IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Power Estate v. Hayward,* 2021 NLCA 58
Date: December 20, 2021
Docket Number: 202001H0051

BETWEEN:

	ESTATE OF WILLIAM JAMES POWER	APPELLANT
AND:		
	DONNA HAYWARD	FIRST RESPONDENT
AND:		
	PATRICK HAYWARD	SECOND RESPONDENT
AND:		
	BRENDAN HAYWARD	THIRD RESPONDENT
AND:		
	JEROME HAYWARD	FOURTH RESPONDENT
AND:		
	PATRICK J. POWERS	FIFTH RESPONDENT
AND:		
	JIM POWERS	SIXTH RESPONDENT
AND:		
	KEVIN POWERS	SEVENTH RESPONDENT

AND:

ANNE POWER — EIGHTH RESPONDENT

AND:

PATRICK DAVID ANDERSON — NINTH RESPONDENT

Coram: Welsh, Goodridge and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201601G4879
(2020 NLSC 85)

Appeal Heard: September 22, 2021
Judgment Rendered: December 20, 2021

Reasons for Judgment by: Welsh J.A.
Concurred in by: Goodridge J.A.
Concurring Reasons by: Butler J.A.

Counsel for the Appellant: Represented by Alice Power, Executrix
Counsel for the First, Second, Third, Fourth, Fifth, Sixth and Seventh Respondents: Christopher E. Gill
Counsel for the Eighth and Ninth Respondents: William T. Cahill

Authorities Cited:

Welsh J.A.:

CASES CITED: *Mugford v. Mugford* (1992), 103 Nfld. & P.E.I.R. 136 (Nfld. C.A.); *Russell v. Blundon,* 2002 NFCA 20, 210 Nfld. & P.E.I.R. 326; *Maloney v. Fry*, 2018 NLCA 18, 2 C.A.N.L.R. 647.

STATUTES CONSIDERED: *Quieting of Titles Act*, RSNL 1990, c. Q-3, section 13(2).

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rule 37.

Butler J.A. (concurring):

CASES CITED: *Russell v. Blundon* (1999), 185 Nfld. & P.E.I.R. 181 (Nfld. S.C. (T.D.)); *Russell v. Blundon*, 2002 NFCA 20, 210 Nfld. & P.E.I.R. 326; *Wickham's Estate v. Estates of Wickham and Wickham (No. 1)* (1997), 17 Nfld. & P.E.I.R. 452 (Nfld. T.D.); *Mugford v. Mugford* (1992), 103 Nfld. & P.E.I.R. 136 (Nfld. C.A.); *Maloney v. Fry*, 2018 NLCA 18, 2 C.A.N.L.R. 647; *Taylor et al. Admin. of Morgan v. Nfld. Concrete Products Co. et al.* (1946), [1941-46] Nfld. L.R. 500; *MacCormack v. Courtney* (1895), Irish Rep. 97; *Pawlett v. Newfoundland* (1983), 41 Nfld. & P.E.I.R. 349 (Nfld. C.A.); *Littledale v. Liverpool College*, [1900] 1 Ch. 19; *Petten Estate v. Petten Estate* (1989), 74 Nfld. & P.E.I.R. 289 (Nfld. C.A.); *Matchless Group Inc. v. Carpasia Properties Inc.*, 2002 NFCA 56, 216 Nfld. & P.E.I.R. 206; *Earle Estate v. Finn*, 2008 NLCA 14, 274 Nfld. & P.E.I.R. 33; *Cantera v. Eller*, [2007] O.J. No. 1899, 157 A.C.W.S. (3d) 652 (Ont. S.C.J.), aff'd 2008 ONCA 876.

STATUTES CONSIDERED: *Quieting of Titles Act*, RSNL 1990, c. Q-3.

Welsh J.A.:

[1] The Estate of William James Power brought an application in the Supreme Court of Newfoundland and Labrador, General Division for a certificate of title pursuant to the *Quieting of Titles Act*, RSNL 1990, c. Q-3. The land at issue was divided into four parcels. The applications judge granted a certificate of title for parcels A and B, but denied the certificate for parcels C and D. The Estate appeals against the judge's decision regarding parcel D.

BACKGROUND

[2] The property at issue, which comprises approximately 19.61 hectares, is a portion of a Crown grant made to Ann Haley in 1837. Subsequently, two brothers, Patrick and John Power, occupied and farmed the property.

[3] The judge accepted that Patrick, who built a house on parcel C around 1910, farmed and maintained parcels C and D prior to his death in 1942. The estate of Patrick, who died intestate, has not been administered. Three of his sons, William, Patrick and Phillip lived on the property during their lives. William died in 2003 leaving a will. It is his estate (referenced for convenience as the "Estate") that made the application for a certificate of title.

[4] The second brother, John, occupied and farmed parcels A and B. It was not disputed that, in 1955, William purchased his Uncle John's interest in the property and that "he and his family occupied it to the exclusion of others from 1956 to the present" (decision of the applications judge, 2020 NLSC 85, at paragraph 59). Accordingly, a certificate of title was granted to the Estate for parcels A and B. The applications judge explained:

> [54] There is no doubt that William Power and his wife and children occupied Parcels A and B. The adverse claimants concede this and consent to a certificate issuing to the [Estate] in respect of Parcels A and B. ...

[5] Regarding parcels C and D, the judge identified the nature of the issue:

> [54] ... Neither is there any doubt in my mind on the evidence on a balance of probability that William exercised sufficient possessory acts over Parcels C and D to oust any strangers to the Property. The real issue is whether by his acts of possession he also intended to and did exclude his siblings represented by the [respondents].

[6] As to William's actions in respect of his siblings, the judge found:

> [58] There is no evidence that William excluded his siblings from Parcels C and D. On the contrary, they all lived on Parcel C until they either left home as adults or died. They were free to go on the property if they wished. The evidence from [Patrick's] daughter Ann is that [he] walked the property frequently and knew the trails through the woods [generally on parcel D] intimately. ... Neither [of William's brothers] sought [or was] granted permission by William to build their houses and to live freely on the land.
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> ...

> [60] ... While the [Estate] submitted that William possessed Parcels C and D, counsel acknowledged that [Patrick and Phillip] retained an interest in some portion of Parcel C. Counsel for the [Estate] sought to limit this interest to the land immediately surrounding the houses occupied by [Patrick and Phillip], which he submitted was approximately one acre each. Reference was made to municipal residential taxation information which allocated about that amount of land to the residential numbers representing the Power properties recognized for taxation purposes. Ann has been paying municipal taxes on 17 Power's Lane and David Anderson has been paying taxes on 15 Power's Lane. This was but one piece of information to be considered and was not conclusive of actual ownership or of the amount of land involved ... .

[7] Prior to his death, William had considered applying for a certificate of title for parcels C and D, but abandoned the pursuit. The judge held, among other things:

> [83] In my view, it is illogical to conclude that William would seek contribution from [Patrick and Phillip for quieting the title] if he believed he owned Parcels C and D. A more reasonable explanation for William not including Parcels C and D in his declaration of ownership is that he did not believe that he was the sole owner of that property and he could not quiet it without the cooperation of [Patrick and Phillip] as co-owners. He therefore restricted his declaration of ownership to that land represented by Parcels A and B.
>
> [84] On another occasion, Patrick David Anderson, one of the adverse claimants, asked William with whom he was friends for a piece of land from Parcels C and D for his children to build houses for themselves on. Mr. Anderson testified that William said he couldn't do it because the land was "too tangly" and there were too many people involved or words to that effect. This is not the response of a person who was certain of his ownership of the land.

[8] Further, in his last will and testament, William used different language when dealing with parcels A and B than C and D. In clause 3(d), in devising parcels A and B in equal shares to two daughters, he used the words "my parcel of land at Logy Bay" (decision of the applications judge, at paragraph 85). The judge concluded that:

> [85] ... This is the land he had purchased from his Uncle John and the wording denotes certainty of ownership.

[9] By contrast, referring to parcels C and D, clause 3(e) uses the language, "transfer all my interest and share", which the judge found was a "clear indication" that William did not believe that he was the sole owner of those parcels (decision of the applications judge, at paragraph 87).

[10] The applications judge concluded:

> [101] In all of the circumstances I am convinced that on the balance of probabilities Patrick was the owner of Parcels C and D. Upon his death intestate [in 1942] that land devolved to his widow and children. William's acts of possession did not dispossess them of their interests. As co-owners, they did not have to do anything to assert their interests in the property. William did not make any efforts to exclude them and there is no evidence that they had any knowledge that William held such an intent. To repeat what Gushue, J.A. stated in *Russell* [2002 NFCA 20] at paragraph 6, "Surely, a co-owner who is being excluded from her property by the other co-owner should at least be aware of the exclusion."

[11] Accordingly, the judge denied the Estate's application for a quieting of title for parcels C and D, adding:

> [102] ... It is not my role [in an application for a certificate of title] to resolve any differences the adverse claimants may have in respect of their respective interests in Parcels C and D.

ISSUES

[12] To be considered in this appeal are: (1) an application for fresh evidence; and (2) whether the judge in the court appealed from erred in determining that the Estate had not established the right to issuance of a certificate of title to parcel D.

ANALYSIS

Application for Fresh Evidence

[13] The Estate applied to have fresh evidence admitted for purposes of the appeal; in particular, an excerpt from the 2008 Report of the St. John's Urban Region (Agriculture) Development Area Review Commission, and a two-page copy of the Municipal Assessment Roll for the Town of Logy Bay, Middle Cove, Outer Cove for 1990. At the hearing, the application was dismissed, with reasons to be included in this decision.

[14] Pursuant to rule 37 of the *Court of Appeal Rules*, NLR 38/16:

> (1) Upon application, the panel hearing the appeal may permit additional evidence for purposes of the appeal.
>
> ...

(3) In determining the application, the Court shall consider

(a) whether, by due diligence, the evidence could have been brought in the court appealed from;

(b) the relevance of the evidence in the sense that it bears upon a decisive or potentially decisive issue in the appeal;

(c) the credibility of the evidence;

(d) whether the evidence, if believed, could reasonably have affected the result; and

(e) any other relevant factor.

[15] In this case, the relevant factors leading the panel to refuse to allow the fresh evidence are set out in paragraphs (b) and (d); that is, the evidence sought to be entered did not satisfy the requirement of relevance, specifically to the issues on appeal. The proposed evidence would, at best, have provided factual context for purposes of the quieting of titles application in the court appealed from. It was neither necessary nor helpful for purposes of the appeal, and could not reasonably have had any effect on the result.

Quieting of Titles

[16] The *Quieting of Titles Act* provides for the issuance of a certificate of title where the judge "considers that the applicant is entitled to the land" (section 13(2)). A certificate will not issue if there are adverse claims that are unsettled. In this case, the only question before the Court was whether the Estate had established its entitlement to the land. A determination regarding the rights of adverse claimants was not before the judge who explained:

> [46] The civil standard of proof on a balance of probabilities applies. The [Estate] must show that the claim to the land stems from a legal basis or, alternatively, possession: *Pawlett v. Newfoundland* (1983), 41 Nfld & P.E.I.R. 349, ... (C.A.) at para 9 . The *Act* does not permit the judge hearing an application for a Certificate to declare other interests in the property. The only jurisdiction the Court has is to determine whether the [Estate] is entitled to the Certificate sought ... .

Patrick Power's estate – not administered

[17] The right to an interest in an estate that has not been administered is discussed in *Mugford v. Mugford* (1992), 103 Nfld. & P.E.I.R. 136 (Nfld. C.A.). Goodridge C.J.N., for the Court, explained:

> [56] ... This interest has been described as a chose in action, a right to have the estate administered according to law and to receive a distributive portion of the estate when the debts of the estate and the administrative and other costs have been discharged.
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> [57] The disputed land may prove to be the principal or, even, the sole asset of the estate of Thomas Mugford. The administrator, if and when one is appointed, may have to face the claim of Ernest Mugford claiming, through the estate of Joseph Mugford, a possessory title or a statutory defence by reason of 20 years possession. If such claim is successfully resisted by such administrator, then the land may be sold and, subject to the payment of debts and expenses, the proceeds distributed. The administrator, if the land does not have to be sold to pay debts and expenses, might consider *in specie* distribution. ...

[18] In this case, Patrick's estate included land now described as parcels C and D. The legal interests in those parcels, and division of the property among the beneficiaries have not been judicially determined, except to the extent that the parties agreed that William purchased his Uncle John's interest in parcels A and B. In the absence of an administration of Patrick's estate, William's Estate could establish its right to a certificate of title by way of possession, which is the route adopted by the applications judge.

[19] I would add here that the judge's reference to William, Patrick and Phillip as co-owners is not problematic. In this context, the term is not meant to be construed in its strict, legal sense, but rather as a convenient means of indicating that, if and when Patrick's estate was administered, the brothers would have a right to receive an interest in accordance with the law.

Separation of parcel D

[20] In this case, a fundamental difficulty arises with the Estate limiting the appeal to parcel D, given the fact that the applications judge was satisfied that parcel D was not clearly delineated from parcel C for purposes of determining entitlement under the *Act*. The judge noted that the Estate instructed the surveyor regarding parcel D:

> [31] There appears to have been a wire boundary fence between what was John Power's land (Parcels A and B) and Patrick's land (Parcels C and D). There was no fence between Parcels C and D. Parcel C was not actually a surveyed parcel of land but one delineated by the surveyor on the survey plan on the instruction of the [Estate] to show the approximate area of the property where the farming activity was undertaken and to show where certain members of the Power family lived at various times as earlier described. The boundary between Parcels C and D is delineated by a tree line.

[21] Having considered the evidence, the judge proceeded to deal with parcels C and D as one, making no separate findings of fact regarding parcel D, which, he found, had not been established as a separately defined area. In light of the judge's assessment of the evidence and findings of fact, there is no basis on which to conclude that he erred in dealing with parcels C and D together. It is, therefore, not possible to address the issues on appeal in respect of parcel D as a separate parcel.

[22] That conclusion, in my view, disposes of the appeal. The applications judge did not err in refusing to grant a certificate of title for a parcel of land, parcel D, for which the boundaries had not been established. However, given the manner in which the appeal was presented, I would add the following comments regarding the question of possessory title.

Possessory title

[23] Establishing entitlement to a certificate of title for property based on adverse possession requires the claimant to prove on a balance of probabilities four criteria: possession must be open, notorious, exclusive and continuous or uninterrupted. These same criteria apply whether the dispute involves consideration of adverse claims by family members, other claimants, or strangers (*Maloney v. Fry*, 2018 NLCA 18, 2 C.A.N.L.R. 647, at paragraph 11). In this case, the judge was satisfied that the necessary acts of possession were sufficient to exclude strangers. At issue was whether family members had been excluded.

[24] Generally in establish possessory title the claimant's intention to possess the property will be inferred by objective actions such as occupation, fencing, signage, and eviction of trespassers. It is on such evidence that open, notorious, exclusive, and continuous possession may be demonstrated.

[25] In the case of family members, the claimant's actions must give clear notice to the relevant persons. The decision of the majority in *Russell v. Blundon,* 2002 NFCA 20, 210 Nfld. & P.E.I.R. 326, provides an example:

> [6] ... It is important to note that whether or not, in these circumstances, the respondent took any active interest in the property over the years is irrelevant. She was a co-owner of an undivided half-interest in the property. She was never excluded in any manner from the land by her brother. Surely, a co-owner who is being excluded from her property by the other co-owner should at least be aware of that exclusion. There are no acts of a possessory nature on his part which could possibly

> be deemed to demonstrate open, notorious and exclusive possession as against her as a co-owner. ...

Again, the use of the term “co-owner” was meant to indicate that those persons may have a right to receive an interest in the estate in accordance with the law.

[26] In this case, as discussed in paragraphs 6 to 10, above, the applications judge assessed the evidence, made factual findings, and gave reasons for concluding that the Estate had not established the four criteria for adverse possession. William did not take actions to exclude other family members from parcels C and D. Neither did he establish boundaries between those parcels to demonstrate open, notorious, exclusive and continuous possession of parcel D. There is no basis on which to find that the applications judge erred in concluding that the Estate failed to establish the right to a certificate of title based on adverse possession.

Costs

[27] The respondents, being successful on the application for fresh evidence and on the appeal, shall have their costs in this Court, as requested, from the Estate under column 3 of the scale of costs in the *Court of Appeal Rules*. However, given his limited participation, counsel for the first to seventh respondents shall have his costs from the Estate only for attendance for the hearing in this Court and disbursements.

SUMMARY AND DISPOSITION

[28] In summary, (1) the fresh evidence sought to be admitted by the Estate did not meet the requirement of relevance to determination of the appeal; and (2) the applications judge did not err in concluding that the Estate had failed to prove its right to a certificate of title for parcel D.

[29] Accordingly, I would dismiss the application for fresh evidence and dismiss the appeal, with costs as set out in paragraph 27, above.

B. G. Welsh J.A.

I concur: ______________________________

W. H. Goodridge J.A.

Concurring Reasons by Butler J.A.:

INTRODUCTION

[30] My colleague has addressed the appeal under the broad question of whether the applications judge erred in determining that the Estate had not established the right to issuance of a certificate of title to Parcel D.

[31] I agree that the appeal should be dismissed but I am of the view that two related issues raised within the eight grounds of appeal require additional comment.

ANALYSIS

The Nature and Characterization of the Rights of the Parties

[32] The Estate asserted that the applications judge erred in determining that William James Power and his siblings were co-owners of the property and that the applications judge's characterization caused "the lens through which the trial judge viewed all of William's actions" to be "improperly coloured".

[33] There is inconsistency in the jurisprudence on the nature and characterization of the rights of next of kin of an unadministered estate that requires resolution.

[34] Throughout his decision the applications judge frequently referred to William James Power and his siblings (or some of them) as "co-owners" (see for example paras. 73, 74 and 101). Relative to this, he made substantial reference to both the Supreme Court decision in *Russell v. Blundon* (1999), 185 Nfld. & P.E.I.R. 181 (Nfld. S.C. (T.D.), and the Court of Appeal decision in *Russell*. The applications judge was satisfied that *Russell* had addressed similar circumstances to the case before him, namely "one member of a family, all of whom inherited property from the same common ancestors, dispossessing his siblings" (para. 62), and he cited *Russell*, at para. 6, in support of the

characterization of the respective parties in such circumstances as co-owners of Parcels C and D (para. 71).

[35] *Wickham's Estate* acknowledges that in an unadministered estate, the interests of those persons entitled to inherit under intestate succession law "are beneficial, the legal estate being in limbo pending appointment of a personal representative" (para. 9(1)).

[36] In *Mugford* this Court concluded that in such circumstances the property of the deceased, "real or personal, would pass to his personal representative and not to his next of kin" and that "the interest of the next of kin is in the estate itself and may be roughly compared with the interest of a shareholder in a company" (para. 40). On facts similar to the within appeal, this Court found that the claimant "has no legal or equitable interest in" land of the estate (para. 55).

[37] This Court's subsequent decision in *Maloney* addressed a judge's conclusion on a dispute between two brothers each claiming through the unadministered ancestral estate of their grandfather. Welsh J.A. for a unanimous Court held that in these circumstances the parties "were not co-owners of the property" (para. 11).

[38] It follows that, on the facts of the case on this appeal, the applicant, his stepmother and siblings were not legal co-owners of any property of the unadministered estate of Patrick Power. Instead they had beneficial interests in the unadministered estate (as opposed to any individual property forming part of the estate). The legal ownership of any such property remains in limbo until a personal representative is appointed for Patrick Power's Estate. The applicant, his step-mother and siblings were also legal co-owners of the chose in action (right to administer the estate).

[39] The question to be addressed by the applications judge would have more accurately been stated as whether William James Power had dispossessed the estate of Patrick Power, not whether he had dispossessed his siblings. "…[N]ext-of-kin not in the character of administrators can gain adverse possession" (*Taylor et al. Admin. of Morgan v. Nfld. Concrete Products Co. et al.* (1946), 15 Nfld. L.R. 500, at 507, citing *MacCormack v. Courtney* (1895), Irish Rep. 97).

[40] However, the applications judge's references to the nature and characterization of the parties' rights as co-owners did not affect the basis on which he assessed the Estate's claim to title.

[41] On a quieting of titles application, the claimant must "show that the claim to the land stems from a legal basis, or alternatively, possession" (*Pawlett v. Newfoundland* (1983), 41 Nfld. & P.E.I.R. 349, at para. 9 (Nfld. C.A.)).

[42] The applications judge correctly considered the Estate's claim to title of Parcels C and D on a possessory basis and not a legal basis. William James Power's actions were assessed by the applications judge for the requirements of open, continuous, notorious and exclusive possession. No error is disclosed in the applications judge's approach to the Estate's claim.

Subjective Intent

[43] The fourth ground of appeal was that the applications judge erred in concluding that William James Power did not have the requisite subjective intent to dispossess his siblings. The Respondents acknowledged this requirement and maintained that there was "a higher evidentiary burden" on the Estate to establish possessory title when family members claim through the same ancestral estates. They asserted that William James Power's "work and subsistence on the land" could not be used to demonstrate the requisite intent to dispossess the interests of William James Power's siblings.

[44] My colleague takes issue with the applications judge's conclusion that the Estate's claim for possessory title required that it establish a subjective element. She concludes that in this case the distinction between acts of possession and acts of trespass does not arise.

[45] I am of the view that establishing an intent to exclude other people is a mandatory component of a claim for possessory title. The Estate was required to establish that William James Power's acts of possession were taken with the intent to extinguish any interest his siblings may have to Parcels C and D through the estate of Patrick Power.

[46] *Wickham's Estate,* at para. 115, cites *Littledale v. Liverpool College,* [1900] 1 Ch. 19, at 23, for the following general principle:

> … and possession by the plaintiffs involves an *animus possidendi* – i.e., occupation with the intention of excluding the owner as well as other people …

[47] This Court has long recognized that intent is a required element. In *Petten Estate v. Petten Estate* (1989), 74 Nfld. & P.E.I.R. 289, this Court stated:

> [21] What is required of one who seeks to establish ownership by adverse possession has been the subject of a long line of authorities. The cumulative result of these authorities was succinctly stated by Hon. Sir Wm. Mullock, C.J. Ex.D in *Wright v. Olmstead*, [1911] 20 O.W.R. 701 at 704:
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>> To succeed, plaintiff must show (a) actual possession for the statutory period by himself and those through whom he claims, (b) that such possession was with the intention of excluding from possession the owner or persons entitled to possession, and (c) dis-continuance of possession for the statutory period by defendant and all others, if any, entitled to possession. If he fails in any one of these respects he fails to establish a right to possession.

[48] Both *Matchless Group Inc. v. Carpasia Properties Inc.*, 2002 NFCA 56, 216 Nfld. & P.E.I.R. 206, at para. 19, and *Earle Estate v. Finn,* 2008 NLCA 14, 274 Nfld. & P.E.I.R. 33, at para. 11, make the following point:

> … the reclaiming of possession by an owner out of possession requires an intent to do so. Simple entry on the land is not enough.

[49] The oft-cited passage from the concurring reasons of Marshall J.A. in *Russell* suggests that "these dual elements have long been recognized as inherent attributes of adverse possession by the courts in this jurisdiction" (para. 28). He stated further:

> [28] … Hence, in *Taylor et al. Admin. of Morgan v. Nfld. Concrete Products Co. et al.*, [1941-46] Nfld. L.R. 500, Dunfield J. held at p. 506:
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>> …there was possession; such *animus domini* on the one hand and such general recognition on the other as is enough to support possession of an outlying and somewhat inaccessible field under outport conditions.

[50] In some cases the intention of excluding others may be presumed by the nature of the objective acts of possession. *Cantera v. Eller,* [2007] O.J. No. 1899, 157 A.C.W.S. (3d) 652 (Ont. S.C.J.), aff'd 2008 ONCA 876, states:

> [52] … this is a case where the intention is presumed by the nature of the possession. As Anderson J. stated in *Beaudoin*:
>
>> Where there is possession with the intention of holding for one's benefit, excluding all others, the possession is sufficient and animus is presumed. If it were necessary to say so, one could say of such a situation that the intention ipso facto included the intention to exclude the true owner even if his rights were unknown to the person in possession (at 2).

> [53] It is clear that for many years, the owners of both properties treated the post and wire fence as the line between their properties. In this sense the fence did "enclose" the backyard at 96 Johnson. There is no need to establish any additional element of intention; it is inferred from the continuous, notorious and open possession, at least in a case such as this where the owners or their predecessors in title were operating under a mutual mistake.

[51] Whether the requisite intention can be presumed by the nature of the objective acts (or whether the distinction between acts of possession and trespass is obscure) is a question of fact for the applications judge and his conclusion is entitled to deference on appeal.

[52] It is apparent from the applications judge's reasons as a whole that on examination of William James Power's acts of possession, he was not satisfied that an intention to dispossess any interests his siblings had in the property could be presumed from the objective actions. As a result, a large portion of the applications judge's reasons was dedicated to whether William James Power's acts were intended to dispossess those others who had an interest in Parcels C and D.

[53] In my view, this was an appropriate consideration in the contextual framework of the Estate's claim for possessory title when the adverse claimants were family members having identical interests. In requiring the Estate to establish both objective acts of possession and an intent to exclude others, the applications judge did not impose a higher burden of proof upon the Estate.

[54] Paragraphs 11-35 and 77–101 of the judge's decision are pertinent. The judge summarized the evidence presented and the conclusions that could be drawn from that evidence. Both of these portions of the applications judge's decision provide details of the use of the land by William James Power, his stepmother, his brothers Patrick and Phillip and their respective families, as well as strangers (the latter, with William James Power's express consent).

[55] On the objective element, the decision as a whole confirms that William James Power's use and occupation of Parcels C and D was open, continuous and notorious (from 1942 to his death in 2003) as well as exclusive to persons other than his siblings (whose next of kin were the adverse claimants).

[56] The applications judge then addressed the subjective element and concluded from the evidence as a whole that William James Power had not entered onto Parcels C and D after his father's death with the intent of excluding his stepmother and siblings from the land (para. 77). He also found that the

other family members had no notion that William James Power's acts of possession were intended to exclude them or extinquish any claim that may have by virtue of their equivalent interest in Patrick Power's unadministered estate. In other words, it was not apparent from William James Power's actions that he intended to dispossess his siblings' interests in the Estate of Patrick Power. The subjective element could not be presumed from the objective acts of possession.

[57] The applications judge relied upon William James Power's own references to Parcels C and D to support his conclusion that William James Power entered onto the land aware of the interests of the others and without an intention to exclude them. There was reference to "Patrick, Phillip and William" on Parcels C and D in a 1981 survey plan attached to an easement that William James Power gave at the request of a neighbour. The "Power brothers" were noted on a 1988 survey of Parcels C and D attached to William James Power's declaration of ownership of Parcels A and B. Also in 1988, William James Power's will bequeathed "all my interest and share" (in what the applications judge concluded was Parcels C and D) "to my children …". The judge distinguished the wording of this bequest from the testator's bequest of Parcels A and B to his daughters in which he used the words "my parcel of land at Logy Bay".

[58] No error is disclosed either in the applications judge's consideration of the subjective element or in his conclusion that the Estate had failed to establish that the actions of William James Power were taken with an intent to extinguish the interests of his siblings.

CONCLUSION

[59] For the reasons stated, I find no error in the applications judge's conclusion that the Estate had not established the criteria required for a certificate of title under the *Quieting of Titles Act.*

G. D. Butler J.A.