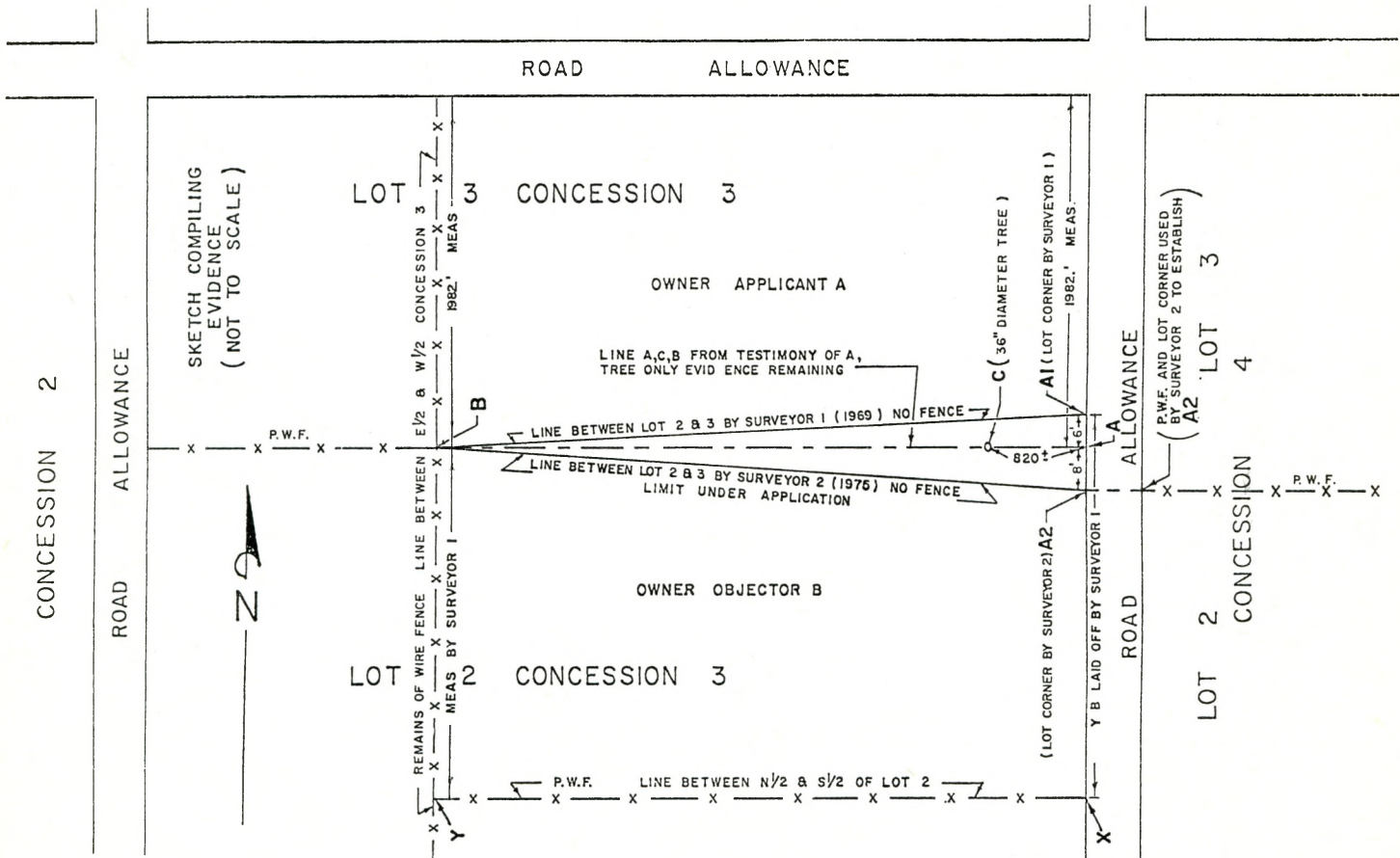




# The Boundaries Act



## BACKGROUND: THE PROBLEM

**T**HE BOUNDARIES Act decision summarized here is a mix of the fence as best evidence, the use of the Surveys Act and the testimony of a lay witness.

The boundary under application is the boundary between Lots 2 and 3 extending westerly from the road allowance between Concessions 3 and 4 to the half lot line. This is a double front system with lots measuring 30 x 66.67 chains. The line between Lots 2 and 3 we are considering, was not run in the original survey. The current Surveys Act and its predecessors have laid down the method of re-establishing unrun lines in this type of Township by instructing surveyors to run from the lot corners at the front corners of the half lots on the course of the governing line.

Since the devolution of title is not germane to either the evidence or argument, it is not summarized.

Essentially it came down to a dis-

agreement between two surveyors as to the correct method of establishing a lot line. Both surveyors accepted the same point, B (see sketch) as evidence of the position of the lot line. However, at the road allowance between Concessions 3 and 4 their methods are quite different. Surveyor 1, working from the south side, in Lot 2, established the northeast corner of Lot 2, labelled A1, from the line XY, which is the line between the north and south halves of Lot 2, in the east half of the concession. He obtained his "layoff" distance by measuring the distance YB from this line to the point B on the line between Lots 2 and 3 along a fence on the front of the concession. He then laid off this distance YB northerly along the front of the concession from the point X to establish his lot corner at point A1. He joined point A1 to the point B for the position of the lot line.

Surveyor 2, on the other hand, treated the lot corner at the road allowance between Concessions 3 and 4 as a "lost corner" and established this corner at point A2 by using the lot corner opposite

it in Concession 4 as an "undisputed corner", in a method provided in the Surveys Act for the re-establishment of a lost corner in a double front system. Surveyor 2 then joined point A2 to B for the position of his lot line. The distance between points A1 and A2 is 14 feet. As mentioned both Surveyor 1 and Surveyor 2 agree on the position of point B on the lot line at the half lot line. The manner in which this point was established is discussed herein.

Also shown on the sketch is a straight line ACB. The origin of the point C and the evidence surrounding this line is discussed herein. Essentially it is the result of joining point B to point C and producing it to the front of the concession on the strength of the testimony of a witness that a fence once existed along this line.

And so our sketch shows what appears to be three choices for the missing lot line, namely:

1. The line A2B by Surveyor 2, which was also the boundary place under application.



- The line A1B which was surveyed by Surveyor 1 for owner B, in a previous survey.
- A third possibility is shown; that is, the position of a line reconstructed from the testimony of owner A, the applicant in this case. It is noted that this line is some 8 feet north of the point at the front of the concession set by Surveyor 2 on A's behalf. It is also noted that the line A2B is more beneficial to A than the line ACB.

**EVIDENCE: TESTIMONY  
EXPERT EVIDENCE**

Surveyor 2 who surveyed the boundary under application for A, testified that he had considered the evidence of Surveyor 1's survey and decided he couldn't accept it. He was aware from talking to his client A that there had once been a fence along this property line which had been removed before either surveyor came on the scene. He testified that since the position of the fence, on the oral evidence of his client A, could not be verified by either field or documentary evidence, he considered the north-east corner of Lot 2, Concession 3 as a "lost Corner" as defined in Clause J of Section 1 of The Surveys Act, R.S.O. 1970, and re-established its position from evidence of the lot corner opposite, on the easterly side of the road in accordance with Section 24(2) of the Act (point A2 on the sketch). Surveyor 2 accepted the position of the lot line fence opposite the "lost corner" as the "undisputed corner" called for by the Surveys Act. The line between Lots 2 and 3 was then run westerly in a straight line to the point B which both surveyors accepted as marking the position of the lot line at the half lot line.

**EXPERT EVIDENCE**

Surveyor 1 had surveyed the line between Lots 2 and 3, Concession 3, some years earlier on the instructions of B who is an objector to this application. It was A's disagreement with this survey which sparked the Boundaries Act application.

Surveyor 1 testified that he found a fence along the north and south halves of Lot 2, (labelled XY on the sketch) and a steel fence post marking the intersection of this line with the remains of a fence line running northerly along the east and west halves of the lot (at the point Y in the sketch). He also found a fence along the line between Lots 2 and 3 in the west half of the concession. There was no fence along the line between Lots 2 and 3 in the east half at this time (testimony established that this fence had been removed several years previously). Since the fence in the west half of the Concession on this line was fairly well established and continued to the line between the east and west halves of the con-

cession, Surveyor 1 was able to establish the point B on the line between Lots 2 and 3 at this intersection. There is no disagreement between the two surveyors as to the position of point B, although one would expect a jog at this point due to the manner in which the Surveys Act prescribes the running of these lot lines. This was generally not the case in Anderton Township.

Surveyor 1 measured the distance YB between the points established according to the occupation at the rear of the north half of Lot 2 as discussed herein and laid off the identical distance at the front along the concession road from point X on the half lot line between the north and south halves of Lot 2, to re-establish the northeast corner of Lot 2 at the point A1. The line A1B joining this point to the evidence of occupation at the point B, followed a "dead furrow" the limit of cultivation between the fields along the lot line. Surveyor 1 testified that he believed this to be a limit of occupation acknowledged by both owners A and B. However, Surveyor 1 did not discuss the position of this lot line with A or B, but did place some markers along the line. Surveyor 1 testified that while the line of cultivation, or "dead furrow", may have been 2 or 3 feet south of his line, it was not in the order of 6 feet as owner A had testified. He testified that he believed that the bearing of his line A1B, was very close to the governing bearing in this area.

**LAY EVIDENCE**

The applicant A, testified that he had been farming the east half of Lot 2, Concession 3 since 1943 although he had only been the owner since 1953. He testified that in 1943 when his mother owned the property, there had been a post wire fence along the line between Lots 2 and 3 from the road allowance between Concessions 3 and 4, to the half lot line. South of this fence there had been a drainage ditch which drained easterly into a larger drainage ditch along the road allowance.

A further testified, that in 1943 the line fence touched the north side of a 24 inch diameter tree which is shown on the sketch (point C) to be approximately 820 feet west of the road allowance and which now has a diameter of some 36 inches. In 1953 part of the fence was removed with the exception of some 500 or 600 feet along the lands of the adjoining owner B who objected to this application. B at the time was pasturing cattle in this area. About 1965 the remainder of the fence was removed and the drainage ditch filled in and both owners commenced tilling the lands up to the lot line. In the same year the drainage ditch along the road allowance between Concessions 3 and 4 was moved and deep-

ened destroying the corner post and the physical evidence of the lot line at the front. The only evidence remaining along this lot line was the aforesaid 36 inch tree shown on the sketch.

A testified that he had continued farming his land up to the position of the former fence until 1969 when he found that Surveyor 1 had run the lot line for B. A adjusted his cultivation line to Surveyor 1's line even though he estimated the former fence line to be approximately 6 feet south of Surveyor 1's line at the east end and approximately 1' to 2' south at the half lot line. A further estimated that the former fence where it met the road allowance between Concessions 3 and 4, had been some 8 feet north of the lot line fence across the road in Concession 4.

It should be noted that A had never agreed with Surveyor 1's positioning of the lot line in his survey for B and indicated this as a matter of record within a few years of Surveyor 1's survey. In 1975 A retained Surveyor 2 to reestablish the line between Lots 2 and 3 for an application under the Boundaries Act.

**STATUTE LAW**

The Surveys Act, R.S.O. 1970, Section 24 (2).

*"If the lost corner is a corner of a lot on a township boundary or on a concession line, he shall determine the distance between the two nearest undisputed corners, one being on either side of the lost corner, and he shall reestablish the corner by dividing the distance proportionately as intended in the original survey having due regard for any road allowance made in the original survey, but where there is an undisputed corner on the other side of the road allowance opposite the lost corner, he shall reestablish the lost corner from the position of the undisputed corner . . ."*

**CASE LAW**

Although not cited in the original decision the following excerpts of case law might be helpful. Palmer V. Thornbeck, (1877) 27 U.C.C.P. 291 (C.A.):

*"In all actions brought to determine the true boundary line between properties, the burden of proof lies upon plaintiff who seeks to change the possession".*

Bateman & Bateman V. Pottruff (1955) O.W.N. 329 (C.A.), quoting from Diehl V. Zanger (1879), 39 Mich. 601:

*"... and that a long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared".*

Kingston V. Highland, (1919) 47 N.B.R. 324 (quoted from the Canadian Abridgement).



"Occupation as evidence. The original lines must govern, and the laws under which they were made must govern, because the land was granted, was divided, and has descended to successive owners under the original lines and surveys; it is a question of proprietary right. The general duty of surveyor in such a case is plain enough. He is not to assume that a line is lost until after he has thoroughly sifted the evidence and found himself unable to trace it. Even then he should hesitate long before doing anything to the disturbance of settled possessions. Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary, when no other is attainable, and the surveyor should inquire when it originated, how and why the lines were then located as they were, and whether claim of title has always accompanied the possession, and give all the facts due force as evidence".

### REASONS AND JUDGEMENT

In delivering judgement, the tribunal wrote as follows:

"The concern of the hearing is to determine by the best available evidence the true position on the ground of the line between lots 2 and 3 in the east half of Concession 3.

"The evidence clearly indicates that a line fence existed along or near this lot line for a great many years, at least as far back as 1943, and probably much earlier, until 1965 or 1966. The evidence of Surveyors (1) and (2) clearly indicates to me that had this fence still been in existence at the time of their surveys they would have accepted this fence line as the best available evidence of the lot line as originally run, whenever that may have been.

"The evidence of Surveyor (1) was that he did not enquire of the owners as to any prior existing fence, or where they viewed the lot line to be. (B) was shown the position of the line after it had been determined by his Surveyor. The Surveyor was of the opinion that his survey method was appropriate since the line so re-established was in close agreement with the line of cultivation between the fields".

"Surveyor (2) chose to disregard the evidence of his client that the former fence line was 6 feet south of the Surveyor 1 line and relied on the fence line across the road. From the testimony given in the hearing, some doubt exists as to the reliability of this fence line. In any event, the applicant's submission through counsel is that the true position of the line is not in accordance with the Surveyor 2 survey, but follows the former fence line, which was, according to the applicant's testimony, approximately 8 feet north of the Surveyor 2 line at the front.

"I am in agreement that the true position of the lot line was defined by the former fence line and the problem is to determine whether the applicant's memory as to its location, or the evidence of cultivation found by Surveyor 1, is the best evidence as to its former location. It was acknowledged that the "dead furrow" between the fields could have varied from 2 to 3 feet from the Surveyor 1 line.

"I was impressed by the applicant's candid testimony with respect to the boundary, which testimony did not support his own surveyor's opinion as to the position of the lot line. I believe that after farming a particular piece of land for over 35 years the applicant would know the former location of the fence line, even though all direct evidence, with the exception of the tree, had been removed. His was the only testimony presented in the hearing concerning the fence line, as the evidence clearly indicates that the fence had been removed before the surveyors appeared on the ground. The uncontested testimony of A that the fence line was 6 feet south of the Surveyor 1 line at the front, and was straight from front to rear and touched the north side of the tree that still exists today, is supported by drawing a line 6 feet south of the Surveyor 1 iron bar at the front to the Surveyor 1 iron bar at the rear, which line, based on information shown on the draft plan, would pass just to the north and very close to the existing tree.

"After giving full consideration to all the evidence presented in the hearing, the material filed in support thereof and the submission of counsel, I accept that the former fence line is the best available evidence of the line under application and that the position of that former fence is to be found by joining the iron bar set by Surveyor 1 at the limit between the east and west halves of Lot 2 in Concession 3, easterly in a straight line to a point in the westerly limit of the road allowance between Concessions 3 and 4, 6 feet south of the line set by Surveyor 1, all as shown on the draft plan before the hearing".

Accordingly, the line ACB was confirmed as the true boundary between Lots 2 and 3 in the east half of Concession 3.

### COMMENT

In this particular case the point to be made is that once the position of a line is established with a valid first running of a line, then the duty of subsequent surveyors is not to re-establish the line by some theoretical means, but to seek the most certain, or best evidence of its already established position. Both Surveyor 1 and Surveyor 2 should have been able to come to the same decision as the tribunal in this instance.

This is not to be overly critical of the two surveyors since we have no idea of how they went about working up their evidence concerning this line. It appears that Surveyor 1 didn't interview witnesses for evidence of an existing fence. Surveyor 2, on the other hand, did talk to his client A but didn't feel that this evidence (the oral evidence of A), was strong enough to set a boundary with. Obviously the tribunal didn't agree since it did accept A's evidence.

In looking at Surveyor 1's method obviously it doesn't stand a test of law. He treated the lot corner at A 1 as a "lost corner" and then re-established it with a convenient distance he plucked from within the interior of the lot structure. Surveyor 1's testimony concerning a "dead furrow" appears to have been given little weight since he admitted he did not discuss the position of his line with anyone.

Surveyor 2, on the other hand, used an acceptable Surveys Act method to set point A2 except that the tribunal ruled that there was sufficient evidence in the form of the tree and A's testimony, to re-establish the lot line in its former position. Surveyor 2's method fails because by this ruling the corner is not "lost" and therefore cannot be re-established by a strictly theoretical means. Again, this is not to be overly critical of Surveyor 2 since we have no knowledge of how certain the manner A presented his oral evidence to Surveyor 2 was.

In the final analysis both Surveyor 1 and Surveyor 2's methods failed because neither successfully sought or discovered the evidence of an already existing legal boundary. The evidence in the form of one tree is frail unless considerable trust is established concerning the truth of A's testimony. You will note that the tribunal accorded such trust to A's testimony especially since it produced the straight line which should be the consequence of the evidence. It did and at the distance of 8 feet north of the lot corner across the road just as A had testified.

We have noted that Surveyor 1's method would fail in any event since it does not accord with law. If there is no evidence, and Surveyor 1's method indicates he believed there wasn't, then he should have used a Surveys Act method. Even this would fail because there was a valid first running of the lot line discoverable from A's testimony and the tree mentioned. Both surveyors failed to shift the burden of proof away from the settled possession as Palmer V. Thornbeck says they must.

Confirmation and Condominium Section, Legal and Survey Standards Branch, March 1982. ●