SUPREME COURT OF NOVA SCOTIA
Citation: Chisholm v. Snyder, 2014 NSSC 36

Date: 20140129
Docket: ANT. No. 405943
Registry: Antigonish

Between:

William Patrick Chisholm

Applicant

v.

Glenn Douglas Snyder and Thelma E. Snyder

Respondents

Judge:	The Honourable Justice Margaret J. Stewart
Heard:	July 22, 2013
Counsel:	Donald Macdonald, for the applicant Daniel J. MacIsaac , for the respondents

By the Court:

[1] This application involves the interpretation of a reservation of a hay/crop right in favour of "Gordon Chisholm, his heirs and assigns" in a 1960 deed from Gordon Chisholm to the respondents' predecessor in title Ida Durant. An area of some 2.7 acres of Gordon Chisholm's 150-acre farm lot in South Side Harbour, Antigonish County, was conveyed, along with a 100-year old farm house and barn (or its foundation), collectively "the Snyder lot." After describing the dimensions of the 2.7-acre lot fronting on the western side line of the South Side Harbour Road, which runs through Chisholm's farm lot, the deed then provides the following:

> RESERVING however to the said Gordon Chisholm his heirs and assigns the right and privilege to enter upon the said land from time to time for the purpose of removing hay or other crops or improving the land, ...

[2] For clarity, the Snyder lot borders on the South Side Harbour Road and is some 340' by 342' by 353.8'. The farm house is located towards the northwest corner, with the back of the house not far from the western line abutting onto Chisholm's farm lot. The front of the 20' by 30 or 40' house faces the road, which is the eastern line. The driveway runs along the southern line abutting onto Chisholm's parcel for some 240' until it curves and proceeds north. Prior to 2011 it was at a distance of at least 50' in front of the house. Since the early 1960's, only

the foundation of the barn has existed near the northern line, which is some 107 feet from the north side of the house.

[3] By application, William Patrick Chisholm (Chisholm), Gordon Chisholm's nephew and successor in title, seeks an order confirming and declaring his right to enter the land now registered in the names of the Snyders "for the purpose of removing hay or other crops or improving the land" as stipulated in the "RESERVING" clause in the Snyders' June 2011 deed from Ida Durant's daughters. He also seeks an order directing the Snyders to perform acts consequent on the declaration sought, i.e. removal of a foundation, return of the land to its former state, and ceasing to mow the area reserved for stated agricultural use. The reservation in the deed, he argues, provides at law for a grant of a *profit a` prendre* which is valid and effectual.

[4] By Notice of Contest, the Snyders seek dismissal of the "void or voidable" "condition" given that (a) it is inconsistent and repugnant to the estate in fee simple created by the deed; (b) from inception it did not contain a time for termination; and (c) a reasonable amount of time has elapsed since its creation. In their view, it reflects a hay lease or licence revocable at will. Alternatively, the respondents argue that if the alleged condition is valid, and a right in the nature of a *profit a` prendre* exists, then the purpose for its creation has expired, in that Gordon Chisholm lived on the adjacent property when the "condition" was created and "the land or hay or pasture" was needed ; but, these circumstances have changed and the "condition" no longer benefits the dominant tenement. Further, they argue, it does not confer an exclusive right on Chisholm to cut hay or other

crops or improve the lands. The Snyders submit that any rational interpretation would permit them to construct a family residence, shops, and a septic bed on the property, given that, when it was granted to Ida Durant, a dwelling existed on the property. Finally, the Snyders say, if the "restriction" is upheld, relief should be in the form of damages, not specific performance. Relying on "doctrine of tender", the sum of $2500 was deposited with the court.

[5] In essence, the issues as argued by the applicant's counsel are threefold: (1) What is the nature of the reservation in the deeds and does it remain extant? (2) Is there any basis for determining that it has expired or is limited in any way? (3) What is the appropriate disposition?

Factual Background

[6] In 1972 Gordon Chisholm, who had owed the Chisholm lot since 1959, deeded it to his brother Ronald Chisholm, who, in turn, deeded to his son, the applicant, in 1998. The Snyder lot had been excepted out since the conveyance in 1960. At that time, Gordon Chisholm had a large cattle barn and a herd of some 78 cattle. The barn burnt down in 1972 and the cattle were sold off.

[7] As a boy in the early 1960's, Chisholm assisted his uncle in mowing hay on the then Durant lot (the Snyder lot). After 1972, he assisted his father, and eventually took over ploughing, cultivating and growing the hay. Hay was an income source for the Chisholms, as well as being used for cattle feed until 1972. Since 1998, Duncan MacIntosh has seeded and mowed the lot, removing round

bales of hay annually. This was done by agreement with Chisholm. No affidavit or agreed statement of facts from MacIntosh was filed.

[8] Until the Snyder purchase in 2011, the old farmhouse had only been used as a summer home, sometimes for as little as a weekend a year. Until Chisholm stopped mowing the hay, he (and his uncle before him) mowed flush to the house. Chisholm later did some back cutting near the house for MacIntosh. According to Glenn Snyder, MacIntosh has neither mowed a soft spot along the south side and to the north of the driveway between the main road and the house, nor has he mowed flush to the house; rather he appears to be guided by trees between the road and the house on the east side, some 69' from the house and between the house and the northern line some 47' from the house. This amounts to cutting on the outside of the trees, leaving the Snyders to mow and clean up the area between the house and the trees since the 2011 purchase.

[9] In Chisholm's recollection, since the early 1960's, only the foundation of the barn has existed near the northern line and to the north of the driveway in front of the house and he was able to mow over it. It is common ground that the portion of the lot between the south side of the house and the southern line, where a clump of trees is located, has never been seeded or mowed and there is no intension of doing so. Besides removing hay from the area not occupied by the house and driveway and not between the south side of the house and the southern line, all of the Chisholms have been involved in plowing and seeding the Snyder lot. In the past, crops like oats have been planted on the lot. The lot has not been ploughed for the last eight years.

[10] The Snyders have used heavy equipment to mow the soft area in the front, and some 240 feet along the driveway left unmowed by MacIntosh, as well as waiting for MacIntosh to cut before cleaning up and then keeping the lot cut afterwards. With respect to the house, they removed the northern addition. They also created a new foundation or frost wall with slab between the front of the house and the driveway and moved the house over to it. The result is that they occupy about the same amount of space as before, but 20' east of the old location, thereby butting up to the driveway and occupying land previously mowed by the Chisholms. The property has a 2013-2014 tax-assessed value of $18,000. Property taxes are $185. The Snyders purchased the property for $20,000 in 2011.

[11] Prior to its conveyance to the Snyders in 2011, the lot had been migrated into the land registration system. The parcel description attached to the deed notes the reservation referred to in the deed, flowing from an "easement" over the lands in Gordon Chisholm's 1960 deed to Ida Durant. It is uncontested that the Snyders were aware of Chisholm's right to remove hay. In addition, prior to the purchase, Glenn Snyder was informed of this by the vendors, Ida Durant's daughters. He made no attempt to ascertain the nature and extent of the reservation. He waited until a month or so after the purchase to enquire of Chisholm as to the possibility of having the reservation released, which Chisholm declined. Chisholm subsequently advised, orally and through counsel, that there was an issue as to what, if anything, the Snyders could do. He suggested that expenditures should be held off subject to resolution of the dispute. He objected to the Synders ignoring the reservation and insisted he had the right to mow the area not occupied by the

house and driveway. He points to actions such as excavating and laying new foundation in a previously mowed area and then moving the building, mowing area between house and road and interfering with second cut.

[12] Glenn Synder testified about intentions to build a new home between the old house and the road, requiring a septic system; to convert the old house into a garage; to add an outbuilding; to improve the well; to plant a 10-by-5 foot vegetable garden; and possibly to subdivide in order to provide his son with land on which to build. In his view, Chisholm could make hay and mow it if there was enough room after he builds his retirement home, but the respondents want the "lease off".

Analysis

[13] I turn now to the nature of a *profit a' prendre* and a consideration of what results flow from the terms of the 1960 deed and the reservation therein. I conclude that the deed, taken as a whole, creates a grant of a real interest in the land in the nature of a *profit a` prendre*; the central issue thus becomes whether the way the Snyders see fit to use their land is reasonable having regard to the interest of Chisholm as owner of the *profit*.

The Nature and Effect of the Reservation

Whether a profit a` prendre exists in law?

[14] A *profit a` prendre* is often described as a right to make some use of the soil of another. In *British Columbia v. Tener*, [1985] 1 S.C.R. 533, Wilson J., Dickson C.J.C. concurring, provided the following definitions at paras. 12-14:

> 12 A *profit à prendre* is defined in *Stroud's Judicial Dictionary* (4th ed.), vol. 4, at p. 2141 as "a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil". In *Black's Law Dictionary* (5th ed.), it is defined as "a right to make some use of the soil of another, such as a right to mine metals, and it carries with it the right of entry and the right to remove and take from the land the designated products or profit and also includes the right to use such of the surface as is necessary and convenient for exercise of the profit".
>
> 13 Wells J. elaborated on the nature of a *profit à prendre* in *Cherry v. Petch*, [1948] O.W.N. 378 where he said, at p. 380:
>
> > It has been said that a *profit à prendre* is a right to take something off the land of another person. It may be more fully defined as a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right. It is an incorporeal hereditament, and unlike an easement it is not necessarily appurtenant to a dominant tenement but may be held as a right in gross, and as such may be assigned and dealt with as a valuable interest according to the ordinary rules of property.
> >
> > It is important to note that it is the right of severance which results in the holder of the *profit à prendre* acquiring title to the thing severed. The holder of the *profit* does not own the minerals in situ. They form part of the fee. What he owns are mineral claims and the right to exploit them through the process of severance....
>
> 14 *Profits à prendre* may be held independently of the ownership of any land, i.e., they may be held in gross. In this they differ from easements. Alternatively, they may be appurtenant to land as easements are, i.e. they may be a privilege which is attached to the ownership of land and increases its beneficial enjoyment.

> In this case the respondents would appear to have a *profit à prendre* in gross since they do not own any land to which the profit is appurtenant.

[15] Rowe, J.A., drawing from *Halsbury's Laws of England*, in *Chain Lakes Logging Corp. v. Arbitibi-Price Inc.*, 2005 NLCA 13, provided the following overview of the nature of a *profit a` prendre*, at para. 16:

> A *profit à prendre* is a right to take something off another person's land. It may be more fully defined as a right to enter another's land and to take some profit of the soil [including timber] ... for the use of the owner of the right. ... [para. 240]
>
> A *profit à prendre* is an interest in land, and for this reason any disposition of it must be in writing. A *profit à prendre* which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce. ... [para. 241]
>
> The owner of a *profit à prendre* has rights of a possessory nature, and can bring an action for trespass at common law for their infringement. [para. 251]
>
> *Profits à prendre*, though sometimes called "licences", must be carefully distinguished from mere licences, which are not tenements and do not pass any interest or alter or transfer property in anything, but only make an act lawful which otherwise would have been unlawful. A mere licence is not transferrable, nor can it be perpetual; it is not binding on the tenement affected, but is a personal matter between the licensor and the licensee. [para. 252]
>
> A *profit à prendre* ... may be created by express grant ... *Profits à prendre* have always been regarded as incorporeal hereditaments ... only capable of being created by deed. ... [para. 253]
>
> No particular form of grant and no particular words are necessary to create a *profit à prendre*. ... If the effect of a deed or other instrument, when the words are taken as a whole, is to create a right of the nature of a profit à prendre, the instrument will be construed as a grant of that right. ... [para. 255]
>
> The owner of a *profit à prendre* may in general take the subject matter of the right either in person or by his employees, and he may also get the benefit of his right by selling or leasing an interest in the *profit à prendre*, for a longer or shorter term, to any person capable of taking such an interest; and so long as that interest

> endures the donee has an irrevocable licence to take so much of the profit as has thus been granted to him. [para. 257]
>
> A *profit à prendre* cannot exist by custom ... [para. 260]

[16] In *Manitoba v. Senick,* [1982] M.J. No.93 (Man.C.A.), at para 9, the court quoted from Megarry and Wade's *Law of Real Property* (4th ed.) at p 779:

> A licence may be coupled with some proprietary interest in other property. Thus the right to enter another man's land to hunt and take away the deer killed, or to enter and cut down a tree and take it away, involves two things, namely, a licence to enter the land and a grant of an interest (profit a` prendre) in the deer or tree. At common law such a licence is both irrevocable and assignable, as a adjunct of the interest with which it is coupled.

[17] The court also cited *Duke of Sutherland v. Heathcote*, [1821] 1 Ch.475, at 484, to the effect that unless it is explicitly stated in the deed granting a *profit a' prendre* that "the owner of the profit has the exclusive right to the profit, the owner of the land may also remove from the land the substance which was the subject matter of the grant." In the *Digest of the Law of Uses and Profits of Land* (London: Stevens and Sons,1888), Stephen Martin Leake provides further detail and elaboration on the nature of *profit a` prendre*:

> *Profits a` prendre*, being incorporeal hereditaments, are created by grant or by prescription. The grant of a *profit a` prendre* requires a deed, whether it be granted for a freehold interest or for a term of years; and if not made by deed, it operates only as a licence and is revocable... [346]

> A right to the sole and exclusive pasture over the land of another may be vested in gross in a man and his heirs, for an estate analogous to a fee simple; it may be claimed by grant or by prescription at common law; it is also assignable for the same or for any less estate .... A similar grant may be made of the herbage or venture of land, *vestura terre*, including the crops of grass, underwood, brushwood and litter growing upon the land to be cut and taken away, and not, like pasture, only fed off by cattle; but without any right or interest in the soil beyond the necessary easement of entering upon the surface to take the profits granted... A grant of such profit may be limited to a certain season ... or it may be limited to the first crop, *prima tonsura*, excluding all other rights and profits... The grantee ...of the herbage or vesture of land has possession of the surface for the time being so far as is necessary for taking the profits granted, and he can maintain an action of trespass in right of that actual possession. The owner of the soil subject to such exclusive possession of the surface is excluded from maintaining an action for a trespass upon the surface only; but he retains the right of action for a trespass to the subsoil... [331-332]
>
> The grant of a *profit a` prendre* imports all rights accessory to the taking of the profit in the usual and proper manner, including such use of the land as may reasonably be required for that purpose. [348]

[18] The finding that hay was capable of being the subject matter of a grant of a *profit a` prendre*, a basic criteria in any analysis of same was not questioned by the Manitoba Court of Appeal in *Senick*, *supra*. This follows given that hay is a crop of grass (herbage or vesture of land) that has been dried and taken away and "growing grass is the natural and permanent produce of the land renewed from time to time without cultivation" (*Law of Uses and Profits of Land* at 44 and 331).

[19] In *Senick*, *supra*, besides granting the vendor, his successors and assigns "the right to remove hay" from the parcel sold "as long as he wishes to do so", a right to "upgrade the hay on this said parcel whenever he wishes to do so" was also granted. I note that the phrases "from time to time" and "improving the land" appear in the Chisholm reservation. I am satisfied that the reference to "hay" in the

1960 deed does not mean "a hedge or enclosure" or "net to take game" associated with a "hay-bote", being "a liberty to take thorns and other wood to make and repair hedges, gates, fences, etc. ...; also wood for making of rakes and forks (*Wharton's Law Lexicon*, A. S. Oppe (14th ed., 1953) at 467). At the time of the grant the Snyder lot was not wooded and such a definition of " hay" is ancient. As for crops, they are mentioned, along with game birds, by the Supreme Court of Canada as natural produce capable of being extracted by a holder of a *profit a prendre* after entering onto the owner's land: *Saulnier v. Royal Credit Union of Canada*, 2008 SCC 58 at para. 28. In stating such, Binnie J. confirmed that a "common law *profit a` prendre*" is " undeniably a property right".

Whether the Reservation is inconsistent and repugnant to the estate created by the deed?

[20] The respondent submits that the reservation is inconsistent with, and repugnant to, the estate created by the deed. Among the authorities cited is Anger and Honsberger, *The Law of Real Property* (3ded., 2006), at 8-10, where it is stated that a "condition or deed which is repugnant to the very essence of the estate created by it is void. This is because the grantee or testator is limited to creating interests that are recognized by law; they do not have the capacity to alter those interests." The principle is that a condition, the effect of which would be to destroy or take away the enjoyment of the fee simple, is repugnant to the rights conferred on the holder of the fee: *Re Malcolm*,[1947] O.J. No. 590, at para 8.

[21] Gordon Chisholm granted Ida Durant the fee simple in a 2.7-acre parcel of land, reserving out the right of entry from time to time for the purpose of removing hay or crops or improving the land to himself and his successors. Implicit in the right to enter and remove is the holder's right to mow, cut, or harvest the hay or other crop: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para 29. The reserving out was followed by the grant including ("together with") all buildings belonging to the land. Covenants to Durant and her successors of quiet enjoyment and of authority to sell and convey what was a good estate in fee simple followed.

[22] No issue is taken with the fact that the deed contains language clearly conveying a fee simple estate. The issue, it appears, is whether the condition in the reservation, is inconsistent with and repugnant to a fee simple grant the size of 2.7 acres so as to be void in law. Among the factors suggested as being relevant are the limited size of the land described in the deed and the extrinsic evidence of its yield and of the applicant wanting to confine the Snyders to the boundaries of the house and driveway as of the time of the conveyance. The latter facts are inadmissible to find one term of conveyance repugnant to another, given that I conclude there is a lack of ambiguity in the deed. There is nothing in the context of the conveyance to indicate any contrary meaning to the plain, clear and unambiguous words of the reservation. Any consideration of same is reserved for the issue of rights and obligations of the parties as owners of interests that follows below.

[23] Reading the deed in its entirety while applying the law relating to interpretation inclusive of reservation provisions, as set out and applied in *Polsta v. Periot Family Farm Ltd.*, 2003 PESCAD 23, at paras. 13-16, it appears that Chisholm did not retain title to the 2.7 acre parcel; however the conveyance reserved to Chisholm the right to enter and remove hay or crops in accordance with the reservation on land occupied by building(s). The reservation qualifies the grant of the fee simple and, when read in the context of the whole document, is not repugnant to the grant. It is not a question of creating an interest not recognized in law. The case is distinguishable from those where (for example) conditions are void as restraints on the power of alienation (*Stephens v. Gulf Oil Canada Ltd. et al* (1976),11 O.R. (2d) 129 (Ont. C.A.).) As grantor, Chisholm retained for himself and his assigns the right to remove hay from a portion of the land and thus qualified the grant of the fee simple, as in *Polstra*, *supra*. As to repugnancy of the reservation due to lot size noted in the deed, one or more buildings existed on the 2.7 acres when the reservation was granted and later registered. There is nothing obvious about acreage of 2.7 as a term of the deed not being able to accommodate, or being inconsistent with, such a reservation, which is without specified parameters or descriptive words to suggest otherwise.

Expiry or Limitation of the Reservation

[24] The Notice of Contest raises two issues: (b) the condition "in its inception did not contain a time for termination" and (c) the condition is "invalid because a reasonable amount of time has elapsed since its creation." In support, the

respondents cite *Imperial Oil Limited v. Young*, [1998] N. J . No. 248 (Nfld. C.A.), a case which dealt with an agreement that did not create an easement or a *profit a` prendre*, but rather a contractual licence terminable with reasonable notice in certain circumstances. As a mere or bare licence, the right to park vehicles was not a property right and not transferable, unlike a *profit a` prendre*, which is an incorporeal hereditament and, as noted above in *Halsbury's*, a property right dealt with according to the rules governing the conveyance property (see also *Cameron v. Silverglen Farms Ltd. and George*, [1983] N.S.J. No. 415 (C.A.), at para. 8).

[25] In this case, the reservation is in a deed which grants a fee simple. The deed thus gives the entire interest, subject to a qualification. This qualification is transferable and is not subject to termination; there is no explicit or implicit indication of such, and there has been no surrender or merger. It is not necessary for a right such as that reserved in the deed to provide for termination (see: Cherry v Petch supra at para 19); indeed, such does not appear to have been in the contemplation of the parties to the 1960 conveyance. The deed as accepted and registered expressly says the right granted is to be for the Grantor and his assigns. The court in *Cameron*, *supra*, addressed the issue of assignability where the instrument used the specific language of "assigns," holding that such a use "unequivocally implies and presumes" it (para. 11). Such is my interpretation. Not only was termination not necessary or contemplated, but, there can be no reliance on a reasonable amount of time elapsing when assignability is invoked by the terms of the condition. Essentially, the Snyders have relied upon an authority dealing with the law pertaining to licences and have asked that it be applied to this non-licence situation.

[26] What is the effect, it any, of the reservation of hay and crop rights in favour of Gordon Chisholm in the 1960 deed? From the principles cited, I have concluded it reserves to Chisholm a right, in the nature of a *profit a` prendre*, to enter from time to time upon the lands which were conveyed in the deed and to remove the hay or crops by mowing or harvesting, and to take it away and to improve the land. The extent of the right is addressed in the references to heirs and assigns, and the registration of the deed. A *profit a` pendre*, as an incorporeal hereditament, runs with the servient land. It can be registered on the title under the land registration system. When registered, the *profit* runs with the land, and when the land is sold, the *profit* is transferred to the new landowner along with the title to the land. It gives Chisholm the right to enter the Snyders' land and take hay or crops from the land. Subject matters that are part of the land and capable of being owned. Although a *profit* is an interest in land, no specific property in the *profit* is given until it is taken. Therefore it is presumptively not exclusive to Chisholm, and no such intention is expressly stated. Chisholm's right is limited by the seasons, and only limited in the taking by the number of cuts capable per growing period. A *profit* can be for any length of time. It terminates at the end of the specified term if such appears in the deed; by surrender or merger, or when a court orders it terminated. None of these circumstances exist here.

Alterations to Dominant Tenement Extinguishes the Profit

[27] The respondent's essentially argue that if a right in the nature of a *profit a` prendre* existed, it was extinguished years ago "because the purpose for which the

condition was created has now expired." *Profits* to be taken from the land of another, that do not satisfy the legal conditions of appurtenancy in relation to a dominant tenement, may be held as rights in gross, provided they are capable of being the subject of a grant. (Leake, *supra*, at 328) At the same time, when legal conditions of appurtenancy in relation to a dominant tenement are satisfied and there is an alteration of the dominant tenement, then the profits appurtenant to a dominant tenement are extinguished wholly or in part by such permanent alteration of the tenement as destroys or diminishes the appurtenancy of the profits (Leake, *supra*, at 356-357).

[28] Here, the language of the reservation does not state a purpose for removing the hay that would indicate appurtenancy to a dominant tenement, and no specific words limit what use can be made of the removed hay. The Chisholms, as owners of the *profit* both then and now, retained ownership interest in the abutting land, originally using the grant for hay for cattle fodder, as well as selling it as one would do with timber. If appurtenancy can be read into the reservation and if the benefit to the land of the owner of the *profit* is meant to include the use made of the land, i.e. wintering cattle in a barn, then both the barn and the cattle are gone. However, the hay continues to be sold. Chisholm and his predecessors never ceased getting the benefit of their right, and he continued by leasing his interest to MacIntosh. If the *profit* appurtenant has been extinguished by the permanent alteration of the Chisholm tenement, since it is no longer a cattle farm, then removal of the hay is still held as a right in gross, unaffected by such circumstances. It is a right exercisable by Chisholm, the owner of it independently

of his ownership of any land. The reservation is not rendered void or the *profit* extinguished due to alteration to the Chisholm lot.

Rights and Obligations of the Owners of the Servient land and of the Profit a` Prendre

[29] As noted earlier, in dealing with this central issue reliance is placed upon Anger and Honsberger, *supra*, at p. 17-29, where the authors observe that where a *profit a` prendre* does not clearly and explicitly create an exclusive right, the fee simple owner "may take from the soil the same sort of thing granted to the grantee of the *profit a` prendre.*" Further, the servient owner "may use the land in any way that is reasonable having regard to the interest of the other. What is reasonable is a question of fact. Similarly, the grantee of a *profit a prendre* must use the servient land reasonably having regard to the interests of the grantor. The grantee of a *profit a` prendre* who damages the servient lands will be liable in damages..."

[30] The language of the reservation does not clearly and explicitly afford Chisholm exclusivity of the hay and crop rights. The Snyders, while they are not prevented from taking same off their land, did not cite it as a right intended to be exercised in any capacity, and it need not be considered in the context of Chisholm's right to carry on the activity. The right to remove hay or crops is inevitably going to reduce the rights of the Snyders, the servient owners, as every servitude or *profit* will bar some ordinary use of the servient land. At issue is whether the way in which the Snyders see fit to use their land is reasonable having regard to the interest of Chisholm as owner of the *profit*, and whether they are to

be left with no use of their land beyond Chisholm's proposed 25-foot home parameter (south side excluded), and driveway usage based on past cutting practice and experience of nominal or limited occupancy.

[31] On any view, in practical terms, the right claimed by Chisholm is a substantial interference with the use of the land by the Snyders. The property was (as per the deed) always intended for the dual purpose of being lived upon and yielding profit to be taken away. If seasonal growing and then mowing is allowed to occur flush to the house, as has occurred in the past, they could not do anything permanent on the rest of the land without interfering with the right claimed. This would mean no garden, no outbuilding, no new residence, and so on. On the other hand, if the Snyders are allowed to subdivide 2.7 acres in order to allow for another lot and residence besides building a new residence on the existing lot, Chisholm will be denied his right when one considers that the present hay yield, which on the evidence appears to allow for some space around the house, is far from extensive and is exclusive of the unmowed soft area along the driveway and in the front.

[32] Reasonable ordinary use of the Synders' land as a residential or home property, in my opinion, entails an area that is both functional and recreational, with reservation rights not interfering with its permanency. What use they see fit to make of it is only limited by regulations, building codes, etc. To confine an inhabited home on 2.7 acres to 25 feet of curtilage would be unreasonable. Indeed, the facts indicate that for more than two years of the 15-year period of MacIntosh cutting and removing the hay, it was only cut outside an area marked

by trees, 47 feet to the north of the house and 69 feet (including the driveway) to the east of it. When and how often Chisholm did a back-cut for MacIntosh on the inside area was not indicated. The assertion of MacIntosh's wider unmowed area immediately north and east of the house went unchallenged. The hay in this area has not always been cut and taken, and for the last two years the Snyders cleared it away, granted this was done under Chisholm's protest. Reasonableness lies in the acreage it creates. Based on the estimate of 240 feet along the driveway, until it turns, and 107 feet from the house to the northern line, the combined square footage of the two areas outside the trees (240 - 69 = 171 x 342 and 107- 47 = 60 x 182.80 (355.80 - 171)) is 1.59 acres of the 2.7 acre lot. Chisholm's arrangements with MacIntosh have evidently been satisfactory for 15 years. Allowing the Snyders the inside area is a reasonable use of their land to provide for infrastructure and new construction or replacement or renovation of the 100-year old dwelling. Indeed, the functional space at one time included a barn that was apparently located to the north of the trees in an area now mowed for hay. It is uncontentious that the area extending from the south side of the house to the southern property line and west of the driveway where it turns to the north was never seeded or mowed. The approximately 100-foot wide area to the west of the driveway is occupied by the old footprint and new location of the farmhouse. The portion of that area immediately to the west of the old house location simply blended together with Chisholm's abutting lot when he was cutting. This area is where the septic for the house is located.

Conclusion

[33] I conclude it is reasonable in these circumstances for the Snyders to use their land inside the tree lines as appropriate curtilage for the homestead dwelling, specifically, west of a straight north-south (T1) tree line between the Snyders' northern and southern lines and south of a straight west-east (T2) tree line between their western line and its intersection with the T1 tree line. This would not be an actionable infringement of the reservation rights. This is inclusive of the uncontentious area south of the old house and west of the driveway, the area to the west of the old house and east of the western line and to the south of the T2 tree line and north of the uncontested area and southern line. The reverse L-shaped 1.59 acre section to the north and east of the T1 and T2 tree lines, with the base running along the South Side Harbour Road obviously is unaffected. The Synders should assume that there is going to be second or third cut by Chisholm or his agent unless advised otherwise and not mow to keep tidy after the first as Chisholm's right is not first cut limited. Neither should they contemplate subdividing the property, as it would extinguish Chisholm's right. Focussing on hay, the soft area is obviously capable of being mowed and that is Chisholm or his agent's call. If it is not mowed during the period of the first cut, then the Snyders can take what steps they need to cut it and keep the soft area mowed for the rest of the growing season.

[34] As for rejecting Chisholm's application because the right is incapable of judicial control, many interests in land, such as easements, involve parties having to accommodate and cooperate with each other; the same is true here. The

reservation stands and is neither voided or terminated .An order providing for a declaration in the nature of a *profit a` prendre* is granted.

[35] If necessary, the parties may address costs in writing.

Stewart, J.