

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Boutilier v. Rhodes*, 2022 NSSC 6

**Date:** 2022-01-06  
**Docket:** Syd. No. 470404  
**Registry:** Sydney

**Between:**

George Darrell Boutilier

Plaintiff

v.

John Rhodes and Linda Rhodes

Defendants

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**Trial Decision**

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**Judge:** The Honourable Justice Robin C. Gogan

**Heard:** November 24, 26 and December 1, 2021, in Sydney, Nova Scotia

**Counsel:** Darlene MacRury, for the Plaintiff  
Darren Morgan, the Defendants.

**By the Court:**

**Introduction**

[1] It is often said that fences make good neighbours. This is not one of those cases.

[2] George Boutilier bought his home in Glace Bay in 2000 (the “*Boutilier property*”). At that time, a fence divided his property from that of his rear neighbours, John and Linda Rhodes. Boutilier had a large backyard with mature trees. He and his wife enjoyed spending time in the yard. Boutilier installed a shade garden in his back yard in the area adjacent to the existing fence line.

[3] Trouble came in 2010 when the Rhodes decided to install a pool in their backyard (the “*Rhodes property*”). This development required a set back of five feet from the boundary line. Rhodes told Boutilier that he wanted to move the fence. Boutilier suggested consulting with a surveyor to confirm the location of the boundary between their properties.

[4] John Rhodes did not wait for a survey. He unilaterally removed the existing fence and replaced it with a much-improved version that ran through the Boutilier shade garden. After trampling Boutilier’s perennial plants and destroying part of his

rock wall, the Rhodes went on to enjoy their new pool. Boutilier's survey later determined the location of that new fence to be almost four feet inside his backyard.

[5] What follows is a decision settling the common boundary line between these neighbours and disposing of the ancillary claims.

## **Background**

### *(a) Procedural History*

[6] This matter began when Boutilier bought his home at 250 York Street, Glace Bay, Nova Scotia on July 31, 2000, from Gerald and Elizabeth Shore. Boutilier did not obtain a property survey before the purchase but was provided with one that had been done for the sellers by Prendergast Surveys on July 4, 2000 (the "*Shore survey*", *Exhibit 1, Tab 3 and Exhibit 2*). The survey identified the boundaries of 250 York Street, including a rear common boundary line with the property owned by John and Linda Rhodes of 33 Marconi Street, Glace Bay.

[7] The Rhodes removed the existing fence line and installed a new one in a new location in 2011. Boutilier then hired a lawyer. Boutilier's counsel wrote to the Rhodes on August 25, 2011 enclosing the Shore survey. The Rhodes were asked to remove the new fence and compensate for damage to the garden no later than

September 16, 2011. In response, the Rhodes obtained a survey from Stewart Setchell on March 26, 2014 (the “**Setchell survey**”, *Exhibit 1, DE Tab 2 and Exhibit 4*). This survey showed the common boundary line intersecting a common corner between the Rhodes, Boutilier, O’Brien and Chernin properties with no encroachment upon the Boutilier property.

[8] Boutilier obtained his own survey from Prendergast Surveys on December 11, 2012 (the “**Prendergast survey**”, *Exhibit 1, Tab 4 and Exhibit 3*). This survey identified an encroachment by the Rhodes over the common boundary line. Another letter was sent to the Rhodes on March 22, 2013, enclosing the new survey, and asking for immediate removal of the fence. There was no response.

[9] Boutilier commenced the present claim on November 16, 2017, alleging trespass and seeking damages and injunctive relief. The Rhodes filed a defence on May 16, 2018, denying encroachment and trespass. The trial of this matter was held on November 24 and 26, 2021. Boutilier and John Rhodes testified at trial and both parties offered opinions on the common boundary from their respective surveyors. The surveyors testified and were cross-examined. Their evidence is reviewed below. The parties were given until December 10, 2021, to provide closing submissions in writing, but neither party did so.

***(b) Evidence of the Parties***

*George Boutilier*

[10] Each of the parties testified about the history of the common boundary between their properties.

[11] Boutilier has held title to his property at 250 York Street, Glace Bay since he purchased it in 2000. His Deed and the legal description of the property is in evidence (*Exhibit 1, Tab 1*). He testified that there was a picket fence running along the rear boundary of his property when he purchased it in 2000. He described it as an “old fence” and said that he did not do much to maintain it. He believed that it was “his” fence because the pickets were on his side and the fence frame on the Rhodes’ side.

[12] Although he did not have his own survey when he purchased the property, Boutilier said he could identify landmarks from the Shore survey along his boundary lines. He said that the survey markers identified in the Shore survey were visible along the edges of the property along with the fencing and hedging. He had comfort from the Shore survey that he knew the borders of his property. He specifically recalled a survey marker being visible in an area adjacent to the O’Brien shed.

[13] Boutilier said that he began some work in his back yard in 2003 or 2004. He moved some dirt over to the fence area to reinforce it and constructed a shade garden in the rear corner of his property adjacent to the O'Brien shed. His garden was surrounded by a rock wall and was "right up to the fence", running along the common boundary. Boutilier planted and did seasonal maintenance to his shade garden after its construction.

[14] Boutilier produced photos of the contested area dating to 2003 or 2004. The backyard, "old fence", and shade garden are clearly visible in the photos from this time period (*Exhibit 1, Tab 7, p. 5 – top 2 photos*). These photos show the fence intersecting with a large tree and the O'Brien shed. *Exhibit 1, Tab 7, p. 6 – bottom 2 photos* show wider views of the old fence prior to any renovations to the Rhodes property. Boutilier described the old fence as "bi-secting" the large tree along the fence line with the fence being nailed into the tree on two sides.

[15] In 2009 or 2010, the Rhodes built a new deck. The deck was attached to the rear corner of their house and straddled the space between their house and the old fence. Only inches separated the deck and the old fence. Boutilier recalled that by this point, the old fence was leaning quite a bit toward his property. He asked John Rhodes to straighten it and he did.

[16] It was in 2010 or 2011 that John Rhodes told Boutilier of an intention to put a pool in his yard. He and his wife were in the process of obtaining a permit when the fence line became an issue. Boutilier was told that the survey marker placed by Dennis Prendergast in 2000 adjacent to the O'Brien shed was "too far north". Boutilier contacted Prendergast to discuss the location of the survey marker and was told that the marker was correctly placed.

[17] Notwithstanding the placement of the survey marker, the Rhodes proceeded with construction of a pool, deck, and new fence. A portion of the old fence was removed and replaced by a new one that terminated at the rear corner of the O'Brien shed (see photos in *Exhibit 1, Tab 7, pp 7, 9, and 10*). This moved the terminus of the fence line almost four feet south toward Boutilier's house. The new fence ran from the corner of the Rhodes deck through the area of the rock garden. It had an offset to accommodate the old tree that it had once bi-sected. Boutilier testified that he lost access to a three-foot by twenty-foot section of his shade garden with the construction of this new fence line.

[18] The construction of the fence required John Rhodes to be on Boutilier's side of the fence. Rhodes did not seek or obtain permission from Boutilier to move the old fence or construct the new fence or to access his garden area as a construction zone.

[19] Boutilier said that the fence remains today as John Rhodes built it. He has done nothing to it. He said that the issues around the fence have made it difficult for him to feel comfortable in his own yard. He does not enjoy it as he did before the fence was moved. He would like to see the new fence removed and another installed in the previous location.

[20] Boutilier confirmed that he had no idea of the history of the fence location before the Shore survey. He did not know how the old fence came to be located in the area that it was when he bought his house in 2000. He concluded by noting that the contested survey marker placed by Prendergast in 2000 was in plain view when he purchased the property and not an issue until more than a decade later when the Rhodes wanted to build a pool. It was only then that John Rhodes advised him that the marker was in the wrong place. It was around this time that the contested marker disappeared.

*John Rhodes*

[21] John Rhodes testified. He and his wife Linda moved to the home at 33 Marconi Street in July of 1986. His deed and legal description are in evidence (*Exhibit 1, DE 1*). The description provides that the common boundary begins at a stake and then runs “*easterly a distance of eighty feet till it strikes the rear line of*



*Fairman's lot*". "Fairman's lot" is a reference to the lands now owned by Brian and Theresa O'Brien. The O'Brien property is accessed from Prince Street meaning that the "rear line of Fairman's lot" is the common boundary between the O'Brien and Rhodes property. When the Rhodes purchased their property in 1986, they did not have a survey prepared. They did obtain a plot plan prepared by surveyor John Pope on July 20, 1986, showing the location of their house on its lot (*Exhibit 5*). At the time, the neighbour along the rear of their property was Morris Shore.

[22] John Rhodes testified that a fence line existed along the rear boundary of his property when he bought it. It was a picket fence. About a year later, he "refurbished" the existing fence line. He installed new posts, straightened the existing fence, and replaced a ten to fifteen foot section with a wood framed chain link fence. It is the new section of fencing that appears in a video from August 14, 1989 (*Exhibit 6*). Rhodes said that the new portion of the fence line intersected with the O'Brien shed about one foot north from its rear corner. Rhodes said that the new fencing was "basically" in the same place as the old one. In spite of his placement of this new fence, Rhodes testified that "he always used the corner of O'Brien's shed as the corner of his property". He did not say why he thought this or how he relied on the corner as his boundary. Nor did he say why he placed the refurbished fence in the position he did if he believed the boundary line was different. He did not

recall “anyone complaining” about the fence he installed. In the context of the questions, I took that to refer to the location of the fence.

[23] John Rhodes testified about changes to the fence line after 1989. He was asked about when the chain link fence was changed back to a picket fence. I found his evidence on this point confusing. He could not recall when the chain link fence was replaced with a picket fence. He did not make the change and he did not see who did. He thought it happened sometime in the mid 1990s. He also mentioned that his relationship with neighbour Morris Shore came to an end in 1997 or 1998 but did not say why. Mr. Shore died not long after. It was not contested that it was Morris Shore’s son Gerald that had the Shore survey prepared by Prendergast Surveys in July of 2000. John Rhodes disagreed with the placement of the common boundary in the Shore survey saying that it was “not at all” accurate and showed the boundary running further north than the “original” fence line.

[24] Rhodes confirmed that he had hired Prendergast Surveys to survey his property in 2004. He said this was prompted by an issue with his driveway and an encroachment by his neighbour’s hedge. He said that he did not receive a survey plan at that time, and no one showed him where the survey markers had been placed.

[25] John Rhodes testified to other things. He said that when he removed the picket fence in 2011, it was decrepit and “garbage”. He thought it was 2010 when someone nailed the sections of the picket fence into a large tree. This notwithstanding the photographs offered by Boutilier showing the fence attached to the tree in 2003 or 2004. Rhodes noted that the tree was the same one shown in the video from 1989 but that it had grown substantially in the time between 1989 and 2010. He admitted that he did not have Boutilier’s permission to remove the picket fence and replace it in a different position in 2011. It was his evidence that he had spoken with Boutilier in 2010 about “realigning” the fence to the property line so that he could put in his pool. It was in 2010 that he constructed a new deck that extended at a right angle from the corner of his house to the vicinity of the old picket fence line.

[26] When cross-examined, John Rhodes was variously inconsistent, incredible, argumentative, combative, glib, and evasive. At one point, under persistent questions about the location of his 2011 fence, he said that there was a survey marker in the ground supporting his boundary line. He said that he saw it about twenty years ago and that both surveyors had missed it. When asked why he hadn’t raised this earlier in the litigation or raised it with the surveyors, he said “he forgot about it until two years ago”. He said he did not point it out to Prendergast in 2004 during his survey of the Rhodes property because “its not my business”. He went on to say that

Boutilier knew of the survey marker because “he buried it”. Rhodes advanced no evidence that a survey marker existed as he alleged. Nor did he have any personal knowledge or other basis to say that Boutilier had buried the marker. I pause here to note that the evidence of both surveyors was that they scanned the property with metal detectors in the search for survey markers and no such marker was discovered.

[27] Throughout his evidence John Rhodes demonstrated a cavalier attitude toward Boutilier’s property rights. He admitted to removal of the Prendergast survey marker placed in 2000 because “he disagreed with the location”, he admitted to having no permission to remove the existing fence and replace it in 2011, and to trespass and damage to Boutilier’s property to construct his fence. He anticipated future trespass to maintain the fence. He admitted to moving the fence to accommodate his pool deck and not having a survey to support the new location. Finally, he admitted to ignoring letters advising of the encroachment and making no attempt to rectify the issues.

[28] If I could identify a singular theme to the evidence of John Rhodes it would be “better to ask forgiveness than permission”. It was not until years after he unilaterally moved the common fence line that Rhodes obtained his first and only survey. This was the Setchell survey done on March 26, 2014 (*Exhibit 4*).

***(c) The Expert Evidence***

[29] As noted already, each of the parties offered the evidence of duly qualified Nova Scotia Land Surveyor in support of their position on the location of the common boundary line. The parties consented to the qualification of the surveyors to provide opinion evidence and they were qualified and evidence admitted notwithstanding imperfect compliance with *Civil Procedure Rule 55*. Both surveyors are well known local surveyors with decades of experience in their fields.

[30] The surveyors agreed that the common boundary line began with an unmonumented point on the southwest corner of the Rhodes' property and that the boundary line ran in a straight line from that point. They disagreed with the terminus of the line. The Setchell survey placed the end point at a common corner and the Prendergast survey placed it almost four feet north of that point along the common boundary between the Rhodes and O'Brien properties.

[31] Boutilier's expert evidence came from Dennis Prendergast of Prendergast Surveys. He completed a survey for Boutilier's predecessors in title, Gerald and Elizabeth Shore on July 4, 2000 (*the Shore survey - Exhibit 2*). He completed a survey for Boutilier on December 11, 2012 (*the Prendergast survey - Exhibit 3*). He also did a survey of the Rhodes property in 2004. For the Rhodes survey,

Prendergast placed markers but did not draw a survey plan as it was not then required. Prendergast also provided a rebuttal report dated December 9, 2016 (*Exhibit 1, Tab 5*).

[32] The Rhodes' opinion came from Stewart Setchell whose survey was completed on March 26, 2014. The Setchell survey is *Exhibit 4* (an excerpt is *Exhibit 1, Tab DE 2*), his report dated March 26, 2014, is *Exhibit 1, Tab DE 3* and a report dated April 26, 2019 is *Exhibit 1, Tab DE 4*.

[33] More will be said about the survey evidence later in these reasons.

### **Issue**

[34] What is the location of the common boundary between the Boutilier and Rhodes property? Did Rhodes commit trespass? If so, what is the appropriate remedy?

### **Position of the Parties**

*George Darrell Boutilier*

[35] Boutilier submits that the common boundary is as indicated on the Prendergast survey dated December 11, 2012. He also relies on the Prendergast survey to say

that the Rhodes built a fence that encroaches on his property and have committed a trespass. He seeks injunctive relief and damages.

*John and Linda Rhodes*

[36] John and Linda Rhodes submit that the Boutilier claim should be dismissed. They take the view that the fence line is on the common boundary and that there has been no trespass except the trespass committed to construct the new fence in 2011. They rely on the Setchell Survey (*Exhibit 4*) to delineate the common boundary and say that it represents the location of the fence when they bought their property in 1986.

[37] Further, the Rhodes argue that if trespass is established by the location of the new fence, then the appropriate remedy is not injunctive relief but damages. It is their view that the trespass is miniscule and that forcing the removal and realignment of the fence would also force them to move their deck and pool.

[38] Before moving to an analysis of the issues, I note that neither party advanced a claim based on possessory title.

**Analysis**

*(a) The Law*

[39] The parties to this boundary dispute have cited authorities on the law of civil trespass. In my view, to determine whether trespass is made out, the common boundary line between these adjacent properties must be determined. This can be done based on the evidence, including analysis of the competing survey opinions.

[40] In *Goulden v. Nova Scotia (Attorney General)*, 2013 NSSC 253, Stewart J. provides a summary of the law governing the interpretation of deeds. She states as follows:

#### **LEGAL PRINCIPLES**

[12] **Boundary Determination** ... it will be of use to set out several of the legal principles that govern the rather technical field of boundary determination. Various legal principles govern deed interpretation and boundary demarcation when the court is required to resolve boundaries. The general rules of evidence apply to boundary disputes, which are typically heavily concerned with documentary evidence of title. In deed interpretation, the question is not the grantor's subjective intent. Rather, the court is concerned with the meaning of the words used in the deed. That is to say, the question is "what is the expressed intention of the grantor?": *Knock v. Fouillard*, 2007 NSCA 27, at para. 27. If the terms of the conveyance are clear, extrinsic evidence is not admissible: Anne Warner LeForest, Anger and Honsberger's Law of Real Property, 3d edn. (Aurora, Ont: Canada Law Book, 2010) at p. 18:30:30.

[13] When the words of a deed are not ambiguous, either in themselves or when applied to the land in question, the intention of the original grantor is to be taken from the words in the description in the deed. No further rules of interpretation are required: *Herbst v. Seaboyer*, (1994) 137 N.S.R. (2d) 5 (C.A.), at para. 15; *McCormick v. MacDonald*, 2009 NSCA 12, at para. 73. A latent ambiguity occurs when the words of a document on their face do not admit to a different possible meaning, but the surrounding circumstances show that two or more different meanings are possible. A party may demonstrate that a latent ambiguity exists, and attempt to resolve it, by adducing extrinsic evidence, including evidence of subjective intention....



[14] The rules for ascertaining the intention of a grantor in the event of an ambiguity were set out in *McPherson v. Cameron* (1868), 7 N.S.R. 208, [1868] N.S.J. No. 2 (S.C.). Dodd J. said the general rule “is to give most effect to those things about which men are least liable to mistake” (para. 5). In applying this principle, the elements of the description are “marshalled” in the following order: “First, the highest regard had to natural boundaries; Secondly, to lines actually run and corners actually marked at the time of the grant; Thirdly, if the lines and courses of adjoining tract are called for, the lines will be extended to them, if they are sufficiently established; Fourthly, to courses and distances, giving preference to the one or the other according to the circumstances” (para. 5).

[15] In *Kolstee v. Metlin*, 2002 NSCA 81, the Court of Appeal confirmed that cases such as *MacPherson, supra*, *Saueracker v. Snow* (1974), 14 N.S.R. (2d) 607 (T.D.), and *Humphreys v. Pollock*, [1953] 3 D.L.R. 730 (N.B.S.C.A.D.). aff’d [1954] 4 D.L.R. 721 (S.C.C.), “correctly set out the general principles to be applied in interpreting descriptions of land as spelled out in a deed. As a general rule, the intent of the parties to a conveyance is to be gathered from the words of the document. If there is an ambiguity, the common sense rules as quoted by the trial judge from *MacPherson* ... are generally to be applied. When courses and distances clash, preference to one, rather than the other, will depend on the circumstances” (para. 66).

[16] More recently, in *Nicholson v. Halliday* (2005), 248 D.L.R. (4th) 483, [2005] O.J. No 57, the Ontario Court of Appeal set out the surveyor’s hierarchy of evidence: (1) natural boundaries; (2) original monuments; (3) fences or possession that can reasonably be related back to the time of the original survey; and (4) measurements (as shown on the plan or stated in the metes and bounds description). See *Robichaud v. Ellis*, 2011 NSSC 86, at para 25. ...

[17] In re-establishing a 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”: *Thelland v. Golden Haulage Ltd.*, [1989] O.J. No 2303, 1989 CarswellOnt 2417 (Ont. Dist. Ct.) at para. 11. Stortini J. stated in *Traynor v. Hilderley*, [1997] O.J. No. 4839 (Ont. Ct. J. (Gen Div)), that if “original monumentation is found and is undisturbed as to location, it must be accepted, erroneous as may have been the original survey” (para. 14). If there is no evidence “of either the original monuments or the original line, then the surveyor must refer to the measurements as contained in the deed or on the plan. This approach may, of course, be affected by possessory title. If no other method of establishing the boundary line in question is available, the court must fix the boundary line with the assistance of the deed measurements and the law of possessory title” (para 15).

**(b) Is there ambiguity in the property description?**

[41] In this case, the parties have been unable to resolve their dispute with reference to the legal descriptions of the properties. The lots in question are inside a town block bounded by Yorke Street on the south, Marconi Street on the north, Prince Street on the east and Fletcher street on the west. The Rhodes property is on the Marconi Street side and the Boutilier property is on the Yorke Street side. The surveyors agree that if the lots are plotted by measure alone, there is an overlap that impacts the common boundary. The difficulty of plotting by measure alone is also manifested in the divergent survey opinions.

[42] The surveyors agreed that this is a common issue and the basis for considering other evidence in this case. As one example, the language of the Rhodes' deed provides for a common boundary that runs easterly from a stake a distance of eighty-eight feet. The Boutilier deed contains two relevant descriptions that together account for the common boundary, one of which runs westerly from a point a distance of sixty feet, and the other runs west from a stake a distance of twenty-seven feet for a total of eighty-seven feet. The Boutilier boundary is therefore measured at one foot shorter than the Rhodes' deed measures it.

**(c) Resolution of the Ambiguity**

[43] Given the presence of ambiguity, the authorities permit reference to extrinsic evidence to determine the intent. The authorities further commend the use of common sense in the use of extrinsic evidence.

[44] There are many cases on the interpretation of deeds that refer to a “hierarchy of evidence” to be considered. This hierarchy was considered by our Court of Appeal in *Podgorski v. Cook*, 2012 NSSC 174. In that case, the applicant sought an order establishing the boundary line between adjacent properties. At trial, the court considered competing survey opinions and a claim of possessory title. The boundary was established as set out in the applicant’s survey. The respondent appealed.

[45] The Nova Scotia Court of Appeal dismissed the appeal (at 2013 NSCA 47). In doing so, it dealt with the “hierarchy of evidence” at para. 20:

[20] It is unnecessary to decide in this case whether the “hierarchy of evidence” should apply in Nova Scotia. One would have thought that the application of the “hierarchy of evidence” and related survey principles would initially be a matter for the expertise and opinion of the surveyors in question. So, for example, whether monuments were ‘original’ or whether ‘fences or possession’ can be reasonably related back to the ‘time of the original survey’ would be matters of expert opinion for a surveyor”.

[46] I pause at this point in the analysis to recognize that both parties testified about the location of the fence line between their properties at the time of their respective purchases.

[47] Boutilier knew nothing about the history of the common boundary but described a picket fence along the back of his property that intersected with a large tree in 2000. He also had the Shore survey and could clearly see the survey marker placed by Prendergast in the northeast corner of his property. He had no reason to question that the fence line represented the common boundary. He planted his shade garden in reliance on that fence line. At trial, he offered the photographs to show the location of the fence line and his garden in either 2003 or 2004 (*Exhibit 1, Tab 7, p. 5*). He was not aware of any issue with that location until a conversation with John Rhodes in 2010, a decade after the Shore survey was completed and a survey marker placed at the contested corner.

[48] John Rhodes testified that a picket fence line existed along the boundary when he bought his property in 1986. There is support for this evidence in the plot plan of John Pope from July of 1986 (*Exhibit 5*). I also note his evidence that the fence line did not run parallel to his house, a point he made when discussing the construction of his deck. This latter recollection is consistent with the 1986 Pope plot plan (*Exhibit 5*) showing a distance of seven feet from the southwest corner of the Rhodes' house to the rear fence line and a narrower distance from the southeast corner of the house to the rear boundary line. The Pope plan also showed the fence line to be a straight run. I find this evidence consistent with the 2000 Shore survey

(*Exhibit 2*) showing the former distance measured at seven feet, 2 inches and the latter at six feet, 7 inches. It is clear that the fence line at the time of the Rhodes purchase was straight and not parallel to the back of his house. Rather, the fence line narrowed in relation to his house as it ran northeast toward “Fairman’s lot”. This is consistent with the Prendergast opinion and inconsistent with the Setchell opinion.

[49] As I understood John Rhodes’ evidence and argument, it was his view that the fence location when he bought the property was the correct location of the boundary line. Soon after purchase, he refurbished the fence line and replaced a section (a ten to fifteen foot span) in “basically” the same location as the earlier picket fence. That location is reflected in the 1989 video (*Exhibit 6*). The remainder of the existing fence line remained in its place. I note that the terminus of the fence line in the video is not the corner of the O’Brien shed but a point north of the corner.

[50] At some point in the mid-1990s, the contested portion of the fence line was moved to a different location and was nailed to a tree. Its location is consistent with the photos in *Exhibit 1, Tab 7, p. 5*. John Rhodes said that he did not make that change and disagreed with it but did not notice the changes until it came time to place his pool in 2010.

[51] In isolation, I found it difficult to believe that John Rhodes would not notice the fence had been moved and changed back to a picket fence as soon as that change occurred. When I also consider that he placed a shed in the contested area of his backyard in or about 2003 and had a survey of his property done in 2004, I find it incredible that he did not notice anything remarkable about the fence before 2010 or 2011. As a result, I do not find John Rhodes' evidence a solid basis on which to make any conclusions about the historic location of the boundary line. And I dismiss the suggestion that a failure to consult him for the purpose of the 2000 Prendergast survey was fatal to that opinion. John Rhodes demonstrated a propensity to say and do what suited him to the point of destroying survey evidence.

[52] Finally, I note that although John Rhodes advocated for a placement of the fence that reflected the location in the 1989 video (*Exhibit 6*), that is not the same location of the fence he went on to construct in 2011, nor is it consistent with the Setchell survey. Considering all of the evidence from John Rhodes, it is difficult to discern on exactly what basis he believed that the location of his 2011 fence was correct and uncontroversial.

[53] Turning now to the survey opinions, the evidence from both was consistent on process, principles employed, and authorities relied upon. Both discussed their consideration of the hierarchy of evidence. They agreed to an unmonumented point

on the southwest corner of the Rhodes property as one end of the common boundary. They agreed that the common boundary was a straight run. Neither concluded that the boundary line had an offset to accommodate a tree as does the existing construction of the Rhodes' fence.

[54] The main point of divergence between opinions is the northeast terminus of the common boundary. The Setchell survey opines that the terminus is a common corner – a point which gives the Rhodes property the full measure of eighty feet along their northeast border with the O'Brien property and which sees a common boundary that runs along a continuous line from adjacent properties. In coming to his opinion, Setchell relies on information provided from John Rhodes as to the location of the fence line when he purchased the property. He also relies on the measurement from the legal description.

[55] There are a number of issues with Setchell's approach. First, his opinion is impacted by any weight he placed on representations made by John Rhodes. Second, reliance on distance is reliance on a form of evidence that falls near the bottom of the hierarchy of evidence. Both Setchell and Prendergast agreed that measurements were often wrong. Yet Setchell gave full weight to the distance called for in the Rhodes description.

[56] Second, in giving weight to the distance, Setchell did not give any weight to the call point in the Rhodes's description which provides an easterly run "a distance of eighty feet *till it strikes the rear line of Fairman's lot*". The rear line of Fairman's lot is now the rear line of the O'Brien property. A plain reading of those words suggests a point of intersection with the rear boundary line as opposed to the corner of the O'Brien lot or a common corner point. It appears that Setchell gave full weight to distance and disregarded the call point.

[57] Further, I note that the description in the Rhodes deed has the common boundary running easterly to the noted point of intersection and then northerly to the intersection with the rear boundary line of the Johnston lot. The call points in these runs are points of intersection with existing boundary lines. It seems to me that Setchell's opinion plotted the boundary in the reverse, giving the Rhodes's the benefit of a full eighty feet along its common boundary with the O'Brien lot to a point and then turning west and running eighty feet to the unmonumented point. This is not how the description itself plots the boundaries. In my view, giving preference to distance over call point and plotting the runs in reverse both impact the boundary lines in the Setchell opinion. Setchell agreed when cross-examined that he could only come to a common corner by giving the Rhodes the full distance of eighty feet on their boundary with the O'Brien property.



[58] Setchell was at a disadvantage given the timing of his survey in 2012. He testified that he was not aware of a boundary dispute when he initially did his survey. Significantly, when Setchell did his site visits, survey evidence available earlier in time was no longer available. John Rhodes had removed an important survey marker and the earlier fence line. These actions placed Setchell in a challenging position. To compensate, Setchell discussed the earlier surveys and marker locations with Prendergast and received information from John Rhodes.

[59] As I understood Setchell's evidence, he was given the 1989 video to review (*Exhibit 6*) but was not told that the fence line in that video was not the one that had existed when the Rhodes bought the property and not the one reflected in the Pope plot plan (*Exhibit 5*). Setchell did not have the benefit of the photos in *Exhibit 1, Tab 7, p. 5*. When shown these photos he agreed that the common boundary shown in the Shore survey was consistent with the location shown in those photos. He also agreed that Prendergast had an advantage over him in being able to review the old fence line.

[60] In my view, the opinion offered by Prendergast is the preferred opinion. He had the benefit of viewing the fence line that existed in 2000 when he did his original survey of the area. He gave preference in his work to the call point in the runs over the distance. He acknowledged, as did Setchell, the frailties in relying on distances

and gave more weight to the call points in his opinion. In Prendergast's view, the fence line that existed in 2000 demonstrated "long time occupation". He remarked that it was an older fence line and that "each party was living up to the fence".

[61] Prendergast testified that in coming to his boundary line opinion, he relied on field evidence and was able to pick up several points on which he created a straight boundary line. On this basis, he placed a survey marker at the southeast corner of the Rhodes property. When Prendergast did a survey of the Rhodes property in 2004, he relied on that marker and noted that John Rhodes did not object to the marker placement at that time. It is acknowledged that the 2004 survey originated in a dispute over a different area of the Rhodes property. However, by then the fence line had been in its location since the mid-1990s, almost ten years, and there was no indication from John Rhodes in 2004 that he disputed the placement of the common boundary or the location of the survey marker.

[62] When Prendergast returned at Boutilier's request in 2012, the new fence was in place. Prendergast concluded that the Rhodes's fence encroached onto the Boutilier property by 3.8 feet at the point it met the rear corner of the O'Brien shed. On cross-examination, Prendergast admitted that he had primarily used evidence of the fence line that existed when he did his 2000 survey to place the common boundary line. It was Prendergast's opinion that the fence he observed in 2000 was

more than twenty years old. He did not discuss the fence location with anyone at that time because there was evidence of it being a “long time occupation line” and that his practice was not to disturb evidence of long-time occupation. Prendergast said that his methodology picked up the old fence line the best that he could but acknowledged that he picked up one fence post that was over a foot off of his line.

[63] Having heard the evidence in this matter, it is clear that the fence line observed by Prendergast during his 2000 survey was part original fence line and part refurbished fence line. There is no evidence available that exactly delineates the northeastern terminus of the common boundary prior to the video offered by John Rhodes which shows the chain link fence he had installed running behind a tree and ending at some point north of the common corner of the four adjacent properties. John Rhodes admitted that he had moved that portion of the fence. For the reasons given, I do not accept his suggestion that the fence he installed in 1989 was placed in the basically the same position as the previous picket fence. And in any event, even John Rhodes was not cavalier enough in 1989 to terminate the fence line at the common corner.

[64] It seems to me a reasonable inference that sometime after Rhodes placed the northeastern segment of the fence line in its 1989 location that his then neighbour Morris Shore objected and moved it to the placement observed by Prendergast

during his 2000 survey. John Rhodes said that the chain link fence he installed was replaced by a picket fence in the mid 1990s, but it could have been over anytime between August 1989 and July of 2000. Rhodes did not object to that repositioning until 2010 at a point when he wanted to install his pool. At no point prior to 2010 was there any evidence to support that the common boundary ended at a common corner. I do not accept John Rhodes' evidence that he observed a survey marker at that location. His evidence on this point is simply not credible.

[65] I consider it significant that the plot plan of John Pope shows a narrowing of the distance between the fence line and the Rhodes house as it runs toward the northeast. This is consistent with John Rhodes' evidence and is consistent with the line placed by Prendergast. It is also consistent with the language in the description calling for this boundary to end at a point intersecting the rear line of what is now the O'Brien lot. It is inconsistent with the line placed by Setchell which shows the line moving further away from the Rhodes house as it moves northeast and ending at a common corner.

**(d) Trespass**

[66] I conclude that the common boundary between the Rhodes and Boutilier properties is as it is set out in the Prendergast survey dated December 11, 2012

(*Exhibit 3*). I further accept, on the basis of this survey opinion, that the Rhodes have encroached upon the Boutilier property and committed a direct and flagrant trespass in installing a fence line in its present location (see *Canada (Attorney-General) v. MacQueen*, 2013 NSCA 143).

[67] The final question here relates to the appropriate remedy. Boutilier seeks injunctive relief and damages. The circumstances here involve a clear case of trespass that has been ongoing since the existing fence line was constructed in 2011. The fact that Boutilier did not request interlocutory relief does not detract from the serious nature of the intrusion upon Boutilier's property rights. The Rhodes committed trespass in removing the previous fence line and in constructing the existing fence line. The manner of construction contemplated future trespass, a matter for which John Rhodes was unequivocally unapologetic.

[68] I have considered the authorities cited by the parties and conclude that it is just to order a permanent injunction restraining John and Linda Rhodes from any further trespass on the Boutilier property (see *Maxwell Properties Ltd. v. Mosaik Property Management Ltd.*, 2017 NSCA 76 at paras 33-40). This injunction shall be subject only to the further relief being granted as follows:

(a) The offending portion of the existing fence shall be removed, and a replacement installed on the common boundary. The Rhodes shall have six months to complete the movement of the fence or such longer period as Boutilier may agree to in writing. No person shall enter upon on the Boutilier property even to remove the existing fence without Boutilier's express consent.

(b) The Rhodes shall be responsible to repair the Boutilier shade garden and remediate the encroachment area. This work shall be done by a professional landscaping company, be carried out immediately upon removal of the existing fence and concluded within thirty days. The goal should be to replace the perennial garden and restore the encroachment area to a reasonable standard. The work shall be complete when approved by Boutilier.

(c) In the alternative, Boutilier may opt to carry out the repair and remediation himself. In the event he does, the Rhodes shall obtain a minimum of two quotations for the work and Boutilier shall obtain at least one. These quotations shall be exchanged through counsel. The Rhodes shall pay Boutilier an amount equal to the average of all of the quotations. The payment shall be made to Boutilier within thirty days of the fence work being completed.

(d) The Rhodes shall not undertake any repair or remediation work personally and shall not engage anyone else to do the work without first giving Boutilier the right to approve of the scope of work and to exercise the option given to him to do the work himself upon agreement on the amounts payable.

[69] There was no evidence to support, and no submissions made, seeking any additional damages.

### **Conclusion**

[70] The common boundary line between the Boutilier property and the Rhodes property shall be resolved with reference to the Prendergast Survey dated December 11, 2012 (*Exhibit 3*).

[71] A permanent injunction is granted enjoining John and Linda Rhodes from further trespass on the Boutilier property. The existing fence shall be removed within six months from the date of this decision (or such longer period agreed to by Boutilier), and another constructed on the common boundary. All of this work shall be done at the Rhodes' expense. The Boutilier shade garden shall be repaired or damages paid to Boutilier as set out above within thirty days of the completion of the fence realignment work.

[72] I hereby expressly retain jurisdiction to deal with any further disputes arising from the execution of this decision.

**Costs**

[73] Boutilier has been entirely successful and is entitled to costs. The parties shall have until February 14, 2022, to agree on costs or provide written submissions to the Court.

[74] Order accordingly.

**Gogan, J.**