

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**Citation:** Fowlie v. Stacks of Clothing Ltd., 2010 NSSC 23

**Date:** 20100120  
**Docket:** 283573  
**Registry:** Amherst

**Between:**

Colin T. Fowlie and Teresa M. Fowlie

Plaintiffs/Defendants by Counterclaim

v.

Stacks of Clothing Ltd. formerly named Trans  
Canada Autohaus Ltd.

Defendant/Plaintiff by Counterclaim

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# DECISION

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**Judge:** Justice J. E. Scanlan

**Heard:** January 6, 7 & 8, 2010, in Amherst, Nova Scotia

**Counsel:** Robert H. Pineo, Solicitor for the Plaintiffs/Defendants  
By Counterclaim  
Brian S. Creighton, Solicitor for the Defendant/Plaintiff  
By Counterclaim

**By the Court:**

- [1] This case arises from a boundary dispute involving waterfront lands at Fox Harbour, Cumberland County, Nova Scotia. Historically the lands had a relatively low market value but in recent years, according to the parties, the market value of lands in the area have increased substantially.
- [2] That the lands were not worth a lot in earlier years is reflected in the fact that conveyances were effected without the assistance of surveyors. At least one result of the lack of surveyor assistance is the registry is littered with sketches that are clearly little more than vague representations as to the exact size and location of the parties lands. There are aspects of the various plans that both assist and detract from each of the parties positions. The deed descriptions are equally vague and offer just about as little insight as to exact location of the disputed boundary.
- [3] Although I refer to the various deeds and plans for what assistance they offer, I am satisfied the best evidence is historical evidence as to possession, occupation and use of the land. This combined with physical evidence on the ground offers the court the most assistance in determining where the boundary is located. In saying the court is placing the boundary, I am satisfied the surveyors who have been engaged by the respective parties cannot properly, through title or extent of title properly, ascertain the

location of the boundary when properly applying the surveying principles by which they are governed. Although I have used the words, possession, occupation and use, I clearly understand this is not a case about adverse possession or title by prescription. This in the end, is a case about whether a conventional line has been proven and if so where it is located.

**Background of acquisition:**

[4] The Plaintiffs, Mr. and Mrs. Fowlie, acquired their lands in 1991 from a Vernon Patriquin. As noted above, the deed description and sketches recorded at the registry of deeds offer little assistance in terms of the precise location of the disputed boundary. The description does however reference the common boundary as:

Thence southwesterly along the remains of an old fence, marking the former Lorne Laird land, a distance of eight hundred eighty feet (880') more or less...

[5] Counsel for Stacks of Clothing say: 'but look at the sketch prepared at the time .' (See Ex. 3, Tab 2, page 2) That sketch shows boundary lines at right angles to the road and it does not extend the boundaries to the water. The sketch was clearly not reflective of what was in the deed description nor is it similar to what was on the ground. I am convinced that sketch offers

almost nothing in terms of showing the location of the parties mutual boundary. I am also satisfied Mr. Fowlie thought he was getting more water frontage than the deed actually called for at the time he acquired the land. At the time the offer to purchase was prepared Mr. Fowlie's father had prepared a sketch and attached it to the offer to purchase. It showed an irregular shaped lot which was wider on the water side than it was on the road side. Mr. Fowlie testified, and I accept his evidence, that Mr. Patriquin told him where to find a post on the shore line. That post would mark the north east corner of the lot. Mr. Fowlie says he searched the area and did in fact find the post in question where Mr. Patriquin had told him to look. It had barbed wire on it at that time. I am further satisfied that the same post is depicted in a photo found at Exhibit #3, tab 9, and it now bears a number 7. Mr. Fowlie said that when he was trying to locate the post and fence which were described to him by Mr. Patriquin he in fact walked into a barbed wire fence and cut himself on the barbed wire that then was in place. Mr. Crowe, a surveyor for the Defendant, opined that the barbed wire nearer the shore disappeared because of the wet conditions nearer the shore. I again refer to the fact the Patriquin to Fowlie deed called for that line to go:

- along the remains of an old fence
- [6] In addition to the barbed wire fence, there was what Mr. Giovannetti described as an old blaze on a tree located on the same line as the barbed wire fence. Although by the time this matter came to trial the tree with the blaze was cut down he said it was the same tree as depicted in Exhibit 3, tab 9, photo 2. The tree was old and rotted to the extent the rings could not be counted to age the tree. A photo of the blaze in the tree before it was cut down can be found at Exhibit 5, tab 25, pages 10 and 11. Mr. Giovannetti's opinion was that it was an old blaze mark which was substantially overgrown by the tree bark. He felt it was a blaze mark in which tool marks were visible as distinct from damage to trees by animals. Blaze marks have traditionally been used to mark lines, just as fences have also marked lines. The existence of the blaze would suggest the barbed wire fence was more than a pasture fence run haphazardly. Blazes do not pen in cattle, they mark lines.
- [7] The photographic evidence before the court makes it clear the area where all of the fencing that remains today had been covered with trees for decades. Those trees would have obscured a clear line of sight for Mr. Fowlie and anyone else who may have tried to look from the shore to the highway along

the disputed boundary. Mr. Fowlie said he thought the line actually went straight from the shore post which he located to a point on the highway which both parties now agree is the starting point (of the common boundary) at the highway. I am satisfied Mr. and Mrs. Fowlie believed the old post I have referred to above, along with the remnants of an old barbed wire fence located near the shore, were marking the common boundary. Based on that belief they improved the land by clearing, excavating and backfilling. They also constructed a gazebo. All of this, they say was done at a substantial cost. Of greater importance, I am convinced that both the Patriquins and Leards, the predecessors in title, believed that same old fence marked the common boundary. I will discuss this in greater detail.

[8] Mr. Fowlie says he also located and left in place what he thought was the line fence. That fence remains and was discussed at length in the evidence. There are a number of photos clearly showing an old barbed wire fence. All who testified as to the fence agree it has been there a long time and the trees have in fact overgrown the wire so it is now well embedded into the trees. The remnants of that fencing could not be located along the full extent of the boundary. In fact there were remnants of barbed wire on the shore post by the time the surveyors did their work. I accept Mr. Fowlie's evidence when

he says there was barbed wire attached to the post when he acquired the property many years ago. I also accept Mr. Fowlie's evidence when he says he did not ever remove any fencing from the area where Stacks now claim ownership. He is not aware of anyone else having removed fencing in that area.

[9] Mr. Lorne Leard gave evidence. He was 81 years old at the time he testified. He spoke of the land in dispute. His understanding is that his father acquired it in 1928. He spoke of the common boundary as having been marked by a **barbed** wire fence. The **barbed** wire fence was always understood by him, his father and the Patriquins as having been the boundary. The boundary he thought was a straight line extending from the road to the water. The remnants of barbed wire fencing depicted in the photos, and which I have referred to above, veer at approximately 60 degrees from the otherwise relatively straight line extending from the road. Contrary to what Mr. Leard understood, the wire going between the highway and point of departure was **non-barbed wire** fence. Mr. Leard was clear in his evidence that the line fence was a **barbed wire** fence.

[10] The evidence suggests the non barbed wire fence is a newer type of fencing that was electric type fencing used to keep cattle in. Mr. Leard said he or his

father would not have used that style of fencing. It would have been installed by the Patriquins who would fence to the edge of the field to keep their cattle in. It is not clear that the old electric fencing is at the same location as the **barbed wire** fence that Mr. Leard referred to. The surveyor, Lyndon Crowe, did reference a berm in the area of at least some of the electric fencing. A berm could, according to the surveyors, also be evidence of line placement. Neither of the surveyors nor Mr. Fowlie, even with the assistance of metal detectors, was able to locate any remnants of a **barbed wire** fence, or any other fence, except the old electric style fence. The parties, through counsel, have agreed the old electric fence will be the boundary from the road to the point of departure. That fencing however ends at the point of departure which I have referred to above. No fencing, barbed or electric, could be located extending in a straight line beyond the point of departure. There was a ball of old barbed wire found on the ground at that point. There was no evidence as to where it may have been prior to being balled up or if it was ever placed anywhere but in that ball. Common sense and practicality say it could not have been removed from the trees if it had been embedded the way the rest of the fencing had grown in to the trees. I repeat, Mr. Fowlie says neither he, nor anyone else to his knowledge,

removed any wire from the area of the line extension from the shore to the road.

- [11] Mr. Leard said he essentially clear cut the trees on his side of the line up to the fence in the 1970's. There were arial photographs of the area in question taken, in 1975, 1985 and 1995. A review of those photos shows no evidence of cutting which would have extended beyond the newer electric type fencing, nor beyond the old barbed wire fencing as located by Mr. Fowlie. The 1975 and 1985 photos were relatively proximate in time to the cutting Mr. Leard said he did right up to the line. Mr. Leard's evidence of cutting to the line fence in the 1970's also begs the question as to how he could have cut beyond the barbed wire fence without noticing it. If he cut up to another old barbed wire fence, where is it? He said by the 1970's it would have been very old. I am satisfied the fence Mr. Leard cut to is the same fence Mr. Fowlie said he ran into and cut himself on when he acquired the property in 1991. The same old barbed wire fence that remains today. Given the fact this fence was obviously in place for many years one would reasonably conclude it was in as good or better shape in the 1970's. The full extent of the fence would not have been visible through the woods and Mr.

Leard may not have realized the old fence was in fact not straight. I accept that at the time of the trial he thought the line was always straight.

[12] Counsel for Stacks of Clothing placed heavy reliance on the vague sketches as prepared in relation to the Fowlie's lands yet seemed to minimize the problems arising out of both the legal description in his client's deed and the plan/sketch which represented the Stacks lands. That sketch would have shown the Stacks lands as extending at right angles from the highway. Perhaps more disconcerting for the court is the fact the disputed boundary, if measured in accordance with the Stack's deed, would be almost the exact length if the boundary went to the post as identified by Mr. Fowlie on the shore. The westerly boundary of the Stack's property would be substantially longer than called for in their deed if it was measured to the point now claimed by the Stacks.

[13] Mr. LeBlanc is the principle for Stacks. He said when his family acquired the property from Mr. Leard he basically walked up and down the middle of the property. He did not check for the location on either of the side lines including the one he now disputes. He was more concerned with how wet the shore area was, than the location of the side lines. He did not even attempt to locate the boundaries until after the dispute arose. That was at the

time he was having a survey done in preparation for development of the lands. Although he marked on exhibits as to where he thought the boundary was, I am satisfied that is little more than his wishful thinking based on hindsight. The area where he marked, I do not understand even to be in accordance with the found electric fencing. Having said that I recognize that he could hardly be expected to mark a line hidden in the trees with any precision.

- [14] The Crown land grants are of little assistance in this case other than to suggest a probable location of the easterly boundary of the Stack's lands. The westerly boundary does not coincide with any Crown boundary. In fact as pointed out by Mr. Giovannetti, historically there is an additional twenty acres that seems to have been added to the descriptions in the back paper title to the Leard's land. That adds more uncertainty in terms of the extent of the lands owned by the Leard's or their predecessors, hence Stack's. In other words, the Crown grant lines are of little assistance in this case. Even a view of the ariel photos suggests the original Crown lines were either not straight or parallel from the beginning, or alternatively parallel lines have not been adhered to along the irregular coast line in the area. In this case the fact the easterly boundary of the Stack's lot is close to where it should be in

accordance with the Crown grant does not mean it can be used to reliably establish the location of the westerly (disputed) boundary as being parallel to that first mentioned line.

[15] There were two survey reports submitted during the trial. Lyndon K. Crowe, N.S.L.S. referenced a non-barbed wire fence 205 metres long running from the road toward the shore as I have referred to above. This part of the fence the parties now accept as a boundary line. In the absence of that agreement there would be some difficulty from a title perspective for Stacks to show title extending to that line. In other words that line gives Stacks land beyond the width called for in their deed. Even Mr. Leard in his evidence suggested the boundary was marked by a barbed wire fence which was not ever located along that 205 metre stretch. In other words that section of the boundary was established by a line agreement not by title or extent of title. Mr. Leard said it was a barbed wire fence that marked the line and the newer non-barbed wire fence was installed along the boundary of the woods by the Patriquins to fence their cattle.

[16] Beyond the 205 metres of non-barbed fence Mr. Crowe references the old barbed wire fence 35 metres in length and the fact that beyond the 35 metres:

...(the fence) disappears into the ground (most likely due to its very old age and the rather wet nature of the shore front), and does not extend to the shore.

- [17] He noted that it runs in a direction which varies approximately 60 degrees from the parallelism of adjoining boundaries, a parallelism which he says is also represented by all found reference documents. Mr Crowe concludes:

It is therefore my opinion that this section of fence is not the fence called for by the Fowlie deed.

- [18] There was no evidence to explain why the non-barbed wire fence ended at the point of departure. All those who testified on the issue and who had conducted a search found no evidence that any fence had ever been placed along the extension of the non-barbed wire fence. In other words there was no physical evidence that the line was as proposed by Mr. Crowe.

- [19] A second surveyor testified, Mr. Thomas F. Giovannetti, P. Eng, N.S.L.S. He had the advantage of reviewing the Crowe report and he concluded that:

...the documentation provided/ required to support the evidentiary location of the boundaries of Parcel X (the Stacks lot) as surveyed by Mr. Crowe NSLS is not sufficient in both title and extent of title. It is my recommendation that if Mr. Crowe cannot provide the documentary information required ascertaining the location of Parcel X within the Grants and the necessary abstract of title for verification of the title and extent of title as conveyed to Stacks-of Clothing Limited, that a boundary line agreement be considered by both parties.

- [20] There was no such agreement. Mr. Giovannetti suggested that Mr. Crowe's methodology was in conflict with Section 8.21 of Survey law in Canada. He

pointed out the deficiencies in terms of registry documents. I have described the registry documents and sketches as vague at best.

[21] Referencing Section 8.21 Mr. Giovannetti said:

The surveyor has no power to decide the location of any boundary or re-survey and can only express an opinion as to where the boundary is to be found based upon a search for and study of evidence he has found in the field, testimony of others and in searches within the appropriate registry offices, Crown records and other offices of record.

[22] In the present case Mr. Crowe chose to ignore the existence of a barbed wire fence even in the complete absence of any other physical evidence as to the location of the line. He did not refer to, perhaps did not even notice, the blaze on a tree along that same barbed wire line. He glossed over the deficiencies/ discrepancies in the Stack's title documents and inconsistencies in registered plans and measurements related to their lands. Mr. Crowe even went so far as to alter his survey plan by removing a reference to a physical feature of the land he had noted on the ground in his original plan. This he did at the request of his client or his client's former counsel.

[23] I am satisfied the most compelling evidence in this case is the existence of the old barbed wire fence and old blaze mark found on that same line. I agree with the observation of Mr. Giovannetti that placement of the line in this case is something that a surveyor could not determine based on title or

extent of title. The placement of the boundary line in the circumstances of this case is:

...a judicial act that must be judged in a court according to the law after hearing the evidence. (Exhibit 3, page 10)

[24] In **Naugle v. Naugle** (1970), 1 N.S.R. 554 the Court referred to the case of **McIsaac v. MacKay** (1915) 49 N.S.R. 476 and compared survey lines as compared to old fence lines and suggested (paragraph 47):

...the fences are by far the best evidence of what the lines of the lot actually are...

That applies in this case. In **McIsaac v. MacKay** in the same passage the Court went on to say:

...regard should be had for the parallel lines setting the **boundaries** of adjoining property owners.

In the present case I have already referred to the fact that some lots in the surrounding area would not appear to be regular in shape and as a result it would not be unexpected that side lines would not necessarily be parallel or even straight.

[25] This is not the situation where the parties have been able to establish a true line, leaving the issue as one of whether the conventional line superseded the

true line. As noted in **Sutherland v. Campbell** [1923] O.J. No. 351, a conventional line may in fact supersede even a true line in some situations.

In the present case, tracing either of the land titles back to Crown grants leaves a number of unanswered questions in terms of where the true line is.

In the present case, I am satisfied that as between the Leard's and Mr.

Patriquin there was a conventional line agreed upon. That line followed the course of an old barbed wire fence. I accept the agreement of the parties that along the 205 metre non-barbed wire that the old style electric fence now establishes the boundary.

[26] As noted in **Grassett v. Carter** (1884), 10 S.C.R. 105:

The law applicable to conventional lines, I take to be, that if a line is agreed upon and one party acts upon it and erects a house or an expensive fence, or holds and improves the land, the other party is estopped from saying the line is not the right one.

[27] In the present case as between Patriquin's and Leard's there was reliance on the line as marked by the barbed wire fence. Patriquin relied upon it to the extent that he represented the barbed wire fence as being the boundary when he sold the same to the Fowlies. Mr. Fowlie, in turn, relied upon the barbed wire fence as the boundary and improved the land through landscaping and the construction of the gazebo.

[28] I have reached a number of conclusions based on my review of the evidence. Using accepted surveying principles and guidelines, it is not possible for the surveyors to establish placement of the common boundary as between the parties. The parties have agreed that the boundary from the road to the point of departure is the **non-barbed** old electric style fence. The only evidence of any barbed wire fencing was as located and identified by both surveyors and Mr. Fowlie. That section of fencing departs from the straight line at an angle of about 60 degrees. In addition to that old barbed wire fence there was a blaze mark along that same line. Mr. Leard cut up to that line in the 1970's but there is no evidence he cut beyond it. I am satisfied the location of the now disputed boundary was long established by that old barbed wire fence. Parts of that fence, or the posts for that fence, exist even today. The line extends from the point of departure to the shore where the old post was identified by Mr. Fowlie. The line as adopted by the previous owner is not straight, contrary to what Mr. Leard may have believed, but it did follow the fence as he had believed. The line does go along the old barbed wire fence and now the electric wire fence. The line will be as suggested by Mr. and Mrs. Fowlie.

[29] The evidence as to damages was vague at best. In essence the trespass amounted to the cutting of trees and brush along what Mr. Crowe came to believe was the true line. He also placed a stake. I accept that neither side acted out of malice or total disregard for the rights of the other. This was a valid contest where both sides have reasonably asked the Court to establish the location of their common boundary when proper applications of survey principles could not do so.

[30] I will hear the parties on the issue of costs if they cannot agree.

**J.**