



Ontario

Ministry of
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The Boundaries Act

THE BOUNDARIES Act decision summarized here was rendered in 1974 and concerns the re-establishment of a portion of the westerly limit of Yonge Street in the City of Toronto. The problem, however, could occur anywhere old buildings exist along a street line created many years ago.

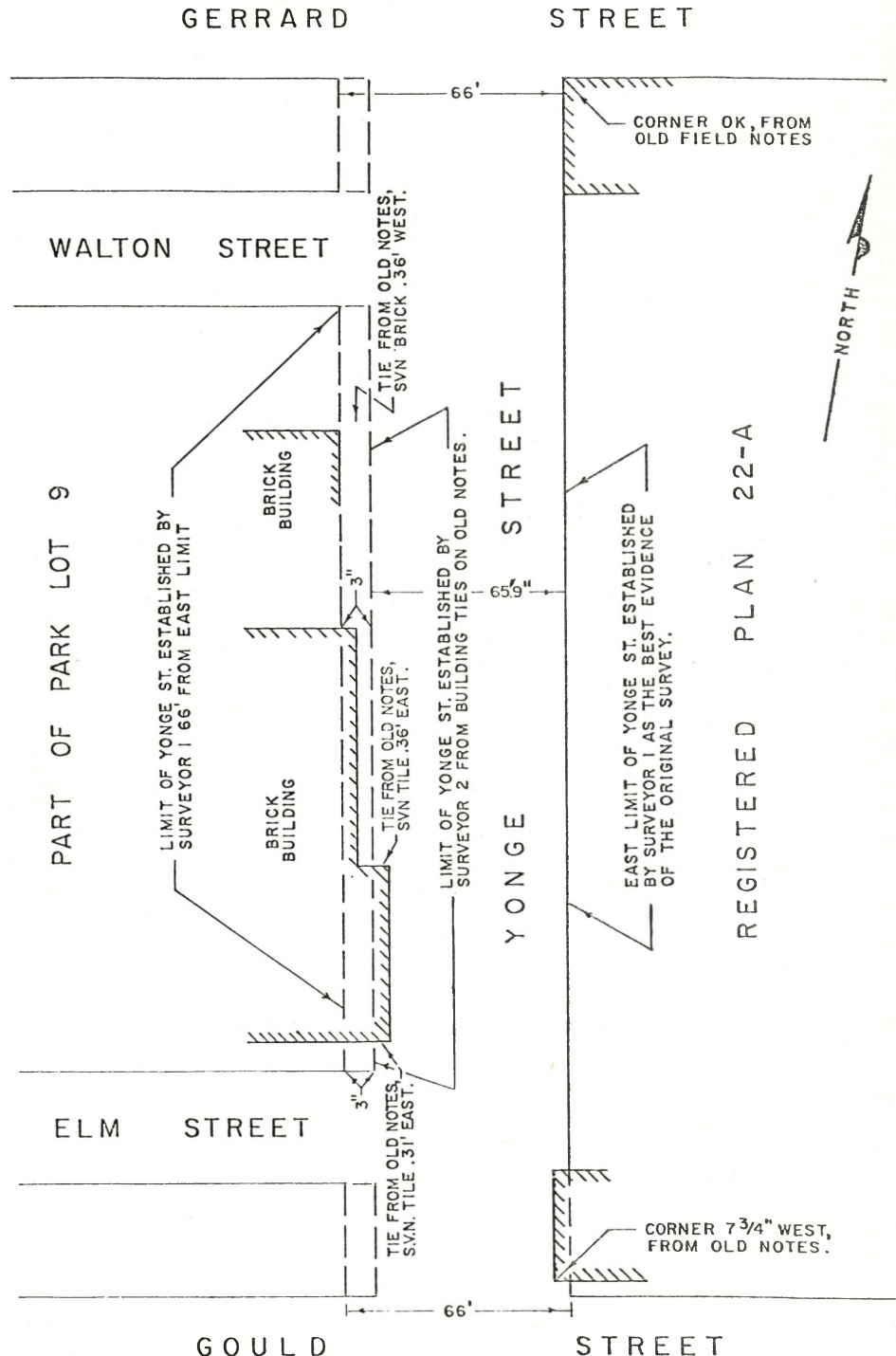
Stripped to its bare essentials, this case comes down to a contest between two versions of the west limit of Yonge Street in the area shown on the sketch. Surveyor 1, acting for the applicant municipality, established the east limit of Yonge Street in accordance with old survey notes dating back many years and purporting to establish this limit of Yonge Street as shown on Registered Plan 22-A, which dates back to 1836. He felt that this was the most certain position of the original limit of Yonge Street in this area and testified that this limit had been accepted by a number of old established survey firms, over many years. To establish the west limit of Yonge Street, Surveyor 1 laid off a net 66 feet from the east limit in accordance with the original survey and the width given Yonge Street on the 1836 registered plan directly adjoining the application area (The aforesaid Registered Plan 22A).

The area in dispute in this case is a short portion of the westerly limit of Yonge Street just north of Elm Street. Surveyor 2, who objected to Surveyor 1's position of this limit, had established this limit some 3 inches east of Surveyor 1's line, in a 1972 survey. Based on a skein of evidence shown in old field notes going back to 1877, he felt that the west side of Yonge Street was just as reliable as the east side and that the width of Yonge Street was not necessarily an exact 66 feet and was, in fact, irrelevant in setting the west limit.

Two different survey methods of re-establishing the west limit of Yonge Street under application were presented as the best available evidence thereof, resulting in two positions of the line some 3 inches apart. The problem before the hearing was to determine by the best available evidence which of these two positions or, in fact, if either of these two positions, represented the original position of that part of the westerly limit of Yonge Street under application.

Testimony established that Yonge Street in this area was first surveyed in 1793 in the creation of the original

SKETCH COMPILING EVIDENCE
OF SURVEYS BY SURVEYORS
1 AND 2, (NOT TO SCALE)



Township of York, under instructions from the Crown. Evidence was also presented that the methods and techniques employed in those early days was to run the line of Yonge Street by means of a compass and to measure distances in chains and links by means of a Gunter's chain. This method obviously resulted in bends and irregularities in the line of Yonge Street, whereas the original plan indicated it to be a straight line between Queen and Bloor streets.

The applicant's surveyor, Surveyor 1, testified in detail as to the survey method by which he re-established the boundary under application. As stated, Yonge Street in this area was created by the original survey for the Township of York in 1793 and is shown as the road allowance between Park Lots 8 and 9. The Township of York was laid out as a single front system where it would be usual for the surveyor to stake out the front of the lots and not to run the sidelines of the lots, including Yonge Street, from the front to the rear of the concession. However, due to the interest of Governor Simcoe in this township, the instructions from the Crown directed the surveyors to run the sideroads, including Yonge Street, and report specifically on any topographical feature encountered during the survey. Because of this one assumes that the original position of Yonge Street in this area was located with some care.

Surveyor 1 testified that a search in the Crown Lands office had failed to disclose the existence of the original field notes of the 1793 survey in the area of Yonge Street. He further testified that the first resurvey of Yonge Street northerly from Queen Street passing the area in dispute and continuing northly to Gerrard Street, was by Robert Lynn, Deputy Surveyor, in 1836 for his survey of Registered Plan 22-A, a plan of building lots on the east side of Yonge Street.

In 1938 a survey by the municipality of the east limit of Yonge Street, directly opposite the boundary under application, accepted evidence by the survey firms of Unwin, Murphy and Esten in 1912, and by Speight and Van Nostrand in 1921, indicating the westerly face of a stone building corner situated at the southeast corner of Yonge and Gerrard Streets as being exactly on the corner and the westerly face of a stone base of a building situated at the northeast corner of Yonge and Gould streets as being $7\frac{3}{4}$ inches west of the easterly limit of Yonge Street. A straight line joining these two points was accepted for the easterly limit of Yonge Street between Gould and Gerrard streets. The westerly limit of Yonge Street was established 66 feet west of this limit. In his 1973 survey, Surveyor 1 had followed this 1938 method

exactly. However, Surveyor 1, testified that he believed that the known survey evidence for the easterly limit of Yonge Street by Registered Plan 22-A and the plan distance of 66 feet, were the best available evidence of the original positioning of both sides of Yonge Street in the area in question.

In support of his survey method of repositioning the westerly limit of Yonge Street, Surveyor 1 filed copies of the plan, field notes and survey report of Municipal Survey 787, done in 1933, confirming the westerly limit of Yonge Street between Louisa Street and Trinity Square somewhat to the south of the area we are considering.

Although Municipal Survey 787 does not extend into the area we are examining, Surveyor 1 felt that the method employed by this municipal survey was applicable to his line. This method was to establish the east limit of Yonge Street on evidence of Registered Plan 22-A, as the best evidence of its original position and then to establish the westerly limit 66 feet west of this on the strength of the registered plan width.

In looking at the survey report for Municipal Survey 787 several things are of note. Although they did not find the field notes for the original township survey of 1793 in this area, the surveyors, Messrs. Speight and Van Nostrand, state in their report that in their opinion Yonge Street was surveyed at that time. They also note that the northeast corner of Queen and Yonge Streets is the only corner which can be directly related to the 1793 survey.

Concerning the re-establishment of that part of the westerly limit of Yonge Street established during the survey for Municipal Survey 787 and more particularly the method of laying off 66 feet from the easterly side, Speight and Van Nostrand cite the following reasons for their survey method:

"The east side of the street developed first and was laid out in a comprehensive way by Robert Lynn in 1836 (Plan 22-A)"

- and -

"In the block, Louisa Street to Trinity Square, no conventional line adopted and used for any considerable time exists, which would conflict with this method".

There were but two witnesses in this case and we have already looked at Surveyor 1's testimony. Surveyor 2 testified in support of his objection and introduced into evidence field notes and plans of prior surveys in the immediate area by long-established survey firms in the city, some dating back as early as 1877.

Surveyor 2 gave evidence that the plans and field notes filed by him in this hearing indicated that a conventional line 1 had been accepted by a number of survey firms for the westerly limit of Yonge Street, extending from the southerly limit of Elm Street northerly to the northerly limit of Walton Street, part of which is the subject of this application. The evidence was that this limit had been run as a straight line at least as early as 1913, based on survey and occupational evidence dating back to the year 1877. Surveyor 2 testified that this conventional line of Yonge Street, as perpetuated through the years by the various survey evidence and marks, was accepted by him in his 1972 survey which established his version of the westerly limit of Yonge Street in the area under application, some 3 inches east of its position as set by Surveyor 1.

Surveyor 2 submitted that the limit of Yonge Street under application is part of the westerly limit of Yonge Street created in the original survey of the Township of York in 1793, and that no evidence of this original survey of that part of Yonge Street in question has been perpetuated down through the years, but that surveys which have been performed on the west side of Yonge Street for the past 100 years were, in the opinion of the various survey firms, the best available evidence in a continuous chain from the date of the original survey to the present. Surveyor 2 further testified that although he could find no record of field notes or plans of resurveys prior to the year 1877, in his opinion, the existence of buildings erected along this boundary prior to that date was evidence of prior surveys. He submitted that the position of Yonge Street as he had located it, some 3 inches east of Surveyor 1's limit was, in his opinion, re-established by the best available evidence of its original positioning. Surveyor 2 further contended that the method used by Municipal Survey 787 to locate the west limit of Yonge Street was not relevant in this area because better evidence was available.

Surveyor 2 also brought to the attention of the hearing the concluding paragraph on page 5 of the report for Municipal Survey 787 indicating the author's opinion:

"It is, of course, common knowledge that a compass line run under the conditions existing at the time of the original survey of the Township of York will practically invariably shew considerable variation from a straight line. When we find therefore that Yonge Street today is irregular, we have no reason to suspect that it does more than follow the irregularities of the original survey".

In argument the applicant, through Surveyor 1, argued that one must look back to the earliest re-survey of the Boundaries of Yonge Street, being Registered Plan 22-A in 1836. This it was claimed enabled the boundary to be traced through a chain of evidence back to that survey or back to a time when it can be presumed that the true position of the boundaries were well known. We have noted that the applicant's surveyor has done this for the easterly limit of Yonge Street opposite the boundary under application. However, he then re-established the westerly boundary of Yonge Street at a plan distance of 66 feet as shown on Registered Plan 22-A, westerly from the easterly limit of Yonge Street. In argument, the objector, Surveyor 2, argued that the problem before the hearing is to re-establish the original limits of Yonge Street created by the 1793 survey and not the limit by the subsequent Registered Plan 22-A registered in 1836. It was argued by Surveyor 2 that although we do not have direct evidence of the original township survey as it relates to the boundary under application, the field notes introduced into evidence by him indicates that a line has been accepted by surveyors for the westerly limit of Yonge Street, for the last 100 years based on the occupation of buildings existing prior to 1877. Surveyor 2 contended that this occupation can be presumed to be evidence of even earlier surveys and that this very early occupation is, in fact, the best available evidence of the original running of the boundary under application.

In rendering its decision The Boundaries Act Tribunal wrote as follows:

"In considering all the evidence, I find that what we are seeking is the best available evidence of the original positioning of Yonge Street in 1793. Registered Plan No. 22A, in my view, did not establish the boundaries of Yonge Street shown thereon, but merely represents the signing surveyor's attempt in 1836 to re-establish the original boundaries by the best available evidence existing at that date".

"There appears to be no dispute between the surveyors as to the position of the easterly boundary of Yonge Street opposite that part of the westerly boundary thereof under application".

"I find that I am in agreement with the submission by the applicant's surveyor that a valid method of re-establishing one boundary of a road is to lay off the plan width from irrefutable evidence of the opposite boundary, provided this re-establishment does not, in fact, conflict with other evidence, which would then

necessitate a re-assessment of this method".

"The positioning of the westerly limit of Yonge Street by Surveyor 1 does appear to conflict with very old occupation accepted by surveyors over 100 years ago as best defining the original positioning of this boundary, thus necessitating a re-assessment of this method".

"It is not sufficient to lay down the theoretical lines in direct conflict with old peacefully settled occupation. The problem is to locate the lost lines not where they should have been, but where they were, in fact, actually located. The original surveys, no matter how crude, must prevail against imaginary theoretical lines".

"I find from the evidence presented to this hearing that the applicant's surveyor, Surveyor 1, has failed to refute the evidence of old occupation and has reversed the onus of proof. In this regard the legal principle stating that "the proof lies upon him who affirms, not him who denies", is of paramount importance. This principle as it applies to boundary positioning is reflected in the case of Palmer v. Thornbeck, (1877) 27 U.C.C., P. 291 (CA), as:

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

"In my view, the common law is quite clear in refusing to upset long established peaceful possession, and in stating that occupation is often better evidence of where the original monuments and lines were than any theoretical positioning after the original monuments have disappeared.

"To quote from Home Bank of Canada v. Might Directories Limited (1914) 31 O.L.R. 340, 20 D.L.R. 977 (C.A.):

". . .The original posts or monuments not being in existence and there being no direct evidence as to their position, some other mode of ascertaining the boundaries of the lots must be resorted to; and in such a case the best evidence is usually to be found in the practical location of the lines made at a time when the original posts or monuments were presumably in existence and probably well known;" or Diehl v. Zanger (1878), 39 Mich. Reports, 601: ". . .A supposed boundary line along acquiesced in, is better evidence of where the real line should be than any survey made after the original monuments have disappeared".

"The applicant's surveyor has argued that the distance of 66' shown on Registered Plan No. 22A, and the distance of

66.00 feet used by him in his survey of the subject application, controls the width of Yonge Street in the area of the survey. As stated earlier, the problem before the hearing, in my view, is to re-establish the boundaries as originally located in 1793, and the method used at that time was to locate roads not 66' wide, but one chain in width. The distance of 66 feet, is an attempt to relate the old chain and link measurements, determined by means of a relatively crude measuring device by today's standards, called a Gunter's chain, to modern day measurements determined by the more sophisticated graduated steel tape. If it could be successfully argued that the original plan width of Yonge Street is to prevail in the re-establishment of the boundary under application, it is quite possible that the present measurement of 65'-9" between the old accepted lines for the easterly and westerly limits of Yonge Street based on old occupation would meet the requirement of a road 1 chain in width, when one considers the equipment and techniques used in those early days.

"For the reasons stated above, in my view, the applicant's surveyor has failed to give due weight to the evidence presented in the hearing of old established occupation and accepted survey lines on the westerly side of Yonge Street. Having given due consideration to all the evidence presented before the hearing, on the evidence adduced and the law applicable, and for the reasons stated above, the objection by Surveyor 2 is allowed,

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"I do hereby confirm the true location on the ground of the westerly limit of Yonge Street as shown (on the sketch in the location surveyed by Surveyor 2)".

This concludes the reasons and judgement of the original decision. If one is to summarize the thrust of the decision, it is simply to say that a net plan width cannot be used blindly to establish the width of a street as against well settled possession on the street limits. In this instance Surveyor 1 imputed an amazing accuracy to the original survey measurements refusing to accept long - settled possession that disagreed with his method by only 3 inches. If a surveyor is going to disregard settled possession on any boundary the burden of proof is on this surveyor to positively prove that the settled possession is not evidence of the original survey or the original location of the boundary".

NOTE:

1. The term 'conventional line' appears to be a misnomer in this instance. A
cont'd on page 28

conventional line is generally taken to mean a line established by agreement on its position (whether written or oral), between the adjoining property owners. In this instance it appears that the position of the west limit of Yonge Street was agreed on among local surveyors but no evidence was introduced to prove that this understanding existed between property owners and the municipality. If there was a 'convention', it was between surveyors, not between owners and therefore there was no conventional line. In fact, the surveyor for the municipality established the limit in a different position. The evidence suggests and, in fact, the Boundaries Act Tribunal ruled, that the west limit of Yonge Street as re-established by the various survey firms was the best remaining evidence of its position as established by the original survey, namely the building ties used by Surveyor 2.

Confirmation and Condominium
Section, Legal and Survey Standards
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