

CASE COMMENT

FOWLIE v. STACKS OF CLOTHING LTD., 2010 NSSC 23

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The case of *Fowlie v. Stacks of Clothing Ltd.*¹ provides an instructive example of how Nova Scotia courts will apply the law surrounding settlement of disputed boundary lines when the parties are unable to resolve the question using survey principles.

Factual background

Fowlie, supra, arose from a boundary dispute involving waterfront lands in Fox Harbour, Nova Scotia. Land values in the area have historically been low. The result has often been that many land transactions over the years proceeded without the assistance of land surveyors. The lack of survey assistance has resulted in the numerous instances in the land registry where plot plans amount to little more than vague sketches of the parcels in question, providing little insight as to the location of their actual boundaries.²

The Fowlies acquired the parcel in question in 1991, from Vernon Patriquin, who acquired it from one Lorne Leard.³ The deed description and sketches recorded at the land registry provided no assistance as to the location of the disputed boundary, except to say that there was a common boundary that ran "... southwesterly along the remains of an old fence, marking the former Lorne Laird land, a distance of eight hundred eighty feet (880') more or less..."⁴

The lands in question lay between the shores of the Northumberland Strait and a highway. The disputed boundary lay roughly west to east, between the highway and the shoreline. The shoreline formed the eastern boundary. The parties were in agreement about the point near the highway where the disputed boundary began.

¹ 2010 NSSC 23

² *Ibid.*, at paragraphs 1 and 2.

³ *Ibid.*, at paragraph 4.

⁴ *Ibid.*

The Court was tasked with finding the path along which the disputed boundary lay as it ran to the shore.

Stacks of Clothing Ltd. contended that the disputed boundary lay along a newer line fence and was roughly perpendicular to the highway.⁵ The parties agreed that the boundary would follow this path up to a certain point.⁶

The Fowlies contended that from the agreed point along the newer fence, the path ran along the remains of an old barbed wire fence, only pieces of which remained in existence. This path veered approximately 60 degrees from an otherwise straight line from the highway to the water.⁷

Reasoning and result

The evidence at trial disclosed that both fences had been covered with trees for decades.⁸ The Court noted, however, that the route following the barbed wire fence had, at some point prior to trial, a tree with an old blaze mark. Blaze marks were traditionally used to mark lines in the same manner as fences. The Court opined that this suggested the barbed wire fence was intended as something more than a cattle pen, which would have run more haphazardly.⁹

In addition, the Fowlies were able to locate an old fencepost near the shore, which ran along the same line; however, the fencepost had no barbed wire on it.¹⁰

The Fowlies located the remnants of the line fence and left it in place. Their evidence was that the fencepost near the shore had pieces of barbed wire attached to it at one time. The Court accepted that evidence.

⁵ *Ibid*, paragraph 9.

⁶ *Ibid*, paragraph 10.

⁷ *Ibid*, paragraph 9.

⁸ *Ibid*, paragraph 7.

⁹ *Ibid*, paragraph 6.

¹⁰ *Ibid*, paragraph 7.

In addition, the original grantor, Lorne Leard, gave evidence to the effect that he had always understood that the common boundary was marked by a barbed wire fence. He testified that he cleared the land at various times during his ownership, right up to the barbed wire fence.

The Fowlies, believing that they owned the disputed area, cleared the land again and constructed a gazebo, at some significant expense.

Although Stacks led evidence from a surveyor, the Court rejected the surveyor's evidence, because the surveyor ignored the barbed wire fence and the blaze mark in coming to a conclusion on the boundary line. In addition, he removed a reference to another physical feature in the land noted in his original plan.¹¹

Ultimately, the Court found that from the agreed point along the disputed boundary, the remainder of the boundary ran along the remnants of the barbed wire fence to the shore.¹²

The Decision in context

The principles that apply to cases such as this are well settled. Survey law has developed a hierarchy of evidence, from most compelling to least compelling, in the determination of disputed boundaries. This hierarchy was examined by the Ontario Court of Appeal in *Nicholson v. Halliday*.¹³ There, Justice Lang, speaking for the unanimous Court, stated:

[28] The leading authority on boundary resolution is *Thelland v. Golden Haulage Ltd.*, [1989] O.J. No. 2303 (Dist. Ct.). In that decision, Stortini D.C.J. cited an article by Lorraine Petzold, O.L.S., the Executive Director of the Association of Ontario Land Surveyors, "The Survey and The Real Estate Transaction", which was presented to the Law Society of Upper Canada in its Continuing Legal Education Seminar of October 1983. That article notes the surveyors' "hierarchy of evidence", which ranks the evidence to re-establish a boundary from most compelling to least compelling as follows (at p. 2 QL):

- (a) Natural boundaries;
- (b) Original monuments;
- (c) Fences or possession that can reasonably be related back to the time of

¹¹ *Ibid*, paragraph 22.

¹² *Ibid*, paragraph 28.

¹³ 74 O.R. (3d) 81, [2005] O.J. No. 57 (C.A.).

- the original survey;
(d) Measurements (as shown on the plan or as stated in the metes and bounds description).

As in the case before this court, in the absence of natural boundaries and original monuments, the surveyor would look for fences or possession before resorting to measurement.

[29] As Stortini D.C.J. said (at p. 2 QL):

[T]he mandate of a surveyor is to re-establish boundaries. In the re-establishment of a lot line a surveyor must consider the best evidence available and re-establish the boundary on the ground in the location where it was first established, and not where it was necessarily described, either in the deed or on a plan. The boundary is the re-establishment on the ground of the original running of the line and this re-establishment of the boundary constitutes the deed line.

In *Fowlie*, as in *Nicholson*, there were no natural boundaries to establish the disputed line, nor was there evidence of any survey monument to guide the parties.

In coming to its conclusion, the Court related the fence evidence back to the description in the deed, and considered the manner in which the parties and their predecessors actually used the land. In addition, the Court considered the measurements referred to in the deed, finding that they suggested a boundary along the barbed wire fence's path.

Conclusion

Where the parties cannot establish a disputed boundary using survey principles, the Court will look to the best available evidence to establish the disputed boundary. It will examine all of the surrounding circumstances that point to the parties' actual use, as well as the intentions of the original grantor.

If the parties offer expert evidence from a surveyor, the tendering party should take care that the surveyor's opinion takes account of all of the same circumstances that the court can be expected to consider. Counsel should consider carefully whether such evidence will be of any real assistance.

In the end, although the parties' actual use of the land is often thought to be more relevant to adverse possession cases, *Fowlie* demonstrates that it can be useful, as well, to establish possession, thus pointing to the most correct determination of the questioned boundary.