

A Boundaries Act Hearing

BY G. R. WILSON

Cadastral and Engineering Surveys
Committee.

THE BOUNDARIES ACT (R.S.O. 1970, Chapter 48)

In the matter of the Boundaries Act

And in the matter of an Application for confirmation of the true location on the ground of the south-easterly 580 feet, more or less, of the south-western boundary of the land described in registered Instrument ***** being the boundary between Lot 40, Registered Plan 4 and Lots 147 to 154, both inclusive, Registered Plan 876.

This is an Application made by Roland L for the purpose of confirming the boundary aforementioned in accordance with a draft plan of survey made by Surveyor "A", dated January 13, 1975.

This Application came before me at 10:30 o'clock in the morning of the 3rd day of September, 1975.

At this time there appeared before me:

Roland L - Applicant.
John H - Counsel for the Applicant.
Surveyor "A" - Land surveyor who signed the draft plan of survey.
Leonard V - Counsel representing Thomas V and Jeannette V; and Jack H; adjoining owners and objectors.
Thomas V - Adjoining owner and objector.
Jack H - Adjoining owner and objector.
James B and Donna B - Adjoining owners and objectors.
Patrick A - Adjoining owner and objector.
Sam R - Adjoining owner and objector.

During the Hearing seven (7) exhibits were filed as set out in Appendix "A" to this Order.

Prior to the Hearing, four formal letters of objection were received from the owners (or their Solicitors) of five properties adjoining to the west of the boundary under Application. These owners either appeared in person at the Hearing or were represented by counsel.

The evidence given under oath by Roland L, the Applicant, and by Surveyor "A", the land surveyor who signed the draft plan of survey, outlined the

events leading up to the Application and the survey background.

The boundary under Application is part of the south-western limit of lands described in Registered Instrument 450-54 V.S., owned by the Applicant, and is part of the south-western boundary of Lot 40, according to Plan No. 4. This boundary is also part of the line between the east and west halves of Lot 7, Concession 7.

The Applicant purchased Lot 40 in July of 1967, at which time there was an old post and wire fence running along the south-western boundary of the lands and continuing north-westerly and south-easterly thereof, extending the entire length of the line between the east and west halves of Township Lot 7, in Concession 7, some 2030 feet, more or less.

In 1967, Surveyor "A" performed a survey of the west half of Lot 7 in Concession 7, being the lands lying immediately to the west of the L lands. A copy of a plan of this survey was filed as Exhibit 5 in the Hearing.

In 1969, Eastcan, the then owner of lands in Lot 7, Concession 7, west of the "L" lands, made application for title certification under provisions of The Certification of Titles Act. Mr. "L" being an adjoining owner was served notice of the C.T.A. Application, accompanied by a plan of survey of the lands under Application, dated December 16, 1968, and signed by "S", Ontario Land Surveyor. The "S" plan indicated the westerly boundary of the "L" lands as following a ***** post and wire fence marking the existing limit between the north easterly and south-westerly halves of Lot 7, approximately 40 years old." ***** The boundary of the "L" lands in dispute was also indicated as a straight line having a bearing of North 45 degrees 53 minutes West between two iron bars in the fence line at its southerly and northerly extremities. It was the evidence of Mr. "L" that upon viewing the "S" plan and noting the reference to the old fence line which he considered as defining the south-western boundary of his property, did not file an objection to the C.T.A. Application.

Subsequently, the plan was approved by the Deputy Director of Titles and filed as Plan C.T.A. **** and Certificate of Title No.***** was issued to ***** at 4:30 o'clock in the afternoon of the 7th day of August, 1969, which certificate was filed in the Registry Office.

The lands within Plan C.T.A. ***** were subsequently divided into building lots by a plan of subdivision signed by "S", O.L.S., registered in the above-mentioned Land Registry Office on August 21, 1969 as Plan 876. The building lots within this plan backing on the south-western boundary of the "L" lands were identified on this plan as Lots 147 to 154, both inclusive.

Mr. "L" watched with interest the development and building of houses adjacent to his lands, but with no special concern until the houses were completed and the lands in the rear thereof were graded. In the process of this landscaping, the old post and wire fence was partially removed and grading machines invaded an area which Mr. "L" believed to be owned by himself. An action for trespass was pursued and won by Mr. "L" against the perpetrator and it was at about this time that Mr. L became aware that the problem was not merely of trespass, but one of boundary positioning.

From the evidence of the Applicant and surveyor, "A", it was established that the monuments marking the rear or easterly corners of Lots 147 to 154 on Registered Plan 876 by "S", O.L.S. were set on the straight line between the monuments shown on Plan C.T.A. ****, which placed the old post and wire fence up to 5-1/2 feet on the lands within the subdivision.

Mr. "L" attempted to stop the complete removal of his fence by appealing to the local municipal officials, but when this was of no avail, an action was commenced in the Courts, which action was discontinued to allow him to make application for boundary confirmation under provisions of The Boundaries Act.

The Applicant's surveyor, Surveyor "A", gave particular evidence concerning his re-establishment of the boundary under Application. It was Surveyor "A"'s evidence that he was familiar with the positioning of the boundary presently under Application (see Exhibit 5). He was again consulted concerning this boundary in December of 1973 by the Applicant, Mr. "L". At that time Surveyor "A" and Mr. "L" walked the boundary and Surveyor "A" was requested to tie in the remains of the old post and wire fence that had been previously partially removed and also to locate a number of small trees on the "L" property near this boundary. The Surveyor stated that he made the necessary documentary search concerning the boundary, including prior surveys by himself and other survey firms, Plan C.T.A. **** and Registered Plan 876. Surveyor "A" returned to the ground in January 1974

it was survey practice for land surveyors in accepting an existing fence as a boundary line to monument each end, or at major bends in the fence line, and to show a bearing and distance between the points so monumented to perfect a mathematical closure of the survey. This practice was not to infer that the straight line between points on the fence line overrode the position of the fence where it deviated from that line, as the fence line in all its deviations controlled the positioning of the boundary.

Surveyor "A" further stated that this opinion also applied to Plan C.T.A. ****, and had he been employed to lay out the original lots on the plan of subdivision, registered as Plan 876, which back on the boundary presently under Application, he would have placed the monuments for the rear corners of the lots in the existing fence line.

It was argued by counsel, Leonard V, that the effect of Plan C.T.A. **** was to certify that the south-western boundary of the L lands was a straight line on a bearing of North 45 degrees 53 minutes West between two monuments 578.61 feet apart as shown on said plan. The fact that the plan also indicated a fence along that boundary was incidental to the straight line definition and it was the responsibility of Mr. "L" upon being served with a copy of the plan at the time of the C.T.A. Application to determine whether or not the fence line coincided with this straight line definition. It was further submitted that as Mr. L had not objected to the C.T.A. Application, he was estopped at this time from claiming that the fence line was the true boundary.

It was counter-argued by the Applicant's counsel that Mr. "L", upon receiving a notice of the C.T.A. Application and a copy of the draft plan in 1968, noted that the plan indicated the boundary of the lands under Application followed the fence line, and as Mr. "L" had always considered the fence line to define his westerly boundary, no objection was necessary. It was further argued that Mr. "L" would have been unable to determine whether or not the fence was on a straight line as it followed a line of bush and trees and could not be viewed between the points monumented.

It was further argued by the objectors that the Applicant had waited too long to proceed to a confirmation of the boundary, some six years after Plan 876 was registered in 1969. The Objectors submitted that this undue delay had placed them in a position of being unable to claim compensation from the subdivider for any lost land.

JUDGEMENT AND REASONS

The problem before the Hearing as presented by the Applicant and Objectors concerns, in my view, the answer to three basic questions.

Firstly: what constitutes the best available evidence of the true position on the ground of the boundary under Application?

Secondly: what is the effect on the positioning of that boundary of Certificate No. 843 and Plan C.T.A. **** issued and approved under provisions of The Certification of Titles Act?

Thirdly: has the conduct of the Applicant, Roland "L", since approval of Plans C.T.A. **** estopped him from claiming that the true boundary is the fence line rather than the straight line definition as shown on Registered Plan 876?

Also, the added question whether the Applicant acted within a reasonable time to effect a remedy to the problem in boundary positioning.

In considering the first question, in my view, ample evidence has been presented by the Applicant's surveyor that the best available evidence of the boundary under Application is the old fence shown on the plan of survey by Surveyor "A", dated 1967, filed as Exhibit 5; Plan C.T.A. ****, filed as Exhibit 1 and the plan by W. N. Wildman, O.L.S., filed as Exhibit 4. The Objectors' claim that Plan C.T.A. **** does not indicate the fence line to be the boundary, is refuted by the Surveyor's interpretation of that plan, and in this interpretation I concur.

In regard to the second question, counsel for the Objectors brought to the attention of the Hearing the statement set out in Schedule 'A' to Certificate of Title No. 843, the significance of which he left to this Hearing to explain, and I quote:

****"The intention hereof being that the monuments shown on Plan C.T.A.-730 govern the limits of the herein described land, but such monuments do not change or alter the position of any previously established boundary."

In considering the pertinent sections of The Certification of Titles Act as it existed at the time of Plan C.T.A. **** (R.S.O. 1960, Chapter 48), it is my view that the monuments shown on a C.T.A. plan are true and unalterable, except where they are found to be prejudicial to the true position of prior established boundaries. Monuments planted on retracement in an effort to position

an existing boundary will be unalterable only if they conform to the original evidence which created the pre-existing boundary. The statement in Certificate No. 843 is to give effect to this interpretation.

In any event, it is quite clear from Plan C.T.A.-**** that the fence is the intended boundary and the problem would appear to be caused by an error of the surveyor, "S", in reporting on the plan that the fence is a straight line on a bearing of North 45 degrees 53 minutes 00 seconds West. This error does not affect the true positioning of the boundary which is dependent on the best available evidence thereof.

The principle of equitable estoppel is a defence and is frequently asserted in boundary cases and is evoked against the party whose acts have led the other party to act to his injury.

This principle is laid down by Colton, L. J. in Proctor v. Bennis (1887) 36 Ch.D. 740 (a) 760, quoting from Ramsden v. Dyson, Law Rep. 1 H.L. 129, 140.

****"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land in which he had expended money on the supposition that the land was his own. It considers, that when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title, and that it would be dishonest in me to remain willfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."

The Supreme Court of Canada in Anderson v. Municipality of South Vancouver (1911), 45 S.C.R. 425 (a) 463 states:

****"a party cannot, because of mere silence or inaction, be held to have acquiesced unless he was fully cognizant of his adverse right".****

There was no evidence presented in the Hearing that would indicate that the Applicant knew of the conflict between the location of the fence and the straight line as shown on Plan C.T.A. **** or on the later registered Plan No. 876, until the developer started to remove the old fence. It was at this time the Applicant took whatever action to him seemed appropriate and the evidence would indicate that he continued in his efforts without undue delay to resolve the boundary problem, including an appeal to the Municipality, an action

THE TREES ACT AMENDMENT

"An Act to Amend the Trees Act" was given its first reading on March 9, 1979. The Trees Act has had as its purpose to provide protection for trees, woodlots, etc. The Act has been closely followed by environmental groups who are interested in preserving the balance of nature and eliminating the wanton destruction of any woodlots etc.

The Association has been following the development of the amendments to the Trees Act to ensure that the amendments as passed would not cause undue hardship to the surveyor when carrying out his duties. Under the new Act, Section 3, Subsection 5(h) creates an exception to a By-Law in cases where an Ontario Land Surveyor must cut trees to perform a survey. This section is worded as follows:

h. "Apply to trees cut by an Ontario Land Surveyor registered under the Surveyors Act or any person in his employ while making a survey."

In a recent article by John Swaigen, general counsel, Canadian Environment-

al Law Association, which was printed in the February issue of *Municipal World*, he takes particular note of the exception allowed for surveyors. He outlines his objections to the amendment regarding the surveyors as follows:

New section 5(h) exempts any trees from a municipal tree-cutting by-law that are cut by an Ontario land surveyor. This exemption is far too broad. It would be better for the surveyor to discuss his intended action and the possible compensation for any damage with the land owner before the damage is done than to cut first and discuss his obligations with the owner afterwards. Mr. J. A. Young, former Chairman of the Regional Municipality of Waterloo has suggested that surveyors should have to seek permission before going onto private land like anyone else, and this requirement would cause them to be more careful.

The amendment may have some unintended consequences. Under the broad wording of the present amendment, it may even be possible for the surveyor to avoid his duty under section 6 of The Surveyors Act to pay compensation for any

damage. The surveyor might plead as a defence to an action for damages that the statutory authority given in The Trees Act overrides any liability under The Surveyors Act. The doctrine of statutory authority provides that anyone acting under the authority of a statute has no liability for damage done necessarily and in the absence of negligence — despite the common law right an owner normally would have to recover damage for nuisance or trespass. For both these reasons, even if surveyors are to be exempted from the by-laws the amendments should state explicitly that they are only to be exempted provided that they are acting in accordance with The Surveyors Act and The Surveyors Act and subject to the provisions of those Acts, and particularly subject to the provisions of section 6 of The Surveyors Act, which makes them liable for damage."

It does therefore appear that although surveyors will be exempted from the restrictions of the Act, they would be wise to still pay heed to that portion of the Surveyors Act, Section 6, which states that the surveyor is liable for any damage occasioned thereby.

commenced in the Courts and finally the present application under The Boundaries Act.

Having given full consideration to all the evidence presented in connection with the Application and Objections, for the reasons stated above, in my view, the Applicant's surveyor has correctly re-established the boundary under Application by the best available evidence of its original positioning and the Objections by Thomas and Jeanette V; Jack H; James B and Donna B; Patrick J. A; Sam R and Benitta R, are denied, and I DO SO RULE.

I DO HEREBY CONFIRM the true location on the ground of the southeasterly 580 feet, more or less, of the south-western boundary of the land described in registered Instrument *****, being the boundary between Lot 40, Registered Plan 4 and Lots 147 to 154, both inclusive, Registered Plan 876, as shown by heavy, solid lines on the draft plan of survey dated January 13, 1975 and signed by Surveyor "A".

I DO ORDER that the final plan of the confirmed boundary be prepared by the Applicant's surveyor to my satisfaction and registered in the proper Land Registry Office as prescribed by Section 16 of The Boundaries Act.

I DO FURTHER ORDER that the costs of the Application be borne by the Applicant in accordance with the undertaking in the formal Application.

DIRECTOR OF TITLES

Surveyor Serenades Moose

Ed. Note:— This news item was sent in separately by several of Charlie O'Dale's friends.

BY MICHAEL McATEER, *Toronto Star*

Charlie O'Dale put his homemade birch horn to his mouth last night in the CNE's Coliseum and blew a long, mournful note.

To the uninitiated it sounded very much like a foghorn. For moose hunters, it was the sweetest sound this side of heaven.

O'Dale, a 65-year-old Ontario Land Surveyor from Midland, was demonstrating how he can lure a lovesick bull moose out of the bush up to five miles away and into his gun-sights.

The sound he produced was authentic enough to win him The Star's moose calling championship trophy and name him Ontario's top moose caller at the Toronto Sportman's Show.

O'Dale, dressed in beaded moose jacket and African safari slouch hat, was one of many outdoorsmen who entertained visitors to the 32nd annual show, which this year lasted 10 days.

Spread over 12 indoor acres, more than 500 exhibits — from canoes to

power boats and tents to luxury mobile homes — attracted an estimated 258,000 paying visitors.

Organizers were hoping attendance would top the 300,000 mark and blamed the recent spell of warm weather for keeping the figure down.

The Toronto show is one of 14 sports-outdoors exhibitions presented across Canada by the Canadian National Sportsmen's Shows in aid of conservation.

Clutching his large carved moose trophy last night, O'Dale told The Star he's been hunting moose in northern Ontario for more than 30 years and has bagged an animal each year.

The largest was a 1,600-pounder about six years ago. "He came crashing through the bush and I got him when he was about 25 feet away," O'Dale said.

"It's a challenge," he said. "You're pitting yourself against the animal."

Using a rolled up piece of birchbark as a horn, O'Dale has attached a short length of vacuum cleaner hose as a flexible mouth-piece.

I suppose my wife wondered what happened to her vacuum cleaner," O'Dale said with a laugh.