SUPREME COURT OF NOVA SCOTIA
Citation: Henneberry v. Compton, 2014 NSSC 298

Date: 20140829
Docket: Hfx. No. 411747
Registry: Halifax

Between:

Joyce Theresa Henneberry and Robert Patrick Henneberry

Applicants

v.

Tyler Robert Compton and Fiona Catherine Andrew

Respondents

Judge:	The Honourable Justice Robert Wright
Heard:	November 4-7, 2013 in Halifax, Nova Scotia
Last Written Submissions:	December 13, 2013
Counsel:	Marc Dunning for the Applicants Alex Embree for the Respondents

By the Court:

INTRODUCTION

[1] This is an Application in Court by the applicants Joyce and Robert Henneberry for a declaratory order that they are entitled to possession of a quadrilateral shaped strip of land (the "disputed land") along the rear boundary of property deeded to the respondents Tyler Compton and Fiona Andrew in 2010, by virtue of the doctrine of adverse possession. If successful, the respondents' deeded ownership of the disputed land would thereby be extinguished.

[2] The applicants and the respondents own abutting residential properties known as 1476 Ketch Harbour Road and 10 Atlantic View Drive respectively in Sambro Head, Nova Scotia. Their common boundary line runs more or less in a north - south direction for a distance of approximately 212 feet, the southern end of which meets the high water mark of Sambro Harbour.

[3] The exact location of this common boundary line on the ground was never in issue before this dispute arose between the parties in April of 2012. Subsequently, the applicants commissioned John C. MacInnis, N.S.L.S. to prepare a survey plan of both properties which he completed under date of March 30, 2013. The

accuracy of that survey is not in dispute and is consistent with the findings of some field work carried out by another surveyor engaged by the respondents in 2012.

[4] The boundary line as plotted on the survey plan, which bisects part of their driveway, came as a surprise to the applicants. The boundary line as surveyed begins running on the easterly side of a row of spruce trees growing along and within the rear boundary of the respondents' property. It then runs through a section of the applicants' gravel driveway as it curves southerly leading to a fishing wharf used by the applicants. The most southerly point of the boundary line is marked by an iron pin marked "P" on the survey plan which is located very close to the centre of the gravel driveway leading to the wharf where it intersects the high water mark.

[5] The boundary line asserted by the applicants in their evidence at trial, outlined in red on a segment of this survey plan, runs southerly along the west side of the row of spruce trees and continues to a point at the high water mark approximately 25 feet southwest of the pin placed at location "P". If this claim were successful, it would reduce the length of the respondents' deeded water frontage from about 75 feet to about 50 feet. The applicants, in their evidence at

trial, claimed title to this strip of land by adverse possession for a period exceeding 20 years.

[6] Unexpectedly, the applicants, in their post-trial brief, changed their position by reducing the area claimed by adverse possession. They now claim a quadrilateral shaped strip of land delineated by a changed western boundary line that runs through the row of spruce trees down to the western end of a visible timber and rock retaining wall that supports the wharf, as shown on the survey plan. This appears from the survey to be approximately 17 feet southwest from the iron pin marked "P", which fixes the end point of the true boundary line.

[7] The applicants bought their land from Norman Henneberry (father of Robert) in 1979 following which they built their home, fronting on Ketch Harbour Road. At the time of the conveyance, Norman Henneberry (who then lived across the road) reserved a right-of-way easement to himself which was described in the deed as being a 6 foot wide right-of-way running in a southerly direction from the Ketch Harbour Road along the western side line of the lot under conveyance to the grantor's wharf at the shoreline. No survey plan was then made showing the exact location of the right-of-way, other than a Location Certificate dated September 10, 1979 obtained by the applicants for building purposes. The latter depicts a 6 foot

wide right-of-way running straight along the length of the western boundary of the Henneberry property from the Ketch Harbour road to Sambro Harbour.

[8] Norman Henneberry was a lobster fisherman and created the easement so as to allow him continued access to his fishing wharf. Prior to this conveyance, he had built and maintained a gravelled driveway to his wharf from the Ketch Harbour Road which is now identified as the "gravel driveway" on the MacInnis survey plan. As noted above, the gravel driveway on the ground straddles the common boundary line, as now established by the MacInnis survey, over the course of its southernmost section of 140 feet more or less until it meets the wharf.

[9] Notwithstanding this minor encroachment, the respondents have pleaded, and affirmed before the Court, that they take no objection to the applicants' continued unfettered use of their gravel driveway for access to the wharf. The respondents have not conceded, however, that the applicants have acquired ownership of the encroaching part of their driveway by their acts of adverse possession. The respondents assert that the boundary line between the two properties should remain as established in the MacInnis survey plan, subject to the applicants' continued and unfettered use of their driveway, and that the boundary

line should not be altered by the applicants' claim for adverse possession of the disputed land.

LEGAL REQUIREMENTS TO ESTABLISH ADVERSE POSSESSION

[10] The law of adverse possession is well summarized in the leading decision of the Nova Scotia Court of Appeal in **Spicer v. Bowater Mersey Paper Co.**, 2004 NSCA 39 and again in a more recent decision of this court in **Behie v. Carrigan**, 2011 NSSC 171 (the latter case also involving a boundary line dispute).

[11] The principles set out in those decisions apply to the present case as well. However, rather than quoting several passages at length, it is more expeditious to highlight in point form the following excerpts from the leading text by Anger & Honsberger entitled *Law of Real Property* (3rd Ed. Canada Law Book) in Chapter 29:

(a) Adverse possession is a doctrine by which a true owner's title to land is extinguished, rather than conferred, by the exclusive possession of land by another person;

(b) The period of possession necessary is prescribed by the Limitations of Actions Act, the effect of which is to limit the time to sue and to bar

any action being commenced beyond the statutory limitation period (which in Nova Scotia is the duration of 20 years);)

(c) Adverse possession that extinguishes a paper title under the statute means possession that is inconsistent with the title of the true owner. There is a presumption that the paper titleholder is in possession of the land. To establish the quality of possession required by the statute, an adverse possessor must show that they have actual possession and the intention of excluding the true owner from possession, and that they have effectively excluded the true owner from possession (absent mutual mistake). Hence, if the person is in possession with the consent of the true owner, the possession is in no way adverse;

(d) Whether there has been sufficient possession contemplated by the statute is largely a question of fact in each case, depending on the exact nature and situation of the land in dispute;

(e) The possession that is necessary to extinguish the title of the true owner must be "actual, constant, open, visible and notorious occupation" or "open, visible and continuous possession, known or which might have been known" to the owner by some other person, to

the exclusion of the owner for the full statutory period, and not merely a possession which is "equivocal, occasional or for a special and temporary purpose";

(f) Acts that do not interfere with, and are not inconsistent with the true owner's enjoyment of the land for purposes which the owner intended to use it, are not evidence of dispossession;

(g) For possessory title, there must be an occupation of land which involves the land's actual and complete possession for all purposes to the exclusion of all others.

[12] I would add that the legal requirements to establish adverse possession in this jurisdiction were summerized by the Nova Scotia Court of Appeal in **Spicer** as follows (at para. 20):

> From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession.

Bearing these principles in mind, I now turn to a review of the evidence to make the necessary factual findings to which they are to be applied.

REVIEW OF THE EVIDENCE

Origin of the Dispute

[13] When the applicants bought their property in 1979 and built a house on it, the gravel driveway along its western boundary already existed, having been built by Norman Henneberry, their predecessor in title, to provide access to his wharf. It will be recalled that in the conveyance of the property to the applicants in 1979, Norman Henneberry reserved to himself a six foot wide right-of-way running along the western boundary of the property leading to his wharf.

[14] Also in existence in 1979 was a row of recently planted spruce trees which were placed along and within the rear boundary of the respondents' property near the western side of the driveway. This row of spruce trees is believed by all concerned to have been planted by past owners of the respondents' property named Wesly and Fernande Johnsen, who acquired the property in 1976.

[15] These trees are now full grown and extend a distance of approximately 80 feet near the western side of the gravel driveway. The trees are close enough to the driveway that their lower limbs need to be pruned on occasion so as not to

overhang the driveway. Underneath these branches is a narrow strip of lawn (of which more will be said later).

[16] The Johnsens sold the property to David and Kerry Gibson in 1992 who in turn sold it to the respondents in 2010. The evidence indicates that prior to that, the exact location of the common boundary line between the two properties was never in issue or even discussed between the applicants and either the Johnsens or the Gibsons.

[17] The evidence of the respondents, which I accept, is that beginning in November of 2010, they were asked by Joyce Henneberry if they would cut down the row of spruce trees. Various reasons for the request were given, including that they were old and ugly, constituted a fire hazard, and interfered with the applicants' sunlight on their property. The respondents turned down the request, wanting to preserve the privacy afforded by the trees. The fact that this request was made by the applicants is corroborated by an e-mail inquiry sent by the respondents to their realtor asking if the removal of the trees would affect the value of their property. They were told that it would.

[18] The request for the removal of the trees was raised again by Joyce Henneberry on subsequent occasions but it was repeatedly refused by the respondents.

[19] The trouble between the parties began in April of 2012 when the respondents returned to their home after being away for the Easter weekend, only to find that all the lower limbs on the row of spruce trees had been cut off to a height of about 4 feet above the ground level. The respondents were upset by this because it was done without their permission and reduced their privacy. A few days later, Joyce Henneberry admitted that she and her husband had done the cutting, over which the respondents expressed their displeasure.

[20] About two months later, Robert Henneberry was seen to be cutting large branches from the biggest of the spruce trees at the north east corner of their property. He indicated to the respondents that he was going to cut off the tops of the other trees and build a woven fence using the tree stumps as posts. At the respondents' request, Mr. Henneberry stopped the cutting. It was on that occasion that Mr. Henneberry, for the first time, claimed ownership of those trees.

[21] With that, the respondents decided to engage a surveyor to try and identify the exact location of the boundary line. The surveyor, Mr. Paul Handley,

established and placed a survey marker at the south end of the boundary line at a point very close (within a foot) of point "P" later established by the applicants' own surveyor, Mr. MacInnis.

[22] In September of 2012, after Mr. Handley had placed his survey pin, Mr. Compton and his father walked along the boundary line, taking photos and using a yellow rope to string between the iron bar at the northeast corner of their property and newly placed survey pin at the southeast corner of their property. They were then confronted by both Mr. and Ms. Henneberry who then took the petty and absurd step of calling in the RCMP who, needless to say, took no action. More constructively, they also engaged Mr. MacInnis to perform a boundary line survey.

[23] Some five months later, the applicants commenced this legal proceeding claiming adverse possession of the disputed land.

The Boundary Line as a Moving Target

[24] An unusual feature of this case is the fact that over its course, the applicants have presented four different variations of the land area claimed by adverse possession.

[25] In their original Notice of Application in Court filed on February 1, 2013, the applicants claimed possessory title to a narrow triangle of land, the apex of which is delineated by an iron pin since marked as point "U" on the MacInnis survey plan at the northeast corner of the respondents' land. The alleged western boundary runs in a straight line to a point on the shoreline 50 feet southwest from point "P" earlier identified (which would reduce the respondents' water frontage from 75 feet to 25 feet). The eastern boundary of the disputed land coincides of course, with the entire eastern boundary of the respondents' property before turning westerly to form the southern boundary following the high water mark a distance of 50 feet.

[26] Between February 1 and February 11, 2013 (which was before the MacInnis survey plan was completed) the applicants decided to re-measure the western boundary they sought to establish by adverse possession. The approach taken by Mr. Henneberry was to walk on the shoreline at low tide to a point where he thought that he could line up the row of treetops in the distance. He then projected that line to a spot on the high water mark at the shore. He then selected a rock on the shoreline directly between where he stood and his imaginary line following the tops of the row of spruce trees. He then measured the distance between that rock

and the west side of his wharf at 25 feet (conceding a margin of error of plus or minus 5 feet).

[27] The whole premise of this approach was the applicants' purported understanding that their western boundary line coincided with the row of spruce trees to the west of the gravel driveway as earlier described. Having made that measurement, the applicants then amended their Notice of Application in Court by changing the length of the boundary claimed along the shoreline from 50 feet to 25 feet (thereby narrowing the triangular area of land claimed by adverse possession.

[28] The third variation was presented through the affidavit of Joyce Henneberry filed on April 5, 2013 which was shortly after the MacInnis survey plan was completed. As an exhibit to her affidavit, Ms. Henneberry attached an excerpt of the MacInnis survey plan outlining in red the area now claimed by adverse possession.

[29] For the first time, the shape of the area claimed changed from a triangle to a quadrilateral by reason of creating a short northern boundary from point "U" extending a few feet westerly along the northern boundary of the respondents' property. Ms. Henneberry explained that she made this change to capture the land they were using, the effect of which was to claim possessory title to all the area

occupied by the row of spruce trees above described. That is to say, the revised western boundary line now asserted ran along the west side of the row of spruce trees to the same end point on the shoreline 25 feet distant from the point now shown as "P" on the MacInnis survey plan. All of the applicants' trial evidence rested upon this delineated area of land claimed by possessory title.

[30] As earlier recited in paragraph 6 of this decision, the applicants, in their post-trial brief, changed their position again by reducing the area claimed by adverse possession. They now clam a quadrilateral shaped strip of land delineated by a changed western boundary line that runs through the row of spruce trees down to the western end of a visible timber and rock retaining wall to the west of the wharf, as shown on the survey plan. This appears from the survey plan to be approximately 17 feet southwest from the iron pin marked "P". Presumably, this last change was made to better conform with the evidence given by the applicants at trial.

[31] If this latter claim were to prevail, the applicants would thereby attain:

(a) Complete ownership of their driveway area;

(b) Shared ownership of the row of spruce trees with the line running generally along the row of tree trunks;

(c) Ownership of the narrow strip of lawn between the tree line and the driveway;

(d) Ownership of a small area on the east side of a berm (which will be addressed later) as well as the narrow strip of land between the berm and the driveway;

(e) A narrow strip of land continuing to the shoreline, bordering the western side of their driveway, which would facilitate a limited amount of storage of fishing gear; and

(f) Additional shore frontage of approximately 17 feet.

Acts of Possession

[32] The acts of possession relied upon by the applicants as plead in their Application included the following:

(a) planting, pruning and maintaining a row of spruce trees;

(b) storing, accessing and moving large quantities of fishing gear;

(c) maintaining and repairing a retaining wall;

(d) maintaining and repairing a wharf;

(e) use and maintenance of a driveway; and

(f) cutting and maintaining the lawn.

[33] It is not necessary in this decision to recount the minutia of the evidence concerning acts of possession. Overall, the alleged acts of possession centred on the use of the driveway, the maintenance and care of the row of spruce trees and the narrow strip of lawn area between them and the driveway, and the area near the shoreline where fishing gear was stored.

[34] In their post-trial brief, the applicants have identified the period from 1979 to 1999 as the 20 year span underlying their claim for possessory title under the *Limitations of Actions Act*.

[35] The evidence concerning the row of spruce trees and lawn area mostly came from Joyce Henneberry. She recounted that the Johnsens moved to the United States in about 1981 and thereafter leased their property to various tenants until it was sold to the Gibsons in 1992. She testified that after the Johnsens left, she regularly pruned and maintained the east side of the spruce trees and even replaced some of them when the original trees died. She acknowledged that she did not go around to the west side of the trees for any maintenance purposes. She also

acknowledged her belief that the row of trees was originally planted by the Johnsens.

[36] Ms. Henneberry also testified that she mowed the grass between the trees and the west side of her driveway and trimmed the grass up to and around the tree trunks with a whipper snipper. She further testified that she carried out these activities exclusively in those areas.

[37] What she did not mention in her affidavit or trial evidence, and which came out in the evidence of her friend and neighbour Anneke Leslie, was the fact that the two of them were hired by the Johnsens to maintain and care for their property after they left it in 1981. Ms. Leslie testified that they were paid to do lawn maintenance and to generally clean up the property.

[38] Ms. Leslie acknowledged in cross-examination that paragraph 25 of her affidavit (which was prepared by Joyce Henneberry) was misleading when she deposed that she was never instructed to mow the lawn under or between the trees or to the east of the trees or to do any yard work in that area. She acknowledged at trial that they were never given any specific instructions whatsoever that she could remember; rather they were given a general mandate to clean up the property.

Both of them knew, of course, that the row of spruce trees had been planted by the Johnsens.

[39] Most of the evidence concerning the storage of fishing gear on the west side of the driveway near the wharf came from Robert Henneberry, supported by his wife. The area used for storage was wild uncultivated terrain sloping gradually to the shoreline and was circled by both applicants on an excerpt from the MacInnis survey plan.

[40] Mr. Henneberry claims that he and his father Norman had exclusive use of this area for the storage of lobster traps and other fishing gear from 1965 to 1999 when Norman retired. Robert Henneberry himself became a full-time commercial fisherman in 1986 and continued until 2011 when he retired under a disability. He acknowledged that the storage shifted on an almost daily basis and was in a constant state of change, depending on his use of the fishing gear according to the fishing seasons. At the time of the preparation of the MacInnis survey plan, the storage of lobster traps is shown as extending approximately 20 feet west of his driveway.

[41] Mr. Henneberry's original affidavit filed with his Application was silent on the question of permission for this storage from either the Gibsons or the

respondents. However, in his rebuttal affidavit, he deposed that the only permission he ever asked for and received from Mr. Gibson was to extend the area for storage of fishing gear further to the west and beyond the area he had circled on the survey plan as having been under his exclusive use.

[42] In cross-examination at trial, Mr. Henneberry acknowledged that he always knew that some of his gear was on the Gibsons' land although he was not sure where the line ran at that location. He also acknowledged that when he talked to Mr. Gibson about getting permission, neither of them ever delineated or identified the parameters of the permitted storage area. Mr. Henneberry's evidence was that he didn't think it mattered.

[43] Mr. Henneberry had a similar discussion with the respondents after they bought the property in 2010. Again, permission for storage of fishing gear on the respondents' property was given without any delineation of the area which they intended.

[44] None of this was ever in dispute between the Henneberrys and any of the successive owners of the respondents' property until the Henneberrys unilaterally cut the row of spruce trees further up the driveway in April of 2012 in the absence of the respondents.

[45] Both applicants testified as to their exclusive use and maintenance of the gravel driveway along the western side of their property. Ever since they bought it in 1979, the applicants have enjoyed the exclusive use of that driveway although they have at times allowed both the Gibsons and the respondents to use it with their permission to access an adjoining small gravelled driveway near the centre of the respondents' back boundary.

[46] The applicants alone have maintained their driveway over the years, applying fresh gravel on a number of occasions to keep it up. There was also an occasion where they needed to repair the driveway when it was dug up to facilitate the repair of a drain pipe that runs from the back of the respondents' property through the driveway and across the applicants' property to the shore. The applicants always believed that their driveway was completely on their side of the boundary line and did not learn otherwise until they received the MacInnis survey plan.

[47] More specifically, the applicants repeatedly asserted their belief, prior to receiving the survey plan, that the northern part of the boundary line was delineated by the tree line (of the row of spruce trees) and extended in a straight line to a point on the shoreline well west of the old wharf (which was said to have

been 8 feet wider than the present wharf). This belief was based upon a statement attributed to Norman Henneberry (who passed away in 2007) who allegedly told the applicants that the boundary line ran from the tree line to a point well west of the wharf (without specifying how far west of the wharf). Their stated understanding was that the west corner of the old wharf extended to the end of a timer and rock retaining wall.

[48] This self-professed belief is central to the applicants' case where it is argued by their counsel that resultingly, there is no requirement to prove that they used the disputed land in a manner inconsistent with the true owners' intention.

[49] The applicants' stated belief is very much contrary to the belief of both David Gibson and the respondents. As noted earlier, David Gibson and his wife Kerry owned the subject property from October of 1992 until February of 2010 when they sold it to the respondents.

[50] Mr. Gibson declined to provide an affidavit to either party in this proceeding. Although he considered the applicants to have been good friends at the time, he felt caught in the middle. He was therefore subpoenaed by the respondents to give evidence at trial.

[51] Mr. Gibson attested to his belief as to where the boundary line ran, which he placed on an excerpt of the MacInnis survey plan. Consistent with that, he expressed his belief that the boundary line ran slightly to the east of the spruce tree trunks down to the west corner of the wharf at the shoreline.

[52] He testified that before Hurricane Juan struck in 2003 he was shown an iron pin at the west corner of the wharf which he believed to have marked the boundary line and which was consistent with what he was told by his realtor and the applicants. His recollection was that there was not much change in the location of the wharf when it was rebuilt after 2003.

[53] In his testimony, Mr. Gibson refuted his discovery evidence where he had said that he believed the boundary line ran through the middle of the trees. His more explicit trial testimony was that he believed the line to have run slightly east of the tree trunks under the overhang of the branches which extended out towards the driveway as far as about 8 feet. He said that he always thought the driveway curved a couple of feet over the boundary line where it briefly widened before extending to the west corner of the wharf. He maintained that all of the land to the west of the driveway, including the row of spruce trees and the storage area for the

fishing gear, was his property and that the land now claimed by the applicants is "totally wrong".

[54] Mr. Gibson testified that he regularly mowed the grass around the southern end of the row of spruce trees and pruned their branches both on the west side and around the corner of the end tree. He further testified that he only trimmed the branches on the east side of the spruce trees when he broke some branches using a truck or hauling boats down the applicants' driveway (with their permission) which he did several times over the years. He also said that he trimmed low dead branches past the middle of the trunks on the east side but not to a significant extent. He acknowledged that Joyce Henneberry cut the grass underneath the overhanging tree boughs on the east side although he said not much grass grew there under the overhang.

[55] As for the area used for storage of fishing gear, Mr. Gibson testified that shortly after purchasing his property, he was approached by Robert Henneberry and was asked for permission to store fishing gear on the west side of the driveway near the wharf. Mr. Gibson was agreeable to this and indeed, reciprocally, Mr. Henneberry granted permission to Mr. Gibson to access his back driveway by using the applicants' gravel driveway.

[56] Although the matter of permission was discussed on several occasions over the years, Mr. Gibson testified that there was never any discussion of the exact area of the storage area to be used with his permission. As he put it, there was no talk of the set amount of gear Mr. Henneberry could store or exactly where he could put it. Rather, from his perspective, it was a general permission to store fishing gear on the west side of the driveway. His assumption from talking with Mr. Henneberry about this was that everything from the westside of the driveway was on the Gibson property.

[57] Mr. Gibson also confirmed that the amount and location and configuration of the stored fishing gear changed constantly, according to its use, and that there were times when nothing was stored there. He stated as well that the location of which did not change much the driveway met both the old and the new wharf, he said he used to step on the cribbing (the retaining wall) to get down to the water alongside both the old and new wharf (thereby making entry on the southeast corner of his property).

[58] With that history, Mr. Gibson further testified that after he listed his property for sale, he told Robert Henneberry that he would need to get renewed permission

for storage from the new owners. He also mentioned this to the respondents themselves which is corroborated by the evidence of Mr. Compton.

[59] Another area which was the subject of Mr. Gibson's testimony was the berm which he constructed in 2008 near his rear boundary line to try to gain some additional privacy. Prior to building the berm, Mr. Gibson had stored a 12 by 16 foot platform in that location in the early 2000's. He later moved it to a different position near the shoreline in 2003 which straddled the storage area now claimed by the applicants.

[60] Mr. Gibson asked for and was given permission by the applicants to use their gravel driveway to bring in equipment to build the berm but he did not ask for their permission for building the berm itself, nor was that even discussed. He believed that he owned not only the specific land area where the berm was built, but also the land between the berm and west side of the driveway. Mr. Gibson also planted evergreen trees on top of the berm for additional privacy.

[61] Mr. Gibson was also asked about the back driveway on his property to the north of the berm which he acknowledged that he accessed by using the applicants' gravel driveway with their permission. He also recounted building a drain pipe there in the early 2000's to connect with an existing drain pipe buried along the

western edge of the applicants' driveway and extending to the shoreline. Mr. Gibson gravelled his back driveway (the eastern end of which is claimed by the applicants as part of the disputed land) and also regularly mowed around it.

[62] Mr. Gibson said that he sold his property to the respondents in 2010, with deeded water frontage of 75 feet, in good faith. It is evident that he was completely unaware of any claim for adverse possession now being made by the applicants for any land west of their driveway.

[63] The evidence of Mr. Compton, both in his affidavit and at trial, was consistent with that of Mr. Gibson. Mr. Compton's understanding of the location of the boundary line is identical to that of Mr. Gibson which is not surprising because at the time of purchase, he walked the line with Mr. Gibson. He deposed in his affidavit that as a result, he believed the eastern boundary to have run from an iron bar at the northeast corner of the property southward along the western side of the Henneberry driveway to the northwest corner of the wharf.

[64] Mr. Compton also said that he first met Robert Henneberry in the spring of 2010 and that they walked together along the driveway to the wharf. Mr. Compton's evidence is that he was told by Robert Henneberry that the boundary

line ended approximately at the northwest corner of the wharf. He said that Mr. Henneberry repeated that comment a number of times since then.

[65] In the same conversation, Mr. Compton testified that there was discussion over the fact that some lobster traps were on his land and that Mr. Henneberry asked permission if this could continue. Mr. Compton agreed, being aware of a similar prior arrangement with Mr. Gibson. Reciprocally, Mr. Henneberry said that the Comptons could use his wharf. Again, however, there was no delineation of the specific area in respect of which permission to store fishing gear was given.

[66] Mr. Compton also attested to several conversations with Joyce Henneberry about the row of spruce trees and attributes to her an acknowledgement, until the summer of 2012, that the spruce trees were owned by the respondents.

[67] Fiona Andrew, in her affidavit, also deposed that in the spring of 2010 she and her husband were shown by Robert Henneberry where the boundary marker at the shoreline should have been. Her evidence is that they were told it was at the corner of his wharf and that the original marker had been washed away by Hurricane Juan.

[68] Ms. Andrew later took some photos of the spot shown to her by Mr. Henneberry as being the southeast corner of her property which she attached to her affidavit. She circled the spot on the photos where two pieces of wood cribbing meet which appears to be within a foot or so west of the corner of the wharf. She also deposed in her affidavit that both she and her husband were present when told by Robert Henneberry that his lobster traps were on their land and that they then told him it was no problem for him to continue keeping his traps there. Ms. Andrew was not cross-examined on the contents of her affidavit.

FINDINGS OF CREDIBILITY

[69] An important element of the applicants' case is their professed belief, prior to receiving the MacInnis survey plan, that they owned the disputed land as delineated on an excerpt of the plan attached to an affidavit. To repeat, that delineated area includes the entirety of the row of spruce trees, runs through the centre of the berm and ends at a point on the shoreline 25 feet southwesterly from point "P". The area claimed has since been slightly reduced in size in closing submissions as earlier noted, with the alleged boundary line running through the row of trees.

[70] The basis of this professed belief is their evidence of having been told by Norman Henneberry that the boundary line ran along the tree line to a point west of the old wharf. Joyce Henneberry added that she believed that the land area they owned was what Norman used.

[71] I am not persuaded that this was an honestly held belief for a number of reasons. First of all, the applicants' affidavits were silent on having been informed by Norman Henneberry that the location of the boundary line was the tree line down to the west side of the old wharf, when that was the very basis of their professed belief when it came to their evidence at trial. It should also be noted that by the time of trial, they had presented three different variations of where the boundary line ran.

[72] A further difficulty with this evidence is that there is no reasonable basis upon which Norman Henneberry could have held the belief attributed to him that his property included the row of spruce trees that had earlier been planted by the Johnsens, and extended well west of the wharf and the driveway he had built leading to it. Likewise, there is no reasonable or objective basis upon which the applicants could honestly have held such a belief.

[73] Robert Henneberry acknowledged in his evidence that he was present at the office of the lawyer who handled the purchase of the property from his father. The evidence of Joyce Henneberry was that their lawyer in 1979 suggested creating a right-of-way along the western boundary of the property they were buying in favour of Norman, who lived across the road, so that he could access his fishing wharf. That was done. As earlier recited, the conveyance from Norman reserved to himself a right-of-way which was described in the deed as being a 6 foot wide right-of-way running in a southerly direction from the Ketch Harbour Road along the western sideline of the lot under conveyance to the grantor's wharf at the shoreline.

[74] By that time, Norman Henneberry had already built the driveway leading to the wharf and both logic and common sense would indicate that the right-of-way created by the deed was intended to coincide with the position of the driveway. Therefore, all of the Henneberrys must be taken to have known that the boundary line of the property being conveyed in 1979 ran along the western side of the driveway.

[75] This inevitable conclusion would have again become apparent to the applicants when they obtained a location certificate in 1979 following the

conveyance for the construction of their home. That location certificate plots the 6 foot wide right-of-way as running along the western boundary of the Henneberry property. That is to say, the western boundary of the right-of-way coincides with the western boundary of the property.

[76] The placement of the right-of-way would have come to their attention again when the Henneberrys later built a garage close to their driveway near the shoreline. The location of the garage was plotted by Mr. Henneberry on the original location certificate as nearly fronting on the right-of-way.

[77] Later, in 2007 which was the year of Norman's death, Joyce Henneberry signed a Statutory Declaration in the migration of their title as part of an attempt to extinguish the right-of-way as a burden upon their property. This would again have drawn the location of the right-of-way to their attention.

[78] Illogically, both Robert and Joyce Henneberry refused to acknowledge in their testimony that the right-of-way and the gravel driveway were in the same location. Incredibly, Robert Henneberry delineated on the survey plan where he thought the right-of-way ran to the west of the gravel driveway, the purported path of which did not even meet the wharf. There can be no doubt whatsoever on the

evidence that the right-of-way created in the deed and the gravel driveway on the ground were in one and the same location. Both were designed to meet the wharf.

[79] It is a facile response for the applicants to now say that they never read the description of the right-of-way in their deed and that they never gave any thought as to where the right-of-way was in relation to the driveway. Joyce Henneberry confirmed in cross-examination that she understood from the time they bought the property that the right-of-way ran along their western boundary line. It is completely implausible for the applicants to assert that the driveway was in a different location.

[80] Beyond that, I find that the applicants did ask the respondents for permission to cut the row of spruce trees after the latter had purchased the property. That does not square with the professed belief that the applicants owned the trees.

[81] Furthermore, the applicants have acknowledged that they did not object to Mr. Gibson's building a berm in the location he chose, even though part of it occupies the disputed land. Rather, they simply gave him permission to use their driveway to bring in the necessary equipment. This is not consistent with the asserted belief that they owned that part of the disputed land.

[82] There was also the evidence of the respondents, which I accept, that they were told by the applicants when they first bought the property in 2010 that the southern end of the boundary line was near the western corner of the existing wharf. Indeed, Joyce Henneberry acknowledged in cross-examination that at some point she had said in a note that the marker of the southern boundary was "near" the west side of the wharf. She added that she was not sure where the boundary line actually was at its southern end. She and her husband later arrived at the 25 foot measurement from point "P" using the very unscientific and unreliable methodology earlier described.

[83] Another anomaly in the evidence of the applicants is that if the boundary line along the row of spruce trees were to be projected northerly in the other direction (which was know to run in a straight line) it would not coincide with the actual boundary line as it extended to Ketch Harbour Road.

[84] All of the foregoing must further be considered in light of the fact that the applicants have presented four different variations of the exact location of the western boundary line. All in all, I have reached the conclusion that the applicants' professed belief that they owned all the disputed land is not an honestly held belief.

[85] Overall, I found the evidence of the applicants to lack consistency, both internally and when compared to the evidence of others which I accept. Their answers on cross-examination were sometimes vague and evasive. On other occasions, their answers on cross-examination were tailored, if not contrived, to suit their objectives in what appeared to be a very self-serving manner. Also, several important points of evidence were omitted from their affidavits filed in support of the Application (for example, the basis of their belief from Norman Henneberry where the property line ran, the subject of permission for storage given by Mr. Gibson and the hiring of Joyce Henneberry and Ms. Leslie by the Johnsens to do yard maintenance).

[86] The fact that the right-of-way created in 1979 was designed to meet the wharf and that its location was to coincide with the driveway earlier built could not reasonably be denied. Yet Mr. Henneberry did so in his evidence, going so far as to say that his father Norman used the driveway but not the right-of-way.

[87] Neither do I accept his evidence when he said that it didn't bother him when David Gibson unilaterally built the berm in 2008 on land which Mr. Henneberry claims to be his. That is entirely inconsistent with his stance in the present litigation.

[88] Another example of a facile answer is Mr. Henneberry's explanation that the initial reference to a 50 foot measurement from the wharf marking the southwest corner of the land claimed by adverse possession was simply a typographical error. It is readily apparent that the amendment of this measurement to a distance of 25 feet occurred as a result of the flawed measurement he took in early February of 2013 as earlier described.

[89] Yet another example is Mr. Henneberry's explanation when asked on cross-examination about permission for storage he was given by Mr. Gibson. His explanation was that the permission referred to an additional area for storage west of the disputed land when at the same time, both he and Mr. Gibson acknowledged that the particular area where fishing gear was to be stored with permission was never delineated in their discussions.

[90] Joyce Henneberry in her evidence also questioned, without any reasonable basis for doing so, whether the driveway and the right-of-way followed the same path. She said she never gave it any thought before discovery examinations in this proceeding, notwithstanding that she sought to extinguish the right-of-way in connection with their migration of title in 2007. She also at one point questioned the accuracy of the location of the survey pins on her own expert's survey plan.

[91] In introducing the third version of the area of disputed land in her affidavit, Ms. Henneberry explained that she changed the shape of the land claimed to a quadrilateral so as to capture all the land they were using. As previously noted, the boundary line therein claimed ran along the west side of the row of spruce trees so as to capture them in their entirety, even though she acknowledged she never did any maintenance work on the west side of the trees. When asked why she was therefore claiming the changed boundary line as she was, the answer given was vague although it is obvious that the intention was to gain ownership of all the land upon which the row of trees stood. Neither could she say what the length of the north line of the quadrilateral was, running along another neighbour's property. It also bears repeating that this position has now been abandoned with the introduction of the fourth variation of the position of the western boundary as previously recited.

[92] There are other anomalies in the evidence of Joyce Henneberry to be noted as well. One of those is her evidence that she did not consult with the respondents before the trees were significantly cut in April of 2012 because it didn't occur to her. This was not a forthright answer in light of the earlier discussions between the parties as recounted by the respondents which I accept.

[93] Another anomaly is that she also says that she knew that part of the berm built by Mr. Gibson was on land they thought they owned. Ms. Henneberry's comment that she was unconcerned and didn't pay much attention to it is not plausible if, at the same time, she truly believed that the berm was being built partly on their land.

[94] Another inconsistency to be noted is her admission on cross-examination that at some point earlier she had said that the southwest corner of her property was located "near" the left (west) corner of the wharf. Her explanation was that she was not sure where the boundary line was when she made that statement and that initially, they were guessing when they identified the point 25 feet distant from the west side of the wharf. Again, that position has now been abandoned in favour of fixing the southwest corner at the end of the retaining wall supporting the wharf as shown on the survey plan.

[95] By contrast, the evidence by David Gibson, who was a neutral witness as previously noted, was given in a straightforward and forthright manner without embellishment or any apparent bias. Accordingly, wherever the evidence differs between that of Mr. Gibson and that of the applicants, I prefer the evidence of Mr. Gibson as being more credible and reliable.

[96] Similarly, I accept the evidence of the respondents over that of the applicants wherever differences occur. Although Ms. Andrew was asked only one question on cross-examination, I found the evidence of Mr. Compton to have been given in a forthright manner and with consistency, both internally and when stacked up against the other evidence in this case which I accept.

LEGAL ANALYSIS AND FINDINGS

[97] There are three primary areas within the disputed land where various acts of possession took place, namely, the area comprised of the row of spruce trees and the contiguous narrow strip of lawn bordering the west side of the driveway, the area used for storage of fishing gear further down the west side of the driveway near the shoreline and, of course, the area covered by the driveway itself.

[98] I will first deal with the contiguous area of the spruce trees and the strip of lawn bordering the west side of the driveway. Significantly, Joyce Henneberry's maintenance of this area by trimming the east side of the tree branches and mowing the narrow strip of lawn began with her hiring by the Johnsens to do yard maintenance after they moved to the United States in about 1981. Ms. Henneberry knew that the row of spruce trees had been originally planted by the Johnsens in the late 1970's and hence knew, or ought to have known, that they were located on

the Johnsens' property. As earlier indicated, she also ought to be imputed with the knowledge that her western boundary line coincided with the west side of the gravel driveway.

[99] I therefore conclude that the yard work which she performed in this area up until 1992 were not acts of adverse possession, but rather were performed in this area under her ongoing arrangement with the Johnsens, if not simply as a neighbourly gesture during their absence. More is required to establish the quality of possession required by the statute. As noted earlier, an adverse possessor must show that they have actual possession and the intention of excluding the true owner from possession, and that they have effectively excluded the true owner from possession.

[100] The earliest that the performance of yard maintenance on the trees and lawn area might be considered as acts of adverse possession would be October of 1992 when the neighbouring property was purchased by the Gibsons. However, the evidence of David Gibson, which I accept, was that on a number of occasions he trimmed the branches on the east side of the spruce trees which would have required him to step upon that land area. He was prompted to do this whenever he broke some of the branches while using a truck to transport a boat down the

applicants' driveway (with their permission). Whenever he did so, he is deemed to have been in actual possession which thereby interrupted any right of possession claimed by the applicants (see Spicer at para. 20 quoted above).

[101] Even if this occasional activity on the part of Mr. Gibson were considered to be too trivial and fleeting to interrupt adverse possession (as argued by counsel), the applicants' claim for adverse possession of this area fails in any event because they fall short of the requisite 20 year mark for exclusive possession. By October of 2012, the confrontations between the parties had already occurred and they had both engaged surveyors, with the respondents' surveyor having established the boundary line essentially in the same position as shown on the MacInnis survey plan.

[102] As noted earlier, for possessory title there must be an occupation of land which involves the land's actual and complete possession for all purposes to the exclusion of all others. The applicants at all events have failed to prove that requirement in respect of this first area for the full 20 year period prescribed by the statute.

[103] I now turn to the area where fishing gear has been stored, dating back to the times of its use by Norman Henneberry.

[104] We do not have any reliable evidence of any arrangement made between Norman Henneberry and the Johnsens when they owned the property (all of whom are deceased). What we do have is conflicting evidence between the applicants and Mr. Gibson about the nature and scope of permission that was given for the storage of fishing gear in that area between 1992 and 2010.

[105] As previously recited, it was Mr. Gibson's belief that the boundary line ran to the west corner of the wharf where there was once an iron pin before Hurricane Juan. His understanding throughout was that all the land west of the edge of the applicants' driveway was his property.

[106] Both Mr. Gibson and Mr. Henneberry agree that there was never any discussion of the set amount of gear that could be stored there or exactly where it could be put on the ground. When he granted permission for this storage after acquiring the property in 1992, it was Mr. Gibson's intention to give a general permission for storage in the area bordering the west side of the driveway.

[107] As earlier indicated, I do not accept Mr. Henneberry's evidence that he believed that this permission pertained only to a small area of land further west of the area of disputed land he had circled on the survey plan. Such an area had never been delineated in any discussions between the parties. In any event, I have

already found that there was no reasonable basis for Mr. Henneberry's asserted belief that the actual western boundary line of his property ran some distance west of the edge of his driveway.

[108] Having made these findings of fact in accepting the testimony of Mr. Gibson over that of the applicants, I find that the storage of fishing gear to the west of the driveway from 1992 onward was through permission, loosely given as it was. It follows that the storage of fishing gear in that general area does not constitute acts of adverse possession.

[109] It should be added that the applicants' claim for possessory title of the strip of land along the driveway between the south end of the row of spruce trees and the storage area fails as well. This area is occupied by the so-called back driveway on the respondents' property and the berm built by Mr. Gibson in 2008. The acts of possession here relied upon are insufficient to establish possessory title and in any event, clearly did not exclude the true owners from actual possession.

[110] There remains to consider the area covered by the driveway itself. It is only in this respect that the applicants' claim should succeed.

[111] I accept this part of the applicants' evidence as to their use and maintenance of the driveway area since acquiring the property in 1979. I am satisfied that they have established more than simply a prescriptive right of use in the nature of an easement to pass over the driveway to access the wharf. More specifically, I am satisfied that their possession of the gravel driveway was open, notorious, exclusive and continuous for the requisite 20 year period so as to extinguish the respondents' paper title to that limited extent.

[112] A practical difficulty in giving effect to this finding stems from the fact that the west side of the driveway cannot be delineated with precision where it is built of gravel and is a bit overgrown with grass (as shown in the photos and attested to by Mr. Henneberry). That is presumably why the west side of the driveway is shown on the MacInnis survey plan as a dotted line. The line widens slightly for a short distance near the berm and then narrows to its normal width. At its very end where it meets the wharf, the driveway flares slightly wider to a point marginally west of the corner of the wharf (which point conceivably tied in with the corner of the old wharf).

[113] Clearly it is desirable to fix the new boundary line in a straight line from the point at which it first intersects with the gravel driveway to the shore. Because the

west side of the driveway cannot be delineated with precision, the best the Court can do is to fix the new boundary line as running from the point where it first intersects with the west side of the gravel driveway to the very end point of the driveway near the highwater mark slightly west of the corner of the wharf. For greater certainty, I have superimposed this new boundary line on a segment of the MacInnis survey plan attached as Appendix "A". The cross-hatched area drawn in depicts the area of land to which the applicants have established possessory title and thereby extinguished the paper title of the respondents.

[114] I recognize that this line excludes a very narrow curvature of the driveway where it widens near the berm but it also includes an equally small area immediately to the south outside the dotted line of the driveway before extending to its end point. I have concluded that this is the most practical solution to be imposed where the west side of the gravel driveway cannot be delineated with precision. I am also satisfied that it does not fetter the normal use of the driveway by the applicants.

[115] Although this decision firmly establishes the location of the new boundary line between the two properties, the potential for future problems remains in two other respects. First, there is a drain pipe servicing the respondents' property that

runs underneath the driveway before extending to the sea that was originally connected by Mr. Gibson. Secondly, there is the timber and rock retaining wall immediately to the west of the wharf, a short end section of which is on the respondents' land above the highwater mark. If the Court may offer a gratuitous suggestion, it is that the parties consider a reciprocal agreement in the nature of service easements in the eventuality that either the drain pipe or the retaining wall become in need of repair. It is time for the parties to put their differences behind them.

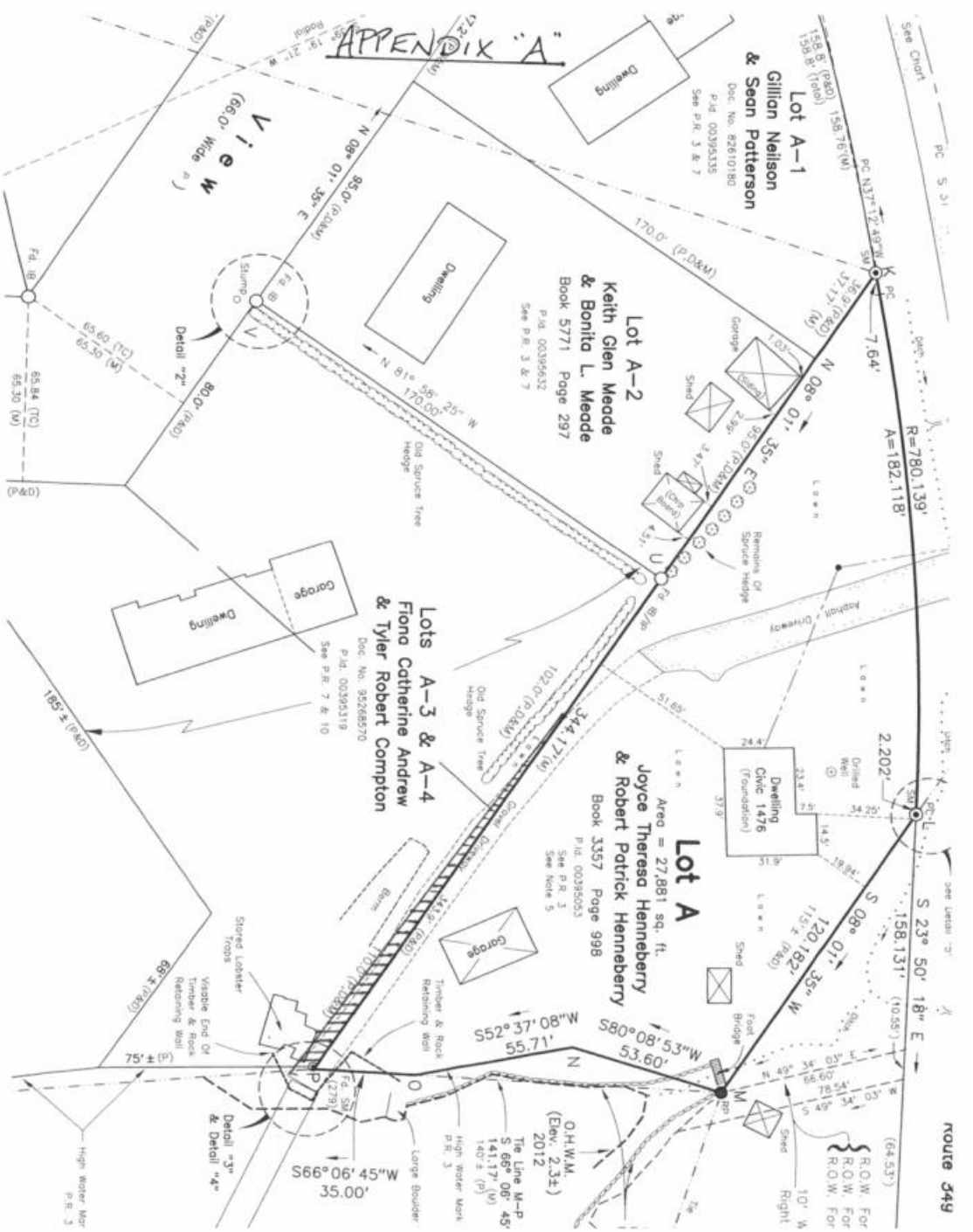
CONCLUSION

[116] The applicants are entitled to an order declaring that the respondents' legal title to the small triangle of land identified in Appendix "A" to this decision has been extinguished by virtue of the possessory title thereto established by the applicants. All additional claims made by the applicants under the doctrine of adverse possession are dismissed.

[117] If the parties are unable to reach agreement on costs, I invite written submissions within the next thirty days.

Wright, J.

APPENDIX "A"


APPENDIX "A"
Lot A–1
Gillian Neilson
& Sean Patterson
Lot A–2
Keith Glen Meade
& Bonita L. Meade
Book 5771 Page 297
Lots A–3 & A–4
Fiona Catherine Andrew
& Tyler Robert Compton
Lot A
Area = 27,881 sq. ft.
Joyce Theresa Henneberry
& Robert Patrick Henneberry
Book 3357 Page 998
Dwelling
Garage
Shed
Old Spruce Tree Hedge
Remains Of Spruce Hedge
Asphalt Driveway
Dwelling Civic 1476 (Foundation)
Drilled Well
Foot Bridge
Stored Lobster Traps
Visable End Of Timber & Rock Retaining Wall
Timber & Rock Retaining Wall
Large Boulder
High Water Mark P.R. 3
O.H.W.M. (Elev. 2.3±) 2012
Tie Line M–P
S 66° 06' 45" W
141.17' (M)
140'± (P)
Detail "2"
Detail "3" & Detail "4"
N 08° 01' 35" E
95.0' (P,D&M)
170.0' (P,D&M)
N 81° 58' 25" W
170.00' (P)
S 08° 10' 35" W
R=780.139'
A=182.118'
S 23° 50' 18" E
158.131'
S 08° 10' 35" W
120.182'
S52° 37' 08"W
55.71'
S80° 08' 53"W
53.60'
S66° 06' 45"W
35.00'
344.17'(M)
132.0' (P,D&M)
185'± (P&D)
75'± (P)
65.60 (TC)
65.30 (M)
65.84 (TC)
65.30 (M)
(P&D)
Route 349
R.O.W. For