



Ontario

Ministry of
Consumer and
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Legal and
Survey
Standards
Branch

The Boundaries Act

AN APPLICATION to establish the limit of a municipal street came before the Boundaries Act Tribunal in 1979. A brick building on Lot 1, Registered Plan D-294 was shown by the surveyor to encroach on Northcote Avenue by 0.30 feet at Queen Street and 0.66 feet at the rear of the building. The owner of the building objected claiming that the building did not encroach but was, in fact, the best evidence of the original street limit.

In all Boundaries Act applications the burden of proving the boundary lies on the applicant under the rule that the burden of proof lies on he who affirms and not

he who denies. In this instance the burden of proof rested on the applicant surveyor. In *Palmer v. Thornbeck*, (1877) 27 U.C.C.P. 291 (C.A.) the rule was stated to say that burden of proof lies upon the person who seeks to change the possession.

The presumption concerning the position of long-settled possession is raised by previous case law when it was said in *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

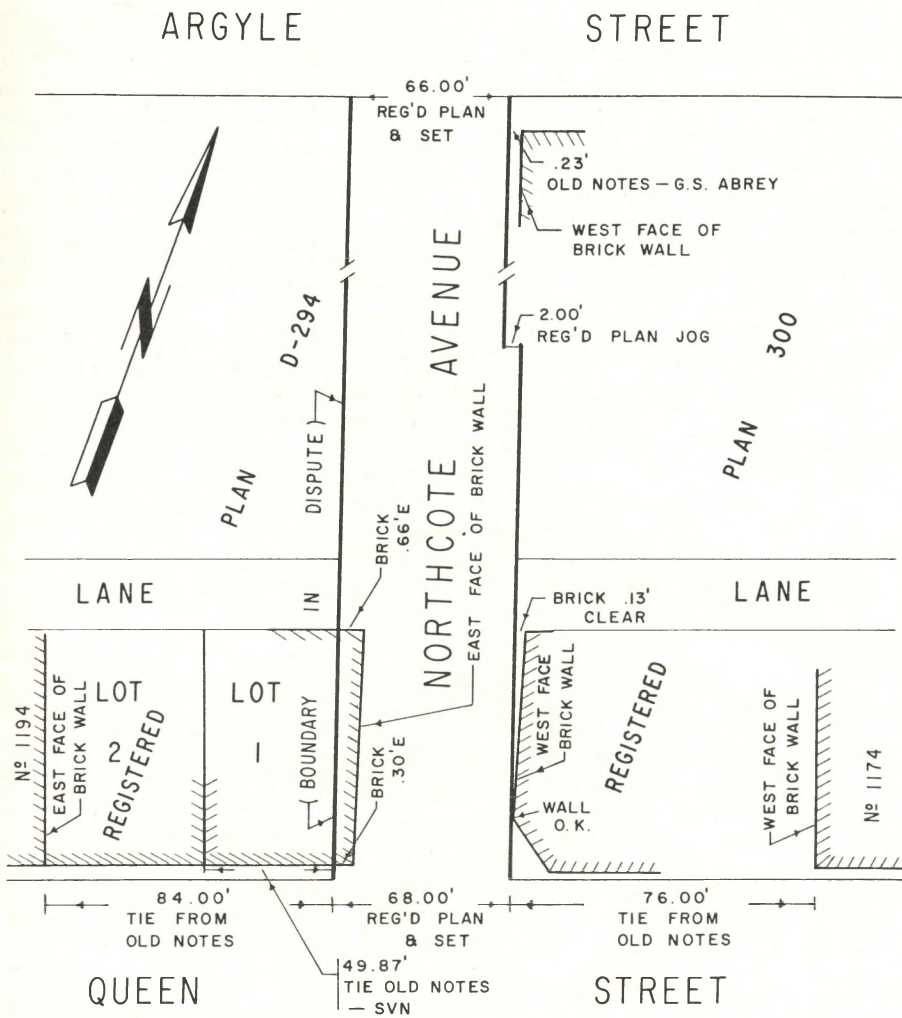
the monuments of the original survey have disappeared". In this instance, the onus was on the surveyor to prove that "the possession", namely the building wall, was not the best evidence of the original survey.

The surveyor was placed under oath and explained the survey method and evidence used in the re-establishment of the boundaries of Northcote Avenue extending northerly from Queen Street West to Afton Avenue.

Northcote Avenue was created by a plan of subdivision prepared by the firm of Wadsworth & Unwin, P.L. Surveyors, and registered as Plan 300 in 1879. The surveyor stated that a search was made of survey records concerning Plan 300, subsequent subdivisions of parts thereof on the east side of Northcote Avenue, and plans of subdivisions of lands on the west side of Northcote Avenue, in the offices of the older survey firms in the City of Toronto, including those of Speight and Van Nostrand; Unwin, Murphy and Esten (successor to the firm of Wadsworth and Unwin); Browne, Cavell and Jackson; and W. S. Gibson (having the G. B. Abrey field notes). Based on these survey records, dating back to the year 1882, and field measurements, the boundaries of Northcote Avenue were re-established and monumented on the ground and, in the opinion of the surveyor, using the best available evidence of their original positioning.

With respect to the area under objection, the surveyor gave particular evidence as to his re-establishment of the easterly and westerly boundaries of Northcote Avenue from Queen Street West, north to Argyle Street, as set out in his Survey Report. Also filed were photostatic copies of field notes of prior surveys dating back to the year 1882 and copies of two encroachment Agreements between the City of Toronto and a prior owner of Lot 1, Plan D-294, dated 1945 and 1962 and registered as Instruments 86752 W.B., and 165424 W.B., respectively.

As mentioned earlier, Northcote Avenue and the lands to the east of Northcote Avenue were laid out by Plan 300, registered in 1879. The lands on the west side of Northcote Avenue immediately north of Queen Street West, including the lands of the objector, were laid out by a plan of subdivision by the firm of Wadsworth & Unwin, P.L. Surveyors also registered in



DRAWN BY : LEO NG

SKETCH COMPILING EVIDENCE

(NOT TO SCALE)

1879, as Plan D-294. The field notes indicate surveys in the area of Queen Street and Northcote Avenue, principally by the firms of Unwin, Murphy and Speight and Van Nostrand in 1882, 1887, 1912 and 1925, and also surveys of the objector's lands, Lot 1, Plan D-294 by the firm of Speight and Van Nostrand in 1892 and by the firm of Unwin, Murphy and Esten in 1896 and 1945. A copy of the plan of the latter survey by Unwin, Murphy and Esten forms part of the encroachment Agreement, registered as Instrument 86752 W.B.

Also introduced into evidence at the hearing were copies of field notes of survey of Northcote Avenue by the City of Toronto Surveying Division in 1957 and 1958, based on the Speight and Van Nostrand surveys of 1892 and 1925 which disclosed similar encroachments of the subject building onto Northcote Avenue, as shown on the 1925 Speight and Van Nostrand survey and the 1945 Unwin, Murphy and Esten survey.

An up-dated encroachment Agreement indicating those encroachments was registered as Instrument 165424 W.B.

The surveyor stated that from an examination of all existing documentation extending from the early surveys, three significant and consistent measurements emerged that allowed him to re-establish the same streetlines, based on the same measurements and using the same buildings as existed in 1892. The three measurements being the 76.0 feet from the west face of the building, known as Number 1174 Queen Street West to the easterly boundary of Northcote Avenue measured along the north limit of Queen Street West; 68.0 feet across Northcote Avenue; and 84.0 feet from the west boundary of Northcote Avenue westerly to the east face of the building, known as Number 1194 Queen Street West. This resulted in a width for the objector's property, fronting on Queen Street West, of 49.87 feet which is identical to the measurement shown on the 1925 Speight and Van Nostrand survey.

The west boundary of Northcote Avenue was run by the surveyor northerly from Queen Street West to a point at Argyle Street re-established by laying off plan width for the street of 66.0 feet from a tie by G. B. Abrey O.L.S. to a house at the southeast corner of Argyle Street and Northcote Avenue.

The objector's building was found to encroach onto Northcote Avenue in identical or similar amounts as indicated on earlier surveys. It was established on

cross-examination that the building situated on the objector's lands has been there since circa 1892.

The objector, did not present any evidence, nor dispute the technical evidence given by the surveyor, but submitted that since the building has been in its present location for nearly 90 years, the easterly face should be considered and is, in fact, the best available evidence of the westerly boundary of Northcote Avenue.

In delivering judgement the tribunal wrote:

"Every boundary and corner established by the first survey thereof and shown on a plan of subdivision is true and unalterable and is defined by the original post or monument (Section 54 of The Surveyors Act, R.S.O. 1970, Chapter 453). Section 55 of the Act gives directions as to the reestablishment of lost corners, etc., on plans of subdivision and I quote:

"A surveyor in re-establishing a line, boundary or corner shown on a plan of subdivision shall obtain THE BEST EVIDENCE AVAILABLE (emphasis added) respecting the line, boundary or corner, but if the line, boundary or corner cannot be re-established in its original position from such evidence, he shall proceed as follows:

"1. If a part of a line or boundary is obliterated, he shall re-establish it by joining the nearest ascertainable points thereof in the manner shown on the plan of subdivision.

"2. If a corner on a line or boundary is lost he shall re-establish it by the method that accords with the intent of the survey as shown on the plan of subdivision and, if it is consistent with the intent of the survey as shown on the plan of subdivision, he shall determine the distance between the two nearest undisputed corners, one being on either side of the lost corner, and he shall re-establish the corner by dividing the distance proportionately as shown on the plan of subdivision having due regard for any road allowance, highway, street, lane, walk or common shown on the plan of subdivision.

"The evidence presented fails to indicate the finding of original monuments at the corners of Lot 1, Plan D-294. The field notes do indicate the location of old posts (presumably the original monuments) in 1882 along the boundaries of Northcote Avenue, north of Lot 1, and in the immediate area and a succession of

surveys of Northcote Avenue and Queen Street West based on the location of those monuments and subsequent surveys.

"The evidence presented also indicates that the surveys between 1882 and 1945 were carried out by two senior survey firms in the City of Toronto using similar, if not identical, boundaries of Northcote Avenue. These surveys since 1912, together with a survey by the City of Toronto Surveying Division in 1957 and 1958, indicate like encroachment of the building, situated on Lot 1, Plan D-294 (the objector's property) onto Northcote Avenue as found by the surveyor and shown on the (sketch).

"A prior owner of Lot 1, on two occasions, acknowledged these encroachments by entering into the two encroachment Agreements, the one registered in 1945 based on the Unwin, Murphy and Esten survey of that date and one in 1962 based on the City of Toronto survey.

"Section 55 of The Surveyors Act directs that where the original monuments cannot be found the boundary or corner shall be re-established by the best evidence available respecting that boundary or corner. When the original monument cannot be located, some other method of re-establishing the boundaries of a lot must be resorted to. The courts have held that the best evidence is usually to be found in the practical location of the boundary made at a time when the original monuments were presumably in existence and probably well known; (Bateman and Bateman v. Pottruff, 1955 O.W.N. 329 (C.A.), referring to Home Bank of Canada v. Might Directories Limited (1914), 31 O.L.R. 340, 20 D.L.R. 977, and an American case before the Supreme Court of Michigan, Diehl v. Zanger (1878) 39 Mich. 601).

"The objector's submission stated that the easterly face of the easterly wall of the building existing on Lot 1, Plan D-294 for approximately 90 years, constitutes the best evidence of the westerly limit of Northcote Avenue. This would, on the principle set down in Bateman and Bateman v. Pottruff, place the onus on the applicant to produce better evidence. In my view the applicant has satisfied that onus and the objection is denied.

"I am satisfied that the boundaries of Northcote Avenue under application have been correctly re-established as shown by heavy solid lines on the (sketch)."

Confirmation and Condominium Section
Legal and Survey Standards Branch
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