

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Potter*, 2020 NSSC 369

**Date:** 2020-12-05

**Docket:** CRAD 498724

**Registry:** Annapolis

**Between:**

Her Majesty the Queen

v.

Roland Chester Potter

**Judge:** The Honourable Justice John A. Keith

**Heard:** November 5, 2020, in Digby, Nova Scotia  
November 6, 2020, in Annapolis Royal, Nova Scotia

**Counsel:** David Curry, Crown attorney  
Roland Potter, self-represented Defendant

**By the Court:**

**BACKGROUND**

[1] Roland Potter stands charged with:

1. Criminal harassment of the complainant Brandy Andrews or members of her family contrary to section 264 of the *Criminal Code* based on certain events alleged to have occurred between May 1, 2020 and June 11, 2020 (Count #1);
2. Three counts of failing to comply with the terms of his Recognizances by “communicating with [the complainant] Brandy Andrews contrary to Section 145(3)(a) of the *Criminal Code*.” The three offences were alleged to have occurred:
  - (a) “between the 15<sup>th</sup> day of May 2020 and the 25<sup>th</sup> day of May 2020.” (Count #2);
  - (b) “on or about the 15<sup>th</sup> day of May 2020” (Count #3); and
  - (c) “on or about June 2 2020” (Count #4)

[2] At trial, I allowed the Crown to amend the Indictment so that Counts #3 and #4 were not confined to a single day but were expanded to a date range “between the 1<sup>st</sup> day of May 2020 and the 11<sup>th</sup> day of June 2020”.

[3] To understand these charges, it is necessary to understand the context within which they arose. The accused, Mr. Potter, and the complainant, Ms. Andrews, are neighbours on Clementsvalle Road, just outside the small town of Annapolis Royal. The charges are rooted in an ongoing feud over ownership to a 50’ x 300’ strip of land located behind Ms. Andrew’s home (the “**Disputed Lands**”). The Disputed Lands overlap what Ms. Andrews claims as her backyard and what Mr. Potter claims as adjacent farmland. The following drawing is neither to scale nor intended to be perfectly accurate, but it helps orient the reader as to the location of the Disputed Lands where the offences are alleged to have occurred.



[4] There is a civil action to settle this fight and definitively establish the boundary line separating the Andrews backyard from the Potter farmland. At this stage, neither the Potter family nor the Andrews family are inclined to compromise or give any ground. At the end of the day, they cannot both be right. It remains to be seen who, if anyone, will truly feel as if they prevailed when the boundary line is finally determined. Pending that, a certain siege mentality has descended.

[5] By the spring of 2020, some of the most unattractive traits so often associated with fights over land were on full display. Seething resentments festered to the point where people assumed the worse and acted with an almost inexplicable vehemence given the comparatively modest amount of property at stake (a little more than 1/3 of an acre of undeveloped grassland in rural Nova Scotia). In the end, apparently commonplace events (e.g. mowing the Disputed Lands or operating a tractor on adjacent farmlands) came to be viewed with suspicion and eventually culminated in these proceedings against Mr. Potter.

## FACTS

[6] Mr. Potter's home is located at 3565 Clementsvale Road. Ms. Andrews and her family live across the road at 3572 Clementsvale Road.

[7] Even though Mr. Potter lives across the road, his farmlands include a parcel directly behind Ms. Andrews' home. To access this parcel, Mr. Potter has the benefit of a 20-foot right of way which is basically a dirt road that runs up the centre of Ms. Andrews' property. The right-of-way bends near the end of Ms. Andrews' property and continues onto the Potter farm lands, passing in front of a

Quonset hut (a semi-cylindrical steel structure) that Mr. Potter built to store equipment.

[8] Ms. Andrews also uses the right of way as her driveway. Because the right of way serves this dual purpose, Mr. Potter and Ms. Andrews frequently interact. As will be seen, the confrontations which gave rise to these criminal charges occurred on or near this dirt road; where Mr. Potter and Ms. Andrews were most likely to encounter one another.

[9] The more specific events relevant to the charges against Mr. Potter are summarized in the following timeline:

## **2014**

[10] Ms. Andrews acquired her home at 3572 Clementsvale Road. Initially, her relationship with the Potters was cordial. Ms. Andrews testified that Mr. Potter installed what appears to be a pole at the back corner of the Disputed Lands and she paid Mr. Potter to plow snow from her driveway. It appears that the seeds to the current turmoil were somehow sown when Ms. Andrews decided that she would no longer use Mr. Potter to plow snow from the driveway because, perhaps, Mr. Potter was too expensive. The details were unclear and relevant only to the extent that the hostility which eventually arose appears to be totally incongruous with a comparatively trivial disagreement over the costs of snow plowing.

## **OCTOBER 3, 2018:**

[11] Ms. Andrews obtained a Peace Bond against Mr. Potter. Ms. Andrews testified that the allegations which precipitated granting the Peace Bond included threats which Mr. Potter was said to have made against Ms. Andrews' sons and her home. That said, Ms. Andrews acknowledged that the criminal charges stemming from these incidents were ultimately dismissed. Although this evidence pre-dated the charges in this proceeding, I allowed this evidence as part of a *voir dire* heard prior to the main trial. I deemed the evidence to be prior conduct relevant to the charge of criminal harassment contrary to section 264 of the *Criminal Code*. More specifically, I determined that the evidence was relevant to the issue of whether Ms. Andrews feared for her safety during the time frame covered by the Indictment and, as well, whether any such fear was reasonable in the circumstances. That said, for his part, Mr. Potter generally denies ever directly speaking to any member of the Potter family after he was under a Peace Bond or Recognizance with one

exception: he recalled speaking to a relative of Ms. Andrews who was apparently delivering a load of wood to the Andrews' residence.

### **SHORTLY AFTER DECEMBER 25, 2019**

[12] Ms. Andrews posted a message on a website dedicated to the memory of a young girl who died after being hit by a tractor driven by Roland Potter. Nobody contested the fact that the event was a tragic accident. Mr. Potter was certainly not criminally responsible for her death. Ms. Andrews testified that she posted her message soon after Christmas, 2019. She recalls this date because she was reacting to an incident where another unnamed adult in the community attacked her children. Apparently, this other unnamed adult blamed Ms. Andrews' sons for running a 4-wheeler off the road even though, Ms. Andrews says, Mr. Potter was actually responsible. In any event, this message was introduced by Mr. Potter primarily for the concluding sentences where Ms. Andrews wrote:

That's what this is all about. Roland and Vivian Potter want my land. Well guess what...your [*sic.*] aren't fucking getting it you useless murdering pieces of shit! You will NOT run us out of our home! You will fucking die of old age before I move from this place. And when the property line issues is settled there will be a gate. A big one and you will not trespass on MY property. Fight fire with fire. If you do NOT own the property behind me, you do NOT have a right of way through my yard, so I suggest you stay the hell out of it because I will be calling the RCMP. This is private property!!

### **SEVERAL OCCASIONS BETWEEN MAY 1, 2020 AND JUNE 11, 2020**

[13] Within the relevant time period (May 1 – June 11, 2020), Ms. Andrews testified that there were numerous times when she would be outside working, and Mr. Potter would drive his backhoe, back and forth on his property. She said that Mr. Potter would sometimes stop (again on his property) and watch her while she was working. Ms. Andrews recorded two videos from her cell phone that, she testified, exemplified this behaviour. Both videos were taken during the relevant time frame:

1. In the first video, Mr. Potter can be seen driving a backhoe on the other side of a line of trees which is behind the Andrews home. This line of trees (and the land where Mr. Potter is driving the backhoe) is not on either the Andrews property or the Potter property. It is on land owned by a third party who, Mr. Potter testified, asked Mr. Potter to complete some work. At all times, Mr. Potter would have been at

least 60 feet or so away from Ms. Andrews. The Crown replayed the video and stopped at certain points to pose questions to Ms. Andrews. At about the 20-second mark, the Crown paused the video and asked Ms. Andrews to comment on the frozen image. Ms. Andrews had no further comment beyond observing that Mr. Potter could clearly be seen by his backhoe, parked near the Quonset hut. The Crown then invited Ms. Andrews to approach the screen and asked for further comment. Upon closer inspection, Ms. Andrews observed that Mr. Potter had his fist in the air and was looking at Ms. Andrews. Later in the same video (at about the 1:27 mark), the Crown repeated this process and Ms. Andrews observed that Ms. Potter was waving at her. Then at the 2:11 and 4:38 mark of the same video, Ms. Andrews commented that Mr. Potter was staring at her.

2. In the second video, Ms. Andrews was again gardening outside near her basement door, and she testified that Mr. Potter stopped to stare at her.

#### **APPROXIMATELY MAY 15 – 17, 2020**

[14] Ms. Andrews was working outside her home in one of her garden boxes. Mr. and Ms. Potter drove their truck up the right of way. Mr. Potter was driving and his wife, Vivian Potter, was in the passenger seat. They stopped in front of the Andrew's home near where Ms. Andrews was gardening and, Ms. Andrews testifies, just stared at her. Ms. Andrews approached the truck and asked them to leave. She reminded Mr. Potter that he was under an Order to have no communications. Ms. Potter took photographs of Ms. Andrews as she approached the truck. The photographs were marked as Exhibits in evidence. During cross-examination, Ms. Andrews said that she was anxious at the time but instinctively approached the Potter vehicle to protect her property and her family. Ms. Andrews testified that, as Mr. Potter drove off, he reminded Ms. Andrews that she could have bought the Disputed Lands for \$50,000.

[15] Ms. Andrews reported the incident to the Bridgetown detachment of the RCMP and spoke with a Constable Edmonds. Pausing here, I note that Constable Edmonds was involved in many of the incidents leading up to the charges being laid against Mr. Potter. Indeed, Constable Edmonds was the main police contact with Ms. Andrews. By contrast, another officer at Bridgetown detachment,

Constable Jeremy Smith, was the main contact between the police and the Potters. Constable Smith testified at the hearing.

[16] Constable Smith testified that he spoke with Vivian Potter immediately after this event. I find that this initial discussion occurred on May 17, 2020, consistent with the evidence. During this conversation, Constable Smith told Ms. Potter to stay off the Disputed Lands and to keep the peace. Constable Smith noted that Ms. Potter began to speak over him, and he acknowledged that the conversation ended when he simply hung up on Ms. Potter.

**MAY 20, 2020:**

[17] Ms. Andrews was working as a licensed practical nurse at Mountain Lea Lodge in Bridgetown, Nova Scotia. At around 6 p.m., her children called to report an incident. They told her that three members of the Potter family (Mr. Potter, his wife Vivian Potter and their son Derek) travelled over to the Andrews' back yard (or what they claim as their back yard) and began to install fence posts and wooden "no trespassing" signs where they believed the rear property line of Ms. Andrews' property should be located. The fence posts were installed parallel to the back of the Andrews' home and within about 10 feet of the rear concrete entrance to the Andrew's basement. At the time, the Potters and the Andrews were already engaged in litigation over the location of this rear boundary line. As such, the Potters' actions on this day were undoubtedly provocative.

[18] Ms. Andrews' son, Simon, was home at the time. Simon was about 17 years old and much younger than either Mr. Potter, Ms. Potter, or their son Derek. Simon Andrews testified at trial. He said that when he saw the Potters installing fence posts, he left the house and engaged them. Simon returned to the house but began listening to the Potters from a window in the house. He decided to return to the back yard and use his cell phone to record the event. The video recording was marked as an Exhibit. It shows the Potters installing the fence. Any discussion essentially involved a running commentary between the two sides but did not involve any actual threats beyond, perhaps, Mr. Potter (who is elderly) asking whether Simon was afraid of a 70-year-old man. There was no sign of violence or behaviour which was physically threatening.

[19] When alerted to this latest incident, Ms. Andrews left work immediately and returned home. She stopped by the Bridgetown detachment of the RCMP along the way to complain about Mr. Potter's most recent actions. Upon arriving home, Ms. Andrews immediately removed the fence posts and "No Trespassing" signs.

She tossed them back on to the Potter property, in a pile beside the Potters' Quonset hut.

[20] Ms. Andrews called the Bridgetown RCMP again and spoke to Constable Edmonds. She said that Constable Edmonds agreed to speak with the Potters. Ms. Andrews testified that Constable Edmonds called back to confirm that the police spoke with the Potters and hoped they had reached an agreement effectively in the form of a "cease fire" to keep the peace until the boundary dispute could be peacefully resolved in Court. As indicated, Constable Edmonds did not testify. However, his typed notes were introduced into evidence by consent. Constable Edmonds' note dated May 20, 2020 confirms a telephone conversation with Ms. Andrews who apparently "stormed off" after being told that there was little the police could do while the underlying issue of ownership remained unresolved. Constable Edmonds' note also recorded a subsequent conversation between Vivian Potter and Constable Smith. Constable Smith confirmed this conversation with Ms. Potter. He said that he again emphasized to Ms. Potter the need to "basically keep the peace"; stay away from the Disputed Lands. He told Ms. Potter to leave Ms. Andrews and her family alone. He also testified mentioning to Ms. Potter that he expected Constable Edmonds told Ms. Andrews that she should also stay off the Disputed Lands. The typed note prepared by Constable Edmonds contains the following note:

Potters were advised that they could potentially be charged for mischief should they continue their actions. Potters agreed that they would stop. Constable Edmonds spoke with Parker (Ms. Andrews) and advised her of same. Parker (Ms. Andrews) also agreed to stop mowing the disputed property and stay off it.

[21] During his testimony:

1. Mr. Potter contended that he did not communicate or engage with the Andrews family. He simply attended on the Disputed Lands accompanied by his family and began to mark his version of the boundary line with wooden stakes and bailer twine;
2. Mr. Potter stated that his decision to plant stakes in the ground was in response to a decision by Ms. Andrews to mow the lawn on the disputed property and, further, that his wife, Vivian Potter, spoke with their lawyer, Bernie Conway, before attempting to mark the line with stakes and twine. Mr. Conway testified at trial. He confirmed that he recommended installing stakes but, at the same time, did not know



about any outstanding Recognizance and would not have given this advice if he felt it would breach an existing Recognizance.

3. Following this encounter on May 20, 2020, Mr. Potter understood that the police brokered an agreement in which all sides would stay off the Disputed Lands until the boundary dispute was resolved. This included Ms. Andrews not mowing her lawn. Mr. Potter's evidence around this agreement is, as indicated, consistent with Constable Edmonds' handwritten note.

### **JUNE 10, 2020:**

[22] Footage taken from a surveillance camera located on a corner of Ms. Andrews' home was marked as an Exhibit. This video recorded Mr. Potter in his backhoe dumping a load of rock on the disputed property. Ms. Andrews testified that this footage was recorded on June 10, 2020 and that Mr. Potter was operating the backhoe about 15 to 20 feet from her house.

[23] Mr. Potter testified that the video was grainy and, to him, depicted a scene in the winter with snow on the ground. He denied dumping rocks on the property on June 10, 2020. At most, Mr. Potter says, he dumped a bucket of snow sometime during the winter but not during the time period in question.

[24] Mr. Potter further testified that any rocks which he dumped on the Disputed Lands were relatively small and were dumped there in direct response to Ms. Andrews mowing the Disputed Lands in breach of the agreement brokered by the RCMP.

### **JUNE 11, 2020**

[25] Mr. Potter dumped relatively small rocks on the back lawn. The rocks did not amount to a large mound, but they were significant in number. Upon leaving the site, Mr. Potter dropped the backhoe bucket as he was backing up thus leaving a large scrape mark on the lawn. Mr. Potter acknowledged these acts although he insisted the scrape mark was accidental. Mr. Potter re-iterated that his actions were taken in retaliation for Ms. Andrews mowing the grass on the Disputed Lands in breach of the agreement brokered by the RCMP.

[26] Ms. Andrews again contacted the Bridgetown detachment of the RCMP. Constable Matthew MacLean attended on site and took photos. Constable

MacLean testified that he photographed the rocks on the lawn and the scrape mark. The charges contained in the Indictment were laid shortly thereafter.

## **ANALYSIS**

[27] I begin with several fundamental keystones of our criminal justice system.

[28] First, Mr. Potter is not required to prove his innocence. He is presumed innocent. That presumption of innocence never abandons Mr. Potter. He can rely on it until and unless the Crown proves he is guilty at law.

[29] Second, and related to the presumption of innocence, the Crown must prove its case beyond a reasonable doubt. It is not enough to suggest that an accused "probably" or "likely" committed the offence. The burden of proof is not based on perfect certainty, but the burden is closer to certainty than to a balance of probabilities. (*R. v. McLennan*, 2016 ONCA 732 (Ont. C.A.)).

[30] Related to this second point, offences in the *Criminal Code* may be broken down into discrete elements or separate parts, and each element must be proven beyond a reasonable doubt. For example, and as will be seen below, the offence of criminal harassment is a single offence, but it is made up of 5 discrete elements. Each of the 5 elements must be proven by the Crown beyond a reasonable doubt.

[31] Third, when considering whether there is a reasonable doubt around any of the essential elements of the offence, the Court is not driven by sympathy or unfounded guesswork or imagined suspicions. A reasonable doubt must be based on reason and common sense – not some fanciful imagined assertion that bears no resemblance to reality. Reasonable doubt, if it arises, must be anchored to the evidence or lack of evidence (*R. v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.)).

## **CRIMINAL HARASSMENT CONTRARY TO SECTION 264 OF THE CRIMINAL CODE FOR THE PERIOD MAY 1, 2020 – JUNE 11, 2020**

[32] Mr. Potter is accused of criminal harassment during the time period May 1, 2020 to June 11, 2020. The harassment is alleged to have occurred at or near Ms. Andrews' home at 3572 Clementsvale Road, Clementsvale, Nova Scotia.

[33] As indicated, there are five discrete elements which make up the offence of criminal harassment. The Crown must prove each element beyond a reasonable doubt. Expressed in terms specific to this case, the elements of the offence are:

1. Did Mr. Potter either repeatedly communicate with Brandy Andrews or other members of her family; or beset or watch her dwelling house and/or engage in threatening conduct?
2. Did Mr. Potter's conduct harass Ms. Andrews?
3. Did Mr. Potter know that his conduct harassed Ms. Andrews? To prove that Mr. Potter was aware that his conduct harassed Ms. Andrews, the Crown must prove one of the following:
  - (a) That Mr. Potter actually knew that his conduct harassed Ms. Andrews;
  - (b) That Mr. Potter knew there was a risk that his conduct harassed Ms. Andrews and that Mr. Potter proceeded in the face of that risk;
  - (c) That Mr. Potter was aware of indications that his conduct harassed Ms. Andrews but remained wilfully blind to those indications because Mr. Potter did not want to know the truth. (See *R v Mandell* 2008 CarswellOnt 3196, [2008] O.J. No. 2190 at para 18)
4. Did Mr. Potter's conduct cause Ms. Andrews to fear for her own or her family's safety?
5. Was Ms. Andrews' fear reasonable in all the circumstances? In respect of this element, the Court must consider whether Ms. Andrews' fear for her safety was reasonable in all the circumstances. That is, would a reasonable person in the same circumstances as Ms. Andrews fear for his or her own safety as a result of Mr. Potter's actions?

[34] Dealing with the first element of the offence, I find that Mr. Potter's actions constituted besetting or closely watching Ms. Andrews and her family, sufficient to satisfy the first element of the offence beyond a reasonable doubt. Mr. Potter was bent on monitoring what was occurring on the Disputed Lands. By the end of May and early June, 2020, Mr. Potter closely monitored any activity on or around the Disputed Lands. It effectively amounted to continuous surveillance.

[35] I recognize that Mr. Potter had other reasons to be on or near the Disputed Lands. He is a farmer, and he owns both farmland and a storage (Quonset) hut

adjacent to the Disputed Lands. However, I am satisfied that the actions he took in May and June, 2020 far exceed ordinary and common usage and became less devoted to farming and more to ensuring a speedy response to any perceived incursion over the Disputed Lands.

[36] As to the second element of the offence, I find that Mr. Potter's actions were harassing to Ms. Andrews beyond a reasonable doubt.

[37] In *R. v. Ryback*, 65 B.C.A.C. 236 (paras 14 – 15), Southin, J.A. adopted the following quote from Murray J. in *R. v. Sillipp*, (1995), 99 CCC (3d) 394 at 406 and 418:

As to the meaning to be given various words they are capable of definition by using either case law or an appropriate dictionary definition. As an example, it would seem to me that to interpret "harass" as being synonymous with "annoy" or "vex" misses the mark. The Oxford Dictionary defines "harass" to mean: "to vex, disquiet, importune, harry, hurrie, turmoil, torment" and "to trouble or vex by repeated attacks". The Webster Dictionary contains the following definition: "to worry and impede by repeated attacks . . . to vex, trouble or annoy continually or chronically . . . to plague, bedevil, badger". In my opinion, the most appropriate synonyms are those which imply being tormented, troubled, worried continually and chronically, being plagued, bedeviled and badgered.

[38] I accept this definition while noting that this element of the offence focusses mainly on whether the actions in question were, for example, unrelenting and disquieting in nature. Questions around whether the accused knew the effect his actions had upon the complainant or whether the accused's conduct reasonably caused the complainant to fear for her safety are relevant to different elements of the offence; and arise later in the analysis.

[39] The evidence clearly demonstrates that Mr. Potter (assisted by other members of his family) was engaged in a disquieting campaign to guard their interest in the Disputed Lands by closely monitoring any activity on the property. They incessantly observed the Disputed Lands, and they focussed their attention on Ms. Andrews in particular. Mr. Potter needlessly sprung into action whenever he felt (rightly or wrongly) that Ms. Andrews or others on her property were failing to properly acknowledge their competing claims to the Disputed Lands or abide by a police-brokered agreement. Mr. Potter repeatedly overreacted. For example, he did not need to stop his truck on the right-of-way to look at Ms. Andrews. He was entitled to pass over the right-of-way. It is not a parking space. Similarly, the decision to dig holes and drop large wooden stakes on the Dispute Lands was

misguided and antagonistic - as was his decision to dump rocks on the Disputed Lands. I am satisfied that the Crown has proven the second element beyond a reasonable doubt.

[40] As to the third element of the offence, I cannot find beyond a reasonable doubt that Mr. Potter was aware his conduct harassed Ms. Andrews and it would be unsafe to convict Mr. Potter of this offence given the evidence before me.

[41] This element of the offence is broader than Mr. Potter's actual knowledge. This element is also established if Mr. Potter knew there was a risk his conduct harassed Ms. Andrews or remained wilfully blind to indications that Ms. Andrews found his conduct to be harassing.

[42] The Crown refers to Ms. Andrews' ongoing efforts to engage the police and the Peace Bond from 2018. The Crown argues that this evidence proves beyond a reasonable doubt that Mr. Potter had the requisite knowledge or was wilfully blind. Respectfully, I disagree. In my view, Mr. Potter's actions (and his knowledge as to the effects of his actions) are as consistent with other possible explanations unrelated to the alleged harassment. Certainly, the evidence is insufficient to meet the evidentiary burden which attaches to this element of the offence. I note the following:

1. Ms. Andrews' website post from late December, 2020 (i.e. after the 2018 Peace Bond) does not suggest that the author is being harassed or is otherwise afraid. Rather, it was clearly intended for the Potters and depicts a person determined to defend their land and, if successful, make sure the Potters use of the right-of-way will be irreparably compromised. It also includes a reference to the Potters as "murdering pieces of shit" in a website dedicated to a young girl who died after being hit by a tractor driven by Mr. Potter. The girl's death was tragic and accidental. While I appreciate that Ms. Andrews may have felt angered and frustrated by the Potters, condemning them in this manner was hurtful and inconsistent with the fact that all parties knew her death was an accident. In any event, for the purposes of this proceeding, this post would certainly not have indicated or led Mr. Potter to think that there was a risk Ms. Andrews was feeling harassed or prone to harassment. I recognize that this website post pre-dates the relevant time frame. However, it provides important context in the months leading up to the relevant time frame;

2. Turning to the evidence of Mr. Potter operating his backhoe on his own property or property owned by a neighbour, Mr. Potter remained about 60+ feet from Ms. Andrews, who was recording him from afar. There was nothing in the videos that could reasonably be interpreted as impressing upon Mr. Potter knowledge of a risk that Ms. Andrews was being harassed or an indication that his conduct harassed Ms. Andrews. Rather, Ms. Andrews was proactively engaging with Mr. Potter by recording his actions. Mr. Potter was reacting to Ms. Andrews. Mr. Potter's actions equally suggest irritation at the fact that he is being recorded – as opposed to actions that reveal some form of knowledge that he was harassing the person who was recording his actions. Regardless, it is clearly insufficient to satisfy this third element of criminal harassment;
3. As to Mr. and Ms. Potter stopping their truck on the right-of-way to watch Ms. Andrews, it is important to clarify that a right-of-way is simply a right to pass over land in favour of another land owner who holds what is called in legal parlance the “dominant tenement”. In this case, Mr. Potter is the owner of the “dominant tenement” and thus has the benefit of the right-of-way. The right-of-way itself is called the “servient tenement” because, roughly speaking, it serves the dominant tenement. To be very clear, a right-of-way is not a right to park for prolonged periods of time. Nor is it some sort of observation platform to watch the people who reside on adjacent lands. That said, I am not satisfied that this evidence demonstrates that Mr. Potter either knew his actions were harassing Ms. Andrews or knew that there was a risk of harassment. Nor am I satisfied that this evidence demonstrates Mr. Potter was wilfully blind because I am not satisfied that the incident was an indication Ms. Andrews found his conduct to be harassing. Mr. Potter may well have misunderstood the extent of his rights over the dirt road. However, Ms. Andrews' responses are telling. She approached the vehicle and engaged the Potters. She testified, and I accept, that she reacted, and consistent with her past conduct, her actions suggest irritation and perhaps anger – as opposed to fear or torment. At least I find that would be a reasonable conclusion for Mr. Potter to reach. I also note Ms. Andrews' testimony that it may be true she reacted with irritation and perhaps anger, but in so far as Mr. Potter's knowledge is concerned, she testified that her response was instinctively protective. Finally, on this

issue, I am also compelled to note that it was not entirely clear when this incident occurred in relation to the other events during the time period in question and so I was unable to put its cumulative effect into proper perspective. This lack of evidence casts further doubts on whether Mr. Potter had the requisite knowledge of a risk that Ms. Andrews was harassed or an indication that she found his conduct to be harassing.

4. The May 20, 2020 decision by Ms. Potter, Mr. Potter and their son, Derek to mark their version of the boundary with wooden stakes and bailer twine must be put in context. Mr. Potter was assisting his spouse, Vivian Potter, to implement advice she received from their lawyer Bernie Conway. Ms. Potter contacted Mr. Conway to discuss what they might do in response to Ms. Andrews' insisting upon mowing the Disputed Lands. Mr. Conway testified that he recommended marking their proposed boundary to avoid being possibly accused of acquiescing to Ms. Andrews' acts of possession and claims of ownership. It was not clear to me whether Mr. Conway had all the relevant background facts before recommending this line of attack – particularly given the history between these neighbours and their capacity for overreaction. Regardless, I am satisfied that Mr. Potter believed he was pursuing a legal strategy as developed by Mr. Conway and communicated by Ms. Potter. Put slightly differently, I was left with a reasonable doubt as to whether these steps conferred upon Mr. Potter the requisite knowledge of criminal harassment for the purposes of this element of the offence.
5. Finally, I turn to the events of June 10 to 11, 2020 and the dumping of rocks on the Disputed Lands. The rocks are relatively small and do not amount to large mounds. However, they are significant in number and clearly intended to restrict usage of the lands – especially mowing. These events are troubling in that Mr. Potter took it upon himself to enter the Disputed Lands for the sole purpose of dumping rocks. That said, again, context is important. Based on the evidence before me, Mr. Potter took this action in the face of what he understood to be a breach of an agreement brokered by the police. More specifically, I accept that the RCMP communicated to Mr. Potter that an agreement had been reached by which the Potters and the Andrews would remain off the Disputed Lands. As far as Mr.

Potter was concerned, this meant that Ms. Andrews would not mow the Disputed Lands. All of this is confirmed in the notes of Constable Edmonds which, as indicated, were admitted into evidence by consent. To be clear, in the context of this proceeding, I find that the terms of an agreement were communicated by the police to Mr. Potter. Ms. Andrews may disagree. For the purposes of assessing this knowledge element of the offence, it is immaterial whether Ms. Andrews herself understood that an agreement had reached. This element of the offence is focussed on Mr. Potter's knowledge and I am satisfied that the police communicated to Mr. Potter that an agreement with Ms. Andrews was reached. If the Crown sought a different conclusion (i.e. that no such agreement was communicated to Mr. Potter), Constable Edmonds ought to have testified. As such, when dumping the rocks in question, Mr. Potter was reacting to what he believed to be a deliberate and provocative breach of the agreement by Ms. Andrews. From that perspective, I am left with a reasonable doubt as to whether Mr. Potter knew his actions risked harassing Ms. Andrews because he believed was responding to her breach of the agreement. I am similarly left with a reasonable doubt that Mr. Potter was wilfully blind to indications that he was harassing Ms. Andrews.

[43] I am not excusing Mr. Potter's actions as innocuous. Nor do I condone the self-help measures which he took in the face of a perceived breach of the agreement. It would clearly have been better to simply call his lawyer or register his objections in writing – and not take matters in his own hands. And, again, there may ultimately be civil consequences. However, for the purposes of this proceeding, I am left with a reasonable doubt that Mr. Potter took these actions with the requisite knowledge element to support the offence of criminal harassment.

[44] I emphasize that I carefully considered the specific events individually as well as their cumulative effect. I remain of the firm view that I cannot safely conclude that the Crown has proven that Mr. Potter had the requisite knowledge, and it would be wrong to convict Mr. Potter of criminal harassment given the evidence before me. On this issue, there were limitations in the evidence. For example, the events involving Mr. Potter driving a backhoe were not placed clearly in time and so it was difficult to fully ascertain their cumulative effect or put all these events into proper perspective. In any event, the same issues regarding Mr.



Potter's knowledge arise and, ultimately, the Crown did not establish beyond a reasonable doubt this element of the offence.

[45] Even if I found that the Crown proved beyond a reasonable doubt that Mr. Potter had the requisite knowledge, I would not have found that the Crown proved the next element of the offence (i.e. that Mr. Potter's conduct caused Ms. Andrews to fear for her own or her family's safety).

[46] I carefully listened to and observed both Ms. Andrews and her son, Simon. Simon did not provide evidence sufficient to confirm being afraid. Indeed, his actions suggest otherwise.

[47] Ms. Andrews struck me as a strong, determined, and resilient person. The documentary evidence supports this conclusion. She described herself as being angry, stressed, guarded, and frustrated by what she described as ongoing taunting. These were her dominant emotions. Later in her testimony, she suggested being fearful that somebody might be hurt by Mr. Potter. However, based on the evidence before me, I was not satisfied beyond a reasonable doubt that Ms. Andrews feared for her safety or the safety of her family. I refer to her website post from late December 2020 as well as the police records that consistently describe a person who was certainly angry and upset, but not afraid. I similarly refer to the manner in which she engaged and approached the Potters' vehicle when they stopped along the right-of-way between May 15 to 17, 2020. As well, when confronted with the stakes planted on the Disputed Lands, Ms. Andrew reacted with frustration. She angrily spoke to the police and immediately removed the posts, tossing them back on the Potter property.

[48] This is not to say that the emotions Ms. Andrews feels are illegitimate or unjustifiable. On the contrary, some of the actions taken by the Potters might reasonably trigger the exact emotions Ms. Andrews described. However, that is different from proving the fear required to establish criminal harassment.

## **BREACH OF RECOGNIZANCE**

[49] The Crown initially submitted that Mr. Potter breached each of the following three Recognizances in support of these three offences:

1. A Recognizance (Before a Justice or a Judge) dated January 29, 2019 and issued under sections 515, 520, 521, 522, 523, 525, 679 or 680 of the *Criminal Code*. This Recognizance refers to a number of offences

such as assault, mischief, uttering threats, resisting, obstructing a police officer and careless use of a firearm and other breaches of some other Recognizance. The time frame for each of the offences named is July, 2018 to March, 2019 – about one to two years before the offences which are before me. I know nothing as to the status of these charges or the other Recognizance. No evidence was led on these issues other than Constable MacLean who testified that he did not know;

2. A Recognizance (Before a Justice or a Judge) dated April 17, 2019 and issued under sections 515, 520, 521, 522, 523, 525, 679 or 680 of the *Criminal Code*. This Recognizance refers to the exact same offences mentions above and the exact same dates. Again, the time frame for each of the offences named is July, 2018 to March, 2019 – about one to two years before the offences which are before me. I know nothing as to the status of these charges or the other Recognizance. No evidence was led on these issues;
3. A Recognizance (Before a Justice or a Judge) dated August 20, 2019 and issued under sections 515, 520, 521, 522, 523, 525, 679 or 680 of the *Criminal Code*. This Recognizance refers to uttering threats on August 18, 2019 and two breaches of a Recognizance also on August 18, 2019 – about 10 months before the offences before me. Again, I know nothing as to the status of these charges or the other Recognizance. No evidence was led on these issues.

[50] In summary, all of the Recognizances for which Mr. Potter stands accused of breaching were issued in connection with other, separate criminal charges against Mr. Potter. More importantly, there was no evidence led on whether the charges which underlie each of the Recognizances were subsisting, withdrawn, proven, or dismissed.

[51] The Crown acknowledged its obligation to prove that the offences giving rise to the alleged offence of breaching a recognizance were outstanding when the Indictment in this proceeding was filed. Based on this and in light of Constable MacLean's evidence, the Crown further acknowledged it had not proven a breach of the Recognizance dated January 29, 2019. However, the concerns which surround the January 29, 2019 Recognizance apply equally to the other Recognizances.

[52] Given the absence of evidence, it would be unsafe to convict Mr. Potter on the three charges of breach of his Recognizance contrary to section 145(1)(a) of the *Criminal Code* (Counts #2 - #4, described above). I find Mr. Potter not guilty of these charges.

## CONCLUSION

[53] I have found Mr. Potter not guilty of all four counts in the Indictment dated July 20, 2020. That said, I am compelled to conclude with a few cautionary words for Mr. Potter. There have simply been too many times where the police have been unnecessarily engaged and forced to intervene between him and the Andrews family.

[54] Outside of this criminal proceeding, as indicated, the Potters and Ms. Andrews are joined in a civil suit to determine the location of the boundary line separating Ms. Andrews' backyard from the Potter farm lands. Obviously, nothing in this decision is binding upon the competing claims made in that civil action. However, so long as the civil case is advanced diligently and in good faith, it is difficult to imagine how any of the interactions described in this proceeding (mowing a lawn or planting stakes to mark one side's version of the boundary line, for example) could somehow tip the balance in favour of anyone. Actions which seek to effect more permanent changes on the Disputed Lands would obviously be more serious. To date, the parties have wisely avoided that sort of unnecessary escalation.

[55] The point is a simple one: Mr. Potter must learn to pursue his land claims through the civil action which has already begun. The mechanisms exist to resolve the underlying boundary dispute in an orderly, efficient, and expeditious manner. Mr. Potter should focus his attention on that existing legal process. Future antagonistic acts and self-help measures may give rise to new criminal proceedings where the outcome might be quite different.

Keith, J.