SUPREME COURT OF NOVA SCOTIA
Citation: *Davidson v. AGNS*, 2023 NSSC 199

Date: 20230619
Docket: 511933
Registry: Antigonish

Between:

Craig Aubrey Vernon Davidson and
Brenda Margaret Davidson

Applicants

v.

Attorney General of Nova Scotia, Bradley MacLeod,
Estate of Joseph Colin MacLeod and Douglas MacDonald

Respondents

Judge: The Honourable Justice Frank P. Hoskins

Heard: November 14, 2022, in Antigonish, Nova Scotia

Counsel: Marc Dunning, for the Applicants

Roseanne M. Skoke, for the Respondents Bradley MacLeod, Estate of Joseph MacLeod and Douglas MacDonald

Mark V. Rieksts for the Respondent Attorney General of Nova Scotia

By the Court:

Introduction

[1] The Applicants, Craig and Brenda Davidson (the "Davidsons"), have applied for a certificate of title under the *Quieting Titles Act*, R.S.N.S. 1989, c. 382, for woodland at Lochaber, Nova Scotia, mapped by Nova Scotia Property Online as Property identification ("PID") numbers 1234913 and 10102705 and referred to in their application documents collectively as "Parcel A" or "Lot 21-1" (Affidavit of Blake Beaton, Exhibit "A", Appendix J).

[2] The Respondents, the Estate of Joesph MacLeod, Bradley MacLeod, and Douglas MacDonald (the "MacLeod and MacDonald"), contest the application and each claim ownership to different parts of PID 10102705. The Davidsons' ownership of PID 1234913 is not contested.

[3] The central issue is whether the location of the southern boundary of PID 1234913 is the stream in its pre- or post-highway realignment location. The Applicants submit that it is the location of the stream post-highway realignment, such that their claim encompasses the entirety of the PID 10102705. The Respondents submit that it is the location of the stream pre-highway realignment such that it encompasses none of PID 10102705.

[4] The Attorney General takes no position and expresses no current interest in the parcel in dispute.

[5] Based on the evidence and submissions of counsel, I am satisfied that all interested persons have been sufficiently notified of the application and that there is no other apparent title holder, other than the Parties to this proceeding.

Background

[6] The Applicants have applied for a certificate of title to two parcels under the *Quieting Titles Act*. The parcels are in South Lochaber, Nova Scotia. They are identified under the *Land Registration Act*, S.N.S. 2001, c. 6 ("LRA"), by the parcel identification numbers 1234913 and 10102705 (PID 1234913 and PID 10102705). The Applicants seek a clarification of boundaries in accordance with a legal description and plan of survey prepared by Blake Beaton, and permission to register

the certificate of title under the LRA. Mr. Beaton's plan (the "Beaton Plan") designates the land claimed by the Applicants as Lot 21-1 or Parcel "A".

[7] Prior to a highway realignment in the 1950s, the lots that are now PID 1234913 (to the north) and PID 10102705 (to the south) were divided by a brook or stream. When the highway was relocated, the stream was diverted to the south, to what is now the southern boundary of PID10102705. Based on paper title, the Applicants claim that their parcel encompasses both PIDs.

[8] The Applicants filed a Notice of Application in Court on January 12, 2022. The Respondents contested their claim by Notice of Contest and Notice of Respondents Claim filed on July 8, 2022. They do not dispute that the lands registered as PID 1234913 and as mapped on Property Online (reflecting the Registry's information) are owned by the Applicants. However, they dispute the boundaries as mapped on the Beaton Plan, which incorporates PID 10102705. The Respondents claim that land in two portions: one to the northwest, to the shore of Lochaber Lake, is claimed by the MacLeod Respondents. This is the area of the old highway that was relocated in the 1950s. The Respondent Mr. MacDonald claims the portion to the southeast, bordering the northwestern edge of the current highway.

[9] For the following reasons, I am satisfied that the Applicants have established, on the balance of probabilities, entitlement to a certificate of title under the *Quieting Titles Act* to the disputed area.

The Evidence Proffered in the Proceeding

[10] The following exhibits were submitted by the parties. The parties agreed that the evidence of Jori H. Hart was to be considered non-expert opinion evidence.

The Evidence: Exhibits Tendered in Court

1. **Exhibit 1**: Respondents' Exhibit Book.
2. **Exhibit 2**: Statement of Qualification of Expert, Affidavit of Clive Scott MacKeen sworn on August 9, 2022.
3. **Exhibit 3**: Affidavit of Jori H. Hart sworn on May 2, 2022.
4. **Exhibit 4**: Affidavit of Craig Aubrey Vernon Davidson affirmed on January 10, 2022.

5. **Exhibit 5**: Affidavit of Craig Aubrey Vernon Davidson sworn on August 10, 2022.
6. **Exhibit 6**: Statement of Qualifications of Expert and Affidavit of Blake Beaton sworn on August 2, 2022.
7. **Exhibit 7**: Affidavit of Blake Beaton sworn on August 2, 2022.
8. **Exhibit 8**: Abstract of Title: signed January 10, 2022.
9. **Exhibit 9**: Deed: Joseph C. MacLeod to James V. MacLeod dated January 2, 1968

   Exhibit 10: Exhibits A 1- A 5 from C. MacLeod's pre-hearing brief filed October 28, 2022.

[11] There was no cross-examination of any of the witnesses.

[12] In this case there are competing title claims to a parcel of land, and thus, the role of the Court is to carefully analyse the underlying title documents to determine which party has a better chain of title (*MacDonell v. M&M Developments Ltd.* (1998), 165 N.S.R. (2d) 115 (N.S.C.A), at para. 30). This requires a careful and painstaking review of all of the evidence, including all of the above underlying documents tendered in the proceeding.

Issue

[13] The issue is whether the Applicants have established their entitlement to a certificate of title to the disputed lands under the *Quieting Titles Act*.

Positions of the Parties

[14] The determination of the parties' boundaries as they affect PID 10102705 turns principally on whether the "centre thread of a stream" identified as the southern boundary on the 1968 O'Leary deed referred to the location of the stream *before* or *after* the realignment of the highway in the 1950s.

The Applicants' Position

[15] The Applicants' position is that there is ambiguity in the deeds and that their paper title claim is consistent with the "hierarchy of evidence" that the courts rely in interpreting deeds. Their claim is based on the highest and most reliable evidence - the actual physical boundaries that existed at the time of the O'Leary Deed was made.

They also submit that the O'Leary Deed is the only conveyance by the Crown after January 16, 1957, which involves the disputed lands (PID10102705).

[16] The Applicants submit that the Respondents rely on an expert report that is based on dimensions, which the courts consider to be least reliable and at the bottom of the hierarchy. They further argue that the Respondents' paper title claims ignore the fact that the Crown owned all of the lands in dispute (PID 10102705) as of January 16, 1957, and the only deed out of the Crown for those lands was the O'Leary Deed.

[17] The Applicants submit that the lands claimed by the MacLeods are entirely encompassed by the lands of the old highway. The 1919 amendments to the *Public Highways Act* vested ownership of the old highway lands in the Crown approximately thirty years before the MacLeods acquired their lands from Mr. Bowie. Mr. Bowie did not own any land of the old highway and therefore could not have conveyed any of that land to the MacLeods. From the time of the 1919 amendments to the present day, no deed has been registered which has the Crown conveying any portion of the old highway or the disputed lands to either Mr. Bowie or the MacLeods.

[18] The Applicants submit that lands claimed by the Respondent, Mr. MacDonald, are entirely encompassed by the lands expropriated in 1957 by the Crown from Wall. Mr. MacDonald's claim ignores this expropriation which took place over ten years before he acquired his land from Wall. Mr. MacDonald acquired everything Wall had left after the 1957 expropriation, and he could not have received more than that so the eastern boundary of the new highway is where his land must end. From the time of the 1957 expropriation to the present day, no deed has been registered which has the Crown conveying any portion of the expropriated lands or the disputed lands to either Mr. MacDonald or his predecessors in title, and no interpretation of the boundaries described in the MacDonald Deed would alter this fact (pp. 18-19 of the Applicants' brief).

The Respondents' Position

[19] The Respondents submit that the Applicants purchased lands situate at #7 Highway Lochaber bearing PID 1234903, which is depicted on the McKeen survey prepared in 1990 for the predecessors in title and registered in Registry of Deeds in Antigonish as plan #118669416. The McKeen survey was registered by the real estate solicitor at the time of the Applicants' purchase of the lands, which is a

material fact because at the time of the Applicant's purchase, at all times their property, the metes and bounds description in the Deed and the legal survey by MacKeen was the property they purchased. This property was vacant land.

[20] The Respondents submit that there is no evidence presented by the Applicants to establish that:

(a) there was a misrepresentation by the real estate agent as to what lands were for sale or what lands the Applicants were purchasing;

(b) there was an error by the real estate lawyer in migrating the lands in accordance with the *Land Registration Act*; or

(c) the predecessors in title adversely possessed, or occupied at any time, the lands now claimed by the Applicants.

[21] After the purchase of the property, a surveyor was retained by the Applicants to survey the lands for them. The survey was done by Mr. Blake Beaton (Strum Report), plan of surveyed document #11940758 and registered on September 21, 2021.

[22] The Respondents submit that the email stream between Blake Beaton, surveyor, and Jason Adams, Land Registration Office, changed the title to "Owners Unknown". They argue that is no authority in the *Land Registration Act* to direct such an amendment without formal application or notice to adjacent landowners. Thus, the Respondent Attorney General and all parties should be concerned if a mapper can change or amend a parcel register or request an amendment without approval of the Registrar General. There is no evidence of any such approval.

[23] The Respondents claim that the Applicants are attempting to apply the provisions of the *Quieting of Titles Act* to acquire a certificate of title to lands owned by the Respondents, which is not the purpose of the *Quieting of Titles Act*.

[24] The Respondents further submit that there is no title to Quiet because the Respondents hold "paper" title, which are Deeds registered in the Registry. Therefore, the property was enjoyed, possessed and owned by the Respondents.

[25] The Respondents view the Applicants' approach to acquiring the lands as a "land grab" and doing so by an expensive and costly process (at pp. 3-4 of the Respondents' brief).

[26] Lastly, the Respondents submit that the title searcher's abstract and non-expert opinion report prepared by Jori Hart set out in an affidavit sworn on May 2 and 3, 2022, is material and essential evidence to be considered by the Court in determining the following:

(a) Ownership of land of Douglas MacDonald by Deed;

(b) Ownership of lands of MacLeod estate by Deed;

(c) The natural boundary and the original Hannifens brook;

(d) The diverted brook, which is not natural in origin;

(e) The Strum plan showing A to B 51.953 meters; 170 feet extension added to MacKeen plan of survey without justification;

(f) No deed of correction or statutory declaration; and

(g) Failure of the Strum plan to note signs of original bridge and remains of Hannifens Brook visual evidence apparent on ground.

[27] The Respondents submit that "the evidence of the title searcher, together with abstract of title, interpretation of documents and plans, visual site inspection and discussion with land owners, neighbours and surveyor is material, compelling and necessary in determining the merits of the **Quieting of Title Action**" (at p. 5 of the Respondents' brief).

[28] The Respondents submit "that Applicant's file an Abstract of Title, no identification of the title searcher. The Respondents filed an Abstract of Title and opinion report from the Title Searcher, confirming Ms. Hart's qualifications, her investigation of the title, including Registry Indices, unrecorded statutory, visual inspection of lands to determine original boundaries and natural boundary ad discussions with neighbours, owners and surveyor. The findings conclude paper title by Deed to lands of:

(a) Douglas MacDonald, Book 104 page 185.

(b) MacLeod estate (original deed in possession of MacLeod's registered Book 104 page 261) (at p. 5 of the Respondents' brief).

[29] The Respondents say that "the confusion arose when the Strum survey (post MacKeen survey) extended the boundary lines on the basis of the diverted brook and

not in the natural original Hannifens Brook as shown in the MacKeen plan of survey and as is evidence on the ground site inspection" (p. 6 of the Respondents' brief).

[30] The Respondents further submit that "evidence of the title searcher, Jori Hart, must be considered by the court in its totality and the opinion offered is the same opinion submitted to the real estate lawyer for consideration" (p. 6 of the Respondents' brief).

[31] The Respondents say that:

> … the definition of title searcher, includes locating public and private records; drafting legal descriptions of a property, compiling documents pertaining to property titles, ownership history and boundary disputes. Although the final determination of title opinion rests with the real property lawyer certifying title; when there is a dispute as to the title as in the case at bar, it is imperative that the opinion presented to the property lawyer is clearly before the Court for the Court's acceptance or rejection of that opinion. Therefore, the evidence of Jori Hart, title searcher, is material, essential, and necessary. (at p. 6 of the Respondents' brief)

[32] The Respondents submit that the statutory declaration dated August 3, 1979, which is not registered, from Ms. Evelyn O'Leary Hall, widow of Senator Clement O'Leary, show:

> … the measurements are clearly 35 feet to center thread of stream, and 72 feet to meet the boundary between lands now or formerly of Clement O'Leary and lands of Joseph MacLeod. From the 1968 Deed to Clement O'Leary from Her Majesty the Queen - 0.17 acres (Book 104 Page 162) to present day, there has been no Deed of Correction, nor a Statutory Declaration registered to correct the metes and bounds in this original deed. (at p. 6 of the Respondents' brief)

[33] The Respondents say that the dispute is regarding PID 10102705 and the south western boundary line of PID 10102705. They say that:

> Mr. Clive MacKeen's Survey Plan of 1990 (registered 2021) shows Hannifens Brook as south western boundary. This brook is shown on all plans by HMQ regarding the new highway. Mr. Beaton's Survey Plan of 2021 shows the diverted brook as south western boundary. This diverted brook is not found on any other plans or HMQ. All the plans regarding the new highway have only identified Hannifens Brook as on Mr. MacKeen's Survey Plan, as a boundary line between Wall property and MacLeod property. There is no plan registered by HMQ/Dep. Highway etc. showing the diverted brook as a boundary. From April 1968 to today's date, there have been no Deeds of Correction/Statutory Declarations filed regarding the Deed from HMQ to Clement O'Leary regarding the 'possible errors' in the

distances. There is a statutory declaration from Mrs. Evelyn Hall (see expert report of Clive MacKeen) wherein the distances are clearly noted as 35 feet and 73 feet. Until August 31, 2021, the lands known as PID 10102705 were assessed to the MacLeod Family and it was not until Mr. Beaton's plan was submitted to the Land Registration Office, the lands became owners unknown. Question is why was this property not cross hatched and shown as a land in dispute but on the email stream between Jason Adams, LRO Mapper and Mr. Beaton, became owners unknown. Email from Mark Rieksts(April 5, 2022) notes the Department of Public Works and Department of Natural Resources and Renewables confirm that neither Department is claiming an interest in the lands involved in this proceeding, therefore as per Deed Book 91 at pages 552 the Estate of Joseph MacLeod owns the lands of PID 1012705 from the southern boundary of the Old Highway to the shores of Lochaber Lake and Mr. Douglas MacDonald owns by Deed in Book 104 at Page 185 the lands of PID 10102705 between the southern boundary of the old highway and the new highway". (at p. 7 of the Respondents' brief)

[34] The Respondents also submit that the following evidence for consideration:

1. Book 97 at page 202 - Expropriation lands of Catherine Wall (name of expropriation is Patrick Wall, who was her son, as Mrs. Wall was incapable of looking after herself as noted in Deed 104/185, attached hereto). (Resp. Ex. Bk. Tab #21)

2. PID 1234889 - George Douglas MacDonald - sketch Mr. MacDonald's lands as per description. This does not save and except the expropriated lands.

a. The search of title of Joseph MacLeod's lands, disclosed the Deed into Mrs. Catherine Wall (Book 83 at page 389) from George Bowie, which was a lot out of 100 acres from Mr. Joseph MacLeod, this later became Douglas MacDonald Property.

b. The email from HMQ departments that they have no interest in the lands expropriated from George Douglas MacDonald lands interest here, as the expropriated lands are a portion of his description will reinvest to Doug MacDonald. (Resp. Ex. Bk. Tab #22)

3. Memorandums and letters from the Real Estate Division, Department of Public Works, Acquisition and Disposal Officers at the DWP Head Office, Register of Crown Lands and Crown Land Information Management Centre, together with a sketch showing part of the expropriated lands. It is stated that the above noted Departments will not be asserting an interest for this land. (Resp. Ex. Bk. Tab. #23)

4. Plan Number 119407584, October 6, 2021 - by Strum Consulting - the highlighted section of this plan appears to be a portion of the expropriated lands, according to the plan, now claimed by Mr. and Mr. Davidson. (Resp. Ex. Bk. Tab #24) (at pp. 7-8 of the Respondents' brief)

[35] The Respondents rely on the expert report of Mr. Clive MacKeen to establish:

(a) The lands owned by the Davidsons;

(b) The original Hannifens Brook between the MacLeod land and Wall properties;

(c) The natural boundary of the original brook; and

(d) The unregistered statutory declaration verifying metes and bounds (at p. 8 of the Respondents' brief).

[36] The Respondents submit that the expert report relied upon by the Applicants should not be accepted for the following reasons:

(a) The survey was prepared after the Davidsons purchase and registration of MacKeen's survey;

(b) Beaton "tampered with" the LRA mapping to change parcel to owners unknown;

(c) Lands in dispute was created by Beaton:

i. Dimensions in prior deed considered as illegible was clear as requested in Registry of Deed and in statutory declaration;

ii. The diverted brook (manmade) not natural boundary is basis of his findings. The diverted brook manmade boundary is not now nor has it ever been the boundary between Wall and MacLeods;

(d) There has never been any claim, by adverse possession or by any predecessors in title; and

(e) There has been no deed of correction or statutory declaration or any controversy with respect to the boundary (p. 9 of the Respondents' brief).

[37] The Respondents submit the following with respect to the *Expropriation Act*:

> In determining ownership of the Highway lands the Respondents refer the Court to the **Expropriation Act** which states as follows:

Section 20 (1)(a) (in part)

Expropriation Act 20 (1) - note the expropriating authority may, by writing under the proper execution by its duly authorized officers … declare that the land or such part thereof is not required and is abandoned by the expropriating authority.

(a) The land declared to be abandoned shall revest in the person from whom it was taken or in those entitled to claim under him.

… the expropriating authority may, by writing under proper executions… declares that the land or such part thereof is not required and is abandoned by the expropriating authority.

… the land declared to be abandoned shall revest in the person from when it was taken or in those claimed under him. (Resp. Ex. Bk. Tab #26) (at p. 11 of the Respondents' brief)

[38] The Respondents argue that the Applicants "or their predecessors in title did not at anytime own the lands expropriated by Her Majesty the Queen for highway. The ownership reverts back to the original owners. An email from Resp. Attorney General confirms the Crown has no interest in the lands; and therefore by operation of law it reverts back to the original owners". (at p. 11 of the Respondents' brief)

[39] Lastly, the Respondents argue that "the Respondent MacLeod owns the portion of PID 10102705 from the southside of the old Highway #7 to the shores of Lochaber Lake shown on Her Majesty the Queen's Plan #763-55 as 0.23 acres. (at p. 11 of the Respondents' brief)

[40] The Respondents further argue that:

… the Applicant Davidsons claim for the lands cannot be established by:

a. Paper title of predecessor

b. Adverse possession of predecessor

c. Ownership pursuant to Expropriation Act

d. Strum report which ignored natural boundaries and enhanced the legal description by 170 feet cannot be relied upon as it was prepared post purchase and post registration of MacKeen survey and post division of natural boundary. (p. 11 of the Respondents' brief)

[41] The Respondents submit that:

… the Applicants' claim to be dismissed with costs and certificate of title to be granted to:

a. MacLeod Estate et al

b. Douglas MacDonald (at p. 12 of the Respondents' brief)

Law: General Principles

Burden

[42] In a quieting of titles application, burden for establishing entitlement to a certificate of title under the *Quieting Titles Act*, is described at ss. 12(1) and 13, which read:

> **Certificate of title after trial**
>
> 12 (1) Where, after the trial or determination of all issues of law and fact between the parties, it appears that a party claiming a certificate of title is entitled to some property right in the land, whether it is the property right claimed or not, the court or a judge may order that a certificate of title be issued to the claimant for the property right to which the claimant has been found entitled.
>
> ...
>
> **Burden of proof**
>
> 13 Nothing in this Act changes the burden of proof upon the parties in actions of trespass to land, of ejectment or for the recovery of land, or in the other actions in which a claim for a certificate of title may be joined under this Act, nor is it required that any lesser or greater title or possession be shown than was required on the twenty-fourth day of March, 1961, in such cases, but the claimant may establish under this Act whatever title the claimant has against the Crown and against persons generally.

[43] In assessing the evidence, I am mindful of the general principles set out in *Brill v. Nova Scotia (Attorney General)*, 2010 NSCA 69, wherein Fichaud J.A. wrote:

> [37] The *QTA* does not enable a court to create title. Rather it authorizes a court to grant a certificate that reflects the title, including possessory title, to which the party is entitled by the legal principles that exist outside the *QTA* ... In *Ferguson (R.B.) Construction Ltd. v. Ormiston* (1989), 91 N.S.R. (2d) 226 (C.A.) ¶6, Chief Justice MacKeigan said:
>
> > ... Legal title since the enactment of the *Quieting of Titles Act* in 1961 can now be more conveniently established and declared by an action such as the present in which all persons interested in the land become joined in a contest to determine who has the best title - a contest in which the rules as to adverse possession, constructive possession, and limitation of actions ordinarily control the result.

> [38] The judge should be satisfied that all interested persons have been joined or sufficiently notified, or are before the court. Then, if there is no other apparent title holder and the contest is between just two parties, the court may quiet title based on the better claim. This practical approach reflects that title to land is relative and heirarchical, not absolute ...

[44] The claims in this proceeding turn on documentary records, that is, deeds and plans, rather than possession. The law governing deed interpretation was summarized by Chipman J. in *Dawn v. Nova Scotia (Attorney General)*, 2014 NSSC 48. After citing the broad principle that "[w]hen there are competing title chains to a parcel of land, the role of the Court is to carefully analyse the underlying title documents to determine which party has a better chain of title" (para. 14). He stated:

> [15] In *Metlin v. Kolstee*, 2002 NSCA 81, at paras. 65-66, the panel considered the principles applicable to interpreting deeds. The Court of Appeal accepted the following recitation from *Saueracker v. Snow* (1974), 14 N.S.R. (2d) 607 (S.C.T.D.), at para. 20:
>
> > The general principles applicable to the interpretation of a deed are ...:
> >
> > 13. Construction -- General Rule. The Court must, if possible, construe a deed so as to give effect to the plain intent of the parties. The governing rule in all cases of construction is the intention of the parties, and, if that intention is clear, it is not to be arbitrary overborne by any presumption. The intention of the parties is to be gathered from the sense and meaning of the document as determined in the first place by the terms used in it, and effect should, if possible, be given to every word of the document. Where, judging from the language they have used the parties have left their intention undetermined, the Court cannot on any arbitrary principle determine it one way rather than another. Where an uncertainty still remains after the application of all methods of construction, it may sometimes be removed by the election of one of the parties. The Courts look much more to the intent to be collected from the whole deed than from the language of any particular portion of it.
> >
> > 24. Extrinsic Evidence
> >
> > Patent and Latent Ambiguities. An ambiguity apparent on the face of a deed is technically called a patent ambiguity -- that which arises merely upon the application of a deed to its supposed object, a latent ambiguity. The former is found in the deed only, while the latter occurs only when the words of the deed are certain and free from doubt, but parol evidence of extrinsic or collateral matter produces the ambiguity -- as, if the deed is a conveyance of 'Blackacre', and parol evidence is adduced to show there are two places of that name, it of course becomes doubtful which of the two is meant. **Parol evidence therefore in such a case is admissible, in order to explain the**

> **intention of the grantor and to establish which of the two in truth is conveyed by the deed. On the other hand, parol evidence is uniformly inadmissible to explain an ambiguity which is not raised by proof of extrinsic facts, but which appears on the face of the deed itself**...
>
> *Extrinsic Evidence as to Latent Ambiguities Generally*: **Extrinsic evidence is always admissible to identify the persons and things to which the instrument refers**.
>
> Provided the intention of the parties cannot be found within the four corners of the document, in other words, where the language of the document is ambiguous, anything which has passed between the parties at, prior thereto and leading up to it, as well as that concurrent therewith, and the acts of the parties immediately after, may be looked at, the general rule being that all facts are admissible to interpret a written instrument which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as tend only to show that the writer intended to use words bearing a particular sense are to be rejected.
>
> [Emphasis added]

[45] Chipman J. cited *McPherson v. Cameron* (1866-69), 7 N.S.R. 208 at 212, as accepted by the Court of Appeal in *Metlin* and *MacDonald v. McCormick*, 2009 NSCA 12:

> [16] Where there is ambiguity in a deed, the Court of Appeal in *Metlin* at paras. 65-66, accepted the following passage from *McPherson v. Cameron* (1866-69), 7 N.S.R. 208 at 212:
>
> > ... The question is how he is to get there, for neither the course nor distance given in his grant will take him there, without the alteration of one or the other. The general rule to find the intent where there is any ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake... On this principle the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshalled: 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...
> >
> > ...

> 18 Also, at paras. 65-66, the Court accepted:
>
> ... the principle is clear that where distances and monuments clash, in the absence of special circumstances, the monuments prevail; in such cases the context shows the boundary to be the dominant intent, the distance, the subordinate ...

[46] Chipman J. summarized the "hierarchy of evidence", described in *McPherson*, that governs the interpretation of ambiguous descriptions:

> [19] As a general rule, the intent of parties to a deed is to be gathered from the words of the deed. If there is any ambiguity, the common sense rules set forth by the Court of Appeal are applied. In Anger and Honsburger, Law of Real Property, 3rd ed. (looseleaf), Diana Ginn and Monica McQueen endorse the following summary of the law:
>
> Where there is an ambiguity in a grant, the object is to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is to give the most effect to those things about which things men are least liable to mistake. On this principle, the things by which the land grant is described are thus ranked according to the regard which is to be given them:
>
> 1. natural boundaries;
>
> 2. lines actually run and corners actually marked at the time of the grant;
>
> 3. the lines and courses of an adjoining tract, if these are called for, and if they are sufficiently established, to which the lines will be extended;
>
> 4. the courses and distances, giving preference to the one or the other according to circumstances.
>
> [20] The above is often, in surveyor parlance, referred to as the "hierarchy of evidence". In the *Anger and Honsburger* text, Ginn and McQueen go on to state, following *Diehl v. Zanger*, 39 Mich. 601 (1878), and various Canadian cases citing it:
>
> > The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that monuments control course and distance.

[47] Similarly, in *Goulden v. Nova Scotia (Attorney General),*2013 NSSC 253, [2013] N.S.J. No. 418, (S.C.), Stewart J wrote:

> [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).

[48] As previously mentioned, one of the issues in this case is the status of land that was expropriated by the Crown in the 1950s and earlier. As a general principle, a former owner does not enjoy any right in land merely because a subsequent owner is not claiming it. There is a limited exception to this general principle for expropriated land where the Minister follows a process to abandon land for which compensation has not yet been paid to the former owner. Pursuant to the *Expropriation Act*, R.S.N.S. 1989, c. 156, "[e]xpropriations prior to the first day of January, 1971, shall be governed by the law in effect at the time of such expropriations" (s. 82(2)). At the time of the 1957 expropriation, the *Expropriation Act*, R.S.N.S. 1954, c. 91, provided, at s. 21(1):

> 21(1) Where **at any time before the compensation has been actually ascertained or determined**, land taken or expropriated under the provisions of this Act, or any part of such land, is found to be unnecessary for the purpose for which the same was taken or expropriated, ... **the Minister may by writing under his hand, registered in the property registry office, declare that the land or such part thereof is not required and is abandoned by the Crown**, ..., and thereupon
>
> (a) the land declared to be abandoned shall revest in the person from whom it was taken or in those entitled to claim under him, or
>
> (b) in the event of a limited estate or interest therein being retained by the Crown, the land shall so revest subject to the estate or interest so retained.
>
> [Emphasis added]

[49] As such, expropriated lands will *only* revest in the previous owner where compensation has not been ascertained or determined, the Crown has determined that the land is no longer needed, the Minister has declared the land abandoned in writing, and the declaration of abandonment has been registered in the relevant land registry.

Chains of Title Background

The Applicants

[50] The Applicants acquired their property by deed dated May 26, 2021, from Catherine Smith. Ms. Smith had acquired the property by deed from the Estate of Senator Clement O'Leary in August 1979. Senator O'Leary had obtained the property from the provincial Crown - specifically, the Minister of Highways - by deed in March 1968. The description in his deed was as follows:

> ... Beginning at the point of intersection of the of the boundary between lands now or formerly of Clement O'Leary and lands now or formerly of Joseph MacLeod with the northwestern boundary of the highway leading from Lochaber to Antigonish and 50 feet perpendicularly distant from the centre line thereof;
>
> Thence in a Southwesterly direction, parallel to said centre line a distance of [?5] feet, more or less, to the centre thread of a stream;
>
> Thence in a northwesterly direction, along the said centre thread, a distance of 110 feet, more or less, to meet the southeastern shore of the waters of Lochaber Lake;
>
> Thence in a northeasterly and easterly direction following the various windings of the aforesaid shore, a distance of [7?] feet, more or less, to meet the aforesaid boundary between lands now or formerly of Clement O'Leary and lands now or formerly of Joseph MacLeod;
>
> Thence South 52°00' East along the alignment of the last mentioned boundary, a distance of 108 feet, more or less, to the point of beginning and contains 0.17 acre, more or less. (Affidavit of Jori H. Hart, filed May 3, 2022, at Schedule B, tab 13)

[51] The Smith deed, dated August 14, 1979, contained a description that was essentially identical, with minor differences, such as the substitution of "southerly" for "southwesterly" in the second paragraph. More significantly, the Smith deed filled in the two illegible digits from the recording of the O'Leary deed: the figure in the second paragraph became 35 feet, and the incomplete number in the fourth paragraph became 72 feet (Hart affidavit at Schedule B, Tab 17). These figures appear to have originated in a statutory declaration by Ms. Hall, Senator O'Leary's widow, that immediately preceded the deed, confirming her ownership of the property. The declaration gives no source for the distances of 35 feet and 72 feet (Exhibit 2, Appendix D).

The MacLeod Title

[52] The MacLeods rely on a 1949 deed from James Bowie to Joseph MacLeod as the basis for their claim to the portion of PID 705 between Lochaber Lake and the eastern boundary of the old highway, where their claimed lands would border those claimed by the Respondent Mr. MacDonald to the west. The MacLeod deed, dated September 27, 1949, includes the following description:

> ... Bounded on the North by lands of John Sears and John O'Leary;
>
> on the East by lands of John Sears;
>
> on the South by land of Michael Hannifan;

> and on the West by the shores of Lochaber Lake containing one hundred acres more or less and being the same lot of land conveyed to the said George Bowie... (Exhibit 3, tab 5).

The MacDonald Title

[53] The Respondent Mr. MacDonald relies on a 1968 deed from Catherine Wall as the basis for his claim to the south-eastern corner of PID 705. The area he claims lies between the eastern boundary of the old highway and the western boundary of the new highway. The area claimed by Mr. MacDonald was expropriated in 1957 from Catherine Wall, who acquired it from George Bowie by deed dated December 1, 1934, and registered September 6, 1935. The deed described the property as follows:

> ... On the South by lands occupied by John A. MacDonald, known as the Michael Hannifan farm;
>
> on the East and North by lands of the Grantor;
>
> on the West by the Antigonish and Sherbrooke main highway.
>
> Beginning at a stake on the aforesaid highway at the northern boundary line of the said Michael Hannifan farm and running along said line in an Easterly direction till it comes to a stake at the brook of a stream known as Hannifan Brook;
>
> thence down stream through said Brook and its different courses in a North Westerly direction till it comes to the bridge over said brook on the main Antigonish and Sherbrooke highway;
>
> thence from said Bridge in a Southerly direction along the said highway till it comes to the place of beginning;
>
> containing two acres more or less;
>
> said land being triangle in shape and being a part of the lot of land conveyed to the said Grantor George Bowie by Joseph D. Bray and wife... (Hart affidavit at Schedule B, tab 2)

[54] A plan labelled "Lochaber - Glen Alpine Right of Way Plan", dated October 8, 1954, prepared for the Department of Highways and Public Works, shows an area of .94 acre in sections of .23 and .71 acre, respectively. (Hart affidavit at Schedule B, Tab 3) This area appears to correspond to the present southeastern portion of PID 705, that being the area claimed by Mr. MacDonald. The 1954 plan was attached to, and referred to in, the expropriation deed, dated January 10, 1957, which includes the following description:

> Beginning at the point of intersection of the boundary between the lands of the Grantors with those now or formerly of Joseph MacDonald with the southeasterly boundary of the reconstructed highway leading between Glen Alpine and South Lochaber and 50 feet perpendicularly distant from the centre line thereof;
>
> thence in a northeasterly direction and parallel to the said centre line a distance of 370 feet, more or less, or until it meets a brook being the boundary between the lands of the Grantors and those now or formerly of Joseph MacLeod;
>
> thence in a northwesterly direction following the various windings of the said brook a distance of 150 feet, more or less, or until it meets the southeasterly boundary of the existing old highway between the aforesaid points;
>
> thence in a southwesterly direction following the several courses of the said old highway boundary a distance of 484 feet, more or less, or until it meets the alignment of the aforesaid boundary between the lands of the Grantors and those now or formerly of Joseph MacDonald;
>
> thence in a southeasterly direction following the alignment of the last mentioned boundary a distance of 11 feet, more or less, to the point of beginning.
>
> The above described lot of land is shown in red outline on the attached plan and contains in all 0.94 acre, a little more or less. (Hart affidavit at Schedule B, tab 3)

[55] The deed to Mr. MacDonald, dated May 7, 1968, and registered the next day, contains the following description:

> Bounded on the South by lands now or formerly occupied by John A. MacDonald known as the Michael Hanifen farm;
>
> on the East and North by lands formerly owned by George Bowie;
>
> on the West by the Main Highway running from Antigonish to Sherbrooke;
>
> said lot beginning at a stake on the said highway at the north boundary line of the said farm known as the Michael Hanifen farm and running along said line in an easterly direction until it comes to a stake at the Brook or stream known as Hanifen Brook;
>
> thence down stream through said Brook and its different courses in a Northeasterly direction until it comes to the bridge over the said Brook on the Main Highway running from Antigonish to Sherbrooke;
>
> thence from said bridge in a Southerly direction along the said Main Highway until it comes to the place of beginning;
>
> said lot herein conveyed containing two acres, more or less, and being triangular in shape, being part of lands earlier conveyed to George Bowie by Joseph D. Bray et ux by deed dated September 6th, 1919... (Hart affidavit at Schedule B, tab 4)

[56] There is no evidence of a conveyance of the expropriated lands back to Ms. Wall.

Discussion /Analysis

[57] The focus of the dispute is the phrase "the centre thread of a stream ..." This phrase first appearing in the 1968 O'Leary deed from the Crown. The Applicants say the stream referenced in the O'Leary deed, the 1979 deed from the O'Leary estate to Catherine Smith, and their own 2021 deed, is the stream as it was relocated when the highway was realigned in the 1950s. This would place the southern boundary on the southern line of PID 10102705. If this is the case, then the disputed lands belong to the Applicants.

[58] As supporting evidence, the Applicants rely on a legal description and plan of survey prepared by Blake Beaton in September 2021. Mr. Beaton designated the land claimed by the Applicants as Lot 21-1, encompassing all of PIDs 1234913 and 10102705. The lot is bounded on the south by the current course of the stream. Mr. Beaton's opinion was that the "centre thread of a stream" referenced in the O'Leary and Smith deeds, and perpetuated in the Applicants' deed, was the stream in its post-relocation course, because this was the stream's position at the time of the O'Leary deed from the Crown in 1968. Mr. Beaton stated:

> In my opinion, based on the chronological order and dates of transaction, her Majesty the Queen acquired lands east of the old Highway to the eastern boundary of the new realigned highway, for the purpose of realignment. The highway was realigned, and stream diverted around 1955, as per Department of Transportation construction records...
>
> …
>
> In 1968 Her Majesty the Queen conveyed a parcel of land which described the centre thread of a stream as the southwestern boundary. In my opinion the deed describes the newly diverted stream as the old stream bed would have no water flow since the diversion and would not be considered a stream. If the deed was prior to the diversion then in my opinion the boundary would be the original stream location... (Beaton report, p 9)

[59] Mr. Beaton compared aerial photographs from 1954 (pre-relocation) and 1964 (post-relocation), as well as other materials (Beaton report, p. 9). There does not appear to be any dispute that the stream and highway were relocated to their present positions, and that this occurred in the mid-1950s.

[60] The Respondents take the position that there is no title to "Quiet" because they hold "paper title" as evidence by the deeds registered in the Registry. They rely on the deeds referring to the pre-alignment conditions and on a survey by Clive MacKeen, prepared in 1990. Mr. MacKeen provided a Report of Survey dated August 8, 2022, wherein he stated:

> The original brook, which was the division between the MacLeod and Wall properties is depicted on Department of Transportation plans... (Mackeen Report at Appendix C and H).
>
> The measurements contained in the deed to Catherine Alexa Smith agreed more favourably with Department of Transportation plan. Excepted for the distance call along the reconstructed highway of 35 feet as compared to 186.75 feet. However, the Department of Highways plan scales to 130 feet more or less... (see Appendix C, a Department of Highways plan supplied by Catherine Smith at the time of the survey, "origin unknown.").
>
> The area of 0.17 acres more or less, agreed more favourably with Department of Transportation plan... (see Appendix C).
>
> It was determined, the best evidence of the southwesterly boundary, was the original brook.
>
> The original brook was located as per plan of survey and the boundary was established on the ground... (see MacKeen Survey Report, Appendix A).

[61] Of the two Department of Highways (or, variously, Department of Transportation) plans referenced by Mr. MacKeen, one, provided by Catherine Smith at the time of his original survey, is undated (Exhibit 2, Tab C). The other is dated October 8, 1954 (Exhibit 2, in front of Tab H). As Mr. MacKeen notes, both plans show the old stream, but not the relocated stream.

[62] The Applicants maintain that the O'Leary and Smith deeds are ambiguous in their reference to a stream. They submit that Mr. Beaton's construction is consistent with the hierarchy of evidence, being based on the location of the stream - a natural boundary - at the time of the 1968 O'Leary deed. They point out that the O'Leary deed could have used language indicating that the "stream" was the former stream, which had been diverted more than a decade before the deed was made. It did not (Applicants' brief at paras. 57-59).

[63] The Applicants submit that there are several weaknesses in the MacKeen survey. They say, firstly, that Mr. MacKeen "assumes dimensions in the O'Leary deed that come out of nowhere" (Applicants' brief at para. 62). Mr. Beaton stated in his report that "[t]he deed description does not seem to be based on a plan of survey

and has possible errors in distances" (Beaton report at p. 7). As previously noted, the illegible distances from the O'Leary deed that Mr. MacKeen designates as 35 feet and 72 feet apparently originate in an unregistered 1979 statutory declaration by Evelyn O'Leary Hall, giving no source for the distances of 35 feet and 72 feet. The strongest inference is that the distances in the Smith deed were derived from the statutory declaration, which, in turn, referenced the description in the O'Leary deed recording, with no explanation of the clarification of distances. As such, the Applicants submit, the distances in the unregistered statutory declaration are not reliable (Applicants' brief at para. 64)

[64] I agree with the Applicants. I find that the evidentiary value of this evidence is undermined by the absence of an explanation or source for the distances of 35 feet and 72 feet. The strongest inference is that the distances in the Smith deed were derived from the statutory declaration, which referenced the description in the O'Leary deed recording, with no explanation of the clarification of distances.

[65] Secondly, the Applicants challenge Mr. MacKeen's reliance on the undated plan provided by Catherine Smith, which shows a hatched area with a southern boundary at the old stream (the hatched area was subsequently mapped as PID 1234913). The hatched area was described in a 1969 letter from the Minister of Highways to the Minister of Lands and Forests as "a section which was conveyed to the late Senator Clement O'Leary on March 12th, 1968" (Affidavit of MacKeen, Tab 1 and Appendix C/Tab C). The plan to which the hatching was added is part of a plan prepared by F. Tupper, with a July 1954 date, pre-dating the highway realignment and stream diversion. Neither the O'Leary deed nor the Smith deed refer to a plan. This suggests, the Applicants submit, that the hatched plan attached to the 1969 letter did not exist at the time of the 1968 O'Leary deed (Applicants' brief at paras. 67-70). Mr. MacKeen took the hatched area to be the Smith property.

[66] In my view, what undermines the evidentiary value of Mr. MacKeen's evidence is his reliance on an undated plan provided to him by Catherine Smith showing a hatched area which he assumes to be the lands of Smith and which are mapped by Property Online as PID 1234913. As the Applicants point out, the southern boundary of the hatched area is the location of the stream pre-highway realignment. It is reasonable to infer from the evidence that this appears to be the same plan attached to a October 20, 1969, letter from I.W. Akerly, Minister of Highways, to the Honourable George Snow, Minister of Lands and Forests. As the Applicant states, that letter refers to the hatched area as "a section which was conveyed to the late Senator Clement O'Leary on March 12, 1968". The difficulty

with this evidence is that its evidentiary value is undermined by the absence of an explanation or suggestion of the circumstances that led to the creation of the letter and plan. As the Applicants point out, the plan to which the hatching was added is part of the Plan No. 763-55, prepared by F. Tupper and stamped "Approved July 28l 1954 (the "Tupper Plan") (Applicants' brief at para. 68). It is reasonable to infer that the plan was prepared prior to the highway realignment and stream diversion, and as the Applicant says, 14 years before the O'Leary Deed was made. Thus, as the Applicants state in their brief:

> [69] Where the stream was diverted after the date of the Tupper Plan but before the O'Leary Deed was made, relying on that outdated plan with outdated physical boundaries, most importantly the location of the stream, is problematic for obvious reasons.
>
> [70] Also, neither the O'Leary Deed nor the Smith Deed make reference to any plan, suggesting that the plan with outdated physical boundaries, most importantly the location of the stream, is problematic for obvious reasons.

[67] In my view, these two points captured above in paras. 69 and 70 are valid and persuasive, which in my view tends to undermine the evidentiary value of the MacKeen report because they raise real issues of the underpinning of expert report.

[68] Thirdly, the Applicants challenge Mr. MacKeen's statement that the measurements in the Smith deed "agreed more favourably with the Department of Transportation plan", except for the distance "along the reconstructed highway of 35 feet as compared to 186.75 feet" (Applicants' brief at para. 71, citing MacKeen Affidavit, Tab 1, p. 2). The Applicants say there are other significant divergences between boundary line distances on the Smith deed and those shown on the MacKeen survey (Applicants' brief at paras. 72-74). The Applicants contend that:

> The dimensions in the deed do not align in any reasonable way with the MacKeen Survey or Beaton Survey and are non-sensical. For example, if the north boundary were 108 feet the property would extend approximately 54 feet into Lochaber Lake following the MacKeen Survey or approximately 68 feet into the lake following the Beaton Survey. (Applicants' Brief at para. 75)

[69] In my view, these salient points also tend to undermine the evidentiary value of Mr. MacKeen's opinion because they tend to call into question the accuracy of his findings. As the Applicants state: "it suggests that the only distance that disagreed substantially from the deed was the 35 feet versus 186. 75" (at para. 72 of the Applicants' brief). There are noticeable differences as described by the Applicants in their brief (at para. 73). As the Applicants point out in their brief:

> [74] Although the most staggering difference is over 500% increase from 35 feet to 186.75 feet, the differences in the other distances are also significant - increase and decreases in range of 20 - 50 %. For Mr. MacKeen to say these differences agree more favourably with the Department of Highway Plan is quite a stretch because it is difficult to see how they agree with that plan at all.

[70] Again, I agree with the Applicants' assertion that:

> [75] The dimensions in the deed do not align in any reasonable way with the MacKeen Survey or the Beaton Survey and are non-senical. For example, if the north boundary were 108 feet the property would extend approximately 54 feet into Lochaber Lake following the MacKeen Survey or approximately 68 feet into the lake following the Beaton Survey.

[71] Finally, the Applicants submit, the O'Leary deed is ambiguous. It cannot be reconciled with the dimensions shown in the MacKeen Survey or the Beaton Survey. As such, it is necessary to consider the *hierarchy of evidence*, starting with physical boundaries. The Beaton Survey, the Applicants submit, is consistent with the physical boundaries at the time the O'Leary deed was made, as evidenced by construction records and aerial photographs establishing that the stream was diverted to the south between 1954 and 1964. By contrast, the MacKeen opinion focuses on deed dimensions, which lie at the bottom of the hierarchy (Applicants' brief at paras. 76-80).

[72] To be clear, I find that the top of the hierarchy is physical boundaries, followed by lines actually run, then lines and courses of adjourning tracts and last, actual distances.

[73] In my view, having considered all of the evidence, I find that the Beaton Survey is much more convincing or persuasive than the MacKeen Survey because the Beaton opinion is consistent with the hierarchy of evidence. In other words, it has much more evidential value than the MacKeen Survey. The Beaton opinion is based on actual, physical boundaries at the time the deed was made. As the Applicants say:

> [78] … By March 12, 1968, when the deed was made, the stream had been moved further south. This is supported by the Department of Transportation construction records and the aerial photographs from the National Aerial Photo Library which prove that the stream was realigned and diverted further south between 1954 and 1964.

[74] The Applicants argue that:

> [79] The MacKeen opinion completely ignores the "hierarchy of evidence". Instead of relying on physical boundaries, the most reliable at the top of the hierarchy, he relies on the dimensions in the deed which are the least reliable and at the bottom of the hierarchy.

[75] I accept and find that the Beaton opinion is more reliable and thus has much more evidential value than the MacKeen opinion because the Beaton Survey it is based on the actual, physical boundaries at the time the deed was made.

[76] To be clear, I accept the Beaton opinion over the MacKeen opinion for all the forgoing reasons, and additionally, for the following reasons.

[77] Mr. MacDonald's claim is based on him having paper title to the lands between the eastern boundary of the old highway and the western boundary of the realigned highway through the MacDonald Deed and the fact that the Crown claims no interest in the lands. The Applicants argue in their brief that there several problems with this claim. The Applicants submit:

> [82] The only way that MacDonald can have paper title to the lands he claims is if the "bridge" in the MacDonald Deed is the same bridge shown on the MacKeen Survey, that is the bridge that runs under the old highway. That interpretation is not supported by the facts or the law.

[78] The Applicants argue that the MacDonald deed describes what is now PID 01234889, a triangular property on the eastern - not western - side of the new highway, which Mr. MacDonald indisputably owns (Applicants' brief at para. 31, citing Hart Affidavit at Schedule B, Tab 5). They submit the word "northeasterly" is an "obvious error" and that it should be "northwesterly", "because that is the downstream direction and without this change the parcel description does not close" (Applicants' brief at paras. 30-31).

[79] The Respondents further submit that the bridge referenced in the MacDonald deed ran under the former highway. The 1990 MacKeen survey placed the northwestern boundary on the eastern edge of the old highway, not the new one (Applicants' brief at para. 32). This would extend the MacDonald lands into the parcel claimed by the Applicants.

[80] The Applicants cite a definition of "bridge" from the Paperback Oxford Canadian Dictionary, 2nd ed (Oxford University Press, 2006): "a structure carrying

a road, path, railway, etc., across a stream, ravine, road, etc." They maintain that the evidence does not support the conclusion that the bridge referenced in the MacDonald deed is the bridge that appears on the MacKeen survey. When the MacDonald deed was drawn up in May 1968, there were two bridges: one under the old highway (shown on the MacKeen plan) and one under the new highway, as referred to in the applicant Craig Davidson's affidavit, wherein he states:

> In addition to the bridge shown on the MacKeen Survey there is another bridge involved in this case. This bridge is the new bridge which allows the diverted path of Hannifan Brook to pass under the newly realigned highway 7 (constructed between 1955 and 1957) and onto the Property... This bridge is made of concrete on the sides and top just like the bridge under the old highway... (Affidavit of Craig Davidson, at para. 11. Mr. Davidson attached as an exhibit photographs taken in 2021 and 2022: Exhibit F).

[81] Similarly, Mr. Beaton referred in his report to "construction of the realigned highway, bridge and newly diverted stream..." (Beaton report, Exhibit, p.10). The Applicants submit that the same reasoning that leads to the conclusion that the "centre thread of a stream" in the 1968 O'Leary deed referred to the post-highway-realignment stream should guide the interpretation of "bridge" in the MacDonald deed, which was likewise registered some ten years after the highway was realigned. I agree.

[82] Having considered all the evidence, I am satisfied, first, that there is an ambiguity arising when the deed is applied to the lands, given the two potential locations of the stream referenced in the Crown's 1968 deed to Senator Clement O'Leary. Applying the hierarchy, the existing stream was a natural boundary existing when the deed was created. That being said, if the change in location of the stream does not give rise to an ambiguity, the result would be the same, since the stream referenced in the 1968 would clearly be the existing stream, since it was the only stream in existence at that time.

Expropriation

[83] Additionally, there is the question of expropriation.

[84] The MacLeod claim rests on paper title under the MacLeod deed and the lack of a Crown claim. At the time of the 1949 MacLeod deed, the old highway had already been vested in the Crown pursuant to the *Public Highways Act*, to a width of at least 66 feet. The Beaton survey shows the 66-foot width of that road as encompassing the entire area claimed by the MacLeods. I find that there is no

evidence that this area was ever conveyed back to the MacLeods by the Crown. There was no need for the MacLeod deed to "save and except" the old highway, as the legislation had already vested the old highway - which was then still in use - in the Crown. As the Applicants submit, the mere lack of a current Crown claim in the former MacLeod lands is irrelevant. It does not give the MacLeods any interest in them (Applicants' brief at paras. 97-101). In other words, based on all of the evidence I am satisfied that there is no evidence that the MacLeods ever had paper title to these lands or that these lands were ever expropriated from the MacLeods or their predecessors.

[85] The 1934 Wall description is similar to that in the 1968 MacDonald deed, but the expropriation of part of the Wall lands occurred in the interim, in 1957. Mr. MacDonald can only have an interest in the lands expropriated from Catherine Wall in 1957 if those lands were abandoned by the Crown and revested in Wall under the legislation then in force, or were otherwise conveyed back to Wall before she conveyed to MacDonald in 1968. There is no evidence that either of these things happened. As such, Wall could only have conveyed to MacDonald what she owned in 1968, which did not include any part of what is now PID 10102705 (Applicants' brief at paras. 90-92).

[86] As with the area claimed by the MacLeods, the present-day lack of a Crown claim makes no difference if neither Mr. MacDonald nor his predecessors ever had title to any part of the relevant .94 acre after the 1957 expropriation (Applicants' brief at para. 93).

[87] Additionally, the MacDonald deed places the western boundary at the "Main Highway running from Antigonish to Sherbrooke." The Respondents' theory would mean that this referred to the eastern boundary of the old highway. The Applicants submit that the "Main Highway" can only be the new highway, the road that existed when the deed was made (Applicants' brief at paras. 88-89).

[88] Further, the Crown conveyed the lands claimed by Mr. MacDonald to O'Leary before the Wall conveyance to MacDonald: the O'Leary deed is dated March 12, 1968, and was registered on April 16 of that year. The MacDonald deed is dated May 7, 1968, and registered the next day (Applicants' brief at para. 95).

Conclusion

[89] Having carefully considered all the evidence and the submissions of counsel, which includes a careful analysis of the tendered documents and surveys, I find, on

the balance of probabilities, that the Applicants are entitled to the order requested under the *Quieting Titles Act*. Their paper title, when assessed in accordance with the hierarchy of evidence, provides a stronger claim than those advanced by the Respondents. I prefer the survey and plan prepared by Mr. Beaton to those prepared by Mr. MacKeen and am satisfied that the stream referenced in the 1968 O'Leary deed is the position of the stream as it was relocated in the 1950s. I am likewise satisfied that the expropriation of the disputed area broke any chain of title the Respondents could advance.

Costs

[90] If the Parties are unable to agree on the actual amount of costs, they may make written submissions within 30 days of this decision.

Hoskins, J.