SUPREME COURT OF NOVA SCOTIA
Citation: Pink v. Lohnes-Davis, 2014 NSSC 304

Date: 20140822
Docket: Bwt. 333895
Registry: Bridgewater

Between:

Joan E. Pink

Plaintiff

- and -

June M. Lohnes-Davis and Allan N. Davis

Defendants

Judge:	The Honourable Justice C. Richard Coughlan
Dates Heard:	January 6, 7, 8, 9, and 10, 2014 April 1, 2, 3, and 4, 2014 May , 2014 and May 12, 2014
Decision Date:	August 22, 2014.
Counsel:	A. Douglas Tupper, Q.C. and Jessie Irving, counsel for the Plaintiff John DiCostanzo, counsel for the Defendants

By the Court:

[1] In 1951 Dr. Charles MacIntosh acquired a family cottage at Summerville Centre, Queens County. The family spent their summers at the cottage. In 2004 after acquiring title to the cottage, Dr. MacIntosh's daughter, Joan Elizabeth Pink renovated it. The property's western boundary was the edge of a Right of Way. A dispute arose as to the location of the Right of Way and the use of the Right of Way. The Right of Way is over lands owned by June M. Lohnes-Davis and Allan N. Davis. The parties were unable to resolve the issues between them.

[2] This proceeding commenced as an Application in Court. It was converted to an Action by a consent order issued June 6, 2011. A Notice of Action was filed June 21, 2011; a Notice of Defence and Counterclaim August 31, 2011; and Notice of Defence to Counterclaim September 23, 2011. Ms. Pink claimed the following relief: a declaration that the Thompson Survey accurately sets out the boundaries of the plaintiff's property; an order directing the defendants remove their sign post and any other fixtures from the plaintiff's property; an order directing what use the plaintiff and her guests may make of the Right of Way; an injunction to prevent the defendants from committing future trespass on the plaintiff's property; damages for trespass and interference with the enjoyment of the plaintiff's property.

[3] In their defence Ms. Lohnes-Davis and Mr. Davis claimed a declaration the eastern boundary of their property and the western boundary of Ms. Pink's property is as shown on a plan of survey of Berrigan Surveys Limited dated April 14, 2009; a permanent injunction to stop the use of their property by Ms. Pink, her servants and agents, for anything other than walking on the travelled surface of the Right of Way from the southwest corner of Ms. Pink's property to the northwest corner of her property; an order directing the plaintiff to remove all landscaping in the area west of the eastern boundary of the plaintiff's property; damages for emotional stress; trespass and interference with the enjoyment to the defendants' property; damages for loss of profit from the defendants' business; an order directing Ms. Pink to restore the area she leases from the Department of Natural Resources (DNR) to the rear of Ms. Pink's property to the state it was before she took possession, or provide an alternate acceptable drainage plan to prevent

flooding and an order directing the removal of any portion of the Pink residence which encroaches on the Davis property.

[4] The boundary issue before the court is the location of the western boundary of the Pink property and the eastern boundary of the Davis property adjacent to the Pink property.

[5] Ms. Pink's property was conveyed to her father, Dr. Charles A. MacIntosh by J. Victor Scobey and Jean C. Scobey by deed in 1951. In 2000 Dr. MacIntosh conveyed the property to himself and his children Joan E. Pink and Paul Alexander MacIntosh as joint tenants. In 2003 Dr. MacIntosh conveyed his interest to Ms. Pink and her brother Paul Alexander MacIntosh as joint tenants. In 2004 Paul Alexander MacIntosh quit claimed his interest in the property to Ms. Pink. Ms. Pink's Summerville property is described in the 2000 deed as follows:

> ALL that certain lot, piece or parcel of land situate, lying and being in Summerville, in the County of Queens and Province aforesaid, bounded and described as follows:
>
> BEGINNING at a stake on the Northeast side of Main Highway leading to Summerville, at a point where right of way used by Lawrence Hupman meets the Main Highway and on the eastern side of said Right of way;
>
> THENCE extending along the Main highway in an easterly direction a distance of 50 feet;
>
> THENCE at right angles in a north easterly direction a distance of 50 feet;
>
> THENCE at right angles and in a northerly direction a distance of 50 feet until it meets the side of the Right of way hereinbefore mentioned;
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> THENCE at right angles and along the line of said Right of Way a distance of 50 feet until it comes to the place of beginning, together with the use of the Right of way herein mentioned for the Grantee, his heirs and assigns, in the same way the said Grantors now use the said Right of way;
>
> BEING the lot of land and premises conveyed by Lawrence Human (sic) et ux to the said Lela Zinck, by deed bearing date the twenty-sixth day of August, A.D., 1930, said deed duly recorded in the office of Registry of Deeds at Liverpool NS in Book 68 page 50-51.

ALSO ALL that certain lot, pieces or parcel of land situate, lying and being on the Northen (sic) of the Main Public Road running through Summerville Centre aforesaid and bounded and described as follows:

COMMENCING at the North west corner of land owned by Mrs. Charles Zinck at the Eastern side of a roadway running Northerly from the said Main Public Road to the residence of the said Lawrence Hupman and

THENCE running northerly along the eastern side line of said road way 55 feet more or less, or until it meets the southern Right of way of the Canadian National Railways;

THENCE running easterly along the South line of said Railway Right of way 50 feet to a stake;

THENCE running Southerly along the western line of land of Charles Zinck 55 feet more or less or until it reaches the north east corner bound of said land owned by Mrs. Charles Zinck and

THENCE running westerly along the northern line of the said land owned by Mrs. Charles Zinck; and

THENCE running westerly along the northern line of the said land of Mrs. Charles Zinck 50 feet to the place of commencement, with the use in common with the said Lawrence Hupman his heirs and assigns by the said J. Victor Scobey of the roadway hereinbefore mentioned from the Main Public Road to the rear of the Northern property of the property herein conveyed.

The above two lots of land being more fully described respectively in Book 72 pages 99-100 and Book 72 Pages 100-101.

FURTHER BEING that property as conveyed by J. Victor Scobey and Jean C. Scobey to Charles A. MacIntosh by deed dated March 20th, 1951 and recorded in Book 85 at page 305

Paula E. MacIntosh died on or about the 23rd day of March, 2000 survived by her husband, Charles A. MacIntosh. Reference should be had to the Last Will and Testament of the said Paula E. MacIntosh in the process of being probated and recorded in the Registry of Deeds at Liverpool, Nova Scotia.

[6] I must interpret the deed. The general principles applicable to the interpretation of a deed were set out by Jones, J., as he then was, in *Saueracker et al. v. Snow et al.* (1974), 47 D.L.R. (3d) 577 at page 582.

> ... The general principles applicable to the interpretation of a deed are set forth in paras. 13 and 24, 5 C.E.D. (Ont. 2d), pp. 488-90 and 497-8, as follows:
>
> 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 arbitrarily 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.
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> *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 produced 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.
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> *Extrinsic Evidence as to Latent Ambiguities Generally.* Extrinsic evidence is always admissible to identify the persons and things to which the instrument refers.
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> 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 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.
>
> [38] The relative importance to be given to various items in the interpretation of a deed is well settled. In **McPherson et al. v. Donald Cameron** (1866-69), 7 N.S.R. 208, Dodd, J., in giving the judgment of the Court, stated at p. 212:
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> ... 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., 210. 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.
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> See also **Fraser v. Cameron** (1853-55), 2 N.S.R. 189.
> [39] And as Rand, J. stated in **Humphreys et al. v. Pollock et al.**, [1954] 4 D.L.R. 721 at p. 724:
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> > ... 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 . ...

[7] In *Metlin v. Kolstee* 2002 NSCA 81, the Court of Appeal stated the above statements correctly set out the general principles to be applied in interpreting descriptions of land as spelled out in a deed. The governing rule in all cases of construction is the intention of the parties.

[8] Both lots described in the deeds to Ms. Pink and her predecessors in title are on the eastern side of a Right of Way. The description of the first lot provides:

> ...Thence at right angles and in a northerly direction a distance of 50 feet until it meets the side of the Right-of-way hereinbefore mentioned; thence at right angles and along the line of said Right-of-Way a distance of 50 feet until it comes to the place of beginning," ...

[9] The description of the second lot provides:

> ..."Commencing at the North west corner of land owned by Mrs. Charles Zinck at the Eastern side of a roadway running Northerly from the said Main Public Road to the residence of the said Lawrence Hupman and; thence running Northerly along the Eastern side line of said roadway 55 feet more or less, or until it meets the southern Right-of-way of the Canadian National Railways;" ...

[10] The western boundary of the Pink property and the eastern boundary of the Davis property is the side of the Right of Way or roadway described in the deeds. Both Forbes Thompson and Kenneth Whalen, land surveyors retained by Ms. Pink, were of the opinion the eastern edge of the Right of Way was the western boundary of the Pink property. Lester Berrigan, the land surveyor retained by Ms. Lohnes-Davis and Mr. Davis, agreed the boundary between the Pink and Davis properties is the edge of the Right of Way.

[11] As stated above extrinsic evidence is admissible to identify the persons and things to which an instrument refers.

[12] Mr. Forbes Thompson, N.S.L.S. was retained by Ms. Pink to survey her property. Mr. Thompson prepared a plan of survey of lands of Joan Elizabeth Pink at Summerville Centre, Queens County, Nova Scotia dated September 10, 2006. Unfortunately, Mr. Thompson died before the trial.

[13] Ronald Pink, the husband of Ms. Pink, testified. He first came to the cottage when dating Ms. Pink in 1972. Since then Mr. and Ms. Pink went to the cottage regularly from May or early June until Thanksgiving two or three times a month. Mr. and Ms. Pink were married in 1975. When their children, now 30 and 36 years old were young, they went to the cottage a lot more for long weekends or a week. The summer of 1979 they stayed at the cottage for three months. Since 2004 Mr. and Ms. Pink are at the cottage virtually every weekend.

[14] Since 1972 the Right of Way on the west side of the cottage was a dirt strip with grass growing in the middle between the tire tracks and was the same width throughout its length - about 10 feet wide. There was a grass strip between the cottage and the Right of Way. Mr. Pink's father-in-law, Dr. MacIntosh, had the grass strip mowed. Mr. Pink testified in direct examination the strip was two to

three feet wide along the west of the cottage and in cross-examination that it was three to four feet wide.

[15] The travelled Right of Way was always the same as long as Mr. Pink could remember until changed by Mr. Davis. It was three or four feet from the rocks placed in the landscaping.

[16] There was a hedge in the backyard of the cottage about two to three feet inside the property line with grass growing from the hedge to the edge of the travelled way.

[17] At the end of the area where the extension to the cottage was constructed the Right of Way curved. The location of the curve did not change and there was grass on both sides of the travelled way.

[18] After 2003-2004 Mr. Davis spread gravel and levelled the Right of Way. The gravel spread close to the cottage.

[19] Prior to 2004-2005 there was no problem with the Davis'. They never objected to the strip of land between the cottage and the Right of Way.

[20] The renovations to the cottage which commenced in September 2004 and completed in June 2006 were extensive, but there was no change to the wall of the cottage along the Right of Way.

[21] Paul Alexander MacIntosh, the brother of Joan Pink, was born in 1953. He spent his summers at the cottage from birth until 1972 except for the time he spent at camp. The family moved to the cottage when school ended in June until Labour Day. After 1972 he generally returned to the cottage for a week each year until his father's death. In 2005 he stayed at the cottage for a week. His memory goes back to around 1959.

[22] There was always a grass strip about four to six feet wide along the cottage. The strip ran the length of the cottage and then to the back of the property. The grass strip was always the same in the sixties, seventies and eighties. His father mainly mowed the strip but Mr. MacIntosh periodically mowed it. He used his father's gas lawn mower which was kept either at the family house in Liverpool or

at the cottage. It took three passes with the lawn mower to mow the strip. Until 1972 his father and he almost exclusively mowed the strip. Perhaps Lawrence Whynot who worked for Dr. MacIntosh did some mowing. There was grass growing around the cottage, on the front, back, and both sides of the cottage.

[23] The Right of Way to the west of the cottage was wide enough for one vehicle but not two - eight to ten feet wide. It was a rough dirt and gravel road with rough grass in the middle. There were no changes in the Right of Way before 1986. Mr. MacIntosh mowed the grass in the middle of the Right of Way.

[24] Parking for the cottage was in the front, the east side of the cottage, and the rear. Parking in the back by the railway was originally for two cars but after gravel was placed there was room for more cars. Mr. MacIntosh always parked in the rear.

[25] Joan Elizabeth Pink was born in 1949. Her father, Dr. Charles A. MacIntosh, purchased the Summerville property in 1951. After purchasing the property the family spent summers at the cottage. Ms. Pink spent her summers full time at the cottage from 1951 until she went to university in 1966. She married in 1975. After her marriage she and her husband went to the cottage in Summerville for a couple of weeks in the summer and if the weekend weather was nice, they would go for the weekend. In 1977 Mr. and Ms. Pink had a son. After they had a family, Mr. and Ms. Pink went to the cottage as often as they could, three out of four weekends, and Ms. Pink would spend a week at the cottage. The summer of 1979 Mr. and Ms. Pink lived at the cottage the months of May, June, July, August and September.

[26] Ms. Pink testified the Right of Way to the west of the cottage was ten feet wide with a grass strip in the middle which grew naturally. The Right of Way was just wide enough for a car. Between the Right of Way and their cottage was a strip of grass all the way up to the TV tower. There was a set of steps from the cottage toward the Right of Way. She thought the steps had to be out from the cottage four or five feet and the strip of grass at least five feet as there was grass beyond the steps. Ms. Pink could remember back to when she was three years old and the steps were there, from her earliest recollection, until the mid 1960's. The Right of Way never changed.

[27] The grass strip between the cottage and the Right of Way was mowed by Ms. Pink's father, her brother Paul, or people hired to mow the grass, Lawrence Whynot and Ron Lawson, a friend of her brother Paul. Nobody else mowed the grass. Nobody else asserted they owned the grass strip. The grass in the middle of the Right of Way was mowed and whipper snipped by Ms. Pink's family. The Right of Way did not change until 2004.

[28] Ms. Pink testified there were renovations to the cottage. First in the 1960's plumbing was installed, a new kitchen, and porch were built. When Ms. Pink's oldest son was born in 1977 a bedroom was enlarged. In the 1980's a bunkhouse called the "bunkie" was built. The "bunkie" contained two bedrooms.

[29] Ms. Pink stated vinyl siding was placed on the cottage at the time the "bunkie" was built. After being directed to her discovery evidence in which she testified the vinyl siding was installed in the 60's, Ms. Pink stated she was pretty sure the vinyl siding was placed on the cottage in the 1970's or perhaps the 1960's.

[30] After she acquired title Ms. Pink undertook renovations to the cottage.

[31] Howard Gibson is a carpenter who was retained in 2004 to renovate the Pink cottage. When he first arrived at the cottage the Right of Way on the western side of the cottage was a gravel path with some grass between the wheel tracks. There was grass between the edge of the Right of Way and the Pink's cottage. The grass was the width of a large man's step, around three to five feet. The edge of the Right of Way was delineated by grass all the way to the DNR property formerly owned by the CNR. The grass was mowed at least as far as the hedge. The hedge was removed in October 2004.

[32] The Right of Way was fairly uniform in width. Mr. Gibson remembered the road curving gently to the left. The grass followed the line of the tire tracks. Over time the gravel seemed to creep east.

[33] The construction of the cottage blurred the edge of the grass. The grass was chewed up but came up again in the spring. There was grass growing through the gravel.

[34] Mr. Davis constructed a road in back of the Pink property in the fall of 2004 or the winter of 2005. After the road was built water came down over the Pink property. Mr. Gibson assumed the road caused the water problems. When Mr. Gibson first arrived at the Pink property the land to the east of the Pink property was a swamp with an old spruce hedge mostly under water. Mr. Gibson testified the location of the western side of the Pink cottage did not change during the renovations.

[35] Kenneth Michael Whalen is a licensed Nova Scotia Land Surveyor and has been since 1985. Mr. Whalen prepared a report which was entered into evidence. He visited the site on two occasions, September 7, 2012 and September 19, 2012. During the first visit on September 7, 2012 Mr. Whalen made certain measurements. On the Davis property he measured the Right of Way in three places and found it was nine to ten feet wide with grass in the middle. The Right of Way was well defined on the Davis property. Along the length of the Right of Way the western side of the Right of Way was well defined. The eastern edge of the Right of Way along the Pink property was ill-defined. During the September 7th visit Mr. Davis asked Mr. Whalen what he was doing on his property.

[36] When Mr. Whalen visited the site on September 19th the gravel surface had been pushed back on both sides. The edges of the driveway were gone. The grading destroyed the evidence of where the travelled Right of Way was located. The grading destroyed all evidence of the travelled way and interfered with Mr. Whalen's ability to survey the limits of the driveway. The objective of the second visit was to survey the property.

[37] In reviewing the descriptions of the Pink property, Mr. Whalen was of the opinion the dimensions do not fit on the ground. He testified both Mr. Berrigan and Mr. Thompson agreed the Right of Way was the western boundary of the Pink property.

[38] Mr. Whalen, after completing his work, came to the conclusion that the boundary as surveyed by Mr. Thompson was the boundary of the Pink property. He testified the vehicles travelled further out than where Mr. Thompson placed his survey markers. Mr. Whalen saw the grass strip and Mr. Thompson placed the survey marker to the east of the grass strip. Mr. Whalen considered Mr.

Thompson was conservative in his location of the boundary. Mr. Whalen found the row of rocks used in landscaping were inside the Thompson line.

[39] Dr. David Frank Woolnough, a photogrammetrist, was qualified to give opinion evidence in the field of photo interpretation and photogrammetry. Photogrammetry is the science of making measurements from a photograph. Dr. Woolnough provided measurements along the Right of Way immediately to the west of the Pink cottage. He agreed the interpretation of aerial photographs is not 100 percent accurate. He also agreed he was at the limits of interpretation of aerial photographs in this project. On cross examination he agreed the roadway widened from 1965 to 2000. For example, in his report he measured the distance from the Pink cottage to the centre line of the travelled road to be 5.2 feet in 1965; 7.4 feet in 1976; 8.4 feet in 1992; and 9.6 feet in 2000. When shown exhibit 14 photograph 3 (the cottage with strip of grass and steps in the 1950's) Dr. Woolnough agreed the strip of grass shown was, he thought, about three feet wide not one half foot wide. Dr. Woolnough stated what was shown in the photograph was not compatible with what he interpreted from the aerial photographs.

[40] Paul Lumsden, a photogrammetrist and president of Atlantic Air Survey Limited testified. He was retained by Mr. Forbes Thompson to prepare a map plot of the roadway on the western boundary of Ms. Pink's property. Mr. Lumsden questioned Dr. Woolnough's results based on the difficulty of measuring from a photograph.

[41] Lester W. Berrigan is a Nova Scotia Land Surveyor who prepared a report and a plan of survey showing the eastern boundary of land claimed by June M. Lohnes-Davis and Alan N. Davis.

[42] Mr. Berrigan was retained by Mr. Davis and Ms. Lohnes-Davis to survey the boundary between their property and Ms. Pink's property. After initial investigation, Mr. Berrigan informed Mr. Davis he could not establish the boundary without retaining an expert in aerial photography to determine the location of the Right of Way. Mr. Berrigan then carried out a preliminary location survey. On August 22, 2008 Mr. Berrigan located a rock wall, perhaps eight inches high and found part of the rock wall was 6/10ths of a foot on the Davis property.

[43] Mr. Berrigan received Dr. Woolnough's first report and attempted to plot Dr. Woolnough's measurements on his preliminary site plan. Mr. Berrigan testified it basically did not fit. The road was 2/10ths of a foot off the Pink's cottage. Mr. Berrigan questioned Dr. Woolnough's report. Some months later, Mr. Berrigan received an amended report from Dr. Woolnough dated September 30, 2008. Mr. Berrigan took the amended report and in conjunction with a survey of land on the western side of the Right of Way, established the boundary between the Pink and Davis properties.

[44] Mr. Berrigan agreed the boundary between the Pink and Davis properties is the edge of the Right of Way or road wherever it is located.

[45] Mr. Berrigan stated Dr. Woolnough's measurements was the only thing he relied on to place the boundary. He used a survey by Robert Hunt to see if the measurements fit. He measured from the Hunt plan. Mr. Berrigan agreed the Hunt Plan was in error when it showed the public highway being 25 feet from the centre line to the lot surveyed instead of 33 feet. Mr. Berrigan used the Hunt plan to fit the puzzle together.

[46] Mr. Berrigan was not aware when he did his survey work the Pinks said the boundary was four or five feet and never one half foot from the cottage. He had not seen the photograph which showed the Pink cottage in the early 1950's. Mr. Berrigan was not aware the Pink cottage had steps in the 1950's which went toward the Right of Way. He agreed that would support the Pinks' opinion the boundary was not at the cottage. Mr. Berrigan agreed if he had seen the photograph it could cause one to question Dr. Woolnough's measurements. Although his plan was based on Dr. Woolnough's measurements, Mr. Berrigan stated he did not know if Dr. Woolnough's measurements were correct. Mr. Berrigan testified he took Dr. Woolnough's information and plotted it by the Pink cottage. He took Dr. Woolnough's measurements at face value.

[47] Mr. Berrigan based his survey on Dr. Woolnough's measurements. He worked with the information he had. Dr. Woolnough, when shown the photograph from the 1950's, said what was shown in the photograph was not compatible with what he interpreted from the aerial photographs. I am not prepared to accept the boundary as surveyed by Mr. Berrigan as the boundary line between the Pink property and the Davis property.

[48] Allan Davis was 58 years old at the time of trial. Born in Liverpool, Nova Scotia he grew up in Summerville. He testified he visited the Lawrence Hupman property with his mother. He has a recollection of the property from when he was five or six years old. The Right of Way was a very narrow rocky road very near the MacIntosh cottage. Vehicles could hardly get by the cottage. The Right of Way was narrow, not much wider than the width of a vehicle. The MacIntosh cottage and roadway never changed. He left Summerville in 1975 returning in 1977. Mr. Davis lived at home for two years while he worked for the CNR on the Sable River to Liverpool line. The railroad ran in front of the property he now owns. The roadway from the public highway to the railbed was the same as always. From the railbed to what is now the Davis home the Right of Way was grown in. In 1978 and 1979 Mr. Davis lived in Alberta. In 1986 Mr. Davis and Ms. Lohnes-Davis purchased the Lawrence Hupman property where they now live.

[49] The Right of Way went along the edge of the MacIntosh cottage within a foot of the cottage. From the early 1970's the roadway was very tight to the cottage. Mr. Davis testified when he was five years old he remembered the road was close to the cottage - so close a person would be scared their car was going to scrape the cottage. When shown exhibit 14 photograph 3 (a picture of the MacIntosh cottage in the early 1950's) Mr. Davis said it appeared to show the MacIntosh cottage which has changed a lot. It showed the Right of Way before he had knowledge of it. The photograph showed a strip of something green - it could be grass. The strip of grass along the western side of the MacIntosh cottage seemed wider than a foot. The Right of Way in the photograph was different than he recalled it in the 1960's.

[50] When Mr. Davis and Ms. Lohnes-Davis purchased their property in 1986, the Right of Way was a ten foot road. In the late 1990's the roadway expanded from ten feet to thirteen feet. Mr. Davis widened the roadway to the west . After the Right of Way was levelled, it moved three or four feet westerly toward the Nickerson cottage.

[51] Mr. Davis disagreed with Ms. Pink that the strip of lawn four or five feet wide between her cottage and the Right of Way was present until 2004. Mr. Davis also disagreed with how frequently Ms. Pink visited the cottage saying from the

time he purchased his property in 1986, he only saw her once or twice in fourteen years.

[52] Mr. Davis also testified he never saw anyone mow the lawn by the side of the MacIntosh cottage. Mr. Davis stated Sandy MacIntosh was mistaken if he said there was a four or five foot strip of grass between the cottage and the Right of Way or, if Mr. MacIntosh said the strip of grass was never one foot wide or, if Mr. MacIntosh said it took three passes of the lawn mower to cut the strip of grass. Mr. Davis also took issue with how often Ronald Pink visited the cottage stating he did not see Mr. Pink until 2004.

[53] Donald Ingram levelled the Right of Way for Mr. Davis. Mr. Davis stated there was just room for Mr. Ingram's truck on the Right of Way between the MacIntosh cottage and the row of trees. Mr. Davis was told Kenneth Whalen was retained to do a survey. Mr. Davis did not speak to Mr. Whalen during Mr. Whalen's first visit to the site. Within a couple of days of Mr. Whalen's visit, Mr. Davis graded the Right of Way pushing gravel right up to the fence next to the Pink cottage and to the west. Mr. Davis said he did the grading to deal with the effects of runoff after a rain storm. It was a coincidence it occurred between Mr. Whalen's visits.

[54] June Lohnes-Davis testified. She is 50 years of age. Ms. Lohnes-Davis has no personal knowledge of the Right of Way before 1986. She and her husband purchased their property in 1986. At that time the Right of Way was a small driveway very close to Dr. MacIntosh's cottage. The roadway was very rough with a lot of weeds in the road. The road was rough up to the back of the MacIntosh hedge which was where she and her husband parked at first. The road was tight up to the MacIntosh cottage. Her father scraped his car when driving in. The road was perhaps nine feet wide. Ms. Lohnes-Davis did not see any grass or lawn on the Right of Way side of the MacIntosh cottage in 1986.

[55] In 1987 Mr. Davis and Ms. Lohnes-Davis had gravel placed on the Right of Way. They never spoke to Dr. MacIntosh about the Right of Way. No concerns were raised by Dr. MacIntosh or Mr. and Ms. Pink about their grading of the Right of Way.

[56] Douglas Ingram does construction excavation. He testified he placed gravel on Mr. Davis' driveway about 15 years ago. The driveway was in pretty decent condition. He put gravel on the driveway and levelled it. The driveway was probably eight to nine feet wide. Mr. Ingram did not measure how far the driveway was from the Pink cottage. His dump truck was nine and a half to ten feet wide but he did not know how close he was to the cottage.

[57] Mr. Ingram sold a tractor to Mr. Davis probably in 2004-2005. Mr. Ingram did not think he worked on the driveway after Mr. Davis owned a tractor.

[58] Lawrence Hupman was born in 1947 and lived all his life in Summerville. The Davis property was owned by his grandfather, Lawrence Hupman, who left the property in the late 1960's. Mr. Hupman visited his grandfather in the 1960's. Mr. Hupman testified he did not see the steps of the cottage when they were on the side of the cottage toward the driveway. Acknowledging his estimation of distances was pretty much a guess, he guessed the roadway was eight or nine feet wide and there was probably a foot of grass outside the wheel ruts but could not say what the grass was like.

[59] Mervin Hartlen, a retired Nova Scotia Land Surveyor, testified he received a telephone call from Ronald Pink he thinks in the summer of 2004. He met once with Ms. Pink at the cottage to discuss boundaries. Mr. Hartlen spoke to people in the community including Mr. Davis and went to the Registry of Deeds. He sent a report to the Pink's architect and was paid for his work. Mr. Hartlen does not remember speaking to either Mr. Pink or Ms. Pink after sending his report.

[60] Ronald Pink testified he spoke to Mr. Hartlen to request he do survey work in connection with the cottage property. He did not recall meeting with Mr. Hartlen. Mr. Pink did not receive a report from Mr. Hartlen. Mr. Thompson was retained because Mr. Hartlen did not respond. Ms. Pink did not hire Mr. Hartlen and she did not meet with him. She thought Mr. Hartlen did a survey for them of property in Liverpool. I find Mr. Hartlen prepared a report which he sent to Ms. Pink's architect. There is nothing in Mr. Hartlen's file showing the report was sent to Mr. Pink. I accept Mr. Pink's evidence he did not receive Mr. Hartlen's report.

[61] As previously stated the boundary between the Pink and Davis properties is the edge of the Right of Way. The evidence of Howard Gibson and Ronald Pink

make it clear the renovations did not change the location of the western side of the Pink cottage. The cottage was extended northwardly but not westwardly.

[62] I find there was a strip of grass between the Pink or MacIntosh cottage and the Right of Way. The photographs from the 1950's show a strip of grass. Exhibit 14 photograph 3 shows both a strip of grass between the cottage and the Right of Way as well as steps from the cottage in the direction of the Right of Way. There appears to be three risers on the steps shown in the photograph which is consistent with the evidence of Paul MacIntosh. There is also grass between the bottom of the steps and the edge of the Right of Way. In the photograph exhibit 3 photograph 1, taken in the period 2003-2004, the strip of grass is shown. The photographic evidence is consistent with the evidence of Ronald Pink, Paul MacIntosh and Joan Pink of the strip of grass which existed between the western side of the MacIntosh cottage and the Right of Way. In particular, Mr. MacIntosh stated it took three passes with the lawn mower to cut the strip of grass.

[63] When Howard Gibson first arrived at the Pink cottage, the Right of Way was a gravel path with some grass between the wheel tracks. There was grass between the edge of the Right of Way which was the width, he estimated, of a large man's step of between three and five feet. The edge was delineated by grass which ran all the way to the Department of Natural Resources land. The grass was mowed at least to the hedge. I accept Mr. Gibson's evidence.

[64] I accept Mr. Whalen's evidence of what he observed during his visits to the Pink cottage on September 7 and September 19, 2012. He states in his report:

> ..."It should be noted that on my initial visit of September 7th the gravel driveway was well defined, the travelled way could easily be seen. The entire western edge of the driveway was a clear-cut line where the gravel stopped and the grass began, it ran smoothly from the public highway to beyond the Davis' house. The eastern edge along the Pink property was not as well defined, the gravel was spread out and grass was growing up through it, but the edge of the lane could be determined. The eastern edge took a noticeable change at a point just south of the old rail bed From this point and past the Davis' house the eastern edge of the driveway was clear-cut. I measured the width of the gravel driveway near the Davis' house, where both sides were clear-cut, to be 9 to 10 feet.
>
> On my return visit of September 19th the gravel driveway had been graded and widened. The western edge was pushed back at least one foot and the eastern

> edge was graded up to the wood fence along the Pink's property, grass was no longer visible along the edge. The changes included the entire driveway from the edge of the public road beyond the old rail bed and past the Davis' house. These changes can be seen in the photos that I took on both days.
>
> It had been my intention to precisely measure the driveway on my second visit in order to delineate the current common usage. However, the grading and widening since my initial visit on September 7th destroyed all evidence of the travelled way and interfered with my ability to survey the limits of the driveway."...

[65] A video entered into evidence shows Mr. Davis, within days of Mr. Whalen's visit of September 7, 2014, grading the Right of Way destroying all evidence of the travelled way. Mr. Davis says it was a coincidence. I do not accept that. Mr. Davis destroyed the evidence of the historic location of the Right of Way. I do not accept Mr. Davis' evidence the Right of Way was within one foot of the Pink cottage.

[66] Douglas Ingram was of the opinion the Right of Way was probably eight or nine feet wide. Mr. Ingram did not mention any difficulty getting past the Pink cottage with his truck as Mr. Davis stated.

[67] I have no confidence in Lawrence Hupman's evidence as to the distance between the MacIntosh cottage and the Right of Way. He candidly stated his estimates of distances were guesses. His evidence is also inconsistent with the photographic evidence.

[68] I accept the evidence of Ronald Pink, Paul MacIntosh, Joan Pink and Howard Gibson which is supported by the photographic evidence of the existence of a strip of grass between the western side of the MacIntosh cottage and the Right of Way. I accept Paul MacIntosh's evidence it took three passes with a lawn mower to mow the strip. The witnesses testified the Right of Way was from eight to ten feet wide. Mr. Whalen, from his observations on September 7, 2012 stated:

> ..."The fact that the width of the undisturbed driveway near the Davis' house on my initial visit was 9 to 10 feet is a good indication that the width of the driveway would have been the same along its entire length, including along the Pink property, had it not been disturbed."...

[69] I find the Right of Way was nine or ten feet wide. In his report Mr. Whalen concluded:

> ..."It is my opinion that the best evidence of the common boundary under dispute would have been the physical edge of the gravel driveway. I believe that this would have shown long time and continuous usage by both parties. It can be expected that the location of the driveway may move over the years but this natural movement from vehicular traffic would be gradual if at all.
>
> ...The survey markers that Mr. Thompson set were well within the edge of the travelled way, they were placed at the edge of the spread gravel and this line confirms to the work produced by Atlantic Air Survey. It was evident on my initial visit that vehicles were travelling further out from the line he established."

[70] The boundary line between the property of Ms. Pink and Mr. Davis and Ms. Lohnes-Davis is the boundary as surveyed by Forbes Thompson, N.S.L.S. and confirmed by Kenneth Whalen N.S.L.S. Ms. Pink is entitled to a declaration to that effect.

[71] Ms. Pink seeks an order directing what use she and her guests may make of the Right of Way.

[72] The Pink property consists of two lots of land; one closest to the public highway conveyed by Lawrence Human (sic) to Lela Zinck in 1930, together with a Right of Way described as follows:

> "Together with the use of the Right of Way hereinbefore mentioned for the Grantee, his heirs and assigns, in the same way the said Grantors now use the said Right of Way."

[73] The second lot to the North of the Zinck lot was conveyed together with a Right of Way described as follows:

> "...with the use in common with the said Lawrence Hupman his heirs and assigns by the said J. Victor Scobey of the roadway hereinbefore mentioned from the Main Public Road to the rear of the northern portion of the property herein conveyed."

[74] The above are the Rights of Way of which the Pink property is the dominant tenement.

[75] In this case there are express grants of Rights of Way. In *Anger & Honsberger Law of Real Property*, Third Edition at 17:20:30(a), the author describes how an express grant is to be interpreted:

> "A right-of-way may be created by any of the methods described previously. The nature and extent of a right-of-way created by an express grant depends on the proper construction of the language of the instrument creating it. The following rules apply in interpreting the instrument:
>
> > (1) the grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect to the intention of the parties. (2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant.(3) The past behaviour of the parties in connection with the use of the right of way may be regarded as a practical construction of the use of the way. (4) In case of doubt, construction should be in favour of the grantee."

[76] The author then goes on to discuss the use of a Right of Way by express grant stating at 17:20:30(b):

> "The use of a right-of-way must be within the terms of the grant or of the accustomed use (in the case of a right acquired by implied grant, implied reservation, or prescription), and it must be reasonable. As a general rule, the use of a right-of-way depends on the nature of the servient land and the purposes for which the right-of-way is intended to be used. If the grant of a right-of-way is not limited to any particular purpose, or if a way has been used for several purposes, a general right-of-way may be inferred. However, this will not be the case where the evidence shows intended use for particular purposes only.
>
> There are certain general limitations on the use of a right-of-way:
>
> > (a) a right -of-way to one property does not include a right-of-way to a place beyond that property;
> >
> > (b) the owner of the dominant tenement is restricted to the legitimate use of the right; and

> (c) the burden on the owner of the servient tenement cannot, without their consent, be increased beyond the terms of the grant or, where the right-of-way is based on implied or prescriptive rights, beyond the accustomed use.
>
> The use that is permitted usually turns on the facts. The grantee of a right-of-way cannot enlarge the privilege conveyed by the grant. Unlawful or excessive use of a right-of-way is a trespass on the servient tenement.

[77] The Right of Way with the first lot gives the dominant tenement the same use of the Right of Way as the use made of the Right of Way by the servient tenement at the time of the original grant.

[78] There is no evidence before me as to the use made of the Right of Way at the time of the grant in 1930.

[79] The Right of Way with the second lot gives the dominant tenement the same use the servient tenement may make of the Right of Way.

[80] The evidence of the use of the Rights of Way is: Vehicles and persons using the Right of Way to access the rear of the Pink property; Dr. MacIntosh, his son, Paul MacIntosh and later, persons employed by Dr. MacIntosh cutting the grass located in the centre of the Right of Way and access to cut the grass between the cottage and Right of Way. Prior to the cottage having siding installed, when the cottage was painted - the painters' ladders were placed in the Right of Way.

[81] The Rights of Way conveyed with the two lots which make up the Pink property are much broader than the mere right of ingress and egress. In the case of the lot closest to the public highway, Ms. Pink as owner of the dominant tenement has the same use as the servient tenement used the property at the time of the grant. The servient tenement as the owner in fee simple could use the property in any manner he wished. In the case of the second lot, Ms. Pink may use the Right of Way as could the owner of the servient tenement without reference to any particular date. It is clear Mr. Lawrence Hupman, the original grantor of the Rights of Way, intended the dominant tenement to have the same use of both Rights of Way as the servient tenement. The Rights of Way are over the same roadway. It is impossible to use the second Right of Way as granted unless the Right of Way closest to the public highway has the same rights and privileges. Considering the language used in the grants of Right of Way given by Mr.

Hupman to the roadway and using the rules for interpretation of an express grant of Right of Way set out above, I find the grants of Right of Way are to use the Rights of Way as may the owner of the servient tenement.

[82] In *Gale on Easements*, Seventeenth Edition by Jonathan Gaunt, Q.C. and Paul Morgan, Q.C. Sweet & Maxwell 2002 the authors deal with a grant of a right to "use" at page 355:

> " The grant of a right to "use" a way, however, as opposed merely to pass and repass over it, does entitle the grantee to stop to load and unload and to use the way for all other purposes by which property adjoining a street would normally be accommodated, provided that such use does not interfere unreasonably with the use of the way by its owner or those equally entitled. That description would appear to include parking (so long as this does not obstruct use of the way by others) and it would seem to be implicit in the finding of the Court of Appeal in *Snell & Prideaux Limited v. Dutton Mirrors Limited* that "parking and washing vehicles and loading and unloading" were activities that showed that the dominant owner had not intended to abandon his rights, that this is correct. In *Papworth v. Lindhaven* where the tenants had been granted "full rights ... to use... the forecourts and roadways in the curtilage" of their flats, counsel conceded and the court accepted that this entitled them to park without charge. That a right to "use" a road includes a right to park was accepted by the court in *McClymont v. Primecourt Property Management Limited* citing this paragraph."

[83] The Right of Way enjoyed by Ms. Pink includes the right to temporary parking of vehicles for deliveries and other purposes provided the parking did not obstruct the use of the Right of Way by others.

[84] Ms. Pink also has the right to access her property to maintain and repair her cottage and gardens subject, of course, to in the limitation set out in *Gale on Easements, supra,* at page 355 "...provided that such use does not interfere unreasonably with the use of the way by its owner or those equally entitled."

[85] Ms. Pink seeks an order stating the Right of Way she enjoys also may be used to access lands of the Department of National Resources adjacent to her property. She is not entitled to such an order. As stated above a Right of Way to one property does not include a Right of Way to a place beyond that property. In *Miller v. Tipling* (1918), 43 D.L.R. 469 (Ont. C.A.) Mulock, C.J. Ex. stated:

> "The law is well-established that a right of way appurtenant to a particular close must not be used colourably for the real purpose of reaching a different adjoining close. This does not mean that where the way has been used in accordance with the terms of the grant for the benefit of the land to which it is appurtenant, the party having thus used it must retrace his steps. Having lawfully reached the dominant tenement, he may proceed therefrom to adjoining premises to which the way is not appurtenant; but, if his object is merely to pass over the dominant tenement in order to reach other premises, that would be an unlawful user of the way: *Skull v. Glenister* (1864), 16 C.B.N.S. 81, 143 E.R. 1055; *Finch v. Great Western R. Co.* (1879), 5 Ex. D. 254; *Telfer v. Jacobs* (1888), 16 O.R. 35; *Harris v. Flower & Sons Limited,* [1904] W.N. 106, 180; *Purdom v. Robinson* (1899), 30 Can. S.C.R. 64, 71; *Ackroyd v. Smith* (1850), 10 C.B. 164, 138 E.R. 68."

[86] Ms. Pink claims Mr. Davis and Ms. Lohnes-Davis have interfered with or obstructed her use of the Right of Way.

[87] Mr. Davis and Ms. Lohnes-Davis first put up a barbed wire fence along the edge of the Right of Way as a temporary measure. The fence was three or four feet off the ground. Mr. Davis testified he did not think a rope would have acted as a fence. Ms. Pink advised her lawyer, Mr. Frank J. Powell, Q.C. who wrote to the Davis' then lawyer, Andrew Kimball on May 16, 2006 stating:

> "Dear Mr. Kimball:
>
> **Davis/Pink - Summerville Boundary Dispute/Queens County, Nova Scotia**
>
> Further to my recent telephone conversation with you, I have subsequently received a call from Joan Pink, who has advised that your client Mr. Davis, is placing a barbwire fence along the right of way from the highway back to where the railway line was located thus blocking the Pink's right of way.
>
> Please be advised unless the fence is removed immediately we will have not have (sic) any other alternative but to apply for an injunction.
>
> As you are aware I am out of the office for the next week and I have asked Doug Tupper in our Litigation department to monitor this file."

[88] By letter dated May 17, 2006 Mr. Tupper wrote to Mr. Kimball stating in part:

> ... "As we discussed, your client has placed a barbed wire fence down the side of the right-of-way, impeding Mr. and Mrs. Pink's use of their right-of-way. In fact, the Pinks had arranged for contractors to attend at their property. The contractor's ability to place a flower bed on Mr. Pink's land adjacent to the right-of-way, between the right of-of-way and the Pink's cottage, has been interfered with. If there are any extra costs associated with completing this work, now or at sometime in the future, Mr. Davis will be responsible for those costs." . . .
>
> " It is clear from the evidence, your client has no right to have placed this fence on the right-of-way, interfering with our clients' use of the right-of-way, and no right to place his sign on the Pink's property. Our clients require the barbed wire fence and the sign be removed no later than 10 a.m. tomorrow, Thursday, May 18th. If the fence and sign are not removed, the Pinks with take whatever steps are necessary to have them removed, and to obtain an injunction against your client, together with a claim for damages, and solicitor client costs."

[89] Mr. Davis removed the barbed wire fence.

[90] In 2011 Mr. Davis constructed a wood fence along the edge of the Right of Way adjacent to Ms. Pink's property. Mr. Davis estimated the fence is thirty to thirty-five feet long. In a sketch dated September 7, 2012 Mr. Whalen shows the fence as 32.65 feet long and five feet high and describes the fence as a "solid board fence". I accept Mr. Whalen's sketch as showing the length and height of the fence.

[91] Not all interference with or obstructions to a Right of Way are actionable. To be actionable the interference must be substantial. In *Anger & Honsberger Law of Real Property, supra,* what is required for an interference to be actionable was discussed at section 17:20:30(b):

> "The servient tenement, on the other hand, cannot unduly restrict the use of the right-of-way. An act which substantially interferes with the exercise of a right-of-way is a nuisance. There is an actionable disturbance of a right-of-way if the way cannot be practically and substantially exercised as conveniently after as before the interference. To be actionable, the interference must be substantial. Thus the erection of a gate is not necessarily an interference with a private right-of-way if the owner of the dominant land has reasonable access to the way. In determining the degree of interference, the nature of the obstruction is also relevant. Thus, where the obstruction is permanent this may be seen as creating the requisite

> degree of obstruction although the actual interference with the right-of-way is not great.
>
> > [W]here the thing that is complained of is the erection of a substantial and permanent structure upon the land over which the grantor has already given a right of way, it appears . . . to be almost impossible to say that there is not a real and substantial interference with the right conveyed.
>
> If the owner of the servient tenement obstructs the right-of-way, the owner of the dominant tenement may remove as much of the obstruction as is necessary in order to exercise the right-of-way, or may deviate and go around the obstruction if it cannot be easily removed. The right to deviate must be exercised in a reasonable manner."

[92] I am satisfied and find there has been a substantial interference with the enjoyment of Ms. Pink's right. This interference was caused by the actions of Mr. Davis and Ms. Lohnes-Davis. Ms. Pink has a right to enter her property from the Right of Way. The wooden fence erected prevents her from maintaining the garden planted by the side of the cottage. There is no question the Right of Way cannot be substantially exercised as it was before the erection of the fence. Mr. Davis and Ms. Lohnes-Davis placed lights on the fence close to windows in the Pink cottage which is clearly a provocation toward Ms. Pink and her family. Mr. Davis and Ms. Lohnes-Davis are to cease the obstruction and interference with the Right of Way and remove the fence within thirty days of the date of the order following this judgment.

[93] Ms. Pink seeks an order directing Ms. Lohnes-Davis and Mr. Davis remove their sign post and any other fixtures from her property. Of course, the defendants have no right to place a sign post or other fixtures on Ms. Pink's property. A number of sign posts were erected by the defendants on or near Ms. Pink's property. Mr. Davis and Ms. Lohnes-Davis are to remove any sign post and other fixtures they erected or placed on Ms. Pink's property within thirty days of the order following this judgment.

[94] Ms. Pink claims damages for trespass and interference with the enjoyment of her property. Much evidence was adduced by Ms. Pink concerning Mr. Davis' conduct during and after construction. The evidence shows the defendants' conduct did interfere with Ms. Pink's enjoyment of her property.

[95] I previously dealt with the erection of the wooden fence which obstructed and interfered with Ms. Pink's use of the Right of Way as well as the destruction by Mr. Davis of the evidence of the historic location of the Right of Way between the two visits to the property by Mr. Whalen.

[96] Ms. Pink testified of one day when she was at the cottage, Mr. Davis arrived and pounded on the door of the cottage, yelling and screaming. Ms. Pink ran and had Howard Gibson come in the cottage. Mr. Davis denies the incident took place. Mr. Gibson confirmed the incident took place. He went in the cottage at Ms. Pink's request and said Ms. Pink was scared of Mr Davis. I accept the evidence of Ms. Pink and Mr. Gibson that the incident took place as they testified.

[97] Marilyn Allengate, a gardener employed by Ms. Pink since 2008, testified on one occasion while gardening, Mr. Davis told her to, "Stay off my fucking property or there would be trouble." On another occasion, Mr. Davis while Ms. Allengate was on the Right of Way, grabbed her wheelbarrow causing her tools to fall out of the wheelbarrow and said, "You don't know how it works around here," and left. Another time Mr. Davis got out of his truck with a whipper snipper. Mr. Davis said he did tell Ms. Allengate to get off his property and he may have used profanities. He also agreed he may have told her to, "Get off my fucking property," once. Mr. Davis did not recall saying, "There will be trouble." He denied he threatened Ms. Allengate with a whipper snipper. Instead, he said he told her if he wanted his property whipper snipped he would do it himself. I accept Ms. Allengate's evidence of her encounters with Mr. Davis.

[98] There was evidence of confrontations Mr. Davis had with Terry Feener, a plumber employed by Ms. Pink; Lise Bell, a landscaper employed by Ms. Pink; and the driver of a truck which delivered water to the Pink cottage. Mr. Davis confirmed these incidents took place but in the case of the confrontation with Mr. Feener stated, "He threatened me first." Mr. Davis conceded in cross examination he could have threatened Ms. Bell. I accept the incidents occurred as described by Mr. Feener and Ms. Bell.

[99] Ronald Pink testified of a telephone call he received from Howard Gibson during construction when Mr. Gibson told Mr. Pink he had to speak to Mr. Davis. Mr. Pink spoke to Mr. Davis who was angry and used profanities. Mr. Gibson testified he had coached soccer and never heard language such as that used by Mr.

Davis on that call. Mr. Davis testified he was upset and it was not the right time for a conversation - stating although Mr. Pink did not use profanities he was arrogant.

[100] Both Mr. and Ms. Pink testified cedar trees and rugosa roses died. Mr. Davis said he noticed the trees looking bad, but to the best of his knowledge, he had nothing to do with the trees dying. He salted his driveway. Mr. Davis cut rose bushes hanging over the roadway and put weed killer on grass in the roadway saying he did not do anything in the disputed area. I do not accept Mr. Davis' evidence on this point; his actions in destroying the edge of the Right of Way between Mr. Whalen's visits show he did not hesitate to take action against Ms. Pink's property interest.

[101] Actions were taken by Mr. Davis and Ms. Lohnes-Davis to distress and upset Mr. and Ms. Pink such as placing lights on the wood fence which shone light in the windows of the Pink cottage and when the landscaping of the Pink cottage was finalized, placing a sign for the Davis business right off the cottage porch. The question arises, why would anyone put a sign so close to a person's house? Surely, to antagonize the person. Mr. Davis and Ms. Lohnes-Davis were engaged in a battle with Mr. and Ms. Pink.

[102] I find the conduct by Mr. Davis and Ms. Lohnes-Davis took a toll on Ms. Pink. She described how the cottage was her and her husband's "little piece of heaven". However, that changed as a result of the defendants' actions. Ms. Pink was scared to be at the cottage alone - she was intimidated by Mr. Davis. Up to the time of trial, when going to the cottage, she said to her husband, "I wonder what the present will be today," referring to some action by Mr. Davis.

[103] Ms. Pink is entitled to general damages for interference with the enjoyment of her property including the anguish and distress she suffered in the amount of $6,000.00.

[104] As a result of the findings made above, Ms. Lohnes-Davis and Mr. Davis are not entitled to the declaration of the eastern boundary of their property, the permanent injunction, or the order directing Ms. Pink to reverse the landscaping west of Ms. Pink's boundary they were seeking.

[105] Ms. Lohnes-Davis and Mr. Davis claim the landscaping by Ms. Pink on the lands of the Department of Natural Resources caused flooding which damaged their property, specifically, the Right of Way. Mr. Pink and Mr. Gibson testified the problem was caused by a road Mr. Davis and Ms. Lohnes-Davis constructed in the fall of 2004 or winter of 2005. I am unable to determine the cause of any flooding and therefore will not grant the order concerning the drainage plan or restoration requested by the defendants.

[106] Mr. Davis and Ms. Lohnes-Davis seek damages for emotional stress, trespass and interference with the enjoyment of their property.

[107] Ms. Lohnes-Davis testified when she came home from her job as a nurse during the construction of the Pink cottage, mostly in 2005, she would have to wait to enter the roadway until the workmen saw her and moved their vehicles. Sometimes she would have to wait five or ten minutes. The workers had to see her signalling to turn into the roadway. She was not used to having to wait to get home. Ms. Lohnes-Davis found it frustrating. She also received six or seven complaints about the use of the Right of Way from clients of their business.

[108] Mr. Davis testified he was concerned the obstruction of the Right of Way during the construction of the Pink cottage interfered with his business. During excavation of the cottage, the Right of Way was blocked by the excavation for twenty or thirty minutes. Later, the Right of Way was blocked for thirty minutes while concrete was poured. The hours construction took place was from after 6 a.m. until after 7 p.m. The workers placed staging on the Right of Way. The landscaping would go on for hours at a time and the landscapers knelt in the Right of Way while working on Ms. Pink's property. The landscapers left things in the driveway, including wheelbarrows and tools. The workers continually blocked the Right of Way and Mr. Davis would have to sound his car horn to get their attention so they would move their vehicles.

[109] Mr. Davis testified his objection was the extension of the Pink cottage was built too close to Ms. Pink's boundary.

[110] I find on the evidence the defendants have not established their claim for damages for emotional stress, trespass and interference with the enjoyment of their property.

[111] No evidence was adduced showing any impact on or loss of profit of Mr. Davis' and Ms. Lohnes-Davis' chalet rental business. There will be no order for loss of profit of the defendants' business.

[112] I will hear counsel on the issues of costs and prejudgment interest.

Coughlan, J.