



The Boundaries Act

ONE of the problems a surveyor is occasionally faced with, is the boundary which does not appear to conform with local settlement pattern and does not fit any of the attempts made to describe this boundary. Upon investigation the surveyor will sometimes find that the boundary was brought into being by agreement of the owners at a certain point in time. The Surveyor must then investigate and recommend to his client with regard to the particular circumstances of the case which may support a claim for a conventional boundary.

Surveyors will, of course, recognize that a claim for a conventional boundary, is one usually determined from evidence of the actions of the parties to the boundary, both at the time of creation and also subsequent to this. The surveyor may feel that such a decision is within the province of the legal profession and most surveyors would probably hesitate to lay down such a boundary without consulting with a lawyer and making sure his client understood the full legal implications of the claim being made.

Under previous case law, if the position of a boundary was not known, then the parties to the boundary could decide for themselves where it was, and once the decision had been taken the affirming parties were then estopped from later denying the boundary. This principle, most notably stated in cases such as *MacMillan v. Campbell* 28 M.P.R. 112, (1951) 4 D.L.R. 265 (N.B.C.A.) and *Wilbur v. Tingley* 24 M.P.R. 175 (1949) 4 D.L.R. 113 (N.B.) as well as others, has lately had another legal element introduced. The recent case of *Bea v Robinson et al* (1978) 18 O.R. (2d) 12 will cause surveyors to reflect on their earlier conceptions of the conventional boundary and perhaps now weigh the facts differently, at least in the Ontario jurisdiction.

Nevertheless we would like to lay out the evidence adduced in a Boundaries Act application heard in April of 1978 as it was decided on the basis of the known law existing at the time.

The boundary under application lay within certain lots on a compiled plan as shown on the sketch attached. The compiled plan was dated in 1920 and was a successor to another compiled plan dated in 1871. Since the existence of the compiled plans or the descriptions in the conveyances to the various parties

through the title history were not an issue in this case, we will spend little time on examining this aspect.

In 1959 X had conveyed a certain portion of land to his son A by Instrument 3290, being the northerly 30 feet more or less of the easterly 88 feet of lot 658 as shown on the sketch.

Upon X's death, his widow conveyed the remaining northerly part of X's land to son A by Instrument 37970 and the remaining southerly part of X's land to son A1, by Instrument 38257, making sons A and A1 adjoining owners as shown. The common boundary between A and A1 was now described as a line parallel to and 34 feet southerly from the northerly limit of Lot 658 and its production westerly into Lot 660 and extending throughout from front to rear of the properties.

In 1973 A1 sold his property to the applicant B, by Instrument 58686.

In testimony before the hearing surveyor 2, the surveyor who prepared the draft plan showing the limit under application, testified that he had prepared the draft plan on the instructions of his client B, and that he had found evidence of a prior survey by surveyor 1 in 1976, on the lands of A, the objector to this application. This survey included the line now in dispute. The position of the line in dispute, by surveyor 1, is shown on the sketch as a broken line. Both surveyors show the line in dispute originating at the same point at its easterly end. Surveyor 2, however, accepted evidence from his client B that there had been a previously agreed boundary and positioned his line some 14.94 feet northerly from that of surveyor 1 at its westerly extremity. Surveyor 2 accepted surveyor 1's definition of the easterly end of this boundary but joined it to the position of a fir tree shown at the westerly extremity of the line. A recently constructed fence existed along this alleged agreed boundary.

Surveyor 2's investigation showed that the lot lines shown on the registered plans were approximately parallel to a street lying to the south of the property whereas the owners in the area had oriented their boundaries, as evidenced by occupation, more or less at right angles to the street shown.

Surveyor 2 further testified that the line of occupation for the northerly limit

of B's property was in agreement with the general direction of the south limit of B's property, whereas the line by surveyor 1 was parallel to the lot line and approximately 4 degrees different in bearing, from his position. Surveyor 2 stated that he did not disagree with surveyor 1's position of the disputed boundary as per A's deed, but that the effect of surveyor 1's survey was to displace the well-settled occupational boundaries found at right angles to the streetline.

Surveyor 1 testified that he had surveyed the disputed line in accordance with the direction of lot lines in the block and A's deed. He acknowledged that the position of a deed boundary could be altered by evidence of an agreed line, but said he had no evidence of this at the time of his survey.

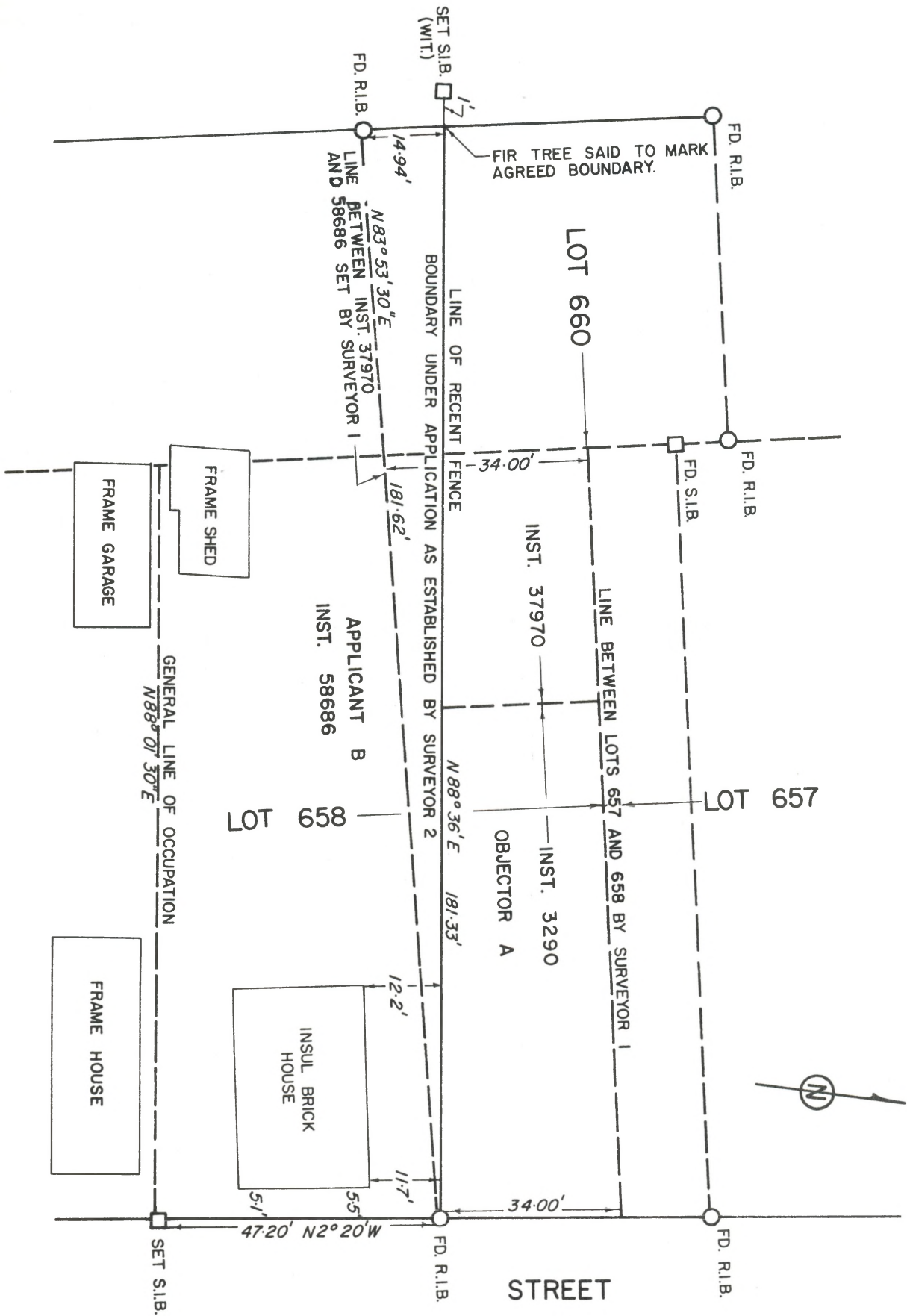
Counsel for the applicant did not dispute the positioning of the deed or lot lines in accordance with surveyor 1's survey. He contended that the position of the boundary had been altered by evidence as to a conventional boundary to be given by lay witnesses.

The applicant B testified that when he purchased the property from A1 in 1973, A1 pointed out a dividing line between his and A's property which ran down the centre of the driveway at the front of the property to the fir tree at the rear. A1 had previously testified that he may have done so but could not remember this circumstance.

B further testified that in 1975 the objector A also had indicated to him that the dividing line ran down the centre of the driveway to the fir tree at the rear. In 1975 when B employed Y to run a line from the point at the front to the fir tree at the rear, A was again asked if he was in agreement with the line and according to B's testimony, A indicated he was. The testimony of B's wife and Y, who ran the line, were in agreement with B as to what occurred and what was said on the day the line was staked.

B testified that subsequent to this he had erected a fence along the line and that his occupancy from 1973 had always been to the boundary now marked by the fence. He was unaware of any disagreement on the position of the boundary until he received a letter from A's lawyer late in 1976.

The evidence of a sister of A and A1, was that her mother had indicated



to her that the line ran down the centre of the driveway.

The evidence of the objector A was in considerable variance to that of B, B's wife and Y. A stated that he had indicated to B that he believed the line ran to the area of the fir tree and that he gave B a copy of his deed to assist in the definition of the boundary line.

A further testified that when he was asked whether or not he agreed with the line as staked by Y in 1975, he indicated to B that the line was acceptable provided it was all on B's property. At some later unspecified date but before the fence was completely erected, A advised B to delay completion of the fence until he had discussed it with his lawyer. A stated that the lawyer's advice was that he could not prevent the erection of the boundary fence but that B should have the boundary surveyed by an Ontario Land Surveyor and that he had so advised B.

The evidence indicates that B did not get a survey at this time but after some delay did complete construction of the fence. In the meantime A had contacted surveyor 1 who, A testified, completed a survey some 3 months later.

This completed the testimony before the hearing. In summarizing the arguments of counsel before the hearing the tribunal wrote:

"Counsel for the applicant argued that an agreed line had been established both before and after the applicant purchased the property. It was further argued that the law does not require the agreement to be in writing, but once agreed and acted upon by the erection of the fence the objector is

estopped from reneging upon that agreement. Counsel referred to The Canadian Encyclopedia Digest (Ontario Third Edition) on Conventional Boundaries at page 19-41".

"Counsel for the objector argued that no agreement was struck and referred to the action of his client in not knowing the true position of the line by producing his deed to (B) to assist in its establishment. Counsel also submitted that his client had only agreed as to the position of the fence provided it was on the true line which action did not prevent him from claiming to the true line when it became known".

In delivering its decision the tribunal wrote as follows:

"Both the applicant and objector, through counsel, acknowledged the correctness of the (surveyor 1) survey for the position of the property line as described in the original deed creating that boundary; the applicant resting his case on evidence of a conventional boundary. The problem then resolves to whether or not a conventional boundary had been established and its position".

"Had counsel been prepared to argue as to the best available evidence of the deed and lot lines, it would appear to me that based on the evidence of surveyors 1 and 2, the method employed in running lot lines at variance with long established occupation would be open to serious question".

"I accept the evidence of (B, his wife and Y) that a line was, in fact, agreed upon and that the position of that line ran between the round iron bar at the street to a particular fir or pine tree at the rear of the property, which line

was further marked by wooden stakes and subsequently fenced".

"I note that (A1) did not refute the existence of an agreement during his ownership, but stated that he could not remember. Based on the evidence of surveyor 2 as to the direction of the lines of occupation in this area, it seems logical to me that (A and A1) might well have considered the dividing line between their properties as being parallel to the occupation along the southerly boundary of (A1's) lands, that is, approximately at right angles to the street. Also the line by Surveyor (2) more nearly runs down the centre of the driveway agreed by all witnesses as defining the boundary line, than the surveyor (1) line".

"The evidence indicates that the objector had second thoughts about the positioning of the fence or line; consulted his lawyer which eventually resulted in the survey by (surveyor 1). The applicant giving evidence that the fence was completed in October of 1975, and the objector stating that he contacted surveyor 1 approximately in mid-June of 1976".

"Based on the evidence and the law referred to by Counsel, I am satisfied that a conventional boundary has been established and that boundary is the dividing line between the lands of the applicant and the objector".

"I am also satisfied that Surveyor (2) has re-established the position of that conventional boundary, as shown by a heavy, solid line on the draft plan before the hearing".

Confirmation and Condominium Section, Legal and Survey Standards Branch.

February, 1981. ●