

SUPREME COURT OF NOVA SCOTIA

Citation: *Leblanc v. Terre Noire Surveys*, 2014 NSSC 165

Date: 2014-05-02

Docket: PtH No. 419595

Registry: Port Hawkesbury

Between:

Paul A. Leblanc and Paul R. Leblanc

Applicants

v.

Simon Ernest Aucoin, c.o.b. as Terre Noire Surveys and
Carol Ann Chiasson

Respondents

Judge: The Honourable Justice Robin C. Gogan

Heard: April 7, 2014, in Sydney, Nova Scotia

Counsel: Jennifer Anderson, for the Applicants, Paul A. Leblanc and
Paul R. Leblanc

Simon Ernest Aucoin, c.o.b. as Terre Noire Surveys, and
Carol Ann Chiasson, the Respondents, not appearing.

By the Court:

Introduction:

[1] The Applicants, Paul A. Leblanc and Paul R. Leblanc are father and son. The son, Paul R. Leblanc is the present owner of lands located on the Cabot Trail, St. Joseph du Moine, Inverness County, Nova Scotia (the “**Leblanc property**”). The father, Paul A. Leblanc, is the predecessor in title.

[2] The Respondent, Carol Ann Chiasson, (the “**Respondent Chiasson**”), is the owner of an adjacent parcel of property (the “**Chiasson property**”).

[3] The Respondent, Simon Ernest Aucoin, (the “**Respondent Aucoin**”) is a Nova Scotia land surveyor who carries on business as Terre Noire Surveys. The Respondent Aucoin surveyed the Chiasson property. His survey gives rise to a boundary dispute and a claim of negligence.

[4] The matter before me involves the resolution of the common boundary between the Leblanc property and the Chiasson property.

Background

(a) Procedural History

[5] The Applicants filed an Application in Court on September 17, 2013. They seek an order confirming that Paul R. Leblanc is the owner of the lands presently identified in the Nova Scotia Property Online database as PID: 50316736. They further seek an order repealing the registration of a survey plan prepared by the Respondent Aucoin dated May 24, 2011 and registered at the Inverness Country Land Registration Office on May 26, 2011 as Plan #98378251. Lastly, the Applicants seek damages from the Respondent Aucoin resulting from negligent preparation of the survey.

[6] The Respondent Aucoin filed a Notice of Contest on December 16, 2013 seeking dismissal of the proceeding. No Notice of Contest has been filed by the Respondent Chiasson.

[7] A motion for directions was heard on January 13, 2014. By consent, the parties divided the Application into 2 parts. The Order issued following the motion for directions provides at paragraph 1:

1. The hearing of the preliminary issue as to which survey plan is correct shall take place April 7, 8 and 9, 2014....

[8] No date was set for the hearing of the second issue, pending the determination of the “preliminary issue”.

[9] The Order for Directions prescribes deadlines for the filing of materials prior to the initial hearing. The Applicants filed their materials as required. No evidence was filed by the Respondents nor did they appear to cross-examine the Applicant’s witnesses. Neither Respondent appeared at the hearing. Mr. Ephraim Chiasson, the Respondent Chiasson’s estranged husband, did attend the hearing but indicated through his counsel that he was simply in attendance to observe the proceedings.

[10] Neither Respondent consented to the relief sought by the Applicants at the hearing of the preliminary issue.

[11] The Respondent Aucoin takes the position that he is not a party to the preliminary issue as it only involves a determination of the common boundary line between the Leblanc property and the Chiasson property. In his view, his evidence can only be considered by the Court if adduced by the Respondent Chiasson in support of her position as to the proper location of the common boundary. The Respondent Chiasson did not adduce the opinion of the Respondent Aucoin.

(b) Factual Background

[12] The Leblanc property and the Chiasson property were originally part of one large tract of land owned by Joseph Doucet.

[13] The Applicant, Paul R. Leblanc acquired his interest in the Leblanc property from the Applicant, Paul A. Leblanc and his wife Roseanne Leblanc by way of Warranty Deed dated February 19, 2013. Paul A. Leblanc acquired title to the property through a chain of title beginning with the original large tract of land owned by Joseph Doucet. The relevant chain of title for the Leblanc property is as follows:

- a. Joseph Doucet to Helen Doucet by Warranty Deed dated September 24, 1986;
- b. Helen Doucet to Lorraine Rocha by Will registered in the Inverness County Land Registration Office on December 1, 1988, in Book 275, Page 1 as Document No. 501121929;
- c. Lorraine Rocha to Paul A. Leblanc and Roseanne Leblanc by way of Warranty Deed dated June 28th, 1989; and
- d. Paul A. Leblanc and Roseanne Leblanc to Paul R. Leblanc by Warranty Deed dated February 19, 2013.

[14] The legal description for the Leblanc property at the time of its original conveyance states:

All those several lots of parcels of land, and premises, situate, lying and being at St. Joseph du Moine, County of Inverness, Province of Nova Scotia, and more particularly described as follows:

Lot No. 1

BOUNDED on the Southeast by lands of heirs of Louis Cormier;

BOUNDED on the Southwest by the lands of Delvina Doucet;

BOUNDED on the Northwest by the waters of the Gulf of St. Lawrence;

BOUNDED on the Northeast by the lands of heirs of Esther Doucet;

CONTAINING 20 acres more or less.

...

SUBJECT TO THE FOLLOWING:

...

Conveyance to Clifford Aucoin recorded in Book 88/338.

[15] On August 5, 1967, Joseph Doucet conveyed a parcel of property to Clifford Aucoin. This parcel of property was a portion of the original large tract owned by Joseph Doucet. After several conveyances, this parcel of property was conveyed to the Respondent Chiasson. The relevant chain of title in relation to this parcel of property is as follows:

- a. Joseph Doucet to Clifford Aucoin by Warranty Deed dated August 5, 1967;
- b. Clifford Aucoin to Marie Aucoin by Will registered at the Inverness County Land Registration Office on April 12, 1991 on

Book 304, Page 578 as Document No. 1188 and Executor's Deed dated April 22, 1991; and

c. Marie Aucoin to Carol Ann Chiasson by Warranty Deed dated January 13, 2006.

[16] The current version of the legal description of the Chiasson property provides:

All that certain parcel of land situate, lying and being at St. Joseph du Moine, County of Inverness, Province of Nova Scotia, and more particularly described as follows:

STARTING at (70) seventy steps from the boundary line of the Main Highway bordering the northeastern boundary line of one Delvina Doucet and running towards the northeast following the Main Highway for a distance of 70 steps;

THENCE turning towards the north-east following the Main Highway and running a distance of (50) fifty steps to a stop;

THENCE turning at a right angle and running to the south-east for a distance of (70) seventy steps to a point bounded on the north-east by the property of Elizabeth Doucet;

THENCE turning approximately south-west and running for a distance of (50) fifty steps to the PLACE OF BEGINNING.

[17] On or about May 2011, the Respondent Aucoin was retained to survey the Chiasson property. A retracement survey was completed on May 24, 2011 entitled, "Plan of Survey Showing the Land of Carol Ann Chiasson Lot 3 Cabot Trail Locality of St. Joseph du Moine Co of Inverness, Prov of NS" (the "**Aucoin**

Plan”). The survey plan was recorded at the Inverness County Land Registration Office as Plan #98378251.

[18] The effect of the Aucoin Plan was to place the boundaries of the Chiasson property in a manner that subsumed the entire road frontage of the Leblanc property along the Cabot Trail Highway. Further, the Aucoin Plan significantly increased the width of the Chiasson property from the “fifty (50) steps” referred to in the legal description of the property.

[19] Upon becoming aware of the Aucoin Plan, the Applicants raised issue with the Respondent Chiasson and her husband. The Applicants also contacted the Respondent Aucoin. The parties were unable to resolve the common boundary by agreement.

[20] In February 2012, Lester Tingley, Nova Scotia Land Surveyor, was hired by Paul A. Leblanc to prepare a retracement survey. Mr. Tingley surveyed the property and prepared a survey plan entitled “Plan of Survey Showing Certain Boundaries of Land of Paul A. Leblanc and Roseanne Leblanc St. Joseph du Moine Inverness County Nova Scotia” (the “**Tingley Plan**”). This plan was dated February 15, 2012 and was recorded at the Inverness County Land Registration Office as Plan #100162529.

[21] The Tingley Plan comes to a different conclusion as to where the common boundary is located between the Leblanc and Chiasson properties. Upon recording of the Tingley Plan, the mappers in the Inverness County Land Registration Office depicted the two areas of dispute as “unresolved parcels” and assigned the parcels PID numbers.

[22] The Leblanc property has since been migrated as PID: 50317197. The Registrar General for the Land Registration System accepted the inclusion of the “unresolved parcels” in the legal description of the Leblanc property at the time of migration.

[23] The Applicants seek a final determination of the common boundary between the Leblanc property and the Chiasson property. They also seek an Order repealing the Aucoin Plan from the registry records.

Issue:

[24] What is the location of the common boundary between the Leblanc property and the Chiasson property?

Position of the Parties

(a) The Applicants Position

[25] The Applicants submit that the location of the common boundary is as depicted in the Tingley Plan. The Tingley Plan is preferred over the Aucoin Plan as it identifies an ambiguity in the legal description of the Chiasson property and resolves the ambiguity with consideration of the evidence of intention at the time of the original conveyance.

(b) The Respondent Chiasson's Position

[26] The Respondent Chiasson did not consent to the relief sought by the Applicants. It was contemplated at the Motion for Directions that she would contest the relief sought at the preliminary hearing and advance the Aucoin Plan as the appropriate location of the common boundary. In the end, she chose not to appear and contest the relief sought by the Applicant. As a result, the Aucoin plan is not directly before the court for consideration as to where the common boundary is located.

(c) The Respondent Aucoin's Position

[27] The Respondent Aucoin states that his survey plan is correct and reflects the location of the common boundary. Mr. Aucoin, in his written submission, took the position that although his plan was correct, this opinion should be adduced by the Respondent Chiasson. Essentially, the Respondent Aucoin argued, he is a witness to this issue and not a party. If the Aucoin Plan establishes the common boundary, the matter is concluded. If the Tingley Plan establishes the boundary line, then the parties would proceed to a hearing on the second issue as to whether the Respondent Aucoin was negligent in his survey of the Chiasson property.

Analysis

(a) The Law

[28] The law supporting the relief sought is succinctly set out in the Memorandum of Law relied upon by the Applicants. The resolution of the issue before the Court involves consideration of the expressed intention of the grantor. If the words of the conveyance are clear, then they must be respected. If the words of the conveyance are ambiguous, further inquiry is permitted to ascertain the grantor's intent.

[29] In the present case, the starting point is a determination as to whether there is ambiguity in the legal description of the properties in question. Assuming that such an ambiguity is established, the question then becomes one of how to resolve such an ambiguity. If the ambiguity is latent, or not apparent in the words of the description, then extrinsic evidence can be considered to determine the grantor's intent.

[30] 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?

[31] The legal description for the Leblanc property does nothing to assist in the location of the common boundary line. The description simply refers to adjoining and excludes the parcel of land conveyed to Clifford Aucoin (which was subsequently conveyed to the Respondent Chiasson). The location of the common boundary must be resolved with reference to the description of the Chiasson property.

[32] On its face, the description of the Chiasson property appears uncomplicated. This description contemplates a rectangular parcel of property that is 50 steps in width along the Main Highway (the Cabot Trail) and 70 steps in depth from the Main Highway.

[33] Unfortunately, this superficial review of the description does not conclude the matter. The description of the Chiasson property contains not only measurements of distance but also calls for an adjoiner. This call comes in the in third run which is as follows:

THENCE turning at a right angle and running to the South-East for a distance of (70) steps **to a point bounded on the North-East by the property of Elizabeth Doucet;**

[34] It is this call for the adjoiner to the property of Elizabeth Doucet that gives rise to the dispute in this proceeding. If one uses the distance measurement as the width of the run, there is no point of intersection with the property of Elizabeth Doucet. If one prefers the call for an adjoiner, then the run is significantly wider, approximately 100 steps, rather than the 50 steps set out in the second run of the description. Clearly, the third run of the description, the common boundary, cannot be determined with reference to both the distance and the adjoiner. The words of the description cannot be reconciled.

[35] This discrepancy between the call for distance and the call for an adjoiner is not apparent on the face of the description. However, the call for distance and the adjoiner result in different end points. Therefore, I conclude readily that the Chiasson property description contains a latent ambiguity. This ambiguity means that one cannot rely upon the words of the description alone to determine the intention of the grantor.

(c) *Resolution of the Ambiguity*

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

[37] There are many cases on the interpretation of deeds that refer to a “hierarchy of evidence” to be considered. This hierarchy was recently considered by our Court of Appeal in *Podgorski v. Cook*, 2012 NSSC 174. In that case, the Applicant sought an order establishing the property 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.

[38] The Nova Scotia Court of Appeal dismissed the appeal (2013 NSCA 47). In doing so, the Court of Appeal 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”.

[39] In support of their position, the Applicant's relied upon the affidavit of Lester Tingley, dated March 4, 2014. Appended to his affidavit as exhibits were his survey plan and survey report. Mr. Tingley's opinion as to the proper location of the common boundary is found in his survey plan which is dated February 15, 2012 and found at Exhibit "D" of his affidavit.

[40] Although the opinion of Mr. Aucoin was not before the court for consideration, the Aucoin Plan was appended to the Tingley affidavit as Exhibit "C". As noted by Mr. Tingley at para. 36 of his affidavit, a review of the Aucoin Plan reveals that the Respondent Aucoin preferred the call for an adjoiner over the call for distance in his interpretation of the description of the Chiasson property.

[41] Little else is known about the methodology employed by the Respondent Aucoin. The Applicants provided evidence that they were not consulted by the Respondent Aucoin before he prepared his survey plan.

[42] Mr. Tingley has been a surveyor for approximately 35 years. The methodology he employed in this case is set out in his affidavit and his survey report. His survey report was appended to his affidavit within Exhibit "F". Mr. Tingley's work began by reviewing surrounding surveys, deeds and other documentation, looking for evidence on the ground and talking to neighboring

landowners. In the end, Mr. Tingley concluded that the call for Elizabeth Doucet's property as an adjoiner to the Chiasson property was in error. His conclusion was based, in part, on the following:

- (a) Evidence on the ground supporting that the original grantor, Joseph Doucet intended to retain some road frontage for himself along the Cabot Trail;
- (b) Remnants of a wire fence located at a distance of 139.53 feet from the starting point of the second run (50 steps would be approximately 150 feet);
- (c) Visual inspection of the fence indicating that it is approximately 30 years old;
- (d) The fact that Joseph Doucet did not reserve out any right of way to ensure access to the remaining parcel of land;
- (e) The fence line between the Chiasson property and the Leblanc property matches the southern boundary of lands formerly owned by Joseph Doucet west of the Cabot Trail Highway which bears PID: 50072594;

(f) Neighboring landowners, Geraldine Aucoin and Donat Leblanc recalled a gentleman pasturing a horse in an enclosure on the Leblanc property in the 1960s in the area between the wire fence and the boundary of Elizabeth's Doucet's property (affidavits of Geraldine Aucoin and Donat Leblanc);

(g) Walk of the Leblanc property and the Chiasson property with Donat Leblanc during which Mr. Leblanc pointed out the northern and southern boundaries of the Chiasson property in locations which accord to the Tingley Plan (affidavit of Donat Leblanc);

(h) A wooden stake located on the ground which appeared to indicate the location of the common boundary in a manner consistent with the Tingley Plan; and

(i) The description by distance is 70 steps by 50 steps which contemplates a rectangular lot and results in a closed figure while the call for the adjoiner does not maintain the shape, doubles the width (approximately) and does not result in a closed figure.

[43] After considering the foregoing, Mr. Tingley's opinion as to the proper location of the common boundary is found in his survey plan dated February 15,

2002. It is the Tingley Plan on which the Applicants rely to establish the common boundary line.

[44] I note in reviewing the affidavits of the Applicants that they offer various hearsay statements in support of their position. These statements relate primarily to information the Applicants say was obtained during a meeting with Joseph Doucet shortly after the property was purchased from him in 1989. Mr. Doucet is now deceased. I conclude that these statements are inadmissible. I further conclude that hearsay statements purportedly made by Clifford Aucoin are inadmissible.

[45] I do however find the evidence and the opinion of Mr. Tingley persuasive. His review of the Chiasson property description was in accordance with the applicable survey principles. His approach was consistent with the case law which directs the consideration of extrinsic evidence and the use of common sense exercised in this case by a surveyor of considerable experience. Mr. Tingley is of the view that the Chiasson property description contemplated a rectangular lot of 50 steps by 70 steps that resulted in a closed figure. A closed figure is the goal of every survey. Mr. Tingley concluded that the call for an adjoiner in the third run was in error as it resulted in a lot with almost double the width provided for in the

call for distance. Further, if the adjoiner was preferred over distance, the description failed to produce a closed figure.

[46] Mr. Tingley's discovery of the fence line and its accord with the documentation (deeds, descriptions, surveys, aerial photographs) on the adjacent properties is significant. The location of the fence line also accords with the evidence of neighboring landowners.

[47] Finally, I accept Mr. Tingley's opinion that common sense supports that the grantor would reserve road frontage in order to ensure continued access to the property. As noted by Mr. Tingley, the grantor did not reserve a right of way when he conveyed the Chiasson property. The absence of such a reservation supports the contention that Joseph Doucet did not intend to extinguish his road frontage. This evidence of intention further supports Mr. Tingley's opinion as to the common boundary location.

[48] In the end, having reviewed the opinion offered by Mr. Tingley as well as the affidavit evidence offered as foundation for the opinion, I find that the proper location of the common boundary line is as set out in the retracement survey prepared by Mr. Tingley on February 15, 2012 and recorded at the Inverness County Land Registration Office as Plan #100162529.

[49] There is no evidence before me as to the process used or information considered by the Respondent Aucoin in rendering his retracement survey plan. The Respondent Chiasson did not participate in the hearing and the Respondent Aucoin's opinion was not before the court. I cannot determine whether or not the Respondent Aucoin identified an ambiguity in the Chiasson property description. If he did identify an ambiguity, I have no evidence as to how he resolved it in coming to his opinion on the boundary line. However, to the extent that the Respondent Aucoin relied upon the call for the adjoiner over the call for distance, I prefer the opinion of Mr. Tingley.

Conclusion

[50] The common boundary line between the Leblanc property and the Chiasson property shall be resolved with reference to the retracement survey of Lester Tingley dated February 15, 2012 and recorded at the Inverness County Land Registration Office as Plan #100162529

[51] The "unresolved parcels" (PIDs: 50316736 and 50316744) shall form part of the lands owned by Paul R. Leblanc (PID: 50317197) in accordance with the Tingley Plan.

[52] An order will issue requiring the removal of the Aucoin Plan (#98378251) from the parcel register for the Leblanc property.

Costs

[53] This decision effectively disposes of the issues between the Applicants and the Respondent Chiasson. The determination of whether the Respondent Aucoin was negligent in rendering his survey opinion remains outstanding.

[54] The Applicants have been entirely successful on the hearing of the “preliminary issue”. They are entitled to costs. The parties shall have until May 12, 2014 to agree on costs failing which the court will make a determination.

Gogan, J.