



# The Boundaries Act

THE 1973 decision reviewed here involves two curve re-tracement problems. If an original curved boundary was staked carelessly, it is extremely difficult to get agreement with the various elements of the curve as shown on the plan. Both the Surveys Act and common law direct that original evidence, or its perpetuation, shall be held in the repositioning of the original limit. Attempting to get a purely mathematical fit of the original plan must be a second choice.

An additional question arises with respect to a street on a registered plan. A blunder in an original township survey can nearly always be accommodated. However, in the case of a curved street boundary on a registered plan, as the magnitude of the error increases the standard solution makes less and less sense. There is no pat answer to this problem. It must always lie with the professional surveyor.

In the case at hand, two objections were received to the repositioning of the curved limits of Pelmo Crescent.

## OBJECTION No. 1

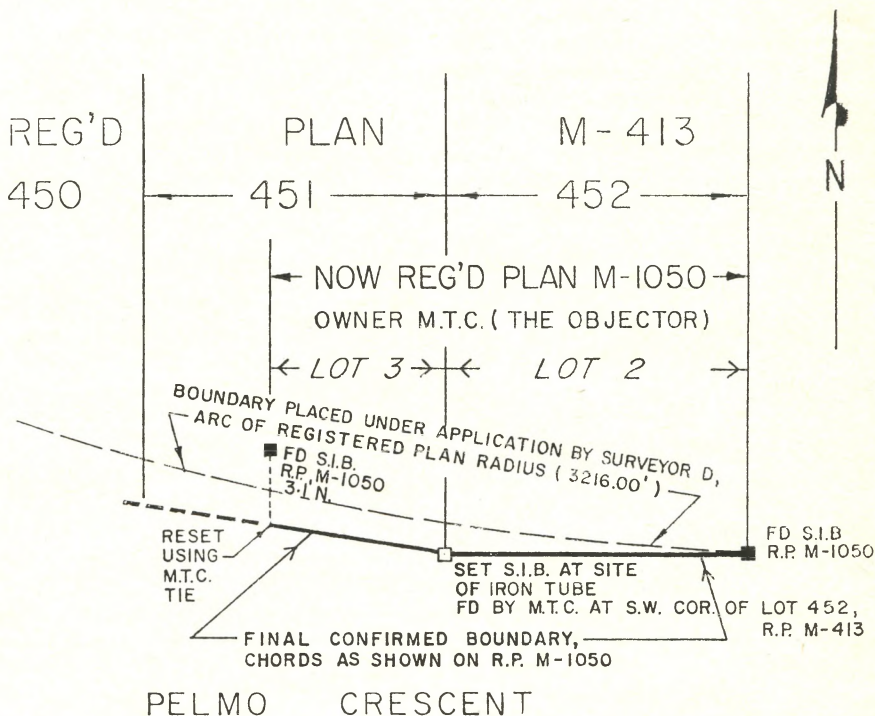
The Ministry of Transportation and Communications, the owner of Lots 2 and 3, Registered Plan M-1050, objected to the positioning of the northerly limit of Pelmo Crescent in front of these lots.

Surveyor T representing the Ministry, claimed that the limit of Pelmo Crescent in this area should be two straight lines joining the found survey evidence at the front corners of lots 2 and 3, Plan M-1050. Surveyor D representing the applicant municipality has shown this limit on the draft Boundaries Act plan as a curved boundary (shown as a light dashed line on the sketch).

Surveyor T testified that prior to the registration of Plan M-1050, considerable investigation was carried out by the Ministry. It was discovered that Registered Plan M-413, which created Pelmo Crescent, was mathematically incorrect and that a curve with a plan radius of 3216.00 feet would not pass through the front corners of Lots 443 to 452 as shown on Plan M-413. A decision was taken to hold the found survey evidence at the front corners of the prop-

## SKETCH ILLUSTRATING EVIDENCE OF OBJECTION N<sup>o</sup> 1

( NOT TO SCALE )



NOTE :  
SUBDIVISION LOTS ARE  
APPROXIMATELY 50 FEET IN WIDTH

(DRAWN BY : DOUG A. KLEIN  
& LEO S.W.NG, '85)

erties and to join these points with chords, rather than to try and use a curved limit which did not fit. This decision was approved by the Land Registry Office prior to registration of the plan.

Surveyor D who prepared the Boundaries Act draft plan, testified on behalf of the applicant municipality. He stated that he had established the beginning and end of the curved boundary in question from M.T.C. survey records. The radius from Plan M-413, of 3216.00 feet, was used to connect these points. Surveyor D stated with reference to the southwest corner of Lot 452, Plan M-413, that as no survey field notes could be found showing the setting of the iron tube found and used by M.T.C. surveyors, the iron tube could not be accepted as defining this point.

In delivering its decision the Boundaries Act Tribunal stated:

"I am of the opinion that Mr. D erred in disregarding this survey monument. To suggest, because records cannot be found, that physical survey evidence should be disregarded is rather presumptuous. I find that Mr. D has failed to refute this survey monument and reversed the onus on proof. In this regard, the legal principle of *'Ei incumbit probatio, qui decit, no qui negat - The proof lies upon him who affirms, not upon him who denies'* is of paramount importance. This principle, as it applies to boundary positioning, is reflected in the case of *Palmer vs. 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 order for Mr. D to reject physical survey evidence, it would be up to him to prove that it had no legal significance. The fact that the boundary in question, as retracted by the objector's surveyors, agrees substantially with the boundary as shown on Registered Plan M-413, in itself lends weight to the presumption that the iron tube found by the objector's surveyors at the southwest corner of Lot 452, Registered Plan M-413, is of legal significance and that the retracement method of joining found survey evidence by straight lines is an acceptable method in this instance.

"In view of the fact that the retracement by the objector's surveyors of the disputed boundary was based on found physical survey evidence and in view of the errors that are apparent in Registered Plan M-413, I can find no basis for disturbing the said boundary as re-established by the objector's surveyors and shown on Registered Plan M-1050."

Accordingly, the Tribunal confirmed the boundary as established by Plan M-1050, as shown in heavy outline on the sketch.

## OBJECTION No.2

The second objection received was from M, the owner of Lot 440, Plan M-413. He objected to the fact that the curved boundary shown on the draft plan by surveyor D, passed well north of an iron tube he believed to mark the southwest corner of his lot. The draft plan indicated that this tube was 3.49 feet south of the curved boundary set by surveyor D (shown as a light dashed line on the sketch).

The hearing was told that Lot 440 had been staked by H. H. Gibson and Son, Ontario Land Surveyors, in 1941. The original field notes of this survey indicate they set iron tubes at the four corners of the lot.

Surveyor D testified that he re-established the northerly limit of Pelmo Crescent here by joining the iron tube found at the southwest corner of Lot 437, (point A on the sketch), to the iron tube found at the southeast corner of Lot 442 (point C on the sketch). A curve of plan radius 1516.00 feet, was used to join points A and C. This curve passed 3.49' north of an iron tube found at the southwest corner of Lot 440 (point B on

the sketch). With reference to the Gibson survey of 1941, surveyor D stated that since the Gibson field notes do not show the method by which Pelmo Crescent was re-established, the iron tube planted by it cannot be accepted as defining the limit of Pelmo Crescent at this lot corner.

In ruling against surveyor D's method the Boundaries Act Tribunal commented:

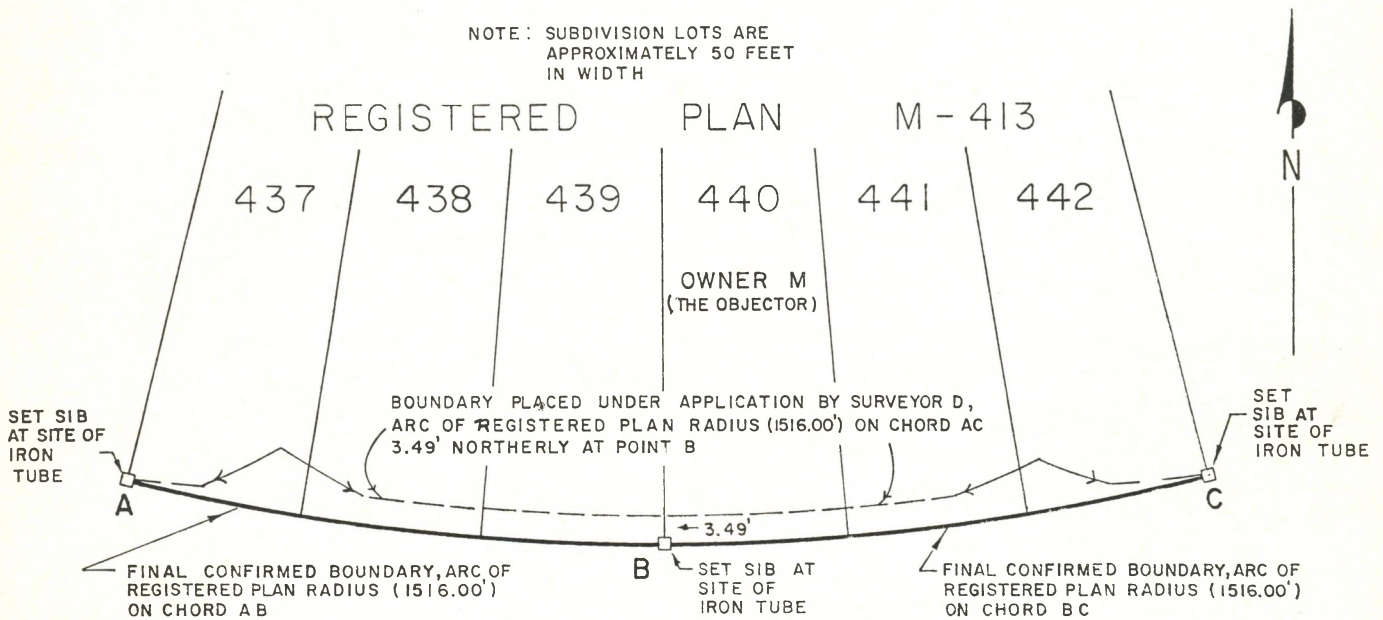
"I am of the opinion that unless gross fundamental errors can without qualification be shown to exist in the Gibson survey of 1941, the iron tubes planted by H. H. Gibson, O.L.S., must be considered the best available evidence of the north limit of Pelmo Crescent in the front of the objector's lands. It would appear reasonable to believe that Mr. Gibson, in the year 1941, was in a far better position to evaluate the existing evidence of the original survey of Plan M-413, than any party confronting this problem at this time.

"In my view, no evidence was presented that the iron tube found by the applicant's surveyor at the southwest corner of Lot 440, Registered  
*Cont'd on page 22*

## SKETCH ILLUSTRATING OBJECTION 2

(NOT TO SCALE)

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(DRAWN BY: DOUG KLEIN & LEO NG, '85)

*Cont'd from page 21*

Plan M-413, was not the same monument set by H. H. Gibson, O.L.S., in the year 1941, nor that this monument was not in its original position.

“In my view, the physical evidence of an old retracement of a legal boundary must hold over the called theoretical values for the boundary, and the onus of proof must lie upon him who attempts to disregard the physical evidence as best evidence. The Applicant's surveyor has failed to supply this proof and therefore, the Objection by M is allowed.”

Accordingly, the tribunal ruled that the curved limit in this area must pass through the point B, the site of the old iron tube set by the Gibson survey. It specified that the limit be a curve of plan radius, 1516.00 feet, joining points A and B on the sketch and a similar curve joining points B and C on the sketch. The final confirmed boundary is shown in heavy outline on the sketch.