Date: 20011130
Docket: SP 05427

IN THE SUPREME COURT OF NOVA SCOTIA
(Cited as: Carrigan v. Fraser, 2002 NSSC 107)

BETWEEN:

DANIEL CARRIGAN

PLAINTIFF

- and -

CALVIN FRASER

DEFENDANT

D E C I S I O N

HEARD: **at Pictou, Nova Scotia, before the Honourable Justice Gordon A. Tidman**

DECISION: **November 30, 2001 (Orally)**

COUNSEL: **Ian MacLean, for the Plaintiff**
Hector MacIsaac, for the Defendant

<u>TIDMAN, J</u>: (Orally)

[1] This is a claim for a permanent injunction by the plaintiff against the defendant and a counterclaim by the defendant for the same relief.

[2] The relief sought by both parties is a prohibitive injunction. Each one seeks to have the other permanently prohibited from trespassing on his claimed lands situate at Garden of Eden in Pictou County.

<u>The lands in dispute</u>

[3] The plaintiff's north sideline abuts the south sideline of the defendant's property. Each party, by survey, has established a boundary line between the properties and each claim that boundary as the true boundary. The area of the land in dispute between the two alleged boundary lines is approximately 30 acres, comprised of wood and bush land.

[4] If Ifind in favour of the plaintiff's alleged boundary line, approximately one-quarter of an acre of the defendant's cultivated blueberry field would extend over and into the plaintiff lands.

[5] If I find in favour of the defendant's alleged boundary line, the entrance of the driveway to the plaintiff's cottage would extend over and into the defendant's lands effectively cutting off access by the plaintiff to the driveway.

[6] In any event, of the historical boundary line location, each party claims the piece or parcel over the other's boundary by virtue of adverse possession.

[7] It is difficult to determine the original boundary line. Firstly, because two licensed surveyors, one acting for each party, cannot agree on its location, and secondly, there is evidence of a blazed line within the boundaries of the land in dispute that could be evidence of a boundary line between the lands of the parties, but not in the opinion of either surveyor.

<u>The Evidence</u>

<u>Evidence of Defendant's Surveyor</u>

[8] The opinion of the defendant's surveyor, Mr. E.C. Keen, N.S.L.S., is based mainly on the location of blazed trees believed to mark the boundary and particularly one alleged corner tree at the west end of Mr. Keen's established boundary line. Although Mr. Keen also alleges blazed boundary trees along the line as established by him, he did not go so far as to give evidence of finding and considering a corner tree which the defendant himself says he found fallen

to the ground and lying close to the eastern end of Mr. Keen's line. Mr. Keen also relies on the corners at each end of his established boundary line being close to right angles to the agreed upon east and west sidelines, as he says they should be.

Evidence of Defendant

[9] Most, if not all, of the other evidence supporting the defendant's alleged line is from the defendant who says he was told by the former owners of both lots that the boundary is located where Mr. Kean says it is. The defendant also says that his predecessors in title told him that a large rock known as "Wileys Rock", which Mr. Keen placed on his boundary line, was a boundary marker. Unfortunately, those predecessors in title are now deceased and cannot confirm the defendant's evidence in this regard.

Evidence of Plaintiff

[10] The plaintiff's evidence is diametrically opposed to the defendant's in that the plaintiff says that his immediate predecessor in title told him that the boundary line is where the plaintiff's surveyor says it is and what is more, he did so in the presence of the defendant, who then and there agreed.

Evidence of Plaintiff's Surveyor

[11] The opinion of the plaintiff's surveyor, Mr. M.G. Wadden, N.S.L.S. does not allege the finding of corner trees or blazed lines as the underpinnings of his opinion. In fact, he says he could find no blazed corner trees, that is, trees clearly blazed on four sides. In forming his opinion of the location of the boundary line Mr. Wadden relies mainly on finding what he says are the remnants of a stone and barbed wire fence extending along 700 to 800 feet of the approximately five thousand foot boundary line which in his opinion is the boundary line fence. Mr. Wadden established the east/west extremities of the boundary line as the extension of the fence line easterly and westerly to the agreed upon eastern and western sidelines on the same compass bearing or azimuth.

[12] Mr. Wadden's opinion alleges two determining factors: First, the line as he found it by markings on the ground is the original boundary line; and second, even if wrong as to the original boundary, the same line is established by occupation based on adverse possession for the requisite prescription period.

[13] In support of Mr. Wadden's conclusions he relies on the following:

(a) An extension of the 700 to 800 feet stone pile and barbed wire fence remnants is indicative of the boundary line and the extension of the fence line westward aligns with two rock piles west of the MacIntosh Road and those rock piles, Mr. Wadden says, are also evidence of a line fence.

(b) Remnants of a barbed wire fence running north and south crosses the boundary line established by Mr. Keen, suggesting that a fence would not ordinarily extend diagonally across a boundary line.

(c) In 1921, Daniel Cameron, a predecessor in title to the plaintiff, petitioned the Crown (Exhibit 1, Tab 12) to purchase 100 acres of land adjacent to the rear or east sideline of his property. Although the property was not acquired in fee simple, field notes annexed to the petition contain a plan of the 100 acre lot showing its west sideline as being 28.58 chains in length, the same length as the east sideline of the Daniel Cameron lot adjacent to it. That dimension of 28.58 chains or 1892.9 feet is very close to the 1898.25 feet as Mr. Wadden independently of knowledge of that plan, measured the east sideline of the plaintiff's lot. Mr. Keen on his plan shows the same dimension as 1739.8 feet.

(d) The line as found by Mr. Wadden is very close to being parallel to the north sideline of the so-called MacDonald lands, situate immediately to the south of the plaintiff's lands, as Mr. Wadden says it should be.

(e) A 1931 aerial photograph of the lands in issue appears to show an occupation and fence line where Mr. Wadden places the stone and barbed wire fence remnants. Two areas cleared of trees on the defendant's property appear to have been cleared to the fence line as determined by Mr. Wadden.

Evidence of Lloyd MacDonald, James Hillier and the Plaintiff supporting the Evidence of Mr. Wadden

[14] That evidence of occupation is supported by the evidence of Lloyd MacDonald who is 70 years of age and has lived close to the property in issue all his life. Mr. MacDonald says that as a youngster he knew the occupants of the

properties in issue and often visited at the properties. Mr. MacDonald says he chummed with Alex Fraser's son, Dan, who subsequently acquired the property through Alex and that property is now the plaintiff's property. Mr. MacDonald says he recalls the stone and barbed wire fence which Mr. Wadden claims to be the boundary fence between the plaintiff's and defendant's lands. Mr. Macdonald says that in approximately 1938 when he was assisting his father cut wood from the MacIntosh or defendant's property, they cut to the defendant's property line. He says there was a wire fence that extended east of the stone fence along the same line but he could not recall if the wire fence extended as far as the stone fence.

[15] Mr. MacDonald says that Alex Fraser, one of the plaintiff's predecessors in title, worked what is now the plaintiff's property and plowed a field up to the stone fence. He says he considered Mr. Wadden's line as the division line between the properties and says that if he and his father had cut wood over the line into the then Alex Fraser property that Alex Fraser would have raised a fuss. He says that as far as he knows there was never a dispute as to the location of the boundary between the two properties in issue up until now.

[16] Both the plaintiff and James Hillier, who says he cut wood on the plaintiff's property for the plaintiff, say that in the past they have cut wood on the lands in dispute without complaint from the defendant. James Hillier, who is 60 years of age, also says that Dan Fraser cut wood in the disputed area and, in particular, in 1974 he did a clear cut in the area in dispute. Mr. Hillier also says that he knows the property well and hunted on the property with Dan Fraser. He says that Dan Fraser showed him the line and there were rock piles on the line. Mr. Hillier says that the lateral fence line shown on Mr. Wadden's plan and marked “X” in red on the plan that was used as an exhibit during the trial, was a pasture fence on the plaintiff's property and that it extended to the northern property line of the plaintiff, as shown by Mr. Wadden.

[17] Both surveyors, Mr. Keen and Mr. Wadden, found discrepancies in the distances of the lines and the calculated acreage in former deeds and plans. Those plans and deeds suggest that all lots, including the lots in issue, were 200 acres in area.

[18] Both surveyors agree that descriptions and stated acreages in Crown grants notoriously did not match the dimensions on the ground and calculated acreages.

[19] If my math is correct, Mr. Keen's line would result in the plaintiff's lot being 185 acres, more or less. Mr. Wadden's established line would result in the plaintiff's lot size containing 215 acres, more or less. This notwithstanding that

original plans and deed descriptions show the lots in issue as containing 200 acres.

[20] The evidence of occupation as previously described, in addition to supporting the original boundary line as established by Mr. Wadden, is also evidence of adverse possession for the required prescription period if the Wadden alleged line is not, in fact, the original boundary line.

THE LAW

[21] In order to obtain injunctive relief, a party must demonstrate the infringement by one of a recognized legal right of the other. There is no dispute as to the applicable law. In fact, Mr. MacIsaac agrees that the authorities provided by Mr. MacLean accurately set out the law in relation to the issues before the Court.

[22] Mr. MacLean referred the Court to the publication "Survey Law in Canada", published by Carswell in 1989 and, in particular, an essay entitled "Boundaries" prepared by Ontario Land Surveyors, David Lambden and Izaak de Rijcke. In the article, reference is made to the various types of evidence considered in relation to determining boundary lines. Paragraph 4.43 at page 121 of the publication provides:

> At all times, the location of a boundary of a parcel is a question of fact to be based on evidence. The orders of reliability of evidence that are definitive of a boundary reflect those things which the courts have found least likely of error, namely, first preference to the natural boundaries of parcels; second preference to original monuments placed or recognized by survey; third preference to features of possessory evidence that can be related in time to the original survey, (this is not adverse possession); and fourth preference to measurements.

[23] Mr. Kean, in answer to Mr. MacLean, on cross-examination, did not disagree with that quoted statement, although he did not refer to natural boundaries in prioritizing his preferences as to the reliability of different indicia of boundary lines.

[24] I accept as practical and as an accurate statement of the law the quoted statement from the essay, "Boundaries".

<u>Application of Law</u>

[25] In applying those priorities of reliability in this case the only evidence of what could be considered as a natural boundary on the line in question is Wiley's Rock. However, there is no evidence of a reference to Wiley's Rock in any of the title documents of either property nor is it shown or referred to in any

historical plans of the property. Neither is there evidence of definitive markings on Wiley's Rock to indicate it as a boundary marker. Indeed, only the defendant gave evidence that Wiley's Rock was a boundary marker and Mr. Keen shows it as being on the boundary line he placed on his plan. James Hillier says that he has heard of Wiley's Rock but did not know it as a boundary marker. Mr. MacDonald says he has never heard of Wiley's Rock.

[26] Next, dealing with original monuments. There is no evidence of original monuments placed on the boundary lines. There is evidence, however, from Mr. Keen that he found a corner tree near the western extremity of the boundary line as he established it. However, there is no clear evidence that the tree was blazed on four sides as both surveyors agree is the proper method of marking a corner tree or that it marked the corners of the properties in issue.

[27] Mr. Wadden's evidence suggests that a stone and barbed wire fence was at one time placed to indicate the boundary. There is no evidence to indicate when it was placed although the aerial photo taken in the 1930's suggests the fence had been placed sometime before then.

[28] Next, evidence of occupation. The plaintiff has adduced evidence of occupation of his lands up to the Wadden boundary line from the testimony of himself, Mr. Hillier and Mr. MacDonald.

[29] The defendant has given evidence of occupation of his lands to the Keen line but the only admitted evidence of occupation by the defendant to the south of the Wadden line is of the approximately one-quarter acre of the defendant's blueberry fields. Although the defendant says the blueberry fields were cultivated in the early sixties, there is no clear evidence as to exactly when that portion across the Wadden line was cultivated. Notwithstanding no denial by the plaintiff that the one-quarter acre in issue is across the Wadden line, the evidence of James Hillier suggests that that portion of the blueberry field was part of the plaintiff's property and that at one time it was an area that Dan Fraser, the plaintiff's predecessor in title, used to unload a bulldozer.

[30] Next, dealing with measurements. The measurement of the east sideline of the plaintiff's property according to the Wadden plan is very close to the measurement indicated in earlier documentation, particularly the plan shown in the 1921 Crown Petition at Tab 1, Exhibit 12.

[31] Although the initial Crown plan of the area shows the lots, including the plaintiffs and defendants, as each containing 200 acres more or less, neither the Wadden nor Keen plan measurements produce a calculated 200 acres.

Conclusions

[32] After considering the evidence as a whole, I have concluded that the plaintiff should succeed in his action. I do so based mainly on the evidence of Mr. Wadden, supported by the evidence of the plaintiff, James Hillier and Lloyd MacDonald.

[33] Mr. Wadden, in addition to preparing an annotated plan of the lands in issue from his survey on the ground, submitted an extensive report stating his conclusions and the evidence he found in support of those conclusions. He carried out extensive archival research of the original Crown grants of the area in issue. He also did extensive research at the Registry of Deeds of the lands in question and surrounding lands. He also sought out and examined historical aerial photographs of the lands in question. I found the conclusions reached by Mr. Wadden to be supported by the evidence.

[34] Mr. Keen also prepared an annotated plan of the lands in question from his survey on the ground. At the time this dispute arose, Mr. Keen was in the process of surveying all the lands of the defendant in the area with the assistance of the defendant. The defendant has had experience in land surveying, mostly as an instrument man assisting licensed surveyors.

[35] Although I found Mr. Keen knowledgeable in his profession and straightforward in giving his evidence, that evidence was somewhat tainted by the influence of the defendant, who assisted him with the survey. This difficulty was recognized by Mr. Keen himself when, after realizing the location of the boundary was in dispute, he told the defendant he should not be assisting in the establishment of his own boundary line.

[36] As to both surveyors, I found the evidence of Mr. Wadden more convincing.

[37] The defendant gave boundary line evidence not supported by his own surveyor, Mr. Keen. Some of that evidence resulted from investigations of the defendant carried out independently shortly before trial and after the defendant had been discovered by Mr. MacLean, the plaintiff's counsel. I found that evidence suspect, particularly where the defendant says that he located what he alleges is a fallen corner tree sometime after Mr. Keen finished his ground survey and gave no evidence of finding such a tree. Where the evidence of the plaintiff and defendant conflicts, I prefer the evidence of the plaintiff.

[38] On a balance of probabilities, the plaintiff has satisfied me that he is entitled to a permanent injunction restraining the defendant from trespassing on his lands immediately to the north of the boundary line established by Mr. Wadden, and I will so order.

[39] I dismiss the counterclaim of the defendant, including the claim that a portion of his blueberry field that extends into the plaintiff's property. I do so on the

basis that he has not satisfied me on a balance of probabilities that he has adversely possessed those lands for the requisite prescription period.

[40] After hearing counsel on the issue of costs, I see no reason for departing from the usual course of events that costs follow the cause. Consequently I would order the plaintiff is entitled to party-to-party costs and reasonable disbursements.

J.