

CANADA / JUDGMENT

Burko v. Martindale

2023 BCSC 2

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Supreme Court of British Columbia

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2023 BCSC 2 Burko v. Martindale

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Burko v. Martindale,

2023 BCSC 2

Date: 20230103

Docket: S55346

Registry: Kamloops

Between:

Robert Barry Burko and Karen Eileen McKibbin

Plaintiffs

And

Cory Reynold Martindale and Tracey Ann Martindale

Defendants

- and -

Docket: S59140

Registry: Kamloops

Between:

Cory Reynold Martindale and Tracey Ann Martindale

Plaintiffs

And

Robert Barry Burko and Karen Eileen McKibbin

Defendants

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

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Place and Dates of Trial:

Kamloops, B.C.

December 5-9, 2022

Place and Date of Judgment:

Kamloops, B.C.

January 3, 2023

TABLE OF CONTENTS

Introduction. 3

Background Facts. 4

The Competing Positions. 6

Legal Framework. 6

Preliminary Issues. 9

Burden of proof 9

Hearsay objection to evidence of Mr. Richardson. 13

Mr. Richardson's evidence and the statements attributed to Mr. Balas. 13

The principled exception to the hearsay rule. 14

Analysis: first hearsay statement 16

Analysis: second hearsay statement 16

Analysis: third hearsay statement	17
Evidentiary status of Mr. Swaile's report	18
Analysis.	19
The expert evidence of the surveyors.	19
Direct evidence.	20
Aerial photographs.	21
Evidence of an historic fence on the property to the west	22
Evidence of a dried up creek bed to the south and west of the Northern Parcel	23
Mr. Balas' admissible hearsay statements to Mr. Richardson.	23
Ground observations of Mr. Sansom and Mr. Alcock.	23
Ground observations of Mr. Swaile and Mr. Minifie.	24
Mr. Swaile's opinion.	25
Mr. Bates' evidence.	26
Assessment of the direct evidence.	26
Historic surveying evidence.	28
The 1887 field notes.	28
The DD Plans.	29
Conclusion concerning the historic survey evidence.	30
Disposition.	30
Appendix - Plan DD 15293 and Plan DD 24952.	32

Introduction

- [1] This case involves a dispute about the location of a property line in the North Okanagan region. The properties in question were separated by Johnson Creek in 1911, and the property line was defined as the centre of Johnson Creek. The dispute turns on a question of fact. Has Johnson Creek moved to the south since 1911? The parties agree that, if Johnson Creek has moved, the movement would be an avulsion, and the property line would have remained where it was.
- [2] The question in dispute can be put differently. Where was Johnson Creek in 1911, by comparison to its present location?

- [3] Barry Burko and Karen McKibbin own the property that lay to the south of Johnson Creek in 1911 (the "Southern Parcel"). They contend that the creek has not moved, that it is still where it was then. They maintain that two plans prepared in 1911 and filed in the land title office were and are mistaken in their placement of the creek and the property line. The two plans are numbered DD 15293 and DD 24952 (collectively, the "DD Plans"). Mr. Burko and Ms. McKibbin are supported by a licenced land surveyor, Brian Minifie, and other qualified experts.
- [4] Cory and Tracey Martindale (the "Martindales") own the property that lay to the north of Johnson Creek in 1911 (the "Northern Parcel"). They contend that the creek has moved so that their parcel of land now includes land to the south of the creek's present location. They maintain that the DD Plans were correct in 1911. They are supported by a licenced land surveyor, Brian Sansom, and other qualified experts.
- [5] The professional disagreement between the two surveyors, Mr. Minifie and Mr. Sansom, was addressed by the Deputy Surveyor General, David Swaile, in a report to the Registrar of Land Titles in 2019. Mr. Swaile neatly encapsulates the disagreement and the question I have to decide in the following excerpt from his report:

The westerly portion of the creek is what is uncertain. Mr. Minifie's assertion is that the creek location today is substantially as it was when the DD plans were prepared, and it is the DD plans that were drafted in error. Mr. Sansom, on the other hand, believes that the DD plans were a fair representation of the creek's location at the time they were prepared, but that the creek moved - suddenly - at some point afterwards. The difference between the current creek location and the plotted location according to the DD plans (I will occasionally refer to this as the "titled" creek location) appears to range up to approximately 50 metres, with the current location being located further north than the "titled" location.

- [6] In the result, Mr. Swaile favours Mr. Minifie's view that Johnson Creek remains where it was in 1911. The evidentiary status and weight to be given to Mr. Swaile's report is an issue in this proceeding.
- [7] Mr. Burko and Ms. McKibbin and the Martindales each claim damages from the other for trespass. They agreed, and I ordered, that the issue of the location of the property line be tried first, with the remaining issues of liability and damages to be tried later. These reasons set out my decision as to the location of the property line.

Background Facts

- [8] The two properties are located in the vicinity of Mara, north of Grindrod, south of Sicamous, and just west of Highway 97. The Shuswap River is to the west. Johnson Creek is a tributary of the river, and so it flows from east to west towards the river. It varies between 3 m and 25 m in width, with substantial variations in water flow according to the season. It overflowed its banks during the spring freshets in 1997, 2012, 2017, and 2022. The properties are situated on an alluvial fan associated with the creek.
- [9] All of the land in issue was formed by the action of the Shuswap River and Johnson Creek over geological time periods since the last ice age. At one time or another, all of it formed part of a river or creek bed. Over the past thousands of years, Johnson Creek has moved about in spasmodic, allusive events caused by flooding.
- [10] The Northern Parcel is bordered by Poirier Road to the north and Highway 97 to the east. The Southern Parcel is bordered by Highway 97 to the east and Hamilton Road to the south. Both properties are and have been partly forested.
- [11] The properties share part of a common legal description. Together, they make up the north half of the southwest quarter of section 15, township 20, range 8, west of the 6th initial meridian. This is land that was surveyed by Dominion Land Surveyors working within the Canadian Pacific Railway belt beginning in the 1880s. Surveyor John McLatchie led a surveying team that marked the west section boundaries on December 15 and 17, 1887. His field notes are relied upon by the Martindales. The south, east and north boundaries are not marked until 1910, when they were marked by Surveyor N.C. Stewart.
- [12] Both properties, not yet subdivided, were the subject of a Crown grant to Fredrick Dean in 1907. They were subdivided when Mr. Dean sold them separately. He sold the Northern Parcel on December 8, 1910, and the Southern Parcel on November 24, 1911. The deeds of sale were registered in the land title office together with plans of the subdivided parcels. Plan DD 15293 described the Northern Parcel and Plan DD 24952 described the Southern Parcel. The DD Plans are attached as an appendix to these reasons. To this day, they remain the only plans of the disputed property boundary on file in the land title office.
- [13] The DD Plans were signed by a British Columbia Land Surveyor, G.L. Williams. They show the centre of Johnson Creek as the southern boundary of DD 15293 and as the northern boundary of DD 24952. In both cases, the creek is shown as a sinuously curving boundary. Whether or not this depiction of the creek was accurate at the time is the question at the core of this case, and I will address the DD Plans in greater detail later in these reasons.

- [14] For many years prior to 2003, the Northern Parcel was unoccupied. It was owned by two brothers, John and Paul Langdon, who lived in England. A local man, Ian Richardson, kept an eye on the property for the Langdons. The Martindales bought it from the Langdons in 2003 and have occupied it since then. They pasture cattle on the property and Mr. Martindale makes use of it in his businesses engaged in construction, manufacturing, and the provision of engineering services.
- [15] The Southern Parcel contains a seasonal campground and RV park called Whispering Pines. Whispering Pines was established in the 1960s. It features gravel access roads and serviced, gravelled campsites that can accommodate large recreational vehicles. An access road adjoined by a row of campsites runs beside the creek to the north. Some of these campsites are located on disputed property.
- [16] From some point prior to 2003, the Southern Parcel was owned and Whispering Pines was operated by Bernie and Sharon Rushton, through a company. Mr. Burko and Ms. McKibbin purchased the property from the Rushtons' company in April 2017 and continue to operate Whispering Pines.

The Competing Positions

- [17] The DD Plans are drawn to scale. From them, it is possible to identify where Johnson Creek is supposed to run, if the plans are accurate. That line follows the present line of the creek where it crosses Highway 97, at the eastern border of both properties, and accurately depicts the creek for about one-third of the way towards the common western boundary. At that point, in its present path, the creek jogs abruptly to the north before turning again to the west. It continues to the north of the line depicted in the plans, gradually diverging as the line on the plans proceeds roughly west-south-west. At the western boundary, the centre of the creek is presently about 58 m north of the line indicated in the plans.
- [18] The land between the line indicated in the DD Plans and the present location of Johnson Creek is disputed property. The amount of territory in dispute is about .65 hectares or 1.6 acres. To put this in context, it represents about 12% of the area of the Northern Parcel, as shown on the DD Plans.

Legal Framework

- [19] In British Columbia, a certificate of title affords to the registered owner of a piece of land conclusive proof of ownership, subject to statutory exceptions; Land Title Act, R.S.B.C. 1996, c. 250 [LTA], s. 23(2); *Phillips v. Keefe*, 2012 BCCA 123 at para. 57 [Phillips CA], varying 2010 BCSC 2005 [Phillips SC]. The documents registered in the land title office describe the property in question, but are not conclusive as to its location on the ground; *Phillips CA* at paras. 58-63. Location on the ground must be determined by survey evidence and that is the issue in this case.

[20] In determining the location of cadastral boundaries--that is, property boundaries--surveyors refer to a hierarchy of evidence ranging from most to least reliable. This hierarchy is accepted by courts as a precedential ranking of the best evidence with which to locate physically a disputed boundary; Phillips CA at para. 66; Phillips SC at paras. 66-72. In summary, the hierarchy is as follows:

- i) natural boundaries;
- ii) original monuments;
- iii) fences or indicia of possession that can reasonably be related back to the time of the original survey monuments; and
- iv) measurements (as shown on the plan or as stated in the metes and bounds description)

[21] The third order of evidence encompasses a very wide variety of possible indicia of possession including the recollections of knowledgeable residents of long settled possession, with a view to determining "whether a reasonable factual nexus has been established between evidence of possession and the presence of original monuments"; Phillips SC at paras. 71-72.

[22] The common law's acceptance of the approach taken by surveyors does not involve a delegation of responsibility from courts to surveyors, but rather the development of common law principles that mirror surveying practice. In Phillips SC at para. 67, Justice Dickson, as she then was, described the common law principles as grounded in the best evidence rule and policy concerns about the risks of disturbing settled possession based on mathematical measurements. That is why evidence of fencing or long-standing possession relating back to the original boundary tends to trump measurements and calculations based on the description of a property in an ancient deed; Nicholson v. Halliday (2005), 74 O.R. (3d) 81 at paras. 33-35, 2005 CanLII 259 (C.A.). In Phillips SC, Dickson J. concluded:

[69] The task of a surveyor is to re-establish original boundaries, taking into account the best available evidence. The task is not to define limits as mathematically described in a deed or elsewhere. []

[23] The respective roles of surveyors and the courts are well summarized by David Lambden and Izaak de Rijcke in Survey Law in Canada: A Collection of Essays on the Laws Governing the Surveying of Land in Canada (Carswell, 1989), at p. 120:

§4.40 The locations of boundaries are a matter of fact in the legal sense and the surveying profession acts as the carrier of these facts from the ground to the courts in cases of dispute that are brought to action. In day-to-day operations (as there is actually very little litigation about boundaries), the surveyor creates the record of things on the ground to be thereafter used by people far-distant from the ground location.

§4.41 In one instance, the surveyor is the creator of fresh evidence as in the original surveys of wilderness lands for settlement or in the marking of lots in a new subdivision by a private owner. In another instance, he is the interpreter of old evidence to locate the position of an original boundary, but he is not the authority of final decision; that remains the function of the courts.

[Emphasis added.]

- [24] Where a water course such as Johnson Creek is a natural boundary, the boundary is usually considered as ambulatory. As the edge of the water course or its centre moves according to the natural processes of erosion and accretion, the boundary moves as well. There is an exception to this legal rule if the movement is due to a sudden avulsion rather than gradual erosion or accretion; *Yukon Gold Co. v. Boyle Concessions Ltd.*, 19 D.L.R. 336 at 352, 1914 CarswellYukon 5 (Y.K.T.C.), aff'd 27 D.L.R. 672, 1916 CarswellBC 81 (B.C.C.A.), aff'd 50 D.L.R. 742, 1917 CanLII 702 (S.C.C.) [Boyle Concessions]; *Clarke v. Canada (Attorney-General)*, [1930] S.C.R. 137, 1929 CanLII 38; rev'd 23 Alta. L.R. 233, 1929 CanLII 303 (C.A.) [Clarke]; *Ontario (Attorney General) v. Shanks*, [1981] O.J. No. 79, 1981 CarswellOnt 1408 (C.A.) [Shanks]; *Black v. Norris*, 2012 NBQB 346, rev'd on other grounds, 2013 NBCA 62. An avulsion is rapid and dramatically obvious, and the property line remains where it was.
- [25] As is apparent from the surveyor's hierarchy generally and in particular its third level ("fences or indicia of possession that can reasonably be related back to the time of the original survey monuments"), the hierarchy presupposes a cadastral boundary originally fixed by a natural boundary or original monuments. In a case such as the present, where the boundary in question was fixed by a natural boundary (Johnson Creek), and the issue is whether that natural feature has ceased to serve as a property boundary through an avulsion, a slightly different approach is required, still respecting the underlying principles and policy concerns. The fundamental question is whether Johnson Creek has moved and direct evidence of the past and present location of the creek, including photographs, historic documentation, and the recollections of residents, is afforded primacy over historic surveying measurements such as those shown in the DD Plans and found in the original deeds by which the Northern and Southern Parcels were subdivided.

Preliminary Issues

Burden of proof

- [26] The parties disagree as to which of them bears the burden of proof. Mr. Burko and Ms. McKibbin submit that the Martindales bear the burden of proving that Johnson Creek has moved. In other words, Mr. Burko and Ms. McKibbin say that the present location of the creek is the starting point for analysis. The Martindales submit that the property line was established by a fence they erected in 2003 which tracked the property line shown in the DD Plans. Accordingly, they submit that Mr. Burko and Ms. McKibbin bear the burden of proving that the property line is different than that established by the fence. Mr. Burko and Ms. McKibbin tore the fence down in 2018, but the Martindales say that makes no

difference.

- [27] The general rule is that the party choosing to dispute an established boundary line bears the burden of proving that the boundary is different, on a balance of probabilities; Phillips SC at para. 73; Phillips CA at paras. 68-71.
- [28] For the reasons that follow, in my opinion, the burden of proof rests upon the Martindales to show that Johnson Creek has moved and is not now located where it was in 1911. I begin by considering the matter without reference to the fence erected between 2003 and 2018.
- [29] The deeds that subdivided the North and South Parcels define the boundary between the parcels as the centre of Johnson's Creek. Both describe a perimeter commencing at the point where the creek intersects the west boundary of section 15, proceeding along the section boundary north or south, as the case may be, to an east/west quarter-section boundary, following the quarter section boundary east to the government road, returning to Johnson Creek along the road boundary, and finally returning along the centre line of the creek to the starting point. The creek is, in principle, a natural boundary, subject to the possibility of an avulsion.
- [30] The DD Plans that accompanied the deeds depict the centre line of the creek as the border between the parcels. While they can be scaled to place the creek to the south of its present location for two-thirds of its length, such measurements and calculations carry less weight, in the surveyor's hierarchy of evidence, than the presence of the creek itself. That is not to say that the measurements and calculations may not ultimately prove decisive, if other evidence is insufficient to permit a conclusion. At this stage, we are only concerned with the burden of proof, that is, the starting point for analysis.
- [31] In addressing the possibility that Johnson Creek has moved, the burden should lie on the Martindales who assert that it has, rather than on Mr. Burko and Ms. McKibbin to prove that it has not. That creeks do not dramatically change their course is the usual state of affairs, and it should be for the Martindales to show that something exceptional has occurred; *Flamant (next friend of) v. Knelson*, [1971] 4 W.W.R. 454 at 460, 1971 CanLII 1324 (B.C.S.C.). Mr. Burko and Ms. McKibbin should not be required to prove a negative.
- [32] I turn to consider the significance of the fence put in place by the Martindales between 2003 and 2018. Notwithstanding the fence, the evidence does not establish that the owners of the Northern and Southern Parcels settled on a property line that is different than that established by Johnson Creek in its present location. There has been a series of positions taken, first favouring one side's position, then the other.
- [33] The Martindales' theory of their case is that Johnson Creek moved from its location in 1911 to something approximating its present location following a flooding event in the 1940s, and the creek has not marked the boundary between the properties since then.

- [34] It is clear that, when a past owner of the Southern Parcel developed Whispering Pines as a campground in the 1960s, they ran the campground to the edge of the creek. The Martindales' case is that traces of the former 1911 creek bed were filled in at the time. So far as the evidence discloses, the Northern Parcel was unoccupied, and there was no one to question the property boundary at the time.
- [35] However, when the Martindales purchased the Northern Parcel in 2003, Mr. Martindale was informed by Mr. Richardson, that the southern boundary associated with Johnson Creek was contentious. Mr. Martindale retained a surveyor, R.C. Power. Based upon Mr. Power's work, the Martindales took the position that the creek was no longer in its original location and that the boundary lay to the south, within the campground. Mr. Rushton did not agree. He retained his own surveyor, Joe Johnson, who expressed a contrary opinion. The Martindales and the Rushtons each retained counsel, who exchanged letters asserting their clients' positions.
- [36] Relying on the DD Plans, Mr. Power staked a boundary line south of the present location of the creek, and the Martindales erected a fence along the line. The Rushtons acquiesced, in that they did not start an action or tear down the fence. There were some discussions with a view to settling the dispute, but nothing came of them.
- [37] In early 2016, Mr. Rushton retained Mr. Minifie to further investigate the property line. Mr. Minifie concluded that the property line is located in the present location of the creek. In 2017, Mr. Burko and Ms. McKibbin purchased the Southern Parcel and retained Mr. Minifie themselves. Following an exchange of correspondence with the Martindales through counsel, they commenced action S55346. In April 2018, they tore down the fence erected by the Martindales in 2003, and resumed occupation of all the land to the south of the creek.
- [38] The Martindales did not accept the position taken by Mr. Burko and Ms. McKibbin. They defended action S55346.
- [39] In May 2019, Mr. Minifie submitted a plan to the land title office to replace plan DD24952. It showed the boundary along the southern shore of Johnson Creek in its present location. The Registrar of Land Titles declined to register the plan and referred it to the Surveyor General for a report pursuant to s. 105(1)(b) of the LTA. Mr. Swaile's report is dated October 21, 2019. He favoured Mr. Minifie's view, except that he considered that the boundary should run down the centre of the creek rather than along its southern shore. He recommended that an application be made under s. 94(1)(d) of the LTA. Mr. Minifie made such an application and the Surveyor General approved it on March 13, 2020. However, the Registrar of Land Titles required the Martindales' approval for the change pursuant to s. 103 of the LTA. The Martindales maintained their position and refused to approve the proposed change.
- [40] Rather than filing a counterclaim in action S55346, the Martindales commenced their own action S59140 in July 2020. These two actions are currently being tried together.

[41] To summarize, the placement of the boundary between the Northern and Southern parcels has been disputed since at least 2003. The owners of each parcel have taken contrary positions in correspondence, on the ground, in submissions to government officials, and in pleadings. While there has been some degree of acquiescence to the situation on the ground at various times, it has never gotten to the stage of a commonly accepted boundary. In the circumstances, I do not think that the fence erected by the Martindales in 2003 and torn down by Mr. Burko and Ms. McKibbin in 2018 serves to displace the burden of proof that would otherwise rest on the Martindales to show that Johnson Creek changed its course through an avulsion after 1911.

Hearsay objection to evidence of Mr. Richardson

[42] Mr. Richardson gave evidence of relevant statements made to him by the owner of an adjacent property, Zoltan Balas, concerning the location of Johnson Creek and the boundary between the Northern and Southern Parcels. These statements are presumptively inadmissible as hearsay and I received them under reserve of an objection in order that I might consider whether they are admissible under the principled exception to the hearsay rule described in *R. v. Khelawon*, 2006 SCC 57, *R. v. Bradshaw*, 2017 SCC 35 and, recently, in *R. v. Handlen*, 2022 BCCA 304 at paras. 20-25.

Mr. Richardson's evidence and the statements attributed to Mr. Balas

[43] Mr. Richardson has lived in Mara since 1988. He is 61 years old and retired, although he still works as a garlic farmer. He is familiar with both the Northern and Southern Parcels. He worked at Whispering Pines on the Southern Parcel as a labourer for about three seasons in the 1980s, and looked after the Northern Parcel for the Langdons for about five years in the mid-1990s.

[44] Mr. Balas owned the property immediately to the west of the Southern Parcel. Mr. Richardson met Mr. Balas in 1988 and assisted Mr. Balas with work on his property. He believes that Mr. Balas was born in 1916 and moved to Mara in the 1940s. Mr. Balas died in 2002.

[45] Mr. Richardson attributes to Mr. Balas three hearsay statements. The first concerns a gulley on Mr. Balas' property, which Mr. Balas described as an old creek bed. This was a statement made while Mr. Richardson was helping Mr. Balas to break up a beaver pond fed from underground water associated with the former creek. Mr. Richardson identifies the route of the former creek on photographs he took during an airplane flight over the property in 1994. The Martindales submit that the dried up creek bed was the former channel of Johnson Creek after it crossed the western boundary of the Northern and Southern Parcels and continued westward towards the river.

- [46] The second hearsay statement is as follows. Mr. Balas told Mr. Richardson that he lived in the vicinity when Whispering Pines was being developed. He saw that the owners of the Southern Parcel cleared brush, leveled it a bit, and filled in the old creek bed of Johnson Creek where campsite numbered from the mid-50s to 64 are now located. Mr. Baylis told Mr. Richardson that the creek was no longer running in the old creek bed, it had shifted. Mr. Richardson explains that he had told Mr. Balas that he was interested in buying the Northern Parcel, and Mr. Balas was telling him this because a corner of the campground was on property that was part of the Northern Parcel. Mr. Balas said that it was going to be a firework show some day, but he asked Mr. Richardson to keep it quiet for the time being, and not to stir up trouble. Mr. Richardson said that he honoured Mr. Balas' wishes and did not disclose what Mr. Balas had told him until much later.
- [47] The third hearsay statement involves Mr. Balas' description to Mr. Richardson of a dispute he had with Helen Boys, the former owner of the property to the south of Mr. Balas' property. Mr. Balas told Mr. Richardson that, in the course of that dispute, he retained a survey crew to survey his property, and they found a peg (survey monument) that would have represented a corner of the Southern Parcel in a location consistent with the property line established by the old creek bed.

The principled exception to the hearsay rule

- [48] Hearsay evidence is evidence of what a third party, sometimes described as the declarant, told the witness out of court, if it is tendered to establish the truth of the statements attributed to the declarant. There are established exceptions to the hearsay rule, none of which apply in this case. Hearsay falling outside the established exceptions is presumptively inadmissible, but may be admitted on a principled basis if two requirements are satisfied: necessity and reliability.
- [49] The reason that hearsay falling outside the exceptions is presumptively inadmissible is because the declarant cannot be observed by the trier of fact, and their evidence cannot be tested by cross-examination. Cross-examination would enable the trier of fact to fully evaluate the possibilities that the declarant misperceived the facts, wrongly remembered them, narrated them in an unintentionally misleading manner, or knowingly made a false assertion; Handlen at para. 20, citing *R. v. Baldree*, 2013 SCC 35 at para. 32.
- [50] In this case, necessity is established because Mr. Balas is dead and cannot be called as a witness in his own right.
- [51] There are two kinds of reliability: procedural and substantive. Indicia of procedural reliability are not present in this case. The Martindales say that there are sufficient indicia of substantive reliability to justify admission.
- [52] Substantive reliability is established if there is sufficient reason to believe that the declarant's statements are inherently trustworthy, taking into account the presence of corroborative or conflicting evidence. Inherent trustworthiness justifies admission of

statements not made in the presence of the trier of fact and not tested by cross-examination. A statement is substantively reliable where "it is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" or it would be "unlikely to change under cross-examination"; Handlen at para. 25, quoting Bradshaw at para. 31.

- [53] Consideration of inherent trustworthiness and substantive reliability, in the application of the principled exception to the hearsay rule, does not engage a determination of whether the evidence is ultimately trustworthy and reliable. The question is whether the declarant's statements are trustworthy and reliable enough to be considered as evidence in the case. Once admitted as evidence, it is for the trier of fact to decide whether they should be given any weight; Phillips CA at para. 104-105.
- [54] In Phillips SC, Dickson J. admitted the hearsay evidence of statements made by a witness' mother as to the location of the accepted boundary between two properties in the 1930s through the application of the principled exception; Phillips SC at paras. 28-38; Phillips CA at paras. 103-105. This decision is of no assistance in this case because it simply involved the application of established legal principles in the particular circumstances of the case.

Analysis: first hearsay statement

- [55] In my opinion, there are sufficient indications of substantive reliability to justify admission of the first hearsay statement attributed to Mr. Balas. The statement appears to have been made by Mr. Balas spontaneously, in the context of work that Mr. Balas and Mr. Richardson were performing together. It is corroborated by Mr. Richardson's own observations and the photos taken by Mr. Richardson. Mr. Richardson's evidence has been tested by cross-examination. As a long time resident, Mr. Balas had had an opportunity to observe and understand the water courses on his property. He is unlikely to have misled Mr. Richardson, either deliberately or unintentionally.
- [56] I conclude that the first hearsay statement is admissible in evidence.

Analysis: second hearsay statement

- [57] The second hearsay statement is closer to the line. Mr. Frame, counsel for Mr. Burko and Ms. McKibbin, submits that the statements attributed to Mr. Balas lack substantive reliability because Mr. Balas asked Mr. Richardson to keep them quiet for the time being, and Mr. Richardson agreed. Mr. Richardson was working for the Langdons at the time, and was being told that someone was encroaching on their property, but never passed that information along. Mr. Frame submits that the inference is that Mr. Richardson did not take Mr. Balas' information seriously.
- [58] Another inference could be that Mr. Richardson did not pass the information along to the Langdons because he was, as he says, thinking of purchasing the Northern Parcel from them, and he might not have wished to inform them that their property was larger than it

seemed. Or it may be that Mr. Richardson felt that he should not pass along information or make use of information that he had received in confidence from Mr. Balas, while Mr. Balas was alive. Neither possibility was explored with Mr. Richardson on cross-examination, although they could have been.

- [59] There is some limited corroboration for Mr. Balas' statement in the form of evidence of a good deal of movement of earth at Whispering Pines in the vicinity of the creek. The roads and campsites are gravelled, and Mr. Ashcroft observed mounds of rocks and pushed up earth. The 1969 aerial photograph shows evidence of recent machine working of the campground. There is further corroboration in the form of a note on a plan prepared by a surveyor in 1988, which is described below at paragraph [83].
- [60] I find that the criteria of substantive reliability are satisfied in the case of the second hearsay statement. Mr. Balas' declaration to Mr. Richardson was made spontaneously. He had had an opportunity to observe, and no apparent reason to mislead. To the extent that there is any doubt concerning motivations, it is a doubt as to Mr. Richardson's motives, not Mr. Balas', and the opposing party had the chance to test Mr. Richardson's evidence by cross-examination. If Mr. Balas were still alive and available to testify, I think it is unlikely that his evidence would change or acquire a different character under cross-examination.
- [61] I conclude that the second hearsay statement is admissible in evidence.

Analysis: third hearsay statement

- [62] In my opinion, the third hearsay statement is not admissible. I am not satisfied that it is either necessary or substantively reliable. If there were survey monuments placed along the southern boundary of Mr. Baylis' property, it is not clear that they cannot be located today or, at the least, that a documentary record of their placement could not be tendered in evidence. Mr. Balas' account of a legal dispute in which he was personally involved is likely to have had a partisan tinge. Corroboration is lacking.

Evidentiary status of Mr. Swaile's report

- [63] Mr. Swaile is a licensed British Columbia land surveyor employed as a Deputy of the Surveyor General. His report was prepared by a public official in the exercise of his duties pursuant to a request contemplated by s. 105 of the LTA. In preparing his report, Mr. Swaile reviewed materials submitted to him by Mr. Minifie and Mr. Sansom and walked the properties separately with each of them in order that he might be fully apprised of their respective observations and perspectives. His report is carefully reasoned. It records his observations, understanding of the legal framework, and the competing contentions advanced before him, and states his reasons for coming to the conclusion that the DD Plans were mistaken in their placement of Johnson Creek in 1911.

[64] Mr. Swaile delivered his report to the Registrar of Land Titles. It is an official record of the land title office and, as such, is open to inspection and search by any person on reasonable conditions the Registrar may impose; LTA, s. 377(1). The report was made available to the parties in this litigation and there is nothing in the evidence to suggest that the Registrar of Land Titles has imposed any restriction on its public availability.

[65] The Martindales submit that Mr. Swaile's report is inadmissible hearsay. Alternatively, and more forcefully, they submit that it should be afforded little weight, describing it as merely an opinion of someone who was not brought to court for cross-examination, and who did not have the benefit of all of the evidence tendered at trial. Conversely, Mr. Burko and Ms. McKibbin submit that Mr. Swaile's report is admissible under the 'public documents' exception to the hearsay rule, and they would afford it substantial weight as the considered opinion of a highly qualified, neutral surveyor fulfilling a public duty.

[66] I am satisfied that Mr. Swaile's report is admissible under the public documents exception to the hearsay rule because it is:

- a) a document made by a public official;
- b) in the discharge of a public duty or function;
- c) with the intention that it serve as a permanent record; and
- d) that is available for public inspection;

R. v. A.P. (1996), 109 C.C.C. (3d) 385 at paras. 14-15, 1996 CanLII 871 (Ont. C.A.); Yahey v. British Columbia, 2021 BCSC 1287 at paras. 826-828; Pantusa v. Parkland Fuel Corporation, 2022 BCSC 322 at paras. 74-84. The requirements of the public documents exception are consistent with the principled analysis of the hearsay rule outlined above. The necessity requirement is attenuated because public policy supports the admission of documents prepared by public officials in order that they not be taken away from their duties to attend in court. The requirements that the official is discharging a public duty and is intending that the document serve as a permanent record together provide some assurance of procedural reliability, while the requirement that the document be available for public inspection provides some assurance of substantive reliability.

[67] The considerations that Mr. Swaile's observations and opinion were not tested by cross-examination, and that he did not have available to him all of the evidence adduced at trial, bear on the weight I can give to his report. I address these matters below.

Analysis

[68] To recapitulate, the issue in this case is whether, in 1911, Johnson Creek lay to the south of its present location along the line indicated in the DD Plans. The burden is on the Martindales to establish that it was.

The expert evidence of the surveyors

[69] Mr. Sansom and Mr. Minifie testified as expert witnesses. Both are qualified land surveyors subject to a professional obligation of objectivity in the determination of cadastral boundaries. It is obvious that both take that obligation seriously. Both provided comprehensive expert reports and thoughtful, helpful commentary in their oral evidence. Both came to give evidence from the background of a long involvement on opposing sides of this dispute: as already noted, Mr. Minifie was first engaged in 2016, and Mr. Sansom was retained in July 2018. Through their involvement, both have become committed to opposing points of view and, perhaps inevitably, that has made them susceptible to an unconscious confirmation bias, namely, a tendency to examine new evidence for indications that it supports their position, and perhaps to discount or overlook evidence that points in the other direction. I have taken this tendency into account in my assessment of their evidence.

[70] The presence of confirmation bias is illustrated by the fact that Mr. Minifie and Mr. Sansom could walk the same paths along Johnson Creek and the line that Johnson Creek supposedly ran along in 1911 and see different things. Mr. Sansom could see depressions in the ground that "appeared to be the location of an original creek channel" and observe that "the row of stakes marking the 1907 location meander between old trees and intuitively feel like a creek channel did exist through this corridor". Mr. Minifie could observe that "the Creek is in a well-established channel with no physical signs of having wandered south from this location".

Direct evidence

[71] By way of overview, the following evidence suggests that Johnson Creek has moved since 1911:

- Aerial photographs and the expert evidence of expert witnesses, Jamie Blackley and Joseph Alcock;
- Evidence of an historic fence on a property to the west;
- Evidence of a dried up creek bed to the south and west of the Northern Parcel;
- Mr. Balas' admissible hearsay statements to Mr. Richardson; and
- Ground observations of Mr. Sansom and Mr. Alcock.

[72] On the other side of the coin, there is evidence that suggests that Johnson Creek has not moved:

- Ground observations of Mr. Swaile and Mr. Minifie;
- Mr. Swaile's opinion; and
- Mr. Bates' evidence.

Aerial photographs

- [73] Several aerial photographs are in evidence. The most informative are a photograph taken on July 16, 1928, and one taken in 1969. Both were interpreted by two expert witnesses, Jamie Blackley and Joseph Alcock, who were particularly helpful in matching the photographs to uncontroversial geographical features such as the Shuswap River and Highway 97.
- [74] In the 1928 photograph, a line of trees follows the supposed 1911 creek location, and a disturbance in the tree canopy extends westward all the way to the river. A fainter line can be seen fairly close to but not exactly in the present location of the creek on the west side of the properties, but a disturbance in the tree canopy further west is not easily discerned.
- [75] The 1969 photograph is different. In it, Johnson Creek is clearly visible close to its present location.
- [76] Mr. Blackley is a geospatial analyst with specialist skills in remote sensing of the environment. His expertise involves the interpretation of data such as that provided in a digitized aerial photograph. Mr. Blackley limited his analysis to the 1928 and 1969 photos, to which he added publicly available light ranging and detection ("lidar") data from 2019. He did not attend at the properties to look for physical evidence. He interprets the data as evidencing a northward movement and widening of the western part of Johnson Creek between 1928 and 1969, and further less dramatic movement between 1969 and 2019. He concludes, in measured words, that "there is reasonable evidence in the comparison of historic and current aerial images that the location of Johnson creek has shifted northwards".
- [77] Mr. Alcock is a professional geoscientist with expertise in, among other things, fluvial geomorphology and aerial photograph interpretation. Mr. Alcock provided an opinion to Mr. Martindale in June 2019 in which he relied, for the most part, on his observations on the ground, with some reference to aerial photographs. He then prepared an expert report on June 1, 2022 in which he relied principally on his interpretation of the 1928 and 1969 aerial photographs, and also aerial photographs taken in 1930, 1947, and 1966. He interprets the 1928 and 1930 photographs as showing Johnson Creek in the location shown on the DD Plans, noting that "the creek was wide enough to have separation of the tree canopy along the creek".
- [78] I accept Mr. Blackley's and Mr. Alcock's interpretations as confirming my own impression of the 1928 and 1969 photographs. I conclude that these photographs provide persuasive but not necessarily conclusive evidence that Johnson Creek changed its course from that shown in the DD Plans to something close to its present course between 1928 and 1969.

Evidence of an historic fence on the property to the west

- [79] To the west of the Southern Parcel is a parcel of land described in the land title office by Plan DD 12425. As with the DD Plans, Plan DD 12425 was drawn and filed by Surveyor G.L. Williams. As with DD 24952 (the Southern Parcel), it shows its northern boundary as the centre of Johnson Creek. However, DD 12425 was overtaken in 1989 by a fresh Plan 41352 that subdivided the property to the north of DD 12425 and substituted a fixed boundary for the former ambulatory boundary established by the creek. The new Plan 41352 was drawn by Surveyor R.C. Power in December 1988 and later deposited in with the consent of all affected landowners.
- [80] Plan 41352 contains a note at the north-east corner of DD 12425, close to the north-west corner of the Southern Parcel, stating: "old fence 3.4 m south of boundary". This would be an observation noted by Mr. Power in the preparation of the plan.
- [81] Mr. Martindale testified that, in 2003, when he erected a fence along the supposed former line of Johnson Creek, he saw an earlier fence in the same location on the neighbouring property to the west. The earlier fence would be that noted by Mr. Power in 1988.
- [82] The presence of an historic fence close to a property line originally associated with Johnson Creek is some evidence that the creek originally ran to the south of its present location. Viewed in isolation, this point is not particularly compelling.

Evidence of a dried up creek bed to the south and west of the Northern Parcel

- [83] Mr. Power's plan drawn in December 1988 contains a note at the north-west corner of Plan DD 12425, approximately 232 m west of the western boundary of the Northern and Southern Parcels. The note states: "Evidence of original creek channel west of corner". This is Mr. Power's observation. It is consistent with the proposition that Johnson Creek originally flowed at this location well south of its present channel.
- [84] Mr. Minifie was asked to address this point in cross-examination. He said that he looked and could not find any evidence of a dried creek bed in this location. He suggested that Mr. Powers' note must be mistaken. But it is plausible that the passage of time has rendered invisible what was visible to Mr. Power more than 30 years ago. Mr. Power's note provides some evidence that Johnson Creek originally ran to the south of its present location.

Mr. Balas' admissible hearsay statements to Mr. Richardson

- [85] Mr. Balas asserted to Mr. Richardson that Johnson Creek used to run in its supposed location in 1911, but shifted to the north, and the old creek bed was filled in. This is cogent evidence that Johnson Creek originally ran to the south of its present location. However, it is possible that Mr. Balas was relying on what he had heard from others rather than his own observations in making this statement.

Ground observations of Mr. Sansom and Mr. Alcock

[86] I have already noted Mr. Sansom's observations of the area in which Johnson Creek is supposed to have run in 1911. They are largely intuitive and impressionistic. Mr. Sansom places more weight on his interpretation of historic survey evidence and his interpretation of the 1928 and 1969 aerial photographs.

[87] Mr. Alcock's ground observations are not much more helpful except to document traces of earth moving work along the banks of the creek in the Whispering Pines campground and to establish that the character of Johnson Creek is such that it could have changed its course suddenly through a flooding event. He states:

Johnson Creek is subject to episodic high floods which carry boulder, cobble and gravel bedload along the channel, and where blockages can occur that redirect water flow which erodes new channels. Channel blockages and diversions are inferred to have occurred at least twice, to erode the new south channel, and to erode the new north channel.

On the subject property, the location where Johnson Creek abruptly curves to the right (approximately 85 m west of Highway 97A) was where the re-created 1911 centreline boundary diverged from the existing creek and crossed the adjacent campground. It is possible that the creek abruptly changed location during a large flood and, later, fill was pushed into the abandoned original creek channel. There was no evidence on the subject property of creek migration by gradual erosion of cut banks and accretion of point bars.

[Emphasis added.]

Ground observations of Mr. Swaile and Mr. Minifie

[88] Mr. Minifie attended at the properties five times between 2016 and 2022. He walked Johnson Creek and the supposed line of the creek in 1911 both on the properties and 400 to 450 m to the west. He reports that he did not find any definitive evidence of a former creek bed to corroborate the DD Plans, and did observe that, at its present location, the creek is running well to the north in a deep, mature channel lined with mature trees.

[89] Mr. Swaile attended at the properties once, on September 19, 2019. He sets out his observations in his report dated October 21, 2019. He walked Johnson Creek across the properties and for approximately 430 m to the west from the western property line. He states:

There is no question in my mind that the creek has existed substantially in its present location, from the highway all the way west to my furthest-visited point within the Southeast ¼ of Section 16, for a very long time.

[90] Mr. Swaile also walked the supposed line of the creek in 1911. He states:

From the "abrupt bend" all the way to the west boundary of the parcels, there is no physical sign of an old creek channel. Although I am relatively certain there have been earthworks over the years to level the campground site, I have not seen any physical signs that directly indicate the existence of an old creek channel. []

In my walks with the surveyors to the west of the subject properties, a few small, isolated depressions were pointed out to me, but in my opinion, none of these are indicative of having been remnants of an old creek channel.

[91] Mr. Minifie and Mr. Swaile's ground observations favour the inference that Johnson Creek has not moved since 1911. The most powerful evidence lies in what they did not observe. They did not observe evidence of an old creek channel on the properties to the west of the subject properties. Nor did they observe evidence of an old creek channel in the Whispering Pines campground, though this point is less significant in light of the history of earth moving work within the campground.

Mr. Swaile's opinion

[92] In his report, Mr. Swaile refers to the surveyor's hierarchy of evidence and reasons as follows:

Johnson Creek would be considered a "natural boundary" - the highest form of evidence. However, the boundary is in dispute because of uncertainty about where the creek has been over the years. If I am to consider that the boundary between the two properties is anywhere other than where the creek exists today, I need to be very comfortable that the evidence fits appropriately into the hierarchy. There were never any original monuments placed along the west boundary to reference the creek, so "original monuments" are of no help. The evidence supporting the "titled" creek location is based primarily on two things: an inexact interpretation of the 1928 photo, and the dimensions shown on old survey records. I have not seen sufficient physical evidence on the ground to support and corroborate these other pieces of evidence.

Thus, based on all of the information I've been provided, and based on what I was able to observe in the field, I am of the opinion - on the balance of probabilities - that Johnson Creek has existed in substantially the same location as it exists today since at least the time of the DD surveys back in 1911, and that the boundary therefore follows the current location of the creek.

[Emphasis added.]

[93] Mr. Swaile's opinion is only as good as the evidence he had to work with, and his reasoning is incomplete. There is important evidence that was not known to Mr. Swaile, and I do not know what effect it would have had on his opinion. Mr. Swaile had the 1928 aerial photograph, which he viewed as "inexact". He did not have the benefit of expert assistance in interpreting it. Mr. Swaile had the benefit of a statement setting out some, but not all, of what Mr. Balas had said to Mr. Richardson. He did not address this point in his report. Nor did he address Mr. Powers' notes on Plan 41352 and, in particular, Mr. Powers' observation of an original creek channel well to the south of Johnson Creek's present location.

Mr. Bates' evidence

[94] Alan Bates is a professional engineer with expertise in fluvial and channel geomorphology. He provided an opinion to Mr. Rushton in 2003 and testified in support of that opinion at trial. He only attended at the properties in 2003 and no longer remembers much of what he saw. Mr. Bates' 2003 opinion was that it was very unlikely that the main channel of Johnson Creek followed the supposed line of the creek in 1911 through the properties. He concluded it by stating that:

[] it is highly unlikely that the channel ran as alleged within the last 100 years. Although the channel may be difficult to discern through the forest canopy, a review of available aerial photography may further confirm historical channel locations. Airphotos in the area date back to 1928.

[95] In cross-examination, Mr. Bates conceded that his retainer in 2003 was very limited, he was not preparing a report for use in court at the time, and machine levelling at the campground could account for many of his observations. He said that, if an air photograph taken in 1928 showed a channel in the supposed 1911 location, it would change his opinion.

[96] Mr. Bates' evidence provides some support for the proposition that Johnson Creek has not moved since 1911, but it is telling that he would not have confidence in his opinion if it were contradicted by photographic evidence.

Assessment of the direct evidence

[97] In my view, the direct evidence favouring the proposition that Johnson Creek has moved outweighs the evidence that it has not, on a balance of probabilities.

[98] Mr. Alcock's evidence confirms the plausibility of the theory that Johnson Creek moved following a springtime flood. The ground observations of Mr. Minifie and Mr. Sansom effectively neutralize one another.

[99] The 1928 and 1969 aerial photographs offer persuasive evidence that Johnson Creek changed its course after 1928, possibly soon after. That would have offered a long time, perhaps even 90 years or so, for the creek to incise a new channel, for trees to mature around it, and for the old creek bed to be filled in or for its edges to gradually erode away. In and after the 1960s, it is probable that an old creek bed within the Whispering Pines campground would have been obliterated by human earth-moving activities.

[100] Mr. Balas' hearsay statements provide persuasive evidence of the former existence of a dried up creek bed in the location of the campground, before it was developed, and to the west on Mr. Balas' property, in both cases to the south of the present creek. Mr. Powers' note in 1988 on Plan DD 12425 is to the same effect.

- [101] The strongest direct evidence against the theory that Johnson Creek moved is Mr. Swaile's direct observation that he could not discern remnants of an old creek channel to the west of the subject properties. Mr. Swaile was a trained observer and, unlike Mr. Minifie, he was approaching this question with an entirely open mind. However, he was making his observations decades later than Mr. Balas and Mr. Power, and it is inherently more difficult to observe the absence of a creek bed than one that is present. It is also likely that Mr. Swaile had a lesser opportunity to observe.
- [102] I am not persuaded by Mr. Swaile's opinion that Johnson Creek occupied its present course in 1911. In his view, apart from historic surveying documents, the only substantive evidence of movement consisted of an inexact interpretation of the 1928 aerial photograph. I have come to a different conclusion on a fuller body of evidence tested by cross-examination during a trial that lasted five days.
- [103] I conclude that, on balance, the direct evidence favours the Martindales' submission that Johnson Creek has moved since 1911 and was correctly positioned in the DD Plans. I would come to the same conclusion even without reference to Mr. Balas' hearsay statements to Mr. Richardson, although it would be a closer call.

Historic surveying evidence

- [104] In light of the conclusion I have come to, I need not go on to consider the historic surveying evidence but will do so in case I am mistaken in my analysis to this point.
- [105] The historic surveying evidence consists of the field notes from Mr. McLatchie's survey in 1887, the DD Plans, and also the original Plan DD 12425 of the property to the west of the Southern Parcel. In interpreting this evidence, it is important to bear in mind that the equipment used by the early surveyors was relatively primitive and sometimes inaccurate, so that errors would creep in with the repeated measurement of distances in "chains" (in principle, a unit of measurement equal to 66' or approximately 20.2 m). Commenting on the accuracy of the Dominion Land Survey, Lambden and de Rijcke, refer to a "net of extended control" established by order-in-council in 1874, following which:

Comparing the smallest unit surveys of township sections with the new extended control showed a pattern of overrun, positional error, of about nine and one half feet to the mile or one part in 570, roughly 0.2%. It could mean an overrun in the area of a section of about 0.4%. the full use of the steel band tapes (of four chains and 300 feet lengths) probably dates from about 1878 or 1879, and thereafter the surveys attained a dramatic increase in accuracy.

Survey Law in Canada, p. 144, §4.101

The 1887 field notes

- [106] In December 1887, Mr. McLatchie ran a field traverse from south to north along the western boundary of the properties. His notes record a 10' wide creek at 11.15 chains (approximately 225 m) south of the northern boundary of what would be the Northern Parcel. This is the only creek noted in the traverse. It is reasonable to infer that any other creek was dried up or insubstantial and that this was Johnson Creek.
- [107] In its present location, the centre of Johnson Creek is approximately 164 m south of the northern boundary of the Northern Parcel. The difference is 61 m.

The DD Plans

- [108] The DD Plans accurately depict the placement of Johnson Creek along the eastern boundary of the properties. They place the Creek 11.06 chains (approximately 223 m) south of the northern boundary of the Northern Parcel, and 9.02 chains (approximately 182 m) north of the southern boundary of the Southern Parcel.
- [109] The DD Plans place Johnson Creek 2 m away from its placement in the McLatchie survey, and 59 m away from its present location.
- [110] It is not at all clear how the DD Plans were prepared by Surveyor Williams. They are scale drawings (at 4 chains to 1 inch), but the only distances recorded are the distance along the northern or southern boundary, as the case may be, and the distance between the boundary and the creek on the west side. There is nothing to indicate how the path of the creek was charted. They are signed but not certified by Mr. Williams.
- [111] A technique used by surveyors, then and now, to guard against blunders and some errors of measurement, is to close a block of property by measuring all the way round its perimeter; Survey Law in Canada, §4.98. Mr. Williams did not take this step in the DD Plans.
- [112] Mr. Swaile observes that:

It is not apparent whether the two DD plans were actually based on a field survey, or whether they were the equivalent of today's Explanatory Plans, which compile information from other registered documents without the benefit of a field survey.

- [113] Mr. Minifie makes the same point and adds:

It should be noted that plans DD12425, DD15293 and DD24952 (all created by Williams) lack fundamental information found on typical surveys plans of similar vintage namely: the date of creation/registration at Land Titles, a title block outlining the parcel of land being dealt with, the type of plan (explanatory (i.e. based on existing records) or not), as well as the signatures of owners/witnesses.

- [114] While these are all good reasons to be cautious of the DD Plans, there are two points that support their placement of Johnson Creek in 1911.

- [115] The first is that the DD Plans place the point of intersection of Johnson Creek with the properties' western boundary at a point that is close to but not identical with its location depicted in the McLatchie survey (about 2 m away). This suggests that the location indicated in the DD Plans was not copied from the McLatchie survey but was independently ascertained, either by Mr. Williams in the field, or by resort to the lost work of another surveyor. While it is not hard to imagine that Mr. McLatchie mistakenly recorded Johnson Creek's location, it is much less likely that two surveyors independently made essentially the same mistake.
- [116] The second point favouring what is shown in the DD Plans is that they are correct at the eastern boundary of the properties and for about one-third of the length of the creek passing across the properties.

Conclusion concerning the historic survey evidence

- [117] Taking these points together, the historic survey evidence convincingly favours the proposition that Johnson Creek has changed its course since 1911. This confirms the conclusion I have already reached on the basis of the direct evidence.

Disposition

- [118] For these reasons, I declare that the boundary between the Northern and Southern Parcels lies along the line charted by Mr. Sansom in Reference Plan EPP94233 as the northern boundary of the Southern Parcel.
- [119] Action S55346 brought by Mr. Burko and Ms. McKibbin is dismissed.
- [120] Costs of both actions are reserved for determination following the trial of the remaining issues in action S59140 brought by the Martindales.

"Gomery J."

Appendix - Plan DD 15293 and Plan DD 24952

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