

SUPREME COURT OF NOVA SCOTIA
Citation: *Barkhouse v. Swinimer*, 2024 NSSC 6

Date: 20240105
Docket: 497648
Registry: Bridgewater

Between:

Allen Lewis Barkhouse and Laura Lynn Barkhouse

Applicants

v.

Jamie Douglas Swinimer and Dominique Anne Swinimer

Respondents

DECISION

Judge: The Honourable Justice Kevin Coady
Heard: September 7 and 8, 2023, in Halifax, Nova Scotia
Written Decision: January 5, 2024
Counsel: Rebecca Hiltz LeBlanc, K.C., for the Applicants
Michael P. Scott, for the Respondents

By the Court:

BACKGROUND

[1] The Barkhouses and the Swinimers are neighbors in the rural community of Martins Point, Lunenburg County, Nova Scotia. Since 2019 they have been involved in a dispute over a small triangular lot of land between their respective properties. Both parties claim ownership of the disputed lot.

[2] On March 10, 2020 the Barkhouses commenced an Application in Court in which they sought the following relief:

1. Declaring that the portion of the parcel of land represented by PID 60108800 is solely the property of the Applicants, that property being approximately one-half of the parcel represented by PID 60108800, and being triangular in shape and being bounded Southerly and Easterly by the other property of the Applicants represented by PID 60108834, and Westerly by property of the Respondents, with the Applicants ownership being based upon a conveyance made to the Applicant, Allen Lewis Barkhouse, by James Barkhouse on September 17, 1993, and which has been in the open, notorious and continuous possession by the Applicants from September 1993 to present time.
2. An Interlocutory, interim and permanent injunction restraining the Respondents, their respective servants, agents, employees, as well as any other persons acting on their respective behalf or instructions, their respective heirs, assigns and successors in title, from entering upon the Applicants' lands;
3. Damages for trespass;
4. For costs of the herein application;
5. For such further and other Order as to this Honourable Court deems just.

[3] The focus of the Barkhouse's evidence at trial was ownership of the triangular lot. They have not advanced sufficient evidence to support an injunction or damages. While the application suggests the Barkhouses are seeking prescriptive ownership, such was not the focus at trial. Instead ownership will be determined on the land's history of conveyancing. While there is evidence of their "open and notorious" use of the lot, it was not sufficient to establish ownership.

[4] On July 24, 2020 the Swinimers filed a Notice of Contest in which they refuted all the grounds advanced by the Barkhouses and claimed full ownership of

the triangular lot. They rely on a 2019 Warranty Deed from Irene and Dawson Baker. They argue that their 2019 Warranty Deed included the triangular lot. Allen and Laura Barkhouse, on the other hand, contend the triangular lot had been conveyed to them by a 1993 Quit Claim Deed from James Calvin Barkhouse and as a result the Swinimer's 2019 Deed could not convey the triangular lot.

THE EVIDENCE GENERALLY

[5] This Court is very familiar with these kind of land disputes and the evidence required to determine ownership. Unfortunately, the evidence in this trial is rather sparse. The following factors impacted on the clarity of the evidence:

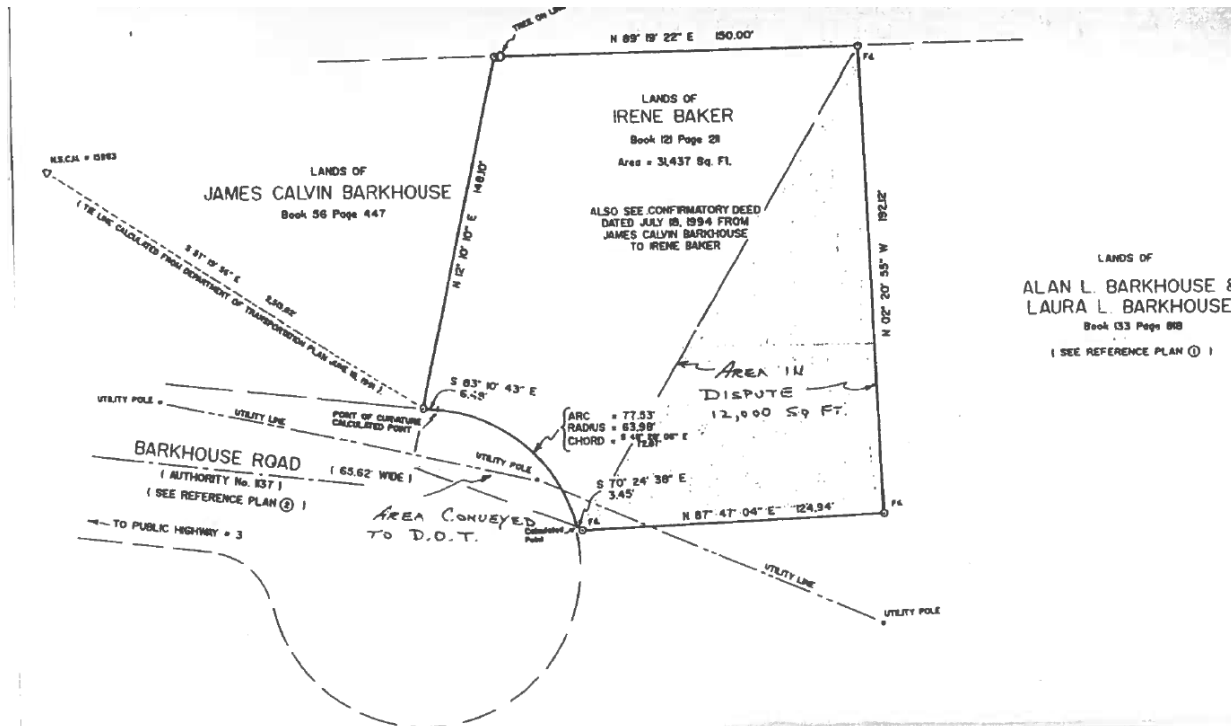
- This application was started by a different lawyer than counsel at trial. It appears as if the matter was not advanced by the initial counsel and trial counsel was retained when the Swinimers made an application in 2022 to have the matter dismissed for want of prosecution. Trial counsel did file new materials in 2023, but the narrative remained the same.
- The evidence at trial did not include a certified title abstract. It would have been very helpful if a reliable abstract for the parties lands, and the triangular lot, were provided. The Court was provided with individual deeds and property on-line documentation. However, that was not sufficient to give the Court a wholesome history of the area.
- The evidence of both parties did not include testimony from the surveyor who conducted a survey in 1994. This survey included the parties lands, as well as the triangular lot. If that surveyor was not available, another surveyor could have been called to explain the 1994 survey, or to have conducted a new survey.
- There was mention of Irene Baker filing a Quieting of Titles Action in relation to the subject lands. That application was not in evidence. The only reference to it was that Irene Baker started the application and that, at some point, it was withdrawn. It is quite likely that this court file may have assisted the Court in determining the full history of the area.

[6] Given these deficiencies, the Court is required to rely on the testimony of witnesses without corroborative evidence. I have the impression that the cost of this litigation has been a burden to the parties. Further, animosity has developed which

impacts the fact-finding process. Nonetheless, a decision is required so that these neighbors can put this dispute behind them.

The 1994 Survey:

[7] In 1994 a survey of the area was completed by Backman Surveys. I am reproducing a portion of that survey to give the reader a sense of the layout:



[8] The Barkhouses property is located on the right side of the survey while the Swinimer's property is in the middle and described as the "Lands of Irene Baker". The triangular lot is described as "Area in Dispute" – it appears as if those descriptive words were added to the survey sometime during this litigation. The lands of James Calvin Barkhouse, on the left, is the original property from which all three areas were conveyed.

Position of the Barkhouses:

[9] The Barkhouses take the position that when James Calvin Barkhouse conveyed property to Irene Baker in 1987, such conveyance did not include the triangular lot. Consequently, it remained the property of James Calvin Barkhouse. They further claim that in September, 1993 they acquired this triangular lot by way

of a Quit Claim Deed from James Calvin Barkhouse. The result was that the 2019 Warranty Deed into the Swinimers did not include the triangular lot.

Position of the Swinimers:

[10] The Swinimer's position is that in 1987 Irene Baker obtained the "Lands of Irene Baker" (1994 survey) from her brother James Calvin Barkhouse. They claim that prior to the 1987 deed, Ms. Baker and her sister attended the property and measured an area that she wished to acquire. Those measurements were then used to create a legal description of the property which was attached to the 1987 deed. An error in the measurements was later discovered. As a result, the 1987 deed incorrectly described the property, thereby omitting the triangular lot from the conveyance.

[11] The Swinimers allege that the following events occurred in the wake of the 1987 deed:

- In September, 1993 the applicant Allen Barkhouse approached Irene Baker offering to purchase the land she acquired in 1987 for \$10,000. Prior to completing the purchase, he retained a surveyor to investigate the property boundaries. In the course of doing so, he discovered the error in the 1987 deed. As a result of the error, Mr. Barkhouse advised Irene Baker that he no longer wanted to buy the property.
- To rectify the error, James Calvin Barkhouse executed a 1994 Confirmatory Deed in favour of Irene Baker. That Confirmatory Deed included a corrected legal description to give effect to the original intention of the parties.
- Also in September, 1993 the applicant Allen Barkhouse went to the home of James Calvin Barkhouse and asked him to sign a Quit Claim Deed in relation to the triangular lot. The content of that document is as follows:

17 Sep 93

Quit Claim Deed

I James Barkhouse convey to Allen Barkhouse the triangular piece of property (125' by 192' by 235', more or less) situated on the Barkhouse Rd (Martins Point, Lun. Co.) between Allen Barkhouse and Irene Baker for \$100.00.

This document was signed by both parties.

- James Calvin Barkhouse was not aware of the error in the 1987 deed and understood that he no longer had an interest in the triangular lot as he had already conveyed it to Irene Baker in 1987. Nonetheless he signed the document and accepted the \$100 cheque.
- On September 29, 1993 Allen Barkhouse attached the Quit Claim Deed to a Statutory Declaration and registered it on October 1, 1993. The following recitation appears in the Statutory Declaration:

In the matter of lands at Martins Point, in the County of Lunenburg, Province of Nova Scotia, described in Schedule "A:" of the Statutory Declaration attached hereto, formerly of James Barkhouse and presently claimed by Irene Baker.

A legal description attached described a lot measuring 125 feet x 125 feet by 192 feet and being a triangular piece of land between the present lands of Irene Baker and other existing lands of Allen and Laura Barkhouse.

- After signing the Quit Claim Deed, James Calvin Barkhouse spoke to Irene Baker about the visit and the document he signed. She was concerned given this transaction came so soon after the withdrawal of Allen Barkhouse's offer to buy the entire parcel for \$10,000. James Calvin Barkhouse went to Allen Barkhouse's home and returned the \$100 cheque to Laura Barkhouse.

[12] The Swinimers claim they own the triangular lot as a result of their 2019 Warranty Deed. They submit that the omission in the 1987 deed was an error that was corrected by the 1994 Confirmatory Deed.

The 1994 Confirmatory Deed:

[13] This document was termed a "Warranty Deed" and was dated July 18, 1994. It was registered at Chester on August 11, 1994. It makes no reference to the 1987 deed. The attached legal description clearly includes the triangular lot. If one follows the dimensions in the July 29, 1994 Backman Survey, and the legal description in the Confirmatory Deed, they are identical:

N 12 x 10 x 10 E – 148.10'

N 89 x 19 x 22 E – 150.00'

N 02 x 20 x 55 W – 192.12'

N 87 x 47 x 04 E -- 124.94'

S 70 x 24 x 38 E – 3.45'

ARC 77.53' – 6.48'

[14] The legal description describes “the lands of Irene Baker” as 31,437 square feet as does the Backman Survey. The following caption appears on the Backman Survey:

Also see Confirmatory Deed dated July 18, 1994 from James Calvin Barkhouse to Irene Baker

[15] Obviously the legal description was based on the Backman Survey, and the surveyor was aware of the dispute over the triangular lot. I am of the view that the notation on the survey “area in dispute – 12,000 sq. ft.” was placed there by the surveyor to reflect the ongoing dispute and that the referenced 12,000 square feet is included in Irene Baker’s 31,457 square feet.

[16] I recognize that the date of this Warranty Deed pre-dates the survey by 11 days. This does not concern me as I suspect the actual measurements took place prior to the Confirmatory Deed.

Evidence of Allen Lewis Barkhouse:

[17] Mr. Barkhouse testified that he and his spouse bought a residential property in Martins Point in 1998. They state they then acquired the triangular lot by way of a Quit Claim Deed dated September 19, 1993 from James Calvin Barkhouse. Mr. Barkhouse acknowledges that the triangular lot was a portion of the lands of Irene Baker (PID 60108800). He submits that the 1987 deed into Irene Baker did not include the triangular lot. He acknowledges that in 1994 James Calvin Barkhouse “purported” to convey the full lot to Irene Baker by way of a Confirmatory Deed. He takes the position that the 2019 deed into the Swinimers could not convey something that James Calvin Barkhouse conveyed to him in 1993. He further acknowledged that he was aware of the error in the legal description in the 1987 deed.

[18] Mr. Barkhouse agreed that he offered to buy Irene Baker’s property for \$10,000 but “it did not go”. He acknowledged that he offered to buy the triangular lot days after the offer to Irene Baker.

[19] Mr. Barkhouse also testified that he gave James Calvin Barkhouse the cheque for \$100 and that days later the latter attempted to return it and cancel the agreement.

He takes the position that he did not agree to cancel the agreement, and as such, a deal is a deal.

Evidence of Laura Barkhouse:

[20] Ms. Barkhouse generally confirmed the evidence of her spouse. She also testified that in 1993 James Calvin Barkhouse came to her home to return the \$100 cheque her husband had given him earlier. She stated that “James wanted to reverse the deal”.

Evidence of James Calvin Barkhouse:

[21] Mr. Barkhouse testified that in 1987 he conveyed PID 60108800 to his sister Irene Baker and her spouse. It was his intention to convey the entire lot. He stated that she walked the property in advance and that she “missed a pin” and as a result the 1987 legal description contained an error. He was aware that a surveyor made a new corrected legal description for the 1994 Confirmatory Deed.

[22] Mr. Barkhouse testified that in 1993 Allen Barkhouse approached him wanting to purchase the triangular lot for \$100. He testified that at the time he did not own any land in the area as he had conveyed any interest he had to his sister in 1987. Nonetheless, he took the \$100 cheque and signed a piece of paper that he now insists was not a Quit Claim Deed. He became nervous about the proposed transaction and was concerned it was an attempt to acquire land already conveyed. He brought the offer and the cheque to Irene Baker who confirmed his suspicions and directed him to return the cheque to Allen Barkhouse. He took the cheque to Laura Barkhouse stating the deal was off.

[23] There are issues related to the testimony of James Calvin Barkhouse and his supporting affidavit. He testified in Court that he did not write the affidavit, did not have counsel and did not tell “the lawyer” what is in the affidavit. He cannot recall if the paragraphs were read to him. I found that he was quite confused and that he has limited recollections of past events. Further, it is difficult to reconcile his taking the cheque, and signing the document, and his belief that he had already conveyed the subject property. I am of the view that he did so for no other reason than receiving an easy \$100.

Evidence of Jamie Swinimer:

[24] Mr. Swinimer purchased his lot at Martins Point from his Aunt Irene Baker on June 14, 2019 (PID 60108800). The legal description in the deed is exactly the same as the 1994 Confirmatory Deed. It also indicates an area of 31,437 square feet. When the Swinimers migrated the property they discovered a “textual qualifications on Title” which stated:

This parcel was the subject of the 1993 statutory declaration of Allen Barkhouse recorded in book 147 at page 571 under # 1793. References may also been made to the 1994 plan # 11953. Any claims to the property that Allen Barkhouse may have had as disclosed in the aforesaid statutory declaration are statute barred pursuant to the *Limitation of Actions Act*.

[25] Mr. Swinimer testified they believed they were acquiring all 31,437 square feet of PID # 60108800 with the 2019 deed. He testified that once the 2019 conveyance occurred, Allen Barkhouse started using the triangular lot for his own purposes. Efforts to deter him went unheeded.

[26] After closing, and in an effort to address the dispute, Mr. Swinimer requested Arthur Backman, N.S.L.S. to prepare a location certificate depicting the approximate area where Allen Barkhouse was encroaching on their lot. The location certificate shows that Allen Barkhouse was encroaching by 3835 square feet. This finding did not deter Mr. Barkhouse. The entirety of the encroachment was on the triangular lot.

Evidence of Irene Baker:

[27] Ms. Baker acknowledges that on June 14, 2019 she conveyed all of PID 60108800 to the Swinimers. In relation to the error in the 1987 deed she stated in her affidavit:

To come up with the description of the Subject Lt, my sister and I went out to the Subject Lot a few months prior to the date of my 1987 Deed and walked the lines. We took measurements of the Subject Lot as best we could with a tape measure. I then gave our measurements to our lawyer at the time, Mr. Gary Bardon, who put our measurements into the description which appears in my 1987 Deed.

[28] Mr. Baker testified that in September, 1993 Allen Barkhouse approached her asking if she wanted to sell PID # 60108800. She had never before met Allen Barkhouse and told him she would think about it. After a second meeting, arrangements were made to complete the transaction. Ms. Baker discussed the outcome in her affidavit:

A few days after I had agreed to sell the Subject Lot to Allen Barkhouse, but before the date I was to attend Mr. Preeper's office, Allen Barkhouse came to my house and told me the deal was off. He told me that he had hired a surveyor to "survey off" a piece of the Subject Lot and that it was now his. He told me I wouldn't receive any payment because he already had the land. At that time Allen Barkhouse also told me that he was going to build a garage on the piece he'd had surveyed off of the Subject Lot.

I understood that I owned the Subject Lot and didn't know how it would be possible for Allen Barkhouse to "survey off a piece" of it. The Subject Lot is all I received from my father and I was upset at the suggestion that it was being taken from me without my consent.

[29] I found Irene Baker to be a credible witness. Her trial testimony was consistent with her affidavit evidence. She obviously is of the view that Allen Barkhouse was willing to pay her \$10,000 for all of PID 60108800 until he realized the triangular lot had not been included in the 1987 deed. She feels that the 1993 Quit Claim Deed was an opportunity to capitalize on the error and acquire the triangular lot for \$100.

[30] A few days later she was advised by her brother James Calvin Barkhouse that Allen Barkhouse told him that he owned a piece of land and that Allen Barkhouse wanted to buy it. She referred to this event in her affidavit:

A few days after Allen Barkhouse told me that the deal was off, I was advised by my brother Jimmy, and do verily believe, that Allen Barkhouse had gone to see Jimmy and had told Jimmy that he owned a piece of land that Allen Barkhouse wanted to buy from him.

Jimmy advised me, and I do verily believe, that Jimmy advised Allen Barkhouse that he did not own any other vacant land on the Barkhouse Road like Allen Barkhouse was describing. Jimmy advised me, and I do verily believe, that Allen Barkhouse convinced him otherwise.

Jimmy advised me, and I do verily believe, that Allen Barkhouse had insisted that Jimmy take \$100 to "sign off" on a piece of land that Allen Barkhouse wanted from Jimmy. Jimmy advised me, and I do verily believe, that he saw no harm in giving up something that he didn't even know he owned.

Jimmy advised me, and I do verily believe, that Allen Barkhouse quickly wrote a few lines on a piece of paper, and Jimmy signed.

Jimmy advised me, and I do verily believe that his discussion with Allen Barkhouse regarding this piece of land happened very quickly.

[31] Ms. Baker commented on the \$100 cheque as follows:

Once Jimmy told me about the \$100 Allen Barkhouse had given him, and the piece of paper he had signed, I asked Jimmy why he had done that, and told Jimmy that what Allen Barkhouse had told him didn't make sense. After Allen Barkhouse had broken his deal with me, I was concerned that Allen Barkhouse was trying to pull one over on us. I told Jimmy to return the \$100 cheque to Allen Barkhouse and tell him the deal was off.

The cheque was returned to Laura Barkhouse. It was never cashed.

[32] Ms. Baker offered the following evidence about the Confirmatory Deed:

After completing the survey work, Arthur Backman prepared a correct description of the Subject Lot based on the Backman Plan. I took that description to my lawyer, Mr. Bardon, and Jimmy signed a warranty deed to us with the corrected description.

The warranty deed with the correct description of the Subject Lot is dated July 18, 1994, and was registered in the Registry of Deeds in Book 181 at Page 12 as Doc. No. 1514 on August 11, 1994 (the "Confirmatory Deed"). A copy of the Confirmatory Deed is attached hereto and marked as Exhibit "D".

The Confirmatory Deed describes the Subject Lot as being approximately 31,437 square feet as shown on the Backman Plan. The description also confirms that it is the same lot that was conveyed to me in my 1987 Deed.

[33] I recognize that James Calvin Barkhouse was unable to recall these events with much detail. I am not surprised.

FINDINGS OF FACT

[34] Irene Baker acquired PIK 60108800 from James Calvin Barkhouse on January 23, 1987 by way of Warranty Deed. She did not retain a surveyor and did not have a legal description for the whole of PID 60108800. The evidence satisfied me that the intention of both was that all of PID 60108800 would be conveyed.

[35] Prior to closing, Irene Baker walked the lines and created a legal description which was contained in the 1987 deed. Unfortunately she "missed a pin" and as a result the triangular lot was excluded from PID 60108800.

[36] In the summer of 1993 Allen Barkhouse approached Irene Baker asking if she was prepared to sell him PID 60108800. Irene Baker agreed to the transaction. On August 22, 1993 an agreement was signed with a purchase price of \$10,000. The agreement was "subject to finance approval and clear title and survey".

[37] Prior to the closing, Allen Barkhouse retained a surveyor to assess the property lines of PID 60108800. He determined that the triangular lot was not included in the 1987 conveyance. That lot was adjacent to his property which made it particularly valuable to him.

[38] Prior to closing and subsequent to the survey, Allen Barkhouse approached Irene Baker and told her the deal was off.

[39] Shortly after this cancellation, Allen Barkhouse approached James Calvin Barkhouse and persuaded him that he still owned the triangular lot. Allen Barkhouse indicated that he wanted to buy the triangular lot and would pay \$100. He then wrote up a hand-written document titled "Quit Claim Deed" dated September 17, 1993 and both signed. A cheque for \$100 was given to James Calvin Barkhouse.

[40] James Calvin Barkhouse was unsure whether he retained ownership of the triangular lot and approached Irene Baker for clarification and advice. I am satisfied he was unaware of the error in the 1987 deed. Ms. Baker convinced James Calvin Barkhouse that he had no interest in PID 60108800 and instructed him to return the cheque which was done. Allen Barkhouse did not accept this proposed repudiation.

[41] Irene Baker then decided to retain a surveyor to satisfy herself she had title to all of PID 60108800. The surveyor discovered the error in the legal description in the 1987 deed. A new complete legal description was formulated and the 1994 Confirmatory Deed was executed and registered.

[42] On June 14, 2019 Jamie and Dominique Swinimer acquired PID 60108800 by way of Warranty Deed from Irene and Dawson Baker. The legal description was exactly the same as in the 1994 Confirmatory Deed.

[43] After the Swinimers purchased their property Allen Barkhouse started placing objects on the triangular lot. The placement of these items interfered with the Swinimers intended use of the area and led to dissention between the parties.

[44] In July, 2019 Mr. Swinimer retained Arthur Backman, N.S.L.S. to prepare a location certificate depicting the area where Allen Barkhouse was encroaching on the triangular lot. The location certificate disclosed a 3835 square foot encroachment.

[45] Late in 2019 Mr. Swinimer formally requested Allen Barkhouse to remove the items off the encroached area so that he could perform tree and brush removal. That request was denied and litigation ensued.

CONCLUSION

[46] The transactions, after the 1987 deed, were conducted among family members in a very informal manner. Lawyers and surveyors were minimally involved. These informal practices were common in rural Nova Scotia. Such an approach can present as an opportunity to exploit weaker parties. That is exactly what happened in this case.

[47] If not for the 1993 Quit Claim Deed, it is unlikely that this trial would be required. The only way that Allen Barkhouse could mount a credible claim to the triangular lot is because of the Quit Claim Deed. The only way the Quit Claim Deed exists is because of Irene Baker's error in walking the lines and "missing a pin". This error was exploited by Allen Barkhouse's dealings with James Calvin Barkhouse.

[48] Allen Barkhouse obviously wanted to expand his property for a variety of purposes. In 1993 he decided to offer Irene Baker \$10,000 for PID 60108800. There was no evidence about whether the price reflected real value. Allen Barkhouse then retained a surveyor who discovered the error in the legal description. He saw this as an opportunity to acquire the triangular lot for a pittance. Consequently he cancelled the transaction with Irene Baker.

[49] Within days Allen Barkhouse persuaded James Calvin Barkhouse that he still owned the triangular lot. Allen Barkhouse wrote up a hand-written agreement and had the latter sign the document. He then provided the \$100 cheque. The fact that the offer was only \$100 speaks volumes about the vulnerability of James Calvin Barkhouse.

[50] The conduct of Allen Barkhouse cannot be condoned by this Court. Consequently, I dismiss this application. The triangular lot belongs to Jamie and Dominique Swiminmer.

Coady, J.