SUPREME COURT OF NOVA SCOTIA
Citation: Morrison v. Muise, 2010 NSSC 163

Date: 20100414
Docket: PtH No. 249924
Registry: Port Hawkesbury

Between:

Beatrice Morrison

Plaintiff

v.

Mary M. Muise

Defendant

Judge:	The Honourable Justice Frank Edwards
Heard:	April 12, 13 and 14, 2010, in Port Hawkesbury, Nova Scotia
Final Written Submissions:	May 4, 2010
Written Decision:	May 18, 2010
Counsel:	Scott Lytle, for the plaintiff W. Harry Thurlow, for the defendant

By the Court:

[1] ***Introduction:*** The Plaintiff's claim is that she and her predecessors have maintained adverse possession of the disputed property. On the third day of trial, Counsel for the Plaintiff closed and tendered the exhibits. Counsel for the Defendant then made a non-suit motion. After hearing lengthy submissions, I granted the non-suit motion with written reasons to follow.

[2] ***Non-Suit Motion: The Law:*** Civil Procedure Rule 51.06 provides the test for non-suit motions in Nova Scotia:

> At the close of the Plaintiff's case and before the Defendant elects whether to open the Defendant's case and present evidence, the Defendant may make a motion for dismissal of the proceeding, or a claim in the proceeding, on the ground that there is no evidence on which a properly instructed jury could find for the Plaintiff.

[3] Whether the Plaintiffs have established a *prima facie* case is a question of law. The decision to be made is whether a reasonable jury could find in favour of the Plaintiffs if the jury believed the evidence at trial up to that point. In dealing with an appeal from the granting of a non-suit in ***Wentzell v. Spindle*** (1987), 81 NSR (2d) 200 (C.A.), Clarke, C.J.N.S. referred to the following passage from Sopinka and Lederman, *The Law of Evidence in Civil Cases* at page 521:

> If such a motion is launched, it is the judge's function to determine whether any facts have been established by the Plaintiff from which liability, if it is an issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the Plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the Plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. This decision of the judge on this deficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence which is a question of fact.

[4] The Nova Scotia Court of Appeal made the following comments on non-suit motions in ***MacDonell v. M&M Development Limited*** (1998), 165 N.S.R. (2d) 115 (C.A.) at paras. 38 to 40:

> On a nonsuit motion, the trial judge has to consider all of the circumstances, including the issues of fact and law raised by the pleadings. The general test for a nonsuit motion is whether or not a prima facie case was made out by the plaintiffs. It is sometimes expressed as whether a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff. If not, the motion will succeed.

[5] The wording of the above paragraphs appears to have been integrated into the wording of new Rule 51.06.

[6] Although the threshold for a plaintiff in establishing a *prima facie* case is low, evidence upon which an alleged *prima facie* case is based must be sufficient to generate a reasonable prospect of success. In other words, it is not enough for a plaintiff to show that some evidence has been elicited on a necessary element of their case without also satisfying the Court that said evidence is probatively sufficient in the context of the legal framework of each cause of action alleged.

[7] The concept of considering the evidence against a legal framework is described succinctly in ***Petten v. E.Y.E. Marine Consultants***, [1995], N.J. No. 197 at para. 4:

> . . . Before a non-suit motion can be granted, the trial judge must be satisfied that no case has been made out "upon the facts and the law". The evidence must be viewed against the legal framework of the claims which are being relied upon. Although the plaintiff may have adduced evidence to link the defendant to the circumstances of the case, that in itself is not enough; the evidence must be capable of supporting the specific causes of action alleged. The judge may determine the applicable law on this non-suit motion because questions of law are always for the judge, and not the jury, to decide.

[8] And further at paragraph 10:

> What is contemplated by the probative sufficiency test is nothing more than a threshold common-sense screening of the

> evidence to ensure that it has some meaning and is not fanciful or ridiculous. Thus, it would not be enough to resist a non-suit motion simply to point to the fact that words were uttered during viva voce testimony or were contained in a documentary exhibit which, if taken literally and outside of their context, could result in the trier of fact finding liability. If the words, judged by common experience or when viewed in the context of the remainder of that witness's evidence (including, say, an unequivocal later retraction) are insensible or ridiculous and cannot have any real meaning of substance or cannot have their literal meaning, the judge on a non-suit motion would be entitled, not withstanding their existence, to conclude that the words themselves did not have enough probative sufficiency from which a jury, reasonably instructed, could infer liability. Beyond that, however, the weighing and assessment process is for the trier of fact and not the judge on the motion.

[9] The Nova Scotia Court of Appeal commented on the issue of probative sufficiency in ***J.W. Cowie Engineering Limited v. Allan et al*** (1982), 52 N.S.R. (2d) 321 (C.A.). In that case the Court upheld the Trial Judge's granting of a non-suit motion in favour of a defendant solicitor who was sued directly by an expert retained by the solicitor in the course of litigation on behalf of a client. The Court comments at paragraphs 13 and 14 while citing *Cross on Evidence* (4th ed., 1974) at p. 66:

> Cross in his text on Evidence (4th ed., 1974), comments on the rules at p. 66:
>
> > The extent of this method of control increased during the nineteenth century, for, as Willes, J., said in *Ryder v. Wombwell,* (1868), L.R. 4 Exch. 32, at p. 39:

> It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, . . . not whether there is literally no evidence but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.
>
> The test to be applied by the judge in order to determine whether there is sufficient evidence in favour of the proponent of an issue, is for him to enquire whether there is evidence which, if uncontradicted, would justify men or ordinary reason and fairness in affirming the proposition which the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue. This test is easy to apply when the evidence is direct, for the question whether witnesses are to be believed must be left to the jury, but it is necessarily somewhat vague when circumstantial evidence has to be considered. In that case, little more can be done than inquire whether the proponent's evidence warrants an inference of the facts in issue, or whether it merely leads to conjecture concerning them.

[10] And further at paragraph 14:

> 14. In *Mahen v. Arkelian* (1972), 30 N.S.R. (2d) 405 (C.A.), the test applied by this Court was whether a prima facie case had been made out by the plaintiff. It is clear that the mere fact there is some evidence, however weak, does not prevent a trial Judge from granting the motion. With respect, I am satisfied the trial Judge applied the proper test.

[11] The Federal Court of Appeal also considered the law with respect to non-suit motions in ***Figueira v. Garfield Container Transport Inc***., [2006] F.C.J. No. 1005. In that case the Federal Court, referring to ***Cowie***, supra, explains that evidence which is "not appreciable" or which is "so minimal as to have no affect in law" does not rise to the level of *prima facie* evidence when considering a non-suit motion.

[12] ***Law: Adverse Possession:*** The Plaintiff's claim is based upon alleged adverse possession of the disputed property.

[13] The law of adverse possession is well settled. The often referred to test is described in LaForest, Anger and Honsberger *The Law of Real Property*, 3rd Edition (Canadian Law Book: Ontario, 2006) at pages 29-16 and 29-17:

> The possession that is necessary to extinguish the title of the true owner must be "actual, constant, open, visible and notorious occupation" or "open, visible and continuous possession, known or which might have been known" to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is "equivocal, occasional or for a special or temporary purpose".

[14] This definition has been cited by Nova Scotia courts repeatedly. Some of these include: ***Spicer v. Bowater Mersey Paper Co.*** [2004] N.S.J. No. 104 (C.A.); ***Palmer v. Nova Scotia*** (Attorney General), [1988] N.S.J. No. 536; ***Board of Trustees of Common Lands v. Tanner,*** [2005] N.S.J. No. 367; ***Fralick v. Dauphinee,*** [2002] N.S.J. No. 646; and ***Conrad v. Nova Scotia (Attorney General),*** [1994] N.S.J. No. 564 (C.A.).

[15] In order to trigger the operation of the ***Limitation of Actions Act***, R.S.N.S. 1989, c.258, the person claiming adverse possession must establish all of the elements of possession, as well as the commencement date for said acts. MacIntosh, in *Nova Scotia Real Property Practice Manual*, writes at page 7-7:

> In order to succeed under the Statute, a party claiming a possessory interest ***must be able to establish a commencement date for his or her acts of physical possession, so that the limitation period may be computed***. [emphasis added]

[16] MacIntosh continues at page 7-9, citing ***Teis v. Ancaster (Town)*** (1997), 35 O.R. (3d) 216 (C.A.) at page 221 for the following:

> To succeed, the acts of possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous. If any one of these elements is missing at any time during the statutory period, the claim for possessory title will fail.

[17] Anger and Honsberger, *The Law of Real Property*, supra, states at page 29-24.1:

> Time of dispossession or discontinuance begins to run when all facts which must be established as part of the adverse possessor's claim have occurred, and when those facts reasonably should have been known to the true owner.

[18] A successful claimant's possessory title will be confined to the specific portion of land he or she openly, notoriously, continuously and exclusively possessed. Possession of part of the land is not possession of the whole. [***Ezbeidy, supra*** at para. 17; and ***Tobias, supra***, at para. 81].

[19] The duration of possession required in Nova Scotia is a continuous 20 years. This time period is found in the ***Limitation of Actions Act***, R.S.N.S. 1989, c. 258. The relevant provisions are:

> 10 No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.
>
> ...

> 13 No person shall be deemed to have been in possession of any land, within the meaning of this Act, merely by reason of having made an entry thereon.
>
> ...
>
> 22 At the determination of the period limited by this Act to any person for making an entry, or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished.

[20] ***Presumptions Favour True Owner:*** The burden of proof in an adverse possession claim rests squarely on the shoulders of the alleged adverse possessor. In ***Tobias et al v. Nolan***, [1985] N.S.J. No. 539, Macintosh J. succinctly states this point at paragraph 74:

> As he who alleges must prove, those who seek to establish title by adverse possession must provide the necessary facts in support of such a claim. It must also be kept in mind that there is a presumption that possession of land is in the party having paper title. Reference is made in this regard to *Bentley v. Peppard* [1903], 33 SCR 446:
>
> > Possession must be somewhere – in somebody – and he who has the title is presumed to have the possession unless the actual dominion and occupancy is elsewhere.

[21] A title holder, or "true owner", is not required to assert a claim to lands. Even if the lands remain vacant, the presumption is that the true owner is in

possession. This presumption is not rebutted by the fact that the true owner is not in actual occupation of the land in dispute. MacQuarrie J. of the Nova Scotia Supreme Court summarized this point in ***Ezbeidy v. Phalen***, [1957] N.S.J. No. 12 at paragraph 14:

> As to (3) where there is a contest between a person who claims by virtue of his title, as the defendant does here, and a person who claims by long adverse possession only, such as the plaintiff must rely on here, there is first of all a presumption that the true owner is in possession, that the seisen follows the title. This presumption is not rebutted or in any way affected by the fact that he is not occupying what is in dispute. In order to oust that presumption it is necessary to prove an actual adverse occupation first which is exclusive, continuous, open and notorious, and after that has been proved, the position is that the owner is disseised and the other person is in possession. If that person who is in adverse possession continues openly, notoriously, continuously and exclusively to exercise the actual incidence of ownership of the property, that possession in time ripens into title …

[22] Charles MacIntosh in his *Nova Scotia Real Property Practice Manual* at page 7-7 writes:

> Practically speaking, there is no difference between dispossession and discontinuance of possession. The limitation period commences to run only if there is both absence of possession by the person who has the right and actual possession by another, and the onus is on the trespasser to establish that the true owner has been out and someone else in for the duration of the statutory period. Consequently, the fact that an owner may cease to physically occupy the land, leaving it vacant, does not start the limitation period running. There is a

> presumption that the true owner is in possession and that presumption is not rebutted by the fact that he or she is not occupying the land, or exercising its rights incidental to ownership. [emphasis added]

[23] The Defendant and her predecessors in title always held valid paper title to the lands in dispute. As such, their constructive possession was and is presumed. The onus is therefore on the Plaintiff to satisfy the Court that she obtained possessory title.

[24] ***Sufficiency of Evidence Needed to Dispossess:*** In ***Ezbeidy, supra***, MacQuarrie J. comments at paragraph 17, "The legal owner is not to be deprived of his property lightly". Hallet J. in ***Lynch v. Nova Scotia (Attorney General)***, [1985] N.S.J. No. 456 comments on the extremely high evidentiary burden an alleged adverse possessor faces:

> [7] The legal concept which allows a person to acquire possessory title good against the holder of the legal title is based on the premise that a legal owner cannot stand aside and allow a trespasser or co-tenant to make improvements to the property and pay the taxes over many years and then come in and claim it, even though he could see the other was in possession. ***As a safeguard to the legal owner, the courts have insisted that the possession be of the quality described before the legal owner's title is extinguished; otherwise there could be great injustices if by doing sporadic, unobservable acts on the land a person could acquire possessory title. Hence the care which should be taken by a court before a finding is***

> ***made that the title of the legal owner to woodland in particular, is extinguished as the acts relied upon are very often sporadic in nature and unobserved by the true owner yet can qualify as being acts that are consistent with the limited use a person who owns land of that nature would make of such land*** .
>
> [8] As claims for possessory title extinguish the title of the legal owner pursuant to a limitations Act, ***the court should only act on very cogent evidence that proves that the person's possession has been visible, exclusive and continuous possession for the required statutory period***. Legal owners should not be dispossessed where land is such that the legal owner would not make a great deal of use of the land, such as wood land, particularly if the claim is made not by a trespasser but by one co-tenant or more against others. Section 12 of the Limitation of Actions Act provides that no person shall be deemed to have been in possession of any land within the meaning of the Act merely by reason of having made an entry thereon. ***Where the acts of possession relied upon with respect to wood land are the occasional unobserved cutting of logs and firewood from the property, such acts do not improve the property even though they evidence the intention of one co-tenant to possess it exclusively. It cannot be too strongly emphasized that evidence of possession to extinguish title must be of a quality that has been required by the courts for hundreds of years.*** Each case turns on its own facts. [emphasis added]

[25] In ***Lynch, supra***, Hallet J. points out that the nature of the lands must be taken into consideration when determining the sufficiently of possession. In particular, when dealing with woodlands, His Lordship cautioned against the acceptance of "sporadic" and "unobserved" acts as evidence of possession and

furthermore that the Court should only act on "very cogent evidence". In ***Spicer v. Bowater Mersey Paper Co., supra***, the Court of Appeal comments on the sufficiency of evidence at paragraph 20:

> ***From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous***. They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession. [emphasis added]

[26] ***Nature of Possession Required:*** Anger and Honsberger, *The Law of Real Property*, *supra*, describes factors which should be taken into consideration when determining the sufficiency of possession at page 29-19:

> Whether there has been sufficient possession of the kind contemplated by the statute is largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute. Possession must be considered in every case with reference to the peculiar circumstances, for the facts constituting possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonable be expected to follow with a due regard to their own interests, are factors to be taken into account in determining the sufficiency of possession.

[27] In ***Ezbeidy***, supra, the court described the nature of possession in the following oft-quoted passage:

> [18] Possession may be roughly defined as the actual exercise of rights incidental to ownership as such, that is, the person who claims to be in possession must exercise these rights with the intention of possessing. Where a man acts toward land as an owner would act, he possesses it. The visible signs of possession must vary with the different circumstances and physical conditions of the property possessed.

[28] In ***Scheinfeldt v. Nova Scotia***, [2001] N.S.J. No. 146, Gruchy, J., held that the nature of the land should be taken into consideration when assessing the sufficiency of the acts of possession. His Lordship also explained that the acts of possession on "wild lands" are assessed differently than other lands (such as cultivated property):

> [24] There is no doubt that the quality of possession required to obtain possessory title of wild lands (as is the lot in question) is different from that required for cultivated or settled lands or property.

[29] The degree of possession is also critical. An adverse possessor must exercise exclusive possession as against the true owner as well as other trespassers. In *Anger and Honsberger Real Property* (3rd ed., 2009) the authors explain at page 29-12:

> To establish the quality of possession required by the statute, an adverse possessor must show that they have actual possession and the intention of excluding the owner from possession and that they have effectively excluded the true owner from possession.

[30] The authors continue at page 29-22:

> It is not necessary, however, for a person in exclusive possession to be certain of his right to do so. If a person, uncertain and unconcerned about his legal rights, remains in exclusive possession, possessory title can result.

[31] In ***Spicer v. Bowater Mersey Paper Co., supra***, the Court of Appeal held that the trial judge erred on the element of exclusivity. Roscoe J.A, speaking for the court, stated:

> [20] From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. ***They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land***. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession.
>
> [21] In this case, the prerequisite that the respondents clearly failed to prove, in my opinion, was that of exclusivity. Possibly, because at trial the appellant argued primarily that the possession was not open and notorious, or continuous, the trial

> judge overlooked ***the requirement that the possession of the trespasser must dispossess the true owner and it is insufficient if the trespasser's possession is merely a possession shared with others during the relevant period of time.*** [emphasis added]

[32] The Court of Appeal in ***Spicer, supra*** held that the use of the land by the unsuccessful respondent did not interfere with the normal use and occupation of Bowater. The court also held that there was clear evidence that the appellants did not abandon the land as they routinely surveyed the forest every five years. The court also noted that the appellant paid the property taxes on the land in question for all of the years the respondent claimed adverse possession.

[33] Exclusive possession typically requires inconsistent use of the property which is adverse to the true owner's intended use. Acts which do not interfere with and are not inconsistent with the owner's enjoyment of the land for the purposes for which he intended to use it are not evidence of dispossession, as provided by MacIntosh at page 7-8:

> Adverse possession is established when the claimant's use of the land is inconsistent with the owner's enjoyment of the soil for the purposes of which he or she intended to use it.

[34] ***Analysis:*** The land in this case is undeveloped. It mainly consists of woodland with sparse clearings in some areas. There are no dwellings.

[35] ***Muise Claim of Title (Defendant):***

- March 11, 1943 – Municipality of the County of Richmond, Grantor, to Lewis Poirier, Grantee.

- September 7, 1945 – Will filed October 1, 1945 as document number 1699, book 26, page 477 transfers interest from Lewis Poirier, deceased, to his brother, Joseph Muise, and appoints Laura Muise (Joseph's wife) as Executrix.

- September 26, 1964 – Quit Claim Deed from Gerald Muise and Mary Muise, George Muise and Alice Muise, Agnes Petrie, Violet Groom (heiress of the late Joseph Muise) to Laura Muise (widow of Joseph Muise) and Mary Middleton (daughter of Joseph and Laura Muise) as joint tenants.

- March 5, 1971 – Warranty Deed, Mary Middleton, Grantor, to St. Peter's Village Commission, Grantee. Conveys a small portion of the lands at issue to the Village Commission, which is now the site of the water supply pump house station. This Lot is mainly situated on a portion of Lots 8 and 9. At the same time, a waterline right of way was granted by Mary Middleton to the St. Peter's Village Commission, which appears to cross Lots 8, 9, 10 and 11.

- August 10, 1978 – Warranty Deed, Mary Middelton, Grantor, to Gerald P. Muise and Mary M. Muise as joint tenants.

[36] ***Morrison Claim of Title (Plaintiff):***

- August 10, 1927 – Executor's Deed, Estate of Angus McLeod, Grantor, to Neil Sutherland, Grantee, describing the lands as Lot 11 of Block C.

- August 25, 1945 – Warranty Deed, Neil Sutherland, Grantor, to Louise Sutherland, Grantee. Property description is Lot 11 of Block C.

- January 22, 1959 – Certificate of Purchase filed in book 12, page 294 on September 8, 1959 confirming that the Municipality of the County of Richmond had taken title to the Sutherland land described as Lot 11, Block C by tax sale.

- July 26, 1962 – Deed, Municipality of the County of Richmond, Grantor, to Joseph A. Sutherland, Grantee, identifies property purchased as Lot 11 of Block C.

- April 21, 1977 – Quit Claim Deed, Ambrose Sutherland, Rose Sutherland, Tina Sutherland, Catherine Sutherland to Joseph A. Sutherland purporting to convey the Grantors' interests in Lot 11 of Block C, but also portions of Lots 8, 9, 10 and 12. This document was not signed by Ambrose Sutherland. (Beatrice Morrison signed on behalf of Ambrose.)

- August 31, 1978 – Above Quit Claim Deed is re-filed at Registry, having apparently been signed by Ambrose Sutherland in the presence of the Plaintiff, who provided an Affidavit to that effect to counsel, Paul C. Doyle, on August 30, 1978.

- September 3, 1982 – Executor's Deed, Beatrice Morrison, Executrix of the Estate of Joseph A. Sutherland, Grantor,

to Beatrice Morrison, Grantee, identifies property as described in 1977 Quit Claim Deed to Joseph A. Sutherland.

[37] ***Surveys Referred to at Trial:***

- 1937 to 1938 – Various versions of a Department of Highways Plan completed over the course of one year.
- February 22, 1977 – Plan of Survey of J.D. Campbell.
- May 26, 1988 – Plan of Survey of R.K. MacInnes.
- December 20, 2004 – Plan of Survey of David T. Atwood.

[38] In light of what I have set out above, the onus is on the Plaintiff to show with cogent and persuasive evidence that she and her predecessors had "open, visible and continuous" possession of the disputed land for twenty years. The evidence must establish a commencement date for the acts of physical possession. Any gaps in possession effectively resets the clock to zero.

[39] The Plaintiff's position is that their possession commences in 1927 with the deed to Neil Sutherland. It is important to remember that the disputed property comprises lots 9, 10 and a portion of lot 8. Neil's deed gave him lot 11 only. And,

on August 25, 1945, Neil conveyed only Lot 11 to his wife Louise. There was no evidence presented at trial to establish that Neil took possession of more than Lot 11 between 1927 and 1945.

[40] The Plaintiff did present two Statutory Declarations (Exhibit 1, Tab 2, pages 51 and 52) dated April 21, 1977 by Joseph A. Sutherland and Daniel C. Stone. Attached to each Statutory Declaration is a description which includes the disputed property.

[41] Paragraph 3 of each declaration states that Neil Sutherland occupied the "said lands" from 1929 until he conveyed "part of the lands" to Louise in 1945. Paragraph 7 of each Declaration states that Neil, Louise and Joseph A. "... farmed the said lands, kept the said lands fenced ...."

[42] I am satisfied that the Statutory Declarations have no evidentiary value. The same Statutory Declarations were considered by our Court of Appeal in ***Muise v. Sampson***, 1999 NSCA 125 (reproduced in Exhibit 1, Tab 47), which was a litigation involving Lots 11 and 12. In Paragraphs 51 to 54 inclusive, the Court stated:

> 51 Apart from the remarkable similarity in form, and content, of the two declarations, there are some apparent inaccuracies.
>
> 52 Paragraph 4 stipulates that the lands were:
>
> > ..occupied by Louise Sutherland from on or about 1945 until on or about 1962 ...
>
> In fact, the transcript suggests that the viva voce evidence of Joseph M. Sutherland, testified that Louise Sutherland died in 1949.
>
> 53 Section 7 stipulates that Joseph A. Sutherland's occupation of the lands, after the death of his father, up until April, 1977, was "open, continuous, notorious, exclusive and undisputed in that we farmed the said lands, kept the said lands fenced...".
>
> 54 Joseph M. Sutherland, however, testified:
>
> > Q. So it is fairly accurate to say that around about 1950, the farming operations pretty much ceased?
> >
> > A. Yeah. More or less.

[43] And at paragraph 60:

> The cautionary approach taken by Hallett, J., as he then was, in *Lynch v. Lynch* (1985), 71 N.S.R. (2d) 69, at p. 76, should have been considered:
>
> > I ruled against the admission of the declaration because (I) there is no provision in the *Evidence Act* to admit the declarations; and (ii) the Rules of Evidence do not permit the admission of such documents as the deponent is not available for cross-examination; and (iii) the declarations did not fit into any of the standard exceptions to the

> Hearsay Rule such as being declarations of a deceased person against interest. The declarations essentially supported the position of the plaintiffs that they and their predecessors had been in possession of the lands for many years. It was apparent from the face of the declarations that they were all in error on a particular fact. Furthermore, there was a sameness to them that would indicate the declarations were, to a certain extent, almost the words of the lawyer who prepared them. ...
>
> There are the provisions in our Civil Procedure Rules to which I have referred pursuant to which affidavits can be tendered in evidence at the discretion of the court. I can think [i]f situations where, in a property case, such declarations could be quite useful; for instance, if they were declarations of a deceased surveyor, known for his integrity and competency, that dealt with the location of old lines, etc. If a Court were satisfied that the declarations had been duly signed and sworn to by the deponent and satisfied of his competency and impartiality, then the Court could exercise its discretion under Civil Procedure rule 31 to admit such documents even though the surveyor was not alive to be cross-examined. ...
>
> In this case, the deponents whose statutory declarations the plaintiff sought to introduce were not experts and from the face of the documents it could be readily seen that one would have to question reliability of the declarations and I exercised my discretion not to allow them to be tendered.

[44] At best, the Statutory Declarations are “not appreciable” or are “so minimal as to have no effect in law.”

[45] Consequently, there is no evidence of the type or extent of possession purportedly exercised by Neil or Louise until, at the earliest, the mid to late 1940's. That evidence would have to come from Frank Sutherland (d.o.b. July 27, 1941), Wayne Bernard Stone (d.o.b. July 25, 1947), and the Plaintiff, Beatrice Morrison (d.o.b. June 21, 1946). Obviously, given their ages, the only one who could say anything about the 1940's is Frank and, even he, at most, would have been eight or nine years old in the 1940's.

[46] The earliest commencement date for the acts of physical possession would be 1945. The Plaintiff is therefore obliged to lead evidence of "open, visible and continuous" possession from 1945 to 1965.

[47] Frank Sutherland was born in 1941 and began living in Halifax in 1959. As noted, he was too young between 1945 and 1950 to give any appreciable evidence of what went on in the 1940's. He testified that he did chores (e.g. getting firewood, caring for animals) from the age of nine or ten. Frank showed the position of the fences and testified that he "heard they were there from the 40's or there about". Frank's description of the farming operation includes the pasturing of two cows and one or two horses.

[48] A major problem with Frank's evidence is that he cannot account for either the quality or continuity of possession between 1959 and 1962. By 1959 all known family members had moved off the property. There were no animals at that time. Frank's father Ambrose worked seasonally for several months per year in Halifax and maintained an apartment there. Ambrose's seasonal abandonment of possession had nothing to do with what realistic acts of possession were possible. It contrasts, for example, with the situation in ***Taylor v. Willigar and Skidmore*** [1979] N.S.J. 548 (NSCA) (Q.L.) where at paragraph 20 the Court found that "... occupation of the (summer) camps in the winter months (was) completely impracticable."

[49] Similarly, in ***Bellafontaine v. N.S. (Attorney General)*** [1992] NSJ No. 252, the Court found possession continuous even though the woodland was used only in the fall and winter "when it was easier to get on the land." Or, in ***Pipes v. Moshell*** [1992] NSJ (217) (SC) where at page 3 the Court noted "... Possession is not lost because it is impractical to occupy the property except in the winter months."

[50] None of those factors are in play with Ambrose's seasonal (I would say "occasional") use of the land during the late 1950's. The evidence is vague as to precisely when Ambrose possessed the land and when he did not. It is equally vague regarding the extent of Ambrose's possession.

[51] With the unspecified exception of his childhood, Joseph A. did not live on the property until he retired there in 1962. The gap in possession between 1959 and 1962 was not filled in by any other witness. The twenty year clock has to be reset in 1960.

[52] There is no evidence of continuous possession between 1960 and 1980. Ambrose lived in a converted bus on the property for four or five years. The bus burnt and Ambrose moved to Halifax with Frank in 1977. Joseph M. put a cabin on the disputed property but it was only there for approximately five years before it burned.

[53] Joseph A. lived on the property from 1962 until his death in 1979. He did nothing on the disputed property during that time. It was not until 1980 that the Plaintiff and her husband began building their home. There is no evidence of their

possession beyond the borders of lot 11 during the construction period. The Morrisons moved onto the property in 1981. There is thus a gap in possession at least between 1979 and 1981. The clock resets.

[54] The third and final window for the Plaintiff to prove her claim is between 1981 and 2001. The evidence is clear that the Plaintiff and her husband did not live on the lot 11 property in the 1990's. They rented the residence and did necessary maintenance such as mowing the grass. Robert Morrison conceded on cross that his mowing on the disputed property was much less extensive than he had indicated on direct. The Morrisons stood silent when confronted by the Defendant about their encroachment on her land. The Plaintiff's possession in the 1981 - 2001 period was at best "equivocal, occasional, or for a special or temporary purpose."

[55] In short, the Plaintiff's evidence, even accepted on its face, falls far short of the proof required to establish their claim in adverse possession.

[56] The Plaintiff also argues color of title. I would summarily dismiss such an argument as it is premised upon the Claimant's "*bona fide* belief of title." [For a

discussion of the law on "color of title" see ***Hartling v. Mason*** 1999 CanLII 2804 (N.S.C.A.) especially paragraphs 31 to 33.]

[57] The present case obviously does not fit. Here the Plaintiff and her predecessors were always fully aware that they had a deed to lot 11 and no more. Their claim is grounded in their alleged adverse possession of lots 9 and 10 and part of lot 8. They have failed to provide evidence upon which a reasonable jury properly instructed could find in their favor.

[58] I have therefore granted the non-suit motion with costs to the Defendant. I advised Counsel that written reasons for my decision would follow. In the meantime, I requested Counsel to forward written submissions on costs. I have now had the opportunity to receive and review those written submissions.

[59] I find that I am largely in favour of the position regarding costs put forward by the Plaintiff. In particular, I am persuaded (for the reasons outlined by the Plaintiff) that an appropriate "amount involved" is $85,000.00. Under Tariff A Scale 2, costs would be $9,750.00. The trial lasted two and a half days thus entitling the Defendant to an additional $5,000.00 for a total of $14,750.00.

[60] I agree that the Plaintiff's actions were not cavalier. The evidence did not disclose some degree of occupation over the years. The Plaintiff honestly believed that she had a viable claim to the land in question. She proceeded in the only manner available to her to have the question resolved. It would not have been apparent to her or to her Counsel that her claim would not survive a non-suit motion. One must keep in mind that, by the time I granted that motion, I had the benefit of seeing the Plaintiff and her witnesses examined and cross-examined. I also had the benefit of hearing the submissions of Counsel.

[61] This was not a complex matter. Nor do I give much weight to the offer to settle. It was not an offer to compromise so much as it was an invitation to capitulate.

[62] I am not satisfied that I need to depart from the Tariff and award a lump sum. I am satisfied that $14,750.00 represents an appropriate substantial contribution to the Defendant's legal costs.

[63] I am also in agreement with the Plaintiff's position regarding disbursements. I would not allow any of the Defendant's travel or accommodation costs. With that guidance, surely Counsel can agree on the remaining disbursements. Failing that, an adjudicator will have to decide.

Order accordingly.

J.