2014

Hfx. No. 431696

SUPREME COURT OF NOVA SCOTIA

Court Administration

Between:

NOV 0.5 2014

MUNICIPALITY OF THE DISTRICT OF GUYSBOROUGH

Halifax, N.S.

and

THE HEIRS AT LAW OF JOSEPH FOGARTY, JAMES P. FOGARTY and FRANK FOGARTY

RESPONDENTS

Affidavit of Frank Fogarty

I Frank Fogarty, of Halifax, Province of Nova Scotia make oath and give evidence as follows:

- 1. I am one of the Respondents in this matter.
- 2. I have personal knowledge of the evidence sworn to in this affidavit except where otherwise stated to be based on information and belief..
- 3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
- 4. I refer to the two properties described by PIDs 35214014 and 35044056 and referred to in this proceeding as the "Fogarty Properties" or, collectively referred to in this Affidavit as the "Land" or "Fogarty's Cove".

THE ORAL FAMILY HISTORY

- I started hearing the family history from my father, John Patrick ("Pat") Fogarty when I
 was about four or five years old. My father was a good story teller and liked to tell a
 good story.
- 6. He would often tell stories about our family's history if something he saw or heard reminded him of a family story.
- 7. My father told me dozens of stories about the family. He kept on telling and retelling these stories over a 35 year period. As best as I can recall, the last time my father would have told me these stories would have been in or about 1994, which was the year before he died. I do not recall the stories changing over the years.

- 8. My Grandfather, Michael Vincent Fogarty also told me many stories about the family history. He was a great story teller.
- 9. One of Grandfather's stories was about a summer when he was 4-5 years old. A ship came into the bay and sent a boat ashore with a man with a wheel chair in it and some other sailors. The man in wheelchair sat on the beach and told the others where to dig. Where the men dug, they found buried items and brought them back into the boat. When my grandfather told this story he told it so vividly that you could see it: he gave details right down to the colours that the sailors were wearing. That was how my Grandfather told a story.
- 10. Grandfather also told me stories about the family, which I verily believed. One particularly interesting story is how his father, Joseph Fogarty (my Great Grandfather) ran his fishing business. Joseph could not read or write, but he knew his business. Every year he rented out huts on the Land to other fisherman from other countries that came to fish in the area and needed a place to dry and salt their catch.
- 11. After the season was done, my Great Grandfather walked to Halifax from Fogarty's Cove and bartered the salted fish for supplies for the coming year at a ship's chandlery. He bartered for his own supplies and for the supplies that his tenants wanted. In exchange for renting out the huts and doing the battering, Great Grandfather received a share of the fish that his tenants had salted on his land.
- 12. Once the deal was done, Great Grandfather would sail back to Fogarty's Cove with his supplies for the year, and the supplies that his tenants had requested. I can remember Grandfather telling me this story many, many times.
- 13. My Grandfather died in 1977. I heard him tell stories about the family from as early as I can remember, likely sometime in the late 1950s, up until he died in 1977.
- 14. My father was one of fourteen children; he had ten brothers and three sisters. Some of my uncles were story tellers as well, and I can remember them telling me about growing up on the Land.

SETTLING AND FISHING THE LAND

William Timothy Fogarty: My Great-Great-Great Grandfather

- 15. I remember hearing my Great-Great Grandfather's story from my father many times, and I do verily believe it to be true.
- 16. In 1820 William Timothy Fogarty (my Great-Great-Great Grandfather) and his wife came to Nova Scotia from Tipperary, Ireland. He left Ireland before the potato famine and travelled to Nova Scotia by schooner. The schooner travelled along the coast of Nova Scotia dropping people off where they wanted to homestead.
- 17. He settled in what is now the Fogarty Properties and fished for a living. He lived more or less hand to mouth on the Land.
- 18. William Timothy Fogarty had six children. He died in 1853 at 60 years of age and passed the Fogarty Properties to his son Mikal Fogarty, Mikal being an Irish spelling of Michael.

19. My father was very proud of his Irish roots and it was a big deal to him that William Timothy Fogarty had come to Nova Scotia directly from Tipperary, Ireland.

Mikal Fogarty: My Great-Great-Grandfather

- 20. I can remember hearing Mikal Fogarty's story from my Father, my Grandfather, and my Uncle Mike (who was one of my father's brothers). I do verily believe this story to be true.
- 21. Five years after his father died, Mikal sought and received a grant from Queen Victoria for the Fogarty Properties (the "Grant"). Copies of this grant are still in the family; my brother Brian has a copy. Some of my cousins have copies as well.
- 22. The family oral history that I heard from my Grandfather and my father always stressed that the Grant was from Queen Victoria to Mikal Fogarty and his assigns or heirs **FOREVER**. They put alot of emphasis on that word, "forever". I also remember my father and Grandfather saying that the price of land was 11 pounds, and an annual payment of one peppercorn per year when it was asked for.
- 23. Part of the family history was that William Timothy Fogarty had come to Nova Scotia from Ireland with nothing. My Grandfather and my Father expressed the view that Mikal Fogarty had done the right thing by securing the Land for the Fogarty family. It always was an important part of the family story as told by my Father and Grandfather, that after the Grant, the land belonged to the Fogarty family name forever.
- 24. I did not have a copy of the Grant prior to this proceeding, but I have read the document at p. 7-9 of Exhibit "A" of the Affidavit of Marion Bryson and that document appears to be consistent with the family history that I recall hearing from my Father and Grandfather.
- 25. Mikal lived on the land and fished for a living. He had 11 kids and my Great-Grandfather Joseph Fogarty was his 9th child. Mikal passed the land to his son Joseph Fogarty.
- 26. I have reviewed the deed at Exhibit A, p. 12-13 of the Affidavit of Marion Bryson and this document is largely consistent with the family's oral history that I heard from my Father and Grandfather although I note that Mikal is spelled as "Michael" and that "Michael Fogarty" signed the deed with an "X" noted as "by his mark": I do not know why the land was passed from Mikal Fogarty to his 9th child; I can only surmise that perhaps the older children moved away or that Joseph Fogarty was perhaps the hardest worker.

My Great Grandfather: Joseph Fogarty

- 27. Joseph Fogarty, whose heirs at law are named as respondents in this proceeding, was my Great Grandfather. I heard his story from my Father and Grandfather and do verily believe it to be true.
- 28. Joseph Fogarty received the Land from his father, as described above. He lived on the land his whole life and worked as a fisherman. He died at the age of 42.
- 29. My Grandfather (Michael Vincent) was the oldest son of Joseph Fogarty. Grandfather worked the fishery full time with Great-Grandfather (Joseph). Grandfather told me lots of stories about fishing with Great-Grandfather and about his life in the fishery. He often said that it was a very hard life.

- 30. My understanding from the family history that I heard from my father and Grandfather, which I do verily believe to be true, was that Grandfather's brother Stephen Ambrose Fogarty died a bachelor. I note from reviewing the Affidavit of Betty Dobson, Exhibit A, p. 1 that Stephen Ambrose Fogarty is noted as dying unmarried in 1956. This is consistent with the family history told to me by my Father and Grandfather.
- According to the family history that my father and Grandfather told me, which I do verily believe to be true, my Grandfather's brother Martin Joseph Fogarty died a bachelor of wounds sustained in the First World War. I note from reviewing the Affidavit of Betty Dobson, Exhibit A, p. 1 that Martin Joseph Fogarty is noted as dying unmarried in 1918. This is consistent with the family history told to me by my father and Grandfather.
- 32. My Grandfather (Michael Vincent) never told me that either of his brothers or sisters worked in the fishery or were to receive any of the Land from Great-Grandfather (Joseph).
- 33. I am sure that they did work on the land, but my understanding from my father and Grandfather, which I do verily believe to be true, was that the expectation in the family was that his sisters would marry and leave the land.
- 34. An overarching theme in the family stories told by my father and Grandfather was that the Land was to belong to the Fogarty name forever. I understood from my Grandfather that this objective could not be accomplished if the Land went to one of the women in the Fogarty family who would marry into another family.
- 35. In the family stories, the Land was always linked to the Grant and to the Fogarty name. Based on what I have been told by my father (John Patrick) and Grandfather (Michael Vincent), which I do verily believe, it is my understanding that whenever the land was passed from one generation to the next, there was always an intention that the Land be passed on from father to one son and remain under the Fogarty name, as my father and Grandfather talked about the Grant being made to Mikal Fogarty and his heirs.
- 36. When my Grandfather (Michael Vincent) told stories about fishing with his father (Joseph), Grandfather talked about how he, as a young man, looked to the future when he would take over the land from his father. The general tone of these stories was that the Land would pass to him from his father, as it had passed from father to son before.
- 37. My Grandfather used phrases like "then it was my turn to take care of the place". He did not use the word stewardship, but that word would describe my Grandfather's view of the land. He would hold it for a time then pass it on to a son who would care for the Land and keep it in the Fogarty family.

MOVING OFF THE LAND

My Grandfather: Michael Vincent Fogarty

- 38. My Grandfather was Michael Vincent Fogarty, he went by the name "Vincent". He and my father told me stories about his life, which I do verily believe to be true.
- 39. Grandfather was born on the Land and fished there. He was a fisherman like his father. He was the oldest son of Joseph Fogarty.

- 40. Grandfather was not married when his father died. He later married and had 14 kids: 11 boys and 3 girls. The first five children were raised on the Land.
- 41. Michael Vincent Fogarty lived on the Land until the 1930's.
- 42. When World War Two broke out, my Grandfather's four eldest sons enlisted. At that time, my Grandfather had to make a decision about whether he was going to continue trying to fish the Land by himself, or go do something different.
- 43. Rather than try and fish from the Land by himself, Grandfather moved off of the Land and took a job in Hazel Hill, just 2km outside of Canso and about 10-12kms from Fogarty's Cove by land.
- 44. Grandfather's job was with the cable company. He was a janitor.
- 45. Grandfather could not read or write. I vividly remember asking him to read a comic book to me when I was four or five and he responded "Now Frankie, you know I can't read or write". I was very surprised when he said that because I thought all "grown ups" could read.
- 46. Grandfather's inability to read was an asset when he applied for a job with the cable company, because it meant that his employer didn't need to worry about him reading cables that he was not supposed to see.
- 47. As I recall, Grandfather worked in Hazel Hill until the late 1950s or early 1960s, when he retired to Dominion, Cape Breton.
- 48. After he moved away from the Fogarty Properties, Grandfather would occasionally go back to the Land to visit and to do some sport fishing. I can remember going to the Land with Grandfather three or four times when I was kid. I can also remember Grandfather telling us about his trips back to the Land to go sport fishing and telling us about his overnight visits to the Land before he retired and moved to Cape Breton.
- 49. My father told me, and I do verily believe that Grandfather (Michael Vincent Fogarty) paid the taxes on the Fogarty Properties from the time that his father (Joseph Fogarty) died until his death in 1977.
- 50. After Grandfather moved away the forest started to reclaim the Fogarty Properties. Over the last 80 years the land has gradually become overgrown.
- 51. My Grandfather (Michael Vincent Fogarty) was the last person to fish commercially from the Fogarty Properties.

Recreational Use of the Property

- 52. To my knowledge, since Grandfather moved away from the Fogarty Properties in the late 1930s, the only person who has lived on the land was my uncle by marriage, Guy Gagnon. He camped on the land for the summer of 1994. Other than that, the family's use of the land has been recreational, as set out below.
- 53. My Mom was from Little Dover, which is close to the Land. We had a cottage in Black Duck Cove, which is very close to Little Dover. When I was young our family would

- spend our summers there at the cottage. We were there from the day after school let out until the day before school started again.
- 54. I can recall going to the Fogarty Properties when I was a child, beginning in or about 1960, with my father and sometimes my Grandfather. We would go over to the Land from our cottage to explore and play.
- 55. My father, John Patrick Fogarty was the only one of his siblings to stay in Nova Scotia.
- 56. Other than the two incidents described below, I cannot recall any of my first cousins ever visiting the land.
- 57. I can recall one of my cousins, Daniel Fogarty, visited the Fogarty Properties when were kids and found a coin in the ruins of an old foundation. That was a particularly memorable event because Father and Grandfather had told my siblings and I that the family used to hide money in the walls as a good luck gesture because they had little use for it in the days of fishing and bartering. My siblings and I used to look for the coins and we never found one. I recall thinking that it was unfair that my cousin found a coin on his first visit to the land when my brothers and sisters and I had been looking for remnants of the money in the walls for many years.
- 58. I also recall that one of my cousins, Jeff Fogarty, came down with his family and camped on the Fogarty Properties for a few days in 2003.
- 59. I am in contact with some of my first cousins, but I do not think I have contact information for any of my second cousins.

Paying the Taxes: Robert Phillip Fogarty and James Patrick Fogarty

- 60. When Grandfather lived in Dominion, two of my cousins (James Patrick Fogarty, a named Respondent in this proceeding, and his sister Agnes Fogarty, now Agnes Pearce) lived with him and my Grandmother.
- 61. My uncle, Robert Phillip Fogarty, moved to Dominion in or around 1970, after he retired from his work in Toronto as a manager at Loblaw's.
- 62. I am advised by my cousin, James Patrick Fogarty, and I do verily believe that my uncle, Robert Phillip Fogarty paid the taxes on the Fogarty Properties after Grandfather passed away in 1977. He paid them until his admission to a nursing home around 2000 or 2001.
- 63. My uncle, Robert Phillip Fogarty died in or about 07 December 2009.
- 64. I am advised by my cousin James Patrick Fogarty, and I do verily believe, that he began paying the taxes after our uncle Robert Phillip Fogarty entered a nursing home.

The Descendants of Michael Vincent Fogarty

- 65. Attached hereto as Exhibit "A" is a spreadsheet showing the identity of 23 descendants of Michael Vincent Fogarty, including 4 of his children and 19 of his grandchildren.
- 66. I make this affidavit in support of the position that heirs at law of Michael Vincent Fogarty are the heirs to the Fogarty Properties.

- I have not participated in the creation of the websites opposing the quarry which are found in the Affidavit of Barry Carroll. To my knowledge these websites are not being operated by members of the Fogarty family.
- I have come forward to swear this affidavit because I feel that it is important that I honour the legacy of my Grandfather who viewed himself as a caretaker of the Land. I understand that the land has been expropriated and that this proceeding is being made to settle the title to the land. In that spirit, I wish to provide the Court with my family's story in the hope that it will assist the Court.

Sworn to/Affirmed before me at Halifax
Regional Municipality, Province of Nova
Scotia this day of
LUCADO, 2014
(2) (1) (1)
I how which
Signature of Authority

Frank Fogarty

Print Name: _____ Official Capacity:

BONNIE DALTON

A Commissioner of the

Commissioner of Nova Scotia

2014

Hfx. No. 431696

of the

Nova Scotia

BONNIE DALTON A Commissioner of the Supreme Court of Nova Scotta

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Heir#	<u>Name</u>	Relation to Joseph	<u>DOB</u>	<u>Address</u>
	Joseph Martin Fogarty (1922-<2009)	Grandson No Children	02-Jun-22	Deceased
	John Patrick Fogarty (1923-1995)	Grandson Children As Follows	25-Oct-23	Deceased
1	Carolyn Ann Mundle	Great Granddaughter	10-Feb-48	175 Pugwash Point Rd. Pugwash, NS BOK 1LO
2	Brian Patrick Fogarty	Great Grandson	18-Dec-50	9218 Peggy's Cove Rd. Hackets Cove Halifax, NS 902-823-1030
3	Janet Marie Walsh	Great Granddaughter	08-Jan-53	1153 Johnathan Dr., Oakville, ON L6J 7J4 905-829-0426
4	Francis Howard Fogarty	Great Grandson	05-Aug-54	512 Parkland Dr. #418, Halifax, NS B3S 1N1 902-443-8568
5	John Wayne Fogarty	Great Grandson	19-Apr-56	10 Parkwood Dr. Moncton, NB E1E 3X4 506-389-1269
6	Diana Jean Wallis	Great Granddaughter	08-Apr-57	Beeches Rd Braeshore Pictou, NS 902-485-4130

7	Terrance Michael Fogarty	Great Grandson	20-Sep-58	10 Kent Ave, Halifax, NS
				902-445-4056
. 8	Michael Gregory Fogarty	Grandson	17-Nov-24	
	James Vincent Fogarty (1925-1970)	Grandson Children As Follows	25-Nov-25	Deceased
9	Agnes Louise Pearce	Great Granddaughter	2-Sep-43	4- 655 Wonderland Rd. S. London, ON N6K 1M1 519-204-4760
10	James Patrick Fogarty	Great Grandson	03-Sep-44	9 Donovan Cres., Glace Bay,NS
				902-849-6277
11	Mary Graham (nee Fogarty) (1926-1983) David Lamont Graham	Grand Daughter Children As Follows Great Grandson	14-Sep-26	Deceased
12	Patricia Ann Graham	Great Granddaughter		
	Robert Philip Fogarty (1928-2009)	Grandson No Children	23-Dec-28	Deceased
	Donald Francis Fogarty (1930-<2009)	Grandson No Children	14-Apr-30	Deceased
	William Thomas Fogarty 1931-<2009)	Grandson Children As Follows	10-Oct-31	Deceased
13	Raymond William Fogarty	Great Grandson	18-Mar-54	30 Ferguson Dr. Barrie, Ont L4N 7B4

14	Shannon Rose Marie Fogarty	Great Granddaughter	12-Dec-71	
	Howard Gerald Fogarty (1933-<2009)	Grandson No Children	25-Jul-33	Deceased
	Ralph Frederick Fogarty	Grandson Children As Follows	06-Aug-34	Deceased
15	Daniel Vincent Fogarty	Great Grandson	05-Apr-58	7541 Mission Heights Dr. Grande Prarie, AB T8W 1Y6
16	Vincent Frederick Fogarty	Great Grandson	01-Jul-59	7272 Kingsway Suite 1204 Burnaby, BC V5E 1G4
17	Mark Timothy Fogarty	Great Grandson	20-Sep-60	58 Islandview Dr. Mirimichi, NB E1N 6B4
18	Ann Louise Fogarty	Great Granddaughter	06-Apr-62	200 Rues des Chaltes Beresford, NB E8K 1W8
19	Ralph Christopher Fogarty	Great Grandson	16-Sep-65	1748 Hwy 18 Doyles Brook, NB E9E 2H9
20	Michael Fogarty	Great Grandson	10-Mar-77	40 Shamrock Ave. Moncton, NB E1E 2J3
21	Kathleen Patricia Dunn	Grand Daughter	08-Feb-37	65 Oliver Cres. New Maryland, NB E3C 1E2 506-459-7346

	Elizabeth Anne Fogarty (1938-1997)	Grand Daughter Children Deceased	23-Feb-38	Deceased
22	Ronald Edward Fogarty	Grandson	24-Feb-41	141A Lakeshore Rd. St. Catherines, ON 905-228-1516
23	Peter Garfield Fogarty	Grandson	22-Jul-47	