SUPREME COURT OF NOVA SCOTIA
Citation: MacMillan v. MacMillan, 2013 NSSC 393

Date: 20130402
Docket: PtH No. 335261
Registry: Halifax

Between:

Ronald J. MacMillan, Evelyn T. MacMillan and Gary MacMillan

Plaintiffs

v.

Norman MacMillan

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Heard:	September 18th, 19th, 20th, 21st, 24th, & 25th, 2012, and October 12th, 2012, in Port Hawkesbury, Nova Scotia
Written Decision:	April 10, 2013
Counsel:	Michelle Kelly, for the Plaintiff Harold A. MacIsaac, for the Defendant

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By the Court:

INTRODUCTION

[1] The MacMillan Farm ("the farm") is located in Judique, Cape Breton, on the Campbell Road. Its history in the MacMillan Family dates back more than one hundred and fifty (150) years when it was deeded to Donald MacMillan in 1859.

[2] John A. MacMillan and his wife, Flora MacMillan, owned the farm which consists of 400 acres. John A. lived on the farm all of his life. He and Flora had four children who were all raised there. The children were Catherine, Angus, Ronald, and Alexander.

[3] There were two deeds which made up the four hundred (400) acres, one for a hundred and sixty (160) acres and the other for two hundred and forty (240) acres. The lots are adjoining lots which when combined form a rectangular shaped lot.

[4] John A. died in the year 1986, at the age of 96. His wife, Flora MacMillan, died in the year 1992, at the age of 95.

[5] Of the four (4) children only Angus remained in Judique. His son Norman MacMillan is the Defendant. The Plaintiff, Ronald, and Alexander are still living. Catherine (O'Leary) died in the year 1997. Together, with the help of others, including the Plaintiffs, Angus and Norman helped maintain the farm over the years.

[6] When John A. died, he devised the property by will to his wife, Flora, and his four (4) children, each receiving an undivided one-fifth (1/5) share in the farm property as Tenants-In-Common.

[7] When Flora died, she left her share to her son, Angus, leaving him with two-fifths (2/5) ownership in the farm. In 2006, Angus deeded his two-fifths (2/5) interest in the farm to the Defendant. Norman, at this time, continues to own a two-fifths (2/5) interest.

[8] The Plaintiff, Ronald MacMillan, still owns his one-fifth (1/5) share. His wife, Evelyn, also a Plaintiff, acquired the share of Alex MacMillan by deed in 2003. Their son, Gary MacMillan, also a Plaintiff, acquired the interest of Catherine O'Leary, in following her death. His deed is dated July 20, 1998.

[9] Individually, the three Plaintiffs therefore each hold a one-fifth (1/5) interest in the farm property, with the Defendant, Norman MacMillan, owning a two fifths (2/5) interest.

[10] This is a action commenced by the Plaintiffs under the *Partition Act*, R.S.N.S. 1989, c. 333, to have the "homestead" sold, or set off to them. The Defendant, Norman MacMillan, has filed a defence and counterclaim, asking that the Court divide the property, "on the ground".

[11] The major considerations in this action are whether the land can be divided without prejudice to the parties and/or whether a sale is necessary are major considerations. The *Act* also allows for a set-off of the land in whole or in part to one or more of the parties in return for monetary compensation. Essentially, the *Act,* and the cases cited by the parties, allows the Court to exercise its discretion.

[12] The ability (or lack thereof) of the parties to use and share the property as co-owners was a contentious issue at the trial, which lasted eight (8) days. Further, the ability of the parties to share the maintenance of the property, the repairs, expenses and related issues, formed a major part of the evidence.

[13] It is apparent that different philosophies are at play as between the parties. The Plaintiffs' intended use for the property is as a summer residence/home. The Defendant wishes to maintain, to some extent, the historical character and integrity of the property, as a farm.

[14] The Plaintiffs, (Ronald and Evelyn MacMillan,) and their family have had the benefit of enjoying the property in the summer months, especially since Ronald's retirement. Since 2006, in particular, the issues around shared use and enjoyment as well as maintaining the property have been escalating between the parties. The Defendant, in 2009, sought a more structured approach through legal counsel. It is this discord, and the inability of the parties to resolve it that has brought the matter before the Court.

[15] A description of the property, its makeup, the topography of the land, and the valuations which have been provided in evidence are relevant issues. First, however, some additional background and a discussion of the pleadings should be set out in terms of the positions of the parties.

THE PLEADINGS/POSITIONS

[16] The Plaintiffs have pleaded Sections 5, 24(1), and 28(1)(a) of the *Partition Act*. They seek an order for set-off whereby they would receive the entire four hundred (400) acres and pay to the Defendant a sum agreed upon by the Court for his two-fifths (2/5) interest. In the alternative, the Plaintiff seeks an order that the property be sold with the opportunity for the Plaintiffs to be bidders on the property.

[17] The Defendant, Norman MacMillan, has filed a defence and counterclaim to the Plaintiffs' action, claiming that the property is capable of partition (division) on the ground. The Defendant pleads that in addition to the large acreage, there is ample road frontage along the Campbell Road, which stretches almost the entire southern boundary of PID# 50147826 property.

[18] The Defendant proposes that the cleared lands, including the house, well, septic, fields and driveway can be deeded to the Plaintiffs. Included would be a panoramic view of St. George's Bay. In exchange, the Defendant would receive the balance of the land, which is essentially wood land.

[19] The Defendant pleads that a division on the ground may be “equalized” by a monetary set-off, if such is necessary to achieve equity after a simple division. The Defendant is flexible as to whether he is the party receiving one or the other of the pieces under his proposal/scenario.

[20] The Defendant, Norman MacMillan, claims a deeply rooted connection to the farm, having “grown up “ and stayed in Judique until he was 18 and having returned to work it and maintain it with his father, Angus, and his grandfather, John A.

[21] In each of the parties’ position , the appraisals submitted by them , is important evidence . The Defendant’s appraisal by Ship Harbour Properties Limited consists of two (2) parts. These are contained at Tabs 13 and 14 of the Joint Exhibit Book (Exhibit #1). The Defendant appraised the cleared land (32 acres) with all buildings and amenities included deeded ownership of the driveway (12acres) at $152,000.00. The remaining lands (essentially the wood land) was valued at $91,000.00. The total of both of the Defendants’ appraisals is $243,000.00, for the entire property, including land, buildings, driveway, well, septic, ocean views, wood land, wood lot road access, and road frontage.

[22] The Plaintiffs also claim a close connection and association with the property. The Plaintiff, Ronald MacMillan, is 87 years of age and is the second son of John A. and Flora. He was born in 1925 and left the property in 1944. Ronald and Evelyn have six (6) children and have been residing in Ontario and raising their family since 1952. Since then, they have been returning to the property every year both in the summer and at other times of the year (Exhibit 1, Tab 1- A).

[23] The evidence confirms that the primary reason for their visits was summer vacation for two (2) weeks before Ronald retired, and then approximately, for six (6) weeks since Ronald has retired, which was over last fifteen (15) years. There were, however, other visits to Ronald's parents other times of the year on occasion to celebrate anniversaries and as needed. They would bring their children with them for vacations and perform ongoing maintenance during their stay. Ronald liked to paint and the place was up kept by mowing, etc. Over the years, Evelyn stated, "neither of them sat" and were always doing something to the place.

[24] In 1998, the Plaintiffs were responsible for a major renovation to the house. A detailed list of the repairs and renovations has been included in the evidence as Tab 7 of the Plaintiffs' exhibits.

[25] The Plaintiffs have provided evidence of the value of the farm, in the form of an appraisal from W. Black & Son Limited, located at Tab 10 of the Joint Exhibit Book (Exhibit #1). Mr. Black valued the entire farm (400acres), inclusive of all buildings, land and amenities in the amount of $140,000.00. Using this amount, the combined (3/5)shares of the Plaintiffs would be worth $84,000.00 and the (2/5) of the Defendant would be worth $56,000.00.

[26] The Plaintiffs have stated this case is not about, whose connection runs deeper or who was "promised" the property years ago. The Plaintiffs say each party is a rightful owner and that the relationship among the owners has been "so acrimonious", that it must come to an end. Much evidence was given as to why the parties were not seeing "eye to eye".

[27] If a court is required to consider the "equities", are the Plaintiffs correct to say such things don't matter, or that deep connections don't matter? There is also evidence that Angus MacMillan was to be deeded the land by his father. Angus purportedly refused, out of concern for fairness to his siblings.

[28] The Court also heard evidence as to the manner in which the shares of Alex

MacMillan and Catherine O'Leary were acquired. In his counterclaim, the Defendant has alleged in Paragraphs 5(p) and 5(q) of his defence/counterclaim as follows:

> **"5(p)** In 2003, when the Defendant was working in Alberta, his uncle, Alexander MacMillan offered him his 1/5 interest in the property if he would come home to look after his father who was in failing health. The Defendant accepted this offer but upon selling his home in Alberta and coming home found that the Plaintiff, Evelyn Macmillan, had purchased Alexander MacMillan's 1/5 interest in the property;
>
> **5(q)** Similarly, with respect to Mary O'Leary's 1/5 interest in the property, it was her wish that it be given to the Defendant, and her husband, after her death, made that offer to the Defendant, but before he could respond the Plaintiff, Gary MacMillan had obtained a quit claim Deed of that 1/5 interest;"

[29] In addition, the Defendant maintains his grandfather offered to deed him the property. The Defendant also maintains that his father, Angus, "singlehandedly (except for the monetary assistance of his sister, Mary O'Leary) cared for his parents (the Defendant's grandparents) through his lifetime, particularly during the last 10 to 15 years of their life, when they lived alone on the property, as other children had left the area."

[30] In addition, much evidence was given as to the contributions to the homestead over the years by the respective parties. The contributions have been substantial on both sides. The Court will address the extent to which they must be taken into account and any partition, sale, or set-off.

[31] The topography of the land is a relevant issue and must be addressed in terms of whether the land can be divided, or whether maximizing the value requires a sale. On this issue, the future intended use of the land by each party is also relevant.

[32] I turn now to provide some additional background

BACKGROUND

[33] The evidence indicates that Angus MacMillan was the oldest son and was born on February 7, 1922. His statutory declaration was obtained from him on September 17, 2011, before his death on December27,2011. His declaration informs us that his father, John A., was born August 9, 1889, and his mother, Flora A. MacDonald, was born on June 29, 1897. Both were born in Judique, where they resided at the MacMillan homestead until their deaths.

[34] Angus MacMillan stated that there was no home care available for his parents, and his father would not consider a nursing home. Consequently, the care for his parents fell to him, which he did in addition to his normal daily activities. This included working in Port Hawkesbury through the week and returning daily to Judique.

[35] Angus MacMillan's declaration further states, from the early 1980's his parents became more dependent on him for all their needs. At Paragraphs 7 & 8 of his Declaration, Angus MacMillan stated as follows:

> **7.** When John A. made his will, I was present and Hughie MacIsaac was the lawyer retained. The property was left to, Flora MacMillan (my mother) and the four children as Tenants in Common. I know that my father truly thought that the family would work together for a fair and equitable use of the property. Unfortunately, this is not happening.
>
> **8.** Considering the family discord that has arose, I sincerely regret that I in my desire to act fairly with my siblings, I did not allow my father to sign the entire property over to my son, Norman, when he made the proposal.

[36] Mr. Angus MacMillan was named the sole executor and trustee for both of his parents' wills. He states he was their sole care giver all of his adult life.

[37] Norman MacMillan gave evidence that he returned home from Alberta in 1983-84 to help his father. Norman was born in 1960 and remained in Judique until he was 18, when he left in 1978 for Alberta. His evidence was he returned home at the request of his grandfather, and to help with and care for the farm.

[38] Norman spent four years from 1984-1988 living on the farm with his grandparents and helping them. He recounted in evidence much of the work that needed to be done to maintain it. This included the making of hay, taking care of the animals (milking twice a day), the cutting and hauling of firewood, the building and repair of fences. Although the farm was downsized at that point, there was still considerable work to be done. He described it as a full time job for him and his father Angus; looking after his grandparents and the farm.

[39] Norman acknowledged the contribution of the Plaintiffs in maintaining the house (in particular the foundation/sill work) and keeping it standing. He further acknowledged the early work the Plaintiffs preformed in dismantling the barn, even though Norman himself played the major role in finally taking the barn down. Norman felt had he been around earlier the barn may have been saved. He was

particularly close with his cousin Gordon, a son and Plaintiffs Ronald and Evelyn. Norman's brother Robert also helped maintain the farm in various ways including the repairing of the road, cutting of firewood and fence posts, as well as additional chores.

[40] Norman was with his grandfather, when he passed away. He rushed to Inverness to see him in hospital on a foggy night. They spoke briefly and spoke of the farm. Norman stated his grandfather asked him not to let it go down, or words to that effect. I accept that this was said.

[41] The Defendant provided a series of photographs at Tab B-3 of Exhibit 1. His evidence when reviewing these pictures showed, his knowledge of the land, the farm, the animals (e.g. the horse Maude died in 1983) and the people. It showed also his knowledge of the way things were done, what needed to be done, and who was doing what. He spoke of his grandfather's walking stick and the Ayrshires (long horn cows).He said the animals were still there in the early 80s and he knew why the long horns had come to leave the farm. (Angus made his father get rid of them if he (John A.) was to return to live at home from hospital.)

[42] In terms of the walking stick (Norman) did not in his evidence take the

opportunity to say his grandfather "needed it". Rather he stated his grandfather "always had it". Throughout his evidence the Defendant was willing to give credit, where it was due. Any aggression or behaviour appeared to be "out of character". Rather it appeared due to his frustration with not being able to share the use of the homestead with the Plaintiffs. It was also due, he stated to the manner in which his father was being treated, which he felt was wrong.

TOPOGRAPHY

[43] The parties gave evidence as to the elevation/terrain of the farm acreage. The Plaintiff Gary MacMillan summarized his position on the characteristics of the property. He said a division would be difficult to achieve without prejudice to everyone's interest as for everyone to have cleared land ,with driveway access and an ocean view, everyone would need to be "standing in the same spot".

[44] The evidence (as shown on Exhibit 2, the topographical map; the photographs, aerial photographs and *viva voce*), shows that the land slopes from west to east. The house, cleared land, driveway and outbuildings are all located on "high ground". The driveway entrance is located on the southern PID consisting of 160 acres. The

buildings and the remainder of the driveway leading into the property as well as the cleared fields are located,(mostly) on the northern PID consisting of 240 acres. The land becomes more elevated somewhat when one proceeds in a southeast direction from the house toward the Campbell Road. This point is shown on the map as OV (Ocean view) 1,2 and 5..

[45] As you proceed easternly, towards the river the property slopes down considerably to form a wide ravine containing the river which leads to a bridge on the Campbell Road. The river is shown as the blue line in Tab B-2 of Exhibit 1. From the east side of the river it rises again to form high land toward the eastern boundary near the road referred to in evidence as the wood road or "Stora Road". There is a high point and an ocean view to the northeast " on the east side of the river. None of this land is cleared and would require substantial clearing to access and develop.

[46] One can see the sloping of the land clearly on aerial Photo No. 3 at Tab B-1. At first glance this photo would suggest there are problems dividing the land equitably, as the drop below the farm house, outbuildings and cleared land is considerable. It is obvious that the lands containing the house is the "choice" part of the farm, at least at this time. Much time and expense would need to be incurred to make the land both

habitable and suitable for development. Roads would need to be constructed (except for the "wood road") including any artery which was built or permitted off of the existing right-driveway . The existing entrance from Campbell Road could be used as a common entrance to provide access to the remaining lands, but a shared driveway among these parties would not be feasible and is probably unnecessary given the amount of available road frontage.

PARTITION-GENERAL PRINCIPLES

[47] There is no right of partition at common law. In Nova Scotia, s.4 of the *Partition Act* grants the Court the authority to compel a partition of jointly held property or to have the property sold and the proceeds distributed among those entitled. Section 4 reads as follows:

> 4 All persons holding land as joint tenants, co-parceners or tenants in common, may be compelled to have such land partitioned, or to have the same sold and the proceeds of the sale distributed among the persons entitled, in the manner provided in this Act, *R.S., c.333, s.4.*

[48] Pursuant to s.5 of the *Act*, the land owner (one or more) may bring the action (for a partition) in the Supreme Court.

[49] Neither of these sections mentions the term "set off", which is what the Plaintiff seeks in the case before me. "Partition" is defined in *Black's Law Dictionary (7th Edition)* as follows:

> "The dividing of lands held by joint tenants, co-parceners, or tenants in common."

[50] And further defined in *Blacks*:

> "Any division of land or personal property between co-owners."

[51] Set off, is dealt with in s.24(1) of the *Act*, which states as follows:

> 24(1) When the land, of which partition is sought, cannot be divided without prejudice to the owners, or when any specific part thereof is of greater value than the share of any party and cannot be divided without prejudice to the owners, **the whole land, or the part so incapable fo division, may be set off to any one of the parties who will accept it, upon payment by him to any one or more of the others of such compensation as the commissioners determine.**

[52] In Nova Scotia the general principles of partition may be summarized as follows:

> (I) Co-owners maybe compelled to divide or sell;
>
> (ii) Where the land cannot be divided without prejudice to the owners, it may be set off in whole or in part to any of the parties who will accept it upon payment by him

or her to one or more of the parties;

(iii) The Court may appoint three (3) Commissioners to effect the partition; and

(iv) The Commissioner shall determine the amount of compensation in any set off.

[53] Subject to a further discussion of the case law, the *Act* prefers partition over sale where it can be done without prejudice to the parties or their interests. If it cannot, a sale may be necessary, or a set off (in whole or in part) if that would achieve a fair and reasonable outcome.

[54] The Court has the discretion to determine the outcome that will do "complete equity" as between the parties, having regard to all of the circumstances. A perfect division isn't always possible nor should any preference be given to the largest individual interest holder, or group of interest holders. Fairness in all of the circumstances of ownership must be the guiding principle when the relevant factors are considered.

THE APPRAISALS

W.R. BLACK & SON LIMITED - for the Plaintiffs

[55] The Plaintiffs submitted the appraisal of Mr. Sean Black. Mr. Black had not previously given evidence in Supreme Court or qualified as an expert. Given his qualifications, he was accepted as an expert in the area of appraising real estate. Mr. Black's appraisal was dated January 19, 2010, two years earlier than the Wambolt appraisal, which was completed on January 23, 2012.

[56] Mr. Black provided a single value for the entire 400 acres, without valuing separate portions. He used the comparison approach to arrive at his valuation of $140,000. He stated the remaining "economic life" of the house was 25 years, noting that if a dwelling is used seasonally, it's economic life is reduced. Mr. Black could not recall the heating system within the MacMillan farmhouse. He valued the land at $245.00 per acre which when multiplied by 400 equates to a land value of $98,000.00. He valued the entire site at $219,820.00 (cost) and then deducted accrued depreciation of 75%, due to a loss in value over time. This left a net value for the house of $55,000.00. With adjustments and applying the comparison approach he arrived at a value of $140,000.00.

[57] He favoured his own comparable properties over those of Mr. Wambolt, in that all three were rural properties with farmhouses. One of his comparbles had a good view of the Bras d'or. He would have chosen the first of Mr. Wambolts' comparables, but Mr. Black would have preferred a larger acreage. Even so he stated Mr. Wambolt's figure of $255.00 per acre was not unreasonable. Although Mr. Black took issue with the method, it was in line with his valuation of $245.00 per acre.

[58] In cross examination it was noted that Mr. Black did not account for the view of the ocean. He didn't observe the ocean view but stated also that proximity to the ocean is an important factor. He did not estimate a value for pulpwood, noting he walked the "other areas". He agreed the 400 acres was mostly wooded and walking it was not feasible and not typically be done.

[59] Mr. Black considered Mr. Wambolt's appraisal to be "hypothetical", but agreed that appraising is not a precise science. He agreed with the principle that the value per acre is normally reduced as the acreage increases

SHIP'S HARBOUR APPRAISALS LIMITED

[60] As noted, Mr Wambolt's appraisal is more recent by two years. It has assigned more than one value (within the 400 acres), in the sense that, if partitioned the various parcels can be assigned certain values, both in terms of equalizing the interests and in determining the equalization payment in the event of a set off.,

[61] Mr. Wambolt did account for the ocean view. Further however, he stated that while the land is rural, the house is in very good shape. The cleared fields accompanied by the upgraded condition of the road adds to its value. In addition, new windows, cut lawns and in particular the location make this a desirable property. He stated the property provides a good deal of privacy while being located close to the town of Port Hawkesbury. He stated there are very few properties sold in Judique, and properties located on Route 19 are hard to come by, given their proximity to the town for convenience and shopping. For this reason, despite his investigating, it was difficult to find comparables along Route 19. His evidence was there is little "turnover".

[62] Mr. Wambolt has appeared and been qualified as an expert in Court on numerous

occasions. He has performed hundreds of appraisals in the Counties of Richmond, Inverness and outlying areas. He stated generally, as acreage increases, cost per acre normally decreases. Mr. Wambolt did not provide a value for one entire property strictly as one parcel. His appraisal was based on ascertaining a value for the land the Plaintiffs have always used and enjoyed (including the driveway) the majority of cleared land, ocean views, and the buildings including the house. His opinion was this lot, totalling 44 acres was worth $152,000. He valued the remaining acreage at $91,000.00.

[63] In cross examination, Mr. Wambolt's evidence was that the value for the entire farm would be "substantial" in a strong market. The market he felt was strong in that area. The extent of the road frontage on the property was also an important factor, in his mind. Houses he said will sell for more on Route 19 than they will in the town.

MAINTENANCE AND REPAIRS

[64] Both parties have provided evidence of repair work and improvements made to the property by them over the years. The Plaintiffs state in their brief:

> "As admitted by the Defendant, if not for the work done by

> the Plaintiff the farmhouse would no longer be standing and definitely would not be fit for habitation."

[65] The law allows the Court to consider "lasting improvements" that have "enhanced the value" of the property to be credited to the party making the improvements. The rationale is the other party may not take advantage without submitting an allowance for improvements of their own (*Finanders v. Finanders* 2005 NSSC 145.)

[66] The Defendant's position is that if there are to be "equitable allowances", he too must be given credit for the work he performed, which he says preserved the farm in many ways, and in particular the fields. I shall review the evidence of the contributions by both sides.

[67] The Plaintiffs provided (in Tab 1A of Exhibit 1) a dozen or more pictures showing the upgrades to the house from 1998 to 2004. This involved scraping, painting, improvements to the kitchen, bathroom, replacing and insulating behind the old stove in the parlour, replacing the water tank in the basement. To the outside they replaced sheathing, (cladding) and re-shingled and painted the house. There was extensive work around the foundation (the sill work). Pictures taken in the year 2000

showed a large pile of gravel with the Plaintiff Evelyn MacMillan involved in shovelling. Some, but not all, windows have been replaced.

[68] The evidence generally from the Plaintiffs is that the house was "falling down". It is apparent from the evidence that it was deteriorating and required substantial work. The Plaintiff should be credited with this work. A contractor (Alex Cameron) was hired and paid a substantial sum. Ronald MacMillan worked persistently on improving the exterior of the house. The Plaintiff Gary MacMillan also contributed with respect to removal of the stove, water tank and in other ways.

[69] The Plaintiff provided pictures of the Defendant's work, showing an unfinished road, and piles of debris, namely trees that were cut on the western side of the driveway leading from the Campbell Road. I note a number of these pictures showed cleared fields which both the Plaintiffs and Defendant claim they are responsible for maintaining.

[70] The Defendant provided his list at Tab B-5 of Exhibit 1. Like the Plaintiff the list is quite detailed and includes "man days" worked over a period spanning from 1965 to 1998 as one period. The second time frame which he provided was from 1998 to the

present.

[71] Much of the ongoing work claimed by the Defendant was for clearing of fields with the bush hog and the tractor. There were extended periods of time spent on this prior to any dispute. For example, there were 25 man days in 1984 (northwest section of lower PID); 35 man hours in 1987 (wood road construction).

[72] Much of the work performed by Norman MacMillan was also major work in the sense that it involved the use of heavy equipment such as a hi-hoe, tractor, bush hog, skidder and dump truck. He repaired and upgraded the well (with new crocks, piping, gravel etc.) and did the work himself. He removed large rocks and boulders from the fields. He excavated the driveway to improve drainage and to prevent washouts. He used the fill to "level" the "hole" left after tearing down the barn. It is evident from the photos alone that this work, especially during the more recent period was "bull work" which not everyone could do on their own. It was also extensive. He did hire contractors.

[73] The Plaintiffs took issue with much of the Defendant's work. In particular there was extensive evidence given about his work on the driveway, and that it was not what

had been agreed to in the “letters” between counsel, many of which were entered into evidence.(Exhibits 5-21). The Plaintiffs say a work plan was requested from the Defendant but not provided. The Defendant says the letter from Plaintiffs’ counsel dated June 13, 2011, left it up to him to do the work.

[74] The Plaintiffs’ maintain the Defendant was simply requested to clear the ditches on the eastern side of vegetation, to allow better drainage. They say it is borne out by the counsel letters that he did not abide by this agreement.

[75] Instead they say the Defendant took it upon himself to excavate a considerable area west of the driveway and essentially left a “mess”. The Plaintiff Gary MacMillan noted also that he did not install an overflow pipe in the well and that the quantity and quality were not improved. It was acknowledged however that the area of the well is in or near the former cow pasture, and that in the past coliform counts were present. The Plaintiffs’ did not agree with filling in the hole left by the barn removal. They complained about the debris left along the driveway and in other areas. This complaint appears reasonable enough.

[76] Norman’s response is that much of the work was simply not finished when the

photos (Exhibit 2 A-1) were taken. He gave evidence as to his reasons for ditching and excavating the western side, so as to relieve the burden on the eastern side, and there would be no issue of flooding on that side as it would be diverted away (with berms) from the eastern side of the driveway during heavy rains and in spring. It would eventually be diverted back to the culvert on the Campbell Road.

[77] Snow drifting was also an issue which would be corrected. In short, with this and the other tasks, the Defendant stated he was doing what he felt was necessary to finish the job properly. Further there was limited time to do it, as when the weather came available he was required to be out fishing and to find time after long days to continue his work. In regard to not seeking permission or consent to certain things, he didn't think he had to.

[78] There was considerable evidence, that the Plaintiff Ronald MacMillan had previously kept the ditch on the eastern side of the right-a-way (driveway) clear, by using his trimmer and expenses for that equipment were claimed as part of the Plaintiffs' expenses.

[79] Disagreement is not foreign to these parties. There are numerous incidents

where things were said to Norman (for example by Evelyn MacMillan) which caused him upset (e.g. the June 25th, 2009 letter (Exhibit 2 A-8), the comment that he shouldn't spend money on the farm). During the recent work, the evidence shows that he was under pressure (from himself also) to get the work done.

[80] There were some expenses claimed by the Plaintiffs which the Defendant argued did not benefit him or the property. (e.g. the computer camera installed by Gary, the lawn tractor that he did not have access to).

[81] In terms of man days, the Plaintiffs claimed the total of 107 plus 33. The Defendant's counsel took issue with this and pointed out that there were in fact 91 man days for a total of 124, instead of 140. He is correct in this. Further Mr. MacIsaac argued that for certain man days claimed, (e.g. 5 man days in 2004), the work would have been performed by the contractor or subcontractor. (e.g. to spread gravel).

[82] The Plaintiffs' position in regard to the invoices is that they are only relevant if they "add value" or contributed a "lasting benefit". This is correct. Ms. Kelly for the Plaintiffs argue therefore that the Court should not consider repairs to the bush hog or attendances for personal care. In this regard (personal care) she states the Statutory

Declaration of the late Angus MacMillan (at Tab B16 of Exhibit 1) is irrelevant.

[83] Also she argues much of the excavation work west of the ditch was unnecessary, and her clients were taken back in that it was worse than before. The Plaintiffs' issue is how much of what the Defendant did actually added value? In this regard she says only his improvements to the roadway and the well fall into that category. This is consistent she says with Robert Wambolt's assessment.

[84] The Plaintiffs take issue not with what the Defendant did but how much it improved the property. They say the Plaintiffs should be awarded $15,000 in set off value for the driveway and well, which when combined with his two fifth share of the land (at $250 an acre) and an amount of $7000 for his two fifth share of the house (which they say is $70,000. less betterments of 52,500 for a net value of 17,500) .The Plaintiffs submitted therefore that for set off purposes, the Defendant's share would total $62,000, with his share of the land being worth $40,000.

[85] Each party has submitted receipted work in the amount of $34,558.29 (the Plaintiff) and $31,010.46 (for the Defendant). There is very little discrepancy in these amounts. In terms of man days, even if attendance for personal care is discounted the

Defendant's man days exceed the Plaintiffs at 310 man days (compared to even 107). It should be noted that none of the expenses submitted by the Defendant include attendances for personal care. The total personal and contracted expenses for the Defendant is $38,840.92 compared to the Plaintiffs' of $43,310.12.

[86] For the purpose of this decision rather than validate some invoices and invalidate others, it is important to consider the entire contribution by each side and determine whether one side or the other, should be credited with certain amounts.

[87] I do not think it is quite fair to say that time looking after the grandparents accounts for nothing. If personal care is required then someone surely needed to look after the homestead. With the Plaintiffs living away, the evidence is clear this fell to Norman and his father Angus on a daily basis. I am satisfied that some animals were there until the early 1980s, and even if they left a bit earlier, there was lots to do. If the grandparents didn't need such care there would have been time to do more work on the house both inside and out. As it was the grounds were kept up as best one could under the circumstances.

[88] Ronald and his family have been living away since 1952 (or earlier). They

returned every summer to use the property without rent. Granted, Norman used the house as well, but not for long or for regular periods. His association with the house is mostly work related. If Ronald and his family are to be credited with saving the house, Norman and his family should be credited with at least preserving it, in addition to ensuring the fields were cleared. Cleared fields matter also, in terms of the appraisal. Of course Norman had a hand also in the house and replaced things like the attic vent and the water pump.

[89] At the end of the day both parties efforts were made in good faith and directed at maintaining the property. Taking into account that the Plaintiffs' man days should be less than 107, this issue could be decided on the basis of a "tie" or a draw.

[90] As the Plaintiff Ronald MacMillan admitted in evidence, everyone did their share. To suggest that credit should not be given for repairs to the bush hog is in my view wrong. Norman's good nature and personal skills at repairing such equipment enabled him to borrow this equipment from the Gillis family, who were generous in lending it to him as opposed as to renting it. If this work had to be contracted out or the expenses would far exceed those submitted by the Defendant. The Defendant ensured it was always returned in a good state of repair. There evidence that the

radiator would be replaced, the cost of which for parts alone was in excess of $639.69.

[91] On the totality of the evidence it could also be concluded that the Defendant did more than his share. I concur with his stated position that he did at least as much as the Plaintiffs, if not more. I find that the majority of work completed by the Plaintiffs added value and lasting improvements to the home. Since 1998 the expenditures by the Plaintiff have been significantly less than those the Defendant has expended, more recently . On the whole I find that a sum or amount in the Defendant's favour should be determined over and above that of the Plaintiff for set off purposes.

[92] I hereby set that amount at $15,000.00. This figure is consistent with the amount the Plaintiffs submission for "betterments" to the driveway and well completed by the Defendant. It is also reasonable based on the house values contained in the appraisals ($55,000.00 and $61,000.00). It is in my view a reasonable amount for lasting improvements to the house, which instead of $55,000.00 the Plaintiffs now value at $70,000.00. The driveway / culvert work was completed in 2012, after the most recent appraisal.

ANALYSIS AND DECISION:

[93] The Plaintiffs are seeking primarily that the land be sold to them with a set off to the Defendant for his two fifth's interest. Alternatively they seek that the land be sold pursuant to s.28(1)(a) of the *Partition Act* with the right for them to bid on the property. They have submitted that the Court may appoint a realtor, or sell it by public auction, or as prescribed in the *Civil Procedure Rules* (Rule 74).

[94] As stated the Defendant has filed a defence and counterclaim . He has pleaded that a sale is unnecessary and that the land is capable of partition (division) on the ground, in proportion to the parties' interests. In the alternative he has requested a division "on the ground", with an equalization payment to the party receiving the portion of greater value, to the party retaining the portion of lesser value.

[95] While section 5 of the *Act* allows any one or more persons to bring an action for partition "or" sale, the case law is clear that the *Act* must not be used as a means by one landowner to acquire the interests of another. In *Sahlin v. Nature Trust of British Columbia*, 2010 BCSC 318 the court stated it, "...must not condone the compulsory taking of land of one owner by another co-owner". The *British Columbia Partition of*

Property Act, RSBC 1996,c. 347, stated there must be "good reason" to order a sale. In Nova Scotia, the language is such that a Court must consider partition, unless a sale of the land is necessary (s.16 & 17 of the *Nova Scotia Partition Act*).

[96] The Plaintiffs rely on the case of *Beckett v Beckett* 2008 Carswell Ont. 2631. In that case the Court stated at para.16 regarding the choice between partition and sale as follows:

> "I draw from those cases that in exercising its discretion as to partition or sale, the Court must consider which resolution is more likely to be to the advantage or benefit of all parties. The analysis will include looking at what is fair, equitable, and practical. Should it appear that partition cannot be made without prejudice to an owner, the Court must proceed to sale."

[97] In terms of priority, given what has been said about what the *Act* should not be used for; the Court in *Beckett*, suggested a proper exercise of discretion is to first determine whether partition can be made, without prejudice to an owner.

[98] In *Lynch v Nova Scotia Attorney General*, [1987] NSJ No. 472, Hallett J. ordered a sale due to there being prejudice, if partitioned. In *Finanders*, Edwards J. held that a sale was appropriate because the lands were incapable of division, and a fair division

was not possible.

[99] In terms of the onus of proof, some cases have described the onus as being a neutral one (*Sahlin*). In others, such as *Ponvert v. Wood*, 2006 CanLII 5614 (ONSC), the onus was more clearly stated to be at para.11:

> In general, "an order for partition or sale is discretionary; which, in practice, means that while an applicant's right thereto is not absolute, the burden is on an opposing co-tenant to persuade the Court to deny partition (or sale in lieu thereof): see Re. Hutcheson and Hutcheson [1950] O.R. 265, Davis v. Davis [1954] O.R. 23 (C.A.)", Professor Bora Laskin (as he then was): Cases and Notes on Land Law, 1958, p. 402. While Chief Justice Laskin's remarks were directed to cases, unlike this one, in which the parties were contesting the issue whether partition or sale of the jointly-owned property itself is the appropriate remedy, they would, in my view, apply with equal force to cases, like this one, where both parties agree that partition of the subject property is appropriate, but are contesting their respective partition proposals."

[100] Once again it can be seen that there is a definite onus on the party opposing the partition, to persuade the Court to deny it, or to pursue the Court that a sale in lieu thereof is necessary. Much will depend on what the parties have sought in their pleadings.

[101] In *Deloisio v. Dolejs* (1994), 137 NSR (2d) 368, the Nova Scotia Court of Appeal provided guidance in respect of the burden of proof. In that case the Court ruled that the trial judge did not have a duty under the *Partition Act* to consider partition or set off first, before ordering a sale because, partition was not sought as part of the pleadings. The parties had requested a sale, and it would have been improper for the judge to consider those matters given the pleadings. The Court ruled, that the combined effect of the *Partition Act* and the *Civil Procedure Rules* of Nova Scotia gave the judge broad power regarding the sale of the property.

[102] The Defendant in the case before me has requested partition. By the position they have taken, the Plaintiffs' have recognized an onus to establish to the Court that the land cannot be divided without prejudice to the owners. I turn now to consider that issue.

[103] Prior to doing so I note that the *Partition Act* in Nova Scotia contemplates the Applicant, as the one seeking partition (see s.15). Such is not the case here. It is the Defendant(Plaintiff by Counterclaim) who seeks partition. In responding to the counterclaim, I will treat the Plaintiffs (Defendants by Counterclaim) as having the right to "plead any matter tending to show" that the Defendant (Plaintiff by

counterclaim), “ought not to have partition”.

[104] The Plaintiffs Ronald, Evelyn and Gary MacMillan advance a number of arguments as to why partition ought not to be granted to the Defendant. In their brief their primary argument is that a division will be prejudicial because “the characteristics of the land get lost” if the land is divided. Because of the limited water views, the relatively small amount of cleared land, and the nature of the property , the land does not allow for an equitable division.

[105] The Plaintiff referred to *Beckett,* where the Court denied partition of a 200 acre parcel, due to there being too many questions relating to the value, and too many uncertainties. The land in *Beckett* was located in a downtown metropolitan area of Toronto. The Court noted the Applicants were seeking to realize the maximum value of their interest in the property in a timely fashion by having the land sold and the proceeds divided. Such is not the case here where the Plaintiffs wish to retain the property, with full ownership for future generations. Here as well, the MacMillan Farm is double the size of the property in *Beckett*, and is located in a much more rural setting, with considerable frontage on a public road.

[106] In the Plaintiffs' closing submissions, they submitted six (6) reasons as to why prejudice exists to prevent a division of the land. Those reasons are listed below :

(i) Topography - the "lay of the land" prevents it from being divided equitably;

(ii) Access - access will be an issue due to there being a single private driveway;

(iii) Neighbours - the Plaintiffs should not be required to live next door to a farm operation;

(iv) Costs and Delay - there will be further costs and delay if the property is divided;

(v) Future Court Actions - due to the parties inability to get along there will be future court actions; and

(vi) Costs of Developing Farmland - the costs of developing the land as farmland outweighs the potential benefit.

[107] In reviewing the Plaintiffs' brief, I note that several of these (i,ii, and vi) were also contained therein. While some of these arguments have more merit than others, I am not persuaded by them , that the land cannot be divided.

[108] My reasons are as follows.

[109] In terms of the topography, other than the land being uneven, I've been provided with no evidence other than a topographical map. On that map, the Defendant noted a total of five (5) potential ocean views. Simply because the land is uneven, that alone does not mean division is not possible.

[110] In terms of whether a division is possible, I have been provided with no survey or survey evidence to show that the land cannot be divided on an equitable basis, either due to elevations, access, topography, or any other reason.

[111] Further, I have not been provided with evidence that planning considerations, prevent the land from being divided. Mr. Wambolt referred to the exemption from subdivision for parcels 25 acres or more, under the *Municipal Government Act,* SNS 1998, c.18. Whether there are planning considerations that would hamper or be prejudicial to dividing the land is unknown.

[112] Uncertainty alone is not a reason to deny partition. What is certain and what is known, is that the subject land consists of 400 acres with considerable frontage on a public road. In fact, Campbell Road fronts almost the entire property. Frontage is a

significant and positive planning feature, as is the large acreage.

[113] In terms of the appraisals, the Black Appraisal would be more reflective of market value, and thus more reliable had it taken into account the ocean view, of which there is more than one. In cross examination, Mr. Black referred to the view as "distant". This may be the case but to ignore it as a characteristic of the property, affects the weight to be accorded to his value, as does the fact that his appraisal is dated in early 2010.

[114] The Ship's Harbour Appraisal, completed by Mr. Wambolt did take into account the ocean views. While his value per acre is close to that reached by Mr. Black, Mr. Wambolt's value of $255.00 per acre was attributed to the remaining land (the wood land). When assessed as one large lot, an increase in acreage can result in a declining value per acre. Here, however, the increase in value assigned by Mr. Wambolt to the (lesser) acreage proposed by the Defendant for partition (32 acres + 12 acres), was due to this acreage containing virtually all the amenities, including cleared land, house, buildings, driveway access and the view.

[115] I have considered the appraisal of Mr. Wambolt and the reason for a limited

number of available comparables, in the Judique area. His valuation, in my view is consistent with this being a desirable, private location, close to the town of Port Hawkesbury. While it does not represent an appraisal of the entire lot (as one), it is evidence that different portions (of the larger acreage) can be valued separately.

[116] The Plaintiffs have provided no plan or separate map, if only to show that the land cannot be divided without being prejudicial to the parties.

[117] The Court, therefore, is left with one map/plan scenario (being that of the Defendant) for consideration on the issue of whether the land can be divided.

[118] The Court in *Beckett* summarized the Court's role in these matters as "looking at what is fair, practical, and equitable". It is difficult to make such a determination without sufficient evidence to consider all of the alternatives. Such evidence in my view would include survey, planning and related information. In many respects, the Court is left to consider, by conjecture, the arguments advanced by the Plaintiff . I note in *Sahlin* the Court had several maps and/or scenarios available to it for consideration.

[119] I have considered the Plaintiffs' argument that they should not be required to

live, next to a farm. It hardly seems logical that in dividing a farm, the owners should state that they should not be required to live next door to (a farm), being a portion of the same the property that is being divided.

[120] In terms of the cost and delay of further division, this argument has some merit, due to the circumstances of the parties. In commencing the action, an order from the Court for partition is a foreseeable remedy. The *Act* provides that Commissioners shall be appointed to assist the Court in the division. It was the Plaintiffs' who saw fit to commence the action .They must be prepared to accept the result. That said, the costs and delay will not hamper or prevent the Plaintiffs from continuing to use the property as they have in the past, subject to the Court's direction on this issue, should partition be ordered.

[121] In terms of future court actions and the inability of the parties to get along, this argument too has merit, to an extent. The parties' have had difficulty agreeing on shared usage of the property, let alone a division of the property. What must also be considered that no land owner is guaranteed neighbours which will be to their liking. Granted, there is a history here, but if a partition is completed properly, then future court actions can be minimized if not prevented. Gary MacMillan, in his evidence,

stated that the land could be divided among his immediate family, if "done properly". Further, he stated a "buffer" area would help alleviate differences.

[122] The Plaintiffs submit the cost of developing the land presently as farm land, outweighs the benefit. Given that the Defendant's reason for partition is to farm, partitioning of the land makes no sense, they submit and is not required.

[123] The Defendant gave evidence that the cost of developing even one acre of farm land is very expensive, and practically prohibitive, or words to that effect. That, however, does not mean the opportunity should be taken away from him by a sale being ordered.

[124] The Court can look to the Plaintiffs' evidence. Ronald MacMillan stated in evidence his reason for not wanting division is that he would be "landlocked". Both he and his son, Gary, stated they wished to see the land continue for the use by their future generations. By allowing the land to be sold, there is no guarantee the land would not be lost to future generations, which would be contrary to their stated wishes.

[125] As stated in *Ponvert*, the fundamental rule is fairness, in determining which proposal would most fairly accommodate the "competing and often divergent interests of the co-owners".

[126] The Defendant's position is that he made a significant contribution to the farm property, which has been explained (financially) in his summary of time and money spent, entered into evidence. In his brief, the Defendant has provided a list containing no less than 17 items of work he performed on the property, during the years he was home, and since he came back to Judique to stay in 2006. Included in that list, is each year winterizing the home and in each year, in spring, cleaning it up and restoring the water for another year. In many respects he got it ready for use by the Plaintiffs. For example, in 2010 he replaced the jet pump in the well at a cost of $406.33 (see Tab B-5 of Exb.1).

[127] The Defendant testified that much of what he did was out of a sense of obligation to his grandparents, with whom he lived when he first returned in 1984 to 1988. In 2006, when he returned for a second time, he became a two-fifths owner of the land.

[128] His evidence was that he was close to his grandfather and was attempting to

honour his request (which Norman described as a promise) not to let the Farm "go down". Norman was away for short terms for example, attended St. Mary's University, in Halifax, but he always returned home to Judique. Running through the Defendant's position is that Norman acted to his detriment. His evidence was when he returned home from Calgary, he sold his house at a substantial loss. Norman's close relationship with his grandfather was not seriously challenged, nor was his evidence as to the "promise" to his grandfather.

[129] In terms of the Defendant's legal position, it is that his contribution to the farm is at least equal to if not greater than that of the Plaintiffs.

[130] In terms of the *Partition Act*, the Defendant's position is that the combined effect of Sections 17, 18, 24(a), and 28, is that the *Act* requires an initial determination whether the land can be partitioned on the ground rather than be set-off to one or other of the parties, or sold.

[131] The Defendant relies on such wording as, "if after trial it appears partition should be made.. (s. 17)". The Defendant further relies on the case of *Allen v. Carver*, [1981] NSJ No. 42, where Chief Justice MacKeigan of the Court of Appeal stated, "The judge

must first consider whether a sale is necessary".The Chief Justice added that "if no sale is necessary, the judge appoints three commissioners " to make partition and to set off to the parties their respective shares." (Paragraph 17) The Chief Justice referred to Section 27 of the *Partition Act* in stating that "a judge may order sale at any stage of the proceedings where:

> "(a) the land, or any part thereof cannot be divided without prejudice to the parties entitled;"

[132] What does it mean for a judge to make a discretionary decision under this *Act*? In *Deloisio*, the Nova Scotia Court of Appeal ruled that the combined effect of the *Partition Act* and the *Rules* gave the judge broad powers respecting the sale of the property. Discretion, of course, is not a "free wheeling" affair. Correct principles must be implied to ensure no injustice has resulted. In *Ponvert*, the Court in Paragraph 10 cited the following with respect to proceedings under the relevant act, in stating, "the Court should give directions as will do complete equity between the parties": *Gage v. Mulholland* (1869) 16 Gr. 145. Whether a sale is necessary will depend first on whether the land can be divided, without prejudice, to the parties entitled. If it can, no sale is necessary. If it cannot, a sale may still not be necessary if set-off can be achieved to compensate the owner or owners for any part which is of greater value (Section

24(1)).The onus is on the person opposing a partition. These are the considerations the Court must apply in the present case in exercising its discretion.

[133] The Defendant argues that this large farm is capable of division. In *Finanders*, the court refused partition. The property consisted of one home on 2.25 acres. The Defendant argues that, unlike *Finanders*, the parcel here is 400 acres. There is plenty of room for another home .In fact, he submits the land is large enough to create an entire second farm.

[134] The Defendant further draws the Court's attention to Section 268(2) of the *Municipal Government Act*, which exempts from subdivision approval, a parcel in excess of 25 acres.

[135] In support of his position, the Defendant puts forth and relies on the case of *Sahlin*, a British Columbia case. In *Sahlin*, as here, the amount of land involved was sizable, at 330 acres. The Chambers judge held there was good reason not to order the sale of the land. One of the factors underlying the Court's decision was the Sahlin family's long standing connection to the property. The Court further found that the order for partition would allow both parties to realize their objectives for the use of the

property.

[136] In *Sahlin*, the Court took particular note of certain factors (at page 31) which included the following: 1) the history of ownership of each parties; 2) the use objectives of both parties; 3) the financial circumstances of the parties; 4) the financial realities facing the parties if a public sale is ordered; 5) the ease of partition; 6) the equities respected by the parties throughout. I will discuss these factors, collectively, as they relate to the evidence in the case before me. Included in that discussion will be the issue of access, which is the Plaintiffs second argument in para. 104.

[137] In terms of the history of the property much has already been said about Norman's strong connection to the property. His father Angus acquired his share at the same time as the Plaintiff Ronald MacMillan, when their father John A. died. Angus received his second share upon the death of his mother Flora. He conveyed both of these shares to Norman in 2006.

[138] Much evidence has been given in connection with the shares owned by Evelyn MacMillan and Gary MacMillan and how they acquired same. I have reviewed and considered all of the evidence in regard to this issue including the direct and cross

examination of the evidence of John O'Leary and Alex MacMillan. In addition the evidence of Norman's sister Mary is relevant in this regard as is Norman's evidence and that of Evelyn MacMillan. From this evidence it appears that Ronald MacMillan had little to do with the acquisition of these shares.

[139] In terms of Evelyn and the share acquired by her son Gary, she essentially left this up to John O'Leary and his lawyer. The evidence of Mary however seems to suggest that mention was made to her of the sum of $10,000, which appears to be the same sum for which a donation was later made in Catherine's memory. In terms of Alex he certainly had his own reasons (financial) for conveying his share to Evelyn and his evidence was credible. I find however he did have some conversations with Mary in this regard. From those conversations I am unable to conclude or make any definite findings, except that conveying the shares was discussed.

[140] While the relevancy is also open to question I believe that with respect to Norman's evidence (on the acquisition of the two shares by the Plaintiffs); there was something to it. Suffice as to say that with respect to Evelyn MacMillan and as well her son Gary MacMillan they took advantage of each opportunity presented to them. I note that Mrs. MacMillan was in the unique position of collecting the insurance and property

taxes, when she asked Alex MacMillan, whether he would be interested in conveying his share to her. The Defendant's father asked him to phone her. Norman's evidence is that her response to his questioning about the shares was "family is family" and "business is business. I accept that this was her response.

[141] For Angus he was present when his father made his will. He therefore knew of his father's intention to leave the property to all of his children. As he stated in his Declaration this was in the hope that all would get along. Angus had a hand in Norman not accepting the deed from his grandfather. It is reasonable to conclude that Angus in part was attempting to respect his grandfather's wishes to leave the property to all of Angus' siblings. For Angus family was family. The business aspect did not enter his mind.

[142] In terms of the intended use of the property the evidence is clear that the Plaintiffs intend to use the property as a summer residence or summer home, much in the same manner as they had done in the past. For Norman while he acknowledges that farming is not (practically speaking) a viable enterprise at this time, he submits it is possible to divide the land with both parties receiving some clear land, some high land, and woodland.

[143] In terms of the financial circumstances there is little or no evidence of that before me except that Norman has found it necessary to travel west to obtain employment and work. I think it is a reasonable inference that at least collectively the Plaintiffs are in a better financial position than the Defendant should the land be sold at a public auction with the parties being able to bid on same. I note that in *Sahlin* the Court's concern was that a sale is tantamount to an expropriation, unless both parties are in an equal position in terms of their financial circumstances. It is entirely possible that the Defendant would be at a disadvantage in this respect.

[144] In terms of the ease of partition I refer to *Ponvert,* which emphasized that the nature and characteristics of the property are of fundamental importance. Here I note there is a distinct view of Henry Island and Port Hood Island.

[145] In *Carver* it was stated that by MacKeigan, C.J. that no partition would be fair in respect of some or all of the lands. Further, it was noted that what maybe an advantage to one party would pose considerable risk to another. For example if the parties wished to extricate their financial interests in a timely fashion. Indeed a sale may pose a risk to the Plaintiffs and does not square with their intention to maintain the

property “for future generations” in the event the property was lost to a third party.

[146] Similarly, the Defendant’s intention that the property be used for farming does not square necessarily with his statement that developing farmland (“even one acre”) may not be feasible. The Defendant however, is requesting a portion of the cleared land be conveyed to him as part of any partition and set off.

[147] In the present case there is approximately one half mile of road frontage. In *Lynch* the Court was concerned about the ability to provide a number of access roads. It does not appear that that same concern would be present in this case. In addition the Defendant is flexible and is not insisting that the scenario put forward by him should be the only one accepted. It is open to the Court in his view to make variations to the partition he proposed.

[148] I do find the scenario proposed by the Defendant, it being “to provide the Plaintiff with the house and cleared land consisting of 32 acres plus ownership of the driveway and area containing it of 12 acres extending to Campbell Road to be at least considerate of the Plaintiffs’ past use of the property.

[149] There are numerous incidents in the evidence which feature prominently in the relationship between the parties, and in particular their attempts to share the property equitably. The Defendant gave evidence that the Plaintiffs were unwilling to share the property, during the summer months. Twice the Defendant said he made arrangements for friends to stay on the property, but he was required to inform these people they could not. It was necessary for the Defendant to make other arrangements for them after learning at the last minute that the property would not be available. He paid from his pocket for their stay else where on at least one occasion.

[150] The Plaintiffs maintain that they had difficulty arranging shared times with the Defendant, and arrived in Judique on at least one occasion to find the Defendant had not left, with his things not moved out.

[151] There were several discussions, many un-pleasant this resulted in meetings and attempts to discuss the sharing arrangements, and at times their respective shares in the property.

[152] I have decided not to recount the details of these events, but I have reviewed the evidence and considered them in this decision. These include but are not limited to the

following incidents.

I The arrival of the Plaintiffs in 2009 when the defendant and his girlfriend Anna were readying themselves to leave. The bush-hog had broken down and there was meat thawing on the counter.

ii The meeting/confrontation in 2006 the field at the farm between Evelyn MacMillan and Norman MacMillian (while he was on the tractor) and the discussion regarding the "shares".

iii The telephone discussions and meeting between Gary and Norman in 2008, which lead to the meeting at Baxters Cove, which further lead to the meeting at the homestead followed by the supper at the Red Shoe.

iv The Plaintiffs arriving earlier in 2009 (Gary's intentions to work on the property with contractors) forcing the Defendant to make other arrangements.

v Norman's refusal to be out in 2009, due to what happened the previous year.

[153] The Defendant was clearly frustrated in his efforts to share the property with the Plaintiffs. The Plaintiffs had become accustom, until 2006 to using the property during the summer. I find while the Plaintiffs recognized the Defendant's right to share the use of the property, there was an un-easiness about "giving up" the summer. The Plaintiff Evelyn MacMillan spoke of the "lovely springs", and "lovely falls", during which the Defendant could enjoy the property. Further it was mentioned in evidence by the Plaintiffs that the Defendant had the property available to him for ten (10) months. These events caused the Defendant to seek legal counsel in an effort to settle the sharing of the property. This resulted in the series of letters between the Plaintiff and

Defendants' counsel, entered as Exhibit # 5-21.

[154] In those letters the Plaintiffs offered to share the property with the Defendant having the farm from January to June, and the Plaintiff having the farm from July to December of each year. In cross examination, Gary MacMillan was asked about the fairness of this position. He stated it was a position that the Plaintiffs took as part of a negotiation. The court recognizes that collectively the Plaintiffs hold a three fifth (3/5) share and would be entitled to use the property for more then half of the year.

[155] I have mentioned these matters because there was an abundance of evidence given on the relationship between the parties. While I have considered this evidence, the incidents are not and should not of themselves be determinative of the outcome of this matter. If anything they demonstrate why it became necessary for a resolve of the matter, and why sharing the use of the property, is not a viable option.

[156] In *Beckett* the court made a point of stating the process of partition should not be used to punish or reward. I adopt this principle in this my decision.

[157] That said, I do not wholly agree with the Plaintiffs, that a deep connection to the

property is not relevant. In as much as I do not judge the parties on their attempts to share, I do consider the evidence related to the history of ownership by the parties to the property to be entirely relevant. This is supported by the fact set out in *Sahlin*, the first of which is framed as the " the family's long standing connection to the property" . (*Sahlin* para. 33(a))

DECISION:

[158] Having considered the evidence and the submissions of counsel I am not satisfied that a sale of the land is necessary or that the land cannot be divided without prejudice to the parties.

[159] Although the terrain of the land is uneven and has steep slopes, the land consists of 400 acres. I have been provided with no survey information that the land cannot be divided due to these elevations. The documentary evidence in that regard consists of a topographical map and some aerial photographs. These photos were in fact submitted as part of the Defendants documents.

[160] Further although there is one driveway leading into the property, there is

approximately one half mile of public road frontage. I have been provided with no planning information that would show or suggest that an access road or roads off of the Campbell Road would not be permitted. I have been advised as part of the evidence and submissions that the planning provisions of the *Municipal Government Act*, exempt a parcel of land (created) which is in excess of 25 acres.

[161] I have heard evidence that some of the more predominant features such as cleared land, high ground and ocean view would be difficult for the parties to share. The Plaintiffs' interest has been argued and presented collectively as a three- fifth interest with the Defendant having a two- fifth interest.

[162] The Plaintiff has provided no plan for a sharing of the land "on the ground". The Defendant has provided a proposed division on the ground, with alternatives.

[163] In my view the willingness of the Defendant to be flexible is conducive to referring the matter to commissioners under the Act. It will be for them to determine whether partition can be made and whether any set off is necessary to compensate one party or the other for any specific part of greater value.

[164] I have considered also the fact that this land has been in the MacMillan family for well over a century. As part and parcel of that I have considered the Declaration of the late Angus MacMillan, that by his father's will John A. MacMillan believed all of his family members would share and work together on the use and enjoyment of the property.

[165] I am mindful that all of the parties wish to retain ownership of the land, the Plaintiff in its entirety and the Defendant as part of a division. Unless it is obvious that a division is not possible, the fairest direction the Court can provide is to further the possibility of division by referring the matter to commissioners , pursuant to the Act.

[166] If fairness is to be the fundamental principle, it would not be fair to the Defendant to have the land sold because division may not be possible. For such a drastic result to occur, there must and should be clear, cogent and convincing evidence that the land cannot be divided without prejudice. In my view, for all of the foregoing reasons such evidence is not present.

[167] In reaching this conclusion I am further cognizant that the Plaintiffs' have put a significant amount of time and effort into maintaining the property, and in particular the

house. Also the assistance that they provided to John A. and Flora, is not lost on the Court. In my view, however it would not be doing "complete equity" to simply allow the land to be set off to them in its entirety, unless a sale was necessary, which I have found it is not. Even if a sale were necessary, I am not satisfied that the appraisal of Mr. Black represents current market value. The Wambolt appraisal, in my view contains a market value which reflects better, the substantial value which is to be attributed to this private, rural setting, in a desirable location.

[168] Consequently I am not satisfied that even if a sale were necessary, that the Plaintiffs' proposal is reasonable or acceptable, in these circumstances.

[169] I turn now to consider the proposal of the Defendant for partition in this matter.

PROPOSAL

[170] The Plaintiffs did not request the Court to make separate division or set off of each of their one-third (1/3) shares. For example, at Paragraphs 67 and 58 of their brief, the Plaintiffs state it would be prejudicial to divide the homestead into "two separate parcels". Further, they stated that the Plaintiffs, collectively, should be able to "keep

the homestead". Once again, the nature of the pleading should dictate the relief granted.

[171] The Defendants proposal is to convey to the Plaintiffs 44 acres, 32 acres from PID # 50012707 and 12 acres from PID # 50147826. The 32 acres shall include the house, buildings and much of the cleared fields. The 12 acres shall include the driveway and land to the east (of the driveway) which totals 400 feet in width. The 32 acre parcel is to be 1400 feet in width.

[172] As an alternative the Defendant proposed that the Plaintiffs retain the driveway, but convey to the Defendant, the land to the east of the driveway, from the southern PID. In other words the land east of the driveway would be conveyed to the Defendant, unlike the Defendants first proposal which conveys the Plaintiffs, 400 feet out of the southern PID, inclusive of the driveway.

[173] I have considered what would be a fair, equitable, and practical division, based on ownership percentages of 60% and 40% for the Plaintiffs' and Defendant, respectively.

[174] In general the proposal as submitted by the Defendant, leaves the Plaintiffs with

a relatively small amount of acreage, even though it is the value of the land the Plaintiffs would receive which of importance. When one considers the Plaintiffs' past use and future intended use, the Defendant's proposal make sense. In addition I recognize the 400 feet from the southern PID to the Plaintiffs would allow a "buffer" while providing the Defendant with some high land, and possibly some cleared land, with a view from high ground.

[175] Even so I think that the commissioners should consider whether the Plaintiffs are entitled to some additional land from the northern PID (50012707), with perhaps the river forming the eastern boundary of the Plaintiffs' land, but only out of that (northen) PID. The commissioners can then consider whether to convey only the driveway from the southern PID (50147826) to the Plaintiffs or the driveway plus land to the east of the driveway to allow a buffer (wooded area) between the Plaintiffs and the Defendant in what would be the boundary line dividing the southern PID (50147826) between the Plaintiffs and the Defendant.

[176] While a buffer is important, it is equally and if not more important that the Defendant receive land out of the southern PID (50147826) which would provide him with a view and some high ground as well as some cleared area, if that is possible.

Depending on what the commissioners decide, additional land for the Plaintiff may require a set off or payment by them to equalize the values of the lands received. Similarly the commissioners will determine whether any payment or set off should be made by the Defendant, if that is called for to equalize the shares. As it now stands the Defendant will have a credit of $15,000.00 to be used in any set off, as I have found.

[177] These directives, while it is mandatory that they be considered, are not intended to be binding on the commissioners, who shall reach their own conclusions and decision for the purpose of submitting their report to the court, under the *Act* (ss.18 - 23).

CONCLUSION

[178] I have decided the fairest and most equitable decision is to order partition by appointing three commissioners under the *Partition Act* to divide the land in accordance with the respective interests, and if necessary set off portions with compensatory monetary payments to equalize the share(s). I am not satisfied on the totality of the evidence that the land could not be divided without prejudice to the parties or that a sale was necessary.

[179] I have therefore not granted the Plaintiffs' request for the entire land to be set off to them.

[180] The appointment of the commissioners and their duties is set out in s. 18 - 23 of the *Act*. I expect that further direction from the court may be required to effect these appointments. The commissioners need to be sworn. They must also be independent.

[181] It is my view that in addition the commissioners should possess some knowledge of land values and/or dividing land. Accordingly at least one or more of the commissioners should be a Nova Scotia land surveyor. If the parties are unable to agree on the appointment of the commissioners, the court will hear a motion to finalize the order of partition, and if necessary give directions with respect to the motion or any further matter arising from this decision.

[182] I will hear the parties as to costs at the appropriate time.

Order Accordingly

Murray J.