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**IN THE SUPREME COURT OF NOVA SCOTIA**  
**[Cite as: Whiting v. MacDonald, 2001 NSSC 3]**

**BETWEEN:**

**DANIEL GEORGE WHITING and MARY WHITING**

**PLAINTIFFS**

**- and -**

**FRANCES MacDONALD and MARIE MacDONALD**

**DEFENDANTS**

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**D E C I S I O N**

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**HEARD BEFORE:**            **The Honourable Justice Walter R.E. Goodfellow in the  
Supreme Court of Nova Scotia at Sydney, N.S. on November  
30, 2000, December 1, 2000, December 5, 2000.**

**DECISION:**                **December 5, 2000 (Orally)**

**WRITTEN RELEASE  
OF ORAL**                    **December 6, 2000**

**COUNSEL:**                **Darlene MacRury, Solicitor for Plaintiffs  
Frank G. Gillis, Solicitor for the Defendants**

**GOODFELLOW, J.: (Orally)**

**BACKGROUND**

Daniel George Whiting, born December the 16<sup>th</sup>, 1947, is the husband of Mary Whiting. They were married in 1967. His father was Hoyles Whiting and his mother, Philomena.

Hoyles Whiting obtained a Deed July the 12<sup>th</sup>, 1945 from a Daniel Campbell for land accessed off what is now Bell Street, Glace Bay, Nova Scotia. This property is known as 49 Bell Street and Daniel's father secured an additional lot bordering on Bell Street and the access driveway from Neil MacCormack by deed dated the 21<sup>st</sup> of July, 1955. The property acquired in 1945 became the home of Hoyles and Philomena Whiting and Daniel George Whiting was born and remained in that home until he was approximately 19 years of age and returned to the family home somewhere around 22 to 23 years ago. He and Mary Whiting have four children which although they were not born in the family home, lived and were raised for much of their childhood in the family home.

Art Mullins is the father of Ann Marie MacDonald who is married to Francis MacDonald. He is 64 years of age and has lived the last 15 years approximately at 44 Duncan Street and previously, his mother had a home on Bell Street. He left that home when he was 19 years of age but returned to the area after an earlier divorce and purchased property adjacent to

the Whiting property he thought in 1984 but probably in 1986. This property had a building built by Harbex for the storage of furniture which Art Mullins and his brother, Cecil Mullins, tore down. Arthur Mullins had a survey for what he understood at that time to be his lands done by J. Carl MacDonald, N.S.L.S. January the 31<sup>st</sup>, 1986 which shows the Harbex building being the larger of two designated buildings located and notes the land to the North as lands of Amelia Dicks and lands of Hoyles Whiting.

Another plan was prepared at the request of Art Mullins by Dennis Prendergast, N.S.L.S. the 7<sup>th</sup> of July 1997. It shows the approximate line by Carl MacDonald in 1986 and the area in dispute, which were previously noted as lands of Amelia Dicks, is from the line drawn by Carl MacDonald in 1986 and the area in dispute. The disputed parcel of land is approximately 26 feet by 60.96 feet lying to the Northeast of a Municipal pipeline easement of the Southeastern side of Duncan Street.

Art Mullins conveyed the land, including that which the former Harbex building was previously situate, and including the land under dispute to his daughter Ann Marie MacDonald, in 1997 and Ann Marie MacDonald and her husband, Frances, proceeded to build a home on the property. The building is not situate on the land in dispute, however, the Macdonald's wish to build a garage on the land in dispute and have put fill over the grass now extending to much of the disputed land.

## **PLAINTIFF'S CLAIM**

The Plaintiffs seek a declaration of the use and occupation of the disputed lands pursuant to the provisions of the *Limitation of Actions Act*, R.S.N.S., 1989 c.258 as amended by virtue of open possession, dominion, control and use of their family and their predecessors in title from approximately 1940 until the conveyance by 1997 by Arthur Mullins to the MacDonald's.

The Defendants dispute the Plaintiffs claim and put them to the strict proof thereof and additionally claim actual possession of the lands and/or possession of part only of the lands which they say is described in their Deed giving them constructive possession of the entire parcel.

## **LIMITATIONS OF ACTIONS ACT**

### **Action respecting land or rent**

**10** No person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.

## **CONSTRUCTIVE POSSESSION**

The principle of constructive possession is set out in Anger and Honsberger of Canadian Law of Real Property (1985) Vol 2 pp 1571,

The rule as to constructive possession differs according to whether the claimant has documentary title or color of title or is a trespasser without color of title. Where a person having paper title to land occupies part of it, he is regarded in law as being in possession of the whole unless another person is in actual, physical possession of some part to the exclusion of the true owner. To constitute color of title it is not essential that the title under which the party claims should be a valid one. It is not the instrument which gives the title, but adverse possession under it for the requisite period, with color of title. A claim asserted to property under the provisions of a conveyance, however, inadequate to convey the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the *Statue of Limitations*, other requisites of those statues being complied with.

**R.B. Ferguson Construction Limited v. Ormiston** (1989), 91 N.S.R 2<sup>nd</sup> 226 (NSCA), MacKeigan, C..J, pp. 228

A person who has possessed part only of lands described in what may have been a defective deed is deemed to be in constructive possession of the entire parcel described in the deed. Haliburton, C.J., in **Lessee of Lawson v. Whitman** (1851), 1 N.S.R, 208, and **Wood v. LeBlanc** (1904), 34 S.C.R. 627.

## FINDINGS

**Fencing:**

Daniel and Mary Whiting both give evidence that there existed a fence delineating their land and the land of Art Mullins. They indicate that remnants of the fence existed for many years immediately to the rear of the Harbax building and that it ran from Duncan Street through to Bell Street. Mary Whiting has resided at 49 Bell Street for approximately 23 years and she and her husband Daniel brought up their four children in the home. When they first occupied the family home their children were two, four, eight and ten years of age. She's not entirely sure the Harbax building was there when she moved into the property but remembers it being removed by Art Mullins and that it was there for approximately ten years. She clearly recalls a fence that ran behind the barn but during her time there was no evidence of it running all the way to Duncan Street or to Bell Street. What existed from her own observation was a few posts, barbed wire and the four or five posts that she came across are no longer there because she took them out probably in 1979/1980. There were only bits and pieces left for removal. She explained why she removed them because the first winter they were there the kids would play in that area and the second winter they took to jumping off the barn (Harbax building) and she was scared that the children would impale themselves and so she along with her son who was then eleven or twelve removed the remaining posts and debris and she used grass cutters right up to the Harbax building. Mary Whiting maintains that the photographs introduced in evidence the originals of which were made available to the defendant's solicitor but can not be located by either party's solicitor would show in her words; "the fence clear as a bell". She estimated the fence to be probably a foot but very close to the Harbax building. She had estimated on discovery March the

11, 1999 a distance of two to three feet from the Harbax building and at one point apparently acknowledged that the furthest the fence could be out was five feet. She explained that when she mentioned five feet she was talking of the top section but still believes that it was closer to a foot and she recalls children having to squeeze between the fence and the Harbax building and that there was just enough room for them to get through by squeezing through. I found Mary Whiting's evidence to be particularly credible on this point and made a note of her honesty during the time she was on the stand.

Daniel George Whiting recalls when his father bought the property marked lands of Hoyles Whiting from MacCormack for fifty dollars (\$50.00) and he can always remember fencing and he marked on the 1997 Prendergast plan where he recalled a fence immediately to the rear of the Harbax building and on the boundary line as shown on the earlier MacDonald survey. He recalls the fence being in existence when he was a kid in the '50's and portions of it remaining from his recollection into the early '80's. This was in the area of the Harbax warehouse and his land. There were part posts, they were dilapidated and it is his understanding that the remains were removed by his wife Mary. He also gave evidence of generally speaking the degree to which fencing was utilized in his earlier days of his familiarity with the property in dispute and the surrounding area. He is convinced the fence was still there in part in 1987. He says the surveyor mark shown to him by Art Mullins was in line with the old fence. He expressed the same view as Mary Whiting that the original photographs would show the fence.

In cross examination he says the fence was right behind the Harbax building, very close to it, within three feet but he acknowledges that he never measured it. He recalls the fencing by MacCormack because they had horses to restrain. He acknowledged in one of the aerial photographs that the dark line wasn't necessarily indicative of a fence but certainly looking at that aerial photograph it is impossible to discern with any certainty what the dark line referred to represents.

Mrs. Helen MacDonald is now 68 years of age, and resides at 47 Bell Street. Hoyles and Philomena Whiting were her uncle and aunt and William Ford was her father. She recalls a fence behind the Harbax building running from Bell to Duncan and says the kids used to jump off the building and it was a foot or two between the building and the fence.

William Ford now 53 has lived on Bell Street for most of his life. His parents were William and Jessie. He recalls an old fence going straight through from Bell to Duncan.

Hugh Cameron Kennedy lives at 75 Duncan Street. While he describes himself a neighbor, his home is some distance from the disputed property. I would summarize his evidence as that of; "drive by observations." He was doubtful that he was every actually on the

land in dispute until apparently last year he walked across it to go to the wharf. I find that there is no foundation to his observations. Specifically I conclude that he's wrong in suggesting that there was no fencing or remnants of fencing in the early '70's. My observation of him was that he knew not of what he spoke.

James Ford has a very strong familiarity with the area and his first recollection of his uncle Hoyles Whiting and aunt Philomena was about 1940, 1941. William Ford was his father and he recalls the fence being there until he was about 20 years and that the MacCormick land was always fenced in primarily because they had horses. When he was in his words a little smaller he was able to walk between the fence and the Harbax building and placed the distance at 18 inches to 2 feet. He recalls the fence went elsewhere and repeated that behind the Harbax building he used to squeeze through. He has a memory of it after he was married in 1966 and remembers some parts of the posts being white washed until 1970 and that it began to deteriorate and fall down after MacCormack died. He says there was a fence line that ran behind the barn and confirmed in cross examination that the fencing was there for some period of time. He described a fair amount of fencing in that area. His evidence, along with the evidence of others leads me to the conclusion that for a period of time, particularly when people had animals there was a fair measure of fencing in that general area. Neglect and disrepair began when the area took on a more quasi urban character. He described the fencing in it's deteriorated state, being broken off and specifically remembers fencing in the area where the surveyor's marker stake(S.M.S.).

Dennis Prendergast, N.S.L.S. gave evidence and when he did the survey of the 2nd of November 1987 he acknowledged that the scope of the survey changed from a location certificate for the Whiting house to of a legal ownership.

I accept the evidence of Daniel George Whiting that he in fact had discussions with Mr. Prendergast and that he was advised by Mr. Prendergast part of his existing home was not on land within his Deed and I've no doubt that was the focus of the change from a location certificate and that quite probably became a preoccupation. Mr. Prendergast does not recall any conversations with Mr. Whiting and made no notes of any features of the disputed land and recalls no conversations with Mr. Whiting's. He does describe the land in the disputed area as uniform and without any sign of changed between the disputed area and the undisputed area of the Whiting lands.

When Mr. Prendergast went out in 1997 to do the Mullin's survey he found the recently installed town water line and everything on the Northeast towards Mr. Whiting at that point he notes was all mowed or maintained. He acknowledges the notation on his 7th of July 1997 plan relating to the lot under dispute; "area A.D.F.E.A. maintained by Daniel Whiting." He thinks this might have come from Art Mullins and on my overall assessment of the evidence. I am satisfied that on a balance of probability this reference on the plan in 1997 had its source from Art Mullins. Mr. Prendergast acknowledged the reference to remnants of old fence line on the

Whiting boundary with the lands formerly of Sarah Kennedy. Existence of fencing was denied by Hugh Cameron Kennedy. Mr. Prendergast also acknowledged the marking of a fence line on the plan of Russell MacKinnon N.S.L.S. 30th November 1979 and that fence line coincides by extension across the road where Daniel George Whiting says the fence existed just to the rear of the Harbax building. I must point out in fairness to Mr. Prendergast that he does not deny having conversations with Mr. Whiting but simply indicates he honestly can't recall such discussions.

Mr. Prendergast did not appear to me to have done a very through conscience recording of notes nor did he give any explanation or historical foundation why he accepted in 1997 one S.M.S. over another.

Theresa Gillis in her evidence referred to fencing. She referred particularly to fencing by her grandmother's home.

Cecil Mullins is 65 and has a familiarity with the area. His only involvement with the Harbax building was with respect to dismantling it and he outlined how it was taken down and indicates that the back portion was allowed to fall into the disputed area and it's his recollection that there was no fencing in that area or any signs of fencing such as posts, partial posts etc. It's

my recollection he did make some remark about the grandmother's house being no too close to the fence. In any event I have not found his evidence very forceful in all of it's respects and while he comes across as a honest, decent person, he appears more to have convinced himself of the state of affairs rather than relaying with any real conviction what actually existed at the time of demolition. His brother Art Mullins also described the manner in which the Harbax building was taken down. he says there was no fence line but acknowledges some fencing in the area, particularly on the MacCormack property. Again I believe he acknowledged some fencing by the Whiting grandmother's property. Very clearly he takes the view that there was no fence line. While he made statements such as; "I go by the surveyor". It's inconceivable to me that he would not have seen and known of the remnants of the fence behind the Harbax building. I do not accept that he would not have had some knowledge of the remnants of the fence to the rear of the Harbax building.

## **MAINTENANCE AND USE**

I've already referred to the extent and time frame when the Whiting children and other children played particularly in the winter time within the disputed area and most particularly by jumping off the Harbax building. It was this degree of activity that concerned Mary Whiting and was a major reason in her removal of remnants of posts and barbed wire.

Arthur Mullins gave evidence that he mowed and maintained the disputed area at least

after the demolishing of the Harbax building and it is interesting that not one other witness came forward to confirm or support in any way that Art Mullins at any time maintained, mowed or for that matter concerned himself with the disputed property until he attempted to include it in the conveyance to his daughter.

The use and occupation of the disputed area goes back to the days when the Whiting grandmother had her home on the property and Hoyles Whiting had a garage which quite probably encroached to some extent on the disputed area. The grandmother's house was not too far away from where the fence delineating the properties existed for many years. Daniel Whiting was a kid in the late '50's. He thinks around '56, '57 when the grandmother's house was torn down and he tore the garage down somewhere around 1966 and 1967. He recalls tearing the garage down to reduce the municipal assessment and taxes. Daniel Whiting put the grandmother's house which he's familiar with since he was a kid partly on and partly below the disputed land. The garage was utilized by his father particularly in the winter to store his car.

Theresa Gillis now 73 is the granddaughter of Catherine Whiting and she recalls her grandmother giving Hoyles and Philomena three rooms in the house. She pointed to the lands of Amelia Dicks as being right where the old former grandmother's home was located and she can't recall exactly when the grandmother's home was taken down.

Mrs. Helen MacDonald recalls the grandmother's home and described it as a two bedroom bungalow and referred to it as being "up further" which would place it at least of the disputed area. She remembers the grandmother Katherine being called "Kit" and she recalls the home not being a great distance from the fence. Her best recollection is the grandmother's home was torn down in '54 or '55, early '50's. She recalls dozens of kids playing in the area. She recalls the same posts being removed. Before they were removed they were jagged like, a foot to a foot and a half off the ground she would say.

William Ford recalls helping tear down the red barn which incidentally is shown in a post card, **Exhibit #2**. He helped to tear it down a good many years ago. He said 25 to 30 and his brother used to keep lobster gear in that garage or red barn. He recalls the old house next to the barn which was grandmother Katherine Whitings. He was in it two or three times when he was about six years old and understood the barn and house were owned by Daniel's father.

James Ford was born October 12, 1939, is a lobster fisherman and he is the one that stored fishing gear in the old barn/garage. He remembers the grandmother's house and he thinks it was taken down in 1954 because he remembers he lost his brother in February 1954 and it was the same summer that they tore down the house. It is his recollection that the front door of the grandmother's house was not used by many people and it was mostly the back door and he generally placed the grandmother's house when moving his hands over the various plans within

the disputed area.

Art Mullins knew from early recollection around 1940 that the grandmother Whiting lived in the home under discussion.

There is considerable evidence of Mary Whiting mowing and maintaining the disputed land area. I have already alluded to the fact that she removed the remnants of the fence and she used grass cutters to cut the grass that in the area of the fence posts. She married Daniel Whiting in 1967. They moved there in 1977 in December and she not only removed the remnants of the fence but cleared up all the rocks and boulders, used her grass cutters then proceeded to mow the land with frequency every year thereafter. Essentially at the same time as maintaining the remainder of the lawn area of the Whiting property. She maintained the property right up to the Harbax barn and did so without any objection until Art Mullins turned this property to his daughter Ann Marie MacDonald. She confirmed that she mowed in the area which is now covered with dirt, just a little down from the Woodland sign. Daniel George Whiting confirmed by his observations of the extent and frequency with which his wife mowed the land in the disputed area. Theresa Gillis also confirmed that Mary kept it mowed and she observed her doing it hundreds of times and said it was like a golf course and no different than the remaining Whiting land. William Ford saw Mary mow the disputed lands a hundred times. He on occasion helped her cut the grass. James Ford gave evidence that when the grandmother's house and

garage were removed Hoyles wife which would be Philomena used to mow it and that Mary took over and continued in the normal fashion to mow it the same as their other land.

Art Mullins claims to have mowed and maintained the land. Anything he did in that regard would have been after he purported to convey the disputed area to his daughter. Any suggestion that he mowed or maintained the disputed area prior to that time is fiction and not fact.

There is also evidence that the land or at least part of the disputed land would have been provided over many years to fishermen going to their wharfs as a parking area by permission of Daniel Whiting.

The Defendant Marie MacDonald gave evidence and the major thrust of her evidence was her interpretation of an ariel photograph as it relates to what she says were telephone/power posts. There is no foundation for her interpretation, no evidence of when the poles were placed, where they were placed, what changes were made, what distances were involved in any changes, the angle of the photographs, and when the existing posts were installed, etc., etc., and Mrs. MacDonald has nowhere near the familiarity and knowledge of the area of those who have lived

there most of their lives.

### **Paper Title**

Daniel Whiting insists that the area under dispute is contained in the initial Deed from Daniel Campbell to Hoyles Whiting 12 July 1945, however, I am unable to conclude on the evidence before me that such is the case. Art Mullins relies now on the Prendergast survey of the 2nd of November 1997 as providing confirmation of his paper title to the area in dispute. I am far from satisfied that he has paper title to the disputed area. It must be remembered Mr. Mullins engaged J. Carl MacDonald, N.S.L.S. to survey his land and that plan of January 31, 1986 fixes Mr. Mullins boundary at the line where the fence existed immediately to the rear of the Harbax building. The earlier plan by Russell MacKinnon, N.S.L.S. 30th of November 1979 referenced a surveyor marker stake (S.M.S.) at the fence line and when Mr. Prendergast prepared his final plan that S.M.S. appears to have been removed and in any event Mr. Prendergast simply measured from a S.M.S. at the other end of the Mr. Mullins boundary and ran the line the distance said in Mr. Mullin's Deed. There is no historical or other evidence that provides a comfort level that Mr. Prendergast's starting point of a S.M.S. is anymore valid than the one he chose to ignore that existed in the earlier surveys.

### **Acknowledgment of Possession-Title**

Daniel Whiting gave evidence of several conversations between himself and Art Mullins.

When Mr. Prendergast indicated to Daniel Whiting that his house was not within his description, Daniel Whiting went to Art Mullins and says Art Mullins assured him that the disputed land was Daniel Whiting's, that it was not in the Mullins Deed and further that Mullins showed him the S.M.S. that existed in the earlier surveys. Art Mullins assured Daniel Whiting that he would never try and take the now disputed land from him. There were other conversations where Art Mullins assured him not to worry, that Daniel Whiting's daughter Sherry could go ahead and build on the land because it was Whiting land. Art Mullins indicated that when he had the 1997 survey that he had told the surveyor that it was Whiting land and that is consistent with the remark placed on the 1997 plan by Mr. Prendergast. There were other conversations. Art Mullins simply denies any of them ever took place. I am satisfied that a number of conversations took place wherein Art Mullins unequivocally acknowledged to Daniel Whiting that the now disputed land was owned by Daniel Whiting's. I have very strong preference for the evidence of Daniel George Whiting over that of the evidence of Art Mullins in relation to these conversations having taken place and I prefer the corroborated evidence of Mary Whiting to the denial of Art Mullin's spouse.

## **CREDIBILITY**

Counsel have indicated and I agree that credibility is a major factor in weighing the evidence advanced in support of adverse possession of the disputed land area and its long time

delineation from the land upon which the Harbax building was previously situate. So that there will be no misunderstanding other than the specifics comments I've already made on the issue of credibility, I make it clear that I readily and strongly prefer and accept the evidence of Daniel Whiting over that of Art Mullins. I had an opportunity to observe carefully all of the witnesses and in particular I observed Art Mullins notable discomfort in his denials of what took place between he and Daniel Whiting and of the evidence they advanced in relation to lengthy adverse possession of the land now under dispute by Daniel Whiting and his predecessors.

## **CONCLUSION**

I've already determined that the paper title of Frances MacDonald and Ann Marie MacDonald derived from Art Mullins did not encompass the now disputed land area, however, even if I am in error in that regard I am satisfied on the totality of the evidence as I have carefully weighed that Daniel George Whiting and Mary Whiting have met the onus of proving well beyond a balance of probabilities threshold, adverse possession and an intention to possess the land as well as exercising control of the land to the exclusion of all other persons and they are entitled to the declaration sought.

## **COSTS**

Having heard counsel with respect to costs, it is difficult to fix the amount involved when

dealing with rights-of-way and relatively small pieces of land. **Collins v. Speight** (1993), 123 N.S.R. 2<sup>nd</sup> pp.71. **Whyatt v. Franklin** (1993), 123 N.S.R. 2<sup>nd</sup> pp 347. Normally I equate the effort required to something akin for a two day trial perhaps \$30,000.00 as the amount involved and for a three day trial something in the vicinity of \$45,000.00 as the amount involved. In this case it's clear that although we sat on three different days the trial was more in the nature of two days or less and I have a distinct impression that the actual value of the land was somewhat less than \$30,000.00. The matter while detailed and time consuming was not complex and as counsel indicated substantially turned on the issue of credibility. In the circumstances doing the best I can I fix the amount involved at \$20,000.00 with costs in accordance with **Tariff A, Basic Scale 3** \$2,625.00 plus disbursements of \$353.65. Total costs and disbursements tax allowed in the amount of \$2,978.65.

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Goodfellow: J.

Sydney, Nova Scotia  
December 5, 2000