SUPREME COURT OF NOVA SCOTIA
Citation: Goulden v. Nova Scotia (Attorney General), 2013 NSSC 253

Date: 20130819
Docket: SY. 290886
Registry: Yarmouth

Between:

Michael L. Goulden

Plaintiff

v.

The Honourable Attorney General of the Province of Nova Scotia and Joseph E. MacDonald and Louanne MacDonald and Clifford VanBuskirk and Ardith VanBuskirk and James Kimbrell and Betty Kimbrell and Gary Rapp and Brian Ricky Rapp and Jonathan Rapp

Defendants

Judge: The Honourable Justice Margaret J. Stewart

Heard: July 23-27, 2012, Shelburne & Barrington, Nova Scotia;

Final written submissions: September 6, 2012

Counsel: Allen C. Fownes, for the Plaintiff
Andrew Nickerson, Q.C. for the Defendants
Greg Barro, for AGNS (not participating)

By the Court:

INTRODUCTION AND BACKGROUND

[1] ***Introduction.*** This is a proceeding under the *Quieting Titles Act*, R.S.N.S. 1989, c. 382. It involves competing claims to property on the western side of Highway 404 (the Shore Road) in Carleton Village, Shelburne County. The issues include the location of certain boundaries and the existence or non-existence of a prescriptive right-of-way over the disputed area, which is wood and brush. The deed descriptions contain limited particulars. The Attorney General does not oppose the quieting titles claim.

[2] ***Background.*** The defendants are neighbouring and nearby landowners to the plaintiff: James and Betty Kimbrell own land to the west of the plaintiff's property; Clifford and Ardith VanBuskirk own land to his north; Joseph and Louanne MacDonald own land north of the VanBuskirks. Finally, the defendants Gary, Brian, Ricky and Jonathan Rapp own land west of the Kimbrells' property. The common factor is the various defendants' boundaries with the property of the plaintiff, Michael Goulden's property.

[3] The location of Goulden's western boundary line in respect to the Kimbrells' eastern line is in dispute. Goulden claims the boundary is the one established by surveyor Ronald Dearman on a 1996 survey of his property. The Kimbrells rely on a line run by another surveyor, David Thorne, on a March 1983 survey of the lands of Ida Mahaney, their predecessor in title. The VanBuskirks and MacDonalds say part of Thorne's line was demarcated by an old wire fence, and later by its remnants.

[4] The other principal boundary issue is the location of Goulden's northern boundary with the VanBuskirks. Although Goulden argues the deed description is not ambiguous, and should therefore be interpreted according to its plain meaning without extrinsic evidence, if the court were to find otherwise, reliance is placed on Goulden's viewing and discussions with a former abutting owner, the late Arnold DeMings, respecting the location of his northern line. Goulden claims the shared boundary line is a line (A-B) set by surveyor Lester Berrigan on a

November 2007 survey plan and a 2002 concept plan of Goulden's lands. Berrigan followed a northern line from an 1898 survey by Deputy Surveyor James McKay.

[5] The defendants say Arnold DeMings owned no land west of Highway 404, which is where the disputed areas lie; they maintain that all of his property was to the east of the road. They also say the evidence reveals that he did not actually know where his northern line was located. The VanBuskirks claim their southern boundary (i.e. Goulden's northern boundary) to be the line BY-AX set by surveyor Everett Hall on a 1999 plan of Goulden's lands and a 2008 survey plan of the VanBuskirks'. They point to the evidence of Gerald DeMings, a predecessor in title of theirs and the MacDonalds to their north. They refer to a survey marker at point BY, set by Thorne in his April 1983 survey of Goulden's lands and identified by Gerald DeMings as his southeast corner. Goulden argues that Gerald DeMings's evidence as to the specific location of the boundary is prone to error and should be disregarded, given that some 48 years have passed since DeMings lived there. He says there is no corroboration, and suggests that DeMings put little importance on the location of the boundary. He also questions surveyor Hall's impartiality.

[6] The location of the MacDonald southern line is also affected by the placement of Goulden's northern line. The MacDonalds were predecessors in title, and now adjacent landowners, to the VanBuskirks, following a 2005 subdivision. In February 2005, the MacDonalds subdivided what they believed to be their property, immediately to the north of Goulden's, into Parcel A and Lot 2. Parcel A, the southern parcel, was sold to the VanBuskirks, who, in turn, joined it with a triangular Lot 1 on the western side of Highway 404 to create Lot 1A. Lot 1 lay to the east of Goulden's eastern boundary line as shown on Berrigan's 2007 quieting plan. The VanBuskirks had purchased Lot 1 from Arnold DeMings's daughter, Melda Langille. Goulden claims that all of VanBuskirk's Parcel A, as well as a southern portion of MacDonald's Lot 2, are in fact his property.

[7] The portion of Lot 1 south of the VanBuskirks' proposed boundary with Goulden (the BY-AX line) was part of the property of George Egbert Hamilton, Lamont Hamilton, and Ethel Bowers (formerly Hamilton). The Hamiltons were predecessors in title to Goulden and VanBuskirk/MacDonald. The VanBuskirks acknowledge that the area south of the BY-AX line belongs to Goulden, although

it is not claimed in the quieting titles proceeding or noted in red on Berrigan's 2007 plan.

[8] None of the parties claim title by adverse possession. The claims are all based on deeds. Goulden, MacDonald and VanBuskirk have the same chain of title and there is no conflict. As will become clear, the interest of Arnold DeMings is central to the deed interpretation and boundary determination between Goulden, the VanBuskirks and the MacDonalds, due to references to him as an adjacent landowner.

[9] An additional issue is an alleged right-of-way across the disputed lands of Goulden and the VanBuskirks, allowing the Kimbrells and Rapps to access their lands from Highway 404. The Rapp properties are located to the west of the Kimbrells'. The Rapps claim a right-of-way for vehicles across Goulden's and the Vanbuskirks' properties. They say they maintained and used this right-of-way openly, notoriously and continuously from at least 1970 until 1998. That year, Goulden took action to prevent its use, over their protest. In essence, this is the retrial ordered by Hamilton, J.A. in *Kimbrell v. Goulden*, 2006 NSCA 102, for the purpose of enabling MacDonald "to present his position on any ownership interest he had in the servient tenement and to allow him to testify on the issues of acquiescence and permission in particular" (para 43).

[10] The defendants claim this right-of-way at common law on the basis of the doctrine of lost modern grant, and pursuant to the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258. The Kimbrells assert the same right. Prior to the purchase from the MacDonalds, the VanBuskirks allegedly used the same right-of-way to access the property of a relative for the purpose of (among other things) cutting and hauling lumber and accessing the Rapps' gravel pit. Like the MacDonalds when they owned the land, the VanBuskirks take no issue with the Kimbrell and Rapp claims.

[11] Goulden denies that a right-of-way exists. He denies that any grant was ever made. He claims the Kimbrells cannot have rights that their predecessors, Ida Mahaney and Norine and Larry Wildman, denied. He says the Rapps' use was by permission, no different from sporadic and casual use by the public. He also seeks damages for trespass, as well as a declaration that any future use of the road will be at his pleasure, if at all. In the alternative, if he is not entitled to ownership of

the land, he claims the same right-of-way as any others who are found to have such a right over the VanBuskirks' property.

LEGAL PRINCIPLES

[12] ***Boundary determination.*** Before embarking on a review of the evidence, it will be of use to set out several of the general legal principles that govern the rather technical field of boundary determination. Various legal principles govern deed interpretation and boundary demarcation when the court is required to resolve boundaries. The general rules of evidence apply to boundary disputes, which are typically heavily concerned with documentary evidence of title. In deed interpretation, the question is not the grantor's subjective intent. Rather, the court is concerned with the meaning of the words used in the deed. That is to say, the question is "what is the expressed intention of the grantor?": *Knock v. Fouillard*, 2007 NSCA 27, at para. 27. If the terms of the conveyance are clear, extrinsic evidence is not admissible: Anne Warner Le Forest, *Anger and Honsberger's Law of Real Property*, 3d edn. (Aurora, Ont: Canada Law Book, 2010) at §18:30:30.

[13] When the words of a deed are not ambiguous, either in themselves or when applied to the land in question, the intention of the original grantor is to be taken from the words of the description in the deed. No further rules of interpretation are required: *Herbst v. Seaboyer*, (1994) 137 N.S.R. (2d) 5 (C.A.), at para. 15; *McCormick v. MacDonald*, 2009 NSCA 12, at para 73. A latent ambiguity occurs when the words of a document on their face do not admit a different possible meaning, but surrounding circumstances show that two or more different meanings are possible. A party may demonstrate that a latent ambiguity exists, and attempt to resolve it, by adducing extrinsic evidence, including evidence of subjective intention. A patent ambiguity, by contrast, is "apparent from the face of the document": *Taylor v. City Sand and Gravel Ltd.,* 2010 NLCA 22, at para. 21; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d edn. (Toronto: Lexis Nexis Butterworths, 2012) at §2.8.5.

[14] The rules for ascertaining the intention of a grantor in the event of ambiguity were set out in *McPherson v. Cameron* (1868), 7 N.S.R. 208, [1868] N.S.J. No. 2 (S.C.). Dodd J. said the general rule "is to give most effect to those things about which men are least liable to mistake" (para. 5). In applying this principle, the elements of the description are "marshalled" in the following order:

"First, the highest regard had to natural boundaries; Secondly, to lines actually run and corners actually marked at the time of the grant; Thirdly, if the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established; Fourthly, to courses and distances, giving preference to the one or the other according to circumstances" (para. 5).

[15] In *Kolstee v. Metlin*, 2002 NSCA 81, the Court of Appeal confirmed that cases such as *MacPherson*, *supra*, *Saueracker v. Snow* (1974), 14 N.S.R. (2d) 607 (T.D.), and *Humphreys v. Pollock*, [1953] 3 D.L.R. 730 (N.B.S.C.A.D.), aff'd [1954] 4 D.L.R. 721 (S.C.C.), "correctly set out the general principles to be applied in interpreting descriptions of land as spelled out in a deed. As a general rule the intent of the parties to a conveyance is to be gathered from the words of the document. If there is an ambiguity, the common sense rules as quoted by the trial judge from *McPherson* ... are generally to be applied. When courses and distances clash preference to one, rather than the other, will depend on the circumstances" (para. 66).

[16] More recently, in *Nicholson v. Halliday* (2005), 248 D.L.R. (4th) 483, [2005] O.J. No. 57, the Ontario Court of Appeal set out the surveyors' hierarchy of evidence: (1) natural boundaries; (2) original monuments; (3) fences or possession that can reasonably be related back to the time of the original survey; and (4) measurements (as shown on the plan or as stated in the metes and bounds description). See also *Robichaud v. Ellis*, 2011 NSSC 86, at para. 25. The Court of Appeal recently considered this hierarchy in *Podgorski v. Cook*, 2013 NSCA 47, declining to decide whether it applies in Nova Scotia. The court held that the "application of the 'hierarchy of evidence' and related survey principles would initially be a matter for the expertise and opinion of the surveyors in question. So, for example, whether monuments were 'original' or whether 'fences or possession' can be reasonably related back to the 'time of original survey' would be matters of expert opinion for a surveyor" (para. 20).

[17] In re-establishing a line, a surveyor must "consider the best evidence available and re-establish the boundary on the ground in the location where it was first established, and not where it was necessarily described, either in the deed or on a plan. The boundary is the re-establishment on the ground of the original running of the line and this re-establishment of the boundary constitutes the deed line": *Thelland v. Golden Haulage Ltd.*, [1989] O.J. No. 2303, 1989 CarswellOnt

2417 (Ont. Dist. Ct.) at para. 11. Stortini J. stated in *Traynor v. Hilderley*, [1997] O. J. No. 4839 (Ont. Ct. J. (Gen Div)), that if "original monumentation is found and is undisturbed as to location, it must be accepted, erroneous as may have been the original survey" (para. 14). If there is no evidence "of either the original monuments or original line, then the surveyor must refer to the measurements as contained in the deed or on the plan. This approach may, of course, be affected by possessory title. If no other method of establishing the boundary in question is available, the court must fix the boundary with the assistance of deed measurements and the law of possessory title" (para. 15).

[18] In some instances I will make reference to notes on surveyors' plans. I note that where a deed refers to a plan in the description, notes on that plan are considered to be incorporated into the deed: *Fullerton v. Brundige* (1887), 20 N.S.R. 182, 1887 CarswellNS 43 (S.C. in banco) at para. 5; *K. & W. Enterprises Ltd. v. Smith* (1971), 7 N.S.R. (2d) 411, 1971 CarswellNS 162 (S.C.T.D.) at para. 43.

[19] This does not exhaust the scope of the legal principles governing boundary determination. When other points of law are relevant to a particular issue, they will be addressed in that context.

[20] ***Credibility.*** This proceeding also raises questions of credibility. The Supreme Court of Canada considered the problem of credibility assessment in *R. v. R.E.M.*, 2008 SCC 51. McLachlin C.J.C. repeated the observation of Bastarache and Abella JJ. in *R. v. Gagnon*, 2006 SCC 17, that "[a]ssessing credibility is not a science" and that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon* at para. 20, cited in *R.E.M.* at para. 28). The Chief Justice went on to say, at para. 49:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short,

> assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[21] The assessment of the evidence of an interested witness was considered in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), where O'Halloran J. said, for the majority, at para. 11:

> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[22] Such factors as inconsistencies and weakness in the evidence, interest in the outcome, motive to concoct, internal consistency, and admissions against interest are objective considerations going to credibility assessment, along with the common sense of the trier of fact: see, e.g. *R. v. R.H.*, 2013 SCC 22. It is open to a trier of fact to "believe a witness's testimony in whole, in part, or not at all": *R. v. D.R.*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8, at para. 93. I have taken these principles into account in reviewing the *viva voce* and documentary evidence in conjunction with counsel's submissions and the relevant law.

EVIDENCE

[23] ***Surveys.*** In this case, some seven survey plans of the plaintiff Goulden's property, or parts thereof, were completed between 1982 and 2008. Three were done at Goulden's request; one by an adjacent landowner to the west (Mahaney); one for the Municipality of Shelburne to address a petition by Brian Ricky Rapp under the *Private Ways Act*; one for a complaint to the Nova Scotia Land

Surveyors Association against surveyor David Thorne; and one for the VanBuskirks. The plans and their dates are as follows: March 3, 1983, D. S. Thorne, N.S.L.S. No. 423, Mahaney and Wildman Property Survey Plan No. 1546DT82; April 4, 1983, D.S. Thorne N.S.L.S. No. 423, Goulden Property Survey Plan No. 1592DT83; November 18, 1996, R.C. Dearman N.S.L.S. No. 317, Goulden Property Survey Plan No.4133596; September 16, 1999, Everett B. Hall N.S.L.S. No. 323, Goulden Property Survey Plan No. S7409-99; June 28, 2002, Lester Berrigan N.S.L.S. No. 409, Concept Plan No. 8746 re ownership of existing gravel road from public Highway 404; November 13, 2007, Lester Berrigan N.S.L.S. 409, Goulden Property Survey Plan No. 11,194 provided for quieting action; and February 24, 2008, Everett B. Hall N.S.L.S. No. 323, VanBurskirk Property Survey Plan No. S8503-08.

[24] Of the surveyors, Thorne is deceased, Dearman did not testify, Berrigan was called as an expert by Goulden, and Hall was called as an expert by the VanBuskirks and relied upon by the Kimbrells as well. Both Berrigan and Hall filed reports concerning the northern boundary, and relied upon their previous work with the Goulden property, i.e. Berrigan in 2002 for the Shelburne Municipality and Hall in 1999 for the Land Surveyors Association in relation to Goulden's complaint against Thorne.

[25] ***The Gerald DeMings property.*** By way of tax deed dated May 2, 1936, the Municipality of Shelburne conveyed 20 acres of land – shaped like a boat with a keel facing north – at Carleton Village to George Egbert Hamilton. The land was to the west of the Shore Road (Highway 404). The second of three lots is described as "Bounded on the north by the Highway, from the "Big Hill" so called, to the Gunning Cove School; On the east by the Highway, lands of the Estate of Adam Hamilton, and lands of Lester Perry; On the south by lands of George McKenney and; On the west by lands of Herbert Goulden and containing in the whole about 20 acres more or less."

[26] By deed dated May 8, 1964 , Preston Lamont Hamilton, George Egbert Hamilton's son, conveyed the northern end of the land (the unsurveyed "bow" of the boat) to Gerald DeMings. Mr. DeMings had occupied a portion of the land since 1962. He had built a house beside the old hauling road – originally an ox trail – that extended from Highway 404 westerly across the property. The hauling road crossed the lands of adjacent owners (or future owners) Ida and Lawrence

Mahaney, Norine and Larry Wildman, and the Rapps. A gravel pit was located on the Rapp property.

[27] Only Gerald DeMings's deed description defines the northern boundary line of the land in dispute. It does so by reference to Arnold DeMings' lands, as follows:

> Beginning at a point on the west side of the Shore Road at said Carleton Village where land of the Grantor herein intersects with land of Ida Mahaney and the said Shore Road, this particular point in the said Shore Road being known as "Clay Hole";
>
> Thence running in a southerly direction along the said western side of the Shore Road until it reaches the Northerly boundary line of lands of Arnold Demings;
>
> Thence in a Westerly direction along the North side line of lands of Arnold DeMings and Lamont Hamilton until it reaches the Easterly boundary line of Ida Mahaney;
>
> Thence in a Northeasterly direction along the Easterly boundary line of lands of Ida Mahaney to the Shore Road and the place of beginning.

[28] Prior to moving away from the area in 1965, Gerald DeMings spoke to the Department of Transportation about relocating the old road from his doorstep. He complained that the gravel trucks were dangerous for his children. Subsequently, in 1967, new owners complained of the dust. In 1970 or 1971, the Department of Highways relocated Highway 404 to its present location. Aerial photos indicate less use of the section of the old road that passed the house in 1968. By 1971, however, there was intense use of the portion of the road relocated to the south, and the section of the old road connected to it (the pit road).

[29] Forrester ("Fot") Williams obtained the lands of Gerald DeMings by tax deed from the Shelburne Municipality, dated June 26, 1968, after acquiring it at a tax sale in 1967. He conveyed the property to Dieter C. Oswald by deed dated April 7, 1983. Oswald, in turn, conveyed it, with some lots excepted, to Joseph and Louanne MacDonald on October 31, 1988. The MacDonalds divided off the majority of the area in dispute, the lands to the south of the house, to Clifford and Ardith VanBuskirk in February 2005.

[30] ***The plaintiff's property.*** On February 24, 1983, shortly before Dieter Oswald purchased the Gerald DeMings property, Goulden purchased what was intended to be all of the remaining land held by the Hamiltons under the 1936 tax deed. The deed excepted out Gerald DeMings's property to the north. It was later determined that the deed was deficient as to the parties' intentions. A confirmation deed was required so that the entire homestead – not just five to six acres, excepting the part on the north conveyed to Gerald DeMings – would be conveyed to Goulden. The confirmation deed was executed on June 8, 1999. Thus, this deficiency existed when Thorne surveyed Goulden's lands in 1983 and established his northern line. He placed the line between Goulden and Williams north of the irregular homestead fence line and 139 feet south of a found survey marker on what he noted to be the Williams lands' western line.

[31] Mr. Goulden was 52 years old at the time of trial. He testified that he grew up a mile from his current property, which he obtained from his grandmother's friend Ethel Bower in February 1983. Ethel Bower was a daughter of George Egbert Hamilton and a sister of Preston Lamont Hamilton. Goulden said Preston Hamilton lived in the house in the 1960s, when he was growing up. He died in the early 1980s. The area in dispute, including the Goulden, VanBuskirk and MacDonald properties, is derived from grants out of the Hamilton lands.

[32] After acquiring the property, Goulden retained David Thorne to survey it. Thorne was surveying in the area for Ida Mahaney and her daughter, Norine Wildman, whose property (subsequently the Kimbrell property) was to Goulden's west. Thorne produced a plan of the Mahaney property dated March 3, 1983, and one for Goulden dated April 4, which Goulden (while stressing that it was not the plan Thorne showed him) confirmed he had seen. This plan placed Mahaney to his west, Roy and Carol Blades to the east, Susan Hamilton to the east, Arnold Demings to the east, and Rodney Williams to the north. There was no line between the Hamilton and Demings properties.

[33] Before retaining Thorne, Goulden said, he spoke with his neighbours about the boundaries. He reported these discussions to Thorne, who, he claimed, did not pay any attention to them. He blamed Thorne for the subsequent boundary-line disputes. Goulden said Ethel Bower, his predecessor in title, had only a vague idea of the boundaries. He said two neighbours – "Fot" Williams and Arnold DeMings – showed him where the boundary line was, and he discussed it with others,

including Mahaney and Wildman. Referring to the plan, he said, Arnold DeMings had referred to a fence on his northern line and ledge rock on the road, and pointed out where the fence was, and an adjacent driveway. He said the fence Arnold DeMings pointed out was on the eastern side of the highway, "right through the corner" and he saw "steel growing in the trees - could be nails or anything but there was something indicating it was there." He said Arnold DeMings showed him the approximate area where he believed his line lay to the eastern side of the highway, and referred to Loran Blades's driveway and house being there now.

[34] Goulden said Arnold DeMings showed him "where it came to a corner on this ledge rock" which was "on the eastern side" of Highway 404. When asked by his counsel again, "So he only showed you the eastern side?", he said, "yes, he just showed me what he owns." Asked again whether Arnold DeMings showed him anything on the western side of the road, he testified (while pointing to the southeast corner at Hwy 404) that "the only thing he showed me was down here where Hamilton keeps a fence." Goulden marked this ledge rock on the 1999 Hall plan. VanBuskirk placed it further south. Goulden described it as being as wide as the courtroom, with a visible depth of six to eight feet. This was on the eastern side of Highway 404, across from the disputed area on the western side. Goulden said Arnold DeMings indicated that he knew his northern line was above the ledge rock, and that he always kept the fence up on that line.

[35] Goulden said Arnold DeMings produced the unrecorded 1898 McKay survey plan when he confronted DeMings about the line. He said this plan was the basis for DeMings's objection to Thorne's placement of Goulden's northern corner, on the western side of the highway. He said DeMings accused him of stealing his land. Goulden said he gave copies of the McKay plan to his lawyer, and to the surveyors Robert Dearman, Robert Hunt and Lester Berrigan. He met with Gary Rapp, Thorne, two workers, Fot Williams and Arnold DeMings, in an attempt to rectify the situation and "get it over with." He said they all wanted Thorne "out of there." Williams and Arnold DeMings, he said, were "on Thorne's back."

[36] When Thorne completed his April 1983 plan, Goulden said, he was not happy with it, refused to pay, and later made a complaint to the Nova Scotia Land Surveyors Association. Goulden believed that the only correct line was his fenced southern line. He did not accept Thorne's northern line, given what Arnold

DeMings and Williams had shown him, and in view of the McKay plan. Goulden later retained Robert Dearman, who prepared a survey plan of his property dated November 18, 1996. He said he did not know Hall was surveying his land until he discovered a recorded survey plan by Hall, dated September 16, 1999, while dealing with the municipality over a petition by Brian Rapp for a right-of-way. Goulden testified that he first met Hall at discovery concerning his complaint against Thorne; Hall purchased Thorne's business. In these circumstances, Goulden questions the ethics of Hall reviewing Thorne's work.

[37] Goulden said Hall came to his home around February 1998 to inquire about Goulden's understanding of the boundaries. He said he gave Hall no information. He said he next saw Hall at a municipal meeting about the Rapps' right-of-way petition. Goulden said Hall never told him who hired him to survey his land. He did provide Hall with an old grant map that was in his possession.

[38] When asked to describe the road over the disputed land to Mahaney's property as it was in February 1983, Goulden compared it to a courtroom exhibit table, about four feet wide. He indicated that it would accommodate a three-wheeler trailer, and that it would be difficult to accommodate a half-ton truck. All-terrain vehicles sometimes travelled the road. He said it ran from the main road in a westerly direction as far as the CN Railway bed. He said it was not kept up. Before he bought the property, he said, he used it twice. On one of those occasions, around 1982 or 1983, he saw Gary Rapp cutting wood on Wildman's property. In the mid-1990s he saw people dumping garbage, and hauling fill beginning in the mid-1990s.

[39] Goulden recalled one occasion early on when VanBuskirk and his father-in-law, Manney Goulden (Ida Mahaney's nephew), were cutting wood and complained about his cattle being loose. Later Goulden said conflicts arose over the use of the road. He said Gary Rapp graded the road, with a grader and backhoe, then gated it with a steel cable and lock between two oak trees, just beyond Goulden's and Mahaney's property line. Goulden identified the location of the gate on Hall's 2007 plan. The trees were later cut down and then replaced with railway ties. Goulden placed this event prior to lawyer Celia Melanson's 1998 letters (discussed below). Goulden said that the ungraded road had a bed sufficient for vehicles, and that after grading it was level, smooth and rock-free. After that, he said, there was unwanted and uncontrolled traffic, as people used it as a short

cut, a dump, or a place to drink or hunt. He said there were all-terrain vehicles driving it at all hours. He said Rapp graded it more than once, and that he was constantly trying to stop this and keep him out.

[40] Goulden said that prior to the grading, he was not aware of Gary Rapp's truck carrying fill out. He said the Rapps were hauling fill from the CNR pit most of the time. As to the Rapps cutting wood and hauling it out over the disputed right-of-way, he said there were several other roads – possibly as many as seven – that they could have used, such as a back road through the CN pit to the Rapps' homestead. He also said a truck could drive down the CN rail bed. He said he had met VanBuskirk and Rapp on that road in their trucks, carrying produce.

[41] ***Conflict over the pit road.*** The dispute over ownership and use of the road began in the late 1990s. Prior to that time, Goulden said, he had heard gossip to the effect that he was trying to take land. Over the years, there were a few incidents and exchanges where he believed other parties were too close to his boundary. The evidence is such that it is difficult to ascertain a sequence of the events and incidents described in relation to the road to the pit. By early 1998, after Dearman's 1996 survey, Goulden blocked the road to the east of a locked steel cable gate installed earlier by Gary Rapp on Mahaney's property after Rapp had graded and upgraded the pit road. Goulden said he was concerned about a significant increase in public use of the road after its grading and widening. He had asked for, but not received, a key. He told Gary Rapp that he did not want him crossing his property, and that Ida Mahaney and Norine Wildman ("the women") did not want him crossing their land.

[42] Gary Rapp did not take issue with the exchange as described by Goulden. He told Goulden he intended to haul fill from the pit. Rapp said the maintenance and upgrading of the road to the pit occurred when necessary, every two or three years. He did not recall Goulden asking for a key to the gate. Over the years the road had been gated, but not always locked. Goulden recalled a gate from when he was a child, Gary Rapp recalled one in 1975 and Brian Ricky Rapp remembered a gate in the late 1980s.

[43] Further context is provided through an exchange of letters between counsel. On March 12, 1998, the VanBuskirks, acting as authorized agents for Ida Mahaney, Norine Wildman, and Brian and Gary Rapp, offered Goulden $500.00

for a deeded right-of-way on the land Goulden had recently had surveyed, in order to resolve his cutting off of the allegedly 40-year-old right-of-way from Highway 404 to their lands. The offer was by letter from counsel, Celia Melanson. Goulden said he interpreted the letter as an offer of $500.00 in exchange for a deeded right-of-way. He said he spoke with Ms. Mahaney and Ms. Wildman, who were distant cousins of his, and told Ms. Melanson he did not want VanBuskirk or Rapp pressing his wife, from whom he had recently separated, about the issue.

[44] By further correspondence on May 1, 1998, Ms. Melanson asked Goulden to remove the fence he had erected on property allegedly owned by Ida and Lawrence Mahaney. She stated that access was being denied to landowners and their assignees to the rear of the property over the existing road. She also pointed out that there was no certainty that the road was on Goulden's land. She referred to Thorne's 1983 survey plan as establishing that the road in fact crossed lands of Joseph MacDonald, and advised Goulden that the landowners had MacDonald's consent to use the right-of-way. No resolution was reached. Goulden denied erecting any fence, and denied knowing what fence she meant. He said he had put a fence on the survey line between his land and the Mahaneys', in order to keep cattle contained and to deter people from entering his land.

[45] By letter dated August 25, 1998, Donald Harding, who represented Norine Wildman (but not Ida Mahaney) indicated that VanBuskirk's status as Ms. Wildman's agent was being retracted. He added that Ms. Wildman wanted no further cutting or trespassing on her lands. He requested that she be provided with any survey work relating to her land and any information with respect to rights-of-way crossing her land.

[46] By letter dated August 26, 1998, Ms. Melanson advised Mr. Harding that the VanBuskirks would deal directly with Norine Wildman. According to Mr. VanBuskirk that discussion resulted in agreement to pay for a quantity of cut wood, with permission to remove cut wood not yet hauled out, and no further cutting to be done on the Mahaney/Wildman land until 2000. The Kimbrells subsequently purchased the land and gave him permission to cut. As reflected in Mr. VanBuskirk's undated letter to Donald Harding, written after September 1998, and after the cut wood was hauled out, it proved a difficult task due to problems using the road. Goulden had obtained Norine Wildman's permission to enter onto the land, but was also acting in some "caregiver" capacity and was involving the

police in matters that he believed were already resolved directly with Norine Wildman.

[47] ***The Rapp Private Ways Act petition.*** In January 1999, Brian Ricky Rapp brought a petition under the *Private Ways Act*, R.S.N.S. 1989, c. 358, for a 25-foot right-of-way over the lands in dispute and the Mahaney/Wildman land. A memorandum filed by Ms. Melanson with the petition provided a history of the pit road right-of-way. It indicated that there did not appear to have been any written grant of a right-of-way, or written agreement, dealing with the pit road. Both Melda Langille (Arnold DeMings's daughter) and the MacDonalds verbally confirmed their agreement to a right-of-way over lands they believed they owned. Goulden did not agree. The Wildmans did not consent to a right-of-way or agree to its existence. There was no reference to any position being taken by Ida Mahaney.

[48] At trial, Goulden adopted statements he made in a letter to the commissioners and Shelburne municipal council, dated October 4, 2002. He referred to Gary Rapp's activity in 1998. He said Gary Rapp and James Kimbrell had admitted in court on September 11, 2002, that there were at least three other roads in addition to the disputed right-of-way. He said the Rapps had other means of vehicle access, such as along the railway tracks. He said he had seen them take gravel out by these other means.

[49] After receiving a legal opinion that the Municipality had no authority to make a determination under the *Private Ways Act*, the Rapp application was dismissed by council in late December 2002.

[50] ***Use of the alleged right-of-way.*** Goulden described the use, and, in his view, abuse of the disputed right-of-way. He complained of blockage by vehicles, garbage dumping, and blocking by cable. He said his truck was blocked in by a pile of wood for three months at VanBuskirk's direction (with Kimbrell also present) in 1999 or 2000. He said he was blocked in several times, including blocking in of lobster traps that he was storing on the road. Goulden described the area in dispute as a "war zone" beginning around March 1998. In May 2003 he took steps to install a camera at the intersection of his eastern line with the south side of the disputed right-of-way.

[51] Goulden stated that he believed in 2003 that the property between the highway and his eastern line belonged to Melda Langille, Arnold DeMings's daughter, before the VanBuskirks bought it from her. He stated that in 1983 he knew he owned the property containing the road, based on interactions with Arnold DeMings and Fot Williams. He was content with that; but, he did not have a survey to match it. The Thorne survey did not take his line that far north.

[52] Between 1983 and early 1998, Goulden said, he was only in the disputed area a couple of times. He only began to cut wood in 2000. He said “Fot” Williams and Joseph MacDonald, successive owners to the north, also did not use the disputed lands. He said it was a rocky property, with holes and rocks in the road, mostly used by people on foot and bikes. Since he acquired the property, Goulden said, to his knowledge the Department of Transportation had not trucked fill out of the area.

[53] ***Evidence of Gerald DeMings.*** In May 1964 Gerald DeMings purchased 20 acres from Lamont Hamilton, George Egbert Hamilton's son. This parcel included the disputed area. This was the only conveyance out of Hamilton's 1936 tax deed until Goulden received the remainder in 1983 and 1999. Mr. DeMings was one of the few lay witnesses not involved in the action, and the only witness with direct knowledge of the deeds and boundaries of the disputed lands. His evidence included two statutory declarations, dated January 12, 1997 and February 26, 2003.

[54] Gerald DeMings lived in Carlton Village for 27 years. His father's home on Highway 404 was almost across the road from Lamont Hamilton's, now Goulden's, property, down the road from the parcel that Lamont ("Monty") Hamilton sold him in 1964. He had built a house on this location some two years earlier, on an area belonging to Hamilton that he described as "up the road, past the old house and past the big rock." His driveway access from Highway 404 was the old road. He said the road was active with Department of Transportation gravel trucks. After he squatted on the land for two years, he testified, Mr. Hamilton agreed to sell it to him. They walked the area and measured it off. According to Mr. DeMings, his southern line met Highway 404 a "good 100 yards" to the south of his home. Mr. DeMings located this point on Hall's plan. The line which went "slash ways" up to Ida Mahaney's land was not blazed. He recalled a blaze being put on the spruce

tree on Mahaney's line. According to "Monty," no one owned any land between his land and Highway 404. No survey work was conducted.

[55] According to Gerald DeMings, the trucks travelling past his doorstep, and concern for his children's safety, led him to ask the Department of Transportation to re-route the road running past his home. He described a discussion where, besides himself, Clarence Deinstadat on behalf of the Department of Transportation, Bernard Rapp (Gary and Ricky Rapps' father), and Lamont Hamilton were present for this discussion. He said Arnold DeMings was not present. In an earlier affidavit, he had made reference to Arnold DeMings being present for a meeting with the Department, along with Bernard Rapp and himself. He stated that at that time he didn't know they were talking about another road. Gerald DeMings moved away from the area in 1965. When he came back to visit, he said, the relocated new road section was on his land, which now belonged to someone else.

[56] Gerald DeMings drew a line indicating his recollection of the location of his southern line on a survey plan provided by Hall. In February 2003 he visited the property with Hall. They drove down to Church Road and then drove back up. He testified that he showed Hall where he thought the line was located and showed him the spot that he and “Monty” had decided upon. He found a pin on the side of the road after locating the spot. Hall showed him the northern Dearman line, which was south of the location of his former house. In a declaration of the same date, he expressed his disagreement with that line, stating that it should be located further south, some 150 feet to the south of the new road, and that the northern boundary of Arnold DeMings' land was always considered to be located on the east side of the highway, directly opposite and to the east of the survey marker set by Thorne in 1983, about 150 feet north of a very large rock or boulder located on the west side of the road. What was always accepted and used as the common boundary between himself and Lamont Hamilton is reflected on Hall's 1999 survey plan as BY-AX.

[57] ***The Berrigan and Hall plans.*** In order to understand the background, it is necessary to consider Berrigan’s survey of Goulden’s property, dated November 13, 2007, and Hall’s survey of the VanBuskirks’, dated February 24, 2008. As an aid to comprehension, a portion of the Hall plan is attached as Schedule A (the plan is reproduced on an East-West heading, and so must be turned sideways; for

further clarity Highway 404 runs north-south.) The reproduction cannot convey the particular details of the competing surveys, but does give a visual sense of the lay of the disputed lands, which principally lie along the western side of the highway. The alleged Pit Road right-of-way can be seen branching off the highway to the west, with the "old road" section further north until it meets the new relocated section at the fork and continues on as it always has to the west. Both plans show the Kimbrell lands (formerly Ida Mahaney and Norine Wildman) to the west of the area that is the subject of the *Quieting Titles Act* action. The Kimbrells own a second lot to the west of the property that borders on Goulden's property. The Rapps' lands are west of the Kimbrells' western lot.

[58] Lot 1A has been referenced before. The lands designated as Parcel A and the portion of Lot 1 to the north of Hall's survey line, which extends from point BY on the west side of Highway 404, northwesterly on an angle to point AX on the disputed western Thorne line, are claimed by the VanBuskirks. As such, the VanBuskirks claim Hall's BY-AX line as their southern boundary with Goulden. Goulden, however, disputes the VanBuskirk claim to a line so far south. He relies on Berrigan's plan, which shows his northern line further north than Hall's BY-AX. Berrigan's line runs from point A, some 20 feet from the west side of Highway 404, westerly in a straight line some forty feet south of MacDonald's home, until it meets the disputed western Dearman line at point B. Berrigan's northern line is between 20 and 25 feet north of that identified by Dearman for Goulden in 1996.

[59] Each of Hall's plans (1999 and 2008) shows the northern line Thorne ran for Goulden in 1983, extending westerly at a slight angle, south of Hall's angled BY-AX northern line. It started from Hall's point BY, on Highway 404, which was a found survey marker set by Thorne on Goulden's1983 northern line (as he found it). Hall's plans indicate that this line was "surveyed in 1983 by mutual agreement." Also shown as intersecting with point BY from Goulden's undisputed southeast corner is the eastern line surveyed by Thorne in 1983. This line was to the east of the Dearman/Berrigan eastern line, noted as being an "extension of the most northernly portion of old fence" found on the ground by Thorne along sections of the eastern line. The most northerly portion of the old fence referred to was on lands now owned by Goulden to the north of his driveway and formerly owned by Adam Hamilton.

[60] Some 364 feet to the south of Thorne's 1983 northern line, at a survey marker found by Thorne, Hall's plans show the western end of the northern boundary of the five-or-six-acre homestead property of George Egbert Hamilton. It was demarcated east to west by an old irregular wire fence found by Hall in 1999, as per the limitations of Goulden's 1983 deed. The 1999 confirmation deed from Hamilton's daughter, Ethel Bower, to Goulden confirmed that there was no unknown land, and that Goulden owned all of the land south of the northern line as described by the Gerald DeMings/MacDonald deed description.

[61] Thus, the line set by Thorne in 1983 as Goulden's northern line is south of Hall's BY-AX northern line and Berrigan's A-B northern line, and north of Hall's 1999 homestead line, which no one claims the true northern line.

[62] Hall's plans show the line that Gerald DeMings identified as the southern boundary of his former property as running near the BY-AX line, commencing some 75 feet to the north of point BY, about 25 feet from the west side of Highway 404 (as it was prior to its 1970 relocation.) This line is also in the vicinity of the "Road to Pit," being the disputed right-of-way. Hall shows the Gerald DeMings southern line running northwest on a shallow angle and crossing the BY-AX line on the north side of the Road to Pit, at the point where it meets Thorne's disputed western line some 30 feet north of point AX. This line is noted as the "line as indicated by Gerald DeMings on a previous plan – approximate location only (not surveyed.)"

[63] Hall's plans show the VanBuskirks' Lot 1 (part of Lot 1A) between the western side of Highway 404 and the eastern boundary claimed by Goulden in the quieting. As previously noted, the VanBuskirks acknowledge that the portion of Lot 1 south of the Hall BY-AX northern line as shown on the plan is actually Goulden's land, as a result of a 1936 tax deed to Goulden's predecessor in title, George Egbert Hamilton. In the circumstances, the VanBuskirks argue, Goulden should be seeking to quiet all of Lot 1 south of their claimed northern line (the BY-AX line), making the west side of Highway 404 Goulden's eastern boundary. The VanBuskirks acknowledge that they would need to purchase the portion of Lot 1 north of BY-AX, being the apex of the triangular lot, from the MacDonalds, in order to rectify this situation on the property they claim.

[64] Hall's plans show the lands of Mary Hagar (and subsequently Charles Arthur Hagar) to the south of Goulden's property, demarcated by a wire fence. Goulden's southern line is undisputed.

[65] Other than the pit road that crosses it, the land in dispute in the area of the Goulden northern line is mainly woodland. Around Berrigan's proposed A-B northern line, there is bush land. Other than a survey marker set by Thorne on Highway 404 in April 1983, there is no physical evidence of blazing, fencing, or demarcation of the two proposed lines between the adjacent properties of Goulden and VanBuskirk/MacDonald. Gerald DeMings referred to a blazed spruce tree at the west end of the southern line that he set with Lamont Hamilton in 1964. The tree was not found. No survey work was done in 1964. No pin or marker was placed by Hamilton or Gerald DeMings to mark the east end of their common line at the highway. The deed descriptions are meager, providing names of adjacent landowners with cardinal directions, but no measurements or metes.

[66] On the western line of Goulden's property the lines proposed by Berrigan and Dearman on behalf of Goulden (the Dearman line) and by Thorne and Hall on behalf of the Kimbrells (the Thorne line) progressively diverge by between ten and fifteen feet as they run north. The Dearman line lies further west. Both proposed lines cross the road to pit in the vicinity of the AX end of the AX-BY line. The Mahaney/Kimbrell side is woodlot, as is the land on each side of the road to pit and north of Goulden's homestead.

[67] In the course of his March 1983 survey for Mahaney/Wildman (the Kimbrells' predecessors in title), Thorne surveyed Goulden's western boundary line, being the common line between them. Goulden takes issue with all of Thorne's work. Specifically, he challenges the claim that a fence existed on his western boundary in 1983 (as reported by Thorne) or its remnants in 1999 (as reported by Hall). Goulden said he erected a fence in 1983, to keep animals contained; he claimed he later moved it nearer the line set out by Dearman (and subsequently accepted by Berrigan). The Dearman/Berrigan line (originally established by Dearman in November 1996) extended from a fixed southwest corner where two old existing fence lines intersect, in a northerly direction to the south end of a fence and stone wall, the McKenney fence, on the eastern side of Highway 404. In other words, the Dearman western line crossed the highway in order to extend to the fence and stone wall.

[68] ***Goulden's northern line***. In his April 1983 survey of Goulden's property, Thorne placed his northern line some distance to the south of the A-B line proposed later by Berrigan on his 2007 plan, and the BY-AX line proposed later by Hall on his 1999 and 2008 plans, but not as far south as Hall in his 1999 review of Thorne's work. Goulden's pre-June 1999 confirmation deed left open the possibility of unknown land.

[69] Goulden essentially argues that the lack of ambiguity in Gerald DeMings's deed, and the acknowledgement by both surveyors that an unrecorded1898 survey plan by Deputy Surveyor James McKay of Arnold DeMings's land lies on the ground as testified to and shown by Berrigan and duplicated on Hall's 2008 plan, ends the matter of the location of Goulden's northern line. As such, it is submitted, little concern need be accorded certain issues raised by the 1970 Highway 404 plan. Arnold DeMings's 21-foot north line west of the highway, ending at point A, and Lamont Hamilton's north line extending from there westerly in a straight line to Mahaney/Kimbrells' eastern line, would be the northern line of Goulden's property. The road to the pit, including the new relocated section, is to the south of that line and would therefore cross lands owned by Goulden.

[70] The Defendants submit that Goulden's northern boundary is defined by reference to Arnold DeMings's land in Gerald DeMings's (now VanBuskirk/MacDonald's) deed description. They say extrinsic evidence of title history and possession, offered as proof of an ambiguity, shows that Arnold DeMings held neither legal title nor possessory title to lands west of the highway. The resulting ambiguity, they say, calls for extrinsic evidence, such as that of Gerald DeMings.

[71] Goulden refers to things he says were shown and said to him by the late Arnold DeMings, as well as "Fot" Williams, at the time of the Thorne survey, as well as documents such as the unrecorded 1898 McKay survey plan, which Goulden copied and provided later to the surveyors Dearman, Hunt and Berrigan, as well as the 1970 relocation plan for Highway 404.

[72] Berrigan and Hall agree that Thorne did not opine on the McKay plan which, as referenced on Hall's 2008 plan and Berrigan's 2007 plan, created a triangle of land with a square apex to the north on the west side of the highway. It

is referenced as the VanBuskirks' Lot 1 of Lot 1A. Goulden later bought the land immediately south of the triangle from the Hamiltons. This gave a right-of-way and driveway to the former Hamilton (now Goulden) house to the west. The McKay plan identifies Hamilton as owning land immediately east of the highway. It makes no reference to the piece Goulden purchased to the west of the highway.

[73] ***Goulden's western line.*** The length of Goulden's western line is determined by the location of his northern line. The western line is defined in the 1936 Hamilton tax deed, Goulden's deed, and the 1964 Gerald DeMings/MacDonald deeds. These documents provide only cardinal directions and the identities of adjacent lot owners. Extrinsic evidence to identify persons named is found in the recorded affidavit of Audrey Norine Wildman, which names Herbert Goulden (Ida Mahaney's father) as the owner of the lands to the west, by way of a 1957 quit-claim deed. It also indicates that Ida Mahaney was conveyed the lands by Herbert Goulden's heirs the same year. In 1986 she conveyed the property to herself, her daughter Norine Wildman, and her grandson Lawrence Wildman. Various witnesses identified Ida Mahaney as the owner of the adjacent lands and predecessor to the Kimbrells.

[74] Thorne prolongated Goulden's western line from the northern end of an old wire fence marked on his survey plan, using an "x-x-x" marking. The plan shows the fence on the western line of Goulden's neighbour to the south, Hagar. Thorne ran Goulden's western line northwards from the end of that fence, creating the "Thorne extension" for a total distance of 1,340 feet. Thorne went on to prolongate the fence line from the north end, straight and on similar bearings to a point on the west side of Highway 404. This is the point referred to as the "clay hole" in Gerald DeMings's deed. Having found remnants of the old fence in 1999, Hall relied on Thorne's line, while acknowledging a loss of some old fencing from the Thorne extension.

[75] On his 2002 concept plan and 2008 survey plan, Berrigan started his western survey line from Goulden's southwest corner at the intersection of the two existing boundary fence lines. He found no old fencing, only a fence to contain cattle. Like Dearman in 1996, he projected Goulden's western line from that starting point, running northerly to the west of the Thorne line at a progressive width difference of up to 15 feet. He ended it at a point at the south end of a fence

and stone wall on the northeast side of the highway, offset by the road and some 70 feet or more west of Thorne's end point.

[76] Goulden made several comments respecting the presence of fencing on the western line in 1983. He said he understood that the "x's" marked on the plan indicated fencing. He said he assumed that Thorne had found fencing in the area, but that he himself could not locate any fencing on the area where the x's lay on the plan. He said he believed that Thorne extended it, as there were fences in existence along there. He indicated on the plan that Thorne found fencing by Hagar's line because it was still there, but said there was none that he could find, other than that which he had put up himself to keep his children's pony (and later the cattle) from straying.

[77] With respect to fencing on the 1996 Dearman line, Goulden said that years later he put a fence on a survey line adjacent to the Thorne line or the Dearman line, or between them. As for removing fence from the Thorne line, he said there had only ever been one fence since he arrived, and he put it there. He said he "may have repaired fences but I never removed the fence, it was always on the survey line." He said it probably started on the Thorne line when he did the cut-through, but was eventually adjacent to the Dearman line. He said he did not remove the fence, nor did he remove any remnants of an old fence in the area.

[78] In contrast, Clifford VanBuskirk attested to the presence of old fencing in the area of the Thorne line marked by x's on the plan as far back as 1971, when he began going onto the Mahaney property with his future father-in-law. Ricky Rapp corroborated Goulden's testimony to a degree, but attested to pieces of old fence being stuck in the trees when Goulden was relocating the fence he had erected on the Thorne line to the new line Dearman had cut. Similarly, in his 1999 survey, Hall, unlike Berrigan two years later, found remnants of old fencing that extended Hagar's existing old fence line northerly along Goulden's boundary (the Thorne extension) for some 340 feet less than Thorne.

[79] Within five weeks of Goulden's purchase, Dieter Oswald bought the former Gerald DeMings land from Forrester Williams by deed dated April 7, 1983. This was also within days of Thorne completing his survey of Goulden's property. Mr. Oswald said the real estate agent showed him lines and pins on the road frontage, although they did not walk the back line. His southern line was the only one

blazed out. The land extended out to the main road, with a survey marker in the ditch at the road. He identified the road to the gravel pit as being located on the land he owned. Mr. Oswald said he knew Forrester Williams – "Fot" – who had hauled wood for him. He said they walked the lines together a few times while cutting wood or to look the area over.

[80] Mr. Oswald said he had no concerns about the location of his lines. He said that during the five years he owned the property before selling to Joseph MacDonald in 1988, no one ever contested the lines. He assumed that "the survey line was right and that is where it was." He had no discussion with Thorne about the boundary. Thorne's services were retained in subdividing his property to the north. By that time Lamont Hamilton was dead. Oswald was content with the survey lines, and relied on the pins. He sold land in accordance with those lines. A piece to the north that he sold to Vincent DeMings was surveyed. He said he saw no need to survey the home lot. He knew Goulden, but said they never discussed boundaries.

[81] Mr. Oswald said that when he bought the property, the section of the old road to the north of his house was grown over with alders and only the portion that was a driveway by the house remained. Further along, Fot Williams had kept a pig pen. By that point it was not identifiable as a road. The relocated new road to the south of the house, however, was in very good condition**.** It was sandy and cut back, and cars could drive on it. He did not recall any commercial use, but said he and other local residents drove on it with pickup trucks, all-terrain vehicles, and four-wheelers. He said loads of sand were hauled out over it. He did not feel possessive about the pit road, but got annoyed when people used it to dump garbage. He said he had no issues with dust or noise, as trees separated the road from his house. In his time, there was no contest over the use of the road.

[82] The MacDonalds purchased Gerald DeMings's former property by deed from Mr. Oswald dated October 31, 1988. A few pieces had been excepted out by Mr. Williams and Mr. Oswald, which are not of concern here. Joseph MacDonald said Mr. Oswald told him, without showing him, that the southern boundary of his surveyed land was towards Goulden's and that it was "beyond," meaning that it was south of the wood road that Mr. MacDonald identified as the pit road on the 2008 Hall plan. The old road on the plan was his driveway. It went from the highway to the edge of his house. In 1988 there was no sign of a road beyond the

house. As for renovations or additions to the house, other than adding a pool and deck, he made none.

[83] According to Mr. MacDonald, some five or six months after he moved in Goulden asked him if he would sell or give him the piece of land crossed by the wood road. In return, Goulden would provide him with cut wood from the land. He said Goulden had never previously raised any issue with the boundary between the two properties, but he later raised the issue of the disputed land. The MacDonalds retained Hall for background research. In February 2005 they sold most of the disputed lands to the VanBuskirks. Mr. MacDonald said he wanted to remove himself from the dispute. He could not afford court action and wanted to be "clean of the mess." The VanBuskirks paid $1,500.00 for the land, and gave him an oral indemnification respecting court costs.

[84] Mr. MacDonald described the pit road in the 1980s as a dirt road with no side growth, on which vehicles could drive with no problems. He would use it to go hunting. In the 1990s it began to grow in, and boulders were placed across the road. He said various parties, including the Rapps, were closing the right-of-way over what he believed to be his land. He avoided involvement in the Kimbrell/Goulden law suit. He said he never exercised any control over the egress to the pit road. As far as he was concerned anyone could use it.

[85] ***Dearman's 1996 survey.*** Some 13 years after Thorne's 1983 survey of Goulden's property, Dearman surveyed Goulden's property and prepared a plan dated November 18, 1996. The plan is in evidence, though Dearman did not testify. He commenced Goulden's western line by running it from the intersection of two old fence lines at Goulden's southwest corner, one being the boundary fence line shared with Hagar to the south. This south line was the only fence line Goulden agreed was correctly identified and marked as such by Thorne. The other fence line found by Thorne was the line shared by Hagar with Ida Mahaney and Norine Wildman, whose lands lay to the west. From that commencement point, Dearman extended the line northerly to the west of the Thorne line, with a gradual width differential between the lines of some 12 to 15 feet. After connecting with Goulden's northwestern corner, the line projected and ended at the southern end of the McKenny stone wall and fence on the opposite side of Highway 404. As has been noted, Berrigan adopted the Dearman line and Hall adopted the Thorne line.

[86] Dearman relied on the McKay plan, which was provided to him by Goulden. His northern line was some 20 to 25 feet south of where Berrigan later placed the line in 2002. Berrigan's line projects from point A, some 21 feet to the west of Highway 404, in a westerly direction some 40 feet south of MacDonald's house until it meets the disputed Dearman-Berrigan western line at Berrigan's point B.

[87] ***Hall's 1999 survey.*** Hall purchased Thorne's survey business in 1997. He became aware of a few complaints with the Nova Scotia Land Surveyors Association, one being a complaint by Goulden respecting Thorne's work with the boundary lines. Part of the context of Goulden's complaint was Dearman's November 1996 survey. The Association's insurer asked Hall for a second opinion respecting Goulden's northern boundary.

[88] In response to the request, Hall produced a survey plan of Goulden's property, dated September 16, 1999. He referred to Goulden's 1983 pre-confirmation deed, which raised issues of interpretation and unknown land given that it described what Lamont Hamilton classified as a five-to-six-acre homestead property. Hall concluded that the northern boundary of the lands Goulden acquired was the northern boundary that Lamont Hamilton referenced in describing his homestead property: an old irregular wire fence north of Hamilton's house and south of Thorne's northern line. This gave Goulden between three-and-a-half and four acres less than the line set by Thorne. Hall's 1999 plan indicates that Thorne's northern line was by mutual agreement. Goulden disputes that claim. Matters were resolved without trial. Thorne's 1983 survey plan was neither retracted nor modified. Goulden's 1999 confirmation deed rectified any deed interpretation issue.

[89] In the course of his research, Hall contacted Gerald DeMings, who swore two affidavits, dated January 12, 1997, and February 26, 2003. At Hall's request, he also marked on a plain plan his recollection of the location of his southern boundary, as set by himself and Preston Lamont Hamilton to the west of the pre-relocation Highway 404 in 1964, at the time he purchased the land. Hall described this line as "unsurveyed" on his 1999 plan. Hall also acknowledged Goulden's lands between the homestead northern line and Gerald DeMings's unsurveyed southern line, and showed Dearman's 1996 northern line just south of MacDonald's dwelling.

[90] Gerald DeMings's affidavit of February 26, 2003, was sworn the day after he and Hall visited the property on which he had lived starting in 1962, and which he purchased in 1964. He indicated that the Dearman line, running only 60 feet to the south of his former house, was too far north. He believed that the distance, which he recalled by reference to physical features, was some 300 feet to the south of the house. He built the house only a few yards south of the old woods or gravel pit road that was used as a driveway. There was no road to the pit from the highway south of his house in the 1960s. He recalled seeing the relocated section of the road on what he believed to have been his property when he returned years later.

[91] Gerald DeMings went on to state his belief that Thorne's1983 survey marker on the west side of Highway 404 was located at the southwest corner of the lands he acquired from Hamilton. The southern boundary of his lands ran from the survey marker in a northwesterly direction "on a slant" to the east line of Ida Mahaney's lands, at a blazed fir tree some 30 feet north of the northern side of a long-established section of the old road crossing Mahaney's eastern boundary. He showed Arnold DeMings's northern boundary directly opposite and to the east of Thorne's 1983 survey marker, and some 150 feet north of a large boulder he associated with the location of Highway 404 and Adam Hamilton's home.

[92] ***Berrigan's 2002 plan.*** Surveyor Lester Berrigan was retained by the Municipality in connection with the Rapp Private Ways Act petition. In 2002 he provided a concept plan and a report concerning the location of boundary lines pertaining to the use and ownership of a gravel road leading from Highway 404 to the Kimbrell, Wildman, and Brian Ricky Rapp properties. Berrigan noted ambiguities in Goulden's 1983 deed from Bowers. He agreed with Hall that the deed described a five-to-six acre homestead extending north only to the old fence, with Adam Hamilton's land as its only abutter to the east. This was the deed Thorne used in his survey of Goulden's land, and in locating Goulden's northern line to the north of the old fence homestead line. As such, it was only when Goulden received the 1999 quit-claim deed from Bowers, with her declaration, that the intention of the words was clear and he acquired title to all lands extending north to the southern line of the former Gerald DeMings property.

[93] Berrigan attempted to determine the location of Gerald DeMings's southern boundary. It was not possible to establish the line between Goulden and

MacDonald without a boundary agreement or a court decision. Hall's 1999 plan describes Thorne's northern line as being by mutual agreement. Goulden denied this, stating that the owners were angry with Thorne. Berrigan opined, as per Gerald DeMings's deed description and McKay plan, his southern boundary follows Arnold DeMings's northern line a short distance, some 21 feet, west from the highway (being the square apex of the triangular Lot 1) to Arnold's northwest corner, then continues westerly (possibly in the same direction as Arnold's northern line), following Lamont Hamilton's north line to Ida Mahaney's eastern boundary. There was no physical evidence establishing the northern line westerly from Arnold's northwest corner (Berrigan's point A). In such circumstances, according to Berrigan, a surveyor cannot make assumptions as to the directions of the line without a boundary agreement between the adjoining owners. He took the view that the situation was governed by parallel boundaries. He further stated any claim south of point A would be an adverse claim to the lands of Goulden.

[94] ***The Kimbrell purchase.*** In November 2000, the Kimbrells purchased Betty Kimbrell's grandfather's woodlot on the western side of the highway abutting Goulden and MacDonald's western boundary. They also bought the old home on the eastern side of the highway from Mahaney and the Wildmans. They were most concerned with acquiring the house. At the time of the offer, James Kimbrell was aware that there was an issue over the use of the road to the pit in that he knew VanBuskirk had been physically blocked, but he did not fully understand the situation. They intended to buy the property regardless of any issue with the road.

[95] The deed description did not reserve out the pit road, or any road, for the benefit of adjacent property owners, nor did it reserve a right for the Rapps or anyone else to travel over the property. In 2007 Mr. Kimbrell provided a written right-of-way across the property for the Rapps. When he became owner he was added to the Rapp petition, although it would burden his property, where the pit road extended. The Kimbrells had no independent knowledge about their eastern boundary from observations prior to their purchase of the land. They support the Thorne line as adopted by Hall.

[96] Various events occurred in the late 1990s and 2000s in relation to the use of, and blocking of, the road. There was a major altercation in the fall of 2001 when Goulden, pointing a shotgun, threatened to shoot anyone moving boulders from the road, using the words "spilling guts." This incident led to criminal

proceedings, and an eventual pardon. There was any number of other events and exchanges. For one, Goulden's truck was blocked in for three months. He cut another road along the western boundary in order to access the disputed area near the road to retrieve items on the road.

[97] ***The VanBuskirks purchase Parcel A.*** In February 2005, the VanBuskirks purchased Parcel A from MacDonald, adding it to the triangular Lot 1 that he had purchased from Melda Langille to form Lot 1A. Both pieces were purchased in order to have control over the land west of Highway 404, allowing VanBuskirk access to the Kimbrell woodlot to haul wood. Mr. VanBuskirk intended to place Goulden in a position of trespass if he tried to block access, and himself in a position to carry on the action for ownership of the disputed land and to resolve the right-of-way dispute. Not being an owner prior to 2002, he was not a party to Rapp's petition. He said that since the 1970s, when he dated Manney Goulden's daughter, he spent about two weeks annually helping to cut and haul wood for family members off of his father in laws' aunt's property using the road.

[98] ***Berrigan's 2006 survey.*** In 2006 Goulden retained Berrigan to survey his property, in order to address the right-of-way and boundary dispute issues. Field work was carried out in February and March 2007, producing a plan dated November 13, 2007. The plan also incorporated research and field work carried out for the Municipality in 2002, ie. Berrigan's concept plan.

GOULDEN'S NORTHERN LINE

[99] ***The McKay plan.*** Berrigan relied on the unrecorded plan prepared by James McKay, dated May 7, 1898, for establishing Goulden's northern line. The only reference to the McKay plan is found in a deed of Robert Munroe (a predecessor in title to Arnold DeMings) dated April 18, 1898. Berrigan's view was that it conforms with other deed measurements on the ground; with adjoiners in Arnold DeMings' deed; and with the 1964 deed into Gerald DeMings. It also agreed with most aspects of 1970 Department of Transportation relocation plan. The exception is that where measurements starting at Church Road are taken, Arnold DeMings's northern line is apparently 70 feet south of where the McKay plan places it.

[100] Berrigan and Hall agreed on where the McKay plan lies on the ground. They also agreed that the McKay plan, as shown outlined in pink on the 2008 Hall

plan is accurately placed and displayed. Berrigan's point A is the northwest corner of the McKay plan, where the northern line extending from Shelburne Harbour intersects with the western line, some 20 feet west of Highway 404. According to Goulden, the 20-foot extension between the highway and point A, the square apex of VanBuskirk's triangular Lot 1, is the "northern sideline of lands of Arnold DeMings" described in Preston Hamilton's 1964 deed to Gerald DeMings. Using the parallel line approach because of the lack of evidence on the ground, Berrigan opined that Goulden's northern line, shown as Berrigan's A-B line, projected from the side of Highway 404 westerly "along the north side line of the lands of Arnold DeMings" for 21 feet to point A, then along the north line of the Lamont Hamilton (now Goulden) lands, in a straight line to point B on the contested western Dearman line. Berrigan's A-B line, the northern extension of the McKay line on the west side of the highway, lies about 20 or 25 feet north of Dearman's 1996 northern survey line.

[101] Predating by a century any deed reference to the 1898 McKay plan, Hall's research into the parties' common chain of title, as well that of Arnold DeMings, reveals a latent ambiguity associated with Gerald DeMings's 1964 deed, which defines Goulden's northern line and VanBuskirk's southern line. I accordingly find such an ambiguity exists.

[102] The Hamiltons (George, then his son Preston) were predecessors in title over lands now owned (or claimed) by Goulden, MacDonald and VanBuskirk. Gerald DeMings's lot was a 1964 conveyance out of Hamilton's 20-acre lot, as per Hamilton's 1936 tax deed. Under his 1983 and 1999 deeds from Hamilton's daughter, Ethel Eldora Bower, Goulden acquired the remaining Hamilton land. This incorporated all lands west of Highway 404 and south of the common northern boundary shared with Gerald DeMings's successors in title: Forrester Williams (1968-1983), Dieter Oswald (1983-1988), Joseph MacDonald (1988-2005), and VanBuskirk. The deed description originating in the 1964 deed from Preston Hamilton has been cited earlier.

[103] Although the words of the deed appear clear on their face, and do not obviously permit a different meaning, a latent ambiguity arises from the description of the southern boundary line – Goulden's northern line – as running westerly "along the North sideline of lands of Arnold DeMings and Lamont Hamilton" after reaching "the northerly boundary line of lands of Arnold

DeMings" on the "western side of the Shore Road." The title history indicates, however, that Arnold DeMings did not have paper title to any land west of Highway 404. He did not acquire any such property from George Egbert Hamilton in 1947. Preston Hamilton made the only non-family conveyance from the 1936 tax deed, to Gerald DeMings in 1964. There were no other non-family conveyances prior to 1983, when Ethel Bower (Preston Hamilton's successor) made the conveyance to Goulden.

[104] As such, the description as it stands cannot be applied to the land. Arnold DeMings, owning no land on the west side of the highway, was not an abutter. Further, as Goulden testified, the only evidence on the ground that could relate to what Arnold DeMings might have believed he owned to the west of Highway 404 was a short piece of fence on the property immediately to the south, owned by Adam B. Hamilton and subsequently acquired by Goulden. There was no evidence of occupation of any land west of Highway 404 by Arnold DeMings or his successors. Therefore, he could not have obtained title by prescription. This is not contested.

[105] In addition to title history prior to 1936, it is relevant that George Egbert Hamilton's 1936 title was derived from a tax deed, conveyed by the Shelburne municipality. He received three lots. All of the land at issue on the quieting titles action is in the second lot, which is shaped like a boat with its keel facing north. The second lot is described as follows:

> Bounded on the north by the Highway, from the "Big Hill" so called, to the Gunning Cove School; On the east by the highway, lands of the Estate of Adam Hamilton, and lands of Lester Perry: On the south by lands of George McKenney and on the west by lands of Herbert Goulden and containing in the hole about 20 acres more or less.
>
> The three above described pieces of land being a part of the lands mentioned and described in a deed from the heirs of Isaac Wilkins, to the Reverend Henry How, dated April 9, 1888 and recorded January 9th, 1890 in Book 29, Page 329, in the Registry of Deeds at Shelburne, in the Province of Nova Scotia; the same appearing to be the property of the Reverend Henry How by deed dated April 29th, 1888 and recorded in the Registry of Deeds at Shelburne in Book 29, Page 329.

[106] The 1936 tax deed conveyed to George Egbert Hamilton all of the land west of Highway 404. The description excludes any land alleged to have been owned by Arnold DeMings to the west of the highway. It makes no reference to lands owned by Arnold DeMings or his predecessor, Abby Dexter. VanBuskirk takes the position that the municipality did not consider Arnold DeMings to own any land west of Highway 404, with the logical inference that he would not have been assessed for any such land. Further, it is submitted, if Arnold DeMings or his predecessors did own land to the west of the highway, title was conveyed to Hamilton in 1936. A tax deed conveys "an absolute and indefeasible title in fee simple to the land described in the tax deed and is conclusive evidence, with respect to the purchaser and every person claiming through the purchaser, that every requirement for the proper assessment and sale of the land has been met": *Marketable Titles Act*, S.N.S. 1995-96, c. 9, s. 6(2). As a result, any title held by Arnold DeMings's predecessors would have been extinguished by the tax deed. Obviously, the 1898 McKay survey plan, placing Arnold DeMings land on the west side, does not convey any title.

[107] As for Arnold DeMings's title, Hall determined that the 1790 deed from Isaac Wilkins to William Burns, and Burns's 1818 conveyance to Gilbert McKenna, conveyed only the property between the east side of the highway and Shelburne Harbour. As a result McKenna, Arnold DeMings's predecessor, did not have a deed to any land on the west side of the highway. The title history established Highway 404 as the westernmost boundary of the land belonging to Arnold DeMings. His northern line could not extend west of the highway.

[108] By contrast with Hall's investigation of the conveyances of 1790 and 1818, Berrigan based his survey on the McKay Plan of 1898. He did not concern himself with title prior to 1898. He agreed that the Burns deed did not extend west of the rock on the highway, wherever the highway was located in 1790. He did not dispute that the pre-1898 deeds for Arnold DeMings's property did not extend it across the highway. Berrigan said he did not know where the road was located in 1790, never having seen a plan of that vintage that showed it, but added that he also had no reason to believe the highway was not in the same location as Highway 404. In short, he could not say whether the road had been moved.

[109] Goulden argues that an old road, visible at the northwestern end of the Burns lot in a 1945 aerial photo, could have extended in a more-or-less straight

line so as to form the basis for the eastern most line alleged by Goulden, and that the existence of that old road and the resulting land configuration, could explain a property such as Arnold DeMings's lying west of Highway 404 as it came to exist. Hall testified that he considered all possibilities before concluding that Arnold DeMings's land lay only to the east of the highway. I accept Hall's conclusion that the old road on the Burns lot was a deviation or spur off the main highway. Hall's evidence, along with other evidence, negatives Goulden's suggestion. Hall saw no evidence of such an old road on the west side of Highway 404. The 1898 McKay Plan shows the road to the east of its solid western boundary. The 1875 A.F. Church map of Shelburne County shows only Highway 404 running from Gunning Cove to Round Bay, with Church Road running to the shore and no sign of any portion of an old road or parishioners on it to the west. Abstracts of the Doane property always place it on the east, not the west. The proposed straight line would prevent the northern boundary of the Doane property and the southern boundary of Burns's 140-acre lot from running 18 chains to a natural fixed boundary, as repeatedly described and relied upon when reestablishing the McKay plan. Finally, on the McKay plan, Adam Hamilton's name is only associated with surveyed lands on the east of Hwy 404.

[110] Indeed, given the 1936 tax deed and Arnold DeMings's acquisition of his property from Abby Dexter by deed dated October 8, 1947, referring to "the east line of Wilkins property", his northern line could only extend to the east side of Highway 404 and not beyond, as the Gerald DeMings description states. Neither he nor his daughter Melda Langille could have held title to land to the west of Highway 404.

[111] I am satisfied that, whether relying solely on George Egbert Hamilton's 1936 tax deed or the full title history starting with the Wilkins-Burns conveyance of 1790 as described by Hall, the result is the same. Arnold DeMings could not have paper title to any land on the western side of Highway 404, regardless of what anyone in the community may have thought, including Arnold DeMings himself. The description as it pertains to Goulden's northern line is ambiguous when it is applied to the land. Extrinsic evidence of the tax deed and the title history raises the ambiguity.

[112] Based on the deed, it is clear that the drafters thought that Arnold DeMings owned land west of Highway 404, because it is used as a reference in the

description. Such was not the case. What the parties described was based on misconceptions as to what Arnold DeMings owned.

[113] Extrinsic evidence, including evidence of subjective intention and surrounding circumstances, is admissible and necessary to resolve the ambiguity as it relates to Goulden's northern line. Acts of user before a grant are "cogent evidence of what was intended to be granted"**:** *Van Dieman's Land Company v. Table Cape Marine Board*, [1906] A.C. 92 at 97.

[114] What was meant to be conveyed by Lamont Hamilton's deed to Gerald DeMings? Where did the relevant parties think Arnold DeMing's northern line was lcoated? Goulden's evidence of what he was shown and told by Arnold DeMings respecting the location of his northern line and its extension across Highway 404 is at odds with other evidence concerning Arnold DeMings's knowledge as to the location of his northern line. It also conflicts with Gerland DeMings's understanding of its location in relation to his own southern line.

[115] It is clear from the evidence of Hall and Berrigan that there was no physical evidence on the ground to establish the line shared by Goulden and VanBuskirk/MacDonald. The blazed tree Gerald DeMings referenced as being at the western end of his line was not present, and no pin was set by Hamilton and DeMings on Highway 404, in 1964. Similarly, both surveyors were clear that the northern line established by the McKay plan was not marked by any physical evidence, except near the east, some 500 feet from the shore on lands now owned by Turner and Starr, where each of them confirmed a found old marker. Thorne, as evidenced by Hall's 1999 survey plan, considered the slightly angled northern Goulden line that he ran in 1983 with its BY starting point on the Hall plan to be by mutual agreement. Goulden denied that there was any agreed line between himself, Arnold DeMings, and Fot Williams flowing from their Highway 404 meeting with Thorne. Instead, he maintains that they wanted to be rid of Thorne. I am satisfied, in any event, that no party is relying on the Thorne northern line.

[116] There is evidence for the conclusion that at the time of the 1964 and 1983 conveyances to Gerald DeMings and Goulden, respectively, Arnold DeMings did not believe that his northern line was the northern line on the McKay plan. Rather, he believed that his northern line was well to the south of this.

[117] According to Goulden himself, there must have been an agreement between the owners in the area as to their lines before his time. It would follow that the DeMings and Hamiltons did not have a clear understanding on the ground of the exact locations of the boundaries (a statement against interest for Goulden). Also, the 1970 Highway relocation plan shows not only Arnold DeMings and Cecil Hamilton, but also the Shelburne municipality "formerly" owning land west of the highway and south of lands named as Arnold DeMings's, rather than the estate of Adam Hamilton, as per the 1936 tax deed.

[118] Neighbours and relatives provided evidence about the location of Arnold DeMings's northern line and his consideration of it in regards to the McKay northern line. Stanley DeMings was a relative, as well as Arnold DeMings's neighbour to the north. By deed dated October 9, 1975, his widow, Annie DeMings, conveyed a southern lot to her daughter Joyce Ann DeMings (now Blades). The description of this lot began "at a point on the easterly side of the said main road which marks the northwest corner of lands of Arnold DeMings; Thence running along the northerly boundary line of lands of Arnold DeMings..." (emphasis added). This resulted in a rectangular lot, 250 feet deep by 100 feet wide, ending 100 feet along the eastern side of Highway 404 at Arnold DeMings's northwest corner.

[119] Blades's 1975 southern boundary was, then, intended to be the northern boundary of Arnold DeMings's property. His northwest corner was neither Berrigan's point A, nor was it a location opposite point A on the east side of Highway 404. It was, rather, to the south. After 1975 Blades erected a mobile home and a shed on her property. Save for a small portion of the northern end of the home, both buildings were located, as shown on Thorne's 1984 survey plan of the Arnold DeMings property, entirely south of the McKay northern line. Arnold DeMings did nothing to interfere. At the very least, his relatives and neighbours evidently thought that his northern line was well to the south of the McKay line.

[120] At some point surveyor Robert Hunt received a copy of the unrecorded McKay plan from Goulden. Hall referred in his evidence to Hunt surveying east of the highway and plotting the McKay northern line in 1984, thus bringing the question of its location to every ones attention. This work was not identified as a "plan" on Hall's 2008 plan reference list, although Hunt's May 1995 and November 1996 survey plans were so identified. Thorne was hired. In preparing

his September 1984 survey plan showing the subdivision of Arnold DeMings's lands, Thorne used the McKay line as the rectangular lot's southern line.

[121] Thorne dealt with the unsurveyed land to the south not as part of the original October 1975 lot, but as land to be conveyed by DeMings to Blades by deed dated November 13, 1986. As a result, Blades's home and shed are on lands that she obtained from Arnold DeMings in 1986. The fact that this problem only surfaced after the McKay line was plotted indicates that members of the DeMings family, including Arnold DeMings himself, understood that his northern line was south of the McKay line. In 1975 her rectangular lot, per deed description, was marked out by stakes and stones at the northeast and southeast corners. Both the north and south lines ran straight from and to the highway from the stakes. There was evidence on the ground available for Arnold DeMings's inspection for nine years. There is no indication that Blades had any knowledge of "kept up" fence posts demarcating a line around her driveway. Such a thing would not have been brought to Blades's attention, nor could she have witnessed him keeping it up. Otherwise, I infer, she would not have built in that location. The most convincing conclusion is that such things did not exist. Blades was not called as a witness. Unlike Gerald DeMings, she owned property at the site, and had, or knew of, her own physical terms of reference as to where her lines ran when she built. It was not a question of being indifferent to ownership.

[122] Support for the position described above is found in the 1970 Department of Transportation relocation plan. As described by Hall, this plan shows the Stanley DeMings southern line and the Arnold DeMings northern line within ten feet of DeMings's northern line shown on Thorne's 1984 survey of the DeMings/Blades property, not on the McKay line. While mindful of the evidence respecting the relative accuracy of highway plans when lines are not evident on the ground, it is a reasonable inference that Arnold and Stanley DeMings's input would have been sought. I conclude that they thought their common boundary line and DeMings's northern line was south of the McKay line. I reject Goulden's re-direct evidence that Arnold DeMings considered Joyce Blades to be a squatter.

[123] No plan was referenced in the 1947 conveyance to Arnold DeMings. At some point, the unrecorded McKay plan came to his attention. He believed that he owned land west of Highway 404, without ever occupying or demarcating such land. The 1970 Department of Highways plan named him as an owner on "both

sides of R.O.W.," and placed his northern line on the western side, some 300 feet (not 40 feet) from the only marked dwelling. This is consistent with the evidence of Gerald DeMings respecting the location of his southern boundary. On the other hand, measuring from the opposite direction, starting at Church Road, placed Arnold DeMings's northern line approximately 70 feet south of where the McKay plan placed it, and some 110 feet from the dwelling. Neither surveyor could explain the discrepancy. It was suggested that, given the cost of surveying, highway plans may set out unmarked lines based on estimates. As previously noted, it is a reasonable inference that when attempting to establish lines, the Department would consult with owners whose lands were being expropriated.

[124] Further context is provided through the unchallenged evidence respecting pieces of fencing on the former Adam B. Hamilton property, now owned by Goulden, found by Thorne in preparing his 1983 Goulden plan. These were depicted by Hall on his 2008 plan as Thorne's 1983 "extension of the most northerly portion of the old fence." When projected, this fencing reaches precisely the same point identified by Gerald DeMings in 2003 when he examined the property on the ground. Hall marked this point as BY in 2008. If it is projected across Highway 404, this line reaches the approximate southwest corner of Joyce Blades's lot. Considering that this is the area that the DeMings thought to be Arnold DeMings's north west corner, and that Arnold DeMings's believed that he owned land on western side of the highway, it is reasonable to conclude that Arnold DeMings believed that his northern line on the western side was very close to where Gerald DeMings placed the boundary between himself and Lamont Hamilton. It is the same point that Arnold DeMings never took any independent action to change after it was set by Thorne as the east end of Goulden's northern line in 1983. Any comment by "Monty" to Gerald DeMings about Arnold DeMings not owning land west of the highway would not be in error, given that the 1936 tax deed description specifically referred to the highway as his father's and his eastern boundary. At the same time, the deed refers to Arnold DeMings as an abutter, and Hamilton was not prepared to sell any land south of the point later marked BY on west side of Highway 404, which Gerald DeMings identified as being almost across from where he believed that Arnold DeMings northern line met the unmarked east side of Highway 404. This belief arose from his wood cutting days on Arnold's property.

[125] As noted earlier, Gerald DeMings, as the grantee, is the only witness with direct knowledge of the land and boundaries intended to be conveyed by the 1964 deed. His evidence of subjective intention and surrounding circumstances is relevant. He gave his evidence in a direct and forthright manner. It is true, of course, that on one occasion he responded with a joke when faced with a difficult question in the courtroom. However, he quickly gave a direct answer, without prompting or admonition. Nor do I believe that a "feed of lobsters" influenced Gerald DeMings's memory in placing his 1964 southern boundary line. I infer nothing from this comment. More specifically, no evidence supported an inference of collusion on his part with the defendants. He was an independent witness with no agenda and no interest in the result. The fact that he recalled owning 75 acres is as much of a comment on the detail of discussions with others and knowledge of the content of his deed as on his recall. He answered the questions asked and elaborated when asked.

[126] One of Gerald DeMings's few elaborations was "I know that to be true because I cut wood there," when he identified Arnold DeMings's northern line on Hall's 2008 plan. He placed it on the east side of the highway, just south of Joyce Blades's southern line, almost opposite the place where he and Lamont Hamilton established their line, and opposite and just south of the point on the highway which he identified on his freehand drawing as the eastern end of his southern line. The closeness of the latter to the line he eventually identified on the ground supports the accuracy of his memory.

[127] For recall purposes some 48 years after the fact, Gerald DeMings was not functioning in a vacuum. He was knowledgeable about the area, with life experience as a woodsman, fisherman and truck driver. He had terms of reference with respect to his boundary beyond a blazed fir tree long since gone and an unmarked point on Highway 404. Besides a large rock on the west side of the highway, the old road and driveway in front of his house (as described by Dr. Woolnough) remained a constant. Goulden's own witnesses, Charles Bower and Viola Williams, indicated that the road was very close to ("on the doorstep") of the Williams home that was "in close proximity to the home" Gerald DeMings built and that for Gerald DeMings it was "a few yards" to the north of his house which was his reference point for recalling a 300' distance to BY, the eastern end of his southern line on Highway 404 and a point south of the disputed land and right of way. On viewing it again in 2003 with Hall, he dismissed Dearman's northern line,

some 20 feet further south than the McKay/Berrigan A-B line with its 40-foot location from the house. Gerald DeMings's viewing of the area in 2003 was not a first. He had visited before and knew the location of the new pit road from the highway in relation to his former property. I am satisfied that he would remember a huge boulder on the side of a road that he travelled for more than 27 years, as I am satisfied that he recalled the location where he chose a boundary point in relation to where he built his house, and in relation to the old road and driveway, despite changes in the terrain and the growth of vegetation. Given the distances involved, I am satisfied that he would know if his southern line was 40 feet – or, for that matter 110 feet – rather than 300 feet from the house, as well as its location in relation to the old road. I accept that his line with Hamilton was not the McKay-Berrigan line.

[128] It was also from the northerly sideline of the old road that Gerald DeMings was able to recall that his southern and western lines met some 30 feet to the north of it, rather than 125 feet. He specifically recalled his southern line running on a "slash" to reach the fir tree on his western line at the 30-foot point. Any slash from point A would result in line A-B running through his house, or north of it, defeating the purpose of his purchase of the land. Accepting his recollection (as I do), it follows that neither Lamont Hamilton nor Gerald DeMings could have meant to establish a line represented by the extension of the McKay line to the west.

[129] In considering Gerald DeMings's evidence, I have taken note of his explanation on direct examination as to why he stated in his statutory declaration that Arnold DeMings was at his pre-1965 meeting with the Department of Transportation. At trial he testified that this was not the case. His testimony, however, did not appear to negate or retract his recollection that Arnold DeMings attended at some meeting with him. While there is a degree of conflict here, he made it clear that Arnold DeMings was not involved with the purchase and that he believed that Arnold owned nothing to the west.

[130] At some point before moving away in 1965, Gerald DeMings requested a relocation of the old road because of safety concerns for his children. Nothing in this raises any confusion in relation to the evidence of Viola Williams whose affidavit evidence was not subject to cross-examination. Charles Bower, who returned home in 1973 after leaving in 1966 to join the army, recalled gravel truck

usage on the old road for two or three years in the 1960s. Dr Woolnough confirmed the development of the quarry before 1968. There was no evidence of anyone living in the house for the two years before its tax sale to the Williamses in June 1967 and subsequent deed to them a year later on June 26, 1968. Given that the property was unoccupied, there was no apparent need for the Department to correct the situation. The Williamses also wanted the road moved away from their doorstep. Indeed, according to the plaintiff's expert Dr. Woolnough, the 1968 photo shows signs of abandonment of the old section, in keeping with Viola Williams evidence. The new pit road was completed by mid-1970 to 1971, and access to the quarry was by way of this new extension of the old road. By 1971, according to Dr. Woolnough, use of the new pit road was intense, with gravel spreading into the highway from trucks turning into the highway. This intense situation continued, according to the photographs, into the summer of 1989.

[131] I decline to draw an adverse inference against Gerald DeMings. There was evidence that prior to his death in the early 1980s Lamont Hamilton required a caregiver and was allegedly in poor physical condition and left a house in need of repairs. There was no evidence that his condition impeded him some 19 years earlier, when, according to Gerald DeMings, they walked the property to measure their line. Gerald DeMings was not cross-examined on the point. Goulden was four years old in 1964, some four to six years before encountering the "heavy" Hamilton he recalled. Charles Bower described a grossly overweight Lamont Hamilton, but was not specific to a time or event other than working in the fish plant where Hamilton was employed after returning home from the army in 1973. While mobile, Hamilton used a stool to perform his shift on the line. Hamilton's competency was not in issue; in 1981 he was able to sign a deed and convey his property to his sister Ethel Eldora Bower. There was a question about Hamilton's literacy. According to Goulden, his mother wrote out Hamilton's Christmas cards and Hamilton signed them.

[132] One has to query why, as Goulden suggests, Fot Williams would be annoyed with Thorne over the placement of his southern line. The line Thorne cut in 1983 was south of a found survey marker as depicted on both of Thorne's 1983 survey plans and located on Williams western line in the disputed area. The only evidence of other survey work was that completed by Thorne on the Williams/Mahaney line in May 1980, when Williams conveyed a lot at the north end of his property to Michael Murphy. Similarly, Mr. Oswald, who purchased the

Williams property almost simultaneously with the completion of Thorne's April 1983 survey, raised no issue about the location of his southern line, or the fact that the right-of-way crossed his lot while he owned the property from 1983-1988. This was a result of many walks over the land with the former owner, Fot Williams, who worked for him, as well as discussion with his neighbour Goulden. Indeed, his uncontradicted evidence was that he and Goulden never discussed line issues. This means that at the height of Goulden's controversy with Thorne and Arnold DeMings, who was accusing him of theft of his land, Goulden did not tell Mr. Oswald what Arnold DeMings was saying about the true location of their boundary line. Mr. Oswald was also never approached by Arnold DeMings about the position of his newly surveyed line and the true location of that line in relation to DeMings property. Finally, Oswald had exchanges with Thorne, who later did survey work on the property in order to convey pieces of his property to the north, and who ran lines off of his existing survey work on the common boundary line with Mahaney.

[133] Similarly, MacDonald, who purchased the property from Mr. Oswald in 1988, raised no issue with his southern line, or with the fact that the right-of-way traversed his property, until Goulden later took the position that it was his land. I accept that Goulden approached MacDonald about acquiring the land in dispute.

[134] Similarly, there was no evidence of Arnold DeMings seeking to have Thorne's 1983 northern line retracted or reestablished, or the highway pin removed, so as to meet some other line criteria that would increase his lot size. Indeed, rather than showing dissatisfaction and annoyance, as Goulden suggested, Arnold DeMings was prepared to have Thorne do further surveying of property he believed, or came to believe, he owned within 18 months. Neither did Goulden's lawsuit or complaint to the Land Surveyors Association resulted in the pin being removed or plan retracted.

[135] Goulden indicated at trial that when he purchased the property from Ethel Bower, some 16 years before she signed a statutory declaration stating that she believed there never was a right-of-way over the lands, she only had a vague idea about the boundary. In contrast, when he was questioned at discovery about Bower showing or telling him anything about the northern boundary, he testified that she said "basically that it was up by the road." By 1983, the new extension of the old road, some 150 feet north of where Gerald DeMings placed his southern line, had

been in existence for 12 years or more, and the old road was only associated with the driveway.

[136] Goulden's recollections pertaining to some significant tangible facts, based on his own expert witness's testimony, as well as others, were in error. For example, in 1983, aerial photographs reveal the Pit Road to be a minimum of 16 feet wide, not the four feet that he cited when recalling the meeting he had with Thorne. Intense usage of the Pit Road was evident from 1971 to at least July 1989, long before the 1990s starting point for hauling fill insisted upon by Goulden. Given the straightforward nature of the topics, the degree of variation in the responses, the exactitude with which it was provided and the significance of the evidence to an issue before the court, it is difficult to conclude that this reflects mere error. This, along with previous and subsequent findings and the evidence as a whole, causes me to question Goulden's accuracy and sincerity in relaying what might have been said, or what was relayed as being said, by Arnold DeMings. Where his evidence conflicts with Gerald DeMings, that of DeMings is preferred.

[137] As argued, the evidence reveals that Arnold DeMings did not know where his northern line was on either the eastern side of Highway 404 or on the western side, where he and others believed he owned property. That said, there is evidence that Arnold DeMings and others thought that his northern line on the western side of the highway was approximately in the location established by Gerald DeMings. That location is consistent with where Arnold DeMings seems to have thought his northern line was on the eastern side of the highway, at the very least somewhere between 70 and 260 feet south of the McKay line. Even 70 feet is consistent with the extension of the fence found on the former Adam Hamilton property and with the common DeMings line location on the 1970 Highway 404 relocation plan, and would place the location on the east side of Hwy 404 just north of where Gerald DeMings placed it.

[138] After weighing and considering all the evidence, I conclude that the intent of the deed from Lamont Hamilton to Gerald DeMings as it defines the northern line of the Goulden property places the DeMings line in the location shown on Hall's 2008 plan, connecting points BY to AX. The land to the north of line BY-AX is owned by the VanBuskirks and MacDonalds. The Pit Road, consisting of the 1970s extension of the old road running from Highway 404, crosses lands owned by them. Goulden owns all land to the south of line BY-AX sought to be

quieted, and to the west of Highway 404, including the portion along the highway and south of BY-AX that Melda Langille deeded to VanBuskirk. If the VanBuskirk property is encumbered, and since no notice of the quieting has been provided to the third parties, VanBuskirk shall convey it to Goulden free and clear of all encumbrances using the measurements and bearings on Hall's 2008 plan.

GOULDEN'S WESTERN LINE

[139] The western line issue involves the boundary between the lands of Goulden and the Kimbrells. The question, in effect, is whether the correct line is that run by Dearman in 1996 for Goulden (used by Berrigan in 2007) or the line run by Thorne in 1983 for Mahaney (reflected on Hall's 1999 and 2008 plans).

[140] The 1957 Mahaney deed description, registered with the Kimbrells' November 2000 deed, was attached to a statutory declaration of Norine Wildman. It makes no reference to a highway. It identifies Nathan Munroe as the adjacent owner to the east, and Ida Mahaney to the west. According to Hall's 2008 plan, Munroe owned land to the east on the opposite side of Highway 404 in 1949. George Egbert Hamilton's 1936 tax deed and Preston Lamont Hamilton's deed to Gerald DeMings are clear and unequivocal: the Hamilton (now Goulden) land was east of Ida Mahaney's land on the west side of Highway 404. On the evidence before the court, there appears to be an ambiguity, and no extrinsic evidence.

[141] In preparing his 1983 survey plan of the Mahaney (now Kimbrell) property, Thorne relied on survey work done between January and October 1982, as well as his own Michael Murphy survey of May 1980, as evidenced by the noting of three "found" survey markers on his March 1983 plan and his reference to the 1980 Murphy survey on the 1983 plan. He established the adjacent western line for Charles and Mary Hagar, Ethel Bower (now Goulden), and, to a degree reestablished the lines of Forrester Williams (now VanBuskirk/MacDonald) and Murphy. In both pre- and post-1964 deed descriptions, that common western line extended to the west side of Highway 404. The establishment of a northern boundary line in 1964, when Hamilton sold to Gerald DeMings, limited the extent of the common boundary between Goulden's predecessors and Mahaney. It no longer extended to Highway 404. Rather, Gerald DeMings and his successors became Mahaney's adjacent landowners to the north along the line, ending at the highway.

[142] Hall opined that the relocation of Highway 404 in the 1970s affected the existence of the "Clay Hole", a cited monument on the western side of Highway 404, well to the north of the disputed area. This was the end point of Lamont Hamilton's (Bower's predecessor) western line on the western side of the highway, as defined in Hamilton's deed description to Gerald DeMings in 1964 – not the same description as in Hamilton's 1936 tax deed ("bounded on the north by the Highway, from the 'Big Hill' so called, to the Gunning Cove School").

[143] Mahaney's land, described as 50 acres, more or less, in the limited 1957 description attached to Wildman's declaration, was said to be bounded on the north by Gunning Cove, on the east by lands of Nathan Munroe, on the south by lands of the Estate of John DeMings and on the west by lands of Ida Mahaney. In this description, both her eastern and western lines extended north to Gunning Cove, with no reference to stone walls, fences or highways. To be clear, no fences or stone walls are referenced in any deed description in evidence relating to the disputed boundary.

[144] Mahaney and Wildman conveyed three lots to the Kimbrells on November 6, 2000. They relied on Thorne's 1983 Mahaney survey plan for each lot description, with a "reference should be had to" and not a "being and intended to be" notation respecting Ida Mahaney's January 30, 1986, conveyance to her daughter and grandson. The conveyance was recorded simultaneously with Norine Wildman's November 2000 statutory declaration attaching the 1957 land description. In 1957, Herbert Goulden, Ida Mahaney's father, acquired land by quit-claim deed from the heirs of Augustus Goulden. To repeat the full description attached to Wildman's statutory declaration describes the lands conveyed by the quit-claim deed as follows:

> All and singular...
>
> ...certain piece a parcel of land situate, lying and being at Gunning Cove, in said township and county of Shelburne containing in all 50 acres more or less and bounded on the north by Gunning Cove, on the east by lands of Nathan Munroe, south by lands of the Estate of John DeMings and on the west by lands of Ida Mahaney.

[145] Ms. Wildman did not testify. The statutory declaration sets out Mahaney's title history from 1957, when she was deeded the property by her father's heirs, with a life interest to her mother, until 1986, when she conveyed the land to herself, her daughter Norine and her grandson Lawrence Wildman (as noted above). The 1957 and 1986 deeds were not in evidence, nor was Herbert Goulden's 1957 quit-claim deed.

[146] Tasked in 2002 with establishing certain boundaries respecting " use and ownership of an existing gravel road from Public Highway No. 404" to the Kimbrell, Wildman, and Rapp properties, Berrigan produced a concept plan showing the locations of the Thorne and Dearman boundary lines, starting at the same point "on the old fence line" at Goulden's southwest corner. Dearman's line is the further west of the two. Berrigan showed the Dearman line on his November 2007 plan as Goulden's western line. At trial, his view was that there was no obvious reason to prefer one line over the other. He noted the gradual divergence of between ten and fifteen feet going north. When asked why he chose one over the other, he said, "that is a good question. I am not sure I can put a straightforward answer... I chose one or the other and obviously it will be settled in the quieting action."

[147] Seeing no fence or fence remnants in 2002, Berrigan commenced at the intersection of two old existing fence lines running the full length of the adjacent lands to the south, those being Charles and Mary Hagar's western and northern boundaries. He referred to a section of old fence line, marked as found physical evidence of fencing on Thorne's 1983 Mahaney plan. These marks were at the southern limit of the Mahaney (now Kimbrell) property, extending northerly along Hagar's adjacent western line, and intersecting with an old wire fence dividing Hagar's northern and Goulden's southern boundaries. Berrigan did not walk this area, but he concluded that it tied together Goulden's southwestern corner. In his opinion, there was no question that this was the correct starting point in determining Goulden and Kimbrell's boundary.

[148] After establishing the line's southern commencement point "on the old fence line," Berrigan projected a straight line to the northwest, to the south end of a 900-foot-long fence with a 125-foot section of stone wall attached. Dearman referenced this point as a "found fence line at Fort Point Road." Berrigan designated it as "old fence and stone wall on the eastern sideline of public

highway 404" some 3,000 feet away. In the process, Berrigan placed Goulden's northwest corner and end of the boundary line some 20 feet or more north of the point set by Dearman. The 1983 Mahaney plan shows the fence and portion of stone wall (the MacKenney fence) to the north, across the highway running between Lawrence and Ida Mahaney's property on the west and the lands of John MacKenney on the east.

[149] Berrigan walked the western boundary of Goulden's land. Thorne's 1983 plans showed fencing extending from the southwest corner along the line (the Thorne extension). Berrigan, unlike Hall in 1999, did not see this fencing, or any evidence of it. He did not discount the possibility that it may have been removed. He did not use a metal detector. He saw some new fence and relatively new red blazes, but no old blazing. As such, he was not convinced that there was old fence on the Thorne line for the projection, as per standard practice of any line. He instead used Dearman's line with the "monument already on the ground," projecting northerly in a straight line coinciding with the point set on the south end of the MacKenney fence and stone wall "very far to the north on the other side of the highway".

[150] Thorne in 1983 found and followed the physical evidence on the ground of fencing and marked on his Mahaney plan a distance of 1340 feet from the baseline and southern limit of the Mahaney property, northerly along the Mahaney eastern boundary to a point where the fence ran out some 900 to 1000 feet along the Goulden/Mahaney section of the line, 502 feet south of a found survey marker located 139 feet north of Goulden's northern boundary as set by Thorne, and south of the northern boundary lines later set by Hall (30 feet and width of road) and Berrigan/Dearman (some 21 feet less than Berrigan). The fence did not extend to the northern limit as described in the Gerald DeMings deed, as the clay hole in Hwy 404 or as just noted to any of the proposed north limits of the disputed Goulden land. A month later, relating to Goulden's property, Thorne depicted the Goulden/Mahaney section on his plan as 220 feet of the found fencing. He also depicted some 269 feet of fencing found on the entire length of Goulden's southern line, as well as fencing found along Goulden's eastern line, with some 172 feet of it halfway between his southeast corner and the driveway to Hamilton/Goulden house, then some 105 feet extending from the north side of that driveway northeasterly along the line until it ended. The latter section no longer existed when Hall and Berrigan conducted their survey work. As noted

earlier, if prolongated it extends to the eastern end of Thorne's northern line, being Hall's point BY.

[151] Neither Dearman's 1996 plan nor Berrigan's 2002 and 2007 plans show the "found" survey marker as depicted by Thorne on his 1983 Mahaney plan 502 feet north of the north end of the fence and 139 feet north of the survey marker placed by Thorne on his 1983 Goulden plan to mark the intersection of Goulden's northern and western lines. Thorne ran Goulden's western line to this found marker, as per his 1980 survey work. He also relied on it as a point, along with two other "found" survey markers, when running Mahaney's eastern line a month earlier. It is noted on Hall's 2008 plan as a survey marker Hall placed. It shows on the south side of the unsurveyed old section of the road to the pit, some 47 feet (including the road) south of Hall's northern and western lines' intersection point AX, and a road's width south of the intersection point of Gerald DeMings's hand-drawn northern and western lines. It was a survey marker that Fot Williams would have had to be familiar with. It is a reasonable inference that Thorne's marker was removed at some point.

[152] Berrigan identified two concerns in selecting Dearman's line over Thorne's line: firstly, the lack of any physical evidence on the ground, in particular old fencing or remnants; secondly, although it is acceptable practice to project a fence that is regarded as a boundary fence further along the line, there must be additional evidence of the line beyond a projection from the end of the fence. The Thorne line projects from the north end of the Thorne fence extension to the west side of Highway 404. Berrigan opined that a fence on the ground quite often indicates a boundary line, provided that generally it is a straight course; that it goes with the direction of the deed and surrounding area; and that it conforms to the deed description and to previous survey plans and Crown grants. As such, a fence is not necessarily the true boundary line.

[153] Hall pointed out that various lots were not defined in bearings and distances. He gave the example of Ida Mahaney's property description. It did not start at a point baseline and run a given number of degrees north for so many feet until it hit a set point; rather, all the surveyors had was a deed bounded on one side by one adjacent owner, and on the others by the other adjacent owners. Where the deed did not provide the answers, physical evidence can show where the boundary line lies.

[154] Hall supported the Thorne line because, in his view, Thorne's plan provided the oldest and most reliable physical evidence. Thorne's Mahaney plan was the first to locate physical evidence (fencing) on the ground in the area. As for the fencing found by Thorne, and later himself, along Mahaney's eastern boundary, including Goulden/Kimbrell's section, Hall opined it to be the demarcation of their properties with its origins as a boundary fence between what had been William Doane's property and the property squatted on by George Egbert Hamilton and Leslie Hamilton.

[155] Hall was clear that given the nature and extent of the physical evidence of wire fencing on the ground in 1983, supported by his findings in 1998-99, he did not support a projection of the common line from any point south of the north end of the old wire fence that Thorne exhibited. Thorne's fence extended 1,349 feet from a baseline as shown on previous surveys at Mahaney's southern limit, northerly 420 feet along the length of the adjacent Hagar lands, and then along a partial section of Bower's land (the Thorne extension). It ended 930 feet north of Berrigan's commencement point and 500 feet south of a found survey marker, which was associated with the adjacent Williams lands. The line then projected from the north end of the fence, northerly to the found marker; to a second found survey marker set by Thorne in 1980 at the southwest corner of Michael Murphy's land; and to a third found survey marker on the west side of Highway 404, at Murphy's northwest corner. It ran northerly along Murphy and Mahaney's common portion. Taking the bearings along Hagar's western fence line and the extension of the fence along Bower's property, Thorne's line formed a fairly straight line from the north end of the fence northerly to Highway 404.

[156] Considering the nature, length and location of existing physical evidence on the ground, Hall, like Thorne, did not rely on the MacKenney fence. Rather, he calculated a straight line between the southern end of the fence on the previous surveyed baseline of the Mahaney property and the northern end. He applied the methodology of inverse numbers, projecting the line northerly along the bearings established by the fence to the west side of Highway 404, and then back, while connecting with the three found survey markers. The inverse point at the highway does not line up with the south end of the MacKenney fence.

[157] According to Goulden, in 1983, there was no sign in the highway of the "clay hole", being Gerald DeMings's (and, pre-1964, the Hamiltons') end point along Ida Mahaney's eastern boundary. Thorne's 1983 Mahaney plan depicts a building labelled "old school" to the northwest of Thorne's western line at the highway, and, at the highway, some 150 feet west of the MacKenney fence (and on the opposite side of the highway.) The 1970 Highway plan also depicts a building referenced as a "hall". No evidence was led as to the location of the 1936 "Gunning Cove School" or "Big Hill." The clay hole was not shown as physical evidence on Thorne's 1983 Mahaney plan. It was seen by Gerald DeMings in 1964, but Hall believed it was lost when Highway 404 was relocated in 1970. As a result of the 1970 highway plan, Forrester Williams, lost between ten and fifteen feet to the new highway. The survey marker placed by Thorne in 1980 at the end of the Mahaney-Williams-Murphy common boundary on the west side of the highway would have been affected by that distance, but not the bearings. Highway 404 is a limit called for in each of the Hamiltons' and Gerald DeMings's deed descriptions.

[158] Hall considered it an option to project the fence on the Goulden-Mahaney section of the boundary further along the line by calculating a straight line from the north end of the fence to the south end of the MacKenney fence, provided that the projection corresponded with additional evidence of the line beyond the north end of the fence.

[159] At issue is not only whether an old wire fence served as a boundary line between the adjacent properties, but whether that fence, or remnants of it, ever existed so that this determination can be made. For Hall and Berrigan, the existence of the fence governs the methodologies for their prolongation and ultimate placement of the line. Also relevant is whether the "peaceful acceptance" of Thorne's line affords better evidence of where the proper line should be in the circumstances, as per *Nicholson v. Halliday* (2005), 248 D.L.R. (4th) 483 (Ont. C.A.).

[160] The concept of protraction (or prolongation) of a fence line is discussed in James F. Doig, "Settlement of Boundary Uncertainties," in Canadian Council of Land Surveyors, *Survey Law in Canada* (Carswell, 1989). Discussing *Charbonneau v. McCusker* (1910), 22 O.L.R. 46 (C.A.), Doig writes, at §8.68:

> ... Where the line formed by the protraction of a fence has been held to constitute the boundary line there was always a line run, put, or marked out, and observed and acted upon by each party exercising acts of ownership according to it; and it was this observing of the line that was decisive and not the line claimed being the continuation of the fence...

[161] Doig also refers to *Belyea v. Belyea* (1857), 8 N.B.R. 588 (C.A.), where (in Doig's words) the parties, as adjoining owners,

> had, over a period of 20 years, occupied their lands in the front part of their properties according to a certain fence that was never extended to the rear. The front part was cleared land while the rear was uncleared. In the absence of actual possession up to any line in the uncleared portion it might be considered that the parties intended to hold according to the projection of the line so fenced. [Doig at §8.68.]

[162] Nothing in these authorities leads me to conclude that prolongation would be inappropriate in this instance. The surveyors did not concern themselves with Thorne's 1980 survey work or the found markers. Berrigan was not called on rebuttal to respond to Hall's reasoning on inverse numbers.

[163] ***Did the fence exist?*** Based on the evidence of Hall and the statutory declaration of Norine Wildman, fences and stone walls were never mentioned in the deed description of the Mahaney property, nor were they referred to in the deed descriptions of any conveyances associated with the 20-acre Hamilton lot, including the subsequently reserved out Gerald DeMings lot and subsequent northern subdivision lots. During Berrigan's observations in 2002 and 2007, the only fencing he saw along the shared Goulden western boundary section was new.

[164] Mr. VanBuskirk stated that fencing existed in 1971, when he began working with Manley Goulden around the eastern boundary of "Aunt Ida" Mahaney's property near Hamilton's south limit. This is supported to a degree by Charles Bower, who, without providing specifics, recalled fencing on his grandfather George Egbert Hamilton's property when he was a child in the 1950s. Brian Ricky Rapp recalled that around 1996, when the Dearman survey was completed and Goulden was relocating his fence, old fence remnants still existed along the shared boundary. Hall said that during his survey work for the Land Surveyor's Association in 1998-99 he found old wire fence remnants on Goulden's boundary with Mahaney, to a length of some 590 feet, not the 900 feet or more of fence that

Thorne marked on his 1983 Mahaney plan, and not the 220 feet of fencing that Thorne marked a month later on his April 1983 plan of Goulden's property. VanBuskirk did not recall remnants in 1998.

[165] Any evidence of existing old wire fencing on the shared boundary conflicts with Goulden's testimony. Thorne's Mahaney survey showed at least 900 feet of found physical evidence of fencing on the boundary. Two similarly-marked existing fence lines were acknowledged as such and intersected at Goulden's southwest corner. Subsequently, some 590 feet of old fence remnants were identified in 1998-99.

[166] All this evidence essentially confirms the oral evidence of the existence of the fencing. As such, I reject Goulden's suggestion that Thorne, after a year of surveying on Mahaney's property, and after surveying in the area of the north end of the common boundary since 1980, for no apparent reason and without any physical basis, extended an acknowledged 420-foot fence line by marking it as over 900 feet. It appears that there was activity involving part of the old fence on the common boundary line in April 1983. By 2002 there was no trace of any old wire fence or its remnants. I do not accept Goulden's position that the fence did not exist and that he did not see the fence Thorne depicted on his 1983 survey plans.

[167] ***Is the fence a boundary?*** The next question is whether the fence as found on the ground by Thorne and later confirmed in part by Hall was one that delineated the boundary and was the best available evidence of the original running of the line between the two lots. The relevant criteria are found in *Nicholson, supra*, as well as in Berrigan's opinion. They include such considerations as the legacy of the fence itself, its construction, location, history (including acceptance by subsequent owners), and conformation with deed descriptions, previous survey plans and Crown grants.

[168] The location of the fence found by Thorne cannot be considered simply as having been for conventional purposes such as containing cattle. It was so close for such a length to an alleged boundary that its purpose as a boundary fence should be at the forefront. Intentional offsetting would be unlikely, given the nature of the land to the west.

[169] The fencing was made of old wire. It ran a quarter-mile, mostly in a straight line. It started with a 435-foot section along Mahaney's line, running from a southern "baseline as shown on previous surveys." This was in keeping with the rectilinear and north-south nature of other property lines in the area. Where Goulden's and Mahaney's shared section (the Thorne extension) began, besides being an extension of a fence section opined to be an existing fence line, it was also the intersection of a fence opined to be an old existing west-east fence line that delineated Goulden's southern boundary and Hagar's northern boundary.

[170] On both his Mahaney and Goulden plans, Thorne continued the fence with a prolongation line on bearing close to the last section of the fence until the line on the Mahaney survey, having extended to two found survey markers, reached the northern limit 2534.49 feet away at Highway 404, at the third found survey marker. On the Goulden survey the line projected past the set intersection of Goulden's northern line to the first found survey marker some 139 feet away, close to the bearing which the straight fence established. This was supported by evidence on the ground not available to Hall and, like the fence, not available to Dearman and Berrigan.

[171] The 900-foot Thorne extension of fencing on the Mahaney plan covered approximately a quarter of the distance to Highway 404, the northern limit in Hamilton's and Gerald DeMings's descriptions. The 1340 scaled feet of fencing provided for a third of that distance. The greatest distance between Dearman's line and Thorne's was 15 feet.

[172] The projection of the line created by the fence found by Thorne in 1983 extended along the western boundary line Thorne had run for Murphy in 1980. As Mr. Oswald testified, subsequent purchasers of land from Oswald south of Murphy, including MacDonald, relied on this, as well as other survey work. This projected and surveyed boundary section has been accepted and acquiesced in by all of the abutting landowners, including Mahaney and Kimbrell to the north, for some 28 years prior to this proceeding. In my opinion, this evidence of the boundary and of peaceful acceptance is relevant and informs the analysis of the fence's purpose as delineating a boundary.

[173] The limited Mahaney property description caused Hall to turn to the physical evidence on the ground. The 1957 quit claim deed description has the

property conveyed to Herbert Goulden, and then Ida Mahaney, covering 50 acres and extending north to south from Gunning Cove to the lands of the Estate of John DeMings. Although it is not specified, this would of necessity require crossing Highway 404. No fences or stone walls were referenced in any deed description in evidence relating to the disputed boundary.

[174] By confirming Dearman's projection line to the MacKenney fence, Berrigan essentially treated the fence as additional evidence of the line beyond the established commencement and projection points, at the north end of some 420 feet of existing fence line found by Thorne and Hall along Mahaney's eastern boundary where it intersects with Goulden's southern boundary. Mahaney's 1957 deed description identifies a natural boundary – Gunning Cove – as the northern boundary, for running Mahaney's eastern line from and, western line to, before meeting at the start. The only plan in evidence is Thorne's 1983 Mahaney plan, which provides an insert of two Mahaney lots located between Gunning Cove and Highway 404. The only Mahaney property line extending to the cove north of the MacKenney fence is not a projection of it; rather, it is a line some 100 feet or more to the west of it, on the other side of Fort Point Road.

[175] The MacKenney fence starts on the eastern side of Highway 404, extending some 900 feet before attaching to the stone wall for another 125 feet and ending at Fort Point Road, which runs east from Highway 404. As such, the placement of Mahaney's line running south of Gunning Cove is anything but straight. The section extending south from the cove is offset from the MacKenny fence, not in line with it, and is on the other side of Fort Point Road. The MacKenney fence does not line up with Mahaney's western line at the highway. On Thorne's 1983 Mahaney plan, before Mahaney's western line meets the west sideline of Highway 404 it angles some nine degrees to the east and meets the southern end of a stone wall that continues north at the same angle until it meets the highway, which is not parallel with the MacKenney fence. No deed calls for those lines to be parallel to one another and no plan provides that information. There is no evidence that the MacKenney fence has anything to do with the line in question. No survey information, deed description or *viva voce* evidence indicates a relationship between the MacKenney fence on the eastern side of Highway 404 and any property on the western side. There is no evidence of what the MacKenney fence is meant to establish between the highway and Fort Point Road, where it ends.

[176] Berrigan's comments about there being no "black and white" answers with respect to fencing, and no difference in how fencing and stone walls are considered, equally applies to the MacKenney fence. This is especially the case when there is a void of evidence beyond acknowledging it in 2007 to be an old fence and stone wall, as per Berrigan's plan and evidence.

[177] Both Berrigan and Hall were clear that in the surveyor's hierarchy of evidence for determining boundary lines, there is no difference between stone walls and fences and that they do not prefer one over the other. Thus Berrigan's use of the word "effectively" when asked if Dearman's line was a projected line between stone walls at either end. Although stone walls may last longer, they are no more important, unless, according to Hall, they are side by side. Neither expert assigned any stone wall the priority of an original monument or, more to the point, suggested that a stone wall was an original monument for the purpose of the hierarchy of evidence, a fact relied upon by plaintiff's counsel in argument.

[178] As noted earlier, the Court of Appeal stated in *Podgorski v. Cook*, *supra*, that the "application of the 'hierarchy of evidence' and related survey principles would initially be a matter for the expertise and opinion of the surveyors in question. So, for example, whether monuments were 'original' or whether 'fences or possession' can be reasonably related back to the 'time of original survey' would be matters of expert opinion for a surveyor" (para. 20). In that case the court specifically noted that determining whether a monument was original is a matter for expert opinion. In relying on *Podgorski*, I am mindful of the comments in *Kolstee v Metlin*, *supra*, that a"surveyor is but an expert who conducts a survey and, in so doing and in reporting to the court, must be guided by the legal principles developed by the courts over the years. A trial judge is not locked into the opinion of a surveyor if it does not accord with the judge's interpretation of the deed applying well established legal principles" (para. 100).

[179] After original monuments, the next highest-ranking category of evidence cited by Dodd J. in *McPherson v Cameron, supra,* is "lines actually run and corners actually marked at the time of the grant." Treating the hierarchies in *Nicholson*, *supra*, and *McPherson*, *supra*, as congruous, then "original monuments" refers to any physical evidence placed at the time of the grant for the specific purpose of marking the boundary, not just any existing structure at the time of the grant.

[180] In this case, I accept the opinions of the surveyors and do not assign the stone wall the priority of an original monument. Whether the commencement point is Goulden's southwest corner or the projection from the north end of the boundary fence found by Thorne, to conclude that the MacKenney fence has any relationship to the boundary in question is purely speculation in view of the evidence.

[181] On the question of parallel boundaries, the court in *Naugle v. Naugle* (1969), 1 N.S.R. (2d) 554 (S.C.T.D.), affirmed at 2 N.S.R. (2d) 309 (S.C.A.D.), cited, at 560, *McIsaac v. McKay* (1915), 49 N.S.R. 476 (S.C. *in banco*), as authority for the proposition that "as between an old fence line and any survey made after the original monuments, if any, have disappeared, the fences are by far the best evidence of what the lines of a lot actually are and further that, in so far as possible, regard should be had for the parallel lines setting the boundaries of adjoining property owners."

[182] As noted earlier, the application of the "hierarchy of evidence and related survey principles" is initially "a matter for the expertise and opinion of the surveyors in question" (*Podgorski*, *supra*, at para 20), subject to the relevant legal principles (*Metlin*, *supra*, at para 100). Hall did not dismiss parallel boundaries as a principle for controlling the direction of a line in circumstances where physical evidence on the ground was lacking or had come to an end; certainly, context mattered. Berrigan, too, concurred that it was not a fixed approach in that, although he believed it to control the northern line he was proposing, he acknowledged that such an opinion "is always subject to question." Berrigan's testimony as to there being no straightforward answer to which line is to be preferred and as to not being sure he could provide a straightforward answer to why he chose one over the other, although he did choose and elaborate, suggests that, in these circumstances, no fundamental error in principle has occurred.

[183] ***Conclusion on the western line.*** Considering the evidence as a whole, I conclude that the Thorne line rather than the Dearman line is Goulden's proper western line and is the common line between Goulden and Kimbrell. It is in accordance with an old wire boundary fence, now no longer present on Goulden's section, representing the best available evidence of the original running of the line between the two lots, not a fence of convenience. It also accords with established

survey methodology appropriate in the circumstances. Kimbrell, VanBuskirk and MacDonald established the bearing to be followed for the disputed boundary by virtue of the fences that do exist and did exist at the time of the original survey by Thorne.

THE RIGHT-OF-WAY

[184] I have resolved the conflicting claim of ownership of the disputed land to the north in favour of VanBuskirk and MacDonald. They therefore own land crossed by the Pit Road, over which they recognize a right-of-way, as do the adjacent Kimbrells and Rapps. Neither the old or new relocated sections of the road were surveyed. Hall's plans reveal a short section of the Pit Road also crossing Goulden's property to the south of the line BY-AX. The road crosses Goulden's northwest corner and his boundary line with Kimbrell in order to reach the Kimbrell and Rapp lands from Highway 404, across the VanBurskirk and MacDonald lands. Goulden disputes the existence of a right-of-way over his property.

[185] The Kimbrell, Rapp and VanBuskirk property owners (the claimants), then, seek recognition of a prescriptive right-of-way across the northwest corner of Goulden's property. There is no grant of a right-of-way in any deed. The question is whether the usage of the alleged right-of-way by the claimants and their predecessors has been open, notorious, continuous, unobstructed and without permission of the alleged servient owners, Goulden and his predecessors, for a period of 20 consecutive years or longer.

[186] It is clear that an easement arising by prescription pursuant to ss. 32 and 34 of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, must arise out of a period of use immediately preceding the commencement of the action: *Gilfoy v. Westhaver* (1989), 92 N.S.R. (2d) 425, [1989] N.S.J. No. 268 (S.C.T.D.), at para. 30; *Nickerson v. Hatfield*, 2013 NSSC 1, at paras. 43-46. By contrast, establishing an easement by way of lost modern grant makes no such requirement. The doctrine was described by the Court of Appeal in *Mason v. Partridge*, 2005 NSCA 44:

> 17 Mr. Mason's appeal is based on the doctrine of modern lost grant. Charles MacIntosh, *Nova Scotia Real Property Practice Manual*, at 7-21 described that doctrine as follows:

> ... The [doctrine of lost modern grant] is a judge-created theory which presumes that if actual enjoyment has been shown for 20 years, an actual grant has been made when the enjoyment began, but the deed granting the easement has since been lost. However, the presumption may be rebutted.

> 18 In [*Henderson et al. v. Volk et al.* (1982), 35 O.R. (2d) 379 (C.A.)], the Ontario Court of Appeal set out the requirements for establishing an easement pursuant to either a limitations statute or the doctrine of modern lost grant in the following passage:

> > 14. It should be emphasized that the nature of the enjoyment necessary to establish an easement under the doctrine of lost modern grant is exactly the same as that required to establish an easement by prescription under the *Limitations Act*. Thus, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was continuous, uninterrupted, open and peaceful for a period of 20 years. However, in the case of the doctrine of lost modern grant, it does not have to be the 20-year period immediately preceding the bringing of an action.

[187] Prescription requires acts amounting to adverse use or enjoyment, falling short of possession and stronger than trespass. A prescriptive right of way requires continuous use of the road by the claimant and predecessors. In an earlier decision in this proceeding (2006 NSCA 102 at para. 31) the Court of Appeal cited R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, 3rd ed. (London: Stevens & Sons Limited, 1966), at 841, on continuity of enjoyment:

> The claimant must show continuity of enjoyment. This is interpreted reasonably; in the case of easements of way it is clearly not necessary to show ceaseless user by day and night. User whenever circumstances require is normally sufficient, provided the intervals are not excessive. A claim which clearly fell on the wrong side of the line was where a right of way had been exercised only on three occasions at intervals of 12 years.

[188] Goulden claims that usage was not continuous and says the alleged right-of-way was only used when it was inconvenient to use alternate means of access. He denies that the Rapps' use was adverse, given that it was contemporaneous with temporary permissive use by the Department of Transportation. He also argues that the Kimbrells cannot have rights that their predecessors did not consent to and denied existed. He references the lack of deeded rights-of-way, including in the

Kimbrells' 2000 deed from Mahaney and the Wildmans. Further, he claims there is a lack of corroborative witnesses.

[189] Dr. David Woolnough, a photogrammetrist, provided an expert's report and oral evidence on behalf of Goulden. He gave a thorough and accurate history of access to the Rapp quarry over the old and relocated new sections of the road to the pit. He discussed the use made of the road through a series of photographs, which provide snapshots in time for August 2, 1945; July13, 1955; May 29, 1968; October 10, 1971; June 11, 1978; July 24, 1989; August 18, 2000 and September 8, 2007. Where recollections differ from the findings in Dr. Woolnough's report, I accept Dr. Woolnough's conclusions.

[190] Dr. Woolnough confirmed that there was consistent commercial use of both the old and new sections of the Pit Road from the 1960s through to 1989. Photographs covering the period 1971-1989 reveal heavy use of the quarry and indicate that the road was 16 feet wide, at a minimum, in order to accommodate the resulting heavy truck traffic. While no quarry and no road were evident in 1945 and 1955, the photos show that the quarry was developed by 1968, and that access to it was from the highway by the old pit road.

[191] These findings from the photographs coincide with Gary Rapp's and Charles Bower's recollections of use of the quarry in the early and mid 1960s. From 1962, Gerald DeMings and his successors experienced the gravel trucks and used the section of the old road near the highway as their driveway. The 1968 photo shows signs of abandonment of the old section. Some time between 1968 and 1971, the old section of the road was abandoned and access to the quarry was by way of the new relocated extension to the south. By 1971, use of the new road was quite intense, with gravel visibly spreading into the highway from trucks making the turn. Between 1978 and 1989, the same intensity of use as in 1971 was present. In July 1989, it was "just as fully used." There were some trails beyond the quarry, but they were not accessed by vehicles and certainly not by wide load trucks, given the lack of gravel and their narrowness.

[192] Dr. Woolonough concluded that a change occurred sometime between the photographs of July 1989 and of August 2000. The 2000 photo shows a road seven to eight feet wide, able to accommodate trucks and all-terrain vehicles, but not large trucks. The road was no longer gravelled. It did not appear to be kept up

as an access route to the quarry. Elaborating, Dr. Woolnough said that in the 2000 and 2007 photos, the road resembles a forest trail used to access lands for lumber and recreational purposes. He opined that over a span of two to three years, the covering could change the calibre of the photograph such that one could not tell that it was not necessarily gravel on the surface.

[193] Dr. Woolnough's evidence, including his interpretation of the photographs prior to July 24, 1989, provides for some 18 years of heavy usage and maintenance of the 1970-1971 new road to the pit. This directly contradicts Goulden's evidence. It is implicitly consistent with and in part corroborative of the evidence of Gary Rapp that he graded the new road on an as-needed basis, every two or three years, from the mid-1970s until he was prevented from doing so by Goulden in 1998. He used a 12-foot wide blade. The maintained travel portion was some 17 or 18 feet wide.

[194] Further support is found in Goulden's own admission that he did no maintenance work to the road and that the sides of the road were trimmed back. Brian Ricky Rapp confirmed that grading continued into the 1990s. He linked the circumstances to his mother still being alive and the road being good in 1995, when 24 tandem loads of pit gravel were removed to build Cory Goulden's new driveway.

[195] The section of the Pit Road on Goulden and VanBuskirk's property, running from the common Mahaney-Kimbrell and Hamilton-Goulden line to the fork in the road where the relocated new section commences, is the old road. Originally the old road was an ox trail used for hauling wood before being upgraded by the government when the quarry was first opened in the early 1960s, according to the evidence of Charles Bower, Gary Rapp and Dr Woolnough. As such, the entire section of the road that is on lands owed by Goulden, and the pre-fork section on VanBuskirk's, existed and was in use, along with the rest of the old road, over 38 years before the blockages in the late 1990s and into the 2000s. The new section was an extension of the old road that always accessed and egressed from the highway over the lands of Hamilton-Gerald DeMings and their successors, in order to travel to the quarry pit on the Rapp land or to haul wood. In the process, they crossed Goulden's and the Kimbrells', and their predecessors', lands.

[196] Prior to August 1998, the VanBuskirks were acting as agents for Ida Mahaney, Norine Wildman and Brian and Gary Rapp "with respect to a road right-of-way to lands in Gunning Cove," according to a letter to Goulden from their counsel, Celia J. Melanson, on March 12, 1998. As agents, the VanBuskirks were attempting to advance the positions of Ms. Mahaney and Ms. Wildman at that time. Ms. Melanson wrote that she understood that there was "an existing roadway from the public highway" to the Mahaney, Wildman, and Rapp properties, which had "been in existence and used with consent by those land owners and their predecessors in title for over forty years. Given this fact, it is my opinion these landowners have an existing right-of-way over the road. I am advised that you have cut off this right-of-way." She went on to advance an offer of $500.00 for a deeded right-of-way "[i]n order to resolve this matter expeditiously and as cost effectively as possible for all parties involved..." (I note the use of the word "consent" by Ms. Melanson. This remark, whatever it may mean, does not displace the evidence going to lack of permission.)

[197] There is no indication that Ms. Mahaney ever retracted the VanBuskirks' authority. As for Ms. Wildman, her counsel, Donald G. Harding, indicated in a letter to the VanBuskirks' counsel on August 25, 1998 that "at this time ... she no longer wishes your clients to act as her agents." It appears from this letter that Norine Wildman was under the mistaken impression that there had been a survey of her lands done for the Vanbuskirks. It is evident from the correspondence, however, that Ms. Wildman had previously accepted that there was a prescriptive right-of-way on her and her mothers lands, as overseen by her agents. Lawrence Wildman's 2004 affidavit does not convince me otherwise; in any event, the Vanbuskirks did not speak for him. Nor, it appears from Mr. Hardings's letter, was Mr. Harding representing him. Unlike his mother, Mr. Wildman, although present, neither retained Mr. Harding nor took a position through counsel in August 1998. He was documented by Ms. Melanson in January 1999 as not consenting to, or conceding the existence of, a right-of-way. Goulden was acting as caretaker for the Wildmans but not for Ida Mahaney who as of November 2000 was competent enough to convey her property.

[198] I am satisfied that the evidence of Ms. Wildman's communications to her counsel is reliable, and that it is necessary in order to bring the evidence before the court. I prefer it to Larry Wildman's affidavit. Given the position of the other two servient owners, an ordinary and diligent landowner attempting to protect his

interests would have a reasonable opportunity of being aware of the defendants' use of his land. Mr. Wildman was present during the August discussions with counsel and aware of the position of his mother and grandmother. In situations where a servient owner claims ignorance of the use of an easement, it has been said:

> Actual ignorance of the exercise or enjoyment of the alleged right will not in every case prevent the enjoyment from being as of right. There are some things which every man ought to be presumed to know. Very slight circumstances may put the servient owner upon inquiry, and if he neglects to make inquiry it may be that knowledge must be imputed to him. Where an ordinary owner of land, diligent in the protection of his interests, would have a reasonable opportunity of becoming aware of the enjoyment by another person of a right over his land, he cannot allege that it was secret. If, however, the enjoyment be fraudulent or surreptitious, it cannot support a prescriptive claim.

See *Garfinkel v. Kleinberg*, [1955] 2 D.L.R. 844, 1955 CarswellOnt 58 (Ont. C.A.), at para. 8, citing *Halsbury's Laws of England*, vol. 11, 2nd ed. (London: 1933), at 296-7, para. 537. I impute such knowledge to Mr. Wildman, as a servient owner.

[199] Mr. Harding's letter directed that there was to be "no further cutting or trespassing by anyone" on Ms. Wildman's lands, and requested that the VanBuskirks "confirm how much wood has been cut to date on her lands." I accept that after further discussion, Norine Wildman allowed VanBuskirk to remove wood already cut, and settled the price on the wood cut. Agent status respecting Ms. Wildman was not reestablished, and no further cutting occurred until November 2000, when the Kimbrells purchased the property. During this time, the dispute continued over Goulden's attempts to block the road. Some cutting occurred on the disputed land. Ida Mahaney, as in the past in relation to the road, took no position with respect to Rapp's 1999 *Private Ways Act* petition over her lands. Norine Wildman and her son Larry, as noted earlier, took the position that they did not consent nor did they concede the existence of a right of way.

[200] No authority has been offered that would support the conclusion that a servient owner could revoke a right-of-way that had already been established through lost modern grant. It was clear from Ms. Melanson's letter that the owners she was representing were asserting use of the road crossing Goulden's property over a span of 40 years.

[201] I accept that as a result of contact between Brian Ricky Rapp and Norine Wildman prior to the 1999 petition, the Rapps no longer crossed over the lots. However, I find on the evidence as a whole that there had previously been no issue, nothing had been said, and there had been acquiescence by Ms. Mahaney (which continued), as well as the Wildmans, to the Rapps', VanBuskirks', Manley Goulden's, and the community's non-permissive use of the road way.

[202] Similarly, for the first time, the VanBuskirks sought permission of a heretofore indifferent (though aware) Macdonald in March 1998. At the same time, in an effort to resolve matters, the VanBuskirks – on behalf of Ms. Mahaney, Norine Wildman, and the Rapps – offered Goulden $500 for a deeded right-of-way. Nevertheless, Goulden's permission had never been sought or given in the past. Prior to 1998, according to the defendants (other than the Kimbrells), such a conflict was not contemplated. This conclusion is supported by Charles Bower's evidence of the lack of any dispute over the pit road prior to the late 1990s. The purported denial of use of the road could not displace a prescriptive right that had already arisen. In addition, I prefer Eldora Bower's evidence, or rather lack thereof, as relayed to Goulden on purchase in 1983 over placing any reliance on her declaration some sixteen years later.

[203] I conclude that sufficiency of use has been established. There were no excessive intervals until the 1998 blockages. Manley Goulden, along with VanBuskirk, cut wood on the Mahaney, later Mahaney/Wildman, lot between 1971 and 1998. The Pit Road was used to haul it out. This went on for a period of eight to ten days annually, depending on weather and equipment, and entailed supplying four or five cords to various family members, including Ida Mahaney. There was also seasonal use of the road by fishermen, preceeding VanBuskirk's 1975 commencement. They travelled to and relied on a vein of sand on the Rapp property for their cement pot ballast at least a couple times a year. Removal of sand also occurred for other purposes, like basement floors. Seasonal use by locals included using the road to go berry picking and hunting along with use by ATV drivers.

[204] Other seasonal use of the old road in the 1960s and the new section of the road in the 1970s included the Rapps annually cutting and hauling out some six cords of firewood per family over a two week period. (This wood came from the

wood lot where the quarry pit was also located.) The quarry development in the 1960s resulted in regular gravel truck usage of the old road until around 1968, and intense use of the new road into the 1990s. Gary Rapp continued to maintain the road by grading and cutting back growth until the blockages. This action by Goulden necessitated an effort through Celia Melanson to affect a expeditious and cost-effective resolution. Neither VanBurskirk nor any of the parties for whom he acted as agent in making the March 1998 money offer for a deeded right-of-way from Goulden conceded that there was not already a right-of-ways in existence.

[205] Usage of the road way by the Rapps must be without permission of the landowners, or their claim to a prescriptive right will be defeated. Goulden says the Rapps use could not be adverse since it was contemporaneous with permissive usage by the Department of Transportation; he suggests that this usage was somehow transferred to the Rapps. This may be true for occasions when Gary Rapp was employed to haul gravel for the Department. However, Goulden offers no authority suggesting that this would otherwise be the case, and that repeated temporary use of the road by the Department for specific purposes connected to road work would nullify usage by neighbouring and proximate owners that would otherwise amount to a prescriptive right-of-way.

[206] ***Conclusion on right-of-way.*** I am satisfied that the criteria for a prescriptive right-of-way have been established. Goulden is a servient landowner, as the Pit Road crosses his northwest corner. The quieting is subject to the right of way. Goulden's claim for trespass and damages for same is dismissed. The defendants seek no damages. Damages sought by Goulden for costs, conversion and slander of title are also dismissed.

RELIEF

[207] Accordingly, I grant a Certificate of Title that entitles Goulden to all lands within the described boundaries:

> (1) The boundary between Michael Goulden and the lands of James and Betty Kimbrell (Goulden's western boundary) is the “Thorne Line” as shown on the 2008 plan of survey by Everett Hall, NSLS. The Dearman and Berrigan survey markers are ordered to be removed at Goulden’s expense

by Everett Hall or his NSLS delegate, unless the parties agree as to another qualified NSLS surveyor.

(2) The boundary between Goulden and the lands of Clifford and Ardith VanBuskirk and Joseph and Louanne MacDonald (Goulden's northern boundary) is line BY-AX, as shown on the 2008 plan of survey of Everett Hall, NSLS. The Dearman and Berrigan survey markers are ordered to be removed at Goulden's expense by Everett Hall or his NSLS delegate, unless the parties agree as to another qualified NSLS surveyor.

(3) The boundary between Goulden and the lands of Charles and Mary Hagar (Goulden's southern boundary) is the line as shown on the 2007 plan of survey by Lester W. Berrigan NSLS, and on the 2008 plan of survey of Everett Hall.

(4) Goulden's property to the west of Highway 404 and south of the line BY-AX includes a portion of VanBuskirk's Lot 1, if unencumbered, as conveyed to him by Melda Langille. The eastern boundary of Goulden's lands to be quieted (Goulden's eastern line) is the line as shown in part on the 2008 Hall plan of survey. It is abutted to the east by Highway 404, then by Goulden's lot obtained from Adam Hamilton, and then by the abutting non-participating owner David Lloyd Williams. If the property south of BY-AX that VanBusirk purchased from Melda Langillle is encumbered, VanBuskirk shall convey it to Goulden free and clear of all encumbrances, using Hall's 2008 plan for the description of that portion.

(5) A prescriptive right of way exists over the road known as the Pit Road. From Highway 404 it crosses MacDonald's, VanBuskirk's, Goulden's, and Kimbrell's lands in order to reach the Rapp properties. The right to use same is by foot and vehicle. Its width is a minimum of sixteen feet to a maximum of eighteen feet.

(6) Goulden is ordered to remove any obstacles, such as rocks, boulders, lobster traps, farm equipment etc., that he placed on the road, or had placed on the road and are now located on MacDonalds' or VanBuskirks' land, by September 30, 2013. Should Goulden fail to remove these obstructions, the

defendants are permitted to remove same, the cost of which shall be borne by Goulden.

[208] If the parties are unable to agree on costs and disbursements, I will receive written submissions no later than September 30, 2013.

Stewart, J.