



*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.

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It will come as no surprise to land surveyors that in many neighbour disputes over a common boundary, both sides will view themselves as wronged and see the other as the instigator of trouble. This seems to be particularly true where an ambiguity exists within a description or an inconsistency is discovered when a description is applied to the ground. Both parties will approach an ambiguity with a view that they are correct and, unfortunately, with a frequent assumption of some malevolent intentions from the neighbour. Entrenched opinions will seldom lead to an amicable resolution through agreement; instead, in the quest for certainty, a surveyor is called in and if parties still do not reach an agreement, litigation may ensue. The land surveyor's role may then evolve into one of an expert witness at which point the process by which the surveyor has reached an opinion comes under significant scrutiny by both the disagreeing party and the decision maker – whether a court or tribunal.

In the recently decision from the Nova Scotia Court of Appeal in *MacCallum v MacDonald*<sup>1</sup> we see the review of a trial decision in which a neighbour, unhappy with both the surveyor's opinion and the trial court's decision, exercised a right of appeal - but was ultimately unsuccessful. The trial decision was reported as *MacDonald v MacCallum*<sup>2</sup> and set out both an interesting review of the law of interpreting deeds and expert testimony. It also provides a thoughtful account of some of the challenges that may arise when there are differing but honest beliefs between neighbours regarding the spatial extent of their property rights.

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## The Value of Expert Witness Testimony

**Key Words:** *metes and bounds description, retracement, expert testimony*

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<sup>1</sup> *MacCallum v. MacDonald*, 2023 NSCA 24 (CanLII), <https://canlii.ca/t/jwg7l>

<sup>2</sup> *MacDonald v. MacCallum*, 2021 NSSC 362 (CanLII), <https://canlii.ca/t/jm53k>

Metes and bounds descriptions may be difficult to decipher under the best of circumstances. Quite often there are discrepancies between the deed description and what appears on the ground and a surveyor is engaged in order to resolve that confusion and confirm the location of the boundary line. The affected neighbouring owners may take issue with the surveyor's opinion leading to litigation, particularly where both owners approach the issue with an honest belief that they are in the right.

Two cottage property owners were in such a predicament. The dispute in *MacDonald v MacCallum*, centred on the boundary between two cottage lots in a small coastal community in Nova Scotia. The orientation of the properties was described by the trial judge as:

The subject properties are adjacent to one another in a cottage community on the Northumberland Strait. The community consists of two main streets (MacDonald Lane and Toney Cove Lane) which begin on Highway 366 and run perpendicular toward the shore. Extending off these two Lanes are five streets which are oriented roughly parallel to the shore.

The MacDonald and MacCallum lots are located on two of the side streets. Although they have civic addresses on separate streets they are in close proximity to one another. The MacDonald lot is generally more to the west and closer to the highway while the MacCallum lot is more to the east and slightly closer to the shoreline.<sup>3</sup>



**Figure 1:** Aerial view of coastal community. Google® Maps. All rights reserved.

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<sup>3</sup> *Ibid.*, at para. 6

A Google® Street view of the community on Google Maps in 2013 shows a clustering of modest cottages, sheds and other out buildings and trailers along a series of gravel roads just up from the beach. The area is relatively open, with no fencing between the lots. An undated aerial view of the community can be seen in Figure 1 above.

The Applicants in the trial decision alleged that shortly after the Respondent took title to his lot he began driving onto and parking his vehicles on the Applicants' land. It was further alleged that the Respondent parked his 30-foot recreational 5<sup>th</sup> wheeler in a manner that intruded onto their parcel and then constructed a small shed that encroached slightly onto their parcel. The Respondent took the position that the disputed portion of the land was in fact a right of way. The Applicants had retained a surveyor in order to undertake a retracement survey in order to consolidate their parcels and also to establish the boundary with the Respondent neighbour and confirm whether there was any encroachment of the Respondent's buildings over that boundary line.

This process involved back-title research, and field work on the Applicant's property and surrounding area. Litigation ensued and the surveyor's evidence was, as the court described "ultimately critical to the determination of the matter."<sup>4</sup> In the reported case, the court set out in relatively comprehensive detail, the surveyor's evidence.

The Ryan Survey was in evidence and a good deal of time at the hearing was spent reviewing and discussing its contents. The survey covered all the lots surrounding the disputed parcels. Mr. Ryan testified that he was able to locate substantially all the indicators referred to in previous deeds. He indicated that he was able to locate:

1. Leisure Lane, Dogwood Drive and Toney Cove Lane travelled ways.
2. The ditch running east-west which he took to be an indicator of cottager occupation, and which was referred to in various deeds.
3. Evidence of occupation for the various lots.
4. Corner posts consisting of iron bars, iron pipes and survey markers which he identified as having been set previously by surveyors Michael Greene, NSLS and Mark MacMillan, NSLS.

As part of the field work Zackary Ryan spoke with Brian MacCallum. Mr. MacDonald pointed out the Michael Greene markers on his southeast boundary. Also located near the MacCallum southwestern corner was a curled iron bar standing out of the ground on the north side of the ditch and a buried iron pipe laying on its side close to the ditch and which he testified he believed had been disturbed by the movement of a travel trailer which

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<sup>4</sup> *Ibid.*, at para 32

appeared to him to have been hauled from Dogwood Drive across the ditch and placed on the neighbouring Lisa MacCallum property to the north.

In addition to locating and relying on the previous survey markers Mr. Ryan also consulted with one of the prior surveyors, Michael Greene.

After these consultations Mr. Ryan received copies of sketches prepared by Michael Greene as part of his work. These were also in evidence.

Following his discussions with Greene, Zackary Ryan concluded as follows:

1. That his field evidence and the information provided by Greene matched up precisely.
2. He understood no cottagers had expressed concern with the placement of the Greene survey pins. He believed these matched up well with available occupational evidence and the boundaries set by him compared well to the deed distances given for various lot owners.
3. For these reasons he accepted the Greene coordinates and concluded that these established the southwestern alignment of the MacDonald property and the southeastern boundary of the MacCallum property, as well as providing a good basis for further analysis.
4. The road allowance called for between the MacDonald property and their neighbours to the south (Terry and Jennifer MacDonald) had never actually been built, possibly as the result of a change in the design intentions. This allowed him to conclude that the Cameron MacDonald and Terry and Jennifer MacDonald lots did properly adjoin, as appeared to be the case during the site assessment.

Mr. Ryan described in detail his process of setting the various boundaries and alignments of the relevant lots. He did observe that the survey marker at the northeastern corner of the Terry and Jennifer MacDonald lot (which was being used to help establish the most southern boundary of the Cameron MacDonald property) was found to be 0.6' from the coordinate supplied by Michael Greene. He noted this was the only physical evidence that did not fit precisely with the other existing data and coordinates. He, therefore, concluded that this marker was likely reset after having been disturbed in some fashion and for this reason he used Michael Greene's original coordinate in the calculation as opposed to the pin which he concluded had been disturbed.<sup>5</sup>

The court further described the surveyor's conclusion on the Respondent's lot as follows:

The MacCallum parcel consists of a consolidation of two deed descriptions. Lot 1 is described as a 50' by 100' lot touching on Toney Cove Road (to the north) and on a 16' foot right of way (Dogwood Drive) to the south. The description includes a right of way to travel over these lanes to get to the shore and to the Port Howe Shore Road.

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<sup>5</sup> *Ibid.*, at para 41-46

Mr. Ryan indicated that Lot 2 is described as having 20' of footage on the Toney Cove Lane, then running along a ditch 130', then having 94' of frontage on Howard Johnson Road (now known as Dogwood Drive) and 100' touching Lot 1 and running back to Toney Cove Lane. There is no right of way statements. [...]

The placement of the boundaries of the Brian MacCallum lot was a focus of the Ryan Survey. Mr. Ryan detailed his methodology for establishing its boundaries and placement. His report detailed his conclusions as follows:

31 As stated before, Brian MacCallum's lot must touch the ditch and the property owned by June and David MacCallum, resulting in a measured frontage on Dogwood Drive of +/- 147' compared to 144' described in the deeds:

- A. Lisa MacCallum's southwestern boundary is described as +/- 35' as per the Land Registration description and in the back title (Book 809 Page 458). I found the measured distance to be 31.63'. This is a reasonable margin of error to expect from a deed distance described as "more or less".
- B. The resulting alignment was found to run about 0.3' (or 9 cm) north of the curled iron bar I had located in (12B).
- C. The resulting alignment matched the existing bend in the travelled way of Dogwood Drive.
- D. The measured distance along the ditch between Brian and Linda MacCallum was found to be +/- 118' as compared to the +/- 135 recorded in Lisa's description and the 130' recorded in the back title to Brian's property.
  - i. I did investigate what holding 130' along the ditch would result in and I found the resulting boundaries strayed further from the deed descriptions by considerable margins. I rejected this finding in favour of my above calculations.
- E. The description for Lisa's lot does not contain an adjoiner reference or call for the ditch (as is called for in the back title to Brian MacCallum's lot), however, these lots would appear from the measurements to adjoin.<sup>6</sup>

Regarding the issue of the right-of-way, the surveyor's evidence was that the Applicant's deed referenced the right-of-way as "Together with a right of way to travel over the aforementioned roads as provided by the Grantor, to reach the Port Howe Shore Road, so called, this being Highway 366."

The Surveyor also noted that the Respondent's property, which was a consolidation of two lots, included a right of way description on one of the lots but not the other. The surveyor's

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<sup>6</sup> *Ibid.*, at paras 48 -54

conclusions on the deed descriptions and the encroachments were set out in the reported decision:

The expert's conclusions on the deed descriptions that comprised the MacCallum property were as follows: (Survey Report para 46)

- A. A. Lot 1 would enjoy a right of way along its Toney Cove Lane frontage and Dogwood Drive frontage, both running southeasterly to their respective intersections with Toney Cove Lane, as well as running along Toney Cove Lane from its intersection with the shore to its intersection with Highway 366.
- B. Lot 2 does not include any right of way statements. As both lots have always been in common ownership since the conveyances made by Sarah MacDonald, it may have been the intention this parcel would have been accessed via Lot 1.
- C. Lot 2 would have the benefit of whatever proscriptive rights the court might find to exist.
- D. The right of way described in these deeds, and with various deeds in the surrounding area, indicate their purpose is to gain access to specific lots from Highway 366, and in some cases to the shore. There is no provision for general access or a right to park on the right of way.
- E. I did investigate Brian MacCallum's claim to have acquired lands at the end of Dogwood Drive to park his boat (Paragraph 55 of his affidavit). I found no recorded evidence of this claim.

With respect to the encroachment issue, Ryan's affidavit says as follows:

11 A site visit was made on or about the 18th of October 2019 and two encroachments were found to exist, one being a small shed in which the southwest corner was sitting over the boundary by about 2.9'. The other being a travel trailer sitting lengthways along the boundary. The northern portion of the trailer being about 3.3' feet over the boundary and the southern portion of the trailer being about 3' over the boundary.<sup>7</sup>

The court reviewed the law on the interpretation of deeds by citing the decision of the Nova Scotia Court of Appeal in *Metlin v. Kolstee*, 2002 NCSA 81, as follows:

[65] In his decision, after reviewing the evidence, the trial judge referred to the principles applicable to the interpretation of a deed as set out in *Saueracker et al. v. Snow et al.*, (1974), [1974 CanLII 1310 \(NS SC\)](#), 14 N.S.R. (2d) 607, 11 A.P.R. 607, 47 D.L.R. (3d) 577(T.D.); *McPherson et al. v. Cameron*, (1866-69) 7 N.S.R. 208, and *Humphreys et al. v.*

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<sup>7</sup> *Ibid.*, at para 58-59

*Pollock et al.*, [1954 CanLII 358 \(SCC\)](#), [1954] 4 D.L.R. 721. Justice Coughlan stated in 37-39 as follows:

[37] The general principles applicable to the interpretation of a deed are set out by Jones, J. (as he then was) in *Saueracker et al. v. Snow et al.*, (1974), [1974 CanLII 1310 \(NS SC\)](#), 47 D.L.R. (3d) 577 at p. 582:

. . . The general principles applicable to the interpretation of a deed are set forth in paras. 13 and 24, 5 C.E.D. (Ont. 2d), pp. 488-90 and 497-8, as follows:

13. Construction. — General Rule. The Court must, if possible, construe a deed so as to give effect to the plain intent of the parties. The governing rule in all cases of construction is the intention of the parties, and, if that intention is clear, it is not to be arbitrarily overborne by any presumption. The intention of the parties is to be gathered from the sense and meaning of the document as determined in the first place by the terms used in it, and effect should, if possible, be given to every word of the document. Where, judging from the language they have used the parties have left their intention undetermined, the Court cannot on any arbitrary principle determine it one way rather than another. Where an uncertainty [still remains] after the application of all methods of construction, it may sometimes be removed by the election of one of the parties. The Courts look much more to the intent to be collected from the whole deed than from the language of any particular portion of it.

[38] The relative importance to be given to various items in the interpretation of a deed is well settled. In *McPherson et al. v. Donald Cameron* (1866-69), 7 N.S.R. 208, Dodd, J., in giving the judgment of the Court, stated at p. 212:

... The question is how he is to get there, for neither the course nor distance given in his grant will take him there, without the alteration of one or the other. The general rule to find the intent where there is any ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake;

[66] These statements 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 rules as quoted by the trial judge from *McPherson et al. v. Cameron*, *supra*, are to be applied. When courses and distances clash preference to one, rather than the other, will depend on the circumstances.<sup>8</sup>

The decision with respect to the boundary location and the right of way issues relied upon the assessment and conclusion of the surveyor. In explaining this conclusion, the court went into some detail on what all was considered and why. Excerpts of this discussion are set out below.

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<sup>8</sup> *Ibid.*, at para 90

I have assessed the totality of the evidence on this issue. I have determined that the position adopted by the surveyor is correct in all the circumstances. He was presented with evidence of use and occupation. These are standard tools used in interpreting signs on the ground as these relate to metes and bounds descriptions. I find the professional judgment he brought to bear was reasonable.

I have considered the issue raised by Mr. MacCallum around the surveyor's reliance on the placement of a certain marker (the "bent iron pipe") in reaching some of his determinations. The role of Mr. Ryan is to take the totality of the indicators and history available to him and, based on the cumulative evidence, offer an opinion. In totality the conclusions reached by Mr. Ryan are supported and reasonable. [...]

My conclusion is that the exercise he followed is reasonable and intelligible. It was not driven by any improper motive and relied on the best available information including the past work of Michael Greene, NSLS.<sup>9</sup>

The decision was appealed by the unsuccessful respondent and that appeal was dismissed. The decision shows the value of expert witness testimony where the witness clearly understands their duty and their role in assisting the trier of fact in an unbiased way that does not advocate for the position of the client who initially retained their services. This is particularly important in a situation where litigating parties view the same events from different perspectives and both see themselves as wronged - and the other party as the instigator. As noted by the court in the trial decision,

[...] I do not believe that either side has intentionally attempted to mislead the Court. But I have concluded that I need to be cautious in how I apply the recollections of each side. The upset and emotion that each side has experienced has no doubt made it difficult for them to separate their feelings about the other side from a dispassionate recollection of events.<sup>10</sup>

*Editors:* Izaak de Rijcke & Megan Mills

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## **Cross-references to *Principles of Boundary Law in Canada***

Boundary retracement is discussed in *Chapter 3* and a discussion of the role of the surveyor as an expert witness can be found in *Appendix 3*.

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<sup>9</sup> *Ibid.*, at paras 95-99

<sup>10</sup> *Ibid.*, at para 86



## 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.<sup>11</sup> These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year’s quota.

### Surveying and Geomatics Educators Society (SaGES)

This year, the conference will take place again in person – and in Canada. A presentation proposal submitted by Izaak de Rijcke and Dr. Michael Sheng at UNB on the topic, “*Lessons Learned from Teaching Boundary Law in a Virtual Environment*” has been accepted.



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