Ontario Ministry of Consumer and Commercial Relations

Legal and Survey Standards Branch

The Boundaries Act

One of the problems which constantly faces surveyors is to decide when the calls of a deed can be favored over physical evidence. Some surveyors seem uncertain whether their responsibility as professionals places the onus on them to extend their research to interviewing witnesses to obtain evidence relating to the boundary, and to then measure the actions of the parties to the transaction which created the boundary, in order to establish a priority for evidence being weighed.

Such a case came before the Boundaries Act Tribunal in a 1978 application. From the testimony and evidence presented the facts were established as follows:

In 1934 A purchased a portion of a township lot. He subsequently conveyed 3 parcels out of the south-east corner of this property fronting on a County Road as shown in the sketch attached.

The 1952 conveyance to B had a frontage of 237 feet on the County Road and a depth of 247.5 feet. It was the northerly boundary of this 1952 conveyance to B which was the subject of the Boundaries Act application.

The portion conveyed to B was subsequently divided and the northerly half conveyed to a subsequent owner in 1959 and hence to the current owner B1, in 1972.

The current owner B1, objected to the boundary under application.

A's son, A1, became the owner of the remainder of A's property by an executor's deed.

In testimony before the tribunal B testified that when he purchased what he called "the wood lot," from A in 1952, they did not engage a surveyor but chose to mark the boundaries themselves. They made their own measurements, placed pickets along the boundaries and took the measurements to a solicitor who drew the conveyance for them. They returned to the property and erected a post and wire fence along the northerly boundary of the property, sharing both the labour and cost of the materials.

B further testified that he had always considered the fence to be the northerly boundary dividing his and A's property. After he sold, B passed the property frequently and observed the fence up until the time it was removed by A1 in 1974. He testified that, in his opinion, the chestnut anchor post set by him and A at the westerly end of the original fence in 1952, is the same post and in the same position, today.

A1 corroborated B's testimony concerning the events of the erection of the fence which he assisted in building at the time. He also testified that he had considered this fence to be the common boundary between his father's and B's land.

In 1974 A1 engaged surveyor 1 to survey his lands so he could sell a portion and retain part. The original fence constructed by A and B in 1952 was removed by A1 in 1974, with the exception of the westerly corner post. Sometime subsequent to this A1 and the current owner of the lands south of the boundary under application, B1, had a dispute as to the position of the boundary.

A1 testified that he had always considered his ownership as extending to the old fence and that he was not aware until he saw surveyor 1's bars when the snow melted, that surveyor 1 had established a line some 4 feet north of the fence, as his southerly boundary.

A1 and B1 could not agree on a site for the erection of a new fence and in 1976 B1 retained surveyor 2 to survey his northerly boundary.

The surveys by surveyors 1 and 2 were in agreement as to the position of the common boundary now in dispute. Subsequently B1 erected a number of fence posts along the surveyed line. Surveyor 3, the surveyor who prepared the plan for the Boundaries Act application at the request of A1, testified that a re-establishment of the boundary as originally described using the called-for distance from the deeds, from the north-east angle of the registered plan, placed the deed boundary approximately 4 feet north of the evidence of the former old fence line. This evidence consisted of the old corner post at the westerly end, and an old fence post hole and a standard iron bar found at the easterly end of the line.

Surveyor 3 discussed the position of the boundary with his client A1, and upon being advised of when and how the original fence was located, he was of the opinion that the old fence line constituted the best available evidence of the boundary as it was created and described in the conveyance to B in 1952. It was surveyor 3's further opinion that the deed tie from the north-east angle of the registered plan lying to the south, was in error although he did admit that there was a shortage of some 2.66 feet in the frontages of deeds between the north-easterly angle of the registered plan and the boundary under application. Surveyor 3 stated that the surveys by surveyors 1 and 2 on the boundary in dispute, were in agreement with the deed description, but based on the evidence of the old fence line it was his opinion that the original tie distance was in error.

No evidence was presented on behalf of the objector B1 except the plans of survey by surveyors 1 and 2.

In summarizing the arguments by counsel for both the applicant and the objector, the tribunal wrote:

"Applicant's counsel argued that the intentions of the parties to the original severance which created the boundary presently in dispute is self-evident from their actions, i.e. to limit the extent of the conveyance to the boundaries as initially marked out on the ground by pickets and subsequently by fencing, and that the intention should prevail over written words in the deed. In support of this argument counsel referred to the case of Doe D. Appleby v. Secord (1882) 22N.B.R. 377 (C.A.)"

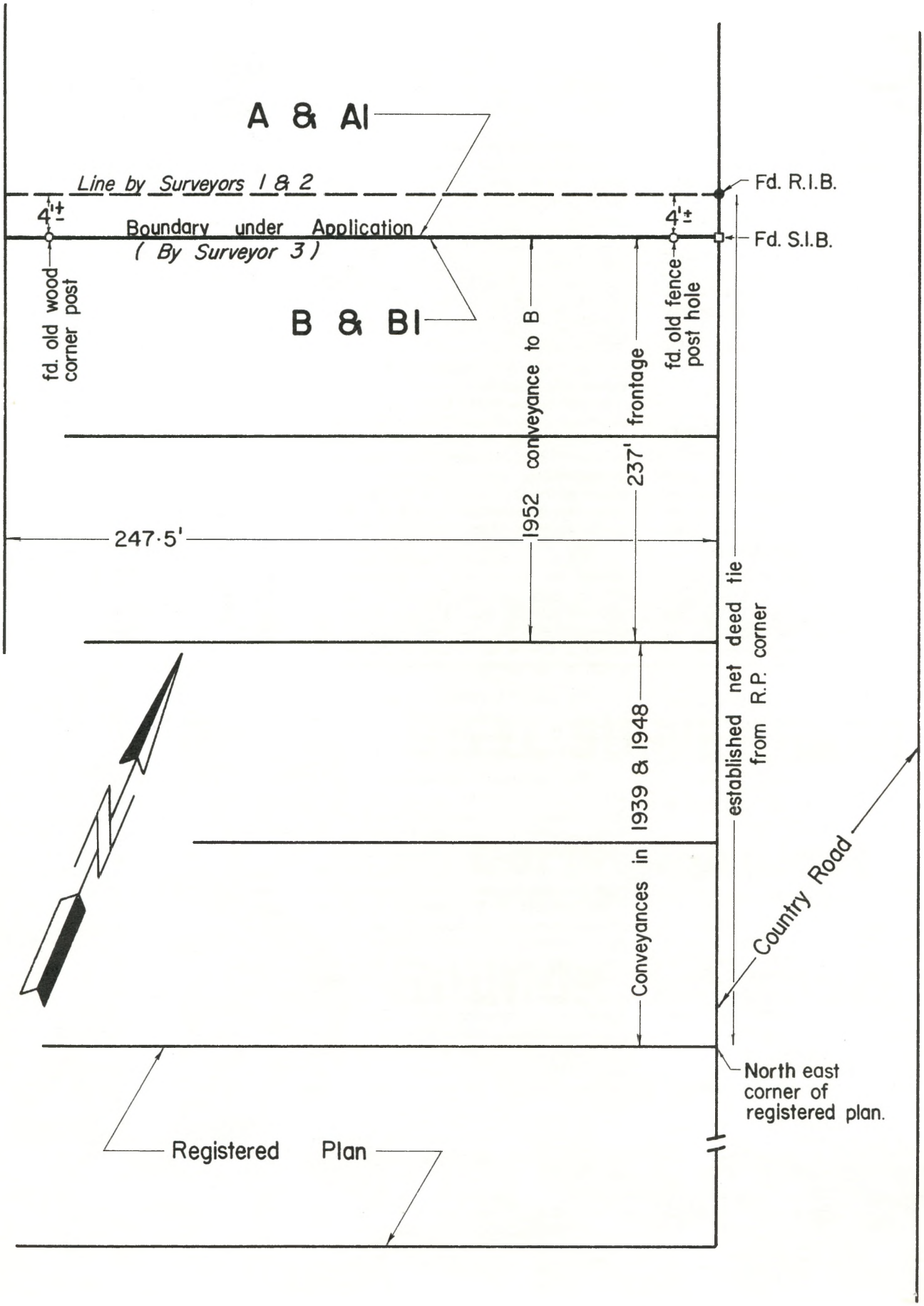
"Objector's counsel argued that the intentions of the parties are clearly reflected in the deed and that the description contained therein should prevail over a fence erected in error. Counsel argued that the issue of occupation to the old fence line was a matter of adverse possession and not one of misdescription."

In delivering judgement the tribunal wrote as follows:

"I find as a matter of fact based on the evidence that (A), the vendor, and (B), the purchaser, in 1952 erected a fence to define the northerly boundary of the intended conveyance. I also find that this fence remained in the same position until 1974 when it was removed by (A1), with the exception of an anchor post at its westerly extremity and that surveyor (3) has re-established the position of that fence as shown by a heavy, solid line on the draft plan before the hearing."

"It is clear to me that the intention of the parties was to limit the conveyance to the boundaries as fenced and that they

cont'd on page 19


A & A1
Line by Surveyors 1 & 2
4'±
Boundary under Application
(By Surveyor 3)
4'±
Fd. R.I.B.
Fd. S.I.B.
B & B1
fd. old wood corner post
1952 conveyance to B
237' frontage
fd. old fence post hole
247·5'
established net deed tie from R.P. corner
1939 & 1948 Conveyances in
Country Road
North east corner of registered plan.
Registered Plan

THE BOUNDARIES ACT

cont'd from page 17

should be so bound, regardless of any words or measurements in the deed, which words or measurements were intended to reflect what had actually occurred on the ground. This principle was upheld in McDonald v. Knudsen (1928) 3 D.L.R. 242 (C.A.) Quoting from the headnote:

> *"Where a vendor goes on the ground with the prospective purchaser of part of it and a surveyor, and the part that the purchaser intends to and does purchase is then staked on the ground, the fact that a wrong description is inserted in the deed does not give the vendor or those claiming under him the right to eject the purchaser after sixteen years peaceable possession of the land as staked."*

"The action of a surveyor employed by either or both or the parties has, in my view, no more legal effect than what they could do for themselves."

"The unalterability of the position of this boundary is also supported by the principles of first survey, peaceful possession and acquiescence."

Given the evidence and the foregoing principles of law the tribunal ruled:

> "I am .... satisfied that the plan (the plan by surveyor 2) is in error in the definition of the common boundary between (the lands of A1 and B1) which boundary is correctly shown on the draft plan before the hearing by ..... Ontario Land Surveyor (3)." ●

Confirmation and Condominium Section,
Legal and Survey Standards Branch.
January 1981.