SUPREME COURT OF NOVA SCOTIA

Cite as: Dawn v. Nova Scotia (Attorney General), 2014 NSSC 48

Date: 20140226
Docket: Hfx. No. 303532
Registry: Halifax

Between:

Robert John Dawn

Plaintiff

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia, The Department of Transportation and Public Works for the Province of Nova Scotia, Elizabeth Mannette, Lawrence Mannette, Daniel Clarence Murphy and Theresa Bernadette Murphy

Defendants

D E C I S I O N

Judge: The Honourable Justice James L. Chipman

Heard: December 2-5, 9-11, 2013 in Halifax, Nova Scotia

Counsel: **James D. MacNeil** and **Tracy Smith** for the Plaintiff, Robert John Dawn
Darlene Willcott and **Lyndsay Jardine** for the Defendant, The Attorney General of Nova Scotia
Allen C. Fownes for the Defendants, Elizabeth Mannette, Lawrence Mannette, Daniel Clarence Murphy and Theresa Bernadette Murphy

By the Court:

INTRODUCTION

[1] This is an action under the *Quieting Titles Act*, R.S.N.S. 1989, c. 382, as amended ("Q.T.A."), in which the Plaintiff, Robert John Dawn ("Dawn"), asserts title to a parcel of land surveyed by land surveyor Robert Ashley ("Ashley"). The land in question is shown as Parcels A and B on Ashley's Plan of Survey dated September 28, 2005 (the "Ashley Plan"). The lands claimed overlap lands which the Defendants Elizabeth Mannette, Lawrence Mannette, Daniel Clarence Murphy and Theresa Bernadette Murphy (collectively, "the Mannettes and Murphys") claim ownership over. The Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the Province of Nova Scotia and the Department of Transportation and Public Works for the Province of Nova Scotia (the "Province"), is a Defendant pursuant to s. 4 of the Q.T.A.

[2] Pursuant to s. 12 (1) of the Q.T.A. this Court has authority to order the issuance of a certificate of title:

Certificate of title after trial

> 12 (1) Where, after the trial or determination of all issues of law and fact between the parties, it appears that a party claiming a certificate of title is entitled to some property right in the land, whether it is the property right claimed or not, the court or a judge may order that a certificate of title be issued to the claimant for the property right to which the claimant has been found entitled.

[3] In s. 13, the Q.T.A. goes on to state as follows:

> Burden of Proof
>
> 13 Nothing in this Act changes the burden of proof upon the parties in actions of trespass to land, of ejectment or for the recovery of land, or the other actions in which a claim for a certificate of title may be joined under this Act, nor is it required that any lesser or greater title or possession be shown than was required on the twenty-fourth day of March, 1961, in such cases, but the claimant may establish under this Act whatever title the claimant has against the Crown and against persons generally. R.S., c. 382, s. 13.

[4] Having regard to the above, the Court's role in Q.T.A. proceedings is not to simply create title but rather grant a Certificate of Title where it is determined a party is entitled to property by establishing the best paper title or adverse possessory title.

[5] The land at issue is located in the Head/West Chezzetcook area of the eastern part of Halifax Regional Municipality, Nova Scotia. The Province is the registered

owner of property, identified by PID 40239717. The property was deeded to the Province on November 30, 1987, for a highway to be constructed.

[6] Dawn Claims that PID #40239717 was owned by his heirs and deeded to him by his grandfather, Clifford Romo. The deed Dawn relies upon to establish the origin of this chain of title is dated February 15, 1918. In this deed, Michael Romo conveyed two blocks of land to Michael and William Romo (the "Romo Deed"). The conveyance that is of interest is the second block of land. The description is as follows:

> ... all the right, interest and claim of the said Michael Romo and others which is unrecorded and described as follows: Beginning at a point on the south of Dyke Brook Bridge on the road leading from Dartmouth to Musquodoboit thence running in a westerly direction until it strikes the old Porters Lake Road thence south along said road until it strikes land belonging to the Myette land until it strikes the Dyke Brook aforesaid, thence north along several courses of the brook to the place of beginning.

[7] In response to the within action, the Province retained a land surveyor, Everett Hall ("Hall"), to, *inter alia*, survey Parcels A and B on the Ashley Plan. As part of his retainer, Hall was asked to set boundary lines and confirm the title and ownership of PID 40239717. Hall prepared a Plan of Survey dated October 18, 2011 (the "Hall Plan").

[8] The Mannettes are the registered owners of property identified by PID 40238578. Daniel Clarence Murphy ("Daniel Murphy") is the registered owner of property identified by PID 40239683.

[9] In their Defence, the Mannettes assert long-standing paper and possessory title to portions of the same land which Dawn claims to be his. The Mannettes retained a land surveyor, Clinton Garland, ("Garland"). He prepared a Plan of Survey dated June 24, 2005 (the "Garland Plan"). The Garland Plan referred to the Mannettes' lands as lots M-1 and M-2.

[10] In their Defence, the Murphys assert title to some of the land claimed by Dawn. The Murphys' title to the land they claim to be theirs is by virtue of long-standing actual physical possession of the land. Their claim is that, notwithstanding that the true paper title owners may have been predecessors to the Mannettes or Dawn, the Murphys' occupation and maintenance of the land ousts others.

[11] The Mannettes and Murphys are co-Defendants and are represented by the same counsel. In any event, the Mannettes confirm that to the extent they have paper

title to any of the land claimed by the Murphys, they concede this land to be owned by the Murphys.

ISSUE

[12] The issue before the Court is which party or parties has/have superior title - paper or adverse possessory - to the lands in question. In assessing the evidence, I am mindful of *Brill v. Nova Scotia (Attorney General)*, 2010 NSCA 69. After quoting the aforementioned s. 13 of the Q.T.A, Justice Fichaud, on behalf of an unanimous panel, stated as follows at paras. 37-40:

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

[38] The judge should be satisfied that all interested persons have been joined or sufficiently notified, r are before the court. Then, if there is no other apparent title holder and the contest is between just two parties, the court may quiet title based on the better claim. This practical approach reflects that title to land is relative and heirarchical, not absolute: Robert Megarry and H.W.R. Wade. At pp. 24-25 *per* Lord Diplock. In *MacNeil v. Nova Scotia (Attorney General)*, 2000 NSCA 31 (CanLII), 2000 NSCA 31, (2000) 183 N.S.R. (2d) 119 (C.A.), at ¶ 43, Justice Cromwell said:

> 43 As Justice Hallett noted in *Bowater Mersey Paper Co. Ltd. v. Nova Scotia (Attorney General) and Peck* reflex, (1987), 80 N.S.R. (2d) 229 (T.D.), aff'd reflex, (1988), 83 N.S.R. (2d) 162 (N.S.S.C.A.D.), where property is woodland, there is evidence of possession for the requisite period and no other person has a stronger claim, the *Quieting of Titles Act*, R.S.N.S. 1989, c. 382 should be applied in a practical way so as to achieve its purpose as a mechanism to quiet titles.

[39] Section 16(1) of the *OTA* says that a certificate of quieted title 'is binding and conclusive upon all persons, including the Crown and whether named in the action or not', subject to limited exceptions stated in s.16 or proof of fraud under s. 17.

[40] The *QTA* affords a process to ascertain and quiet the title to Bella Island. The substantive principles to ascertain that title derive from other legislation and the common law.

[13] Bearing in mind the foregoing, I am satisfied all interested persons are before the Court as parties to this lawsuit.

LAW

[14] When there are competing title chains to a parcel of land, the role of the Court is to carefully analyse the underlying title documents to determine which party has a better chain of title (*MacDonnell v. M&M Ltd.* (1998), 165 N.S.R. (2d) 115, (C.A.) at para. 30).

[15] In *Metlin v. Kolstee*, 2002 NSCA 81, 207 N.S.R. (2d) 27, at paras. 65-66, the panel considered the principles applicable to interpreting deeds. The Court of Appeal accepted the following recitation from *Saueracker v. Snow* (1974), 14 N.S.R. (2d) 607 (S.C.T.D.), at para. 20:

> The general principles applicable to the interpretation of a deed are ...:
>
> 13. Construction – General Rule. The Court must, if possible, construe a deed so as to give effect to the plain intent of the parties. The governing rule in all cases of construction is the intention of the parties, and, if that intention is clear, it is not to be arbitrary overborne by any presumption. The intention of the parties is to be gathered from the sense and meaning of the document as determined in the first place by the terms used in it, and effect should, if possible, be given to every word of the document. Where, judging from the language they have used the parties have left their intention undetermined, the Court cannot on any arbitrary principle determine it one way rather than another. Where an uncertainty still remains after the application of all methods of construction, it may sometimes be removed by the election of one

of the parties. The Courts look much more to the intent to be collected from the whole deed than from the language of any particular portion of it.

24. *Extrinsic Evidence*

Patent and Latent Ambiguities. An ambiguity apparent on the face of a deed is technically called a patent ambiguity – that which arises merely upon the application of a deed to its supposed object, a latent ambiguity. The former is found in the deed only, while the latter occurs only when the words of the deed are certain and free from doubt, but parol evidence of extrinsic or collateral matter produces the ambiguity – as, if the deed is a conveyance of 'Blackacre', and parol evidence is adduced to show there are two places of that name, it of course becomes doubtful which of the two is meant. Parol evidence therefore in such a case is admissible, in order to explain the intention of the grantor and to establish which of the two in truth is conveyed by the deed. On the other hand, parol evidence is uniformly inadmissible to explain an ambiguity which is not raised by proof of extrinsic facts, but which appears on the face of the deed itself. A subsequent will cannot be used to construe an earlier deed of settlement nor as evidence that testator intended to include an additional person among the beneficiaries under the settlement.

Extrinsic Evidence as to Latent Ambiguities Generally: Extrinsic evidence is always admissible to identify the persons and things to which the instrument refers.

Provided the intention of the parties cannot be found within the four corners of the document, in other words, where the language of the document is ambiguous, anything which has passed between the parties at, prior thereto and leading up to it, as well as that concurrent therewith, and the acts of the parties immediately after, may be looked at, the general rule being that all facts are admissible to interpret a written instrument which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as tend only to show that the writer intended to use words bearing a particular sense are to be rejected.

[16] Where there is ambiguity in a deed, the Court of Appeal in *Metlin* at paras. 65-66, accepted the following passage from *McPherson v. Cameron* (1866-69), 7 N.S.R. 208 at 212:

> ... The question is how he is to get there, for neither the course nor distance given in his grant will take him there, without the alteration of one or the other. The general rule to find the intent where there is any ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake; *Davis v. Rainsforth,* 17 Mass., 2010. On this principle the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshalled: *First*, the highest regard had to natural boundaries; *Secondly*, to lines actually run and *corners actually marked* at the time of the grant*; Thirdly*, if the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established; *Fourthly,* to courses and distances, giving preference to the one or the other according to circumstances; *Greenleaf on Evidence* p. 441, n. 2, and the case there referred to.

[17] In *MacDonald v. McCormick*, 2009 NSCA 12, 274 N.S.R. (2d) 258, the Court of Appeal reaffirmed the discussion found in *Metlin*.

[18] Also, at paras. 65-66, the Court accepted:

> ... the principle is clear that where distances and monuments clash, in the absence of special circumstances, the monuments prevail; in such cases the context shows the boundary to be the dominant intent, the distance, the subordinate ...

[19] As a general rule, the intent of parties to a deed is to be gathered from the words of the deed. If there is any ambiguity, the common sense rules set forth by the Court of Appeal are applied. In *Anger and Honsburger, Law of Real Property*, 3rd ed. (looseleaf), Diana Ginn and Monica McQueen endorse the following summary of the law:

> Where there is an ambiguity in a grant, the object is to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is to give the most effect to those things about which things men are least liable to mistake. On this principle, the things by which the land grant is described are thus ranked according to the regard which is to be given them:
>
> 1. natural boundaries;
> 2. lines actually run and corners actually marked at the time of the grant;
> 3. the lines and courses of an adjoining tract, if these are called for, and if they are sufficiently established, to which the lines will be extended;
> 4. the courses and distances, giving preference to the one or the other according to circumstances.

[20] The above is often, in surveyor parlance, referred to as the “hierarchy of evidence”. In the Anger and Honsburger text, Ginn and McQueen go on to state,

following *Diehl v. Zanger*, 39 Mich. 601 (1878), and various Canadian cases citing it:

> The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that monuments control course and distance.

EVIDENCE/ANALYSIS

[21] The Court heard *viva voce* evidence from three experts - Ashley, Hall and Garland. Their qualifications as experts in land surveying were admitted. The experts' Plans of Survey, reports and attachments went in as exhibits. In addition, their Plans of Survey were enlarged and referred to throughout the course of the trial. Hall's Plan (marked as Exhibit 3) was physically the largest of the enlarged plans. More importantly, it became the dominant document at trial as all of the experts and many of the lay witnesses referenced portions of their evidence by referring to Exhibit 3. Furthermore, it was Exhibit 3 which was predominantly marked upon by witnesses so as to demonstrate their understanding of boundaries and the like.

[22] In addition to himself and Ashley, Dawn called his grandfather, Clifford Romo and his aunt, Judith Hatch.

[23] In addition to Garland, the Mannettes called Lawrence Mannette, Reginald Mannette, Donald Mannette and Luke Mannette.

[24] The Murphys relied on the evidence of Daniel Murphy, only.

[25] The Province called Hall and Department of Transportation and Infrastructure and Renewal Real Property Services Acquisition and Disposal Officer, Lewis Wood.

Lay Witnesses

(i) Clifford Romo

[26] Mr. Romo is the ninety-three year old maternal grandfather of Dawn. He indicated that he "signed over" portions of his land to one of his daughters, Judith Hatch, as well as Dawn. With respect to the land deeded to Dawn, Mr. Romo said,

"I didn't want or need it," noting that he had made the conveyance shortly after Dawn was married.

[27] With reference to the Romo Deed, Mr. Romo was asked about a rock in the Dyke Brook. In answer, he said the north line of his property was at the point of the rock "south of the wooden bridge south of the old number seven [referring to Highway 7]". He said that he told Ashley about the rock, but clarified on cross that he had never shown the rock, or anything else on the land to Ashley. In this regard, Mr. Romo said he was not asked to walk the land with Ashley.

(ii) Judith Hatch

[28] Ms. Hatch is Clifford Romo's daughter and Dawn's mother's sister. She lives with her husband in a home along Highway 207 on property deeded to her by her father. In 2001, Ms. Hatch retained surveyor Cyril Pettipas to survey the land she received from Mr. Romo.

[29] Ms. Hatch testified her father showed her what she referred to as "the rock in the gully". Given what she was told by Clifford Romo, she considered the rock to mark the northern boundary of her father's deed.

(iii) Robert Dawn

[30] Dawn grew up in Chezzetcook, Eastern Passage and Hants County. He presently lives and works in Alberta. When Dawn was conveyed the land in question in 2001, he did not initially hire a surveyor. He took this step in the spring of 2004 in the aftermath of Hurricane Juan. He testified that he retained surveyor Glen Myra after observing Luke Mannette cutting wood on land Dawn believed could be his.

[31] Dawn said Mr. Myra did not complete the survey work so he retained Ashley. In his words, "I hired Robert Ashley after the wood was cut and to figure out where my lines were." Dawn indicated he received the Ashley Plan after he told Ashley, "What I understood of the rock south of the Dyke Brook Bridge." Dawn recalled Ashley and Clifford Romo discussing the rock but said that neither he nor his grandfather walked the land with Ashley. Dawn advised Ashley about his understanding of the boundaries of Parcel A but gave the surveyor no information

regarding Parcel B. On cross-examination, Dawn acknowledged never having been with Ashley on Parcel A, “other than along the side of the road.”

(iv) Daniel Murphy

[32] Daniel Murphy testified that he has spent his entire fifty-three years in the area of Chezzetcook, bordering the 207 Highway. With the assistance of photographs and referring to Exhibit 3, Mr. Murphy described his understanding of the placement of barns, sheds, wire fences and stone walls. He spoke of small scale farming and the cutting/piling of wood on property which he always understood to have been in the Murphy family. He explained how, when the Province expropriated land to create Shore Road, some of it was purchased from his aunt Gladys and uncle Herbert Murphy.

[33] Daniel Murphy recalled meeting Ashley when the surveyor was in the area performing work for Dawn. Murphy hired Ashley to survey what he felt to be his land. He paid Ashley’s account, notwithstanding that the Ashley survey did not show boundaries favourable to Murphy, as they lined up with the boundaries of the Ashley Plan prepared for Dawn (and favourable to him). It was suggested through the cross-

examination of Murphy that this might somehow equate with Mr. Murphy acquiescing to the Ashley Plan. I do not find this to be the case; rather, I find Mr. Murphy was merely paying his bill, without regard to a possible inference.

[34] When shown the Hall Plan, Murphy testified that the “jog” in the line coincides with a brook which runs over his property at that point. He was also able to mark where he cut wood on the property dating back to his teenage years and into his forties. He testified that his aunt and uncle (Gladys and Herbert Murphy) had outbuildings in the disputed area and that he and his ancestors cut and piled firewood on the property. With the assistance of photographs, Daniel Murphy gave evidence of occupation and possession by his family dating back over 60 years. Mr. Murphy confirmed his understanding as to where his family’s driveway and parking areas were located. With reference to photographs contained in Exhibit 2 (including one showing an antique Chevrolet truck) Daniel Murphy indicated where his family’s vehicles had been parked over the course of decades.

[35] In reviewing Daniel Murphy’s evidence against the backdrop of the expert evidence (discussed below), I am satisfied that the Murphys have the evidentiary basis to successfully resist Dawn’s claims to ownership. In this regard, I find the

Murphy family has had possession on the ground (visible for all to see) for well in excess of forty years. They maintained the area of land to the exclusion of anyone else, whether the true paper title owners are the Mannettes or Dawn's predecessors (the Romo family). In the result, it is the Murphys who have the rightful claim to the narrow strip of land to the south of Shore Road.

[36] I make the above finding in the context of the evidence and authorities, particularly, *Brill*, *supra*. As noted by Scanlan, J.A. in *Hatt v. Peralta*, 2014 NSCA 15, at para. 10, referring to *Brill*, "... acts of possession are to be viewed contextually depending on the circumstances of each property ...".

(v) Lawrence Mannette

[37] Fifty-seven-year old Lawrence Mannette is an electrical contractor. He grew up on land in the area where he presently resides and began cutting wood on the land at age ten. He cut the firewood with his father and grandfather, entering through what is now Highway 107. He recalled doing this annually in the fall from 1966 until 2000 (when the family moved to cutting wood in another location), without any disruption and/or conflict. Mr. Mannette said that he hired Garland as part of the process to have

his land title migrated. He said the two met on the site and, "I showed him the beginning of the 207 (on the west side of the lot) and took him down Shore Road and to where the Department of Transportation lot is located. I showed him where the fence line was, which my dad showed me years before. At the time he was doing the survey, we walked to the south side of the 107. I showed him the Department of Transportation boundary lines, they were quite evident ..."

[38] Mr. Mannette provided background surrounding his father's sale of a portion of his land to the Province, along the south side of M-2 heading east along Shore Road. He told of the aftermath of cleaning up from Hurricane Juan and paying a contractor $2,200.00 to deal with the mostly fallen softwood on what he always felt to be his family's land.

[39] Mr. Mannette testified that he took the Garland Plan to his then lawyer, Myra Jerome, and arranged to have M-1 and M-2 migrated.

(vi) Reginald Mannette

[40] Ninety year old Mr. Mannette has lived all his life in the community of Chezzetcook. He testified he deeded most of his land to his two sons. Reginald Mannette testified that he and Clifford Romo had a long standing disagreement concerning their property boundaries and ownership.

[41] Mr. Mannette noted that he was approached by the Province and sold some of his land which was used in the construction of Highway 107. He said that he, Arthur and Luke Mannette cut wood in the area both before and after construction of Highway 107. Mr. Mannette testified he never saw any of the Dawn family cutting wood in the area.

(vii) Donald Mannette

[42] Eighty-four year old Mr. Mannette lives along Highway 207, also known as the West Chezzetcook Highway. He spoke of cutting wood together with other family members on land he always thought was owned by his family. Donald Mannette said they respected the wire fence as marking land boundaries. He said he knew Clifford

Romo's father, William Romo, "right well", and there was never any objection from William Romo when the Mannettes did their wood cutting.

(viii) Lewis Wood

[43] Mr. Wood is employed by the Province with the Department of Transportation as an Acquisition and Disposal Officer. His background is in land assessment, not title searching or surveying. He provided background concerning the Province's retainer of Hall, noting that quieting titles actions, "cross our desks". Lewis said the Province wanted to confirm ownership of Parcels A and B. Mr. Wood noted Hall did an "extensive job" culminating in the Hall Plan and Hall's report.

[44] On balance, I found all of the lay witnesses, inclusive of the party witnesses, to be forthright and credible. Having said this, with the exception of Daniel Murphy, the evidence of the lay people was not of great assistance in determining the ultimate issue. In this regard, the witnesses were well intentioned but their testimony did not shed much light on the matters in issue. For example, to a person they were rather vague about dates, documents and the placement of land markings and usage. Undoubtedly, these witnesses were called in an effort to bring context and to establish

historic continuity. Having carefully listened to their evidence, I found myself, in this area, agreeing with Dawn's counsel, who in post-trial submissions described the case as coming down to a "battle of the experts".

EXPERT EVIDENCE

[45] Ashley, Garland and Hall were all qualified as expert land surveyors without objection. Each of these experts brings in excess of 20 years experience to their profession. Counsel took the experts through their reports, attachments and Plans of Survey. By agreement, the experts testified in-chief. All were cross-examined.

[46] All three experts acknowledged that several of the deeds in question were not explicit and that there was considerable ambiguity in the descriptions. The surveyors accepted and understood that they were working with competing title chains and they essentially did the best with what they had to work with.

(i) Robert Ashley

[47] Robert Ashley's thesis was that Dawn had the best chain of title to Parcels A and B on the Ashley Plan. Ashley concluded his November 2, 2012 Surveyor's Report as follows:

> Upon the request for this report, the survey was reviewed completely. After extensive review, there is no change in the professional opinion expressed in the Plan of Survey of Parcels A & B, Lands Conveyed To and Claimed by Robert John Dawn, dated September 28, 2005 (Document Attachment #24).
>
> Although the Nova Scotia Department of transportation may have intended to align the southern boundary of the new Shore Road with the southern boundary of the lands of Annie Romo, it is clear from the NSDOT Plan No. 2742 (Document Attachment *(sic)* #2) that this line was misplaced, as the plan shows the dwelling of Annie Romo (the 'homestead') being located on the land of Clifford Romo. It's interesting to note that the plan shows the Ash tree which I accepted as being the boundary between Clifford Romo and the 'homestead'. This, and the fact that the NSDOT plan was NOT prepared by a professional land surveyor, puts this plan, and others by NSDOT, in question.
>
> The more contentious northern boundary was established with the belief that the Mannette lands and the Dawn lands are in fact adjacent. With this in mind, considerable weight was put on the fact that the Mannette deeds clearly state that their lands are the southern portion of the John Bell Grant (a.k.a. the'baseline'). The location of the southern boundary of this Grant was defined by Parker (Document Attachment # 16), was accepted, as it seems to fit some physical evidence found on the ground, and also fits with other surveys and claims in the area (Document Attachments #17 & 18).
>
> Since the Dawn deed clearly calls for a point on the south of the Dyke Brook Bridge, and the extension of the Parker definition of the southern boundary of the John Bell

> Grant would pass the location accepted to be the Dyke Brook Bridge approximately 82 feet further north, the 'baseline' was deflected to come to the point on the south of the Dyke Brook Bridge. Although it is 'nice' to have perfectly straight lines, boundary law is clear that lines are not necessarily so.
>
> The only alternative that this surveyor can see is a possibility, that there is, or was, another parcel of land between the Mannette (and Myette) lands and the Dawn property. This possibility is rejected, as there is no other party claiming so.
>
> In conclusion, I believe that the survey as depicted on the Ashley plan (Document Attachment #24) reflects the actual boundaries, based on the best available evidence.

[48] Ashley testified he was first contacted by Dawn in 2004 or 2005. He indicated he was familiar with the "challenges" of doing survey work in the Chezzetcook area. He felt the Dawn Deed to be unclear as to full title. He classified his work for Dawn a retracement survey, "as in re-tracing boundaries". In approaching his task, the surveyor said he followed five steps:

1) Researched Property On Line
2) Looked on the ground for physical evidence of boundaries
3) Spoke with members of the community
4) Carried out measurements
5) Analyzed evidence and made decisions.

[49] For reasons which will become apparent, I find Ashley was less than thorough with regard to steps two and three. As will be developed, these were fatal flaws and they explain why I ultimately preferred the Hall Plan.

[50] Since the Dawn Deed is vague, Ashley resorted to external evidence to attempt to resolve ambiguities. He spoke with Dawn and Clifford Romo. The latter, he said, showed him a rock as well as a tree he planted. Ashley said he accepted the rock as the beginning of Dawn's property line. He said he was told of nothing else that would assist in determining bearings. Ashley spoke to Clifford Romo's neighbour, Charles Kuhn, noting he "really did not have much to say". He also spoke with Lawrence Mannette, stating "he had no evidence to change my mind".

[51] Ashley gave his opinion that the Mannette lands, "are clearly in the John Bell Grant which is north of the John Murphy Grant." He noted there were several pieces of rock walls along Daniel Murphy's property. He considered this evidence contrary to his opinion and offered a couple of explanations as to why these walls could be discounted. First, he said the Murphys' ancestors may have merely placed the rocks in piles as they cleared the land for cultivation. Second, he said it was common to

find rock walls but that sometimes they were placed on boundaries and other times they were not.

[52] In the context of what the Court heard from other witnesses about these rock walls, I find Ashley's explanation to be weak. In my view, both Garland and Hall more accurately assessed the impact of the rock walls, particularly concerning the baseline/township/northern boundary line between Lawrencetown and Preston ("the Lawrencetown/Preston line").

[53] Ashley stated that he "walked a good portion" of the property, but then allowed that his crew did "the grunt work" and that he had "somewhat" walked the property. He did not recall seeing wire fences. Ashley's evidence was inconsistent with Mr. Romo's concerning the pointing out of the rock. In any event, Ashley later allowed that the Dyke Brook Bridge is no longer in existence and that a culvert now exists where he believed the bridge used to be.

[54] Given this evidence, I find Ashley did not allow adequate opportunity to look on the ground for physical evidence of boundaries. Both Garland and Hall took the

time to walk the ground and it made a significant difference in their appreciation of the importance of on the ground markings.

[55] Asked about monuments and the discrepancy between sixty and seventy-nine chains (increased by 19 chains in a 1908 deed from an 1883 deed), Ashley said the numbers "are not all that important, it's the actual locations". He felt the former road between Dartmouth and Musquodoboit (the "Old Road ") referred to by Garland and Hall had been "obliterated". Ashley said he did not search back to the Crown Grants, as he went only to 1908. At one point, he admitted "I don't really know where the Romo lands come from."

[56] Ashley felt Garland's opinion to be "very much reflected" by the Province's Department of Transportation engineers' plans, which he discounted. Although he characterized the Hall Plan as an "invaluable tool", he said he disagreed with Hall's conclusions. The root of his opinion was that the Hall Plan improperly identified the location of the Lawrencetown/Preston line. It was Ashley's opinion that this boundary should correspond with the northern boundary of the Crown Grant to John Murphy. Further, he believed the northern boundary of the John Murphy Grant abutted the southern boundary of the John Bell Grant.

[57] Ashley reviewed a number of documents appended to his report and noted that the Ashley Plan (last page of tab 13, Exhibit 6) has the north township line of Lawrencetown abutting the southern boundary of the John Bell Grant.

[58] Dawn, through Ashley's evidence, asserted that the northern boundary of the John Murphy Grant is the Lawrencetown/Preston line. He maintained that all of the documents support this with the exception of one deed, the 1908 deed from one Deluchry to Gus Mannette. Ashley's evidence on the 1908 deed was that he viewed the document as simply wrong and the measurements contained in it as irrelevant for surveying purposes. Ashley's evidence was that you take the beginning point and go north to the natural boundary of the Old Road and then follow the directions back to the beginning.

[59] Ashley testified that he believed that the Old Road no longer physically existed, but that even if it did, the distance from the southern corner of Lot 1G to that Old Road would form the entire extent of the western line of the John Bell Grant.

(ii) Clinton Garland

[60] Garland was called as an expert by the Mannettes. He has been a Nova Scotia land surveyor for about forty years. In 2012, Garland retired from thirty-five years service as a Halifax Regional Municipality surveyor.

[61] Garland was retained by Lawrence Mannette in 2003. He was given documentation and searched title going back as far as the John Bell Grant. Garland prepared a survey and report. He said that he based these on his review of various deeds and plans along with his on the ground work. He located fences, remnants of fences, an old railway line (Plan 134109) and road markings. In the course of his testimony, he explained the difference between barbed and page wire fences. Garland said he accepted the Department of Transportation engineers' boundaries as part of his analysis.

[62] Garland spoke of what his ground work involved, describing what he termed a "criss-cross reconnaissance". He said as a surveyor, "you go back and forth on the land to see what you can find." This extensive walking of the land is to be contrasted with and preferred to, Ashley's "somewhat" walking of the area.

[63] Garland viewed a culvert area, which he said was once Dyke Brook Bridge. He was taken to this area by Clifford Romo who showed him a rock. He noted the rock was not marked, cut or hatched, as is often the case with rocks which are intended to mark surveyors' points of distinction. Later he said of what he was told by Mr. Romo concerning boundaries, "I considered but didn't rate high up there."

[64] I find this discounting of a lay person's evidence to be backed up by the surveyor's on-the-ground observations. I therefore find myself preferring this approach to Ashley's, as Ashley simply discounted information from lay people without demonstrating he had actually viewed the areas on the ground.

[65] Garland stated some of the deeds he reviewed had interlineation. He explained this term refers to added writing between lines and that he incorporated these additions into his "calls".

[66] Besides meeting Mr. Romo and his client, Garland met with a Mr. Kelly of the Department of Highways. Garland testified that he, Lawrence Mannette and Luke Mannette met with Mr. Kelly at Kelly's Bedford office, where they were shown the

survey plans for the layout of the highway in the area. He regarded the information as reliable and incorporated it into his analysis.

[67] Garland said he reviewed LRIS mapping plans as well as a Crown Grant map and that they showed the Old Road, albeit his ground work did not involve going to the area of the Old Road. Garland testified that going a distance from the north boundary of the John Bell Grant southerly down to Shore Road would be approximately seventy-nine chains and not the earlier deed reference of sixty chains.

[68] On cross-examination, Garland acknowledged his report was prepared for the litigation, many years after his actual survey work. In any event, through further answers, Garland confirmed he had most of the attachments to his report years before, when he prepared the Garland Plan.

[69] Garland was taken through the hierarchy of evidence, noting, "the hierarchy will change, depending on the type of job", elaborating that it is important to keep in mind actual measurements. He then acknowledged he did not measure the actual seventy-nine chains, as a subdivision is now located in the area that was once the Old Road. Nevertheless, he provided his rationale for locating the Mannette boundaries

and noted that, although he agreed with Hall's Plan and report, he came to his own conclusions previous to reading the Hall materials.

[70] The Garland Plan is not as extensive as Ashley's or Hall's but, nevertheless, I was impressed by his "on the ground work", which clearly factored into his analysis and findings. Garland concluded his report as follows:

> After I completed my survey, I gave copies of the plan and Schedule A for describing Lot M1 and Lot M2 to Lawrence and Elizabeth Mannette to give to their lawyer to draw up deeds to record in the Registry of Deeds. I had an enquiry from a fellow surveyor, Robert Ashley, N.S.L.S. concerning my survey as he had been approached to do a survey for Mr. Romo and Robert John Dawn. I believe I forwarded him a copy of my plan dated June 24, 2005. He sent me a copy of his completed plan dated September 28, 2005 and a Schedule A for deeds Book 6718, Page 650 and Book 389, Page 683.
>
> In 2012, Lawrence and Elizabeth Mannette gave me a copy of a survey plan by fellow surveyor, Everett B. Hall, N.S.L.S. dated October 18, 2011, showing Lot B, Lands Deeded to HER MAJESTY THE QUEEN in right of The Province of Nova Scotia Represented by the Minister of Transportation for The Province of Nova Scotia. Mr Hall's plan shows a very extensive researched and compilation of info on his plan for the large surrounding area.
>
> On Mr. Hall's plan, he shows on the southern side of Shore Road, a line that is approximately 79 chains (5,214 feet) south of 'Old Highway' or "Coach Road" (Old Road in deed Book 389, Page 683). There is an old road just south of Bell Lake as shown on Crown Grant Sheet No. 75. It gives some justification for where the Mannettes southern line could have been back in 1908 even though it seems to be south of the John Bell Grant line by 19 chains. The John Bell Grant states the north-south distance to be 60 chains (3960) feet) from the old road. Both plans of Mr. Ashley and Mr. Hall, show a different location for the John Bell Grant line and also a difference on both plans as to the location of the John Bell Grant - John Murphy

> Grant line. If one looks on Crown Grant Sheets No. 66 and 75, there is an obvious straight line running west-east and being north of lot numbers 1, 2, 3, 4, surplus, 7, 8, crossing Lake Echo and continuing along various owners, crossing Porters Lake and along the southern boundary of the John Murphy grant, and continuing to intersect Highway No. 7.
>
> On the plan by Mr. Ashley, he shows the John Bell Grant - John Murphy Grant going from point A to Mr. Roma's rock. I believe the lines should be running approximately parallel with Shore road, not diagonally as he shows. The plan by Mr. Hall shows a more appropriate line location.
>
> My assignment was to determine validity and find on the ground what the Mannette family have claimed as their lands, Lots M1 and M2, for the last 60 plus years. I have done so and am professionally satisfied with the results contained within my survey plan. The court will decide whose opinion is the right one with the documentation put forward by fellow surveyors and myself. I hope it is in favour of Lawrence and Elizabeth Mannette.

[71] Garland testified he was satisfied that M-1 and M-2 exist. He testified that the full extent of these lands was established on the ground and that the ownership is with the Mannettes. In this regard, just prior to Hurricane Juan in September 2003, Garland did a "crisis-cross reconnaissance" of Lot M-2. He testified that he found no evidence of any line, boundary marker or any other indication of competing ownership claims for possession of the lot.

[72] As previously indicated, Garland accepted the work of the Province's Department of Highways engineers (not accredited Nova Scotia land surveyors) in laying out the highway boundaries. I do not consider this acceptance to be

problematic. In this regard, Mr. Garland backed up his decision by noting these boundaries exist through his own on the ground observations. For example, he found an old wire fence on the east side of Lot M-2 as having boundary line significance. Mr. Garland did not consider the lines to the west of Highway 207 to be controlling in their effect on Lot M-2. Furthermore, he did not find the lines to the west of the 207 to be determinative of Dawn's Parcel A. He did not have the Ashley or Hall survey work to go by when he commenced his work in 2003. Having subsequently reviewed the Hall and Ashley plans and their reports, Garland did not alter his opinion.

(iii) Everett Hall

[73] Hall is a professional land surveyor who has been licensed in this field for close to fifty years. He gave background tracing his experience in providing surveys in land disputes, noting he had been qualified as an expert in the Supreme Court of Nova Scotia on several occasions. Hall confirmed he was initially retained by the Province, "to do a survey for a lot they had acquired deeds to in the West Chezzetcook area". He said, as part of the process, he "investigated deeds, ownership and traced back property to provide my opinion." Hall reviewed his Plan and report,

noting the latter had various attachments which he said formed part of his opinion. Hall said as part of his review he spoke with Clifford Romo, Charles Kuhn, Reginald Mannette, Lawrence Mannette and Daniel Murphy. Importantly, in addition to speaking to each of these land owners, Hall met separately with them on their properties and had each of them point out what they believed to be significant land markings, including:

a) In the case of Mr. Romo, the trunk of a large ash tree and the rock;
b) With Mr. Kuhn, old fence line;
c) Regarding Lawrence Mannette, where he cut timber over the years;
d) With Reginald Mannette, the area on the west side of Highway 20 where there had been a prior quieting titles action; and
e) Concerning Daniel Murphy, the stone wall along portions of his property.

[74] In fashioning his opinion, Hall said he took into consideration all of what he was told. Hall traced his review of the deeds, stating he took the land descriptions and from there positioned the directions and distances on a grid for Parcels A and B. With reference to page six of his report, Hall provided detail with respect to the change from sixty to seventy-nine chains, from the Old Road down to the

Lawrencetown/Preston line. He referred to Crown Index Sheet 75 as assisting with his review of the placement of this line. He explained how the increase in nineteen chains was reconcilable as it matched up with where he believed the Lawrencetown/Preston line to exist. Hall gave a detailed explanation as to why he felt Ashley's placement of the township line was flawed. Hall noted there was physical evidence - in the form of a stone wall and wire fences - to back up his belief as to where this line should be.

[75] I found Hall's evidence here (as in most areas) to be convincing. For example, he testified "I walked that line ... Daniel Murphy showed me a stone wall to the north of his garage ...". When his testimony centered around the area south of Highway 7, Hall convincingly referred to the importance of an old fence from the old railway line to almost southbound of the new Shore Road, noting, "I walked the south part of the fence." He noted there was a barbed wire fence (which he estimated to be at least sixty years old) and "I followed right straight through." During several exchanges in cross, Hall backed his opinions with, "it fits with what I found on the ground."

[76] Hall impressed as having a clear grasp of the hierarchy of evidence. As to the old highway plans not being prepared by a surveyor, Hall noted that these surveys

were prepared by engineers and that a formal land surveyor association was not formed in Nova Scotia until the 1950's. In any event, Hall stated, "I seldom accept surveyors (or engineers) work until I do my own."

[77] When the Province became involved in the Action, Hall was retained to survey Lots A and B in order to set boundary lines and confirm ownership of PID 40239717. To do this, Hall traced the title of PID 40239717 back to the original Crown Grant from which it originated. As well, he investigated the title and boundaries of several other adjoining and non-adjoining parcels of land in the surrounding area. This involved research into the aforementioned John Murphy and John Bell Grants as well as the Charles Lyons and J. Fredericks Grants. Hall concluded his report as follows:

> **CONCLUSION AND OPINION:**
>
> It is clear from the research that the base line of the John Bell Grant was originally described as being located sixty (60) chains south of the old road that ran from Dartmouth to Musquodoboit and that the distance of sixty (60) chains was in question and that the actual distance from the old road southerly to the base line was seventy-nine (79) chains more or less, leaving only a very narrow strip of land for Michael Romo and William Romo after the others had staked their claims to portions of the same parcel of land described in the conveyance to Michael Romo and William Romo by deed dated February 15, 1918, and recorded in Book 742 at Page 169 on June 10, 1936.

The John Murphy Grant, by grant description, only extended 85 chains (or 5610.0 feet or 1709.9 metres) east of the east shore of Porter's Lake and as a result, the John Murphy Grant did not include Lot A and Lot B shown on the attached plan of survey. The research of the various deeds show that Lot A and Lot B (PID) No. 40239717) are a portion of those lands that was conveyed by Fred Bonang to Albert Myette (Matt) by a deed dated February 3, 1914, and recorded in Book 437 at Page 766, which deed included the lands from the south side of Old Highway No. 7 southerly to the base line. This deed predates the deed to Michael Romo and William Romo dated February 15, 1918, and not recorded until June 10, 1936, in Book 742 at Pages 169, resulting in Albert Myette (Matt) having a recorded deed on record 22 years prior to the Michael Romo and William Romo deed being recorded.

The investigation and research of the various deeds and grants of Lot B (PID No. 40239717 and of all of the adjacent properties south of Highway No. 7 extending as far south as the new Shore Road and beyond and the physical evidence of the stone walls and wire fences that have marked the boundaries of the adjoining lots over the past century show that the lands that originally were deeded by Michael Romo to Michael Romo and William Romo and others by deed dated February 15, 1918, recorded in Book 742 at Page 169 does not include those lands that are currently claimed by Robert John Dawn shown as Parcel A and Parcel B on the Plan of Survey as shown on Plan of Survey No. 5536 prepared by Robert Ashley, dated September 28, 2005, and filed at the Registry of Deeds at Halifax, NS, on October 5, 2007, as Plan No. 88000958, and further that the said deed recorded in Book 742 at Page 169 never included Lot B as shown on the attached Plan of Survey as prepared by Everett B. Hall, and being PID No. 4023917.

Dated at Shelburne, County of Shelburne, Province of Nova Scotia, this 19th day of January, 2012.

[78] Hall's *viva voce* evidence, consistent with Garland's, established references to the Old Road. In particular, Hall located the Old Road by making reference to previous survey plans. He stated he then went back to his office and mapped its location from Crown Index 75 and by tying those calculations in with the Nova Scotia

Controlled Survey and Monument Data Base. From there, he did a mathematical calculation to establish the approximate location of the Old Road.

[79] Hall confirmed that Crown Grants are known to be inaccurate in respect of land dimensions. He demonstrated the potential for overlap when paper grants are plotted. Hall walked the land, surveyed and observed landmarks including the fences and walls. He told of the importance of the stone walls and explained his opinion that they mark the Lawrencetown/Preston line.

[80] Hall testified that he was able to locate the Old Road and that, in the absence of a natural boundary, such as a river, the road could be considered to be akin to a natural boundary. Hall confirmed his view that the Mannette paper title took him to the Grant line between Preston and Lawrencetown. It was Hall's opinion that the Mannette lands (like the other half of the Bell Grant) are approximately 79 chains in length. Hall confirmed that he went back to his office and, with reference to the Old Road and Crown sheet, calculated a distance near this length - 79 chains - down to the boundary of Lawrencetown and Preston.

[81] Hall explained that he often first reviews the land sketch accompanying a deed and then the precise words of the deed. He was not shaken in cross-examination, allowing that his practice is to enlarge and darken old and faded deed wording with the aid of a photocopier so as to gain a better appreciation of the wording.

[82] As part of my review of the evidence, I went over the deeds and surveys along with other relevant documentation tendered as exhibits. In reviewing the underlying title documents, I am satisfied that the Province and the Mannettes have the best chain of title to the lands in question. Further, I reiterate my view that the Murphys have the evidentiary basis to assert adverse possessory title and thereby resist Dawn's claim to ownership.

[83] My review of the exhibits reinforces my finding that the Hall Plan and report is to be preferred over those of Ashley. For example, I found the Romo deed to be vague and problematic as it declares that the interest being conveyed is an "undivided" interest and does not purport to convey the whole interest. This is problematic for Dawn as s. 4A of the *Marketable Titles Act*, S.N.S. 1995-96, c. 9, states:

> **4A** Notwithstanding the *Descent of Property Act* and the *Intestate Succession Act*, but subject to Section 5, an interest in land, whether arising before or after the coming into force of this Act, that has not vested pursuant to an instrument that is registered pursuant to the *Land Registration Act* or the *Registry Act*, is extinguished by a registered instrument other than a will that conveys or purports to convey that interest in the land and that is executed by a person with a marketable title to that interest, upon the expiry of
>
> (a) the twenty-year period immediately following the vesting of the interest; **[emphasis added]**

[84] In assessing the surveyors, I found Hall to be the most thorough and conscientious. Consistent with his testimony, I found his materials, the Hall Plan and report to be thorough, detailed and reasoned. In summary, I found both his written product and oral evidence to be far superior to Ashley's. I would add that, while not determinative in and of itself, it is worthy of note that it was Hall's enlarged Plan of Survey that was repeatedly referred to by the other witnesses.

CONCLUSION

[85] Dawn commenced this lawsuit to assert title to Parcels A and B on the Ashley Plan. I find he has failed, on a balance of probabilities, to establish his entitlement to the land. On balance, I found Hall offered the most reliable opinion evidence with respect to the boundaries. For the reasons outlined above, Hall proffered the most

compelling and authoritative expert evidence and I prefer his opinion to Ashley's opinion.

[86] Upon careful analysis of the tendered documents and surveys, I find, on a balance of probabilities, that the Province and the Mannettes, have the better comparative chain of title. Additionally, I find the Murphys have proved their case for adverse possessory title. In the result the court declares that Dawn has no interest in the property identified in the Land registry as PIDs 40238578, 40239683 and 40239717.

[87] As I have dismissed Dawn's claim in its entirety, the Defendants are entitled to costs and disbursements. If the parties are unable to agree on the actual amounts of costs and disbursements, they may make written submissions within 30 days of this decision.

Chipman, J.