**SUPREME COURT OF NOVA SCOTIA**
**Citation:** Bain v. Nova Scotia (Attorney General), 2012 NSSC 355

**Date:** 20121010
**Docket:** Syd. No. 313233
**Registry:** Sydney, N.S.

Between:

SANDRA BAIN of Saint John, Province of New Brunswick, and LEOTHA SEALE, of Sydney Nova Scotia

Plaintiffs (Defendants by Counterclaim)

and

THE ATTORNEY GENERAL OF THE PROVINCE OF NOVA SCOTIA, representing Her Majesty the Queen in Right of the Province

Defendant

and

SCOTIA LIMESTONE LIMITED and LLOYD FRASER and PATRICIA FRASER

Defendants (Plaintiffs by Counterclaim)

| | |
|---|---|
| **Judge:** | The Honourable Justice Patrick J. Murray |
| **Heard:** | January 16th, 17th, 18th, 19th and 20th 2012, Sydney, Nova Scotia |
| **Written Decision:** | October 10, 2012 |
| **Counsel:** | David MacIsaac, Counsel for the Plaintiff, Sandra Bain<br>Ralph W. Ripley, Counsel for the Plaintiff, Leotha Seale<br>Robert H. Pineo/Jeremy P. Smith, Counsel for the Defendants, Scotia Limestone Limited and Lloyd and Patricia Fraser<br>Duncan MacEachern, Counsel of Record for the Attorney General (without appearing) |

**By the Court**:

## INTRODUCTION

[1] The Plaintiffs, Sandra Bain and Leotha Seale, are seeking a Certificate of Title under the *Quieting of Titles Act*, R.S.N.S. 1989, c. 382. A certificate, if granted, would "quiet" or "clear" the title to their lands. Each claims ownership of a lot located at New Campbellton, Victoria County, Nova Scotia.

[2] For Sandra Bain, the lot in question was the home of her parents, Sandy and Catherine Bain, since the early 1960s (the Bain Lot). Her father, Sandy Bain, died in 1968. Her mother, Catherine Bain, resided in the small home, near the New Campbellton Road, until just prior to her death in 2004. She was a well known and popular member of the New Campbellton community. Her occupation of these lands was also well known. Despite her passing, she is the central figure to the application by her daughter. Neither Catherine Bain or her daughter, Sandra Bain, hold a deed to the land claimed.

[3] Similarly, Leotha Seale, and her husband, Oscar Seale, resided on the lands being claimed by Leotha Seale. Oscar Seale died in 1996. They are also well known to the New Campbellton community. They had a large family and began occupying their lot (the Seale Lot) in the mid-to-late 1950s. Oscar Seale and his wife erected a cottage, in three (3) phases. They initially began camping in the area in a tent. The Seale occupation of the land has been seasonal, as a summer home. It is located further "in" from the New Campbellton Road than Mrs. Bain's, but in close proximity to the Bain lot. There is a small brook running between the two (2) lots to which title is claimed. Like Mrs. Bain, Leotha Seale, does not hold a deed to the property. Neither she or her husband has paper title.

[4] It is acknowledged that paper title to the lands, or deeded title, is held currently by the Defendant, Scotia Limestone Limited, and the Defendants, Lloyd and Patricia Fraser. Prior to them, it was held by the United Church of Canada, the Sydney Presbytery, and the Sydney Steel Corporation ("Sysco").

[5] At the heart of this matter is whether the Plaintiffs, and each of them, have proven title through adverse possession. Under the *Limitation of Actions Act*, R.S.N.S., 1989, C. 258, the true owners' title to lands may be defeated by the possession of another for the requisite period (twenty (20) years), if the true owner

fails to make entry on the lands within that period of time. There are additional requirements which must be met, one of which is that the occupation must be to the exclusion of the true owner. The most common elements are recited as follows. The possession by the occupier must be open, notorious, continuous, and exclusive. Further, the occupation must be without the consent of the true owner, throughout the required period.

[6] This case is about whether Sandra Bain and Leotha Seale have established that they are entitled to ownership of the lands under the doctrine of adverse possession. The failure of a registered owner to act toward his land, as an owner should, can result in serious consequences for that owner if a claim of occupation meets the requirements of the *Statute of Limitations*, and the common law as set out briefly above in a general way.

## THE POSITION OF THE PARTIES

### *The Bain Claim*

[7] The Plaintiff, Sandra Bain, is the only child of Sandy and Catherine Bain. She was born in 1957 and resides in St. John, New Brunswick. She is currently employed with the Canada Revenue Agency.

[8] In 1961, the Seal Island Bridge spanning the Bras d'Or Lakes, at the foot of Kelly's Mountain, was constructed. The bridge connects the Island of Boularderie to the east, with New Campbellton to the west. Prior to the bridge being completed, a ferry service operated between New Campbellton and Big Bras d'Or. The late Sandy Bain worked on the ferry.

[9] On or after the time the bridge was completed, Sandy Bain purchased the bunkhouse which housed the crew at or near the ferry site. It was moved and placed on the lands of the church at or near the New Campbellton Road, and very close to the shore of the Bras d'Or Lakes. It was shortly after that the Bains moved from the farmhouse, located "up the hill" to the small bungalow, being the former crew bunkhouse.

[10] Sandra Bain gave evidence that it was at least October of 1963 when her family moved into the bunkhouse. She remembered starting school in Baddeck and her father taking a watchman's job. She was unsure if prior to that they had

been there, but thought perhaps they had been for a couple of months. She recalled it had been later, "within the year", that electricity had been installed. She remembered the oil lamps. She did say, also, it could have been 1962, 1963 or 1964 that they moved in, within that period. The property became known at that time as Civic No. 1019 New Campbellton Road and that has continued to present.

[11] At the time the Bains moved the bunkhouse to the land, the land was owned by the United Church of Canada. Church records indicate that the church gave consideration to leasing or conveying the Bain lot to them, after the bunkhouse had been placed there. No lease or conveyance was ever completed, or at least none is clear from the evidence. The Bain lot contains an area of 42,544 square feet, and is outlined in orange on Exhibit #7 - the 2009 survey of Island Surveys signed by Mr. Paul G. Harvey.

[12] The evidence indicates that Sandy Bain had a heart condition and it was, therefore, easier for him to use the small bungalow at the bottom of the hill, rather than climb up the hill to the old Bain farm property. The Bain lot, therefore, became their permanent residence. Sandy Bain died in 1968. The farm, known also as the Hamilton property, was sold by Catherine Bain by deed dated July 22, 1968, following her husband's death on March 6, 1968. This property was also known as the MacLean tract, which was registered in Book 4, Page 342. It was that same registry reference that became attached (incorrectly) to the Bain lot on the tax assessments and bills.

[13] The widow, Catherine Bain, never remarried. She continued to reside on the Bain lands, and treated the property as her home. By all accounts, it was a pretty little home which she kept neat and tidy. She was proud of it. The property was maintained by her or she arranged to have it kept up, including: mowing the grass, clearing and cutting of brush and alders, clearing snow in winter and cutting firewood.

[14] An obvious question is, what arrangements did the Bains have with the registered owner of the lands? Apart from the requirement of exclusivity by Mrs. Bain, the issue of whether Catherine Bain's occupation of the lands was consensual and with permission is a major issue, if not the major issue.

[15] Sandra Bain's position is that there is no evidence, in writing, that her mother's occupation was consensual or with permission. Mrs. Bain, she says, continued to occupy the property following Scotia Limestone Limited's offer to relocate her to another parcel of land purchased by Sysco. The Abstract of Title shows that in 1979, the real property, which included the Bain lands, was conveyed to the Sydney Steel Corporation (Sysco). Shortly after that, Sysco conveyed the land to Scotia Limestone (Scotia) in 1980. In 1995, Mosher Limestone acquired ownership of Scotia. In 1998, Scotia conveyed a parcel of land to its' employee, Lloyd Fraser, and his wife Patricia Fraser. This conveyance (Lot 1) overlapped with, and included, a small portion of the Bain lands.

[16] In 2001, Scotia conveyed a further parcel to the Frasers, which included the remainder of the Bain lands, and a portion of the Seale lot (to form Lot 1A). Thus, the naming of Mr. and Mrs. Fraser as Defendants in this matter.

[17] The Will of Catherine Bain, dated October 5, 2003 devised her entire estate to her daughter Sandra Bain, the Plaintiff herein. In her Will, Catherine Bain left her home at 1019 New Campbellton Road "...together with the interest that I have in the parcel of land upon which the house is situate as evidenced by the payment of taxes in relation to the same for the past forty years." It is evident that Mrs. Bain considered the payment of taxes upon these lands for such an extended period to be a critical factor in relation to any claim which she had on the lands. She identified herself as having "an interest" in the lands.

***The Seale Claim***

[18] The late Oscar Seale attended camp as a boy very near to the lands claimed by his wife, Leotha Seale. He attended the United Missions Camp, which included children from Whitney Pier, to enjoy summer camp in New Campbellton, owned by the United Church of Canada for the Women's Missionary Society.

[19] Mr. Seale returned to the area with his wife and family (small children) which began with Sunday drives, then picnics, then eventually tenting on the lands in question in the mid 1950s, when school ended.

[20] Mrs. Seale submitted an Affidavit, which confirmed through a series of photographs (some of which were dated) that she and her family began to use the land, and then built a summer cottage on it. The time-frame for the building and

completion of the summer home was mid-to-late fifties as the beginning and early 1960s as the ending, for the erection for the cottage.

[21] The existence of the photographs and their dates according to the ages of the children, provide credible evidence as to the length of time the Seales have been in possession of the subject lands. It is a period approaching sixty (60) years to the present day.

[22] In addition, Mrs. Seale states her husband built a roadway to the property, to the east of the small brook. Prior to that, the Seales used the roadway on the west side of the brook. A wooden foot bridge was constructed over the brook. This bridge is shown in several of the photographs attached to Mrs. Seale's Affidavit. The "second driveway", she says, has been used continuously since the late 1960s. (Paragraph 28 of L. Seale's Affidavit).

[23] Finally, Mrs. Seale claims, at no time did she or her husband seek out the consent of the church or other owners. They sought only the permission of Mr. Sandy Bain, who lived nearby, with respect to the tenting and construction of the cottage. Mr. Bain, for his part, had no authority to provide Mr. and Mrs. Seale with permission to use or construct on the land.

[24] Mrs. Seale points further to the Affidavit of Judith Colwell (Exhibit #3, Tab 7), the Archivist for the United Church of Canada, for the Maritime Provinces.

[25] The research performed by the church revealed no record in the church's archives of consent being requested by, or given, to Mr. and Mrs. Seale, to occupy and reside on the land. The Plaintiff, Mrs. Seale, says therefore, their occupation has been without permission and, therefore, adverse to the title of the true owners, for the relevant period of time.

[26] There is, however, important evidence affecting the claim to the subject lands by Mrs. Seale. Her son-in-law, James Warren, (married to her daughter Elizabeth (Joey) Warren) wrote a letter in the year 2003 to the Mr. David Mosher of Mosher Limestone Ltd. Mosher Limestone acquired all of the interest of the Scotia Limestone in the year 1995. In the letter, Mr. Warren stated his father-and-mother-in-law had permission of the church - in particular, the "local church board", to be on the lands at New Campbellton.

[27] The letter gives rise to several questions. Was this an assumption on his part, or was it a fact? If it was a fact, what evidence exists to support it? Was it accurate? Is it reliable, or does it contain hearsay? Notwithstanding these aspects, it was admitted by consent.

[28] There is little or no dispute as to the length of the Seale occupation or that it was continuous. There is evidence that the cottage was used less following Oscar Seale's death, as he had used it for hunting in the fall. His son Howard, however, has continued to use it for that purpose. Further, the evidence is that the lands have continued to be used each summer as a cottage by Mrs. Seale and her family.

[29] The key issue in respect of the Seale claim, therefore, is also one of consent. To a lesser degree, there is an issue of whether the use was to the exclusion of the true owner. There is an issue also as to whether the Seale's acquired the right-of-way access to their lot. The description provided by the claimant includes a right-of-way over the existing driveway. Mrs. Seale asks the Court to confer upon the Seale lot, that right-of-way to accompany same.

**THE ISSUES**

[30] (1) Are the Plaintiffs, Sandra Bain and Leotha Seale, (and each of them), entitled to a Certificate of Title under the *Quieting of Titles Act*, R.S., c. 382, s. 1, to the lands claimed by them?

(2) Underlying issues:

(a) Have the Plaintiffs (and each of them) under the doctrine of adverse possession, occupied the lands in question openly, notoriously, continuously and exclusively for a period of twenty (20) years, such that the true owner is statue barred from seeking recovery of the lands under the *Limitation of Actions Act.*

(b) If so, has the occupation or possession been adverse to the true owner, or has the occupation been consensual with the permission of the true owner?

(c) If the possession has been with consent, have the Defendants proven that a tenancy at will was established, which would "start the clock" running, one year following commencement of the tenancy at will?

## LAW AND ANALYSIS

### *Limitation of Actions Act*

[31] Section 10 of the *Limitation of Actions Act* bars an action for the recovery of land, unless an action is commenced within twenty (20) years. A key question is, when did the cause of action arise, so as to mark the beginning of the limitation period? The *Act* says "within twenty (20) years next after the time at which the right to make entry or distress, or to bring such an action, first accrued to the person making or bringing same".

[32] Section 11 of the *Act* has in it deeming provisions which determine the commencement of the limitation period. Under Section 11(a), the right to make entry or distress, or to bring an action to recover land or rent, shall be deemed to have first accrued, "at the time of such dispossession or discontinuance of possession, or the last time at which profits or rent were so received".

[33] The idea is that once the limitation period has run its' course, the right of the deed holder, (or the "paper title holder") to bring an action is "extinguished", as prescribed in Section 22 of the *Act* which states as follows:

> **"At the determination of the period limited by this Act to any person for making an entry, or distress, or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress, or action respectively might have been made or brought within such period, shall be extinguished. R.S., c. 258, s. 22."**

## COMMON LAW

### *Case Law*

[34] The parties agree that the onus of proof lies upon the Plaintiffs to establish they have met or satisfied the elements of the legal test for title by adverse possession. Further, the type and quality of the evidence to cause an owner to lose its' land forever is, and should be, with "very persuasive evidence", as set out in

the case of **Spicer v. Bowater Mersy Paper Co.,** 2004 NSCA 39 - the recognized authority in this area of law. From this authority, it may be said that a true owner is presumed to be in possession of his or her land. In addition, what is required is a "full twenty (20) years" by the person claiming possessory title "and that their possession be open, notorious, exclusive and continuous".

[35] **Bowater** (at paragraph 20) added and refined the test in terms of some additional features, or requirements, depending on the facts of each case. Here, I refer to the words of Justice Roscoe at paragraph 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."**

[36] The Court in **Bowater** went on to say:

> **"Every time the owner, or its employees or its agents stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession."**

[37] Another case often cited, as was done by the Plaintiffs here and in **Bowater**, is **Ezbeidy v. Phalen** (1958), 11 DLR (2d) 660. The Court in **Ezbeidy** (MacQuarrie J.) spoke of when the presumption of possession (by the true owner) is "ousted", stating it is necessary first to prove an "actual adverse occupation", which must (also) be exclusive, continuous, open and notorious. Once that test has been proven, the true owner is "disseised" or "dispossessed". If this continues, the possession, according to **Ezbeidy** will (in time) ripen into title.

[38] "Adversity" being a requirement for adverse possession, I think there is a difference in stating "every time **the** owner (or its' employers, or agents) stepped on the land, they were in actual possession"(as in **Bowater**), as compared to every time "**an** owner" steps foot on the land. The incidents of normal usage will vary as will the type of occupation. This goes without saying, but it bears repeating that the nature of the adversity and the reasons for it, will determine whether the onus

has been discharged. Put another way, is it simple exclusivity that is required, or is it exclusivity from normal usage? The cases would seem to suggest it is the latter. In short, each case is fact specific. I turn now to the facts in support for, or against, each claim made here.

***Sandra Bain***

[39] The Defendants admit that the occupation by Mrs. Bain, and her daughter Sandra Bain was open and notorious (paragraph 19 of Plaintiff's Pre-trial Brief).

[40] Openness and notorious have similar (but also varied) meanings in the context of limitation periods. Both are necessary in that the occupation of the squatter must be brought to the attention of a prudent owner, so as to put the true owner "on notice" and "start the clock". This is what gives rise to such clear and blunt messages as "flying the flag over the land", and "staking one's claim"; and "this is my land, stay off of it"[1]. From there a true owner must make the decision to enter, or take action, within the requisite period. For greater clarity, there is no requirement that the true owner be given notice, only that the occupation be such that it would be discoverable by a reasonably prudent owner.

[41] I find from the evidence that the circumstances here support findings, notwithstanding the admission, that Mrs. Bain's possession was both open and notorious. The lot itself is not large at approximately one (1) acre. Her house was close to the road. Her lot was cleared and well maintained, much the same now as it was in the early 1960s when placed there, according to the Affidavit evidence and *viva voce* evidence of, for example, Mr. Thomas Pittman. Mr. Pittman, a neighbouring property owner, visited New Campbellton yearly from the mid-1950s to 2005, a period of fifty (50) years. Mrs. Bain's acts of possession (and that of her husband), in addition to the two buildings, (her residence and an out building) were numerous. It included gardening, the cutting of brush and alders, the cutting of grass, the use of wood to heat the house, the picking of strawberries and general maintenance and upkeep.

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[1] *Conrad v. Nova Scotia (Attorney General) Et Al (1994) 136 NSR (2d), 170*

*Gould v. Edmonds [2001] NSCA 184*

*Jeffbrett Enterprises Ltd. V. Marsh Bros.,* [1996] OJ No. 1995 (Gen Div) 52

[42] It is evident from the Affidavit evidence, that the Bains maintained their home. It is further evident from the survey (Exhibit # 7) and the photographs (Exhibit #3(1)(e)) that the house, though small, was prominently displayed on the lot. It was open and visible from the road. Their occupation of the lot in the community was also well known. Mrs. Bain, in particular, had many friends and neighbours who visited her. She was well known (and liked), it seems by all.

[43] I conclude there would be no problem discovering the Bains' occupation of the land. The wooden bridge which covered the brook, and which ran beside her house was somewhat of a landmark on the New Campbellton Road. This, I infer, from the Affidavit evidence, the photos and other evidence given.

***Continuity***

[44] In terms of continuity, Sandra Bain stated in her Affidavit at paragraph 15 as follows:

> **"15. THAT the bunkhouse that was moved to the property in 1961 or 1962 and shortly thereafter in 1962 my parents and I moved to this house. From then on it became our family's full-time year-round residence and was used as such by my mother, Catherine Bain, until shortly before she died on the 8th of August, 2004."**

[45] In terms of the year 1961, the receipts provided in Exhibit #3(1)(c) show the bunkhouse was not purchased until the end of May, 1962. It is unlikely, therefore, that the bunkhouse was moved to the property before that date. In cross-examination, Sandra Bain said it could have been 1962, 1963 or 1964. In Discovery, she knew for sure it was from October of 1963. She remembered using the oil lamps before the electricity was hooked up or installed. She said that electrical power had been installed, "within the year". She started school in Baddeck in 1963 and they might have been there a couple of months before that, according to her evidence. Mr. Pittman said in paragraph 16 of his Affidavit it was 1963, 1964. The Minutes of the Sydney Presbytery reflect that approval for an easement to permit the power company to bring electric power to Mrs. Sandy Bain's house, occurred on October 9, 1964 (Affidavit of Judith Colwell, Exhibit #3, Tab 7 (b)).

[46] At any rate, in 1968, her mother took employment with the MacLean family. By coincidence she lived with, and cared for, the mother of the Defendant, Patricia Fraser, in Big Bras d'Or. This lasted for less than a year as it was for the school year. The evidence was they took with them (from the home on the Bain lot) only what was needed and returned home on weekends to check the house and they had it watched over, during the winter.

[47] In addition, the Defendant's argue in their Brief (paragraph 45), that Catherine Bain gave up possession a second time. The second time was in the year prior to her death in August of 2004, when she resided in the Alderwood Guest Home in Baddeck. She resided there for just five (5) months prior to her death. Paragraph 45 of the Defendant's Brief reads as follows:

> **"45. In addition, it is clear that Catherine Bain gave up possession of the Bain Land twice during her occupation of it: once for employment and again in 2003 - 2004 when she began to reside in a seniors' home. During the time that Catherine Bain resided in the seniors' home and for a period of time after her death, Fraser entered the Bain Land and performed the maintenance required."**

[48] I am going to deal with this argument by the Defendant in a brief fashion. This was not a cabin in the woods unlocked and open to be shared by all those who came across it. This was the home of the Plaintiff and her mother. A temporary absence, for work in an otherwise lifetime of occupation, in my view does not stop the clock from running. From the evidence disclosed, they did not abandon the property - quite the contrary. It was her intention to return to it and she did return to the property. It was out of necessity (work) and it occurred, it appears, following the death of her husband in that same year.

[49] Similarly, I am not prepared to conclude, that Mrs. Bain moving to a nursing home several months prior to her death, necessarily meant that her occupation ended. This was near the end of her life. The house and contents remained until her death, for her estate to be dealt with. Neither of these periods constituted a full year's absence. The latter is less relevant to the question to be decided here, as any right to title would most likely have vested long before the February 2004 date, although any twenty (20) year period may be used to claim title, subject to the specific wording in Section 12(1) of the *Quieting of Titles Act*.

[50] I conclude, therefore, that Mrs. Bain's occupation was continuous and extended for approximately forty (40) years from 1963 or 1964 to 2004. A more detailed analysis will be made, if required, to establish a twenty (20) year period ending either in February of 2004 or on the date of her death in August of 2004. In either case, the house remained on the property with contents during her absence.

***Exclusivity - Bain***

[51] The Defendants maintain in their Pleadings, Brief, and Affidavits that during the Bain occupation, they entered the lands and performed certain acts, thereby preventing Catherine Bain, and her daughter, from having exclusive possession.

[52] Setting aside the issue of consent, the Defendants argue it made an entry as true owner in 1979, which would stop and reset the clock, under the *Statute*. Accepting that Mrs. Bain moved to the property in 1962, and began occupying it that year, she would have had seventeen (17) years of occupation in 1979. According to the abstract of Dan Chaisson (entered as Exhibit #1, Tab 3), which was accepted by both parties as accurate (and thorough), the conveyance from the Sydney Presbytery to Sydney Steel Corporation occurred by deed dated October 5, 1979 and registered October 17, 1979 in Book 81, Page 168.

[53] In its' Brief, at Paragraph 61, there are several events which the Defendants state makes Mrs. Bain's occupation non-exclusive:

> (i) The drilling of a well on the Bain lands in 1979, without the permission of Catherine Bain;
>
> (ii) The entry from time to time, of Scotia Limestone or Mosher Limestone employees, on the Bain lands;
>
> (iii) The use of a roadway through the Bain lands by employees of Scotia Limestone or Mosher Limestone;
>
> (iv) The placement of a trailer by the Defendant, Lloyd Fraser, in 1998 or 1999.

[54] It is apparent from the evidence that Sydney Steel and Scotia Limestone began, in earnest, in 1979 to exercise control over the former United Church property on which the Bain lot is situated. This consisted of (1) using the road to the main quarry site, and (2) drilling a well on the property of Mrs. Bain. Both the road and the well are shown clearly in Exhibit #7 (the 2009 survey). The road is also shown on the 1974 survey (Exhibit #11). This survey shows an "old gate" at the top or up the hill closer to the mine site. The 1979 survey shows this as well (Exhibit # 1, Tab 1), without the gate. Both the Bain and Seale dwellings are shown on all of these surveys.

[55] Attached to Sandra Bain's Affidavit (Exhibit #3, Tab A) is the 1976 survey (Exhibit # 3, Tab 2-A) entitled "Plan Showing Lands of the United Church of Canada, Sydney Presbytery, to be Conveyed to Catherine Bain and Oscar Seale, New Campbellton, Victoria County, Cape Breton, N.S." It is dated December 14, 1976 (date of survey) and drafted on December 17, 1976. It is certified. This survey shows the road as a "driveway R.O.W.", running along the eastern side and close to the Bain dwelling between the dwelling and the brook. The brook is located to the east of the road. The well is not shown, as it had not yet been constructed.

[56] Sandra Bain's Affidavit makes little mention of the road. She stated Scotia put in the access road, when her mother refused to move, or words to that effect. (Paragraph 25 of Affidavit of Sandra Bain)

[57] As to the drilling of the well, Sandra Bain states it was drilled with her mother's agreement. Her evidence differs with the Defendants in that she said the water supply was interrupted and, therefore, lost when mining operations began. There was also an issue of when the well had been drilled with Scotia (through Mr. Fraser) stating it was in the autumn (September or October) of 1979. Mr. Fraser said the new well had to be drilled for potability, as the water source for the quarry had failed to pass. Mr. Fraser's evidence was they did not seek Mrs. Bain's permission, nor did she object. They provided her with good quality water from a new well close to her home. For this, he says, she was "very appreciative".

[58] As to the use of the road, Mr. Fraser's Affidavit evidence is as follows at paragraph 20:

> **"From 1973 until approximately 1988, Scotia Limestone used the roadway that crosses the land occupied by Catherine Bain to access the Hamilton and NSPL Properties. At no time did Catherine Bain object or try to stop Scotia Limestone's use of the roadway."**

[59] I have reviewed Sandra Bain's Affidavit (at paragraphs 25 and 26) regarding the road and the well. In particular, I note she states her mother "was approached by officials either from Scotia Limestone or Sydney Steel to see if she would sell her home so that Scotia, could put in a road to go to their mine." As a result "she refused to move and Scotia Limestone put in an access road to the mine behind the hill, where my house is located".

[60] I accept the evidence of Mr. Fraser that employees of Scotia, himself included, would often "step foot" on the Bain lands. Mr. Fraser said, out of "common courtesy" he would stop and inform Catherine Bain he was there and for certain did this on the first occasion, as well as, other occasions. Based on a strict interpretation of **Bowater**, as of 1979 and 1980, when the true owner is in occupation, the squatter is not. This would favour the Defendants in terms of whether the actions constitute a valid re-entry sufficient to "oust" the occupier from, in this case, her possession.

[61] There is the evidence, as well, that Allan Mosher visited the lands from time to time. He gave evidence in cross-examination that he was on the subject lands in 1990, particularly on the Seale property. He stated he had "been back there".

[62] It is necessary here to make credibility findings, as there is a conflict in the testimony and in the evidence of Sandra Bain and the Defendants. The Affidavit evidence filed in support of her claim is strong in respect of her mother's period of occupation from 1962 or 1963 until 2004. As this is quite a substantial period (forty (40) plus years), I believe both the evidence of the possession required, as well as the evidence of reclamation by the true owner must, and should, be persuasive, as has been mentioned in the caselaw authority. I hasten to add there is still but one standard of proof - that being the civil standard. The claimants here must prove their case on the balance of probabilities.

[63] In terms of credibility, there is evidence of a further road being constructed to the west of the Bain property by Nova Construction who, by that time, had the

"crushing" contract for the dolomite quarry. This was not constructed until 1984, some five(5) years after Sydney Steel acquired the property. Contrary to the Affidavit of Sandra Bain, Scotia used the existing road prior to that, rather than putting in a new one.

[64] Ms. Bain's counsel, Mr. MacIsaac, argued that the act of drilling a well is equivocal, and was done for the purpose of assisting Ms. Bain and not to assert their (Sysco's or Scotia's) rights of ownership. Further, they say the use of the gravel road was without any possessory intent, similar to the road constructed in the case of **Boudreau v. Pellerine,** 2010 NSSC 188.

[65] In **Boudreau,** the Court referred to Justice Moir's decision in **Duggan v. Nova Scotia (Attorney General)** (2004), 222 N.S.R. (2d) 229 where Moir, J., canvassed the issue of adverse possession claims. He commented on the general approach to the issue and said:

> **[107] General Approach -- Some authorities have emphasized the consequence of depriving the true owners of their title, as Justice Hallett did in Lynch v. Nova Scotia, [1985] N.S.J. No. 456 (T.D.) at para. 8 when he required very cogent evidence of visible, exclusive and continuous possession.**

[66] On the facts in **Boudreau**, the Court found that the acts of the three co-owners in asserting their ownership rights, were minimal. I was referred by the Plaintiff to paragraph 93, where the Court found the mere cutting of a trail to launch a small boat was not sufficient to establish his (Casey's) claim to the lot. I note further, the Court found the Plaintiff had intent prior to (the road being constructed) and did exercise acts of possession to qualify as possession. The Court stated at paragraph 82.

> **"This evidence of possession certainly became much more substantial after he built the road into the lot..."**

[67] In the case before me, the use of the gravel driveway, with a gate in close proximity to the house, is substantial evidence of possession. The road, from viewing it on the survey and in the photos, is a substantial road. It is not a pathway or a trail to launch a small boat, as was the case in **Boudreau**. The use of a road and a well in real estate law may occur as of right, express or implied, separate from ownership of the "fee". Normally, however, this right is exercised by a third

party and not the owner of the land who has the right through ownership. A right of way by prescription may arise if the requisite period of usage existed by another party. The point being, it does not always mean, or it is not attributed to, the user's ownership in terms of title.

[68] Typically, if reduced to writing (as required by the *Statute of Frauds*), these uses could form a separate easement for a driveway or a "well easement". This is common. The difference here is that in 1979, Mrs. Bain's occupation had not ripened, and so the true owner's entry could not be categorized as merely giving rise to an easement for those limited purposes, even though the Court may still conclude, it was for the those limited purposes and not to reclaim title to the entire land.

[69] The Plaintiff, Sandra Bain, further argues the doctrine of *animus possiendi* to be relevant in that the Defendants, must show clearly by their acts, an intention to assert their rights of ownership. In support of her position, the Plaintiff submits the case of **Matchless Group Inc.**, **Re** (2002), 216 Nfld. & P.E.I.R. 206 (Nfld. C.A.), a Decision of the Newfoundland Court of Appeal.

[70] In **Matchless**, the Court stated, referring to **Stevens v. Skidmore**, [1931] 2 D.L.R. 467, at paragraph 19:

> **"The intention is of no consequence if the action is definite and unequivocal; but when dispossession (in this case, discontinuance of possession) is to be inferred from equivocal acts, the intention with which the acts are done is all-important.**"

[71] In **Matchless,** a set of steps was constructed on the disputed property, occupying only a small portion of the disputed property. The court found the steps were placed in order to comply with a municipal requirement, finding that neither the required unequivocation (a definite act to assert ownership) nor the *animus possiendi*, (an intention to do so) existed.

[72] On the facts before me, Mr. Fraser supervised the drilling of the well. He indicated in cross-examination that, at the time, he was taking his direction from Mr. Leonard Kent, who had "come across" from Sydney Steel. Mr. Fraser was not involved in any board meetings, but the entire time was acting as quarry manager on direction from Scotia Limestone. In his Affidavit, at paragraph 15, he stated

Mrs. Bain, "did not object, protest, or attempt to stop the drilling, in any way". He also said it was Scotia Limestone, and it was 1979. Sysco owned the property in 1979. Mr. Kent was the general manager of Scotia Limestone at the time.

[73] The drilling of a well is, in my view, an equivocal act of ownership. In this case, a well driller was hired and Mrs. Bain, according to Mr. Fraser, was asked if she wanted to hook up to it. I accept this evidence, as I do the evidence as to the use of the road. Scotia put in a gate in 1976-1977, according to Mr. Fraser. Mrs. Bain would come out to greet him and say hello. She would offer him tea. The gate was put in, according to Mr. Fraser, to "prevent people from going in".

[74] The two events, on these facts, I find were equivocal acts of ownership. It was unnecessary for Scotia or Sydney Steel to assert their ownerships right because Mrs. Bain did not object to what they were doing. She was not asserting her "ownership rights", which is contrary to the evidence of her daughter, Sandra Bain. I have found Mr. Fraser's evidence on this point more consistent with the remaining evidence than I did that of Sandra Bain's. Mr. Fraser had a good command of the facts and the manner in which he presented his evidence was credible. He was, I found, sincere and genuine, and as he said, a true friend of Catherine Bain.

[75] Ms. Bain's Affidavit failed to mention the fact that her mother never held a deed to this property but yet conveyed the impression that her mother was clearly the owner. The wording of her mother's Will would suggest that Catherine Bain was well aware she had no deed. In particular, I refer to Mrs. Bain's Will in paragraph II(b)(iv) in which she states:

> **"My home located at 1019 New Campbellton Road, New Campbellton, Nova Scotia, together with the interest that I have in the parcel of land upon which the house is situated as evidenced by my payment of the taxes in relation to same for the past forty years."**

[76] The tax records were admitted into evidence. Ms. Bain said in her Affidavit, her mother had always paid those bills. She learned, and admitted in cross- examination, that this was not the case. When it was drawn to her attention that the tax bills were separated (between land and dwelling), with the land being taxed separately from the dwelling, she acknowledged this (as she had to) by stating "I will have to accept it, if that's what it says", referring to the tax account

invoices. The assessments confirm that the dwelling only was assessed after 1976 (Exhibit #2, Tab (f), pg.33).

[77] In **Logan v. Smith,** [1984] N.S.J. No. 403, Justice D. Burchell did not find it necessary for a person seeking title by adverse possession to have a "specific intention to exclude the true owner". Similarly, Justice Freeman in **Gould v. Edmonds**, [2001] NSCA 184 found there need not be a subjective intent to oust the true owner. I mention these cases in the context of a true owner's reclamation of their land, not the squatters, (subjective) intent as the cases state.

[78] In **Anger & Honsberger, *Law of Real Property***, 3rd ed. at paragraph 29:60:40, the respected authority entitled simply "Real Property", the authors state, "there must be both exclusive possession and an intent to exclude the true owner (*animus possiendi*)". The authors explain, however, that the intention is coupled with the need for the possession to be "adverse" meaning - that if the person who is in possession with the consent of the true owner, whether under a license or some other agreement, then the possession is not adverse.

[79] In consequence, it must be clear that it was the true owner, who re-entered to reclaim the property, by means of the road and the drilling of the well. The acts themselves are clear enough, but what is not, is whether it was the true owner, namely, Sysco or Scotia, at the relevant time.

[80] It is apparent from the evidence that both companies were acting in concert. Sysco had owned the shares of Scotia Limestone since 1971. Scotia, therefore, was wholly owned subsidiary of Sysco. Still, they were separate companies and separate legal entitles. The evidence suggests that they shared or used employees in both companies as their agents, during this time. It was not absolutely clear which company exercised their ownership rights (in respect of the well and the road), in or around 1979 or 1980, even though it is clear one or both of them did, as it concerned Mrs. Bain.

[81] As it is unclear, it follows that the Plaintiff has not discharged her burden, on cogent evidence, that her use was exclusive. I have said it is clear, one (1) of the two (2) companies committed acts of ownership, but unless it was the true owner at the relevant time, the Plaintiff's case may be cogent enough to establish exclusivity on that basis.

[82] For that reason, I think it is prudent to now address the main issue - that is, whether Catherine Bain's (and that of her daughter's) occupation was with permission?

[83] Prior to doing so, I will say briefly, and find on the evidence, that the act of constructing a dwelling on a one (1) acre lot and residing in it as a permanent residence is, in my view, inconsistent with the owner's possession. Whether that possession is as a summer camp or a mine site, even a camp (which is closed), the land was not previously used or intended as a permanent residence. I find further, however, that in these circumstances, the use of the Bain lot as a residence, did not interfere with, or prevent, the owners in 1979 from using the property as they normally would. This is proven by the owners, Scotia and/or Sysco, proceeding to develop the property without objection or interference from Catherine Bain. I will return to this issue later in my decision.

***Whether Catherine Bain was Occupying with Consent***

[84] The Affidavits filed in support of Sandra Bain's claim were similar in many ways. From these, it is evident Catherine Bain had many friends (and relatives) who visited her frequently. They were all aware of the circumstances of how she and her husband came to place the bunkhouse, sectioned it off, and began to occupy what was a permanent home, one (1) that virtually all witnesses said was "meticulously kept" by her. They recounted her moving from the Bain farmhouse "up the hill" to the new property at the bottom, near the road and the stream. The general consensus of the affiants was that it was "shortly after" the Seal Island Bridge was opened to the public in 1961.

[85] As well, the Affidavit evidence, was consistent in saying it was their "impression" that no one ever disputed the ownership of Catherine and Sandy Bain and, generally, no one was aware of anyone ever disputing the ownership of their lot during the time they knew them. None of the affiants, therefore, deal with, or mention "consent" as something which Catherine Bain spoke about - that consent being for her to occupy the lands. Even the Affidavit of the daughter, Sandra Bain, does not deal specifically with the issue of consent. It gives the impression that her mother maintained, that she had title and could decide what was done about the land. For all her apparent openness then, Catherine Bain

appears to have kept certain things private. There is further evidence, however, on this point which must be considered.

[86] It is confirmed (to some extent) in Sandra Bain's Affidavit, that her mother was approached by Sydney Steel to move, or relocate, to a property purchased by Sydney Steel, for that purpose. The Defendants submitted (as Exhibit # 12) a deed from Kenneth F. Emerson and Edna L. Emerson of Main, USA to the Sydney Steel Corporation (the Emerson Deed). It was for a property further down the New Campbellton Road, near Catherine Bain's sister's property. This deed is dated October 10, 1979 and five (5) days after the purchase by Sydney Steel of three (3) properties consisting of the Hamilton Property (formerly Bain), the NSPL Property, and the Property of the United Church (Sydney Presbytery), the latter being the former summer camp property.

[87] Sandra Bain's evidence, in cross-examination, was she was never a party to any conversation between Sysco and her mother. She did say there were two (2) conversations (she had) with her mother that were not in her Affidavit. Both of these involved Mr. and Mrs. Fraser in regard to: (1) the land at Kelly's Cove; and, (2) wanting to buy "our property". These were not contained in her Affidavit.

[88] In paragraph 19 of Mr. Fraser's Affidavit, he stated he discussed the matter with her (Catherine Bain), and she asked him if the company (Scotia) would reconsider its' plans to move her. He said quite clearly in his Affidavit that they did, and decided she could remain on the property at that time. Mr. Fraser was cross-examined on this point in some detail. His answers were clear and unaffected. He had direct knowledge as to why Catherine Bain did not move. He said that she had agreed to move before they (Sydney Steel) purchased the property, but that "they agreed not to move her". She never changed her mind. "Sysco changed their mind", he said. He stated further that the use of the gravel driveway up to the quarry, continued after that.

[89] This evidence, in my assessment, was not contradicted. In addition, it was supported and corroborated by the evidence of Rita MacNeil and her husband, Brian MacNeil. Mr. and Mrs. MacNeil purchased a summer cottage in the New Campbellton area in 1979 and became friends and neighbours of Mrs. Bain. They learned from her, shortly after meeting her, that she was being required to move by Sysco.

[90] Both of these witnesses knew her well and had visited her many times over the twenty-five (25) years between 1979 and 2004. Mr. MacNeil estimated over 100 (one hundred) times. He did chores for her and Mrs. MacNeil helped take her to appointments. They were, in effect, independent witnesses with nothing to gain or lose. They gave their evidence in such a manner. Their Affidavit evidence in cross-examination held up (see paragraph 7), that it was Sydney Steel who informed Mrs. Bain she had to leave. Mrs. Bain told her Scotia Limestone purchased, "around those times" in 1980. In regard to paragraph 8, Mrs. MacNeil confirmed it was Sydney Steel prior to that, "yes". This explains to some degree Mr. Fraser's reference to Scotia in his Affidavit.

[91] Also, Brian MacNeil's evidence made the connection between the move and Sydney Steel. While he did not remember her exact words, he did state in 1979 Sydney Steel owned it, but she had to leave, not then, but later (a year or two (2)), stating it was taken over by another company. Given that it has been over thirty (30) years, this evidence is remarkably close in terms of the dates and times in the evidence, and in the abstract of title. It coincides with Mr. Fraser's and Mr. Mosher's evidence. He (B. MacNeil) gave other details about it saying, she never gave a reason why she had to move other than she did not own it. He said further it was just her (Mrs. Bain) and him and that she did not have the funds to move the building.

[92] I find the evidence of Mr. and Mrs. MacNeil to be extremely helpful on this point and, as well, very credible. I am satisfied, and so find, that Catherine Bain, was given permission to occupy the lands claimed (as shown on Exhibit #7) and that this permission was given in 1979 or 1980. I find it was Sydney Steel who granted this permission, but even if it was not, Scotia Limestone later affirmed or endorsed any decision made to allow Mrs. Bain to remain. The evidence satisfied me it was either one or both of the companies who decided they would consent to her remaining in her home. I find further, as stated (repeatedly in evidence), that Catherine Bain was grateful for having received this consent. As a result, she was not required to move at, or about, that time. She was, however, occupying the lands with the consent of the true owner at that time.

[93] Similarly, my assessment of the evidence would be that Mosher Limestone continued the consent and went a step further by allowing Catherine Bain to

remain there (ultimately) for her lifetime. In this regard, I rely on the evidence of Mr. and Mrs. MacNeil, who spoke of the Moshers and Mosher Limestone. Mr. MacNeil, in fact, thanked Mr. Mosher for their decision to allow her to remain. This is independent and objective evidence.

[94] I am mindful that Lloyd Fraser holds a "vested interest" in stating that Mrs. Bain was there with consent, as he now holds a deed for what would be her lot (as part of the) properties he received in 1998 and 2001 from Scotia. He stated in cross-examination (and this does not appear in his Affidavit) that Mrs. Bain, in fact, asked him to buy the land she was on, knowing she would be "safe" if he owned it, due to their friendship. There was concern about a possible buyer from the USA.

[95] I have found Mr. Fraser to be credible. I make no finding on this last point (her asking him to buy). Like the evidence of Sandra Bain, he introduced certain evidence at trial for the first time. I am reluctant to rely on it and, therefore, do not.

[96] What I am prepared to rely on is what I perceive to be Catherine Bain's honesty and integrity in her dealings over the land. The discussions she had, and that were had on her behalf, were at a very high level in terms of the companies' exercising good faith. Her willingness to leave, I find, was the very thing that caused "them" to allow her to stay. She was too honest to do anything but acknowledge she did not own the land. The company, Sysco, even went so far to buy other land for her, but in the end decided she would stay. This, I believe, to be the reasonable inference to be taken from the evidence. The intervention of Mr. Fraser, long-time employee of Scotia, did not hurt, but as he himself said (at paragraph 21) in his Affidavit, "**they** decided not to move her."

[97] I have considered whether Catherine Bain may have been mistaken as to her reason for thinking she did not own the land. It is entirely possible title could have vested upon the limitation period expiring, but because she held no deed, she as a layperson, would be unaware of her rights to refuse to move, even if title had vested by virtue of her twenty (20) year occupation. In this scenario, that could only ever after a twenty (20) year period after 1962.

[98] If the clock were reset in 1979, or even 1980 (with the finding I have made), the next twenty (20) year period would end in 2000. For this to result in title being vested in her, both the consent (in 1986), or their (final) consent (of Mosher Limestone) in 1995, for her to remain for life, would have to be discounted. Having weighed and considered the evidence, I find as a fact that both of those events occurred. This is a reasonable finding, based on the evidence. I see very little evidence that would refute Allan Mosher's evidence, that the decision was out of compassion for Mrs. Bain. (Paragraph 25 of Mosher's Affidavit).

[99] The evidence is equally strong when assessing whether Mrs. Bain had consent to occupy from the very beginning, from the United Church in 1962.

[100] In terms of whether Mrs. Bain was mistaken as to her situation and, in particular, her ownership (the contents of a strongbox located in her home) is relevant. In it were two (2) letters from Leslie A. Bain, one to Duncan MacKay of the Sydney Presbytery Committee, and the second to the surveyor, L.M. Harvey. The MacKay letter was dated May 6, 1974. The second letter had no date but appears to have been written at the same time, as both letters reference Mr. L. Bain "contacting" Leonard Harvey "last year" and "I have again written him." In the letter to Mr. MacKay he states: "Catherine has been inquiring about her piece of property there and I can understand her anxiety there". Mrs. Bain knew she did not have a deed. Those letters, I find, resulted in the completion of the 1976 survey."

[101] Also included was the letter from Reverend Boyd dated March 15, 1963 in which the Chairman of the Sydney Presbytery was considering a twenty (20) year lease. Mrs. Bain, in fact, had sent the sum of twenty dollars ($20.00) but it was returned stating "all negotiations on this lease are held up at present, in anticipation that certain events may make it possible to sell you this small piece of land this year." I infer from this, that Mrs. Bain was aware of her circumstances. The letter contains a final sentence which I shall deal with later in my decision. (see paragraph 116 herein).

[102] Also contained in her belongings was an incomplete, "Statement of Taxable Property" for the Counties of Richmond/Victoria, Assessment Region. While it is unsigned it states next to the word "Property" that it is "in process of negotiation" and below, "size not determined as yet".

[103] There are no corporate records of Sydney Steel, Scotia or Mosher confirming that consent was given to Mrs. Bain. Attached to the Affidavit of Judith Colwell, however, are the Minutes of the Sydney Presbytery. She, as stated, is the Archivist of the Maritime Conference of Archives of the United Church of Canada.

[104] The Conference houses records for various Presbyteries, including the Sydney Presbytery. The records reveal (see Statement of Agreed Fact[2]):

> (a) At the September 22, 1964 meeting, a letter was reviewed from Mrs. Sandy Bain asking that action be taken on the proposal "some years ago" to sell or lease a small portion of the campground. A motion was duly passed that a commission be appointed to study the issue of houses and cottages built on the camp property and report back to the Presbytery.
>
> (b) At the same meeting on September 22, 1964, Reverend Donald Maguire informed the council that the main concern behind Mrs. Bain's letter was the need for "permission" to run a power line to their house "across camp property". A committee of one (1) was appointed to determine the kind of agreement required by Eastern Light and Power.
>
> (c) On October 9, 1964, the Minutes reflect a decision that the future sale or lease of land would require a more thorough study over a period of time, and that "no land be sold or leased until the commission appointed or gave its' report". On February 10, 1965, it was reported that the land in New Campbellton was not owned by the Presbytery and there was difficulty securing title.

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[2] *Statement of Agreed Facts, Exhibit #10, January 17, 2012, Case No. 313233, as follows: That the record holding of the United Church of Canada Archives in Sackville, New Brunswick, does not represent a complete holding of all historical records of the United Church of Canada and that other such records are also held in other unrecorded places.*

> (d) At the same meeting on October 9, 1964, the Presbytery voted to sign an" easement form" on behalf of the Presbytery to permit Eastern Light and Power to run a power line across the camp property "to bring lights to the home of Sandy Bain".

[105] Reverend Louis Ihasz filed an Affidavit as Exhibit #6. His connection to the camp, Mrs. Bain and, as well, Oscar Seale, ran deep. He was a close personal friend of Catherine Bain. He explained the history of the camp, the United Missions Sunday School, and that the camp was operated by the Deaconesses, starting just before the Second World War. He was at the camp, having grown up in Whitney Pier. He remembered Mr. Sandy Bain delivering the milk, as a "strapping" young farm boy.

[106] He said the Presbytery would have some say and control over the camp as part of the United Missions sponsored by the Trinity United Church. The Presbytery would not control the Mission, however. Any policy or major decision would be decided nationally by a national body, through a hierarchy starting with the local church, then to the Presbytery, then to the Conference, and finally then to the General Council. All property was owned, in trust, by the head office in Toronto, who ultimately made conveyances of real property.

[107] Reverend Ihasz stated he and Mrs. Bain were close friends. His Affidavit verifies his history. He was an Ordained Minister of the United Church of Canada and was the Minister at the Burchell United Church in New Campbellton from 1996 to 2005. He visited Mrs. Bain once a week throughout his ministry. He stated under oath that during his many visits, Mrs. Bain told him the United Church allowed her and her husband to put the bunkhouse on its' property. She told him Mosher Limestone wanted to move her, and offered to move her but she did not wish to move as she had many memories of her little house near the brook. Notably, he said she was thankful to the "company" for allowing her to remain on its' land for as long as she lived. The time frame he was speaking of was 1996 to 2005.

[108] Having heard and considered the evidence of Reverend Ihasz, I have no reason to disbelieve him. This includes his cross-examination. His evidence about how conveyances were made is confirmed by the 1967 deed from the United

Church of Canada, "with head office at Toronto, in the Province of Ontario", to the Sydney Presbytery. He was a member of Sydney Presbytery for five (5) years from 1978 to 1983. He said he was "sure" she said she was there with permission of the United Church. In fact, he knew Reverend Boyd as they went to college together and knew he was chairman. He said she never mentioned purchasing the land, or the church intending to sell. He remembered her saying by the good graces of the United Church she was allowed to stay there as her home.

[109] This same information was provided by Mrs. Bain to Lloyd Fraser, from the time he met her in the mid 1970s, as early as 1973. Reverend Ihasz confirms this saying "she was led to understand she could stay there as long as she lived". Once again, his involvement was after 1995.

[110] I accept this evidence from these witnesses and so find that Mrs. Bain occupied "her" land with permission from the United Church (1962-1967), then Sydney Steel Corporation (1980); then Mosher Limestone (1986), as quarry operator and lessee; and again Mosher Limestone for life (1995). Mosher Limestone Limited operated the quarry in 1986 but did not own the land. It was still owned by Scotia Limestone, which, in 1995, became a wholly owned subsidiary of Mosher Limestone. Paragraph 24 of Alan Mosher's Affidavit states that Lloyd Fraser approached both companies on Catherine Bain's behalf in 1986.

[111] I accept, and so find, that the consent (in 1986) was given by both lessee and owner at that time, and in 1995 by Scotia Limestone, through its' parent company, Mosher Limestone.

[112] I turn now to consider whether Mrs. Bain was a tenant at will, as advanced by her daughter, Sandra Bain.

***Tenancy at Will***

[113] The Plaintiff, Sandra Bain, argues that the provisions of the *Limitation of Actions Act*, can still provide title to her by adverse possession as a tenant at will. That is, even if Mrs. Bain was occupying "with consent", the provisions of Section 9 and 10(f) allow the period of occupation to begin, one (1) year after the commencement of the tenancy in 1962, so that the requisite period would be twenty-one (21) years from 1962 or twenty (20) years from 1963, if the occupation

began in 1962. The same would apply to any subsequent twenty (20) (or twenty-one (21)) year period in the event of a new or "fresh' tenancy at will.

[114] In the leading case of **Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.,** [1974] 44 DLR (3d) 687 (SCC), Dickson, J, summarized the law and its' effect on these sections, stating at pages 688-689:

> **"...in the case of a tenancy at will, cause the statute to begin to run, at the latest and notwithstanding the permissive character of the occupation, at the expiration of one year from the commencement of the tenancy:..."**

[115] Justice Dickson noted there were several requirements, not the least of which that the person be in possession as a tenant at will, which he defined as a person, other than the owner. He further defined a tenant at will as follows:

> **"A tenancy at will is created when one person permits another to occupy lands on the agreement, express or implied, that the tenancy is determinable at the will of either."**

And further:

> **"I think it is beyond question that a tenancy cannot be created in the absence of exclusive possession. Exclusive possession by the tenant is essential to the demise and the statute will not operate to bar the owner unless the owner is out of possession."**

[116] There are things present, in the evidence before me, that favour a tenancy at will by Mrs. Bain. First, she did not pay rent. Second, the term (or period for which she would have consent) was undefined until 1995, when she was given permission to stay there for her lifetime. Thirdly, a tenancy at will may be created and held, pending negotiations.

[117] On the facts before me, there was initially an intent to lease and then an intent to buy. I note there is no evidence that Mrs. Bain paid rent or, in fact, paid the dollar for which she was invited to do so by Reverend Boyd in March of 1963 (Exhibit #2(c)).

[118] There are some things present which, on the contrary, do not favour a finding that Mrs. Bain was a tenant at will. First, the records of the church are incomplete. Whether she, in fact, paid rent is unknown - but there is no evidence that she did. Secondly, the last consent given to her in 1995 was for a definite period - her lifetime. Thirdly, while negotiations were pending, the 1976 survey (Exhibit #7) shows those negotiations were for a purchase, not a lease.

[119] As noted by Dickson, J. in **Ocean Harvesters Ltd.:**

> **"The distinguishing feature which a tenant has, from a mere licensee is a proprietary right, an interest in land as distinct from personal permission..."**

[120] Apart from a proprietary right, did Mrs. Bain have exclusive possession so as to qualify her as a tenant at will?

[121] In **Ford v. Kennie**, 2002 NSCA 140, the Nova Scotia Court of Appeal recognized that there may be an arrangement or agreement that would prevent occupation from being adverse. One clear example would be (as was noted in paragraph 66), when the Plaintiff would have occupied the land with the consent of the Defendant's predecessor in title. n those types of circumstances, the Court noted that "no possessory title could arise" and, as well, depending on the type of agreement, the Plaintiff's claim could be fatal.

[122] In **Ford**, the Court also stated (at paragraph 67) that the "onus is on the paper title holder to show that the possession sufficient to be adverse was, in fact, consensual". I note, as well, the Court agreed with the trial judge's finding that the possession was permissive in view of the Plaintiff's attempt to purchase the property, not unlike here.

[123] The Plaintiff, Ms. Bain, relied on **MacLean v. Reid** (1978), 30 N.S.R. (2d) 499, 94 D.L.R. (3d) 188, (N.S.S.C.A.D.) in which the defendant lived and worked on his parents' farm. The parents conveyed the farm to the defendant's brother who said he could live on the farm for the rest of his life. The brother later conveyed the land to the Plaintiff who commenced an action for possession. The action was dismissed and on appeal, the appeal was dismissed. The Appeal Court held that the Defendant became a tenant at will in 1936, when the parents conveyed to the brother, and the tenancy ceased one (1) year later under the

*Limitation of Actions Act*. The Court held that after twenty-one (21) years, the defendant acquired possessory title. The Court dealt with evidence of a re-entry by the owning brother (on weekends) and also with an issue of whether the tenancy at will had been earlier determined (by a letter).

[124] On the facts before me, I have difficulty determining that Mrs. Bain was a tenant at will, in the first instance. There is evidence she did not have exclusive possession in that the church continued to use the road for access until the mid-1960s, when the camp closed. Secondly, the road was used in the 1970s by Scotia and/or Sydney Steel, and there is also the drilling of the well in 1979. In addition, there is a real question as to whether Mrs. Bain was given any proprietary right or interest, other than personal permission so as to constitute her interest, being that of a tenant. She was arguably every bit a potential purchaser, as she was a tenant. Other than the permission for her personally to remain on the land, any legal right was revocable, and in my view, in the nature of a license, at least until 1995.

[125] In **Reid,** the Honourable Justice MacIntosh found that the Defendant had an interest equivalent to a life tenancy. Here I find, the permission given to Mrs. Bain was "up for review" each time ownership changed. Any proprietary interest she had was quite tenuous. I find, therefore, it did not amount to a tenancy at will, even though she was there at the will of the owner from time to time, making it a revocable licence. I am cognizant that her house is appurtenant to the land and, as such, formed part of the land. This does not, of itself, give rise to an interest in land, which must be governed by the relationship between the parties, including any pertinent agreement. Up until 1995, there was no agreement - there was merely consent.

[126] More significantly, even if Mrs. Bain was a tenant at will, the evidence would strongly support that it was renewed by a series of new arrangements or new tenancies, at various times before her possession ripened into title.

[127] Once again in **Reid,** the Court found there was no subsequent tenancy at will that created a "fresh agreement" between the parties, which would have the effect of stopping the running of the limitation period.

[128] Such is not the case here, based on the findings I have made, as to the consent, and when it was given to Mrs. Bain. Consequently, putting aside whether

she occupied the property exclusively, and whether she had a proprietary right to do so, even if Mrs. Bain occupied the property exclusively in her own right as a tenant at will, beginning in 1962, a fresh arrangement had been reached in 1979 when she was once again given permission to occupy the property, thereby, stopping the running of the limitation period.

[129] Although not previously mentioned, there is further support in the evidence of the consent she was given personally - that being the evidence of Mr. Jack Allen and Mr. Danny MacLennon. This brings, in total, the number of witnesses testifying that Mrs. Bain acknowledged that she was there with consent, to a large number; most of who are independent, with the exception of Mr. Fraser. As previously stated, I found Mr. Fraser to be a straight-forward and truthful witness from the manner in which he gave his evidence. There were often times that he would speak "against interest", and when in doubt, would often give the benefit of that doubt to the opposing party.

[130] Mr. Fraser gave evidence that the reason he purchased the lands in 1998 and in 2001 were in effect to ensure that Mrs. Bain would remain on the property for her lifetime. This was not contained in his Affidavit and, therefore, like certain statements provided by Sandra Bain, I have chosen not to rely on it, nor do I feel I must rely on it, to reach my decision in regard to this claim. There is, to my mind, insufficient evidence which fails to satisfy me, that the Plaintiff, Sandra Bain, has met the obligation of establishing title by possession as the criteria exists.

[131] I am not satisfied that Sandra Bain, by cogent evidence, is entitled to the lands under the doctrine of adverse possession, and/or under the *Limitation of Actions Act*. On the contrary, I find that the owner has established that the paper title holder, Scotia Limestone, has met the burden of satisfying me that Mrs. Bain occupied the lands with their consent and/or with the consent of the previous owners, the United Church and Sydney Steel Corporation. The result is any possession which Mrs. Bain exercised was not adverse, as it was given with the consent of the true owner.

[132] In the result, I find the claim of Mrs. Bain's daughter, the Plaintiff, Sandra Bain, for title for possession, under the *Quieting of Titles Act*, and *The Limitation of Actions Act* is without merit and should therefore, be dismissed.

***The Claim of Leotha Seale***

[133] The lands claimed by Leotha Seale, wife of Oscar Seale are shown in pink on Exhibit # 7 - the 2009 survey of Island Surveys signed by Mr. Paul G. Harvey, NSLS. The "Seale lot" contains 34,8421.6 square feet or .8 acres. The lot contains a substantial dwelling and an additional building, shown on the 2009 Harvey Plan as a "cottage". There is a brook running through the lot from north to south, roughly near the middle of the lot. There is a foot bridge over the brook and a gravel driveway leading into the lot, from the New Campbellton Road.

[134] The evidence is weighty that Oscar and Leotha Seale, and their five (5) children (each as they were born) used this lot since the mid 1950s to the present day. It began with tenting on the lands, and then the construction of their summer cottage beginning in the later 1950s. The last of three (3) construction phases was, according to Mrs. Seale, finished in 1963. The evidence further supports that it has been used seasonally, and that the use has been continuous ever since. There is virtually no evidence that the use of the property as a seasonal cottage by the Seale family was not continuous. On the contrary, the evidence from such witnesses as Mr. Thomas Pittman, state clearly and without room for doubt, that the Seales have been in possession of the lot every year since it was constructed, a period in excess of fifty (50) years. Additionally, the Affidavit of Mr. Pittman confirms that its' layout is about the same as shown on the plan, with the land being cleared, as it is shown in the pictures, taken when it was constructed and already in existence.

[135] It is useful to put this claim in context. The Defendants admit in their Brief (paragraph 47) that Mrs. Seale's occupation was open and notorious. This, therefore, leaves the issues of whether their use was continuous and exclusive, and applying the test in **Bowater**, whether their possession was inconsistent with the Defendant's ownership, and whether her occupation (along with her husband), ousted the Defendants from their normal use of the land.

[136] Although not a live issue, I shall deal briefly with the issue of whether the Seale occupation was continuous. Under the authority of the well-known case of **Taylor v. Williga**r (1979), 32 N.S.R (2d) 11, 54 A.P.R. 11 99 D.L.R. (3d) 118, I am satisfied the use by Mr. and Mrs. Seale was for every summer, and while seasonal, it is still considered continuous. There has been no break in the chain. Mr. Oscar Seale usually stayed after the summer, or went back in November for

hunting season. Mr. Seale died in the year 1996. Ten (10) years earlier, the dwelling became assessed in the Seale name for tax purposes. The assessment and tax bills, however, showed the land as assessed to Scotia Limestone.

[137] While the onus is on the Plaintiff (to satisfy the criteria for adverse possession) the Defendant gave evidence, which is both relevant and helpful, in narrowing the issues. In cross-examination, Mr. Alan Mosher, President of the Defendant, Scotia Limestone, did not dispute the length of the Seale occupation, or that it was continuous. Further, he did not dispute that the land was cleared, or that it was as shown on Exhibit # 7.

[138] There is considerable evidence in addition to that of Mr. Mosher. Mr. Pittman spent many days and hours at the Seale property. He spent every summer in New Campbellton for fifty (50) years beginning in 1955. He travelled there when the ferry was still operating. He remembered that their tent was white, and that they put their milk in the brook to keep it cold. His memory was excellent and his credibility intact. He affirmed that "each summer" he saw the Seales, and most years he would stop and visit weekly. He knew them as neighbours, but was otherwise unrelated.

[139] There is very little doubt that the Seale occupation was continuous, which was further confirmed by the evidence of Virginia Murray Butts, in later years. While her husband, during his lifetime, handled many aspects of the property, Mrs. Seale provided considerable details as to the occupation, which added to her credibility. She stated, from the mid-to-late-1950s onward, "without interruption", each year after school ended in early June, until Labour Day Weekend, her "family stayed initially in a tent, until we built our cottage". I find, on the basis of the foregoing, that the use of the Seales' land was continuous each summer, in every year.

[140] What remains to be determined is whether the Seale occupation was exclusive and without the consent of true owner or paper title holder. It is all but acknowledged that like the claim of Mrs. Bain, the issue of whether the Seales had consent of the title holder and, in particular, the United Church, is the main issue. In this regard, a key piece of evidence is a letter written by one James Warren to Mosher Limestone on October 2, 2003. In many respects, that evidence will be determinative of this case. Prior to assessing that evidence, I shall deal first with

the issue of whether the Seales' use was inconsistent with or prevented the true owner's normal use of the property.

***Camp Closed***

[141] The evidence of Leotha Seale, Rev. Ihasz and others is that the United Church Summer Camp closed in the 1960s, most probably in the mid-1960s.

[142] The Defendant argues until then, the use made by Mr. and Mrs. Seale did not interfere with the camp as the use was, in fact, consistent with (camping by tent), which was the very use the church was making of their property. The Defendants allege further that members of the public and the United Church accessed the church property over "the Seale land" and, therefore, the church's normal use continued.

[143] There is real and demonstrative evidence, which is both cogent and persuasive. Attached to Mrs. Seale's Affidavit are dated and undated photos evidencing their occupations. Mrs. Seale was able to verify the date of the pictures by identifying her children, their ages, and by recounting their dates of birth. There is among them a photo of a fully constructed cottage in the year 1960. Also attached as an exhibit to the Affidavit of Virginia Murray Butts is a photo of a large gathering with several cars at the Seale lot next to the foot bridge, also dated 1960. Mrs. Seale's evidence was that the clearing began in the 1950s, and this is supported by the evidence of her neighbour in New Campbellton, Margaret MacLean. Mrs. MacLean is eighty-seven (87) years of age and lived several miles down the New Campbellton Road. I accept this, because it is a reasonable inference supported by the evidence that Mr. and Mrs. Seale began to construct their cottage in the late 1950s. Mrs. Seale said it was at or about 1956 or 1957, but in assessing the remainder of the evidence and photos, I think it is both sound and reasonable to conclude that the construction of the Seale cottage began in 1958. This, in my view, is supported by the evidence.

[144] From there, I ask whether someone constructing a cottage (and a driveway) on a church's land, otherwise used for camping, is use inconsistent with the church's ownership. I think the answer to this is reasonably, yes. There was some evidence, by Mrs. Seale herself, that the children from the camp crossed their land (they were never stopped) but apart from that, the evidence is not at all plentiful or convincing that the church or the public crossed the Seale lot, save for any use the

church made to access their property up the hill, over the driveway, located east of the Bain dwelling. I do not accept the argument that just because the church did not use this part of their land for camping that that alone would prevent a claim by the Seales. That would not be in keeping with what I understand the law to be, on adverse possession.

[145] I find, therefore, that the occupation by the Seale family was inconsistent with the true owners possession, (while it was owned by the United Church and/or the Sydney Presbytery). I find, further, that the occupation interfered with the normal use of the true owner as the normal use was either as vacant land or as a summer camp. Placing a residence and the act of clearing, constructing, and maintaining same is, in my view, inconsistent with that use. In 1979, the Seales would have been there for twenty-one (21) years.

[146] I turn now to assess whether the Seale occupation was exclusive. Once again the onus is on Leotha Seale to establish, by persuasive evidence, that her occupation was exclusive to that of the true owner or paper title holder(s)).

***Exclusivity - Seale***

[147] The onus of proving that the Plaintiff, Leotha Seale occupied the lands exclusively, is on her. It is not up to the Defendants' to establish she did not. As stated recently, in the case of **Mader v. Hatfield**, 2012, NSCA 66, of the Defendant/Respondent, at paragraph 97:

> "**[97] It was the Maders who had to provide very cogent evidence that Eddie's use satisfied all the criteria for adverse possession, including exclusivity. Whether or not Dorothy Trenholm was aware if the true owners viewed the property that Eddie occupied as theirs was of no consequence for the legal test. Nor did it matter whether Mary Mader or Ms. Hatfield used or mowed the land to which they had legal title. Nor did they have to prove that their activities on their own property disrupted Eddie's possession of lands that others thought he owned. Nor did they have to show that their conduct was intended to exert their ownership rights."**

[148] The submission of the Plaintiff, Mrs. Seale, was summarized at page 10 in the Brief of their counsel, Mr. Ripley, as follows:

> **"It appears clear from the evidence that Scotia Limestone Limited, and its predecessor in title Sydney Steel Corporation Limited, have held "paper**

> **title" since the late 1970's. When they obtained that title, the Seale family had been occupying that property, had power and other amenities to that property, had the property cleared and were exercising dominion over that property for many years. Neither Scotia Limestone nor its predecessors in title took any action to attempt to dispute that until well after the prescriptive period had expired."**

[149] The evidence is, there were several surveys of the property, those being in 1974, 1976 and 1979. The 1974 survey (Exhibit #11) is of the lands of the United Church, being twenty (20) acres, more or less. It shows three (3) encroachments, including the Bain and Seale dwellings, without showing any evidence of further occupation, except for the two (2) driveways. Of those, one (1) is between the Bain and Seale cottages, west of the brook, and a second driveway is shown leading to the Seale cottage, east of the brook.

[150] The 1976 survey shows the lands to be conveyed to Catherine Bain and Oscar Seale (including lot boundaries). It shows both driveways, and Exhibit A of Sandra Bain's Affidavit (Exhibit #3,Tab 1) states the (second) driveway shown in pink was built by Mr. Seale "in the 1960s". The 1979 survey is contained in Tab 1 of the Joint Exhibit Book. It shows the location of drilled holes and property lines of Scotia Limestone Limited. It is similar to the 1974 survey, except it contains the boundaries of lands purchased by Scotia Limestone. Once again, the dwellings of Seale and Bain are shown. Notably, it is described as Plan No. 2, and contains a partial copy only.

[151] There are additional surveys and instruments of subdivision, involving Mr. Fraser's land, which overlaps (in part) with Mrs. Seale's claimed lot, as shown as Exhibit #7. The Defendants argue these surveys represent an entry by the true owners, as surveyors are agents of true owners. The concept of agents and employees was recognized in **Bowater**, thus, the Defendants say Mr. and Mrs. Seale's occupation was interrupted, in each year in which these surveys were performed.

[152] I have reviewed the case law in relation to whether a survey constitutes an entry by an owner on land otherwise occupied by a "squatter". In **Adrian v. McVannel,** 1992 Carswell ONT 628, there was a statement by the Court that the Respondent:

> **"Took none of the steps which a reasonable owner would take to ascertain the extent of his boundary, *such as having a survey prepared.*"** [Emphasis added.]

[153] In **Tanner v. Tanner**, 1988 Carswell NS 393, which also involved the use of a path (or right-of-way), the Court found that the details of the survey were never conveyed to the occupier and, ultimately, concluded as follows at paragraph 43:

> **"The fact of the survey itself does not constitute an entry to break the continuity of Howard Tanner's possession."**

[154] On the facts here, I prefer the view expressed in **Tanner** as it relates to Mrs. Seale. The *Land Surveyors' Act*, R.S.C., 1985, c. L-6, authorizes a licensed Nova Scotia Land Surveyor to enter land for the purpose of conducting a survey and determining encroachments or boundaries. That normally includes the setting of markers, cutting of survey lines, determining setbacks and building locations, and the preparation of a plan accordingly. It is often the owner who hires a surveyor, but in a sale transaction, it is often the purchaser who performs the survey, even though the purchaser does not yet own the land.

[155] In a land dispute, it may well be the person occupying the land or the adjoiner who retains a surveyor. In any event, it follows that just because a surveyor is authorized by law to enter the land, this does not mean he is doing so on behalf of the owner. In those circumstances, where he does enter on behalf of the owner, it will depend on the circumstances of each case. In this case, it is not at all clear that the details of the survey were conveyed to Mrs. Seale. Other than the dwellings being shown, there are no other markings or evidence that stakes were placed to suggest to Mrs. Seale that she was encroaching. The 1976 survey appears to have markers at the corners of the lots, but there is no indication they were "set" markers.

[156] I have touched upon what access the church made of the Seale lands and have concluded, on the facts, that it was minimal. In many respects, it was confined to the original driveway.

[157] There is evidence of Allan Mosher, that in 1990 he went in to inspect the Seale lot. That was the extent of his entry at that time. Under the *Limitation of Actions Act*, a mere entry by a person is not considered under Section 13, to be possession. A person in this context is different from an owner who, according to **Bowater**, need only step foot on the land, to be considered in possession of it. In my assessment, by 1990, any claim the Seales had would have come to fruition, without earlier interruption, as they, at that point, had been there for 32 years. Unlike the situation in **Mader**, where there had been a "series" of entries - there was one entry.

[158] The Affidavits of Allan Mosher contained little evidence with respect to the Seale claim except for the "Warren letters". Similarly, the Affidavit of Lloyd Fraser contained one (1) paragraph, namely paragraph 32 in relation to the Seale claim. It stated, "She had never blocked or protested the use by employees or agents of Scotia (including him) of the property she claims". While there is no onus on the Defendants, what use he is referring to is unclear. It appears from the evidence to have been use of the original driveway or the 1990 entry by himself. The original driveway was west of and not situate on the "Seale lot". There is the entry of surveyors, which I have addressed. As stated, Mr. Fraser, in his personal capacity, came on the scene in the late 1990s and early 2000, at which point there was more activity around the Seale property.

[159] On this basis, I am prepared to conclude that Mr. and Mrs. Seale occupied the Seale lot, exclusively from 1958 to 1990, a period of thirty-two (32) years. I am satisfied that Mrs. Seale has discharged her burden in this regard, based on all the evidence. I will now deal with the driveway portion of the Seale lot and her claim with respect to it.

***Roadways***

[160] There are two (2) roadways which lead to the Seale lot. Both are referred to by Mrs. Seale in her Affidavit. The first one (1) was used in the late 1950s to access the lot. She described this as the first driveway, shown in two (2) photos attached at Exhibits "g" and "l". She said there was a bridge which they constructed to cross the brook, but it would often "wash out". Her husband, therefore, built a second driveway in the "late 1960s or early 1970s". This second

driveway was east of the brook and was constructed over a marshy wet area. It is shown in "pink" on Exhibit #7. The existence of this driveway was confirmed by other witnesses, including Thomas Pittman, Jessie Gatchell, and certain of the Defendants' witnesses (see paragraphs 16, 18 and 28 of Affidavit of Leotha Seale).

[161] There is no dispute that the right of way existed or that it was used by the Seales. That they used one (1) driveway or the other is consistent throughout the evidence. The right-of-way access of the Seales was never blocked, or the period of use from when each was built, was never blocked or interrupted. It is reasonable to conclude that Allan Mosher used the second driveway, for example, when he entered the property in 1990.

[162] The Defendant's position is that the use of both the Seale lot and the driveway leading to it, has been with permission and, as such, no rights have been acquired by Mrs. Seale to either.

[163] The Plaintiff, Mrs. Seale's position, is that a right-of-way by prescription has been established, pursuant to Section 32 of the *Limitation of Actions Act*, which reads as follows:

> **Prescription**
>
> **32 No claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated and where such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of twenty-five years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given, or made for that purpose by deed or writing. R.S., c. 258, s. 32; 2001, c. 6, s. 115.**

[164] The Certificate of Title claimed by Mrs. Seale is for the "fee simple" in the lot itself and, in addition, a right-of-way to access the lot. A description of the right-of-way sought, is as follows:

> **"Together with the right-of-way over the existing driveway, extending northerly from the northwestern boundary of the New Campbellton Road as shown on the above-mentioned plan."**

[165] The Plaintiff maintains this right-of-way should form part of the Certificate of Title as requested by Mrs. Seale, claiming such right is "absolute" as the use was without "some consent or agreement expressly given". The Plaintiff states neither Oscar Seale or Leotha Seale sought, or were granted permission, by the institution consisting of the "United Church of Canada for the Women's Missionary Society of the United Church of Canada".

[166] In my view, it is prudent to deal with the issue of consent to use the lot and the driveway, as one (1) issue. As stated, it is that issue which will be determinative of Mrs. Seale's claim, given the other findings I have made.

***Was the Occupation of the Seales with Permission?***

[167] There are no church records evidencing that Mr. and Mrs. Seale had permission. There are, as well, no corporate records or Minutes of Scotia Limestone or records at Sydney Steel ("none there"). The closest that one could come to permission, expressed or implied in the records, are the Minutes of the Sydney Presbytery, stating that Sydney Steel, as purchaser, would deal with the landowners in the area, at the time of the sale in 1979 - that is when the Defendant states any tenancy is determined, or any occupation or possession would cease, in terms of the clock and the resetting of same under the *Limitation of Actions Act.*

[168] Under questioning from Plaintiff's counsel, Allan Mosher stated, "When asked whether there was any indication that the Seales were "there" with permission, stated, "The only indication he had was the letter of James Warren at 2(j) of Exhibit #4. There is nothing either from the Maritime Archives of the

United Church, and this says the Plaintiff, Mrs. Seale, "speaks volumes". There was not, by the Defendant's own admission, ongoing discussion in the evidence about a possible sale or lease, like the situation with Mrs. Bain. This is so, notwithstanding the 1976 survey, indicating a possible sale.

[169] The letter of Mr. Warren is dated October 31, 2003, some fifty-plus (50+) years since his mother-and-father-in-law began occupying the property. It was written without the knowledge of Mrs. Seale and, thus, without her endorsement. It contains, among other things, one (1) sentence which is particularly relevant. Mr. Warren is married to Mrs. Seale's daughter, Elizabeth "Joey" Seale. In referring the New Campbellton property, his wife's family and his mother-and-father-in-law, he stated to Mosher Limestone Company Limited:

> **"They received permission of the local church board at the time to build, but they could not sell them the property because it was owned by the Presbytery."**

[170] The Defendants rely on this, as well, as a second item in the letter, where Mr. Warren stated his father-in-law, "was assured at the time that the cottage would not be disturbed and that they would be allowed to stay there". The time he referred to was when the church was, "forced to sell" because the Cape Breton Development Corporation, "wanted the land to exploit the dolomite deposits". These facts are corroborated, say the Defendants, by Mr. Warren's letter.

[171] Reverend Ihasz had been a Pastor in New Campbellton, and one who visited his parishioners regularly. Mrs. Seale stated in evidence, she would sometimes go to New Campbellton, even in winter, to celebrate Christmas. Reverend Ihasz also knew the workings of the church and the nature of the decisions made by it in regard to land, and how that would work. He knew nothing and heard nothing ever, in respect of whether Mr. and Mrs. Seale had permission from the church and, in particular, the local board. He, in fact, stated it would have to have been discussed , in the form of a resolution moved, and seconded, as was to a certain extent, with Mrs. Bain.

[172] The Warren letter is submitted by the Defendants as evidence that Mr. and Mrs. Seale built with permission, not as an acknowledgement of title, which would have to be in writing and signed by the person in possession, Mr. or Mrs. Seale. The letter certainly falls short of a proper acknowledgement, but is it credible evidence that permission was given to Mr. Warren's father-and-mother-in-law, Mr. and Mrs. Seale?

[173] There was the suggestion of the Plaintiff's counsel that Mr. Warren, as a lay person, could have easily misunderstood permission as compared to acquiescence. Also, it was advanced that he made a number of presumptions which proved to be incorrect and, as such, is not reliable evidence of permission. Mrs. Seale, they say, was unaware of it, and thus it was not sent with her knowledge or permission. It arose only in 2003.

[174] It is true that Mr. Warren was a lay person. It is also true that he wrote the letter with good intentions to secure a deed for his wife's family. His intentions were good. He wanted to remove the uncertainty around his in-law's property , one they had enjoyed and cherished for so long. In their evidence, the Defendants, Mr. Mosher and Mr. Fraser, both pointed to the letter as what they considered to be the evidence that the Seales occupied their lot with the permission of the church. There are considerable Minutes and dealings with the lands in New Campbellton by the church and, I agree, the handling of those issues by the church was, indeed, formal and businesslike.

[175] Mr. Warren gave evidence in direct, having been called by the Defendants. He met his wife in the early 1970s and has been familiar with the property since then. He spoke of family discussions around the "Sunday dinner table", concerning the land. He was unable to pinpoint the source of the information in his letter other than the knowledge he acquired. He acknowledged making certain assumptions. He acknowledges further he was not authorized by Mrs. Seale to write the letter. He did state she was one of the people involved in the discussions.

[176] There are mistakes in the letter and they might better be described as assumptions which were not exactly correct. His information was general. He

thought the land was owned by Mosher and Limestone but came to learn it was actually Scotia Limestone. He had no explanation for thinking it was the Cape Breton Development Corporation, but was thinking Sydney Steel instead. He simply got it wrong. He was correct about the dolomite operations and by the "Presbytery " he may have been referring to a larger body within the church, such as the National Council. It was in fact owned by the Presbytery, later in 1967, but not at the time the cottage was built.

[177] Mistakes are one thing and assumptions are another. While neither add to the quality of the evidence, Mr. Warren was credible in the sense that he believed what he wrote was correct. Mrs. Seale said under oath it was not. Although it was her husband that mostly had conversations about the land, Mrs. Seale, too, was credible. She spoke of Mr. Bain and that her husband most likely would have informed her, had there been permission from someone else and, in particular, the church. It is possible her son-in-law was mistaken about details, but correct about the gist of the letter; the permission part.

[178] Having considered the matter, there are reasons to be sceptical about the contents of the letter, even if well-intended. There are obvious hearsay concerns with it, as the source is not the person who would be required to give the permission, as one example. Further, it does not state that the Seales sought permission. Mr. Seale is deceased, so there is some necessity to admitting it, but is it reliable? One of the main difficulties with it, is that it is not being relied upon to corroborate other evidence, as much as it is being put forward as "the evidence" that the Seales were there with the permission of the church. He was not accurate about the Sydney Presbytery owning it at the time of construction, though, I stated, he would not be privy to the title details. He stated the church was, "forced to sell". There is little evidence of that. He stated also, in direct, about the community being aware of the permission, but the evidence on that is scarce, unless we assume because Mrs. Bain had permission, so did the Seales. I do not think it would be right to make that assumption, anymore than it would be to assume that just because the church and subsequent owners were aware the buildings were there, that they as "the occupiers", were given consent, either expressed or implied. I believe that to be too big a "leap" in terms of the evidence.

[179] As the result, I find that the Warren letter is not clear and convincing evidence that Mr. and Mrs. Seale were occupying their lot and roadway with permission. I do so knowing the burden is not on the Defendants to "disprove" the claim of the Plaintiffs, per se. Nonetheless, they have attempted to do so with this letter. In my respectful view, it simply should not be relied upon given the remaining evidence (or the lack thereof), for the proof it attempts to establish. It must be approached with caution. Placing too much reliance on it would prove reckless.

[180] There is an onus on the Defendants' to establish that the Seale occupation was with permission. I find the defendants have failed to discharge that onus.

***Alternative Arguments***

[181] In the event that the Seales were, in fact, occupying their lot with permission of the church, as argued by the Defendants, the Plaintiff argues that a tenancy at will was created. Such a tenancy, if created, would expire one (1) year later, allowing the Seales occupation to ripen into title beginning in 1959 (instead of 1958) and expiring in 1978 (twenty years later).

[182] The Defendants argue a proper interpretation of the section of the *Limitation of Actions Act* (Section 10(f)) is that a tenancy at will would not be determined until the consent ended as evidenced by the Mosher letter dated May 3, 2004, which letter denied Mr. Warren's request for a sale of the property.

[183] According to the decision in **Casey v. Canada Trust**, [1960] O.J. No. 604, a "loose family arrangement", would give rise to a tenancy at will. The Plaintiff, Mrs. Seale, said there was no such arrangement with the church, but even if there was, the Defendants cannot rely on its' position that it was never revoked, by any of the church, Sysco, Scotia Limestone or Lloyd and Patricia Fraser. The Plaintiff has submitted caselaw authority that a new owner has an onus to do more than, "acquiesce". Acquiescence, she says, is not permission (see **Fitzpatrick's Body Shop Ltd. v. Kirby**, [1992] N.J. No. 84).

[184] Under the scenario of a tenant at will, the facts, or rather evidence, would support a twenty (20) year period of adverse possession, without interruptions, as well as being open and notorious for the period 1959 to 1978. A new or fresh arrangement does not arise until 1979, save for the Presbytery being conveyed the property in 1967. Should then a distinction be made between the United Church and the Sydney Presbytery in terms of a fresh arrangement, which would create a new tenancy at will, (in 1967) as would the conveyance to Sydney Steel in 1979, as would the conveyance to Scotia Limestone in 1980?

[185] In my view, as weak as the evidence on permission is, it is weaker still on whether a tenancy at will is created. The finding, that Dickson ,J. in **Ocean Harvesters** suggests is necessary ,is that a proprietary interest was intended. Such a finding between the church (or the Sydney Presbytery) and the Seales, is in my view, a venture into the realm of speculation.

[186] This case, in my respectful view, should rest on the finding of whether there was permission in the first instance, given to the Seales. I stand by my finding, that on the evidence, it was not given.

[187] Finally, in an attempt to address the other logical scenarios, there is the twenty (20) year period beginning in 1980 to the year 2000, when the Seales occupied their land, "flag still flying high", and "staking out"[3] their claim. In the intervening years, there was the single entry by Allan Mosher in 1990. There is also the deeding and entry in 1998 of Lloyd Fraser, at least in respect of a portion of the Seale lot and, as well, use of the second driveway.

[188] Recently, in **Mader**, the court mentioned a "series" of entries in the *Limitation of Actions Act*, Section 13 says, "A single entry is not deemed to be possession." Mr. Mosher made a single entry in 1990. In **Bowater**, every time the true owner sets foot, they are in possession. This would apply more clearly to Mr. Fraser in 1998, although it is unclear whether he used any portion of the Seale lands. The weight of the evidence suggests he did not.

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[3] *Supra, see Footnote 1*

[189] There are clearly more difficulties associated later in this Seale timeline, in terms of the burden, which must be discharged by Mrs. Seale. Apart from what I have mentioned, the quality of the possession is strong, even persuasive during the entire period of their occupation, from 1958 to 1998.

[190] Accordingly, I am satisfied that any permission given to the Seales continued only until such time as it was conveyed to a new owner, which would be 1967 for the Sydney Presbytery. Their continued occupation from then on, from 1968 to 1988, would be uninterrupted and without consent for the ensuing twenty (20) years, except for the surveys and conveyances to Sysco and Scotia. As this was prior to Mr. and Mrs. Fraser's involvement, the Seale claim would ripen into title during that time, even if the local church gave permission, be it expressed or implied. Mr. Warren's letter, if accepted, stated that it was the local church and not the Presbytery which gave permission. The letter does not state who provided the assurance. The evidence suggests it could be Sysco in 1979, as they were to deal with the landowners. Beyond those Minutes, there is little or no evidence. The Warren letter, even if accepted, falls short of stating whether it was the Presbytery in 1967 or 1979, or the new owners, Sysco in 1979 or Scotia in 1980, who provided the assurance (that the cottage could stay).

[191] I find, therefore, in the alternative that Mrs. Seale has met the burden of establishing that her occupation was open, notorious, continuous, exclusive and without permission from 1968 to 1988 , notwithstanding the intervening conveyances, in 1979 and 1980. Those were conveyances of the paper title only and did not amount to possession of the true owner. I find further, that the Minutes of the Property Council (Exhibit 3, Tab 7 (F)) requiring Sysco to deal with the people still residing on the property, do not amount to consent, express or implied by Sysco. The evidence of any consent is simply not persuasive.

## CONCLUSION

[192] The Plaintiff, Sandra Bain, has failed to establish that she is entitled to a Certificate of Title, under Section 12 of the Quieting of Titles Act of Nova Scotia. The occupation of her mother, the late Catherine Bain, was with permission and, therefore, her occupation did not ripen into title under the Limitation of Actions

Act, or at common-law. The Defendants have established, and met the onus of establishing, that Mrs. Bain's occupation was with permission in accordance with the reasons I have given. In addition, and in any event, the occupation by the Bains did not oust the true owners, the Defendants, from their normal use of the land, as evidenced by such equivocal acts as the drilling of a well, and the use of the road running through the property. In addition, there was the later use and occupation by Mr. and Mrs. Fraser. In the result, the application by Sandra Bain for a Certificate of Title is denied.

[193] The claim of the Plaintiff, Leotha Seale, for a Certificate of Title to the Seale lot is granted. Mrs. Seale has satisfied the onus upon her to establish that her occupation, with that of her husband, the late Oscar Seale was open, notorious, continuous and exclusive as against the true owners of the land from 1958 to present day. My reasons have been detailed in my decision. Further, Mrs. Seale's use was inconsistent with that of the true owners, and ousted them of their use of the Seale lot. The Defendants have failed to meet the onus on them to establish that the use and occupation by Mr. and Mrs. Seale was with permission. For the similar reasons, the Seale lot shall be granted access over the driveway shown on Exhibit 7, said right of way being as described in the legal description provided for the Seale lot, which description shall form part of the certificate of title. This right of way/easement was acquired by prescription as a result of continuous use of the said driveway, without permission, from the late 1960s to the present, a period in excess of forty (40) years.

[194] Accordingly, an Order will issue requiring the Plaintiff, Sandra Bain, to provide vacant possession to the Defendants within a period of fourteen (14) months from this *Decision* date. The Defendants have, in their pleadings, stated that the Plaintiff, Sandra Bain, may remove all property and structures and the Court is prepared to recognize that in the Order to be issued. Following the fourteen (14) month period, the Plaintiff, Sandra Bain, is enjoined from entering or occupying the Bain lands.

[195] I will hear the parties as to costs by way of written submissions within thirty (30) days.

[196] Order accordingly.

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J.