

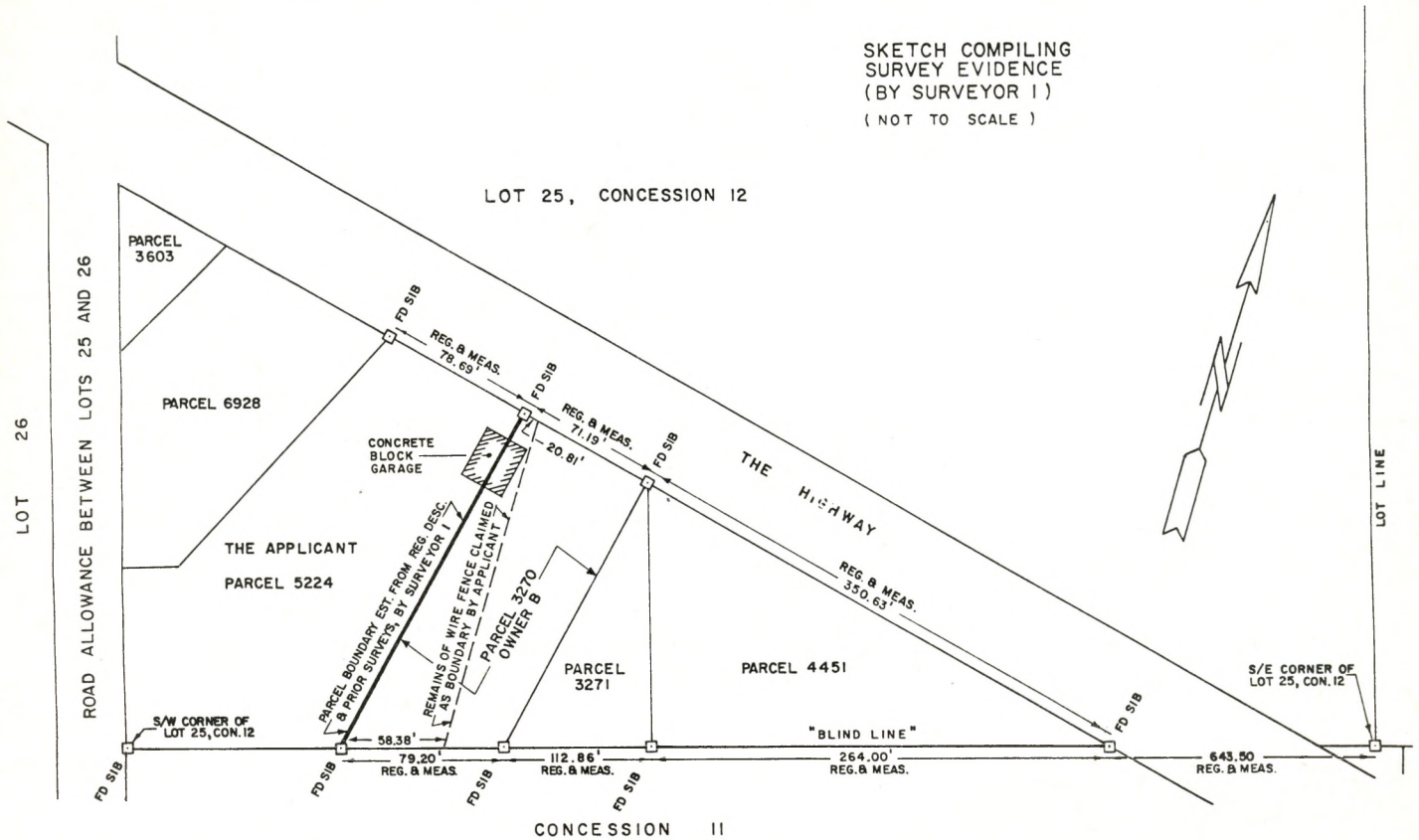


Ontario

Ministry of
Consumer and
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Relations

Legal and
Survey
Standards
Branch

The Boundaries Act



BACKGROUND: THE PROBLEM

THE QUESTION of the significance of a fence in lands registered under the Land Titles Act often presents the surveyor with a puzzle. If the position of the fence disagrees radically with the description in the parcel register, the surveyor must then seek evidence as to the true intentions of the parties to the creation of the original parcel boundaries. A number of Boundaries Act decisions have shown that regardless of how mathematically sound the original descriptions were, they were legally faulty if they did not describe what the parties to the original transaction had agreed on. If this is the case, common law holds that it is the intention of the parties which governs and not the attempt to reduce this intent to words.

Occasionally the attempt to discover the intentions of the original parties will have to be done through the imperfect process of examining the recollections of witnesses to the creation of the boundary. A number of questions arise. Did the erection of the

fence precede the transfer of title? If it did, does it represent what the original parties had agreed on?

Two other questions also arise in this respect. If the fence came after the creation of the parcel boundary, then it may represent a conventional boundary and have to be judged by the common law rules applicable. If, on the other hand, the fence represents the actions of one of the parties only, it may very well constitute an adverse possession, a concept not recognized by the Land Titles Act.

An application involving all of these factors came before the Boundaries Act Tribunal in 1980. The area in question is triangular in shape and lies south of The Highway and is bounded on the south by the "blind line" and on the west by the road allowance between lots 25 and 26, as shown on the sketch.

Parcels 3603 and 6928 lie at the westerly end of the original parcel and Parcel 4451 at the easterly end. They will play no part in this discussion. Parcels 3270 and 3271 were simultaneous trans-

fers to different owners in 1927. Parcel 5224 is the remainder of the original Parcel south of The Highway after the above-mentioned parcels were transferred out.

The Applicant had a draft plan prepared by Surveyor 1 which indicates the surveyor's opinion as to the location of the boundary between Parcel 5224, owned by the estate of the father of the Applicant, and Parcel 3270, as shown by a heavy solid line on the sketch. However, the Applicant disputes this boundary and claims that the true boundary follows the position of a former fence line, as shown by a light broken line on the sketch. This is rather unusual since it makes the Applicant an objector to his own application. In this instance, B, the registered owner of Parcel 3270, was happy with the boundary depicted by the heavy line. The question before The Boundaries Act Tribunal was to decide on the basis of the evidence presented, whether the true boundary line between Parcels 3270 and 5224 followed the heavy line as defined by the surveyor or followed the

light broken line argued for by the Applicant.

EVIDENCE: TESTIMONY

Surveyor 1 testified that his survey accompanying the Boundaries Act application was based on found monumentation planted in earlier surveys for the Department of Highways, through Lot 25, which re-established the front corners of the six parcels shown, as well as the south and west limits of the township lot. This survey was based on earlier surveys in the area. The Highway survey was the first survey which disclosed the problem with respect to the location of the boundary between Parcels 3270 and 5224. It indicates that practically the entire concrete block garage, owned by the Applicant, is situated on Parcel 3270, owned by B.

Surveyor 1 testified that he was satisfied that the boundaries of the parcels were correctly re-established by the Highway survey and in accordance with the registered descriptions. He was also satisfied that subsequent surveys by other surveyors, introduced at the hearing, verified the boundaries re-established by the Highway survey and had correctly re-established the limits of Parcel 3270.

At the request of the Applicant, Surveyor 1 established the site of a former fence line as evidenced by the remains

of posts and wire still existing. This former fence line is shown by a light, broken line on the sketch. If accepted for the limit between Parcels 3270 and 5224, it would place the concrete block garage almost entirely on Parcel 5224. It is to this line that the Applicant claims ownership.

The evidence of various lay witnesses established that a wire fence existed along or near the boundary between Parcels 3270 and 5224 from 1929 until fairly recently when it fell to the ground.

Two brothers, the sons of the person who owned Parcel 3270 from 1929 to 1950, both testified that the fence along the westerly boundary of Parcel 3270 was erected in 1929 by their father and the transferor of the parcel (who at that time still owned the lands to the west, now comprised of Parcel 5224). The purposes of the fence was to confine pasturing animals on the lands to the west.

One of the brothers testified that he had lived on the property from 1929, when he was 10 years old, until 1946 and that his family had always treated the aforesaid fence line as defining their westerly property boundary. It was his recollection that this fence was erected along a line determined by measuring the deed distance, front and rear, from an existing fence line along the easterly

boundary of the parcel. The brother had no knowledge of how the fence along the easterly boundary came to be erected other than to presume that it represented the westerly boundary of the adjoining lands (Parcel 3271). To his knowledge Parcel 3270 was not surveyed in 1929. Both brothers agreed that the family had confined their exercise of ownership to the westerly fence in question.

Both brothers gave evidence with respect to the location of a number of buildings formerly situated on Parcel 3270. These were erected between the years 1929 and 1939 and several were within a foot of the fence line. Both brothers agreed that the Surveyor 1's plan correctly located the former fence line. They both stated that the fence was still standing when they left the property in 1946 and that to their knowledge there had been no dispute as to the location of the fence during their father's ownership.

The testimony of the Applicant confirmed that of the brothers, namely that the westerly fence line had been considered by his father as the property boundary. The Applicant stated that he was born in the area and had lived on Parcel 5224 from 1948 to 1951 and in the immediate area until 1962. The Applicants' father had owned and lived on Parcel 5224 until his death in 1978. In 1951

he erected the garage shown on the sketch, just west of the fence line. The Applicant stated that there had been no dispute until the Highway survey of 1963 when his father and the adjoining owner B discussed the location of the boundary line. Various discussions over the intervening years culminated in a letter from B to the Applicant's father in 1977, threatening legal action.

B's testimony was consistent with that of the Applicant. Although B owned Parcel 3270 from 1950 he did not live on it until 1964. At that time the fence along the westerly boundary was still in place. As B's business operation expanded he gradually added fill up to and beyond the fence which had fallen to the ground. B testified that at no time did the Applicant's father object to his adding fill west of the fence line.

B did not object to the erection of the garage by the Applicant's father in 1951 because he was not aware, at that time, that it encroached on his property. However, B did testify that the owner of Parcel 5224 previous to the Applicant's father had told him that the fence was in the wrong place.

Subsequent to the Highway survey in 1963 B became aware of the boundary discrepancy and had discussed the problem with the Applicant's father several times beginning in 1963. B testified he

wrote to the Applicant's father in 1977 asking that a ditch then existing on the westerly side of the former fence line, be filled in. The letter denied the position of the former fence line as the boundary line and asserted B's claim to the true boundary. With respect to the fence along the easterly boundary of B's lands, B testified that it was never considered by him to define a boundary line.

ARGUMENT: LAW

Counsel for the Applicant argued that the description for Parcel 3270 was created without benefit of survey and that the parties to the creation of the parcel had erected the fence along what they conceived the westerly boundary to be. He further argued that the fence had been accepted by the successors in title from 1929 and that this acceptance by B, the current owner of Parcel 3270, was indicated by his lack of objection to the erection of the garage in 1951, by the Applicant's father. In fact, although learning of a possible boundary discrepancy in 1963, B had not claimed any rights west of the fence until about 1972.

Counsel for the Applicant did not dispute Surveyor 1's positioning of the boundary in accordance with the registered description. Instead, he argued that this line did not reflect the true position of the boundary and that the intent of the parties to the creation of the boundary

was evidenced by their erection of the fence in 1929. Counsel further argued that the common law upholds the right of land owners to create unalterable boundaries without the assistance of a surveyor and cited a decision under the Boundaries Act for plan BA-935 in support of his claim.

Counsel for B argued that the fence on the westerly side of Parcel 3270, although not in dispute for many years, was erected as a cattle barrier and not a boundary fence. He further argued that a good system of surveys had always existed in this lot and that the descriptions in the area mesh together without contradictions. Counsel argued that since all the parcel boundaries as described can be located accurately and without ambiguity, they should be adhered to.

Counsel for B also attempted to refute the argument of the Applicant's Counsel. He contended that in arguing for the acceptance of the fence, Applicant's counsel was referring to the conventional line theory, although not naming it as such. Counsel for B referred to the case *Bea v. Robinson et al* (1978) 18 O.R. (2d), 12, in which the court reviewed a number of cases on conventional boundaries and referred to the decision in *Grasett v. Carter*, a decision of the Supreme Court of Canada, about which the court stated:

"In *Grasett v. Carter* one of the prerequisites for finding a conventional line was that there be uncertainty as to the dividing line of the two lots and that uncertainty be resolved by the agreement of the parties. In that case it was impossible to determine the true boundary of the properties because of errors made in the original and subsequent surveys and because the land had been physically altered. In my view, when the parties do not know the location of the line because they have made no inquiries or other attempts to discover it, that is not an uncertain boundary that can be varied by agreement".

Counsel for B argued that there is no uncertainty as to the westerly boundary line. No evidence was presented as to how the easterly fence was established, its purpose, or whether it was related to a boundary line, and, as such, this fence, in counsel's opinion, was also a fence of convenience. He further argued that B had objected to the position of the westerly fence as soon as he knew of the true location of the boundary line.

Several other points of law "should be noted" in this case. On the interpretation of deeds the Canadian Encyclopedic Digest says:

"a deed free from ambiguity must be

interpreted by the words used; there is nothing more dangerous than to depart from the terms of a document in an attempt to give effect to what is imagined must have been the intention of the parties". 8 C.E.D. (Ont. Third) Title 44, page 50.

On adverse possession the Land Titles Act says:

"Notwithstanding any provision of this Act, the Limitations Act or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription". R.S.O. 1980, C230, Sec. 54 (1).

If we accept the fence as defining the true intentions of the parties to the original creation of the boundary then the parcel was misdescribed. In this event the following statement of the case **McDonald v. Knudsen** (1928) 3 D.L.R. 242 (C.A.) quoted from the Canadian Abridgement may pertain:

"The fact that in the attempt to define upon paper the definition of the location upon the ground, an error in description may have crept in cannot alter the

matter in principle . . .". This case goes on to state that where an owner of land defines the boundaries of the lot he is selling to a purchaser, the purchaser cannot later be dispossessed because the actual deed would locate the property differently.

We have previously noted that the common boundary between Parcels 3270 and 5224 as located by Surveyor 1, and shown by a heavy line on the sketch, agrees with the registered description. The sketch also indicates other parcel boundaries as located by the 1963 Highway survey and accepted by subsequent surveyors, which also agree with the registered descriptions.

REASONS AND JUDGEMENT

In giving its decision the Boundaries Act Tribunal wrote as follows:

"The evidence presented clearly indicates that the westerly boundary of Parcel 3270, as described in the registered description, has been correctly re-established by surveyor 1 as shown by a heavy, solid line on the sketch. Surveyor 1's position of this boundary is supported by previous surveys".

"The evidence also clearly indicates that the owners of land on both sides of the westerly boundary of Parcel 3270 lived peaceably to the fence line from

the time of its erection in 1929 until the Highway survey in 1963”.

“The question to be answered, in my view, is whether or not this fence line can be considered better evidence of the true position of the boundary line than the re-establishment by surveyor 1 in accordance with the registered description. This raises the following issues:”

Adverse Possession

“The lands on both sides of the disputed boundary were at the time of the original creation of the boundary and have since been registered under The Land Titles Act, which precludes any claim to the fence line being the boundary by reason of adverse possession. In any event, the question of a claim to land based on adverse possession is not a matter to be decided under The Boundaries Act”.

Intention of the Parties to the Original Conveyance

“No evidence was presented to indicate that the parties to the original conveyance of Parcel 3270 had defined on the ground the lands to be conveyed, either by themselves or by a surveyor on their behalf, and that the land was then incorrectly described in words in the subsequent conveyance. If this had been the case, the law would give effect to the intentions of the parties; **McDonald v. Knudsen** (1928) 3 D.L.R. 242 (C.A.)”.

“Counsel for the applicant referred to the decision in *The Boundaries Act* application for plan BA-935 in support of acceptance of the old fence line. In that application the disputed boundary was the limit between Parcel 10812 and Parcel 16391, Township of Martland, District of Sudbury. The Assistant Deputy Director of Titles found on the evidence that a fence had existed within the parent parcel before the first severance in 1945. Although the description in Parcel 10812 did not mention the existing fence line as controlling the extent of the Parcel, it was clear from the evidence of occupation and acquiescence of adjoining owners and their successors in title that the fence was the intended boundary and the decision went accordingly. The Assistant Deputy Director of Titles also found that the position of the boundary in relation to the fence line was misdescribed by 18 feet if the Department of Highways’ location of the Township lot line was accepted, but there was reason to doubt the location of the lot line by the same amount”.

“Where the facts do not support the conditions for relief as stated above and there is no ambiguity in the words of the description:

“a deed free from ambiguity must be interpreted by the words used; there is

nothing more dangerous than to depart from the terms of a document in an attempt to give effect to what is imagined must have been the intention of the parties”. 8 C.E.D. (Ont. Third) Title 44, page 50.

The surveyor 1 positioning of the disputed boundary was derived from the words contained in B’s deed”.

Conventional Boundary

“As stated by Justice Boland in the **Bea v. Robinson** case (supra) at page 17:

“I have reviewed the cases on conventional lines because they resolved boundary disputes with a great deal of jus-

tice. Equity prevented the parties from going back on their agreements when their true boundaries were discovered and it was their legal right to do so.

*“On the basis of **Grasett v. Carter**, supra, and the other cases referred to above, it would seem that a conventional line was established in the case at bar and that, therefore, the plaintiffs should succeed; however, I have not reached this conclusion for the reasons below”.*

“Justice Boland then went on to differentiate between the location of a boundary which was unknown, merely because the parties had made no effort to discover it, such as by survey, and the

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BOUNDARIES ACT — cont'd

location of a boundary that was uncertain, with no other means of establishing it other than by agreement. It was only in the latter case that a conventional boundary could be established”.

“It is clear in the subject application that the parties to the original creation of Parcel 3270, did not employ a surveyor to locate the boundary before erecting the fence, but relied on the deed distances from what would appear to be an erroneously placed fence near the easterly Parcel boundary”.

“Based on the principles set down in *Bea v. Robinson* the fence line near the westerly boundary of Parcel 3270, is not a conventional boundary”.

“For the several reasons referred to above, I am accordingly satisfied that the true position of the boundary between Parcels 5224 and 3270 has been correctly re-established by Surveyor 1 and is shown by a heavy, solid line on the sketch”.

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