

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Porteous v. Hurley, 2005 NSSC 229

**Date:** 20050816

**Docket:** SAM 190783

**Registry:** Amherst

**Between:**

Richard Porteous

Plaintiff

v.

Daniel A. Hurley and Norma J. Hurley

Defendants

**Judge:** The Honourable Justice Charles E. Haliburton

**Heard:** June 14 - 16, 2005, Amherst, Nova Scotia

**Written Decision:** August 16, 2005

**Counsel:** Douglas B. Shatford, Q. C., for the Plaintiff  
Cindy A. Bourgeois, for the Defendants

**By the Court:**

- [1] This action has resulted from a conflict between the parties as to the location of the boundary line between their two properties. The plaintiff, Richard Porteous (Porteous), claims as the boundary line that line produced by a survey and plan produced by Mark MacMillan while the defendants, Daniel A. Hurley and Norma J. Hurley (Hurley), believe the boundary line is that determined by their surveyor Russell Atkinson NSLS. The area in dispute totals 13.44 acres.
- [2] Porteous claims a declaration that the MacMillan line is his westerly boundary and he seeks damages for trespass. The damages, if Porteous were entitled, would arise from the cutting of the timber from 2.11 hectares (5.19 acres) of woodland and the construction of a camp, a couple of sheds and a pond on the area in dispute.
- [3] In order to succeed in his claim Porteous must prove his entitlement on a preponderance of evidence.
- [4] The Hurleys take the position that no trespass has occurred inasmuch as the Atkinson line establishes that all their activities have taken place within the boundaries of their own property. It is the Hurley position that the Atkinson line follows the original Crown Grant as laid out in 1859 and occupied by their predecessors in title since that time. Alternatively it is their position

that because of the occupation of themselves and their predecessors any claim of the plaintiff is defeated by adverse possession. Failing that, Hurley claims that Porteous had himself agreed upon the line as established by Atkinson and shown by him on the **draft** plan of survey prepared at the expense of both parties, dated July 2001.

- [5] While I have reached the conclusion that the plaintiff has failed to prove his claim with proof to the necessary standard, my review of the evidence and the documents presented has left me with a number of unanswered questions. The lack of any proven correlation between the original grant of the Hurley land (Schurman Grant) in terms of its present day acreage, or in terms of its width is unsatisfactory. Both surveyors alluded to the fact that discrepancies of ten percent in the size of land grants relative to the actual acreage of the property on the ground was not unusual. Neither surveyor testified as to what the actual acreage was. In evidence they provided their respective conclusions (opinions) which were in direct conflict one with the other. Neither of them however, has provided me with very satisfactory objective facts upon which I could independently reach the same conclusion as they had.

[6] In the end the deciding factor for me has been the “Highway Plan” of 1965, and the actions of the land owners incident to that plan. Again it would have been most reassuring if the surveyors had reached a common opinion on that particular. Mr. Atkinson includes in his plan a particular line which he says is “shown here on 1965 Highways Plan”. Meanwhile, Mr. MacMillan testified that in reviewing the information he could not “relate the 1965 plan to anything (on the ground)”.

[7] I would digress briefly to suggest that the original boundary line was lost by the failure of the Hurley predecessors to exhibit their rights over the property. The property came to the present owners from Mrs. Hurley’s family. She testified that her family’s title came from a conveyance to her great grandfather Murdock MacDonald in 1904. Murdock MacDonald died some time around 1940 having had two wives. He lived on the property with his first wife in a house located where the Hurleys have now built their camp. That site has been identified by the location of lilac and rose bushes. His first wife apparently died in childbirth suggesting to me that he was still a young man when that occurred. After his second marriage, it was Mrs. Hurley’s information that he only “visited” his former homestead. The property passed to James MacDonald in 1932 but his deed went unrecorded

until 1979. The house disappeared through the years and if the land had been cleared it went back to forest. It was considered a wood lot by the family, a large extended family. There appears to have been no really active occupation until the Hurleys showed an interest and acquired title through Mrs. Hurley's mother Vera Margaret Smith, culminating in a deed to them in 1997.

- [8] That history it seems to me is consistent with the evidence of Mr. Porteous that when he acquired the property in 1995 it was his understanding that the MacDonald property (Hurley) had been lost in (the mists of) time and that the reference to "MacDonald" in his deed actually referred to the next property to the west (Weatherbee).

**EVIDENCE:**

- [9] Richard Porteous is a business man. He presently operates forestry equipment and in the past has worked as a small engine mechanic, manager and driver for Cumberland Bus Lines Limited a family company. This company purchased the Weatherbee lands (Matheson Grant) in 1986. Porteous acquired it personally in October of 1995. He was generally familiar with the property, said to be 145 acres. He had walked and hunted over the property and in the mid 1990's was surprised to discover a road had

been developed and a cottage or camp constructed on what he thought was part of his property. He determined that the camp had been built by Daniel Hurley, the defendant.

[10] The two had discussions, in which Porteous indicated he thought the camp was on his property because at the time he “thought the whole property was mine”. Having been persuaded by Hurley that there was indeed a parcel of land which had been referred to as the “Murdock MacDonald lands” he agreed to have a line run to establish their mutual boundary line for which each of them would contribute half the cost.

[11] Eventually he was presented with the “draft” plan prepared by Russell Atkinson showing a proposed boundary line, a large portion of which bore the label “no evidence found”. He was disappointed, but accepted the situation and contributed one half the cost of the surveyors bill.

[12] Subsequently he became aware of the existence of a boundary line on the south side of the Trans Canada Highway which was believed by some to be an extension of the boundary line in question between he and Hurley. Upon hearing this he retained another surveyor, Mark MacMillan, and instructed him to establish the line “where you think it should be”. Mr. MacMillan consulted the property owner, Brian Brown, on the south side of the

highway. He was shown the boundary lines as understood by Mr. Brown and a survey plan which had been prepared in 1973 by David L. Crooker NSLS which represented the disputed boundary line to be somewhat west of that previously established by Mr. Atkinson. This boundary line which began on the south side of the highway lined up with blazes which could be followed on the north side, arguably denoting the boundary between Porteous and Hurley.

[13] With respect to the proposition advanced by defence counsel that the Atkinson line had been made a “conventional boundary”, Porteous denied that he ever accepted the Atkinson survey as final. He said he paid half the cost as he had “agreed to do” before Atkinson did his work, and he conceded that he had not raised any concern about the accuracy of the line to Mr. Hurley nor did he tell him he disputed it. He conceded that he had said on examination for discovery “I said it looks like the line is where you said” when presented with the plan.

[14] Daniel Hurley is 15 years retired as a construction worker with CNR. He has visited the property he now claims, off and on, over a period of 39 years. The property belonged to members of his wife’s family and over the years he had helped Jim MacDonald, a previous title holder, in cutting fire wood

“along the road”. The property on both the east side and the west side of the Hurley land was owned by the Weatherbee family. The road he spoke of seems to have been mainly used by the Weatherbees, moving from one of their properties to the other and crossing the Hurley land. His wife’s relative Jim MacDonald had shown him old stones and hand hewn sills which had formed the foundation of the Murdock MacDonald house. The sills have disappeared over the years but the stones and lilac and rose bushes are still there “right where the camp is now”.

[15] He understood from Jim MacDonald that the boundary line of the Porteous property was “just behind the old house”. When Jim MacDonald was younger, between 30 and 40 years ago, he helped him “frequently to cut fire wood”. My impression of his evidence is that that practice petered out and ended until his mother-in-law and later he and his wife acquired the property; and that they have been active in occupying the property only during the last ten years. Hurley described his own search for evidence of property lines and finally located some evidence only with difficulty. He did find a line that had been blazed on the south side of the Trans Canada Highway and in following that line northerly, determined that it fell near his camp. Piles of stones and some old fencing he believed were consistent with



that being a boundary line. He “felt a lot better after we found stones and fencing”.

[16] When he decided to build the camp in the mid 90's “I made a road down to hit the old road”. The camp and the wood shed were built and a well was drilled. He recalled Porteous coming to inquire about his activity on the land and that he asked Hurley “if I knew where the line was”? Hurley showed him the barbed wire and the rocks that he had earlier discovered. Subsequently when a forest technician was outlining an area of Hurley’s property to be harvested Porteous did come back and demanded a stop to the harvesting. It was then that the surveyors really became involved. Hurley arranged for Atkinson to survey the boundary line and he showed him the wire fencing and the “rock hedge” that he had located. When the plan was produced he took it to Porteous. They looked at it together and “he had no response”. The next contact the two of them had was when the Mark MacMillan line was discovered on Hurley’s property.

[17] Norma Joyce Hurley married Daniel in 1959. She spoke of the family’s connection with the property. James MacDonald the previous owner was her great uncle and a successor in ownership to Murdock MacDonald. She traced the history to her mother, and ultimately to herself and her husband.

Their camp was built she said, in 1993. Her husband showed her the site of the old home which was near a brook and close to roses and a white lilac bush. She said her husband showed her some “old rotten boards” presumably in the immediate area which “didn’t interest me”. She recalled that when Mr. Porteous came to see them he believed they did not own any land at that location.

- [18] Courtney Weatherbee, who was born in 1935 and lived in Birchwood (the community in question) until 1960 provided a historical backdrop to the land and its use. He and his siblings own the land immediately west of the Hurley property and he continues to frequent the area, having built a camp on his portion of the “Weatherbee land” in about 1980. He was accustomed to travel over the Hurley and Porteous lots on his snowmobile. The Porteous lot, he said, at an earlier time was a farm with cattle on it. Together with his grandfather he recalled driving cattle across the Hurley property to that of Porteous. Weatherbees, at the time, owned both sides of the Hurley lot then known as the Jim MacDonald property. They drove cattle across the Hurley lot apparently on the road referred to by Hurley to get to “20 acres of cleared land and other pasture”. With respect to Murdock MacDonald’s house he said “no, I never saw a building . . . I did see what might have been a rock

foundation . . .” With respect to the Weatherbee pasture lot and its boundaries on the east side of Porteous, he recalled a rock pile and barbed wire. He said it was rocky country and they were always picking up rock. There was no building on that Weatherbee property but “I did help Uncle Raymond when I was 13 or 14 to place boards on the property by truck, just over the line”. He said he understood the line to be “the rock line and barbed wire”. He went on to say that he had never seen any boundary line but added “we travelled the old road past the camp area (down what I interpreted to be the MacMillan line) to Highway 104 and out to the mountain”. “At that time I had permission from MacDonald to go along there.” There were plastic markers on the trees but he knew of no “blazes”. As to the MacMillan line being a boundary he said no boundary line existed to his knowledge. His evidence on cross examination was slightly contradictory in that he recalled that there had been a barn on the twenty acres of cleared land and as I understood his evidence, the fence would have been on that property, not necessarily on the boundary line.

[19] Russell Atkinson NSLS graduated from the survey school in Lawrencetown in 1964. He had extensive experience in the Halifax area and for the last 18 years has been working in Cumberland County doing many rural wood lots.

Running boundary lines around Crown Lands and trying to find blazes and corners with two crews working under his direction. In connection with locating this line he had consulted with the Crown Lands information at Halifax to review copies of material relating to the original grants. He obtained copies of the surveys done in connection with the Trans Canada Highway, Route 104 which bisected both properties and was able to tie in his proposed “line” with a point in the 1965 survey. He sent his crew into the woods to locate any evidence existing there.

[20] Mr. Atkinson has recently had hip replacement and is presently handicapped in moving about himself. His answers to questions with respect to what was found on the ground convinced me that that portion of his research was for the most part based on what was reported to him by his workers.

[21] The subject property is bounded on the north by the Birchwood Road, and on the south by the Trans Canada Highway. Mr. Atkinson’s crew were able to find good lines north of the Birchwood Road. In projecting that line southward across the Birchwood Road, they found rocks “along the line”. They were not just dumped there . . . they were orderly . . . (“the width of the rock accumulation we didn’t measure”). That line was continued southerly “until we ran out of fence”. He said “the boys went out and located this line,

I never walked it completely.” The line as drawn by Mr. Atkinson begins at the Birchwood Road where a rock wall was found. It extends through a swampy area where there were apparently no indications of a line to an area adjacent to the present camp where further rock wall is located on the Hurley side of a fence. The fence runs in a generally north south direction but does not form a straight line. From the south end of that fence to the TCH no further evidence indicating a line was located.

[22] His “line” does not honour the line defined in the Crown Index Sheet which ties in to certain posts marking lands retained by the Crown. He testified that errors in the Index Sheet Plans are not uncommon.

[23] Mr. MacMillan qualified as a Nova Scotia Land Surveyor in 1993. He has performed both urban and rural surveys, with about ten percent of his work involving wood lots. He referred to forestry technicians and an independent report which is on file for opinions with respect to blazes on trees and the aging thereof. He was retained by Porteous who introduced him to Brian Brown whose property lies south of the TCH (Highway 104) and who provided him with the 1971 plan of that area prepared by Mr. Crooker. He referred also to the Crown Grants and the Crown Index Sheet. He referred to Crown Monuments numbered 220, 219 and 218 which lie south of the

highway. Monuments numbered 219 and 220 were drawn to his attention by Brian Brown and are found on the western boundary of Mr. Brown's property south of TCH. Those Crown Posts line up, Mr. MacMillan said, with a number of blazes located on the line which he placed as the boundary between Porteous and Hurley. Among the documents he referred to was the Highways Plan of 1965 which he was unable to relate to his findings. His evidence essentially was that by running a line from Crown Marker 219 through number 220 and across the highway he was able to follow blazes believed to have been placed to mark the line to a point about one third of the distance from the TCH to the Birchwood Road. He agreed that neither the line established by him nor the line established by Atkinson "match precisely with" the Crown Grant lines. Before his search for blazes was conducted Hurley had harvested timber in the area of the line projected so that blazed trees, if any, would have been removed. He agreed that at the north end of the line near the Birchwood Road there still were mature trees, but conceded that he found no blazes in that area. With respect to the rock wall relied upon in part by Mr. Atkinson, he testified that it was twenty feet in width in places and he thought it not of any consequence in terms of a boundary line.

- [24] The evidence and findings of the surveyors are striking in their contrast. Mr. Atkinson's work starting from the north above the Birchwood Road was able to locate evidence supporting the existence of an accepted boundary line for about two thirds of the distance to the Trans Canada Highway at which point all evidence of a boundary line disappeared. Mr. McMillan by contrast was able to find evidence of a boundary south of the TCH tying in Crown Monuments 219, 220 which are reflected in the Crown Index Sheet and consistent with a line projected northerly across the Trans Canada Highway and the blazes located on that line for about one third of the distance toward the Birchwood Road when all further evidence of a line disappears. Both surveyors indicate that neither line is consistent with the original Crown Grants.
- [25] In this context the observation appearing on the survey plan prepared by Russell Atkinson referring to the location of the line drawn by him as the line reflected in the 1965 highways acquisition is for me the determining bit of evidence. That point established on the Highways Plan in 1965 must have been accepted as the western boundary line of what is now the Porteous Property by the owner at that time. That owner was Florence Wood who on

July 21, 1965 conveyed 19.57 acres to Her Majesty the Queen for the construction of the Trans Canada Highway.

**FINDINGS:**

[26] From the evidence before me I make the following findings of fact:

1. Florence Wood, a predecessor in title to Porteous conveyed 19.57 acres of land to Her Majesty The Queen in July of 1965 for the construction of the Trans Canada Highway.

2. The western boundary as described in that conveyance based on the Atkinson plan is a projection of the boundary line which he proposed between the lands of the plaintiff and the defendant. I infer that this line was adopted by Florence Wood when the highway right-of-way was taken from her in 1965.

3.

The evidence of Daniel and Norma Hurley and the evidence of Courtney Weatherbee establishes that the present camp, the lilac and rose bushes are located on lands occupied by the predecessors of Hurley over the years before 1960.

4. I find on the evidence of Courtney Weatherbee that the fence, the accumulation of rocks and the pile of boards to which both he and Norma Hurley referred are all on the plaintiff's lands. These indices of



ownership/occupation date from at least the possession by Stuart and Raymond Weatherbee and Florence Wood between 1917 and 1965. (I infer Florence Wood Administratrix of the estate of Raymond Weatherbee was a member of that family.)

5. The proposition that a conventional line was created by the agreement of Porteous is not proven. I accept the evidence of Mr. Porteous that his payment of one half the costs of the Atkinson survey resulted from his earlier undertaking to do so, and did not represent an agreement that it would henceforth be the agreed line between the parties.

6. On the basis of the evidence of both surveyors I find that the boundary line created by the original grants between these two properties has not been established by the evidence.

**CONCLUSION:**

[27] In the defence as filed and the evidence led, the Defendants have claimed that if the property occupied by them is found to not represent the original Schurman Grant then they are nonetheless entitled to possession and title based on adverse possession or alternatively on the basis that a conventional line has been established by the agreement of Porteous. No evidence with respect to occupation and possession has been led except insofar as it relates

to the location of the MacDonald house. That is the location of their own present camp and buildings. In the absence of paper title the occasional entry on the property and the cutting of fire wood is not the kind of continuous, exclusive, and adverse occupation which would give rise to a claim to the whole property.

[28] With respect to the conventional line and the suggestion that the plaintiff had agreed to the lines established by Mr. Atkinson I take it that the current law is as set out in *Lake v. Dobson Lumber Ltd.* (1982) 52 N. S. R. (2d) 431 at paragraph 64 where Grant J. in delivering his decision quoted from *Crossland v. Dory* (1977), 27 N. S. R. (2d) 139, which in turn quoted *Spencer v. Benjamin*, 11 N.S. R. (2d) 123, Macdonald, J.A. quoting in turn the Supreme Court of Canada in *Grassett v. Carter* (1884), 10 S. C. R. 105 for the following:

There is no doubt in my mind on the evidence, that the line was agreed upon. The law applicable to conventional lines, I take to be, that if a line is agreed upon and one party acts upon it and erects a house or an expensive fence, or holds and improves the land, the other party is estopped from saying that the line is not the right one. If, however, nothing is done on the land, and there is no change of position in any way, it is, I take it, within the power of one party or the other to prove that mistake was made in the running of the lines or the adoption of them.

And at paragraph 65 quoting *Sullivan v. Lawlor* (1981), 45 N. S. R. (2d) 325

As to the conventional line, there is not the clear and cogent evidence required to show that there was ever any agreement between the adjoining owners that the line following the blazes . . .

And at paragraph 67 quoting from *Lawrence v. McDowall*, 2 N. B. R. 442

If one of the parties should, within a reasonable time after making the agreement, discover that he had made a mistake and should wish to rectify the error, it would be material to inquire whether the other had been prejudiced to such a degree as to make it inequitable that the mistake should be corrected.

Paragraph 68 quoting from *Philips v. Montgomery et al* (1915), 43 N. B. R.

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When owners of adjoining lands fully cognizant of the dispute as to the location of the line dividing their properties, jointly agree upon a certain line as a division line between them, jointly put up or continue a fence along such chosen line . . . each successor in title is bound by the line . . .

[29] As I have said there is not that clear and cogent evidence required to show that there was any agreement on the part of Porteous to accept the Atkinson line as final. When it came to his attention that there were others, in particular Michael Brown, who had extensive knowledge of the area south of the highway the history of title there, and the Crooker survey suggesting the Atkinson line was not correct, then Porteous had good reason to seek further advice and investigation. In the meantime Hurleys did nothing on the property which would cause them prejudice, even if the further actions of

Porteous did constitute a repudiation of an agreement. Their camp and establishment was already in existence before any question arose as to the boundary line and indeed the harvesting of timber within the disputed area had already occurred.

[30] In the final analysis I return to my opening comment to the effect that Porteous could succeed in his claim of trespass only by proving that the line proposed by Mark MacMillan is the correct line between the properties. Porteous has failed to do so on a preponderance of the evidence and accordingly his action is dismissed.

[31] The plaintiff having failed to prove his case the defendants are entitled to their costs in the action. I am prepared to have written or oral submissions with respect to costs if such are claimed on the defendants behalf.

Haliburton J.