later, and in particular December 2005, that I first became aware of the MacIsaac's claim for exclusive use of the roadway/right-of-way through a letter they had written to my neighbours, John MacDougall and Samuel MacDougall.

The Respondent

[42] Counsel for the Respondents, noting s. 16(1) of the *Act*, refers to the decision of Gruchy, J. in *Keirstead v. Piggott* (1999), 177 N.S.R. (2d) 1 where, in *obiter dicta*, he held that if there had been a right-of-way obtained by prescription, the right-of-way would have been extinguished by the awarding of a Certificate of Title. Counsel for the Applicants does not dispute the submission, that at least in Nova Scotia, a Certificate of Title pursuant to the Act extinguishes any prescriptive title, including easements and rights-of-way.

[43] In respect to the alleged errors by the Court, counsel for S. and V. MacIsaac notes that the lands claimed by his clients did not abut any of the properties to the east of the lands containing Lil' Dan's Lane. Only abutting property owners were entitled to receive notice, it is submitted, and therefore there was compliance. In

respect to receiving a Certificate for the lands containing Lil' Dan's Lane, counsel's submission continues:

> After the MacIsaacs and Kunze settled the matter by purchasing the lands claimed by the Plaintiff, David MacDougall, they in effect purchased the rights of Mr. MacDougall and could therefore rely upon the procedures followed by Mr. MacDougall's lawyers, including Neil McMahon.

[44] However Justice Goodfellow's Order did not assign the MacDougall claim to the lands containing Lil' Dan's Lane to S. and V. MacIsaac, but rather dismissed MacDougall's claim for a Certificate of Title. The Order then granted to S. and V. MacIsaac a Certificate of Title for land for which they had not claimed a Certificate, namely the lands containing Lil' Dan's Lane, without S. and V. MacIsaac having complied, in any way, with the Directions contained in the Memorandum of Justice Edwards, or in Justice MacDonald's Order. By seeking to rely on the MacMahon Affidavit as having complied with Judge Ryan's Order for Directions, they thereby sought to by-pass the Directions of Justice Edwards and Justice MacDonald. Then, having obtained the Certificate of Title, as appears from the Declaration of Dr. Farrell, they remained silent as to the title they had acquired in 1996 until, in December of 2005, their counsel wrote a letter to a number of the

landowners advising of their ownership and claim for exclusive use of Lil' Dan's Lane.

Functus Officio

[45] Citing Justice Hallett in *Golden Forest Holdings Ltd. v. Bank of Nova Scotia* (1998), 98 N.S.R. (2d) 429, counsel for S. and V. MacIsaac suggests the opening of this matter is barred by the principle of "*functus officio* which limits the ability of the Court to overturn or amend an Order which was previously issued by the same Court." Counsel references Justice Hallett's observation that if there is a power to vary a final Order, it must be found in the Court's inherent jurisdiction, and that, apart from matters covered by Civil Procedure Rules 15.07 and 15.08, inherent jurisdiction does not extend to varying a "final" order disposing of a proceeding, unless the Order does not express the true intent of the Court. There would not, in the view of Justice Hallett, be the certainty or finality to Court Orders that the judicial process requires.

[46] Civil Procedure Rule 15.07 is the so-called "slip rule", which has no application in the present circumstance. However, Rule 15.08 provides:

15.08. Where a party is entitled to:

> (a) maintain a proceeding for the reversal or variation of an order upon the ground of a matter arising or discovered subsequent to the making of the order;
>
> (b) impeach an order on the ground of fraud;
>
> (c) suspend the operation of an order;
>
> (d) carry an order into operation;
>
> (e) any further or other relief than that originally granted,

he may apply in the proceeding for the relief claimed.

[47] In *Federal Business Development Bank v. Silver Spoon Desserts Enterprises Ltd.* (2000), 189 N.S.R. (2d) 133 (C.A.), Justice Roscoe dismissed an Appeal, where the Chambers Judge had dismissed an Application to reopen a foreclosure deficiency judgment, on the basis that the new evidence would not have had an important influence on the decision. Justice Roscoe held that on such an Application the Applicant must prove:

1. the matter or evidence arising or discovered subsequent to the original order, is such that it was not previously capable of being obtained or discovered by the exercise of reasonable diligence,

2. the new evidence is apparently credible,

3. when examined with the complete record of the previous proceeding, the new evidence is such that it would be practically conclusive of the issue in favour of the applicant, and

4. provided that, in a case of obvious and substantial injustice, if the second and third requirements are met, the necessity to prove due diligence, should not be applied as strictly.

[48] Although admittedly Dr. Farrell is not a party, nevertheless, it is clear his Application is to reopen this proceeding in order to become a party and to advance his claim for the right to use Lil' Dan's Lane. His evidence of the historical use of the roadway would certainly appear to met the criteria outlined by Justice Roscoe, at least at this stage of the proceeding, namely to reopen the trial and permit him to be added as a Defendant in the proceeding.

[49] On the other hand, in *Coughlan v. Westminer Ltd.* (2005), 231 N.S.R. (2d) 201 (S.C.), Justice Nunn denied an Application to reopen a trial 12 years later, on the basis of the principle of finality and upon finding that the onus upon the Applicant grew heavier as the time grew longer between the original trial and the

Application to reopen. Justice Nunn found that unreasonable or inordinate delay would operate as a bar to any Application under Rule 15.08 and that there would be uncertainties, even with the new evidence, in respect to the original decision.

[50] In the present instance, however, the delay was caused by the omission of S. and V. MacIsaac to communicate to the cottage owners that they had obtained, by the Certificate of Title, exclusive use of Lil' Dan's Lane and thereby the right to preclude its use by the other cottage owners, including, in particular, Dr. Farrell. The unreasonable or inordinate delay was not that of Dr. Farrell, but rather followed from the decision by S. and V. MacIsaac not to communicate their title to those who would be affected and who may have wished to intervene.

[51] Whether the omission by S. and V. MacIsaac to advise Justice Goodfellow that the earlier directions of Justice Edwards and the Order for Directions of Justice MacDonald had not been complied with in respect of that portion of the Certificate of Title relating to the lands containing Lil' Dan's Lane, in that the persons they were aware of or ought to be have been aware of who would be affected by such a Certificate had not been advised, amounted to a fraud, it nevertheless would appear

to be sufficient to meet the criteria for the Application of Rule 15.08 as outlined by Justice Roscoe in *Silver Spoon, supra.*

[52] There is, of course, s. 17 of the *Act*, as it applies to an Application based on fraud, restricting it to one year after the registration of the Certificate in the registry district in which the lands lie. Although there is no evidence as to the date of the registration of the Certificate, it would appear reasonable to presume that the one-year period would have expired prior to the application by Dr. Farrell.

[53] Section 17 of the *Act* stipulates a one year limitation in the case of applications to re-open certificates of title issued on the basis of fraud. In the present instance, at issue is whether the limitation is applicable, having regard to the fact it was not until December 2005, at the earliest, that S. and V. MacIsaac notified the landowners and through them, Dr. Farrell, that they were claiming title to Lil' Dan's Lane, to the exclusion of the cottage owners who used the roadway to access their properties. At issue, therefore, is the extent to which this conduct could be described as "fraudulent" and the application of s. 17 in circumstances where the fraud itself has been concealed from those who are adversely affected.

[54] The Ontario Court of Appeal discussed "fraudulent concealment" in *Halloran v. Sargeant* (2002), 217 D.L. R. (4th) 327; 2002 CarswellOnt 2730, where the issue involved financial information provided by an employer to a terminated employee:

> 31 The doctrine of fraudulent concealment relied upon by the majority was succinctly articulated by Justice Dickson (as he then was) in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), at 390:
>
> > It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. A fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as 'conduct which having regard to some special relationship between the two parties concerned is an unconscionable thing for the one to do towards the other' is sufficient.
>
> 33 Crown Cork argued that the doctrine of fraudulent concealment should not apply in the case before us because there was no justification for the Divisional Court's finding that Crown Cork engaged in unconscionable conduct. In this regard counsel for Crown Cork relied upon the shorter Oxford Dictionary definition of unconscionable: 'having no conscience; unscrupulous; monstrously extortionate, harsh . . . showing no regard for conscience; irreconcilable with what is right or reasonable ... 'The *Oxford English Dictionary* Second Edition, 1991, Volume XVIII gives a broad range of definitions for unconscionable including simply: 'not in accordance with what is right or reasonable'. In my view, it was not in accordance with what is right or reasonable for the company to make an unqualified statement containing a misrepresentation which caused its employee to act to his detriment. The company was in a position to ascertain the state of the law at the time and provide accurate information to Mr. Halloran. There is nothing in the record to suggest otherwise. I believe that it was unconscionable

for the company to invoke the limitation period in s. 82(2) of the Act in order to deny Mr. Halloran's claim when it was responsible for his delay in filing the claim. Mr. Halloran is, in the circumstances, a completely innocent party who did no more than take the word of his employer of 31 years to his detriment. To put it another way, I believe that Crown Cork breached its obligation of good faith and fair dealing to Mr. Halloran and thereby acted unconscionably.

34 Counsel for Crown Cork relied upon Justice LaForest's judgment in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.) at p. 57 where he noted that there was an important restriction to the scope of the doctrine of fraudulent concealment as stated in *Halsbury's*, 4th ed., vol. 28, para 919, at p. 413:

> In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts.

I do not find that the restriction articulated in *Halsbury's* precludes the application of the doctrine in this case. Mr. Halloran was in a vulnerable position in relation to his employer at the time of termination. Given this special relationship there was, in my view, a clear obligation on the part of Crown Cork to provide accurate information to its employee. To do otherwise is an abuse of the relationship. It was unreasonable for the Referee to decline to relieve against the application of s. 82(2) of the Act in this case. In my view, the limitation period in s. 82(2) should not have commenced until Mr. Halloran became aware that severance money under the Act was due to him which was either December 2, 1995 or perhaps earlier, on March 23, 1994. Either of the aforementioned dates bring him within the time prescribed in s. 82(2).

35 I note that in the *M. (K.) v. M. (H.)* case, LaForest, J. reviewed both the *Kitchen* ... and *Guerin* cases and concluded at page 57:

> What is clear from *Kitchen* and *Guerin* is that '*fraud' in this context is to be given a broad meaning, and is not confined to the traditional parameters of the common law action*. [Emphasis added]

> He also stated at p. 58 that the underlying premise of the doctrine of fraudulent concealment is that, 'the courts will not allow a limitation period to operate as an instrument of injustice'. While *M.(K.) v. M. (H.)* involved a tort action for incest, its discussion regarding the doctrine is equally applicable to the case at Bar.

[55] Although involving a tort action for incest, the principles set out in *M.(K.)* v. *M.(H.)* are no less applicable in the circumstance where S. and V. MacIsaac, notwithstanding obtaining their Certificate of Title in 1996 and notwithstanding the property owners, and in particular, Dr. Farrell, were continuing to use the roadway openly, notoriously, continuously and without interruption, did not, until December 2005, notify the users they held exclusive title and were precluding their use of Lil' Dan's Lane to access their properties.

[56] The Application of s. 17 to preclude Dr. Farrell would effectively mean that a person, having misled the Court in order to obtain a Certificate of Title could strengthen their position by then continuing the misleading conduct, by not advising those affected by the Certificate until the expiration of any statutory limitation period. Such a result is manifestly unjust and absurd; the absurdity of such a result must be conclusively determined to have been beyond the intention of the legislature.

[57] In *Schmuck v. Reynolds-Schmuck*, 2000 CarswellOnt 202, Himel J., in a divorce proceeding in which counsel for the husband requested a clarification and review of certain issues determined at trial, made the following observations at paras. 22-25:

> [*Castlerigg Investments Inc. v. Lam* (1991), 2 O.R. (3d) 216 (Ont. Gen. Div.)] is often cited for the rule that a trial judge has untrammelled discretion to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur. The appropriate exercise of a trial judge's discretion is most often considered in the context of requests to re-open a trial in order to present new evidence: ... It is extremely rare for there to be a request to re-open a trial on the grounds of a reconsideration of the case.
>
> In *Kent v. Frolick* (1996) 3, O.T.C. 122 (Ont. Gen. Div.) and *Grant v. Grant* (May 31, 1994), Doc. 671/93 (Ont. Gen. Div.), the court was faced with a party requesting a reconsideration of the case. In *Grant*, one party wanted a reconsideration of the amount of spousal support awarded. In *Kent*, the moving party asked for a reconsideration of the child support award, arguing that the evidence on the quantum of support was not fully understood by the court, and not fully canvassed at trial. In both cases, the court accepted that there was an untrammelled discretion to prevent a miscarriage of justice, but found that there was no justification to reconsider the case.
>
> In *DeGroote v. Canadian Imperial Bank of Commerce* (April 24, 1998), Doc. 92-CQ-12825 (Ont. Gen. Div.) at paragraph 6, Lax J. explains the policy concerns in an application to re-open a trial: 'The issue with which the cases have concerned themselves is how to balance the need to ascertain the truth upon full disclosure of all material facts with the need to preserve the integrity of the litigation process and prevent an abuse of its process. Both needs are directed at ensuring that justice is achieved.'

> It is my view that a party who wishes a reconsideration alone would have to establish that the integrity of the litigation process is at risk unless it occurs, or that there is some principle of justice at stake that would override the value of finality in litigation, or that some miscarriage of justice would occur if such a reconsideration did not take place. No such reasons exist in this case. The questions raised by counsel may be the subject of appeal. As such, I decline to exercise may [sic] discretion to reconsider any of the issues raised by the husband.

[58] The parties provided supplemental submissions on several issues, principally the issues of equitable fraud and fraudulent concealment of causes of action. The applicants say the failure to give notice to all users of L'il Dan's Lane that their right to use the road would be lost amounted to an equitable fraud by the original plaintiff, David MacDougall. As to the limitation period, that say it would run only from the time any equitable fraud should have been discovered. In this respect, they refer to section 29 of the *Limitation of Actions Act*, which states:

> In every case of a concealed fraud, the right of any person to bring an action for the recovery of any land, or rent, of which he, or any person through whom he claims, has been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud was, or with reasonable diligence might have been, first known or discovered.

[59] The applicants suggest the limitation period would begin to run no earlier that December 2005, when the MacIsaacs' lawyer in Ontario wrote to the waterfront lot owners. The "north-south" lot owners, Joseph Farrell and Ian MacDougall, were informed that the closure of the Lane applied to their lots in

January 2007. In any event, the applicants argue, there would be a strong basis upon which to extend the limitation period pursuant to section 3 of the *Limitation of Actions Act*.

[60] The respondents submit that ample notice was given, if not directly to the MacDougalls or Stephen Farrell, then by way of advertisements in the Cape Breton *Post*. They also suggest that there was no "special relationship" between the parties to the original action and the predecessors in title to the applicants, as would allegedly be necessary to establish fraudulent concealment. Finally, they submit that there is no basis for a finding of equitable fraud, arguing that there is no evidence of deliberate intent to mislead the Court with respect to any possible rights claimed by other landowners. I have addressed these arguments above.

Conclusion

[61] The Applications by the Applicants, other than Dr. Farrell, are dismissed.

[62] In the present circumstance the integrity of the litigation process is at risk, since there was a failure to advise the Court that persons affected by the Court's

proposed course of conduct had not been given notice, notwithstanding earlier directions of the Court requiring notice to be given. The Application by Dr. Stephen Farrell to reopen the trial and be added as a Defendant is granted. However, it will be up to the presiding Judge to determine what rights, if any, Dr. Farrell may have to use Lil Dan's Lane as a means as of access to his cottage. Depending on the result, what rights of access, if any, others, including, but not necessarily limited to, the dismissed applicants, will have to use Lil Dan's Lane will also be for the presiding Judge to decide. The effect of re-opening the trial is for the trial judge to determine.

J.