**SUPREME COURT OF NOVA SCOTIA**
**Citation:** MacCormick v. Dewar, 2010 NSSC 211

**Date: 20100602**
**Docket: Tru No. 301062**
**Registry: Truro, N.S.**

**Between:**

**Constance MacCormick and**
**Graham MacCormick**

Plaintiffs

v.

**Alexander William Dewar and**
**Natalia Valentinovna Dewar**

Defendants

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| **Judge:** | The Honourable Justice Cindy A. Bourgeois |
| **Heard:** | April 8, 9, 22 and 30, 2010, in Truro, Nova Scotia |
| **Written Decision:** | June 2, 2010 |
| **Counsel:** | Dennis James, for the Plaintiffs<br>Thomas MacEwan, for the Defendants |

**By the Court**:

## *Introduction*

[1] "Going to the cottage" in Nova Scotia means something special. The seashores, lake fronts and river banks of this province have been utilized in many places for recreational properties that are well used and deeply loved. It is not uncommon for these properties to be held within families for several generations. This dispute arises within that very type of context.

[2] Both parties are the owners of cottage properties situated on the shore of Shortt's Lake, Colchester County. Mrs. MacCormick and Mr. Dewar are third generation owners, having spent significant time during their childhoods, and later as adults at their respective cottages. They, and their parents before them, enjoyed the cottage "community" which became active during the summer months, including a friendly relationship between themselves and other cottage owners in the area.

[3] Unfortunately, the enjoyment of the properties has been somewhat impeded in recent years by the development of a dispute regarding the common boundary between the property owned by the Plaintiffs MacCormick and Defendants Dewar.

## *Nature and History of the Properties*

[4] Both of the properties in question can trace their creation back to the 1930's, when a series of conveyances were made which in effect, served to create the present "cottage community". As was disclosed by the evidence, the conveyances relating to two additional adjacent properties, also are relevant to the determinations to be made by the Court.

[5] The "Hanebury/Fulton" property is immediately to the southeast of the Plaintiff MacCormick property, and the "Cox/Morris" property is immediately to its northwest. The Defendant Dewar property is not rectangular in shape, rather abuts to a portion of the northern boundary of both the MacCormick lot, as well as the sideline of the "Cox/Morris" lot. All of the properties abut

the shore of the lake, and all, other than the Dewar property, gain access to their cottages by virtue of the "Baptist Point lane", a private roadway. The Dewar property utilizes a different point of entry from the public roadway.

[6] As the order of creation and certain aspects of the descriptions of the particular lots were discussed in support of the positions advanced by the parties, to understand fully the respective arguments, the following observations may be helpful:

a) The "Hanebury/Fulton" lot - It would appear from the evidence, unrefuted by both parties, that the creation of this lot, predated that of the present MacCormick property. The lot is presently co-owned by Christine Fulton Sanderson, who testified in the proceedings. The deed description for the property calls for a westerly sideline (abutting the MacCormick lot) of 110 feet and also grants "*the privilege of using a right-of-way in common with others extending from the Public Highway*".

b) The MacCormick lot - This lot was created by virtue of deed dated July 11, 1936 when C. Wilfred Cox granted to Dr. John Reid, Mrs. MacCormick's grandfather, a parcel of land. As is further described below, this original conveyance was subsequently divided in 1946. It is clear that the Hanebury lot was already in existence at the time of the original conveyance, as the deed to Reid references it as a starting point. The description further describes the sideline between the Reid lot and the Hanebury property as running "*northerly along the Eastern boundary of said Hanebury lot one hundred feet (100ft) to a stake at the edge of a road at the rear of said lots*", thus continuing "*westerly along the edge of a road to be extended from the Hanebury lot till it comes to a point which is seventy-five feet (75ft) distant from the shore of said Lake* . . ." The lot was further benefitted with what appears to be two rights of way, described as "*Together with a right-of-way along the rear of said lot on a road to be built or extended westwardly from said Hanebury lot, said Road being twelve (12 ft) feet wide; Together with a right of way from the Main Highway over the lands of C. Wilfred Cox, to the lot of land herein conveyed*".

c) The "Cox/Morris" lot - This is part of the original conveyance made to Dr. Reid in 1936 described above. By deed dated July 16, 1946, Dr. Reid conveyed a portion of his lot to Helen Cox. This property is presently owned by Morris Clarke. As was again unrefuted in the evidence, the deed description of this property, and the occupation "on the ground" over a number of years, do not coincide. Because the existence and location of the roadway or right of way is a subject of considerable importance to the positions advanced by the parties, it is noted that the deed description contains the reference: "*thence running in a Northerly direction on a line parallel with the Western boundary line of the said lot* (referencing the John Reid lot) *until it comes to the road at the rear of the said Reid lot; thence along the said Road, a distance of thirty-five feet to the Northwest corner of the said Reid lot*". This lot was further benefitted with a right of way described: "*Together with a right-of way, now in use in common with others, from the Public Road to the lot of land herein conveyed*."

***The Dispute***

**[7]** It would appear that until 2004, there was no concern amongst the parties, at least none expressed, as to the boundary line between their respective properties. Mr. Dewar became aware in 2004 however, that the MacCormick's had erected a fence, in an area which he believed was included within his deed description. After requesting that the MacCormicks remove the fence, he facilitated its removal. That in turn, prompted the MacCormicks to take a number of steps, including obtaining a full survey opinion, and ultimately commencing the present litigation.

**a) Position of the Plaintiff**

[8] The MacCormicks are seeking a declaration that the boundary between their property and that of the Dewars be found as determined by Douglas K. MacDonald, N.S.L.S. in his plan dated April 29, 2005, and that the Dewars be permanently prevented from making entry upon their property. Further, based on such a determination, the MacCormicks seek a finding that Mr. Dewar trespassed upon their lands when causing to have the fence removed and resulting monetary damages.

[9] This is a somewhat different position than contained in the Statement of Claim which sought that the Plaintiffs "have full legal title" to the property depicted in the MacDonald survey.

**b) Position of the Defendants**

[10] The position of the Dewars has also changed since the commencement of the litigation. In their statement of Defence and Counterclaim, the Dewars deny that the MacCormicks own the area where the fence was constructed, but rather it is contained within their deed description. They seek a declaration that "full legal title" to their property should be determined in accordance with a plan prepared by Emerson C. Keen, N.S.L.S., dated September 27, 2004. They also sought damages with respect to the MacCormick's trespass in constructing the fence, as well as for the costs incurred for its removal.

[11] At trial, the Dewars did not seek to rely upon the Keen plan, and accordingly were not advancing an argument with respect to the extent of their ownership. What was vigorously advanced, was a challenge to the opinion of Mr. MacDonald, it being submitted that his evidence failed to establish the boundary between the two properties on a balance of probabilities. The Dewars ask that the MacCormick claim be dismissed with costs.

[12] Although other concerns were raised, the Dewars predominantly argued that the boundary between their lot and that of the MacCormick 's as placed by Surveyor MacDonald, was fundamentally flawed due to his failure to adhere to the distance called for in the 1936 Cox to Reid deed, as well as his failure to recognize a found iron pin as the northwesterly corner of the Hanebury/Fulton lot. These arguments are addressed further below.

***The Survey evidence***

***[13]*** In support of their position, the Plaintiffs called Mr. Douglas MacDonald, N.S.L.S. to provide evidence. Mr. MacDonald had filed a Survey Report, dated April 29, 2005, which appended his survey plan of the same date. He was qualified to provide opinion evidence in all aspects of real property surveying including but not limited to:

(a) Production and interpretation of survey plans, maps and sketches;

(b) The interpretation of instruments of conveyance including the application of appropriate survey and legal principles;

(c) The understanding and identification of monuments on the ground and the identification and sketching of monuments on survey plans;

(d) The understanding and identification of roadways and/or roadbeds and the identification and sketching of roadways and/or roadbeds on survey plans;

(e) The legal and ethical obligations of land surveyors.

[14] Mr. MacDonald testified as to his approach to the survey assignment, including the methodology applied to reach his conclusions. Initially, Mr. MacDonald reviewed background documentation, including deeds and relevant plans of the area. He directed field technicians to undertake certain measurements, and he personally visited the site on 5 occasions. He acknowledged that the placement of the boundaries of the MacCormick lot was not a straightforward exercise, it being complicated by a number of factors. These were identified in his report and expanded upon in his *viva voce* evidence.

[15] Mr. MacDonald acknowledged a significant discrepancy regarding the Cox/Morris lot, in that the deed description for this parcel was radically different than the history of occupation on the ground. Although Mr. MacDonald could not offer an explanation as to how such developed, he indicated that he saw no reason to challenge the longstanding occupation as it related to the boundary between the MacCormick and present Morris properties. More importantly, Mr. MacDonald testified that the discrepancy regarding the placement of the Cox/Morris lot, did not impact upon his

opinion regarding the proper placement of the boundary in question, namely that between the MacCormick and Dewar properties.

[16] A second discrepancy was of more concern to Mr. MacDonald, relating to the length of the easterly sideline of the MacCormick property. The original Reid deed description called for a sideline of 100 feet, which appeared to be inconsistent with the adjacent Hanebury/Fulton sideline calling for 110 feet. Contrary to the assertion of the Defendants, Mr. MacDonald testified that he did not "ignore" the 100 ft reference as called for in the original Reid conveyance, rather he determined based on the other evidence presented, that a more appropriate approach would be to determine that the stated deed distance was in error, and that the original conveyors intended the length of the Reid easterly sideline to coincide in distance with the previously established Hanebury westerly sideline, stated to be 110 feet.

[17] Flowing from this, to locate the northerly boundary of both the Hanebury/Fulton lot and the MacCormick lot, Mr. MacDonald utilized the placement of the right of way, finding the southerly boundary of the right of way, to be the northerly boundary of the two lots. He noted that the traveled portion of Baptist Point lane meandered, but remained within the confines of the right of way as determined. In order to place the right of way on the ground, Mr. MacDonald referenced and relied upon a 1963 survey undertaken by A.H. Murray, P.L.S. which surveyed, and established the northern boundary of the right of way, thus permitting him to establish the southern boundary. This in turn permitted Mr. MacDonald to identify the northern boundary of the MacCormick lot, which he opined would be coincident with, and run along the southern boundary of the right of way. Mr. MacDonald testified that he had satisfied himself both by documentary review, and examination of physical evidence on the ground that the location of the right of way had not changed since identified by Murray in 1963, nor since the original creation of the lots. As such, he determined that the location of the right of way served as an "original monument", and should take precedence over distances called for in the deed, most notably the 100 foot side line.

[18] In reaching his conclusions regarding the boundary determination, Mr. MacDonald asserted that he relied upon principles long-recognized by the

Courts to prioritize sources of evidence. In his report he appended excerpts from *Survey Law in Canada*, Carswell, 1989, relating to the proper approach to the establishing of boundaries. Of particular importance to the witness in terms of the approach taken to the present determination was the "order of priorities" attributed to American legal scholar Greenleaf, outlined at page 129 as follows:

> Where there is ambiguity in a grant, the object is to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is to give most effect to those things about which men are least liable to mistake. On this principle, the things by which the land granted is described are thus ranked according to the regard which is to be given to them: (1) natural boundaries; (2) lines actually run and corners actually marked at the time of the grant; (3) the lines and courses of an adjoining tract, if these are called for and if they are sufficiently established, to which the lines will be extended; and (4) the courses and distances, giving preference to one or the other according to circumstances.

[19] Mr. MacDonald was extensively cross-examined and presented with a number of propositions regarding an alternate placement of the boundary in question. Considerable time was spent in relation to three issues of contention, namely, the significance of an iron bar located on the MacCormick/Fulton sideline; the use of a non-existent roadway as an "original monument"; and the meaning of "*road to be extended*" contained in the original Reid deed. The Defendants assert that Mr. MacDonald's interpretative approach to each issue is flawed, and as such, the Court is urged to find that his opinion does not meet the requisite burden of proof to establish the boundary in question.

***The relevance of the iron bar located on the MacCormick/Fulton sideline***

[20] The Court was advised, both orally and by virtue of photographic evidence, that there is an iron bar located on the easterly sideline of the MacCormick lot. Mr. MacDonald did not recognize this as reflecting the northeasterly corner of the MacCormick property, rather, he placed the corner 3.02 feet more northerly, and closer to the edge of the travelled

portion of Baptist Point lane. This placement in turn, impacts upon the northerly boundary of the MacCormick lot, and the issue in contention.

[21] The Defendant put to Mr. MacDonald that the iron bar, if it was recognized as the northeasterly corner marker of the MacCormick lot, would result in his determination of the MacCormick/Dewar boundary being flawed. In fact, in combination with the interpretation of "*road to be extended*" contained in the Reid deed as discussed further below, such a finding would, as suggested by the Defendants, result in a boundary very similar to that depicted on the Keen plan. In response, Mr. MacDonald re-iterated his opinion that based upon all of the evidence, he did not view the iron bar as marking the corner of the MacCormick lot.

***The use of a Non-existent road as an "original monument"***

[22] In reaching his conclusions, Mr. MacDonald placed significant reliance upon the determination of the southern boundary of the Baptist Point right of way, as being coincident with the northern boundary of the MacCormick property. Mr. MacDonald referenced and relied upon the 1963 Murray plan in this regard, and viewed the right of way as equivalent to an "original monument" in his list of evidentiary priorities.

[23] This approach was vigorously challenged by the Defendants, who pointed out to Mr. MacDonald that when the Reid/MacCormick lot was created, the right of way did not yet exist, but was merely contemplated. Mr. MacDonald was challenged that a right of way, not yet created, cannot be viewed as an original monument, and therefore should not have been considered. The witness disagreed. Mr. MacDonald testified that in his experience, the fact that the right of way was only contemplated when the conveyance was made, did not preclude it, after being created, from being viewed as an original monument. He provided examples of how such a concept is utilized in modern surveying. Again, despite the Defendants' challenge to the underpinnings of his conclusion, the witness did not vary from the boundary as originally asserted.

***The meaning of "road to be extended" in the Reid conveyance***

*[24]* The original Reid conveyance references the location of the northern boundary of the lot as running "*along the edge of a road to be extended from the Hanebury lot*". The Defendants challenged Mr. MacDonald in relation to this wording, as his depiction of the right of way incorporated a directional deflection. In other words, the right of way placed by Mr. MacDonald, again relying on the 1963 work of Murray, did not follow a straight line. It was suggested by the Defendants that the recognized definition of "extend" required a straight line, and if this was applied to the present case, the boundary would be different than that established by Mr. MacDonald. The witness was not prepared to accept the proposition advanced by the Defendants that "extend" requires the usage of a straight line, and that he was not aware of any authorities in support of such a proposition in survey practice. Again, Mr. MacDonald did not vary his opinion in light of this line of cross-examination.

[25] In a very thorough cross-examination, Mr. MacDonald was presented with various scenarios and suggestions which, if accepted, would modify his findings. Mr. MacDonald continued to assert that his findings followed recognized survey principles, in particular the hierarchy of evidence to be considered in establishing a boundary line. He asserted that the various hypotheses suggested to him by Counsel for the Defendants were not supportable, in his opinion, based on the evidence and recognized survey methodology.

**Other Evidence**

a) Christine ( nee Fulton) Sanderson

[26] Ms. Sanderson, along with her siblings, is the current owner of the "Hanebury/Fulton" lot. She is very familiar with the general area, her parents having purchased her cottage property when she was an infant. Like Mrs. MacCormick and Mr. Dewar, she spent her childhood summers at Shortt’s Lake, and continues to enjoy the property as an adult. She testified that she is familiar with the boundaries of her cottage property, at least those which have always been recognized, as well as that of the MacCormick lot.

[27] Ms. Sanderson testified as to the significance of the iron bar located on the westerly sideline of her property. Specifically, she recalls her father and Mrs. MacCormick's father placing the bar as an indicator of their respective side lines. The men intentionally placed the bar in a position where it would not interfere with traffic on Baptist Point lane. According to Ms. Sanderson, the bar was not intended to reflect the northwesterly corner of the Fulton property - in fact the witness testified that she always considered that her property ran to the edge of Baptist Point lane, recognizing it as the northern boundary of her lot. She expressed a similar belief regarding the MacCormick lot, namely that the southern edge of Baptist Point lane was the lot's northern boundary. According to Ms. Sanderson the location of the Baptist Point lane has remained constant.

[28] Ms. Sanderson further testified as to the use of the MacCormick property since her childhood, continuing to the present. To summarize, this witness testified that the MacCormicks and their predecessors regularly and consistently occupied the area behind their cottage up to the southern edge of the Baptist Point lane, and further, to her knowledge, neither Mr. Dewar, nor his parents before him, utilized that area in any fashion reflective of ownership.

b) Mr. and Mrs. MacCormick

[29] Mrs. MacCormick testified regarding her family's use of their cottage property over the years, in particular, that area to the rear of her cottage extending to the Baptist Point lane. Numerous photographs were entered into evidence depicting the family's usage of this area. Mrs. MacCormick also testified regarding issues of concern with neighbours Clarke, who had undertaken a number of actions at their adjacent property which were considered to be infringements upon MacCormick land. She testified that the fence in question was erected to prevent further encroachments by Morris.

[30] The Court further heard evidence regarding the MacCormick's attempts to obtain a survey of their property. Prior to retaining Mr. MacDonald, they had engaged both Mr. Keen and surveyor Gillis to examine the location of their boundaries. Neither Mr. Keen, or Mr. Gillis had completed a full boundary survey.

[31] Both Mr. and Mrs. MacCormick believed that the survey plan of Mr. Keen prepared on behalf of Mr. Dewar, which referenced therein the northern boundary of their property, was not supportable. As noted above, if the Keen line was accepted, it would significantly decrease the size of the lawn area behind their cottage which they had always traditionally utilized as part of their property. Also, because the Keen plan depicted their property as not being adjacent to the roadway, it served to effectively cut their lot off from the Baptist Point lane. They believed they owned to the edge of the Baptist Point lane, and that the fence was constructed within the bounds of their property.

[32] As was subsequently determined by Mr. MacDonald, the MacCormick's northern boundary does not extend to the edge of the traveled portion of Baptist Point lane, and a portion of the fence was, if the survey is accepted, falls within the Dewar property. The MacCormicks, although surprised with the outcome of the survey plan, testified that they understand how the opinion was reached, and are accepting of it.

c) Mr. Dewar

[33] Mr. Dewar was the only witness called on behalf of the Defendants. He, along with his wife, are the owners of cottage property at Shortt's lake. This property has been in his family since 1939, having passed from his grandfather, to his parents, and subsequently to himself. He, like others who testified, spent a considerable amount of time at the family cottage. Mr. Dewar acknowledged that the MacCormicks and their predecessors in title had used the area in question throughout the years as their backyard, and that his family had not traditionally made any use of the area.

[34] Mr. Dewar testified as to his concerns regarding the erection of a fence by the MacCormicks, and his efforts to have them remove it. He acknowledged that he directed the removal of the fence after several attempts to have the MacCormicks do so, went unheeded. At that time, Mr. Dewar was in possession of the plan from Emerson Keen which placed the fence within his boundaries, and he felt that he was justified in seeking its removal. Mr. Dewar confirmed that he is no longer advancing the boundary line between his property and the MacCormicks' as depicted by Mr. Keen.

[35] A significant amount of Mr. Dewar's evidence purported to address his concerns with the boundary opinion provided by Mr. MacDonald, questioning its accuracy. The concerns expressed echoed many of the propositions put to Mr. MacDonald during cross-examination. It was noted however, that some concerns expressed by Mr. Dewar, had not been put to Mr. MacDonald during his examination, nor identified in pre-trial submissions filed by his Counsel.

**Applicable Law**

**[36]** This dispute does not involve complicated legal principles. The Defendants seek to rely upon case law that requires that a clear and unambiguous deed should be given its plain meaning (see **MacDonald v. McCormick** 2009 Carswell NS 48). Accordingly, by Mr. MacDonald "ignoring" the call for 100 feet in the deed to establish the MacCormick easterly line, the Defendants argue his opinion is fatally flawed. The Plaintiffs assert that the hierarchy of evidence as relied upon by Mr. MacDonald in terms of the proper determination of boundaries is correct, and that a distance specified in a deed, can be superceded by more reliable evidence. This hierarchy in boundary determination has been acknowledged both within this province (see **Carrigan v. Fraser** 2002 NSSC 107 and **DeGruchy v. Pettipas** 2004 NSSC 212), and in other jurisdictions (see **Nicholson v. Halliday** [2005] O.J. No. 57).

[37] As I see it, both lines of authority reflect good law. The issue however, is which applies to the present case before the Court. I find that this is not a situation where the deeds in question, most notably the original Reid conveyance, are unambiguous. There is a very clear discrepancy between the westerly sideline of the Hanebury/Fulton lot calling for 110 feet, and the Reid lot calling for the shared boundary to be 100 feet. Given that each lot was to have the benefit of a right of way over Baptist Point lane, it is difficult to conceive how such could occur if it was truly intended that one lot would be ten feet longer than the other. As explained by Mr. MacDonald in his evidence, if the deed descriptions were adhered to, the location of the right of way would become non-sensical, as there would only be an overlap of two feet where the right of way servicing the Fulton lot, met that servicing

the MacCormick lot. Accordingly, those authorities relied upon by the Defendants are not applicable to the facts in the present case.

**Findings:**

*a) The boundary determination*

[38] Mr. MacDonald provided through both his written report, and *viva voce* evidence, detailed explanation as to how and why he reached the conclusions giving rise to his boundary determinations. I found Mr. MacDonald to be knowledgeable and unbiased with the determinations reached. I specifically reject any suggestion that Mr. MacDonald undertook his retainer with the object of supporting the MacCormick's view of where their boundaries should be placed. I find that Mr. MacDonald independently reached his conclusions based upon the evidence before him, and applying proper survey principles.

[39] As correctly pointed out by Defendants' Counsel, there is no automatic "win" for the Plaintiffs merely because they called expert survey evidence, and the Defendants did not. It is necessary for the Court to carefully consider the opinion of Mr. MacDonald, including the challenges presented to his views, and determine whether based on the evidence before me, the boundary as proposed has been established on a balance of probabilities. I find that Mr. MacDonald properly applied the hierarchy of evidence to the determination of the boundary in question. As explained by Mr. MacDonald, the evidence he considered and the approach he applied, made sense of a difficult and complicated situation. Further, the Defendants' vigorous cross-examination did not prompt Mr. MacDonald to alter his views, but rather discount as unworkable the various propositions put forward by the Defendants.

[40] I found particularly relevant that the Defendants' view of the significance of the iron bar on the MacCormick/Fulton line was discounted by Christine Sanderson. I accept the evidence of Ms. Sanderson that the iron bar does not now, nor did it ever, reflect either the northern corner of the Fulton or MacCormick properties. This finding serves to significantly erode many of the propositions put forward by the Defendants in attacking

the MacDonald findings, based upon the assertion that the iron bar was a "recognized long standing corner marker".

[41] I find on a balance of probabilities that the boundary between the MacCormick lot, and that of the Dewars, is as determined by Douglas MacDonald. That being said, I feel compelled to address an issue raised by the Defendants in terms of the appropriateness of this Court making such a determination given the ownership of the right of way.

[42] In his closing submissions, Counsel for the Defendants urged this Court to not make a boundary determination in the present instance, as such could prejudice the rights of third parties not properly before the Court. In making this assertion, Counsel relied upon evidence of Mr. MacDonald that ownership of a portion of the right of way known as Baptist Point lane appears to remain in the heirs of C. Wilfred Cox. The other portion is owned by the Defendants. By declaring that the boundary is as established by Mr. MacDonald, this impacts on the placement of the southerly boundary of the right of way - a determination made without notice to the Cox heirs.

[43] This argument comes "late in the day". It does not appear to have been a consideration, or at least raised by the Defendants earlier in the proceedings. The Court does not have before it a Certificate of title which establishes the ownership of the easterly portion of the right of way. It does appear likely however, that the ownership of that portion of the right of way, which in turn abuts a portion of the northerly boundary of the MacCormick lot, was never conveyed by the original owner of the parent parcel. A determination of this Court that the boundary established by Mr. MacDonald is accurate, does impact of the placement of the right of way. Should this prevent the Court from proceeding with a determination which is otherwise supported by the evidence before me? I find in these particular circumstances, that it does not.

[44] The evidence before this Court, which I accept, is that the location of Baptist Point lane has remained static over the years, and the traveled portion falls within the granted right of way. The MacDonald plan does nothing to change the location of the right of way from what has been in existence for many years, and earlier identified by Surveyor Murray in 1963. Although there may be other circumstances where such a concern may

prevent a Court from proceeding with a similar determination, in the present instance, I find the likelihood of any Cox heirs coming forward and raising an issue as to how the Court 's determination has negatively impacted on their rights, is minimal. Therefore, the concerns raised by the Defendant, in the facts of this particular case, should not preclude the Court reaching its determination.

*b) The trespass determination*

[45] Having accepted the MacDonald line as reflective of the proper determination of the boundary between the parties' respective properties, I turn now to the claims of trespass. As is clear from the MacDonald plan, one of the fence posts was clearly within the Dewar property, one appeared to be touching the boundary on the Dewar side, one was touching the boundary on the MacCormick side, and one was clearly within the MacCormick property.

[46] Each party has committed a trespass based upon the above finding. The MacCormick's clearly placed a portion of their fence within the Dewar property. The encroachment however, was minimal and I find that the area was traditionally utilized as part of the Plaintiffs' backyard. The Defendant, by directing the removal of the portion of the fence that was within the MacCormick property, or on the boundary line, committed trespass. The fencing material was not destroyed, but placed on the MacCormick property, where it remains.

[47] The Plaintiffs are claiming monetary damages and submitted an invoice for rebuilding the fence. The invoice however, did not reflect that some of the fence may be reusable. As such, I place little reliance on the invoice as a measure of the Plaintiffs' damages. I am prepared however, in recognition of the nature of the trespasses involved, to award the Plaintiffs general damages of $400.00 in relation to the Defendants' trespass and the removal of that portion of the fence on and within their boundary.

## Conclusion

**[48]** I find that the Plaintiffs are entitled to the following relief:

a) that the boundary between their property and that of the Defendants is as depicted in the survey of Douglas K. MacDonald dated April 29, 2005;

b) that they are entitled to general damages due to the Defendants' trespass in the amount of $400.00.

If the parties cannot agree, I will hear submissions on costs.

J.