

THE LINE FENCES ACT

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Almost two hundred years ago when the first line fence legislation was introduced in Ontario, it addressed a major economic concern.

As simplistic as this legislation may seem to us today, that legislation empowering overseers of highways to determine the height and sufficiency of any fence in its conformity to resolutions agreed upon by the inhabitants, most certainly would have rivalled in impact to those early settlers the recently announced \$1.5 billion BILD economic program.

To those early settlers the fencing of the lands was:

- absolutely imperative to defend their claims to the settlement (many of which had never been surveyed);
- to protect their crops against domestic animals, such as hogs, which were frequently by law permitted to run at large; and
- to protect their livestock against wild animals whose natural habitat had been disrupted by man's arrival.

Notwithstanding these necessities, the construction of fences was an expensive, time-consuming overhead which competed directly with the settler's ability to:

- clear his lands;
- construct buildings for both himself and his livestock; and
- raise his crops within the very short growing season.

Time spent on construction and maintenance of fences was therefore a major factor in deciding whether the settler succeeded and indeed whether he and his family survived.

As Mr. Justice McEvroy stated in 1889 in his book "The Ontario Township":

'The need for fence-viewers arose from the fact that disputes were constantly arising about line fences, i.e., fences which separated one man's land from the farm lying adjacent to it.

When one settler had fenced his farm on four sides, the next settler came and by fencing to that of his

neighbour, he was quite as well off as the first settler, although he had done only three-quarters as much work.'

A seemingly quite insignificant situation today with our backhoes and prefabricated fencing, available labour force and welfare state to prop us up even when we fail, but to that early settler, it was conceivably a matter of life and death.

Where the Act does not apply

Even though circumstances have changed dramatically since that time the new line fence legislation enacted in 1979:

- represented the first major change in such legislation in considerably more than one hundred years; and
- nevertheless retained the original concept of line fence legislation as a single purpose statute.

This is a crucial point to keep in mind. The Line Fences Act, 1979

- applies only to line fences (i.e. fences separating one man's land from that of his neighbour); and
- this legislation may not apply in circumstances in which other legislation is applicable.

Special fences - special properties - In many circumstances today fencing duties are imposed by a provincial statute or municipal by-law upon one owner of the adjoining properties. In such circumstances it is arguable that the legislation imposing the responsibility will be paramount and that the duty cannot be shared with the adjacent property owner by the expediency of calling in the fence-viewers to arbitrate pursuant to The Line Fences Act.

In 1928 in the case of Dennis v. Trustees of School Section 28, Township of York it was held that where a duty and a right to make a determination has been imposed upon a school board for the fencing of school properties, The Line Fences Act did not apply.

If this principle is applied as I believe it should be, to other circumstances in which a separate duty exists, then it is arguable that The Line Fences Act may not be applicable in any circumstances in which a duty is imposed with respect to a special type of fence or with respect to the fencing of special properties or in other circumstances in which a duty is imposed by planning legislation.

For example under a:

- property standards by-law; or
- fencing around pits or excavations, or
- around private swimming pools, or

- around cemeteries, or
- enclosing certain parts of a riding horse establishment, or
- enclosing a salvage yard.

Ultimately these may be questions for the courts to decide. However, before becoming involved in a line fence dispute I believe it is imperative that all the parties and the fence-viewers and anybody else concerned, including an Ontario Land Surveyor, should establish with certainty that the Act does in fact apply in those circumstances.

Other exclusions from the new statute are:

- Federal Crown Lands;
- Ontario Crown Lands "...that at no time have been disposed of by the Crown in the right of Ontario by letters patent, deed or otherwise...";
- lands that constitute a public highway; and
- in those few municipalities in Ontario where a by-law has been passed by the council "...for determining how the cost of division fences shall be apportioned"; and
- most important to you as surveyors, in any

circumstances in which there is a dispute as to the true position of a boundary affecting the construction of the fence.

Where the Act does apply

Subject to those exceptions, the new Act now applies in:

- all municipalities, whether rural or urban; and
- when the necessary regulations are passed, also in territories without municipal organization.

The statute is applicable, subject to the exception of public highways, to:

- lands owned by a municipality or local board; and
- all patented Crown Lands in the right of Ontario.

Right to erect a fence

The new legislation clearly recognizes the right of an owner of land to construct and maintain a fence to mark the boundary between his land and adjoining lands.

The uncertainty, contained in the former Act, that implied that

there was a statutory duty to erect and maintain such a fence, has been removed. (Section 3)

However, while a property owner may erect a fence, which is in conformity with the law, upon his own land without consulting his neighbour, where he chooses to have it placed upon the common land which is the boundary line he must be prepared to share his neighbour's opinion, or an arbitration of it, as he would share the land.

Principal Procedures

The statute provides explicit procedures to be followed in the several different circumstances which may arise in its application. These include:

- agreement between owners;
- arbitration of disputes as to the construction, reconstruction and maintenance of fences (Appendix "A");
- appeals against an award of the fence-viewers arising from such a dispute (Appendix "B");
- certification procedures where work has not been carried out in accordance with an award (Appendix "C");

- certification procedures where payment has not been made by a party in accordance with an award (Appendix "D");
- procedures for recovery of costs which have been certified (Appendix "E");
- determination procedures where work has been improperly done (Appendix "F"); and
- procedures for the payment and recovery of the costs of proceedings (Appendix "G").

Unfortunately while the Act appears to have been extremely well drafted from a legal standpoint and procedures are eminently workable and complete, they do not:

- spring readily from the page of the statute in clear chronological order;
- are complicated by the need to have reference to regulations prescribing the types of forms to be used; and
- are further complicated by the fact that in many instances no forms are prescribed to meet the requirements of the statute.

In fact, the procedural structure of this statute will more

closely resemble the interlocking circles of the Olympic flag than it does a straight line chronological progression.

Individual analysis of those procedures is a time-consuming project. It has however been dealt with in detail in the seven appendices "A" to "G" setting out the step-by-step procedures under the Act, contained in PART VI of the book "Fences in Ontario", a copy of which you have received at the commencement of this seminar.

If you turn to page 153 of the book for Appendix "A" you will see also that the procedures referred to include reference to the prescribed form number, the Municipal World form number (these forms are being used extensively throughout the province) and also to the relevant section or sections of the statute and the time allotted for completing the procedure.

If you will turn to page 156 at the end of the first procedures in Appendix "A" you will see also that a closing reference is made to the alternative interlocking procedures to be followed depending upon whether the award is to be appealed or alternatively enforced under one of the other procedures.

Each of the other appendices follows a similar format describing both the procedure or the alternative procedure to be followed and the subsequent steps to be regarded when that procedure is completed.

The procedures set out in the book have been in widespread use throughout this province since it was first published one year ago.

By having reference to these recommended procedures, in conjunction with the statute, published commencing at page 5 of the book, I believe that you can save a considerable amount of time and avoid the possibility of missing a vital step in the process.

Without going into the procedures in detail let me now highlight a number of important points.

Agreement by owners

While the statute confers upon an owner the right to request the attendance of fence-viewers it first contemplates that the owner and the adjoining owner will attempt to seek an amicable agreement. (Section 16 and 22 (3))

It is important to recognize that to be enforceable, any such agreement must be:

- in writing; and
- in the prescribed Form 14 or 15.

Of particular importance to land surveyors is the requirement that the form contain a:

- description of the owner's lands and a description of the

adjoining owner's lands which are "...sufficient for registration in the appropriate Land Registry Office".

As with all other documents which may be registered under the Act no duty is imposed on either party to register an agreement. However, such a document "may be registered and enforced as if it were an award of fence-viewers".

Dispute between owners

In circumstances in which no agreement can be reached between owners and a dispute arises as to the construction, reconstruction and maintenance of a line fence the procedures set out in Appendix "A" of the book will apply.

To commence these proceedings either owner may notify the clerk of the local municipality in which the land is situate that he desires to have the fence-viewers arbitrate in the matter.

While the Act is silent as to the method of giving notice and as to the form of notice, the regulations made under the Act require that the notice be in writing in the prescribed form.

Again, of immediate consequence to surveyors, is the requirement that the form contain a description of both the lands of the owner and the adjoining owner which must be "sufficient for registration in the appropriate Land Registry Office".

The intention here clearly is to place responsibility for an accurate description upon the party making the application.

Upon receipt of the application the municipal clerk, or a person designated under the Act by council, will assume full responsibilities for:

- giving the required notices;
- in the prescribed form; and
- in the manner prescribed by the statute.

Jurisdiction of fence-viewers

Before embarking upon an arbitration the fence-viewers must determine whether or not they have jurisdiction to arbitrate in the dispute. This may be contingent upon a number of factors some of which cannot be spoken to with great certainty.

Prior to calling in the fence-viewers the municipal clerk should ensure that:

- the notices, required by statute, have been sent to respective parties; and
- that the boundary line between the properties is not in dispute (the form of "owners request for fence-viewers (dispute)" contains a statement to this effect, placing the onus upon the applicant); or

- whether the circumstances are influenced by planning or other legislation which may void the fence-viewers jurisdiction.

Failure to give proper notice and the existence of a duty or obligation upon one of the parties for the construction of a fence may bar jurisdiction to the fence-viewers.

Disputed boundary lines

In a number of instances attempts have been made to call in fence-viewers in circumstances in which a boundary line is in dispute. Fortunately, the courts have long since decided that the Act does not confer authority upon fence-viewers, or a judge upon appeal to settle questions of title to lands or to determine the location of a disputed boundary line.

If there is a dispute as to where the true boundary is, and the parties cannot agree, such dispute can only be settled by the courts under authority outside of The Line Fences Act. This point was well settled by the courts in 1908 in the case of Delamatter v. Brown and was followed in Griffin v. Catfish Creek Conservation Authority in 1978 and again in the case of Jacobs and DiTomasso, decided in July, 1980 under the new statute.

To avoid the possibility of matters moving to an advanced stage in proceedings before disputes as to a boundary line are identified the initial Form 1, to be filed by the owner requesting fence-viewers, requires the applicant to make a

statement that "the boundary line between our lands is not in dispute."

If the owner requesting fence-viewers is unwilling or unable to make this statement the clerk should reject the request for fence-viewers and advise the owner to seek professional advice to resolve the dispute before invoking the proceedings under the Act.

Duty of fence-viewers

Where fence-viewers are called upon to arbitrate in a dispute the Act stipulates that the fence-viewers;

- shall examine the premises, and
- if required by either adjoining owner shall hear evidence; and
- may examine the owners and their witnesses under oath.

Of crucial importance, the Act further requires that, in making the award the fence-viewer shall have regard to:

- the suitability of the fence to the needs (formerly wants) of each of the adjoining owners or the occupants of the lands;

- the nature of the terrain on which the fence is or is to be located; and
- the nature of fences in the locality; and
- may have regard to any other factors they consider relevant.

The Act further imposes a duty upon the fence-viewers to have regard to any by-law in force in the municipality under The Municipal Act.

The prescribed Form 4 "Fence-viewers Award (dispute)" includes a statement to the effect that the fence-viewers "...having examined the lands and duly acted in accordance with The Line Fences Act, 1979 award as follows".

It is arguable that by this statement the fence-viewers are indicating that they have had regard to all the factors necessary and that they have so certified in their award. However it is necessary that the records maintained by the fence-viewers setting out the evidence considered, clearly indicate that regard has been had to all of the relevant factors.

In cases decided under other legislation, though in similar circumstances, the courts have held that a failure to obey a statutory dictate to have regard to all factors will void the proceedings.

Apportionment of responsibility

One of the most significant features of the new legislation is found in section 7 which provides a more definite method whereby the fence-viewers are to establish the apportionment of responsibility.

In essence the new legislation is saying that:

- the fence-viewer shall designate responsibility for the work on a 50/50 basis between owner and the adjoining owner, unless

- the fence-viewers, in the circumstances of the case, consider an award in those terms "to be unjust", in which case the fence-viewers may make such award in respect of the construction, reconstruction, repair or maintenance of the fence that they consider appropriate (Chapter 11 - Page 50).

While it may be convenient for fence-viewers simply to make the designation on a 50/50 basis they should always have regard to the fact that their determination is subject to review by the courts and that in many circumstances a 50/50 apportionment would in fact be unjust. Such an apportionment should be viewed as only one of the possible alternatives.

See also Section 23 (3) as to the limitation that the Crown not be required "...to be responsible for more than one-half of the fence or to pay the adjoining owner an amount exceeding 50% of the cost of the fence".

Appeal against award

An owner dissatisfied with an award may now appeal to the judge of the Small Claims Court. (Section 9 (1))

Prior to the 1979 statute the appeal was to the judge of the County or District Court who was required to follow the practice and procedure on appeal "...as nearly as may be, as in the case of a suit in the Small Claims Court".

While the change in the judge may seem of minor consequence, in fact it has created a number of problems which appear to arise from:

- the fact that owners, acting on their own behalf, and even legal counsel, appear to be unfamiliar with the new Act;
- the fact that certain Small Claims Court judges are also unfamiliar with the requirements of the legislation and their responsibilities under it; and
- confusion as to the role of fence-viewers when an award has been appealed.

The Act imposes a duty upon the judge of the Small Claims Court to hear and determine the appeal and states further that he:

- may set aside, alter or affirm the award, or
- correct any error therein, and
- may examine the parties and their witnesses on oath, and
- may inspect the premises, and
- may order payment of cost by either party and fix the amount of the costs.

The decision of the judge is final and the award, as altered or affirmed, shall be dealt with in all respects as it would have been if it had not been appealed from. (Section 9 (5))

The jurisdiction of the Small Claims Court is unlimited as to the amount of the award.

Problems on appeal

On a number of occasions complaints have been received since the enactment of the new legislation about the practices and procedures in the Small Claims Court.

On at least two occasions decisions have been rendered which were unenforceable. For example:

Failure to require construction of a fence - In a decision heard

in the Small Claims Court in the County of Simcoe, Tonissoo and Ayers the judgment failed to maintain the integrity of the original fence-viewers award which had required the construction of a fence.

The judge concentrated on determining a more appropriate apportionment of the costs but made them applicable "...if a fence is required separating the two adjoining properties".

In the absence of a clear direction by the court requiring the construction of the fence the award could not be enforced.

This decision was handed down on October 6, 1980 and I understand complicated negotiations are still underway between the parties to resolve this matter.

Failure to extend time for completion of award - In another instance affecting a decision in the City of Mississauga, the award was appealed and the period for completion of the work, set out in the award as required by statute, expired before the appeal was handed down.

The court failed to provide for an extension of the time and once again the appeal decision was ineffectual.

Fence-viewers "functus officio" after award given - In other instances on appeal, fence-viewers have been requested to attend before the Small Claims Court, and in at least one instance had been subpoenaed to do so.

These circumstances immediately raised the question as to whether or not the fence-viewers should be represented by legal counsel and who should pay the cost of such representation.

However, there was a much more fundamental question that should have been determined. Why were the fence-viewers being required to attend before the court at all?

In many instances a tribunal, of the nature of fence-viewers, is considered to be "functus officio" once they have performed their statutory function, in this case the making of the award.

In my opinion it would be as inappropriate to subpoena fence-viewers to appear before the Small Claims Court on an appeal as it would be to subpoena the judge of a lower court to appear before the Court of Appeal to explain his decision.

While the Act is silent on this point, clearly the fence-viewers are "functus officio" with respect to the making of the award and notwithstanding the fact that they are entitled to a notice of the hearing of the appeal (Section 9 (3)), in my opinion they have no place in the proceedings on the appeal. Any attempt to subpoena them to attend should be immediately challenged.

Land surveyors responsibilities

In some circumstances I understand that land surveyors have been appointed to act as fence-viewers. However, except in those

circumstances, the role of the land surveyor under the new legislation is a very limited one.

Employment by owner - Throughout the Act the necessity for accurately describing land is placed upon either:

- owners entering into an agreement respecting a line fence (Section 16 and 22); and

- upon an owner requesting the attendance of fence-viewers (Section 4 (1)).

In both these instances your professional advice may be necessary.

Employment by fence-viewers - The fence-viewers, however, may only employ an Ontario land surveyor in one circumstance. That arises in a situation in which:

"Where, from the formation of the ground by reason of streams or other causes, it is, in the opinion of the fence-viewers, impractical to locate the fence upon line between the lands of the adjoining owners..."

In such circumstances they may locate the fence either wholly or partly on the land of either of the adjoining owners where it seems to be most convenient.

Where this occurs they may employ an Ontario land surveyor to have the location of the fence described by metes and bounds.

Such location does not in any way affect title to the land.
(Section 7 (4) and (5))

The procedures to be followed for the payment of land surveyor's fees are set out in Section 17 (2) (3) and (4) of the Act and the procedures to be followed are described in more detail in Appendix "G" of the book.

Attendance upon appeal - Unlike the fence-viewer, who is part of the initial decision-making process when making his award, a land surveyor may be requested, or subpoenaed, to attend before the Small Claims court as a witness where an award is appealed. In such circumstances the Ontario land surveyor is entitled to the same compensation as if subpoenaed in a Small Claims Court.
(Section 17 (1))

As our experience with the new statute grows:

- both our understanding of its procedures and limitations;
and
- our ability to apply it effectively will increase.

Though it is a continuance of some of the oldest legislation in this province it nevertheless remains somewhat of an indictment of man's intolerance towards his neighbour. Hopefully, in most circumstances questions concerning line fences will be resolved amicably between the parties without recourse to this Act, though that is more likely to occur, where your professional services are retained.

APPENDIX "A"

Responses to written questions submitted following the presentation of this paper.

Conventional line - Comment on a conventional line being established on an award of fence-viewers where the line is marked at both ends, but no fence was ever built. The award is on deposit in the Registry Office. Is this a legal boundary? (The line was established prior to the present Act.)

The essential element in establishing a conventional line is the making of an agreement between the respective owners.

The fence-viewers have no authority to make such an agreement on behalf of the parties and consequently cannot establish a conventional line. In the absence of an agreement between the owners to establish a conventional line the fence-viewers award would appear to have effect upon the title to the properties.

Conflict of interest - If a surveyor wears two hats - of a surveyor and a fence-viewer - is there a conflict of interest?

The Act is silent as to conflict of interest and The Municipal Conflict of Interest Act, 1972 (and the proposed new statute, The Municipal Conflict of Interest Act, 1981) are not applicable to fence-viewers.

In the absence of any prohibition in the Ontario Land Surveyor's Code of Conduct or other rules established by the Association there would appear to be no legal impediment prohibiting the fence-viewers from retaining the services of one of their members to conduct a survey in the limited circumstances contemplated in section 7 (5) in which the fence-viewers may employ a surveyor. However, as justice preferably should always be "seen to be done..." it would be prudent to avoid such a situation where another surveyor is available to carry out the survey. It should be noted also that the employment of a surveyor pursuant to Section 7 (5) is permissive.

Line Fences Act unworkable - I spoke to several clerks this past week about The Line Fences Act. They said that it was generally unworkable. People are dissatisfied with awards and appeals seem to go endlessly. Please comment.

In my opinion The Line Fences Act, 1979 represents a major improvement in this legislation. While the procedures in the statute are obscure they are nevertheless complete and if reference is had to the step-by-step procedures set out in the book "Fences in Ontario" they are eminently workable. Furthermore, appeals cannot go on endlessly as the "...decision of the judge is final..." (See Section 9 (5))

Type of fence to be specified - May fence viewers say what type of fence shall be erected?

Yes. The award of fence-viewers "shall specify...the description of the fence, including the materials to be used in the construction, reconstruction, repair or maintenance and keeping up of the fence..." (See section 7 (1) (c))

Line of convenience - Please define a line of convenience.

Presumably this is in reference to the circumstances in which the fence may be located off the boundary line "...where it seems to be more convenient..". While for practical purposes it would be prudent for the fence-viewers to establish such a line in consultation with the owners affected, the final determination as to the line is a matter solely within the discretion of the fence-viewers, subject to an appeal to the judge by any owner who is dissatisfied with the award. (See Section 7 (4) and (5))

Description for registration - Whose responsibility is it to determine whether a description is suitable for registration?

The statute places the onus upon the owners entering into an agreement or alternatively upon the owner requesting the attendance of fence-viewers to provide a description "...sufficient for registration in the appropriate Land Registry Office". (See Section 16, 22 (3), prescribed forms 14 and 15 and Section 4 (1), prescribed form 1)

In circumstances in which a description does not appear to be sufficient for registration the municipal clerk would be well

advised to reject the application and request the owner to seek clarification of the acceptability of the description before proceeding.

Survey subsequently invalidated - effect on award of fence-viewers

Responsibility for costs would have to be determined, having regard to all the facts in those circumstances. Under the new statute the onus is placed upon the owner making the request for fence-viewers to provide a description "...sufficient for registration in the appropriate Land Registry Office" and also to certify that the boundary line is not in dispute.

If an insufficient description is given or the fence-viewers proceed upon the advice of the applicant, in circumstances where the boundary line is in dispute, it is arguable that the courts would find that the person making the application was liable for all costs incurred as a result of his improper statement.

Boundary line in relation to placing of wire - If a fence is constructed with 50% wire on one side and 50% on the other may we assume that the line is along the centre line of that fence?

While, in circumstances in which the practice of "face the centre post - the fence on the right is your responsibility" has been followed this may be a reasonable assumption, it should not be considered conclusive and other evidence as to the line should be

sought. See "Fences in Ontario", page 85 for a discussion of this practice.

Wooden fence - determining boundary - Would the same situation exist if the fence was a wood fence?

All the evidence available should be weighed in determining the boundary line. For an example of circumstances affecting a flat board fence and other fences along boundaries see "Fences in Ontario", at page 61.

Unopened road allowance - In the circumstance in question a property, upon which is a pine tree plantation, is separated by an unopened road allowance, from a property upon which cattle are pastured. Who is responsible for fencing to prevent the cattle straying into the pine tree plantation?

In the absence of fences the owner of the cattle has a common law duty to restrain them. A leading authority states:

"At common law the owner of animals is bound to keep them from his neighbour's lands and an owner is not required to protect his property from them... it is also unlawful to permit them to run at large on the highways...The Municipal Act it will be seen, empowers local authorities to alter the law in this respect."

The Law of Canadian Municipal Corporations by Ian MacF. Rogers, Q.C., Second Edition, paragraph 173 at page 949 and 950.

The duty of the owner of cattle to restrain them, and the fact that this duty cannot be offset by a failure of an adjoining owner to maintain that part of the line fence for which he was responsible, is well enunciated in the judgement of Thompson C.C.J., in the case of Acker v. Kerr (1973), 42 D.L.R. (3d) 514; 2 O.R. (2d) 270 (Co.Ct.). For a discussion on this subject see "Fences in Ontario" chapter 6, at page 31.

Further, The Line Fences Act, 1979, provides in Section 18 (1) that:

"Where there is an unopened road allowance lying between the lands of two owners not enclosed by a lawful fence, it is the duty of the fence-viewers, when called upon, to divide the road allowance equally between the owners of the lands, and to require each owner to construct, keep up and maintain a just proportion of the fence to mark the division line, but nothing in this section in any way affects or interferes with the rights of the municipality in the road allowance or is deemed to confer any title therein upon the owners or either of them."

It should be noted that no proceedings should be initiated under this section unless:

- the road allowance is unopened;

- is not enclosed by a lawful fence; and
- effective September 12, 1979, the date upon which The Line Fences Act, 1979 came into force, such proceedings may not proceed without the approval of the council of the municipality in which the original allowance for road is situate.

If the enclosure is made by other than a lawful fence and a by-law has been passed for prohibiting the building or maintaining of fences upon highways the owner may be compelled to remove it.

See "Fences in Ontario" chapter 25, at page 104 for a discussion on this subject.