SUPREME COURT OF NOVA SCOTIA

Citation: Creighton v. Nova Scotia (Attorney General), 2011 NSSC 131

Date: 20110331
Docket: SBW 220834
Registry: Bridgewater

Between:

David Creighton

Plaintiff

v.

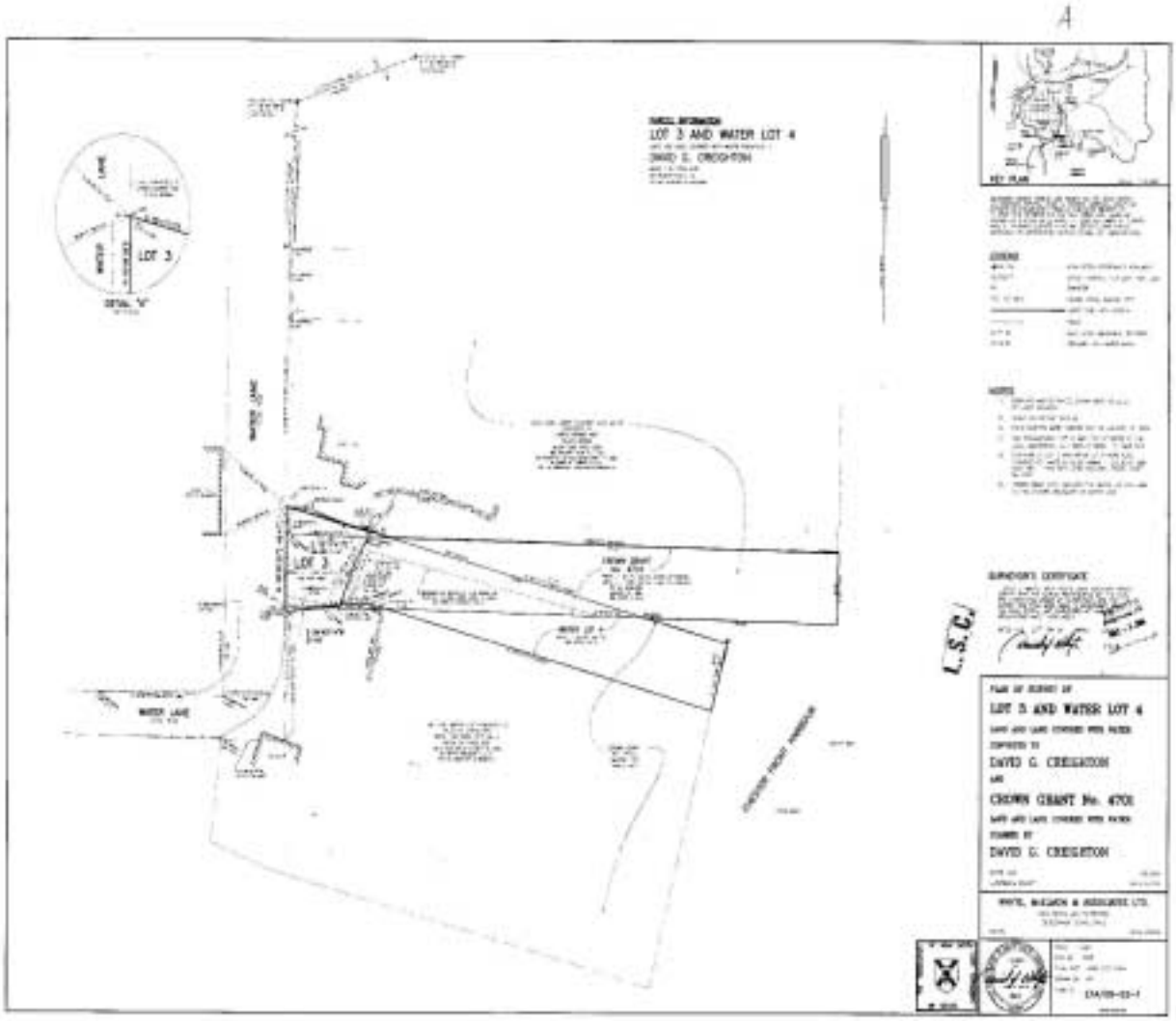
The Attorney General of the Province of Nova Scotia, James Adams, Helen Adams both of Chester, Nova Scotia, and Car-Con Holdings L.L.C., a body corporate, incorporated under the laws of the State of New York, United States of America

Defendants

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	January 24, 25, 26, 31, February 1, 2, 3, 4, 2011 in Bridgewater, Nova Scotia
Written Decision:	March 31, 2011
Counsel:	Richard A. Bureau and Adam Crane, Articled Clerk, for the Plaintiff Martin Dumke and Owen Thomas, Articled Clerk, for the Defendants

By the Court:

[1] This is a *Quieting of Titles Act* action commenced on May 5, 2004 by the plaintiff, David Creighton. The disputed lands comprise a portion of land and accompanying water lot located on Water Lane in Chester, Nova Scotia. The lands are shown on a plan of survey prepared by David J. Whyte, NSLS, being plan #21A-09-S2-1, dated March 23, 2004 and showing lots designated as lots 3 and 4:



[2] The defendants, James and Helen Adams claimed ownership of the disputed property and filed a defence on June 18, 2004 denying Mr. Creighton's claim. Subsequently, the Adamses conveyed the property to Car-Con Holdings L.L.C. Car-Con was added as a defendant by consent order dated October 15, 2008. Car-Con Holding L.L.C. is a private company controlled by Jason Mraz.

[3] The Attorney General of Nova Scotia was named a defendant pursuant to the *Quieting Titles Act*, R.S.N.S. 1989, c. 382. The solicitor for the Attorney General attended at the opening day of trial to confirm that the Department of Natural Resources and the Department of Transportation had no interest in the disputed lands and took no position as to the claims of the parties. The trial proceeded on the competing claims of ownership to lots 3 and 4 by David Creighton and the defendants, James and Helen Adams and Car-Con.

[4] Both parties claim paper title to the property. Mr. Creighton claims that if he does not have good paper title to the property, he and his predecessors in title have established possessory title based on constructive and adverse possession. The defendants deny the claims of constructive and adverse possession advanced by Mr. Creighton and say they have the superior paper title.

The Plaintiff's Title:

[5] By way of background, Colonel William Ogilvie and his wife, Jessie Aird Ogilvie, were grandparents of the plaintiff, David Creighton. Mr. Creighton's father, Douglas Creighton, married Willa Ogilvie, the daughter of Colonel and Jessie Ogilvie. Jack Ogilvie, who sold the lands in dispute to David Creighton, was a brother to Willa Ogilvie and uncle to David Creighton.

[6] The plaintiff's chain of title to lot 3 begins with a 1902 conveyance from Charles Robinson to William Robinson. According to the testimony of David Whyte, the plaintiff's expert, lot 3 was described in this deed. There follows a 1915 deed from William Robinson to Mary A. Robinson and Adelaide Robinson which conveys lot 3.

[7] The plaintiff's chain of title to lot 4 originates on June 9, 1921 with Crown Grant 22100, conveying lot 4 to Mary, Adelaide, Minnie and Blanche Robinson. Title for both lots, then passed through a series of wills from 1940 until 1948, the

last of which bequeathed the disputed properties to the Roman Catholic Episcopal Corporation of Antigonish. Only three of the four sisters (Mary, Adelaide and Minnie) signed off their interest. There is no evidence as to how the interest of Blanche Robinson was transferred. This outstanding interest does not appear to be an issue in this proceeding.

[8] On April 3, 1951 the Roman Catholic Episcopal Corporation quit claimed its interest in lot 4 to William Ogilvie. On September 14, 1956 the Episcopal Corporation conveyed lots 3 and 4 to Ella Wood Miller through two warranty deeds. These properties were then conveyed to Colonel William Ogilvie by Ms. Miller on or about September 15, 1960. Jessie Aird Ogilvie, the wife of Colonel Ogilvie, was bequeathed the property at 15 Water Lane by her husband's will on March 20, 1968. John Patrick Ogilvie was bequeathed the property at 15 Water Lane under the will of Jessie Ogilvie on March 18, 1985. Mr. Creighton acquired the property November 18, 1987 by deed from John Patrick Ogilivie and Audrey Alice Ogilvie.

[9] The plaintiff claims the root of title for lot 3 is the 1902 deed from Charles Robinson to William Robinson. The next conveyance of lot 3 was, as noted above, in December 23, 1915 in a deed from William Robinson to Mary and Adelaide Robinson. These conveyances were described in Mr. Whyte's evidence.

[10] As to lot 4, the plaintiff claims that provincial Crown Grant 22100 is the early title and the property flowed through a series of wills and was ultimately conveyed by the same root of title as lot 3, from the Episcopal Corporation to Ella Wood Miller, then Colonel William Ogilvie, then through the will of Colonel Ogilvie to Jessie Ogilvie and through her will to Jack Ogilvie from whom Mr. Creighton purchased it.

The defendants' chain of title:

[11] The Adams defendants say their chain of title to the disputed property begins with Crown Grant 4701 dated January 13, 1859. There followed a series of property transactions culminating in title in Francis J. Robinson. Mr. Robinson passed away and the property was deeded from Eastern Trust Company, his executors, to Edward D. Corkum on November 12, 1924. Mr. Corkum and, his wife Bernadette, conveyed the property to Louisa Gertrude Harris on October 21, 1943. On September 9, 1958 Louisa Gertrude Harris conveyed the property to

Charles Edwin Harris. The property was bequeathed to Annabelle Harris on or about February 11, 1972 under the will of Charles Edwin Harris. The property was then conveyed to James and Helen Adams by Annabelle Harris on or about August 15, 1978.

[12] It is questionable whether title to lot 3 and the disputed portion of lot 4, which is within the boundaries of Grant 4701, was conveyed in the deed from Eastern Trust to Mr. Corkum on November 12, 1924.

[13] To correct this title problem, the Adamses obtained a confirmatory trust deed in 1996 from Canada Trust, which purportedly included the disputed properties which had been omitted from the deed from Eastern Trust to Mr. Corkum. The property obtained from Canada Trust was then conveyed by Mr. and Mrs. Adams to Car-Con by quit claim deed on July 24, 2007. They take the position that this deed conveyed their interest in Grant 4701. Mr. and Mrs. Adams had previously conveyed their former home property to Car-Con.

Quieting Titles Act:

[14] The scope of the *Quieting Titles Act* was examined by Fichaud J.A., in *Brill v. Nova Scotia (Attorney General)*, [2010] N.S.J. No. 473, 2010 NSCA 69. He said:

> 37 The QTA does not enable a court to create title. Rather it authorizes a court to grant a certificate that reflects the title, including possessory title, to which the party is entitled by the legal principles that exist outside the QTA.
>
> 38 The judge should be satisfied that all interested persons have been joined or sufficiently notified, or are before the court. Then, if there is no other apparent title holder and the contest is between just two parties, the court may quiet title based on the better claim. This practical approach reflects that title to land is relative and heirarchical, not absolute...

[15] Both the plaintiff Creighton and the defendant Car-Con claim a certificate of title. In the event that Car-Con is found to have the better paper title, Mr. Creighton claims ownership by way of constructive and/or adverse possession of the property. Car-Con seeks a certificate of title to Grant 4701 in its entirety and an injunction enjoining the plaintiff from the use of any of the area of Grant 4701.

Issues:

a) Which party, if any, has the superior paper title?

b) Has Mr. Creighton established possessory title to the disputed lands based on the doctrine of constructive possession?

c) Has Mr. Creighton established possessory title to the disputed lands based on the doctrine of adverse possession through open, notorious, continuous, exclusive, actual possession of the disputed lands for over 20 years?

Which party, if any, has the superior paper title?

The Experts:

David Whyte:

[16] Mr. Whye is a surveyor who was qualified as an expert in the field of land surveying. He has been a licensed land surveyor since 1981. He was called as an expert witness by the plaintiff.

[17] Describing the work of a surveyor in advising on the position of boundaries of real property, Mr. Whyte suggested a surveyor would:

1. Go to the site and make measurements.

2. Research historical title documents, including adjoining owners.

3. Speak to neighbours and people who are familiar with the property.

[18] Mr. Whyte said he does not give an opinion on title, but that he does look up title documents to aid in the determination of boundaries.

[19] Mr. Whyte was contacted by Craig Berryman, then solicitor for Mr. Creighton. He was hired to conduct a survey of lots 3 and 4. He was informed of the difficulties with the overlap of Grant 4710 and Grant 22100. He was provided a title search that had been completed on the Creighton property. He accompanied

his crew to the site and they took measurements on the ground. The purpose of the survey was to retrace the survey boundaries. The first thing he noticed of importance was that boundaries were marked on the ground.

[20] In his expert report, Mr. Whyte refers to various surveys done by other surveyors and other information he considered in determining the boundaries of lots 3 & 4. One of the surveys he looked at was the Edwin Turner survey done in 2002 for James and Helen Adams. He said he agreed with Mr. Turner's position of Grant 4701. He did not agree with the Turner boundary on Water Lane. He also reviewed an Arthur Backman survey dated October 18, 1999, for property south of lot 3, showing the southern boundary of lot 3, as accepted by and shown on Mr. Whyte's plan. This Backman survey was a survey for lands of Willa M. Creighton, Mr. Creighton's grandmother, who was the owner of 8 Water Lane at the time.

[21] Mr. Whyte also considered a survey by G.B. Boylan dated January 25, 1951. He testified that the northwest corner of lot 3 as shown on this plan is similar to other plans. The distance shown by Boylan along Water Lane is similar to his determination. However, he did not agree with the Boylan bearing of 64 degrees, 15 minutes west toward the harbor. He used the Boylan plan as evidence of the location of the northwest corner of lot 3.

[22] Mr. Whyte also relied on a plan prepared by Errol Hebb dated September 4, 1958. This is a plan for lands of Gertrude Harris, one of the predecessors in title to Adams and Car-Con. He testified this plan highlights the discrepancy in the bearing of the boundary between lot 3 and the Adamses'/Car-Con property. Boylan set the bearing at 64 degrees, 19 minutes east, while Hebb set it at 52 degrees, 45 minutes east. Mr. Whyte said the plan prepared by Errol Hebb was the first legal description of the Harrises' property and he said it helps identify lot 3, as he is in agreement with the Hebb boundary which shows the northern boundary of lot 3. He found the two markers placed by Hebb and, in particular, the iron pin placed at Water Lane and the iron bar near the water's edge.

[23] Mr. Whyte also testified that he measured the line representing the northern boundary of lot 3 and the southern boundary of the Gertrude Harris property, and the distance from Water Street (as it was then called) to the iron bar on the high water mark. The distance was determined by Mr. Hebb to be 46.02 feet. Mr. Whyte measured the distance at 46.09 feet, which was quite close.

[24] Mr. Whyte tied in the house across the street at 15 Water Lane, much in the way that Mr. Hebb had done, and said his finding was quite close to the location as designated by Mr. Hebb, and was within a half a foot of the pipe found on the edge of Water Lane.

[25] Mr. Whyte referred to a 1921 plan that he said was the first depiction of the northern boundary of lot 3. He said this plan shows the uplands as belonging to Mary Robinson.

[26] Mr. Whyte referred to a deed from John Patrick Ogilvie (Jack) to David Creighton, conveying title into Mr. Creighton for several lots, including lots 3 and 4. He testified that the descriptions used in this deed for lots 3 and 4 came partially from the 1951 Boylan plan.

[27] Mr. Whyte referred to a plan of the Chester waterfront by S. March dated October 7, 1930. He testified he took information from this plan to help to determine the boundary of lots 3 and 4. He said the northwest corner is in the same position as he has shown it on his most recent plan. He said this plan shows the overlap of the grants, noted that lot 3 is shown in possession of Mary Robinson. Mary Robinson is a predecessor in title to the plaintiff, David Creighton.

[28] Mr. Whyte referred to a deed from William Robinson to Mary and Adelaide Robinson in 1915 which is in the Creighton chain of title, and said that a notation in that deed led him to conclude that the lands included a waterside property. The reference in the description is as follows:

> All the right title interest and claim which he now owns in the homestead property, including wharf property, stores and water lots of the parents now deceased of said grantor and includes all the real estate owned by said grantor in Chester Town plot.

[29] Mr. Whyte concluded that this reference suggests that there were lands on the water side owned by the predecessors in title to David Creighton. In cross-examination he was unable to locate the main lot.

[30] Mr. Whyte referred to Grant 4701 over which Grant 22100 overlaps. He testified that Grant 4701 locates the position of lot 20. There are also

measurements along the street between Grant 4701 and lot 20, which he testified was important because the southwestern corner, which is shown on modern surveys, can be measured from lot 20 using distances on the grant. He said in relation to lot 3, lot 20 is north about 188 feet.

[31] Mr. Whyte referred to a deed dated November 24, 1944 from Eastern Trust Company to Edward D. Corkum. He said this was the first description of the Adamses' property. His opinion was that this deed did not convey the area now surveyed as Crown Grant 4701. There was no evidence from the defendants' expert on this point, nor was there any challenge to this opinion on cross-examination.

[32] Referring to the plan he prepared for Mr. Creighton, Mr. Whyte said it describes lots 3 and 4 which are in dispute. He testified the northwest corner for lot 3 was identified on a number of plans. He used a straight bearing from that corner through a bar at the shore to extend out toward the harbor. He said this is the same bearing used by Errol Hebb when he determined the southern boundary of the Harris lot. He said he found a bar two feet from the ordinary high water mark.

[33] Mr. Whyte used the Arthur Backman boundary as reflected on his survey to determine the boundary between 8 Water Lane and lot 3 and/or the water lot. In his report, Mr. Whyte comments that in his opinion, the northern boundary of lot 3 has been marked and has been in the same position since at least 1958. He was inclined to accept a boundary which is evident on the ground and has been established since at least 1958, rather than using historical plan measurements. In other words, there were plans that do not exactly match up with his determination of the northern boundary of lot 3, but he accepted that the line has been established on the ground since at least 1958.

[34] Mr. Whyte reviewed the historical background with particular reference to the key deeds and commented on the description in these deeds and concluded:

> ... The root of title for the Adams property begins in 1924 with a deed to Book 17 Page 301 (appendix M) from the heirs of Frances Robinson to Edward Corkum. The legal description in this deed clearly delineates land and land covered by water, lying to north of Lot 3 and Water Lot 4 and also to the north of the surveyed position of Crown Grant No. 4701. A depiction of this legal description

> is shown on Registry Plan No. H-55 (appendix F). This early description does make reference to a water lot granted to Edward Robinson (presumably Crown Grant No. 4701) but places the water lot to the north of its actual position (see Registry Plan H-55). I believe the key point here is that the deed at Book 17 Page 301 acknowledges that the ownership of Lot 3 is vested (in 1924) in the predecessors in title of David Creighton.

[35] Plaintiff's counsel says that Mr. Whyte reconfirmed in his oral testimony that the deed from the Eastern Trust Company to Edward D. Corkum, dated November 12, 1994 did not convey the area subsequently surveyed as Crown Grant 4701. I agree with the plaintiff that this evidence was unchallenged in cross-examination and in the written expert's report of Lester Berrigan, nor did Mr. Berrigan comment on this point in oral testimony.

[36] Plaintiff's counsel says that these findings by Mr. Whyte are important because the confirmatory trustees deed in 1996 which, according to the plaintiff's counsel, was not presented or commented on by any of the witnesses called by the defendants and which is relied on by the defendants to fix their title, improperly confirms in Schedule A, para. 3, that provincial water Grant 4701 was conveyed in an earlier deed to Edward D. Corkum on November 12, 1924. Therefore, Mr. Whyte's opinion is important because he has testified that the land portion of Grant 4701 was not conveyed by that deed.

Lester Wilbert Berrigan:

[37] Mr. Berrigan is a Nova Scotia land surveyor and a principal of Berrigan Surveys Ltd. since 1998. He received his NSLS in 1970. He was qualified as an expert in land survey and boundary location and the interpretation of title documents for boundary location.

[38] Mr. Berrigan prepared a survey report for Car-Con dated April 20, 2010. He said after he was retained and before going to the site, he reviewed:

a) An abstract of title for Car-Con prepared by Mr. Dumke.

b) Report of survey of Mr. Whyte.

c) Previously acquired plans and grants in this area.

[39] During his direct examination Mr. Berrigan began to enter into evidence exhibits containing deeds and plans that were not listed in his report. Defendants' counsel was given a lengthy adjournment to prepare a submission to the court on the admissibility of these documents, which documents were ruled to be inadmissible.

[40] After this ruling, the defendants' counsel asked very few questions of Mr. Berrigan on his report. I have considered the whole of Mr. Berrigan's report, including the following comments at pp. 2 and 3, respecting the content of various grants and plans:

> 1. Crown Grant No. 4701, dated January 13, 1859 - Boundary line extended at right angles to street, with the point of beginning at the street limit. This Grant would include land and land covered by water.
>
> 2. Crown Grant No. 22, 100, dated July 19, 1921 - boundary lines as shown on this Grant are at approximately a 102◦ 30', angle to the street, not at a 90 degree angle. The Grant only includes land covered by water, not land between the street and the water.
>
> 3. Build up of Grants adjacent to No. 4701 to the North and un-granted lot South of No. 4701.
>
> 4. Plan No. C-19, by S.E. March, dated October 7, 1930 - This survey recognized conflicting boundaries between Crown Grant No. 4701 and Crown Grant No. 22, 100. This survey indicates a store encroached onto the Southern boundary of Grant No. 4701. The plan also indicated there was fence just to the North of the store. This plan clearly shows the boundaries of the conflicting Grants, with Grant No. 4701 at right angles to Water Street and Grant No. 22, 100, 102◦ 30' angle to the street.
>
> 5. Plan by G.B. Boylan, PLS, dated January 25, 1951 - This plan shows the limit of Crown Grant No. 22, 100, property of the Roman Catholic Episcopal Corp. of Halifax. This plan did not show any conflicting boundaries with Grant No. 4701.
>
> 6. Plan No. H-55, by Errol B. Hebb, showing property of Louise Gertrude Harris, Village of Chester, dated September 4, 1958.

7. Plan No. 02-025 by Turner Surveys, dated April 17, 2002 - This plan locates the limit of Crown Grant No. 4701 and shows the conflict with Crown Grant No. 22, 100. The plan locates survey pins, stone walls, picket fences which are still in place today.

8. Plan No. 21-A/09-S2-1 by David J. Whyte, dated March 23, 2004 - This plan basically shows the same information as shown on Turner Surveys Plan No. 02-025. Conflicting Grant lines are shown, stone walls, ordinary high water mark and picket fences. It would appear Turner and Whyte differ in opinions to the location of the North boundary of Grant No. 22, 100. This difference is shown as a dotted line on the Whyte plan and would appear to be 3 feet different than shown on the Turner plan. It would appear both surveyors agree on the location of Southern boundary of Grant No. 4701.

9. Berrigan Surveys Limited Plan No. 11,814 - This plan established the boundaries of property of Car-Con Holdings LLC, including the South boundary of Grant No. 4701. The location of the South boundary of Grant No. 4701 is the same as on the Turner and Whyte plans.

[41] Mr. Berrigan stated the following conclusions at pp. 3 and 4 of his report:

Conclusions and Opinions:

Crown Grant No. 4701 included both land and land covered by water lying to the East of the public street. Crown Grant No. 22, 100 only included land covered by water.

Boundaries of Crown Grant No. 22,100 encroached into Crown Grant No. 4701. I have reviewed deeds to both the Car-Con Holdings LLC property, Document No. 89567359 and the David G. Creighton property (Lot 3 in book 130 at Page 679) and I am satisfied the Car-Con Holdings LLC property is Grant No. 4701, and the Creighton property appears to be based on the G.B. Boylan survey (date 1951), which appears to be a retracement survey of Crown Grant No. 22, 100.

[42] I agree with plaintiff's counsel that Mr. Berrigan offered no opinion evidence on the following points:

a) The December 23,1915, deed from William Robinson to Mary Robinson and Adelaide Robinson, which Mr. Whyte considered to be the root of title to lot 3.

b) The deed from Eastern Trust Company, executors of the estate of Francis J. Robinson to Edward D. Corkum, dated November 12, 1924, which Mr. Whyte testified did not convey the area now surveyed as Crown Grant 4701.

[43] The evidence of Mr. Berrigan was not helpful in determining the proper boundaries of lots 3 and 4. He included transparencies of several plans which could have been overlaid and used to provide his opinion to the court. He did not do so, nor was he asked by his counsel to do so. Mr. Berrigan was not asked to comment on the conclusions reached by Mr. Whyte in his report.

[44] It is difficult to determine from Mr. Berrigan's report the conclusions that he has reached. Part of the problem is that he has provided no oral testimony to explain his findings. I prefer the evidence of Mr. Whyte and, for purposes of this proceeding, I accept the boundaries of lots 3 and 4 as set out in his survey.

Defendants' comments on plaintiff's chain of title:

[45] As to the plaintiff's chain of title, the defendants say that Crown Grant 4701 pre-dates confederation and, therefore, Crown Grant 22100, from which the plaintiff's claim title to lot 4, did not confer any rights to the portion of the lands under dispute. The defendants' position was presented at para. 100 of their post-trial brief as follows:

> 100. At the time of the Provincial Water Grant No. 22100, in 1921, jurisdiction and authority for Chester harbour were in the hands of the federal Crown. Grant No. 22100 to Mary Robinson et al., the predecessor in title to the Plaintiff. Since Grant 22100 granted only water, it could not confer any rights to the portion of land under dispute.

[46] In respect of lot 3, the defendants submit as follows:

> 102. The abstract of the Plaintiff makes reference to a deed in 1915 as the root of title for the Creighton Lot No. 3 as claimed. According to the testimony of David Whyte the description contained in the deed "... including worth [sic-wharf] property, stores and water lots of the parents now deceased" did not contain sufficient specifics to be able to correctly locate the location of what was described. It is submitted that the description in 1915 cannot operate as a root of title for Lot No. 3 under dispute.

[47] Presumably defendants' counsel was referring to the abstract of title of the plaintiff at Tab 19 of the joint exhibit book, entry number one. The reference is to the deed dated December 23, 1915, from William Robinson to Mary A. Robinson and Adelaide Robinson. Mr. Whyte commented in his report on the deed and its description as follows:

> The title to Lot 3 has been traced back by Wendy Gingell to a deed dated 1915 at Book 14, Page 736 (appendix J)...
>
> ...
>
> In addition the early title to Mr. Creighton's predecessors at Book 14 Page 736 (appendix J) refers to "water lots".

[48] On direct examination, Mr. Whyte testified that this deed was the early deed for the property under search. However, on cross-examination it would appear that Mr. Whyte did agree that he could not correctly locate exactly where the description in the deed was situated.

[49] The defendants suggest that the earliest root of title for the plaintiff is in 1956 and that the creation of lots 3 and 4 was based on a survey error in 1951. Their post-trial brief states:

> 108. According to the Berrigan report [Exhibit 1B, Tab 98] an overlay of the transparency of the grant plan to Grant No. 22100, shows that Boylan mistakenly placed the property of the Roman Episcopalian Church of Halifax 30 feet to the north of its actual location. Using the Street line of Water Lane extending both North-South and East-West as anchor points, as suggested by Whyte, the lands surveyed by Boylan are displaced by 30 feet to the north of the original grant survey. It is submitted that as a result of this mistake by Boylan, Lots No. 3 and 4 were created. Incidentally, it is this mistake that creates the boundary line of Grant No. 22100 through the residence of Civic No. 8 Water Lane.

[50] In reviewing the Berrigan expert report, I can find no reference to the creation of lots 3 and 4 due to a survey error. Counsel for the defendants has not indicated where in Mr. Berrigan's report this reference would be, nor has he referred to any evidence given by Mr. Berrigan at trial to support this contention. The submission is apparently an argument being advanced by the defendants' counsel and not an expert opinion proffered by Mr. Berrigan.

Plaintiff's comments on the defendants' chain of title:

[51] The plaintiff's position is that there are several gaps and flaws in the defendants' chain of title, resulting in the plaintiff having superior title to lots 3 and 4.

[52] The plaintiff submits that, according to the expert report of David Whyte, the conveyance from Eastern Trust, as executor of the estate of Francis J. Robinson to Edward D. Corkum, did not convey Crown Grant 4701. As a result, a confirmatory deed to correct title was obtained by the Adamses.

[53] It is noteworthy to consider the following comments by plaintiff's counsel, which I take in their entirety from pps. 25 and 26 of his post-trial submission:

> If your lordship finds that Crown Grant 4701 was conveyed in the 1924 conveyance to Edward Corkum and that the Defendants chain of title is not broken at that point, it is respectfully submitted that the Defendants chain of title is broken in 1958 with the conveyance from Louisa Gertrude Harris to Charles Edwin Harris by Warranty Deed and Plan dated September 9, 1958, and recorded on September 16, 1958, Book 26, Page 462, Document 887 [Item 16] which can be found at Tab 21, Sub Tab 10.
>
> It is important to note that the Warranty Deed from Louise Gertrude Harris to Charles Edwin Harris contains a different legal description of the property than what was conveyed in the two previous deeds, from Eastern Trust Company, Executors of the Estate of Francis J. Robinson to Edward D. Corkum in 1924 and the Deed from Edward D. Corkum et ux. Bernadette Corkum to Louisa Gertrude Harris dated October 21, 1943, and recorded on November 2, 1943, Book 22, Page 481 [Item 15]. The difference is that in the Deed from Corkum to Louisa Gertrude Harris, the description states "conveys the <u>same land</u> and land covered with water as described in 17/301" which is the Deed from Eastern Trust.
>
> The subsequent Deed from Louisa Gertrude Harris to Charles Edwin Harris contains the description that "The herein described lot of land contains an approximate area of Seven Thousand Eight Hundred and Ninety-Two square feet (7,892 sq. ft.), <u>together with the remaining part of the Provincial Water Grant No. 4701</u> not herein before described, all according to a Plan of Survey showing property of Louisa Gertrude Harris dates ... the 4th Day of September, A.D., 1958, by Errol B. Hebb, P.L.S., The Lot hereby described marks or intends to mark <u>a parcel of land</u> and land covered by water". The difference in descriptions between the two deeds shows that there is no longer a conveyance of the same

> property as was possessed by the late Francis J. Robinson. Additionally, this change of description clearly demonstrates that the property that was conveyed to Charles Edwin Harris only contained what was depicted in the 1958 Hebb Plan. It is important to note that the 1958 Plan of Errol B. Hebb depicting the Harris Property does not include Lot 3 and Water Lot 4. The Hebb Plan is located at Tab 4, Tab 74(f), Tab 105 and it clearly indicates that property of Louisa Gertrude Harris as being 7,892 square feet.
>
> The conveyance of the property by Warranty Deed from Annabelle Harris to James Adams et ux. Helen Adams on August 15, 1978, and recorded on August 15, 1978, Book 67, Page 518 [Item 20] which was entered in evidence as Exhibit 15, contains the identical description of the property as the Deed from Louisa Gertrude Harris to Charles Edwin Harris in 1958. Therefore, the conveyance from Annabelle Harris to James and Helen Adams only included the 7,892 square feet of land plus the remaining portion of land and lands covered by water as depicted in the Hebb Plan.

[54] I agree that the conveyances referenced by the plaintiff exclude lot 3 and water lot 4, which are clearly excluded on the survey prepared by Errol Hebb.

Discussion on Title:

[55] To correct the problem, the defendants James and Helen Adams obtained a confirmatory deed to the disputed lands from the successor company to Eastern Trust. Presumably the intent of that document was to convey Grant 4701, in particular, lot 3 and water lot 4. The claim of the defendants to these two lots are dependent on the conveyance from Canada Trust Company to Mr. and Mrs. Adams in 1996.

[56] There are two important issues that emerge and which directly affect the defendants' title to lot 3 and the disputed portion of lot 4:

a) The effect of the confirmatory deed from Canada Trust to James and Helen Adams on December 18, 1996.

b) Whether provincial water Grant 22100 in 1921 is valid to convey water lot 4 or whether, as the defendants submit, it is of no effect because the portion of water lot 4 in dispute was validly granted in Grant 4701, and Grant 22100 conveyed no interest in this lot.

The effect of the confirmatory deed of December 18, 1996:

[57] The confirmatory deed from Canada Trust to James and Helen Adams, dated December 18, 1996, contained a number of recitals, including the following:

> AND WHEREAS by deed dated the 12th day of November, 1924 and registered at the Registry of Deeds for the County of Lunenburg on the 24th day of November, 1924 at Book 17, Page 301, the Eastern Trust Company and Joseph F. Smith, as Executors and Trustees as aforesaid, conveyed to Edward D. Corkum a portion of the Lands;
>
> AND WHEREAS the aforesaid deed was intended to convey all of the Lands, but inadvertently failed to reference in the legal description certain parts of the testator's lands covered with water located within the Lands ...

[58] I am satisfied after reviewing the original deed from Eastern Trust to Edward D. Corkum and the confirmatory deed to the Adamses that the deed to Mr. Corkum only conveyed a portion of the lands and did not convey the lands covered with water. The recitals say so. As a result, the effect of the confirmatory deed would be to convey only lands covered with water. Problematic for the defendants is that the plaintiff's expert gave an opinion, which has not been challenged, that the deed from Eastern Trust did not convey lot 3 and, therefore, the confirmatory deed did not confer any title in lot 3 (by its evidenced intention in the recitals), I conclude that only the interest of Eastern Trust in the portion of lot 4 in dispute was conveyed. Equally problematic for the defendants is the issue raised by the plaintiff's counsel that, in fact, what was conveyed to Charles Edwin Harris and then to the Adamses defendants, was a specific lot of land consisting of 7,892 square feet. It is clear from the Harris survey that lot 3 was not conveyed. The only title that the Adamses could take on lot 3 would be by virtue of the confirmatory deed, and it is clear from a plain reading of the confirmatory deed that lot 3 was not conveyed, but only the water portion of Grant 4701. Presumably this was to correct the location of Grant 4701 which had not been properly located by Errol Hebb.

[59] In *Anger v. Honsberger, Law of Real Property*, 3d edn., at para. 25: 60.10, there is a discussion of the use of recitals in deeds to determine the intent of the parties:

> When the words in the operative part of the deed are clear and unambiguous they cannot be controlled by the recitals or other parts of the deed but, when the operative words are doubtful, the recitals and other parts may be used as a test to discover the intention of the parties and fix the true meaning of the words.

[60] In the *Nova Scotia Real Property Practice Manual* by C.W. MacIntosh, Q.C., Mr. MacIntosh provides the following comment regarding confirmatory deeds at s. 4.4D:

> Objections to title based on an incorrect sequence of conveyances, error in description, omission of a lot, easement or party, a lost deed, etc. may be satisfied by the registration of a confirmatory deed. A confirmatory deed should recite the reason for its execution and reference the intention and registration particulars of the prior document.

[61] As MacIntosh states, a confirmatory deed should set out the reason for its execution and refer to the intention and registration particulars of the prior document. I am satisfied that by its very nature a confirmatory deed would be ambiguous without a recital setting out the intention of the parties. The recitals are a necessary part of a confirmatory deed and are meant to explain the reason the deed is being provided. I am satisfied that the purpose of the confirmatory deed from Canada Trust was to convey the water portion of Grant 4701.

[62] The first survey of the defendants' lands was done in 1958 by Errol Hebb. He showed the location of water Grant 4701 in front of the 7,892 square foot parcel of land conveyed by Charles Edwin Harris. The location of Grant 4701 was in error, but the land portion conveyed was set out by Mr. Hebb in his survey, and it excludes lot 3. I am satisfied the intent of the confirmatory deed is to convey only that portion of Grant 4701 that is covered with water. The confirmatory deed does not purport to, nor does it convey any title to lot 3. That being the case, I am satisfied the defendants have no title to lot 3.

[63] As to lot 4 the issue is which grant takes precedence. As I have stated earlier, the defendants' position is set out at para. 100 of their post-trial brief:

> 100. At the time of the Provincial Water Grant No. 22100, in 1921, jurisdiction and authority for Chester harbour were in the hands of the federal Crown. Grant No. 22100 to Mary Robinson et al., the predecessor in title to the Plaintiff. Since Grant 22100 granted only water, it could not confer any rights to the portion of land under dispute.

[64] The plaintiff's position can be summarized as follows:

a) The defendants offered no evidence, either lay or expert to confirm that Grant 4701, which pre-dated confederation, trumps Crown Grant 22100, which is post-confederation.

b) Provincial Crown Grant 4701 was not conveyed to Edward D. Corkum on November 12, 1924, nor in any subsequent conveyances.

c) The plaintiff's expert witness, David Whyte, confirmed on cross-examination that because Chester harbour is not a public harbour as Halifax or Sydney are, all provincial water grants, pre and post confederation, are valid. When pushed on this point by the defendants' counsel, Mr. Whyte confirmed that he contacted officials at the Department of Lands and Forests and, as a result of his discussions, he formed the opinion that Chester harbour is not a public harbour.

[65] By way of background, the *Nova Scotia Real Property Practice Manual, supra*, discusses property issues relating to harbours at s. 15.2:

> ***Harbours***
>
> Section 108 of the *Constitution Act, 1867* provides that the public works and property enumerated in the Third Schedule to the *Act* shall be the property of Canada. Included in this list are "public harbours, lighthouses and piers and Sable Island".
>
> The provisions of the *Constitution Act* dealing with "public harbours" were not intended to include, within the expression "harbour", every little indentation or bay along the shores of all the inland lakes and rivers as well as along the seacoast and the shores of the Great Lakes where private owners had erected a wharf to which ships came to load or unload good for commercial purposes. Decisions of the Privy Council settled previous uncertainties by ruling that the words "public harbours" in section 108 and Schedule Three included only public harbours as they existed and stood at the date of Confederation, except in the case of new provinces incorporated subsequently.

[66] Therefore, the question becomes "what is a public harbour"?

[67] The *Canadian Encyclopedic Digest* states, under the heading *Constitutional Law,* at paras. 461 and 463:

> 461 A "public harbour" which under Section 108 of the *Constitution Act*, 1867 is the property of Canada, means a place not merely suited by its physical characteristics for use as a harbour, but to which on the relevant date the public had access as a harbour and which they had actually used for that purpose. In this connection the actual user of the site both in its character and extent is material. The date at which the test must be applied is the date at which the *Constitution Act, 1867* by its becoming applicable effects a division of the assets between the province and Canada.
>
> ...
>
> 463 The question whether a particular piece of foreshore on the margin of the harbour is part of a "public harbour" is not decided by determining that the harbour is a "public harbour", but is decided by considering whether, even if there is a public harbour within the ambit of which the piece of foreshore is, the piece of foreshore had been actually used as a place of public access for the loading or unloading of ships or similar harbour purposes at Confederation. This is a question of fact, ...

[68] I am satisfied that whether a specific harbour is a federal public harbour is a factual determination. In other words to determine this issue, factual evidence should be provided to the court in the following suggested areas:

a) Whether the area in question and Chester harbour, in particular, was used as a harbour at the time of confederation.

b) Whether there was government activity or presence in the harbour as opposed to private and private commercial activity.

c) Whether there was expenditure of public funds on the harbour.

[69] No evidence was led by the defendants as to the use of the area in question at the time of confederation. The defendants appear to rely on the fact that Mr. Adams testified that when he put a mooring in the harbour in front of his property he required a federal permit. His evidence is that at some point he was advised that he no longer needed a federal permit, but rather a provincial permit. With respect, the issue is the use of the harbour at the time of confederation in 1867, and

whether or not Mr. Adams obtained a permit from the federal or provincial government to install a mooring does not determine this issue.

[70] There being no persuasive evidence on this issue, I am not prepared to find, as suggested by the defendants, that Grant 22100 was not effective to convey the disputed portion of lot 4. I find that the plaintiff has a good root of title to the disputed portion of lot 4 commencing with the provincial Grant 22100 which directly feeds into the plaintiff's chain of title culminating in his ownership of the property in 1987.

[71] In summary, I am satisfied that the plaintiff has a superior chain of title to lots 3 and 4. I am satisfied that the defendants have no title to lot 3 for the reasons enumerated earlier, and that Grant 22100 was effective to convey the disputed portion of lot 4 to the plaintiff, David Creighton and his predecessors in title.

Issue #2 - Has Mr. Creighton established possessory title to the disputed lands based on the doctrine of constructive possession?

[72] I have determined that Mr. Creighton has a superior paper title. This should determine the issue before me, and I need not go on to determine whether Mr. Creighton has constructively or adversely possessed lots 3 and 4. However, in the event that I am wrong in my determination as to Mr. Creighton having a superior paper title, I will go on to determine whether Mr. Creighton has established possessory title based on the doctrine of constructive possession and/or adverse possession. Based on the evidence before me, which I will now summarize, I am satisfied that he has done so for the reasons which follow.

Evidence - The Plaintiff:

[73] The plaintiff's father, Brenton Douglas Creighton, (hereinafter Douglas Creighton) testified. He said he first came to Chester in 1951 to visit his present wife, Willa Ogilvie. Willa Ogilvie's father was Colonel William Watson Ogilvie. Colonel Ogilvie owned the present 8 Water Lane which is shown on the David J. Whyte plan adjacent to lot 3 on the south.

[74] 15 Water Lane is presently owned by the plaintiff, David Creighton. It was owned in the early 1950's by the Miller family and later sold to Colonel Ogilvie in approximately 1960/1961. Mr. Creighton testified that Colonel Olgivie purchased

this property because 8 Water Lane became too small for his extended family. Mr. Creighton married Willa Ogilvie in 1954 and she spent mid June to early September each year living at 8 Water Lane. He would visit between four and ten times per year from 1954.

[75] Douglas and Willa Creighton moved to Chester in 1992 - 1993 on a full-time basis residing at 8 Water Lane. Prior to that it had been a summer home only. He described using lot 3 as shown on the Whyte plan for storing their sailboat and said they used lot 4 for waterskiing, sailboarding and other water activities. At that time lot 3 was across the street from 15 Water Lane, also owned by the Ogilvie family.

[76] Douglas Creighton testified that they owned two boats at the time, Airlie, a schooner and Alloette, which was referred to by Mr. Creighton as a bluenose. The schooner was 40 feet long and the bluenose smaller. Both sailboats were kept on moorings during the season and then hauled up on other properties. Mr. Creighton testified that they had a dingy to row to the sailboats, which was kept on the sandy beach or land above it which he described as lot 3. He described planting raspberry plants on lot 3, close to the northwest corner, in 1995.

[77] Douglas Creighton said his son, David Creighton, was looking for a place in Chester and 15 Water Lane became available. The property was owned by David Creighton's grandmother, Jessie Ogilvie, who received it from her father, Colonel Ogilvie. Colonel Ogilvie bequeathed the property to Jessie Ogilvie, who left the property to Jack Ogilvie, Willa Ogilvie's brother. Jack Ogilvie sold the property to David Creighton.

[78] Douglas Creighton described cutting grass on the upper portion of lot 3, describing lot 3 as an area of about 50 feet by 50 feet. He said that in addition to the Creighton family using the lot, the Millers, who were the previous owners of the David Creighton lot, hauled their boats up on the property when they owned it. He said that after David Creighton purchased the property he hauled the family boats on to lot 3. In addition to the family mooring boats in the harbour, so did Alan Morash, who was a crew member on Airlie, their sailboat. Mr. Morash used lot 3 to access the water.

[79] Douglas Creighton said he first became aware of an adverse interest in lot 3 approximately 10 years before this hearing. He testified that when they returned

from vacation a small earth mover was carving up lot 3 along the hedges. He said he did not know who did the work but he knew that Mr. Adams was paying for it.

[80] Douglas Creighton said he met Mr. and Mrs. Adams some 15 years before the hearing, but testified that the relationship became strained because of activities regarding lot 3. He gave an example of an incident where his raspberry bushes were uprooted. He said he and his wife went away and, in his words, "the bushes were decimated". He said that in addition to that incident and the incident with the earth mover, there were three or four other times, over a couple of years, when he had to tell the Adamses not to trespass on lot 3.

[81] Douglas Creighton testified that he walked along Water Street past lot 3 at least a half dozen times a day. He said that during those times he never saw the Adamses or anyone else using lot 3. He said that about five years earlier Mr. Mraz asked if he could store kayaks on lot 3. He gave him permission. Mr. Mraz denied having asked permission to store kayaks on the property. Mr. Creighton said an aluminum rowing dingy and a flying junior sailboat were stored on lot 3. He said there were times when the sailboat was at their wharf but, in most instances, when they were not using it it was pulled up on the shore.

[82] Douglas Creighton admitted on cross-examination that in 1980 David Creighton did not own any boats himself. He testified that Jack Ogilvie had boats on lot 3 when he owned the property. He disagreed that the only use of the beach was by himself and Jack Ogilvie. He said many members of the family used the beach, including some of his children and their friends. He said he never saw the Harrises, predecessors to the Adamses, make use of lot 3, and that he never saw Mrs. Adams or Mrs. Harris sit on the beach on lot 3.

[83] Mr. Creighton was shown a winter scene of the waterfront in Chester which appears to have been a portion of a panoramic picture taken by Tim Harris, the son of the predecessors in title to Mr. and Mrs. Adams and Car-Con. Mr. Creighton identified a float on lot 3 as being owned by him and identified a float to the north of the Adamses' property as a float owned by the Adamses.

David Garneau Creighton:

[84] The plaintiff, David Creighton, is 52 years old and is presently the owner of 15 Water Lane. This property is across Water Lane from lots 3 and 4 and the

present Car-Con property. Mr. Creighton grew up in Montreal with his brothers and sisters and his parents, Douglas and Willa Creighton, where he still lives.

[85] When Mr. Creighton was born in 1958 his parents already owned 8 Water Lane. He spent summers in Chester, usually July and August. Jessie Ogilive was his grandmother and Colonel Ogilvie was his grandfather. He testified that with all his brothers and sisters, 8 Water Lane was becoming crowded, so his grandfather purchased 15 Water Lane, which he said included lot 3 and water lot 4. His grandfather also purchased a lot adjacent to the south of 15 Water Lane which was vacant and on which he and other children played. He and other witnesses said there was a sand lot on that property. He said there was a large chestnut tree at the northwest corner of lot 3.

[86] Mr. Creighton said a Mr. Morash worked for his family and that Mr. Morash kept his rowboat on their dock to get out to the boat he owned. He said his family gave Mr. Morash permission to moor his boat on water lot 4.

[87] Mr. Creighton said there was no fence along Water Lane, above lot 3, and they would go from 15 Water Lane to 8 Water Lane, either along Water Lane and enter 8 Water Lane from the street or they would go over lot 3 and enter 8 Water Lane from the side. Mr. Creighton testifies he still enters 8 Water Lane by either way.

[88] Mr. Creighton talked about the occupation of 15 Water Lane. He testified that his grandfather, Colonel Ogilvie was there for two to three months in the summer when he owned it. When his grandfather died, his grandmother retired to the property and was there full-time from 1975 to 1985. Mr. Creighton said his parents spent summers at 8 Water Lane until the mid 1980's, when he and his siblings started growing up and leaving their Montreal home. His parents then began to spend about half the year in Chester. In 1993 they moved there full-time. In 1985 his grandmother left the house to Jack Ogilvie. As Jack Ogilvie had a house close to 15 Water Lane, he put it on the market. Mr. Creighton had obtained a right of first refusal on the property and in 1987 he exercised his option. He purchased it in 1988.

[89] Mr. Creighton described the deed he received as containing four lots: 15 Water Lane, one for a lot south of 15 Water Lane, as well as lot 3 and lot 4. The latter two lots are in dispute.

[90] According to Mr. Creighton, when Charles and Annabelle Harris owned the adjacent property at 18 Water Lane, they owned approximately 18 feet of the beach between the north boundary of lot 3 and south boundary of the Harris, now Car-Con property.

[91] Mr. Creighton testified that in 1988 - 1989 he spent six months in Chester, and in the following year spent two to three weeks in the summer and came at Christmas every second year. In 1999 his wife started to come to Chester for two months at a time. In addition, they rented their home in the summer and gave permission to the renters to use the beach on lot 3.

[92] In direct examination Mr. Creighton was asked to describe his usage before and after his purchase of the property. He said the usage of the property has not changed since the property was purchased from Jack Ogilvie. During the summer they collected seagrass and had occasional bonfires on the beach on lot 3. They sometimes swam from there but mostly off the wharf in front of their father's property. He said he stored a boat there called a flying junior and pulled it up on lot 3. He said this boat was bought by the family in the early 60's but was not brought to Chester until the mid 1980's. During the winter it was stored on lot 3 or on top of a float, which was also stored on the property. He said during the summer the boat/dingy was kept on the shore of lot 3. When he was away the boat was kept on the beach. He said they acquired an aluminum boat in the late 1980's and prior to that had two other wooden boats. In the picture taken in 2005 by Timothy Harris, the float and an aluminum boat can be seen on lot 3, as testified to by Mr. Creighton.

[93] Several other witnesses verified this continual usage of lot 3 as a storage area for boats and for ingress and egress into the water. These witnesses, include Tim Harris, the son of Charles and Annabelle Harris, the predecessors in title to the Adamses and Car-Con.

[94] Mr. Creighton testified there were always moorings on lot 4 and said he put a Cape Islander, which he acquired in the mid 1990's, on a mooring on lot 4. David Creighton's evidence as to the location of the mooring on lot 4 is in contrast to the evidence of his father, Douglas Creighton. When asked to plot the moorings on a plan, Douglas Creighton plotted them outside lot 4. It did appear from observation that Mr. Creighton was confused as to the location of the moorings.

As evidence of his disorientation in relation to the plan, he mistakenly identified the location of David Creighton's home at 15 Water Lane.

[95] Mr. Creighton said lot 3 was sometimes used by the Adamses but not until 2000 when they started clipping the raspberry bushes. He said he never received any complaint from them about his use of the property. He said there had been a hedge put up the Harrises between lot 3 and the Car-Con Holdings property which was subsequently removed. He said he started to see encroachment by the Adamses in June 2001, at which time he had a solicitor write to them. He said the bushes between the Adamses' property and the northern portion of lot 3 were taken down between 2000 and 2003, possibly by the Adamses. He said he was approached by Mr. Adams with a sketch of survey and told that he did not own lot 3. This was in 2000. He said after that meeting he had another letter written to the Adamses and started this quieting titles proceeding in 2004.

[96] Mr. Creighton said the Adamses started putting a float on lot 3 during the 2003 - 2004 period. Prior to that there was no use of lot 3 by the Adamses to store their float. Mr. Adams had previously kept his float on the northern portion of the property as depicted on the 2005 photo by Tim Harris. He said at one point the Adamses pulled their float up on the beach onto lot 3 obstructing Mr. Creighton from pulling his float up onto lot 3. He had to hire a truck to pick it up at the wharf and drop it on the top part of lot 3.

[97] Mr. Creighton identified the original of a photo taken by his sister, Julie, in 1965. The back portion of the photo contains the inscription "grandmum's beach 1965". Mr. Creighton testified that grandmum was Jessie Aird Ogilvie, his grandmother. This photo would appear to show lot 3 looking onto water lot 4. This picture shows three moorings and three boats. It appears from Mr. Creighton's testimony that the bluenose vessel is to the left, Alan Morash's boat is in the middle and the schooner is on the right. According to Mr. Creighton, this picture clearly depicts the bluenose in the confines of water lot 4 and other boats within the confines of the full Grant 22100.

[98] Plaintiff's counsel points out there was no evidence offered to challenge this observation, and the only challenge to the photograph on cross-examination was that the notation on the back of the photograph was in two colors, the implication being that the writing on the back of the picture was possibly at different times.

[99] On cross-examination Mr. Creighton was questioned as to why there were no early photos of his family on the beach. He testified that not all photos were presented as evidence to the court and moreover this was not one of the more photographed parts of the property. He did admit that most photos were taken after 2000. He testified that the reason for this was that this was when the Adamses started to claim the property.

[100] Mr. Creighton confirmed that renters used the property from 2001 to 2004/2005 for approximately six weeks in July and August.

[101] Mr. Creighton admitted on cross-examination that he had not viewed 15 Water Lane at the time he purchased it from Jack Ogilvie. He was questioned how he knew the boundaries and his response was that he was given the deed plus he was familiar with the property from having grown up on it and adjacent properties.

Brenda Mulroney:

[102] Ms. Mulroney lives at 70 Brunswick Street, Chester. She originally moved with her family to Chester in 1956 just before she started school. She lived near the Harrises' property, which is now owned by the defendant, Car-Con, until 1966. After 1966 her father built a house on the outskirts of Chester and she moved there with him but came back in 1970 and has been there ever since.

[103] Ms. Mulroney described the Harrises' house at 18 Water Lane as being at the bottom of the hill across from her residence. Her first recollection was in approximately 1956 when she first moved there when she was 5 years old. She said there was no house on this property at the time, but it was referred to as the "granny Harris" property. She identified the location of the "granny Harris" property as where the Harrises later built their house. She testified that when she was small her parents would visit granny Harris and she and other children, including Tim Harris, would be sent by the parents onto this lot to play. She described the lot as a green lawn with a cherry tree on it. She said there was a bit of a peninsula but it was mainly rock and scrub. She described the granny Harris house as being to the immediate right of the present David Creighton property on the west side of Water Lane and in front of the Car-Con property.

[104] Ms. Mulroney believed that before the house was built the property was owned by granny Harris and, later by Charlie Harris and Annabelle Harris, who built a house. She said the Harrises eventually got a Cape Island boat and kept it on skids on the north side of the property. She said that as a child she played on the area between lot 3 and the Harrises property on what she described as a sliver of beach. She said they were not allowed to play beyond the pile of rocks which marked the end of the sliver and the beginning of lot 3. She was aware that south of this area was Mr. Ogilvie's property. From the evidence it would appear that the reference is to lot 3. She said lot 3 was used by the Ogilvies to store two rowboats, one large and one small. They stored a float there in winter and she said Allan Morash also kept his rowboat there.

[105] When asked how the Ogilvie grandchildren accessed lot 3, Ms. Mulroney said they either came down from the present 8 Water Lane over a stone wall or they would come in off Water Lane. She said at the time in the early 1960's Mr. Ogilvie lived in two places, 8 Water Lane and 15 Water Lane. She also played with the Ogilvie children on a vacant lot which she described as being on the south of the present 15 Water Lane, as well as playing at 8 Water Lane. They swam on the beach south of 8 Water Lane, and there was a tree house built between 8 Water Lane and lot 3 where they also played.

[106] Ms. Mulroney said the Harrises made no use of lot 3 but did use the sliver of sand immediately adjacent to their property, which she understood belonged to them. She and the other children built rafts and had bonfires on this property. She said the reason that they had bonfires in this area was because the bonfires were messy and Mrs. Harris did not want the children messing on other peoples property, presumably lot 3.

Daniel Blain:

[107] Mr. Blain is the father-in-law of Jason Mraz, the principal of Car-Con. He testified on behalf of the plaintiff. Mr. Blain completed a statutory declaration on behalf of the Creightons which was dated prior to Mr. Mraz marrying his daughter and prior to Mr. Mraz purchasing the property.

[108] Mr. Blain testified that he has been visiting Chester since birth and that he resided close to the property in dispute on Duke Street. He generally spent August, but sometimes July and August in Chester and the rest of the year in the United

States. He is familiar with the David Creighton property and understood the ownership of that property was with the Millers then Mr. Ogilvie and then the Creightons.

[109] Mr. Blain first stated in his direct testimony that there was not much use made of lot 3. After he was referred to his statutory declaration he testified that from the early 1990's when he spent more time in Chester he did, in fact, see boats and a skid on lot 3. He stated that the Harrises would always put their boats on the north side of their home, not on lot 3. He confirmed that the property designated as lot 3 was always used by the Creightons and their predecessors in title.

[110] Mr. Blain became aware that the Adamses were claiming the property around 2002. He confirmed that Jack Ogilvie hauled a bluenose on lot 3 on one occasion, and he testified that he recalls that event because he received a call in the middle of the night to help Mr. Ogilvie.

[111] Mr. Blain's evidence is important as his knowledge of the property goes back to the time that the property was owned by the Millers, the predecessors in title to Mr. Ogilvie, his family and Mr. Creighton.

Gerald Michael Giffin:

[112] Mr. Giffin has lived in Chester for 29 years. He first moved to Chester in 1981 and lived in the basement apartment of the Adamses' home. His wife moved in six weeks later and they lived there until 1986. He said the Adamses lived in Truro, but were in Chester on weekends and in the summer.

[113] Mr. Giffin understood that the southern boundary of the Adamses' property was at the end of a stone wall. He said he and his wife stored their windsurfer underneath a balcony on the water side of the of the Adamses' property. He said lot 3 was being used by the Creightons at the time and he assumed it was theirs. He does not recall the Adamses using lot 3 during the time he resided in their apartment. He recalled the Creightons keeping a flying junior and a tin boat (presumably aluminum) with motor on the property. He also recalled them pulling up a float on the property in the winter.

[114] The evidence of Mr. Giffin is important because he is not related to any of the parties and lived in the Adamses basement between 1981 and 1986. His

evidence is consistent with that of David Creighton and that of those witnesses called for the plaintiff and is inconsistent with Mr. Adams' testimony and with the evidence of those witnesses called on his and Car-Con's behalf. As well, his evidence is consistent with that of Tim Harris, who was the other independent witness, neither of whom were related to the plaintiff or defendants

[115] I found the evidence of Mr. Giffin to be straightforward and believable.

Timothy Whitman Harris:

[116] Mr. Harris lives in Chester. His present house is behind 15 Water Lane. He is a real estate broker in Chester and is also a photographer. He moved in 1959 into his grandmother's house next to 15 Water Lane which is behind and across Water Lane from the present house owned by Car-Con. He lived there between 1959 and 1963 with his grandmother, Gertrude Harris. In 1963 he moved into a new house built by his father, Charles Edwin Harris and his mother, Annabelle Harris, across from his grandmother's house, on the present Car-Con property.

[117] Mr. Harris testified that his father started building the house in the fall of 1962 after obtaining the property from his grandmother. Before the house was built it was referred to as "granny's garden".

[118] Mr. Harris said his father was an avid boater and a hobby fisherman. They had a 25-foot double ended wooden fishing boat called the Chantila. For maintenance purposes, his father had a winch to haul boats on the north side of his property to the north of the present Car-Con property on a wooden slipway. In the picture at Tab 30, he identified the float on this property as being a float his father used as a work float from which he swam. He also identified a work boat on the slipway which was used to haul rocks for the wharf that his father built in the late 1960's or early 1970's. The wharf was an ongoing project. He and his father went in their boat to the islands to find logs for the wharf. They secured the logs on the north beach, which was on the north side his parents' former property.

[119] Mr. Harris said his father built the wharf just south of the boundary of the Creighton property. He said his father was careful not to infringe on the Creighton side. He said they owned a portion of the beach which bordered on lot 3. He described the area owned by his parents as being about 1/3 of the sand beach. The other 2/3 would be the present lot 3.

[120] Mr. Harris testified that on the south side of his parents' home there was a pathway that came out onto the beach from the carport and entered onto their one third portion of the beach.

[121] Mr. Harris said they sold and moved out of the house built by his parents in August 1978. He recalled an iron bar on the shore behind a large rock. He wanted to tie his dingy to the bar but his father would not let him. This was the marker between their portion of the beach and the Creighton lot 3.

[122] Mr. Harris testified that the Creightons kept row boats on the property and also a flying junior. He also testified the Creightons had a helper named Alan Morash, who kept his boat on the top of the northern boundary of lot 3. He testified that in the summer when he was young he played with Denny Creighton in July and August. He was also friends with Mary and Tina Hutt, Brenda and Bruce Robinson and Kim Woodroof, who he also played with. He said he and his friends had the run of the whole compound which he described as being composed of the properties owned by the Creighton/Ogilvie families. There was a rock and sand beach on the south side of 8 Water Lane where they swam. He said they swam there because there was a deck where the adults could see them.

[123] Mr. Harris said that when his family first arrived at the property in the late 1950's and early 1960's, the Millers owned 15 Water Lane. Sometime later Colonel Ogilvie bought it.

[124] Mr. Harris was shown a picture which he said came from a family photo album of his mother sitting on their 1/3 of the beach. It shows a skidway to her right. He demonstrated where the pathway was and testified that it was roughly the path of the skidway. He said that to the left of his mother would have been the steel pin. He talked about delineating the boundary between their property and the other 2/3 of the beach.

[125] On cross-examination Mr. Harris gave the following evidence:

> Q. Now you testified earlier that your father had told you not to tie a rowing dingy to an iron bar that was on the beach?
>
> A. Yes

Q. And if you go back to Tab #52, if you would, and, if you could point out you had testified that the iron bar was behind the rocks where you mother is sitting. Is that correct?

A. To be more to the fine point to it, I believe the wooden plank that Annabelle is sitting on, the iron bar would be just under the wooden plank, probably a foot or two inside of the left hand edge of the wooden plank. You can see the plank is resting on a round ... a roundish rock. The pin is just in behind the roundish rock.

Q. And Mr. Harris you are expecting the court to believe that you would have tied a dingy to an iron bar that was high as these rocks, are off the high water mark behind rocks?

A. Yes

...

Q. It is a straight forward question Mr. Harris. Did you have parties on the beach that is lot #3?

A. This is lot #3?

Q. Yes

A. No

Q. Your mother invited people to spend time with her on the beach. Do you agree or disagree?

A. I agree

Q She did. And that included area of lot #3?

A. No

Q. Now, in regards to the two questions I just asked you, if I told you that there are other witnesses who are prepared to testify you did have parties on the beach and that you mother did invite persons onto the beach outside of the area that you claim belong to your parents, do you agree or disagree to such a statement?

A. Do I agree or disagree that you are going to bring people in to say differently?

Q. No. Do you agree with what I just told you that they will say?

A. I don't...

...

Mr. Dumke: Okay, next statement. Your parents believed that they owned the entire beach area, including lot #3?

...

Mr. Dumke: Were you told by your parents that they owned the entire beach?

A. No

Q. The next question. Were you ever present when your parents gave permission to Jessie Ogilvie, respectively, Jack Ogilvie to use the beach to haul up their boats?

A. No

Q. If I told you that the entire beach, including the lot #3 area, was owned by your parents, do you agree or disagree?

A. I disagree.

...

Q. In the years that you lived at the house, did you, in fact, see members of the Creighton family swim from that beach?

A. No

Q. Did you see members of the Ogilvie family swim from the beach?

A. I don't thinks so, no.

[126] On re-direct Mr. Harris gave the following evidence:

Q. Mr. Harris... you confirmed to my friend it wasn't a useful beach and I assume that he's referring to lot #3 and you confirmed it wasn't a useful beach for you to go to. What was the beach, and I am referring now to lot #3, what was it used for?

A. It was more for utility purpose. Spring and fall for storing the Ogilvie, Creighton boats and floats.

Q. And in the similar line of questioning you testified and answered to my friend you never saw the Creighton or the Ogilvie families swim from the beach. What use did you see and (sic) beach again, I am referring to lot #3. If you had parties, where were they?

A. For boating purposes, storage, utility.

Q. Okay. My friend asked you and you confirmed you did not have parties on lot #3. If you had parties where were they?

A. If we had any bonfires, entertainment was over on our side of the beach. It is hard to tell but the sand is better and finer over there. It, just by the wave action, the - you know, there is better sand build up here.

Q. So you are referring to the northern portion of the beach area between the north boundary of civic 8 and the retaining wall shown in Tab 30 of your parents' property at the time?

A. Yes

...

Q. My friend asked you about your mom inviting people to spend time with her on the beach. What part of the beach did your mother invite friends to spend time?

A. Over on our portion of the beach our path come down from the carport down to our third of the beach, and there were rocks to sit on there and there would be a bench or a lawn chair or something, just depending on the year.

Q. You are referring to the beach portion of the Harris house north of what you say is the southern boundary of the Harris property?

A. Correct

[127] I found the testimony of Mr. Harris particularly helpful and believable. He was articulate and straightforward in his response to direct and cross-examination questions. His evidence is important because he is not related to any of the parties and he grew up on the property with his parents until they sold it to the Adamses in 1978. His evidence is consistent with that of the other plaintiff's witnesses, including the Creightons, as to the use of the lot, and that of the other independent witness, Gerald Giffin, as well as Brenda Mulroney, as to the Harrises use of the sliver of beach adjacent to their property.

[128] The evidence of these individuals, including Mr. Harris, is consistent with the plaintiff's evidence and inconsistent with that of the defendants, Adamses and Car-Con.

Defendants' Evidence:

Geoff Diamond:

[129] Mr. Diamond is a resident of Chester. He came to Chester in 1966 when he was 15. Around 1970 he became acquainted with Tim Harris, as both of them went to Kings Edgehill boarding school for a time, and they traveled together with their parents taking them back and forth every two weeks. They also worked on Frobisher Island together.

[130] Mr. Diamond said he was familiar with the property. He said he visited it with Tim Harris. He said he never saw anyone on the beach. He said when he was younger he would pass by the house every couple of weeks while going to school.

[131] Mr. Diamond is a general contractor. He built Jason Mraz's house. He testified on cross examination that it took him two years to complete the home and that it was worth about $2,000,000. He said he still works for Mr. Mraz, keeping an eye on his wharf and property.

[132] He testified that there were bushes on the south side of the Mraz property when he started to build after the Adamses' house had been destroyed. He said when he was building the Mraz house he needed access through lot 3 and he asked

permission of one of the Crieghtons. On re-direct he said this occurred in 2007 - 2008.

[133] On cross-examination the following exchanges took place:

> Mr. Bureau: Thank you. Mr. Diamond, you said your relationship with Mr. Mraz, you said you built a home for him. That is a bit of an understatement isn't it? You built quite a home for him. It's quite a big place isn't it?
>
> A. Yes
>
> Q. A $2,000,000 home, that was a major job for you wasn't it?
>
> A. It was a major job, yes.
>
> Q. It took more than a year or so to complete?
>
> A. Almost two, from start to finish.
>
> Q. You were the general contractor on that job?
>
> A. Yes
>
> Q. You were the general contractor for the new wharf that he put out there?
>
> A. Well, I kept on eye on it. It wasn't part of my mandate, no.
>
> Q. In fact, you are still working for Mr. Mraz aren't you? You still clean the property and look after it when he is away?
>
> A. Yes
>
> ...
>
> Q. So when you started construction there was no fence there but the bushes were there. You see in that picture?
>
> A. Yes
>
> ...

> Q. Okay. When you were building the house on that side you had to actually access some of that property going over, what I am going to call the Creighton lot, that is between the two pink line, you had to access through there didn't you?
>
> A. Yes
>
> Q. Right. And you actually asked permission from one of the Creightons to do that didn't you?
>
> A. Yes

[134] The evidence of Mr. Diamond is of limited weight. His evidence is that he did not see anybody use lot 3 and had no idea who owned it. He did confirm that while working on the Car-Con property, he asked the Creightons' permission to use lot 3 for access. While not of great weight, this fact would tend to indicate that Mr. Diamond was of the view that the Creightons owned lot 3, otherwise he would not have asked permission to cross.

Jason Alexander Mraz:

[135] Mr. Mraz resides in New York. He first came to Chester in the summer of 1990 with his girlfriend. Since then he has visited Chester every summer for approximately two weeks. Car-Con is an investment holding company which he controls. He bought 18 Water Lane in 2004, and later bought Grant 4701 or such interest that the Adamses had in it. He said his understanding at the time he purchased it was that Grant 4701 was next door to the property he purchased and was owned by the Adamses but was in dispute.

[136] He testified that he walked by lot 3 several times a day when he was in Chester. He said he had not paid much attention to lot 3, but he noticed that it was bushy and overgrown. He said there was a fence along 8 Water Lane, on the southern boundary.

[137] Mr. Mraz testified that when he walked by the property he would sometimes see James Adams raking the disputed beach on lot 3. He said he never saw anyone else there. He said there was a portion of grass along Water Lane and he said there was lawn cutting on the grassy area. He testified the only person he saw cutting the lawn was Mr. Adams' son, Russell.

[138] Mr. Mraz denied that he ever asked the Creightons permission to put kayaks on lot 3. He said he used the mooring shown in front of his property and the Adamses' son was using the mooring to the south, which had the white float attached. In his testimony, James Adams was unable to identify the same mooring as being used by his son.

[139] Mr. Mraz said that when he purchased the property in 2007 Car-Con received two tax bills in 2008, 2009 and 2010, one of which was for his residence and the other for Grant 4701.

[140] On cross-examination Mr. Mraz testified that he and his family used the property to the north of their dwelling for sailboats they owned. However, during race week, he said they would sometimes put them in the 20 foot strip, which appears not to be in dispute, just to the south of their property. This is the so called sliver of beach. He admitted there was a fence erected at the time of the construction of his dwelling along the northern portion of lot 3, but he said this was put in by the contractor without his permission and he had him remove it.

[141] Mr. Mraz testified about the purchase from the Adamses. He said he was surprised to be informed when he was constructing his dwelling that the Adamses had reserved a 12-foot right-of-way on the southern boundary of his property. He said this right-of-way was along the southern boundary of his property and the northern boundary of lot 3. He said he became aware of the right-of-way when he received a call from Mr. Adams asking him not to build on the 12 foot right-of-way. He said he did not know when he bought the property that this right-of-way was being reserved by the Adamses. He said Mr. Adams wanted money to sign off the right-of-way and that he was shocked that the Adamses were coming back to the table for more money. He did pay them $140,000 to sign off the easement, plus a quit claim for Grant 4701 which he thought was reasonable.

[142] Mr. Mraz testified that he saw Mr. Adams on the disputed lands raking the beach, and he saw Russell Adams cutting the grass; he retracted these claims on cross-examination. He said that after hearing his discovery evidence he was willing to say Mr. Adams was puttering on his property but not on the disputed property.

[143] As to his paying property taxes on Grant 4701 as he testified to in direct evidence, after being presented with various exhibits, Mr. Mraz agreed that he is not paying taxes on lot 3

[144] Mr. Mraz gave very little testimony as to the occupation of lots 3 or 4. He visited the area for a number of years for two weeks at a time and walked by the property, but by his own admission he did not consider this a noteworthy lot. I interpret him to be saying that he paid very little attention to the use of lots 3 and 4 during his visits.

John Paul Carroll:

[145] Mr. Carroll lives at 75 Water Street. He is retired and has lived in Chester full-time since 1992. Before that he had visited Chester most summers since birth. As a youth he lived on Duke Street with his parents. He said his connection to the property in dispute is from having lived on Water Street and passing this property as he traveled to and from the yacht club. He described the area in dispute as between 8 Water Lane and the Harrises house, which would appear to include both lot 3 and the portion of the beach that is not in dispute, which would now be owned by Car-Con.

[146] Mr. Carroll described the property as open beach and said he and his friends, including Tim Woodroof might have stopped there to play or swim. He said Tim Woodroof's aunt was Annabelle Harris. He said Mr. Woodroof waterskied off the beach. He said he did not know Mr. and Mrs. Ogilvie. On cross-examination he said he was 10 or 15 when he saw Mr. Woodroof waterskiing and said Denny or David Creighton may have been there with him.

[147] Mr. Carroll said he understood as a child that lot 3 was part of the Harrises' property, but said in later years he saw the Creighton family using it. He said the Creightons moored their boat in an area he identified as being in front of the pink lines drawn in Tab 30, which could very well place it in water lot 4.

[148] Mr. Carroll had no knowledge of who owned the property in dispute. In the last 5 or 6 years he saw the aluminum boat and float owned by the Creightons on the property. He did not mention any occupation by the Adamses or Mr. Mraz. He testified on cross-examination that he was never on lot 3 with any of the Harrises,

which would be consistent with the evidence of Tim Harris and others that lot 3 belonged to, and was occupied by the Creightons and their predecessors in title.

[149] Mr. Carrol's evidence is more consistent with the plaintiff's use and occupation of lot 3 and 4 than with the defendants' use. He confirmed the use of lot 3 by the Creighton family. He also confirmed that they moored their boat in an area which appears to be within, or very close to, lot 4.

James Adams:

[150] Mr. Adams lives in Chester Basin. He said that he and his wife were looking for a place in Chester in 1978 and they purchased the property from Annabelle Harris.

[151] Mr. Adams said at the time they agreed to purchase the property the final agreement was left in the hands of legal counsel. He said that they received a parcel from Mrs. Harris a couple of days after they agreed to purchase the property, including a deed, the Hebb plan and a letter from the government regarding the right-of-way on the north side of the property. The north side was of particular concern because they wanted to build an apartment on the north side of the house.

[152] Mr. Adams said there was a water grant with the property. He identified a deed from Louisa Gertrude Harris to Charles Edmund Harris in 1958 a copy of which he received in the package from Mrs. Harris. He said she did not give him a copy of the water grant but he received this document later from a lawyer hired by his Truro lawyer to search title.

[153] Mr. Adams testified that when they purchased the property, he understood that lot 3 was being conveyed with it. The documentation, listed previously, which he had at the time of closing was for a parcel of land as shown in the Errol B. Hebb plan, consisting of 7,892 square feet, plus a portion of water Grant 4701, which on the Hebb plan was incorrectly located in front of the above described parcel. Clearly, this conveyance did not convey lot 3. Later in his testimony, Mr. Adams confirmed that it was not until the Turner survey of April 17, 2002, which he commissioned, that he knew the exact position of provincial crown Grant 4701. Until the Adamses were aware of the location of this grant, they could not assert any ownership of lots 3 or 4. The Adamses active claims to lots 3 and 4 appear to arise close to the time the survey was prepared by Turner. David Creighton

testified that Mr. Adams approached him with a copy of the Turner plan and asserted ownership of the property. He would not have been in possession of the Turner plan until several years after purchase.

[154] David Creighton testified that it was around this time that he became aware of a claim and as soon as he became aware, he had his lawyer write to Mr. Adams. If Mr. Adams believed that he had purchased lot 3 in 1978 one would expect that he would have made some use of the property and, at the very least, resisted the use by the Creightons, The evidence of the Creightons and their predecessors as to the use of lots 3 and 4 is consistent. All the witnesses called by the Creightons, including the independent witnesses, Giffin and Harris and many of the witnesses called by the defendants, acknowledge the use by the Creightons and their predecessors in title of these lots. The use most often mentioned is storage and the launch of their boats from lot 3 and generally treating it as their own.

[155] I am satisfied that Mr. Adams' evidence that he understood he was buying lot 3 at the time he purchased the property, is inconsistent with the other evidence and inconsistent with his actions. In other words, Mr. Adams did not actively pursue an ownership interest in lot 3 or 4 until the Turner survey was prepared in the early 2000's. With respect, I am not satisfied, nor persuaded, that Mr. Adams believed that he was receiving title to lot 3. Simply put, his actions would not support this contention. In any event, whether not he thought he owned lot 3 is not determinative of any of the issues.

[156] Mrs. Adams moved to Chester in 1988 and Mr. Adams in 1990. Between 1989 and 1990 Mr. Adams commuted from Truro. Between 1978 and 1998 they came down on weekends and in the summer, more or less every week, unless weather or other duties prevented them from coming down.

[157] Mr. Adams said when they first purchased the property he cut the grass on the top of lot 3. He said they had a float built for a floating wharf on lot 3 but moved it off. He testified they cleaned up the beach on lot 3 and that his son cut the grass on lot 3, as well as between his house and Water Lane to the north. He testified that he cut bushes down on lot 3 in front of Mrs. Ogilvie's house. Mrs. Ogilvie lived in 15 Water Lane at the time and he said she sat out on her front verandah a lot but she never said anything to him about being on lot 3. He did say that during the years he owned the property he observed Douglas Creighton on the property. He said he twice saw tenants of David Creighton on the property and

Jack Ogilvie for a few years. This evidence of seeing Mr. Creighton's tenants is consistent with the evidence given by David Creighton. He said he saw Jack Ogilvie on the property for a few years. This is consistent with the claim that the Ogilvies also claimed ownership of lots 3 and 4.

[158] Mr. Adams said Douglas Creighton was frequently on the beach twice or three times a week. He described an incident when he was having work done on the seawall and doing some work with rocks around 1988 when David Creighton talked to his builders and stopped them from working there. This would be consistent with the claim of ownership of the Creightons.

[159] Mr. Adams also described an incident when he was moving a float near lot 3 and a Mr. Oickle was working with him. Mr. Oickle had a rope attached to the float and was standing on the shore of lot 3 with Mr. Adams on board the float. He testified that Douglas Creighton tried to take the rope away from Mr. Oickle. This evidence would support Mr. Creighton's claim to ownership. In particular, it suggests that Douglas Creighton was asserting ownership of the property, which would be inconsistent with Mr. Adams' claim to ownership and consistent with the Adamses' claim to ownership of lot 3.

[160] Although Mr. Adams could not identify the year, he said that at one point Douglas Creighton had a man erecting a fence on the north boundary of lot 3 on the triangular lot. He said he asked the worker what he was doing and told him that he objected to him building a solid fence onto their fence. He said that Mr. Creighton came back and finished it but did not connect it to their fence.

[161] Mr. Adams testified he saw Jack Ogilvie on at least one occasion on the south side of lot 3 near the seawall on 8 Water Lane, where it joins lot 3. He said he and Mr. Ogilvie would pick up wood on the beach and put it on lot 3 to be burned. It is of note that Mr. Adams did not assert any ownership to lot 3.

[162] Mr. Adams was asked what use was made of the beach by other members of the Creighton family. He said he occasionally saw children on the beach but no one was picnicking. He said David Creighton's wife would come down on the beach with her dog. He also discussed the moorings in front of lot 3. He said the mooring in front of his property was his but he could not identify the other one, that is, the one with the white float which had been identified as being his son's. He talked about putting his mooring in and needing a federal government permit.

[163] Mr. Adams said he first became aware of the conflict on the ownership of the property in 2000 when he received a letter from Douglas Creighton's lawyer.

[164] On cross-examination Mr. Adams agreed that when he looked at the property with Mrs. Harris he was never taken around the boundaries. He agreed that the physical structure was most important to him because he and his wife wanted to construct an apartment in the basement. He admitted that when he bought the property his focus was putting in an apartment and a right-of-way on the north end of the property. He admitted that he met with his lawyer and looked at the deed and the Hebb plan. He was shown the Hebb plan and confirmed that this was the property he purchased from the Harrises. The property is described as having a land area of 7,892 square feet. Lot 3 would not be part of this lot, but would be on the southern boundary. He confirmed that the Hebb plan showed Grant 4701 but he disputed its location. On the Hebb plan, Grant 4701 is shown immediately to the east (in the harbour) of the lot conveyed by the Harrises to Mr. Adams.

[165] I am satisfied that at the time of purchase Mr. Adams should have been aware that he was not purchasing lot 3, which clearly is excluded on the Hebb plan. He agreed that the deed from Louisa Gertrude Harris to Charles Edwin Harris dated September 16, 1958 conveyed a piece of land consisting of 7,892 square feet and that this matched the description on the Hebb plan. He also agreed it was 18 feet, plus or minus, from the seawall to the southern boundary of lot 3. He also confirmed that at the time he hired Mr. Turner to do a survey for him, that the only plan that existed of these lands was the Hebb plan.

[166] Mr. Adams confirmed that the Turner plan was the first plan to locate Grant 4701. He admitted that prior to the preparation of that plan in April 2003 he did not know where Grant 4701 was located. In other words, he bought the property in 1978 and it was not until 2002 that he received an indication, by survey, of the location of Grant 4701.

[167] Mr. Adams further admitted on cross-examination that when he purchased the property in 1978 there was a boat on lot 3. He agreed that the boat was stored there regularly and that he never asked anyone to explain why. One would expect that if Mr. Adams believed he owned lot 3, he would make inquiries as to the ownership of the boat on his property. There is no evidence that this was the case.

[168] Mr. Adams confirmed that when he sold the property to Jason Mraz he kept a 12 foot wide easement. He admitted on cross-examination that the reason for reserving the right-of-way was so that he would have access to lot 4 if he was unsuccessful in his claim to lot 3.

Helen McLauchlin Adams:

[169] Mrs. Adams is the wife of James Adams. She is 78 years old and a retired teacher.

[170] By reference to photographic evidence, Mrs. Adams identified the Creighton flying junior boat on lot 3. She said that on more than one occasion she saw a "Creighton girl" haul this boat across Water Lane for storage on 15 Water Lane. She testified that the float that was purportedly stored on this property was, in fact, not kept on the property by the Creightons in winter as they testified, but hauled every fall and brought back in the spring by Herbert Rafuse of Chandler's Cove. She said Mr. Rafuse would haul the float there by boat in the spring and haul it back in the fall, approximately three miles. She said Mr. Rafuse did this until the Creightons moved in around 1999 or 2000 when it stopped. As I will outline later, Mr. Rafuse, in rebuttal, gave contrary evidence.

[171] Mrs. Adams did not testify about any use by herself, her husband or her children of lot 3 and Water lot 4, nor did she confirm any understanding that at the time of the purchase from the Harrises, she and Mr. Adams were purchasing lot 3.

Patricia Ann Jackson:

[172] Ms. Jackson is a resident of Chester. She has lived in Chester for 42 years. Her observation was limited to the years 1969 to 1971 when she lived at a residence referred to as Morningside, close to the Car-Con property.

[173] Ms. Jackson testified that the Harrises owned the beach property to the south of their house property. She testified that Annabelle Harris invited her to go to the beach. She said she lived at Morningside for approximately two years and would go to the beach daily in the summer. She described a hedge running along the Harrises' property and said she would go to the beach on the south side of the hedge which would put her close to the northern line of lot 3.

[174] Ms. Jackson said she saw Annabelle Harris on the beach and pointed to an area on Tab 30 which was very close to the area between the portion of the beach owned by the Harrises and the present lot 3. The implication, according to the defendants, is that Mrs. Harris would be using lot 3 in addition to one third of the beach. This, of course, is inconsistent with the evidence of Tim Harris, the son of Annabelle Harris.

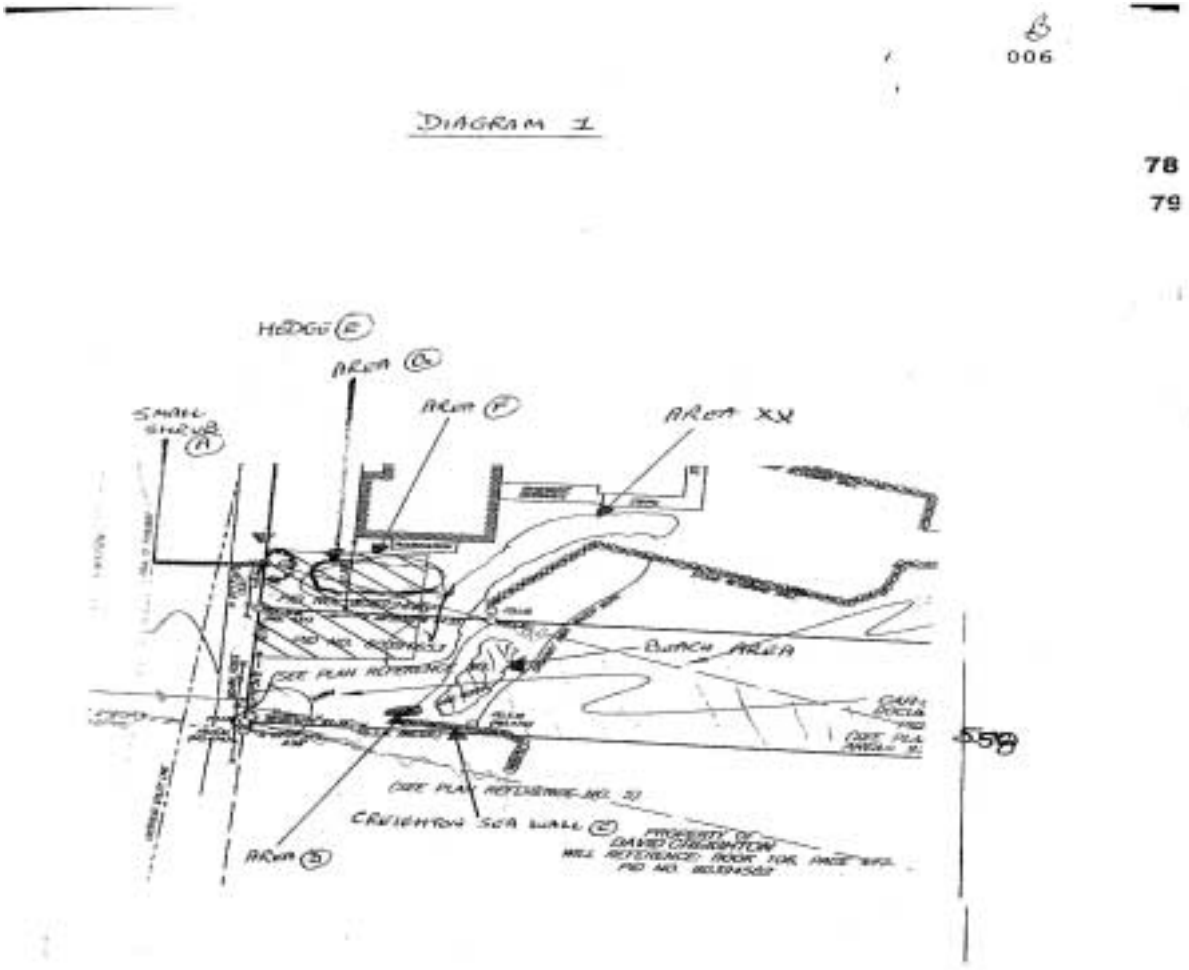
[175] Consistent with the evidence of the Creightons, Ms. Jackson said she saw a dory on lot 3 south of the north line of lot 3. She testified that she saw Tim Harris pulling up a boat on the beach during the period 1969 to 1971 but said she did not know whose boat it was. She said during the first summer in Chester she worked in Halifax and if the Creighton boys had come down that summer to the beach she would not be aware of their presence. She said, however, during the rest of the time she was home.

[176] It is difficult to determine from Ms. Jackson's evidence whether she and Annabelle Harris would have been sitting on lot 3 or on the Harrises' portion of the beach. On the totality of evidence, I am satisfied that is more likely that she was sitting on the Harris portion of the beach. I note the evidence of Tim Harris that his parents always respected the Creighton property at lot 3, and it would be most unlikely for Mrs. Harris to be sitting on the beach on lot 3 given Mr. Harris' testimony. As I have stated previously, I found Mr. Harris to be a very independent and credible witness and I prefer his evidence on this issue.

Dr. David Frank Woolnough:

[177] Dr. Woolnough testified on behalf of the defendants. He is a dominion topographical surveyor. He was qualified as an expert in photo interpretation, photogrammetry and analysis of photographic survey evidence. His expert report is dated March 30, 2010.

[178] Dr. Woolnough's opinion was based on four color photographs which were taken in 2001, 1992, 1986 and 1976. He provided a diagram based on Lester Berrigan's survey on which he noted periods of use on the property. This diagram which is on p. 6 of his report, is as follows:



[179] Based on the four color photographs, Dr. Woolnough reached the following conclusions:

Comments and Conclusions

> There is evidence of continuous use of the beach area, which extends through 60394533, 60394558, and part of 60391653 accessed from the south east corner of the Car-Con house, through a flattened traveled area by owners of the dwelling on #60394533, the Car-Con property
>
> There is no similar access evident from the Creighton property #60394582. All of 60622446 and part of 60391653 (disputed areas) have been used by the occupants of the dwelling in 60394533 since at least 1976.
>
> The ownership of the small boat or raft on the beach in 1992 cannot be determined from the aerial photographs.
>
> Access from public highway #1078 to lots 60394558, 60622446 and 60391653 south of the hedge labeled "E" on diagram 1 would appear to be available, but there is no evidence of a pathway, change in vegetation or regular use of this route. I must conclude that regular access has not been made from the road.
>
> In summary, the evidence from the aerial photographs suggests use of all properties but 60394582 by the owners of the dwelling on 60394533.

[180] On cross-examination Dr. Woolnough agreed that the four photos he relied on were taken in either June or July of the year. He was referred to a large chestnut tree at the northwestern corner of 8 Water Lane and agreed that it was possible that in June or July, if this tree was full of leaves at the time the photos were taken, there could be some impairment of the visual on the ground. He also agreed that it was possible that someone could walk down lot 3 to a boat that was located on lot 3, and that if it was under the tree he would not be able to see that on the photos.

[181] On the sketch in diagram 1, Dr. Woolnough shows an area, designated xx, as a high traffic area. He admitted on cross-examination that it was possible that this area could have been covered by water, if the water washed up there once or twice a year and the effect would be to wipe out any evidence of traffic.

[182] Referring to area "F" on his plan, Dr. Woolnough testified he did not pick up that area as being very sloped, although he was informed on cross-examination that this was the evidence of other witnesses.

[183] Dr. Woolnough was asked about whether there was a deck on any of the photos taken in 1976, 1986, 1992 and 2001. He was not able to locate a deck on the house, which would have been owned in the earlier years by the Harrises and

then the Adamses. On cross-examination he was referred to a deck that was attached to the Adamses' property and was asked to plot the approximate location of this deck on the south eastern corner and then extend it 15 feet east towards the harbour. The 15 feet represents the size of the deck. The deck was plotted on area xx, that is, the area which Dr. Woolnough suggests was a heavily traveled area.

[184] Dr. Woolnough never attended at the property. He agreed on cross-examination that there were a number of areas in which errors can be made in this type of evidence.

[185] Dr. Woolnough was referred on cross-examination to several overlays produced by plaintiff's counsel. He agreed that if people were traveling between the south boundary of the Adamses' house and the north boundary of the bushes that ran along the property down to the beach, there should be some indication of usage. This was, of course, the evidence of several of the defendants' witnesses. Dr. Woolnough failed to pick up the usage in that area. In particular, Tim Harris testified as to this pathway between the southern boundary of the Harrises' home and the bushes located at the northern boundary of lot 3, which extended from Water Lane, down to the steps that would lead to the Harrises' one third portion of the beach. This path was neither shaded nor covered.

[186] Dr. Woolnough concluded that area xx on his sketch is indicative of travel and use of lot 3 by the owners of the Car-Con property. However, on cross-examination he was asked to overlap copies of the Whyte and Turner surveys which were scaled down to match his diagram. When these plans were overlaid on his diagram, it appeared that there were objects blocking the path identified as area xx, which would be inconsistent with the usage of the area as suggested by Dr. Woolnough.

[187] I find the evidence of Dr. Woolnough of little assistance with respect to the occupation and possession of lot 3. There was little, if any, persuasive evidence given by Mr. Adams, Mr. Mraz or any other of the defendants' witnesses to support the areas of usage as outlined by Dr. Woolnough. His evidence is also contrary to that of a number of the witnesses called by the plaintiff. In particular, Tim Harris gave evidence that there was no occupation by his family of lot 3 other than for the "sliver of beach" owned by his parents. Numerous other witnesses testified as to the plaintiff's use of lot 3 and it was supported to some extent by some of the defendants' witnesses. It is difficult to determine how Dr. Woolnough

could have reached the conclusions he did, given the overwhelming evidence of occupation of lot 3 by the Creightons and their predecessors in title.

[188] I give little weight to the evidence of Dr. Woolnough for the reasons outlined.

Rebuttal Evidence - Herbert Lawson Rafuse:

[189] Herbert Lawson Rafuse was called by the plaintiff as a rebuttal witness. He is 81 years old and has resided in Chester, next to the golf course, for 37 years. Among other jobs, Mr. Rafuse builds and works on wharfs and floats. He built one for Douglas and Willa Creighton. He testified that since the early 1980's he had taken this float out of the water every fall and put it on lot 3. This is in clear contradiction to the evidence of Mrs. Adams. She testified that each year Mr. Rafuse would tow the float, used by the Creightons to Chandler's Cove, about three miles from lot 3. In other words, the float was not stored on lot 3.

[190] Mr. Rafuse made it clear that he never towed the float to Chandler's Cove, but placed it on the lot 3 each year since the 1980's, to store it for the winter. I prefer the evidence of Mr. Rafuse on this issue to that of Mrs. Adams. Mr. Rafuse is not related to any of the parties and gave his evidence in a believable and straightforward manner.

[191] Mr. Rafuse also stated that for about three years, starting around 2000, on instructions from Douglas Creighton, he took the float to the public wharf and had it taken out of the water and brought to Robinson's corner. This evidence is consistent with that of David Creighton. Mr. Creighton testified on cross-examination that the float was taken out at the government wharf on one occasion because the Adamses had blocked access to lot 3 with their own float, and as well during one of the years, either 2003 or 2004, the float required repair work.

[192] The significance of Mr. Rafuse's testimony is that he rebutted the evidence of Helen Adams by confirming the placement of the Creighton float each year since the early 1980's with the exception of three years. This is inconsistent with the position of the defendants, but consistent with the plaintiff's position and with the evidence of many of plaintiff's witnesses, all of whom testified to a float being stored on lot 3.

The Law of Constructive Possession and Adverse Possession:

[193] In *Mason v. Nova Scotia (Minister of Justice)*, [1999] N.S.J. No. 123, the Nova Scotia Court of Appeal addressed the doctrine of constructive possession. The court quoted from A.H. Oosterhoof and W.B. Rayner, *Anger and Honsberger Law of Real Property*, 2d ed. (Aurora, Ont: Canada Law book, 1985), at para. 31:

> The rule as to constructive possession differs according to whether the claimant has documentary title or colour of title or is a trespasser without colour of title. Where a person having paper title to land occupies part of it, he is regarded in law as being in possession of the whole unless another person is in actual, physical possession of some part to the exclusion of the true owner. To constitute colour of title it is not essential that the title under which the party claims should be a valid one. It is not the instrument which gives the title, but adverse possession under it for the requisite period, with colour of title. A claim asserted to property under the provisions of a conveyance, however inadequate to convey the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under colour of title, and one which will draw to the possession of the grantee the protection of the Statute of Limitations, other requisite of those statutes being complied with.
>
> The person relying upon the doctrine of constructive possession must enter under a real, *bona fide* belief of title. While in many cases it may be proper to assume this belief, yet circumstances may often warrant a jury, without direct evidence of want of such belief, in finding that the party knew or strongly suspected that he had acquired no real title, and, in such cases, a jury is warranted in treating the party as in no better position than a mere trespasser, acquiring no possession of any land which he does not take into his actual and effective occupation. A person who has no title is in possession in law only of that part of which he is in possession in fact.
>
> A person having clear documentary title may have constructive possession of all land conferred by the title but, if he has not clear documentary title, his possession is limited to such part of the land as is proved to be in his actual possession and in that of those claiming through him.
>
> As a general rule, when a person having colour of title enters in good faith upon land, as where it is proposed to be conveyed to him as purchaser or intending purchaser under what he believes to be good title, he is presumed to enter according to the title, his entry is co-extensive with the supposed title and he has constructive possession of the whole land comprised in the deed.

[194] In *McCormick v. MacDonald,* 2009 NSCA, the Court of Appeal discussed the requirements for constructive possession at paras. 92 and 94:

> An essential prerequisite to a claim of constructive possession is that the claimant be able to rely on colour of right, that is by having some paper title, albeit a defective paper title. It is not the deed or other instrument which gives title, but rather the claimants' *bona fide* belief of holding title coupled with the adverse possession under it for the requisite period of time, with colour of right. The paper title, though defective, may then define the boundary of the legally effective title by adverse possession.
>
> ...
>
> Since paper title is an essential element of constructive possession - only a party with paper title to land can claim constructive possession; the constructive possession is limited to the property described in the deed. *Wood v. LeBlanc* (1904), 34 S.C.R. 627 (SCC) at para. 47-51...

[195] It is important to distinguish the difference between constructive possession and adverse possession. C.W. MacIntosh, Q.C. *supra,* explains, at para 7.1 of the *Nova Scotia Real Property Practice Manual*:

> While a person holding paper title to the land is deemed to be in constructive possession of the whole of the land whether he occupies it or not, a trespasser may obtain possessory title only to that portion that he openly, notoriously, continuously and exclusively possesses. In other words, the true owner's title is extinguished only with regard to that portion adversely occupied. The situation is different if the trespasser enters the land under colour of title, in which case possession of part of it will be deemed constructive possession of all of it within the boundaries described in a deed. Colour of title is explained in *Harris v. Mudie:*
>
> > When a person so enters under a mere mistake as to his rights, purchasing or intending to purchase under what he believes to be a good title as from one whom he believes to be the heir-at-law or devisee under a will, or under a deed from a married woman defectively executed, or a forged deed, there is no good reason why his entry should not, as in the case of a valid deed, be co-extensive with the supposed title, and comes within the class of cases intended, in my opinion, to be protected by the statute; but it must in every case be a *bona fide* claim, and ought not lightly to be

> extended to a purchaser from a squatter or other person having not title, where they party has neglected to ascertain from the registry office, as he can always do in this country, whether the land has been patented, and who is the registered owner; and clearly not to cases where be knows the grantor has not title.
>
> A person who has possessed only a part of lands described in what may have been a defective deed is deemed to be in constructive possession of the entire parcel described in the deed.
>
> The possession necessary to bar the true owner under colour of title must be just as actual, open exclusive, continuous and notorious as when chimed without colour of title. The only difference is the amount of land which may be claimed.

[196] Mr. Creighton submits that he has constructively possessed the properties in dispute being under the *bona fide* belief that he obtained proper title to the disputed properties under the conveyance from John Patrick Ogilvie on March 30, 1988.

[197] Mr. Creighton says that he and his predecessors' title was established in 1915 with the conveyance from William Robinson to Mary A. Robinson and Adelaide Robinson with respect to lot 3, and in 1921 with Crown Grant 22100 with respect to lot 4. In the alternative, Mr. Creighton submits that colour of title commenced on September 14, 1956 with the two conveyances from the Roman Catholic Episcopal Corporation to Ella Wood Miller.

[198] I am satisfied that Mr. Creighton had colour of title and that he has occupied the disputed property, namely lots 3 and 4, as if they were his own. On the totality of the evidence, I am satisfied that there is very persuasive evidence that Mr. Creighton and his predecessors in title constructively possessed lots 3 and lot 4. I have outlined the evidence of all of the witnesses who gave testimony in this trial, and I am persuaded that there is ample evidence to support this conclusion.

[199] Briefly, as to lot 3, Mr. Creighton spoke of traversing lot 3 to gain access to 8 Water Lane. He played on these lands as a child. He testified that the usage of the property had not changed when he purchased the property, and said that when the property was owned by the Ogilvies and after he purchased the property, they collected seagrass on lot 3 and had occasional bonfires. He said they occasionally swam from there, but usually off the wharf in front of their father's property. They

stored a number of boats there, including a flying junior and smaller boats used to access the family sailboats.

[200] There was a float stored on this property since the early 1980's as testified to by Mr. Rafuse. This supports the evidence given by Douglas and David Creighton and other plaintiff's witnesses. This float was also shown on pictures that have been admitted into evidence. Mr. Creighton acquired an aluminum boat in the late 1980's and prior to that had two wooden boats all of which were stored on the lot.

[201] Mr. Creighton testified he never received any complaints about his use of the property until about 2000. In the early 2000's Mr. Adams started to make a claim after he obtained the Turner survey.

[202] Mr. Creighton testified there was a hedge between lot 3 and the Car-Con property put up by the Harris family which clearly delineated the two lots.

[203] Several witnesses confirmed that this was always known as Creighton property. Brenda Mulroney talked about the usage of the property. Daniel Blain, the father-in-law of Jason Mraz, completed a statutory declaration on behalf of the Creightons, and confirmed there were boats stored on lot 3. He remembers back to when the Millers owned the property and confirmed that Jack Ogilvie hauled his bluenose boat on lot 3. Mr. Giffin, an independent witness, confirmed that lot 3 was being used by the Creightons at the time he resided in the Adamses' basement, from 1981 to 1986.

[204] Mr. Harris, the son of the predecessors in title to the Adamses and Car-Con, testified about his parents owning a third of the beach and the other two-thirds, which is the present lot 3, being owned and used by the Creightons. He said his parents were always respectful of the property line between their property and lot 3. He confirmed that the Creightons had rowboats on lot 3 and a flying junior sailboat. He was aware that Col. Ogilvie owned 15 Water Lane and prior to that, the Millers. He confirmed on cross-examination that his mother never invited anyone onto the lot 3 beach, but rather on their own portion of the beach.

[205] On cross-examination, when asked if his parents owned the entire beach, Mr. Harris said he disagreed. On re-direct, he said the Creightons used the lot as a utility lot for storage of boats and related uses. There were a number of other witnesses to support the plaintiff's claim to constructive possession. I am

persuaded that there is overwhelming and unchallenged evidence that the plaintiff and his predecessors in title constructively possessed lot 3.

[206] As to water lot 4, Mr. Creighton testified that there were always moorings on lot 4, and that he acquired a Cape Islander in the mid 90's which he put on a mooring in lot 4, after the boat that was on the mooring was sunk.

[207] Tim Harris testified as to his father building a wharf and said his father was careful not to allow it to encroach on the Creighton water lot 4. Incidental to the use of water lot 3 would be the use of water lot 4 to launch the dingys, aluminum boat and flying junior.

[208] David Creighton testified that Mr. Morash, who worked for his family, kept his rowboat on their dock to get out to the boat he owned. He testified that his family gave Mr. Morash permission to moor his boat on water lot 4. David Creighton testified as to the upper photo in Tab 73 as a photo taken by his sister Julie in 1965. The back of that picture was introduced as Exhibit 2 with the inscription “grandmum’s beach 1965". Mr. Creighton testified that the boats shown on that picture were the bluenose on the left, his uncle Jack Ogilvie’s boat, the blue boat in the middle was Mr. Morash’s boat and the larger boat was the family boat Airlie.

[209] It would appear from the photo that these boats were moored directly in front of lot 3 which would appear to be in the disputed area of lot 4. Daniel Blain testified that he assisted Jack Ogilvie taking the bluenose out of the water. Presumably this would in front of lot 3 and would evidence the bluenose being taken ashore out of lot 4 onto lot 3.

[210] In *Nickerson v. Canada (Attorney General)* (2000), 185 N.S.R. (2d) 36, Gruchy J. commented on the nature of the occupation required of a water lot at paras. 35 - 39:

> 35 But it is also clear, especially by *Taylor v. Williger* that the quality of possession is "highly contextual" and must be judged in the peculiar circumstances of the property under consideration. The Plaintiff asserts that acts of possession of foreshore or water lots may be of a different quality than that required to establish adverse possession of upland. Lord Watson, while dealing with a matter under Scottish law, said in *Lord Advocate v. Young* (1887), 12 App. Cas. 544 (U.K. H.L.):

> It is, in my opinion, practically impossible to lay down any precise rule in regard to the character and amount of possession necessary in order to give a riparian proprietor a prescriptive right to foreshore. Each case must depend upon its own circumstances. The beneficial enjoyment of which the foreshore admits, consistently with the rights of navigators and of the general public, is an exceedingly variable quantity. I think it may be safely affirmed, that in cases where the seashore admits of an appreciable and reasonable amount of beneficial possession, consistently with these rights, the riparian proprietor must be held to have had possession, within the meaning of the Act 1617, c. 12, if he has had all the beneficial uses of the foreshore which would naturally have been enjoyed by the direct grantee of the Crown. In estimating the character and extent of his possession it must always be kept in view that possession of the foreshore, in its natural state, can never be, in the strict sense of the term, exclusive. The proprietor cannot exclude the public from it at any time; and it is practically impossible to prevent occasional encroachments on his right, because the cost of preventive measures would be altogether disproportionate to the value of the subject.

36 While *Lord Advocate v. Young* dealt with the title to foreshore, the English Court of Appeal considered the matter of possession of sea bed. Lord Russell at p. 985 quoted with approval Pollock and Wright on *Possession in the Common Law*, p. 30 as follows:

> What kind of acts, and how many, can be accepted as proof of exclusive use, must depend to a great extent on the manner in which the particular kind of property is commonly used. When the object is as a whole incapable of manual control, and the question is merely who has de facto possession, all that a claimant can do is to show that he or someone through whom he claims has been dealing with that object as an occupying owner might be expected to deal with it, and that no one else has done so.

37 Lord Russell examined the specific factual situation then under consideration and concluded:

> The effect of this evidence is that for some sixty years the plaintiff company and its predecessors have in one way or another been asserting possession of the Rythe, and doing so on the basis that they were owners of the soil therein. It has been argued with

> some force on behalf of the plaintiff company that there could be no better evidence of possession in relation to a tidal creek than the laying of permanent moorings by the plaintiff company and its predecessors and by others with their permission. In my view, this evidence, if it stood alone, would be amply sufficient to establish *a prima facie* case of possession in favour of the plaintiff company. I reject the suggestion put forward on behalf of the defendant that in order to establish possession the plaintiff company and its predecessors should have taken further steps, such as the setting up of permanent and visible marks to delineate the area of which they claimed to be in possession. Such marks could well amount to an obstruction to navigation, and I regard the suggestion that they should have been up in a tidal creek in the middle of Chichester Harbour as quite unrealistic.

38 The law as expressed in such cases as I have set forth above was considered by the Supreme Court of Canada in *Tweedie v. R.* (1915), 52 S.C.R. 197 Anglin, J. at p. 214 said:

> In order to establish title by possession to a portion of the foreshore, it is not necessary to prove the same exclusive possession of it, which would be requisite in a case of uplands. A grantee of foreshore holds it subject to the *jus publicum* of navigation and fishing, and a similarly restricted title to it by possession may be established by proof of such beneficial enjoyment as a grantee holding subject to this jus publicum might have exercised. *Lord Advocate v. Young,* 12 App. Cas. 544 at 553; *Moore on Foreclosure* (3rd ed.), pp.658, 660, 779, note (u), and 830, n (s); 28 Hals., pp. 368-9.

39 Anglin J. went on to consider the type of evidence which might be available to establish possession of a foreshore (and water lot) and said at p. 220:

> The evidence adduced by the defendant in support of his possession is as satisfactory as could reasonably be expected, having regard to all the circumstances, and it should, in my opinion, be held that he has established title to the foreshore in question.

He continued by making it clear that an interest acquired in such a fashion as he was considering was subject to the *jus publicum* of navigation and fishing.

[211] I am satisfied that there have been sufficient acts of occupation by David Creighton and his predecessors in title to establish constructive possession of lot 4. The occupation must be judged in the context of the use of water lots in Chester Harbour. Obviously, a common use is to moor one's boat on the property. This is evidenced in this case. Further, Mr. Morash was given permission by the Creighton family to moor his boat within lot 4. The Creightons and their predecessor in title launched the stored boats from lot 3 into water lot 4 and vice versa.

[212] The ownership of lot 4 in the Creighton family was recognized. Timothy Harris testified that his father, in building his wharf close to lot 4, was quite careful not to encroach on their water lot.

[213] For all of these reasons, I am satisfied that sufficient evidence of constructive possession of lot 4 has been established.

[214] In conclusion, I am satisfied that not only has the plaintiff, David Creighton, established that he holds superior paper title to lots 3 and 4, but in the event that I am wrong in that conclusion, I have no hesitation in finding that he has established constructive possession, he being there under colour of title and using both lots 3 and 4, which was a continued use from his predecessors in title, including Jack Ogilvie and other members of the extended Creighton/Ogilvie family. When he purchased the property, Mr. Creighton understood that he was acquiring lots 3 and 4 and went on to perform acts of possession and ownership on these lots, as did his predecessors in title.

[215] Mr. Creighton says that in addition to having constructive possession based on colour of title, he also has a possessory claim based upon adverse possession.

[216] In the event that I am wrong in my determination that Mr. Creighton has the better paper title and, in the alternative, constructive possession of lots 3 and 4, I am also of the opinion that he has established possessory title.

Issue #3 - Has Mr. Creighton established possessory title to the disputed lands based on the doctrine of adverse possession through open notorious, continuous, exclusive, actual possession of the disputed lands for over 20 years?

[217] Section 12(2) of the *Quieting Titles Act* states:

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

[218] Also relevant is the *Limitations of Actions Act*, R.S.N.S. 1989, ch. 258, in ss. 10 and 22:

> 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.
>
> ...
>
> 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 flight 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.

[219] Mr. Creighton says he and his predecessors in title have been in continuous use and possession of the disputed properties.

[220] The title to an estate in fee simple may be extinguished by virtue of possession of land by someone other than the paper owner. The title of someone who claims to be the rightful owner of a property under a paper title can be extinguished by virtue of adverse possession of another.

[221] In *Spicer v. Bowater Mersey Paper Company*, 2004 NSCA 39, 2004 CarswellNS 99, a decision of the Nova Scotia Court of Appeal, Justice Roscoe wrote at para. 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.

[222] The defendants say the evidence is insufficient to show that Mr. Creighton possessed the lands under dispute to the exclusion of Car-Con and it predecessors in title. The defendants say that any use of the disputed lands by the plaintiff was equivocal because it was shared with others and, more specifically, with the defendants.

[223] I am satisfied that Mr. Creighton and his predecessors in title have established a possessory title and that their possession was open, notorious, exclusive and continuous. Numerous witnesses recognized the possession of lots 3 and 4 by the plaintiff, David Creighton, and by his predecessors in title.

[224] I have recited the acts of possession of Mr. Creighton and his predecessors in title. There is ample evidence from the plaintiff's witnesses and even from some of the defendants' witnesses to establish adverse possession.

[225] Mr. Creighton has always claimed these lands openly. His wife used the lands. He has used it since he has owned the property to store his boats. There is evidence that the use made of the property by David Creighton was a continuation of the ownership in Jack Ogilvie and David Creighton's grandmother and grandfather, William and Jessie Ogilvie.

[226] When Mr. Adams began challenging Mr. Creighton's title in the early 2000's Mr. Creighton resisted and had legal counsel contact Mr. Adams on his behalf. He obtained declarations from several persons in the community. The boundaries of lot 3 were clearly established on the ground and the many witnesses testified that this lot was always in the possession of the Creighton and Ogilvie families.

Conclusion:

[227] For all of these reasons, I am satisfied that not only has David Creighton proved that he has the superior title, but also that he has constructively and adversely possessed these lands since at least 1978 and prior to that his predecessors in title did so.

[228] A Certificate of Title will be issued to Mr. Creighton based on the surveyed descriptions of lots 3 and 4 as prepared by David Whyte.

[229] The plaintiff will have his costs. In the event the parties cannot agree on costs, I will hear submissions.

Pickup, J.