



The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

In this issue we consider a decision from the Court of Queen's Bench for New Brunswick in *Caissie v. Gallant*.¹ In this case, there are no survey plans or diagrams — just a location map for context in an OpenStreetsMap® image so as to place the location into context in rural New Brunswick.

Are Boundary Decisions Ever Final?

Key Words: *res judicata, fraud, issue estoppel, interpretation*

In efforts to resolve boundary uncertainties, all Canadian jurisdictions accommodate property line disputes within their courts. In fact, Canadian constitutional law leaves matters of property and civil rights to the superior courts of the Provinces.² In addition, some provinces have streamlined procedures or even created specialized tribunals to adjudicate these questions. Once decided and finally resolved, the determination is assumed to be just that, final and — final in perpetuity. In some respects, the status of “true and unalterable” has been restored.

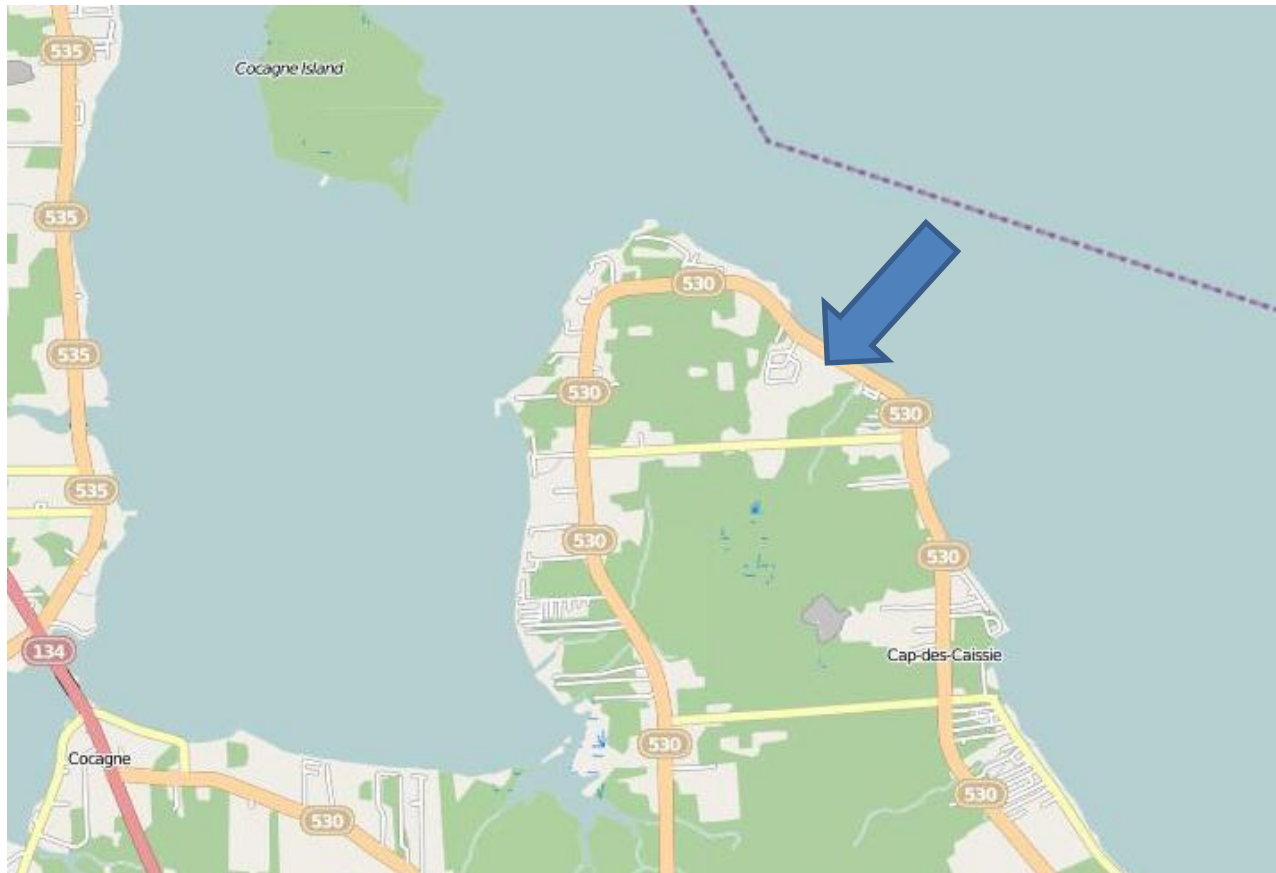
This proceeding is therefore of particular interest to the professional surveyor in how it appears to be an attempt to re-litigate a boundary dispute that had been decided 15 years before, on the pretext that the prior event was somehow wrong because there were elements of fraud that took place. The possibility that a “final determination” may not be final is a serious threat to the certainty of outcomes that are the result of a legal process, but it also raises uncertainty of “legal correctness” that may be relied upon in some parcel boundary cadastres.

The location of this dispute in south east New Brunswick appears as rural area, fronting on the Northumberland Strait. Situated on the landward side of Highway 530, just north of the

¹ The full text of *Caissie v Gallant*, 2012 NBQB 305 (CanLII) is available at <http://canlii.ca/t/ft3tp>

² See s. 92(13) of *The Constitution Act, 1867*, 30 & 31 Vict, c 3, <http://canlii.ca/en/ca/laws/stat/30---31-vict-c-3/97547/30---31-vict-c-3.html>

community of Cap-des-Caissie, the setting appears idyllic — but for the allegations of fraud. A location map³ appears below:



Procedurally, this matter came before the court in a parallel fashion: Caissie asked for a court certificate to be registered against title to land owned by Gallant and Gallant asked for a court order dismissing the Caissie claim since the matter had been decided by the court in 1996. Not surprisingly, the court recognized that these two related matters could both be determined by granting Gallant’s relief and dismissing the Caissie claim.

The facts are both interesting and troubling. In the words of the court, this dispute appears to have been the subject of an earlier decision⁴ dated June 20, 1996. Quoting from that decision, the court repeated,

After careful consideration of the evidence, it seems to me clear on the preponderance of evidence that the dividing line between the lands of the parties herein is that claimed by the applicants which is the line as laid out by surveyor Crandall in 1961 or 1962.

³ Image of the location is from [Open Street Map](#) OpenStreetMap is *open data*, licensed under the [Open Data Commons Open Database License](#) (ODbL).

⁴ The earlier decision was not reported, but is extensively quoted in the subject decision.

The Court's decision is based on the following factors. Firstly, there is overwhelming evidence that Aquilla and Henri agreed to the boundary line in question in the early 1960's, Aquilla having paid his half of the surveyor's fee. There is a lack of evidence that Aquilla questioned that dividing line. The correction deed above-described (exhibit P-8) states in part as follows:

Whereas there was a deference (sic) on the location of line between the Grantors, (Imelda Legere et vir), and Aquila Léger et ux ...

This further confirms that the meeting with surveyor Crandall rectified the boundary problem. Surveyor Desprès respected that boundary line when he prepared the subdivision on the adverse claimant's land. Surveyor McLaren is of the opinion that his plan (exhibit P-1) best represents the evidence he gathered. Counsel for the adverse claimant, in his brief, alleges that the Crandall survey was primary a unilateral act on behalf of Emelda Léger and her son Emery Gallant, but the evidence does not support that contention.

Secondly, it is quite clear that the applicants have used the disputed area over the years much more extensively than the adverse claimant and her family, which fact further supports the acceptance of the division line by Aquilla. Concerning the skating on ice patches and the ice rink on the disputed area, a limited amount of weight must be given to that use as it is quite common in the country to use other people lands sporadically for that purpose, particularly when an uncle and neighbour is involved.

In *Phillips v. Montgomery* (1915) 25 D.L. R. 499, 43 N.B.R. 229, McKeown J. said at page 501:

When owners of adjoining lands, fully cognizant of the dispute as to the location of the line dividing their properties, jointly agree upon a certain line as a division line between them, jointly put up or continue a fence along such chosen line as the common boundary of their respective holdings, and for years limit their respective occupation and cultivation of said properties by such fence, I think in the absence of fraud, each successor in title is bound by the line so agreed upon. See *Perry v. Patterson*, 40 N.B.R. 591, *McIntyre v. White*, 15 N.B.R. 367, also on the question of a conventional line see *Inch v. Flewelling*, 30 N.B.R. 19.

Thirdly, if the adverse claimant was justified with her claim, the end result from an acreage point of view would be completely irreconcilable with the fact that the two brothers, Aquilla and Henri, received each the same amount of land from their father, namely approximately 25 acres each.

Fourthly, the Crandall division line, so-called, dates back approximately thirty-five years ago to 1961 or 1962, whereas the division lines suggested by the adverse claimant is along a fence which was first built only two years ago, namely 1994. Also the adverse claimant must have been unsure of her position as the fence was put up by her at two separate locations in 1994.

The two brothers agreed on the division line in the early 1960's, hired a surveyor to establish it, each paid half of the surveyor's fees and the line corresponds well with the documentary evidence and the parties respective behaviour since then. For those reasons, the claim by the adverse claimant is dismissed and the application for a Quieting of Title by Emery Gallant and Bernice Gallant is granted in accordance with the description appearing in the Application⁵.

The quoted decision in 1996 describes a process by which an application under the *Quieting of Titles Act*⁶ was used to confirm a conventional boundary that had been settled upon since the 1960s. Why would the settled boundary, confirmed by court order in 1996 be again the subject of further litigation? Some clues can be found in the reported decision. For example, in 2001 the Gallants had sued Mrs. Caissie and members of her family⁷, but the reason or details were not given. Sadly, these parties appear to be neighbours who are locked in animosity towards one another and are motivated to have resort to the courts as an event that repeats itself every 5 years.

This time, there were again allegations of fraud and falsehoods that were attributed to one surveyor, a Mr. Allan Crandall. We have been able to retrieve the survey plan prepared for the court application and it is reproduced below, although somewhat cropped so as to eliminate signatures and registration details.⁸ A red and green line have also been added:

⁵ *Caissie v Gallant*, 2012 NBQB 305 (CanLII) at paragraphe 15

⁶ *Quieting of Titles Act*, RSNB 1973, c Q-4, <http://canlii.ca/en/nb/laws/stat/rsnb-1973-c-q-4/54004/rsnb-1973-c-q-4.html>

⁷ *Ibid.*, at paragraph 11

⁸ Plan 200546. The permission of Howard McLaren, NBLs, for the reproduction of a portion of his survey is gratefully acknowledged.



The red line was determined by court order in 1996. The green line was claimed by Caissie as the correct line — but for the fraud which she claimed had been perpetrated in 1996. The lines have also been superimposed on a screenshot of a Google maps image below⁹.

⁹ From: <http://goo.gl/maps/NTGlc>



As often stated, *res judicata* is simply the principle that persons should not be subject to the same dispute twice¹⁰.

As surveyors, we may well appreciate the fact that the evidence of a boundary starts to become obscured the day after it has been created. In fact, efforts to halt or even reverse this “aging process” by deeming boundaries to be “true and unalterable”¹¹ may overlook the fact that evidence and its evaluation lies at the heart of “retracement”. But what makes a “boundary decision ‘final’”? Certainly a decision-maker, who adjudicates on a boundary location, can make a final decision (subject to an appeal). Can a professional surveyor make a determination that is “final”? Probably not — most retracements are opinions. Why are we then surprised at the rarity of the *res judicata* argument in the field of boundary law? In *Caissie v. Gallant*, the *res judicata* argument arose because the boundary had been the subject of a prior judicial determination. This is quite different from a statutory deeming of “true and unalterable”. In the

¹⁰ Spencer Bower and Hadley, in *Res Judicata*, 4th ed., para. 1.01 states, “Res judicata is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes once and for all the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment.”

¹¹ The examples of this, and similar language, abound in the Surveys Acts of the provinces across Canada.

former, the evidence has been researched, evaluated and findings of fact have been made. In the latter, the decree is pointless; the search for evidence begins the next day and that which has been deemed “true and unalterable” grows increasingly elusive with the passage of time.

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FYI

There are many resources available on the **Four Point Learning** site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.¹² These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year’s quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

AOLS AGM

Please visit us at our exhibitor’s booth at the [AOLS AGM](#). We are eager to hear from you about:

- your learning wish list,
- your impediments to learning as a continuous process,
- content that is potential professional development material for surveyors.

SURVEY RESULTS for *Top 3 Survey and Boundary Issues*

In the last *The Boundary Point* issue, we invited readers to complete a survey poll, with their answer to: “*As a professional land surveyor, what do you think are the top 3 surveying and boundary issues of concern to real estate lawyers?*” The results are in, and a very interesting view is expressed. The average age of participants was 50 years, with an approximate split of 50/50 between professional surveyors and “others” (including students).

The top 3 issues that emerged were, by rank, Encroachments (83%), Easements (78%), and Zoning restrictions / Building envelope (30%). At a CPD seminar for real estate lawyers in Ontario in January, 2013, the top 3 issues identified were: (1) The lateral extent of accretion to “waterfront” property that is riparian; (2) Easements and ancillary rights, and (3) Vertical data that defines a topographic contour.

¹² Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd’s [Registered Provider Guide](#) for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

Easements and water boundaries continue as primary topics of concern and the potential for professional surveyors to add value in their work appears to exist in these subjects. Future issues of *The Boundary Point* will attempt to highlight these topics. The next issue's subject will be "*Problem Encroachments: How to Resolve What a Survey Could Have Avoided*".



This publication is not intended as legal advice and may not be used as a substitute for getting proper legal advice. It is intended as a service to land professionals in Canada to inform them of issues or aspects of property title and boundary law. Your use and access of this issue of *The Boundary Point* is governed by, and subject to, the [Terms of Access and Use Agreement](#). By using this issue, you accept and agree to these terms.

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