



Ontario

Ministry of
Consumer and
Commercial
Relations

Legal and
Survey
Standards
Branch

The Boundaries Act

BACKGROUND

THE BOUNDARIES Act decision summarized here was heard in 1980. The boundary in dispute is the easterly limit of land described in instrument 378454, being part of Lot 31, Plan BR-7 as shown on the sketch. In 1979 the applicant J. T. commissioned surveyor M to prepare a draft plan in support of the application.

Elliott Street on which the applicant's property fronts, shall be considered to run due north and south and Wellington Street West on which the objector's property fronts, shall be considered to run due east and west. The applicant's land, according to his deed, has a frontage of 45 feet along the east boundary of Elliott Street and extends easterly to a depth of about 90 feet and forms a part of Lot 31, as shown on a plan in the City of Brampton, prepared by Chisholm Miller, Provincial Land Surveyor, and referred to a Plan BR-7. Land of the objectors, E. and G. H., adjoins to the east of the applicant's land and is described as the easterly halves of Lots 31 and 32 as shown on the said Plan BR-7.

TITLE HISTORY

From the evidence of surveyor M, the exhibits filed in the hearing and material furnished with the application, a brief history of the title of the subject properties emerged as follows:

Lots 31 and 32 were in common ownership until 1889, when W. S. conveyed the land presently owned by the objectors by Instrument 4690 to James Robinson. The land was described as:

"... being composed of the Easterly Halves of Town Lots numbers Thirty-one and Thirty-two ..."

This land was acquired by G. B. in 1900 and came into the ownership of E. and G. H. by an executor's deed registered as Instrument 29737 in 1955.

W. S. transferred the remainder of Lots 31 and 32 in 1911 to M. T., who conveyed part of her land to R. S. by Instrument 13459, registered in 1920. The first description in Instrument 13459 of the north and east boundary of this

land, which is presently owned by the applicant, was as follows

"COMMENCING at the north westerly angle of said lot number thirty-one.

THENCE along the northerly boundary thereof to the westerly limit of the lands sold off said Lot to one James Robinson as appears by registered instrument,

THENCE southerly along the westerly limit of the said lands sold to said James Robinson forty five feet to a point,

THENCE westerly ..."

The remainder of M.T.'s land, which is presently owned by G.R. (Instrument 518671) was transferred by Instrument 21710 in 1946 and was described as the west halves of Lots 31 and 32, saving and excepting lands already conveyed by Instrument 13459.

All the deeds in Lots 31 and 32 are consistent up to this time.

By a deed, registered as Instrument 20177 in 1941, land presently owned by the applicant was transferred to M. S. The description in Instrument 21077 was not consistent with the earlier description in Instrument 13459 and is reproduced (in part) as follows:

COMMENCING at the north westerly angle of said lot number thirty one;

THENCE along the northerly boundary thereof a distance of ninety feet (90') more or less to the fence marking the easterly boundary of lands hereby conveyed;

THENCE in a southerly direction and along the said fence line and parallel to the easterly boundary of Elliott Street a distance of forty five feet (45') to a point;

THENCE in a westerly direction ..."

The present description of the applicant's land by Instrument 378454 and the description in Instrument 518671 are consistent with the above description.

The reasons for the change in description by Instrument 20177 in 1941 were not brought out at the hearing, but parties did not dispute that a fence existed along the common boundary be-

tween the applicant's and the objectors' properties, sometime prior to 1968 and it is the location of this old fence which is the subject of the present dispute.

It was brought out in the testimony that applicant J. T. had commissioned S., Ontario Land Surveyor, in 1971, to carry out a survey of his property. However, he did not agree with the results of the survey prepared by Mr. S., with respect to the east boundary, even though the plan indicates this boundary to be coincident with a wire fence.

EXPERT EVIDENCE

In 1978 J. T. asked surveyor M., to survey his property for the present Boundaries Act application. It was surveyor M.'s testimony that on being retained by the applicant, he discussed the 1971 survey with surveyor S., but on reflection, disagreed with his conclusions.

Surveyor M. re-established the east boundary of Elliott Street, the north boundary of Wellington Street West and the west boundary of Mill Street South, from the best available evidence of earlier surveys of these streets. Surveyor M. also found iron bars at the northeast angle of Lot 31 and the northwest angle of Lot 27. He then re-established the north limit of Lot 31 and east limits of Lots 31 and 32, by methods prescribed by Section 55 of The Survey Act (R.S.O. 1970, Ch. 453) i.e. proportional division between found evidence.

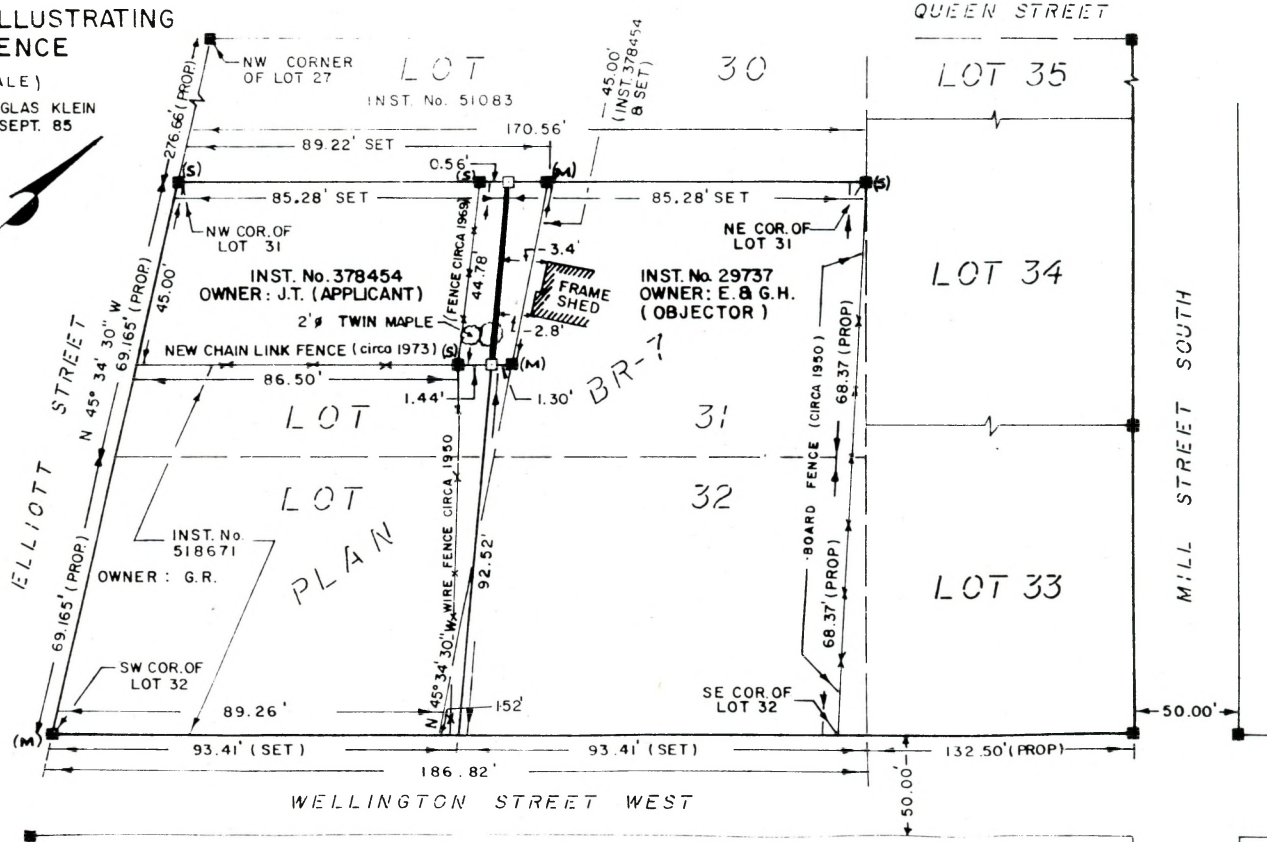
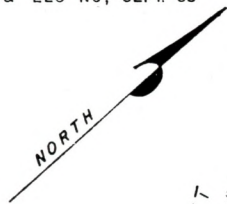
As evidence of the position of the common boundary between lands of the applicant and the objectors, surveyor M. testified that he accepted the applicant's statement made to him, that the present existing fence along the easterly limit of his property was not in its original location. In the surveyor's opinion, this fence, which was the only fence on the common boundary and attached to the west side of a twin maple tree, was not the same fence mentioned in the applicant's deed and was not sufficiently old and the type of occupational fence which could be relied upon to re-establish the boundary under application.

It was M.'s testimony that the boundary presently in dispute had been first created by Instrument 4690 in 1889,

SKETCH ILLUSTRATING EVIDENCE

(NOT TO SCALE)

DRAWN BY: DOUGLAS KLEIN & LEO NG, SEPT. 85



which described the land presently owned by the objectors, E. and G. H., as the easterly halves of Lots 31 and 32 and that the depth of 90 feet more or less mentioned in the applicant's deed, which appeared in conveyances of this land only after 1941, should therefore yield to the earlier description in the objectors' deed. The surveyor accordingly divided Lots 31 or 32 into two equal halves of area in accordance with Section 59 of the Surveys Act by a line drawn parallel to the east limit of Elliott Street. Since the Surveys Act offers no guidance in the manner or direction of running the dividing line, the surveyor was guided by Section 22(2) of the Act, which applies to the first running of aliquot part division lines of township lots in the single front system of townships as laid out by the Crown surveyors.

The aliquot part line, thus established by surveyor M. lies 4.50 feet east of the Surveyor S. monument and present occupation at the northerly end and 2.74 feet east of S.'s monument, set to make the southeast angle of the applicant's property in 1971.

On cross examination, surveyor M. pointed out that if the division line was established by joining the midway point

on the north line of Lot 31 with the midway point on the south limit of Lot 32, it would not divide the two lots into two parts of exactly equal area. This line would also be 0.56 feet east of Surveyor S.'s monument and the fence at the north end of the common boundary and 1.3 feet east of S.'s monument at the south end of the applicant's boundary. The surveyor concluded his testimony by saying that such a line would go through a 2 feet diameter twin maple tree on the common boundary and be 2.63 feet east of the new chain link fence between the land of G. R. and the objectors' land at Wellington Street West, and would, in his opinion, not be in accordance with the provisions of the Surveys Act.

LAY EVIDENCE

J. T., the applicant, gave evidence that prior to 1970, when he purchased the subject property from the executors of the estate of M. S., who was his mother's aunt, he used to visit her occasionally. At those times there existed in the rear of the property a fence on the boundary between the M. S. and the objector's properties and a barn about two feet west of the fence. The fence, J. T. testified, was attached to the east side of the twin maple tree. The barn was taken down in 1968, but its founda-

tion, which was abutting the tree, was still in existence in 1970 when he purchased the property. J. T. further testified that in the following year when he removed the foundation of the barn, he found that the fence line encroached on the foundation and now passed on the west side of the tree. Based on this evidence, it was J. T.'s testimony that the fence had been moved sometime prior to 1970.

Referring to the northerly extremity of the fence, it was J. T.'s testimony that a clothes-line pole near the northeast corner of his property, which prior to 1970 was located about two feet west of the fence on the common boundary, was subsequently found by him to be next to the fence.

In summary, it was J. T.'s testimony that the fence has been moved at least two feet west of its earlier location. In support of this testimony several photographs were introduced at the hearing.

M. T., who has lived for about 17 years at 22 Elliott Street adjoining to the north of the applicant's property and his two sons, T. T. and R. T. who had lived until recently at the above address, appeared on behalf of the applicant.

They gave evidence that there existed a fence between the J. T. and the objectors' properties and a barn approximately 1 foot to 2.25 feet to the west of the fence. They were in agreement with the applicant's testimony that the fence was originally on the objectors' side of the maple tree. M. T. however, could not recall if the fence had been moved, whereas R. T. was of the opinion that the fence presently existing was not entirely the same fence as the one existing prior to 1970. In summary, none of the witnesses could testify with certainty if the fence had been moved or by how much, other than to say that the fence was at one time on the east side of the maple tree at the southerly end of the common boundary.

The evidence of the objector, E. H., who has lived on his property for the last 42 years, was significantly at variance with the evidence of witnesses appearing on behalf of the applicant. It was his testimony that he had not moved or replaced the fence in all the years he had lived on his property, except occasionally to effect some minor repairs. He was also emphatic that he had not relocated the fence to the west side of the tree as alleged by the applicant and other witnesses appearing on his behalf. In this latter evidence he was supported by his son G. H., who has lived all his life, some 42 years, on the E. H. property. In support of their testimony two photographs taken sometime in 1945 were introduced.

ARGUMENTS

Counsel for the applicant argued that the survey by S. in 1971 should be rejected as this survey did not take into account all the oral testimony introduced before the tribunal. Counsel argued that the testimony of the applicant, J. T., and other witnesses appearing on his behalf was consistent that the fence near the south end of the common boundary was to the east side of the twin maple tree prior to 1970 and not to the west side of the tree as presently located and that the Surveyor M.'s positioning of the boundary was consistent with this testimony. Counsel further argued that if the testimony of the applicant with respect to the location of the fence prior to 1970 at the southerly end of the common boundary was accepted, his testimony with respect to the location of the fence at the northerly end should also be accepted.

It was counsel's further submission that the old photographs introduced by

the objectors do not show the existence of a fence in the location as stated by objector E. H.

In summarizing the evidence, counsel submitted that Surveyor M.'s positioning of the boundary was consistent with an acceptable way of surveying the property in accordance with the Surveys Act, as well as consistent with the evidence of the prior location of the old fence line.

Counsel for the objector, on the other hand argued that the line established by surveyor M. does not lead to equitable results. The line established by joining the midway point of north limit of Lot 31 with the midway point of south limit of Lot 32 was, in counsel's opinion, more equitable. It was his submission that the difference between this line and Surveyor S.'s line was not significant considering that the original division was perhaps carried out without benefit of a survey and taking into account the character of the fence. It was his opinion that the intent in 1889, when the first division of land took place, was to divide Lots 31 and 32 by a line joining the midway points.

Counsel argued that the evidence suggesting that the fence had been moved, was inconclusive. He closed his argument by saying that the application should be dismissed, or alternatively the boundary should be confirmed as shown on Surveyor S.'s survey, previously carried out on behalf of the applicant.

DECISION

The problem before the hearing is to determine, by the best available evidence, the true location on the ground of the boundary under application, as first created in 1889. It was generally agreed by the parties that the location of the fence along the common boundary, if undisputed, would be such a boundary. It is my view that the disagreements that the parties have had for several years do not concern the acceptance of the original fence line as the boundary, as in fact, the applicant's deed states, but the belief of applicant J. T. that the fence was moved from its original location, sometime prior to 1970. The objector, of course, denies that he moved the fence, acknowledging only that he repaired parts of the fence over the years. The evidence of lay witnesses was contradictory as to the prior location of the fence.

Based on the evidence in total, I am

of the view that there was a well defined line of occupation along which a fence had been erected a number of years prior to 1968. This fence could be viewed as the best available evidence of the common boundary as originally created. Evidence has been presented at the hearing that the fence presently existing along the common boundary is not in the same location as the fence existing prior to 1968. I am persuaded that the repairs to the fence by E. H. over the years may have altered the location of the prior fence, albeit unintentionally, although no evidence was presented which would conclusively prove the location of the former fence line. Accordingly, we must resort to some other method of re-establishing the common boundary which would accord with the original division of Lots 31 and 32 and take into account the testimony presented before the hearing.

As previously stated, the boundary presently in dispute was created by Instrument 4690, registered in 1889, which first conveyed the easterly halves of Town Lot number thirty one and thirty two and which are presently owned by G. and E. H. by Instrument 29737. No evidence was presented that the original conveyance was based on a survey, but that, in my view, is not conclusive that no survey was made and monuments planted to define the line - only that no direct evidence of that previous survey exists today.

The only other survey of which direct evidence exists today was prepared by Surveyor S. and shown on a plan dated November 10, 1971. In that survey the surveyor shows a wire fence along the boundary presently in dispute and iron bars at its extremities. The tree previously referred to in the testimony is not shown on the plan. Surveyor M. did not accept the fence and monuments shown on Surveyor S.'s survey. He instead, re-established the boundary between the east halves and the west halves of Lots 31 and 32 by equal division of area as prescribed by section 59 of The Surveys Act which applies to lots on a plan of subdivision. He ran the division line parallel to east limit of Elliott Street, in accordance with Section 22(2) of the Act, which applies to the single front system of original township surveys of Crown land. It was the surveyor's opinion that the pattern of division on the underlying plan referred to as Plan BR-7 was of the same type as the single front system of original surveys.

Original field notes of survey for the Plan BR-7 were not introduced at the hearing, nor was any evidence presented which would support surveyor M.'s opinion that the division of land by the said plan was on the same pattern as the single front system as outlined in Section 17(1) of the Surveys Act. I, therefore, find that Section 22(2) of The Surveys Act has no application in the re-establishment of the boundary under application. It is also my opinion that neither the statute existing at the time of the original aliquot part division of Lots 31 and 32, being "An Act representing Land Surveyors and the Survey of Lands" (R.S.O. 1887, Chapter 152), nor the present statute, offer any guidance for running division lines between aliquot parts of a lot on a plan of subdivision.

In this opinion, I am supported by Mr. Justice Boyd in the case of *Hoey v. Tripp* (1912) 25 O.L.R. 578, 2 D.L.R. 136 (C.A.). In dealing with the division of a trapezoidal shaped lot into east and west halves, Mr. Justice Boyd at page 583 stated:

"The Ontario Surveys Act, R.S.O. 1897, Ch. 181, does not apply to the manner of dividing a lot laid out on a private plan; and, if it did, it casts no light on the method of running a dividing line by which an aliquot part is to be ascertained."

The provisions in the Ontario Surveys Act, R.S.O. 1897, Ch. 181, Sec. 19, are, in my opinion, similar to the provisions in the present Surveys Act in respect of lots on a plan of subdivision. It was also held by Mr. Justice Boyd on page 581 that:

"There is no reason in law or in fact why, in a lot shaped like this, with a bias or diagonal line on one side, the line of division to separate it into half lots should be run parallel to the side line, which is straight; it may be run partly straight and partly to accommodate itself to the bias or diagonal line formed by the street at the north-east side of Lot 8."

The court further upheld the principle that all material facts existing at the time of the transaction may be considered so as to better appreciate what was being done.

Based on the testimony before the hearing, I am persuaded that the present fence may not be exactly in the same

location as the prior fence or division line, perhaps because of periodic repairs, but I am also of the opinion that the prior fence was not moved to any significant degree. No evidence was presented which would indicate that a fence was ever in the location of the line established by surveyor M. and this limit should therefore be rejected. It was the suggestion of the applicant and his counsel that the fence may have moved by approximately 2 feet but the evidence is contradictory on this.

We must therefore, go back to the time in 1889 when the first aliquot division of Lots 31 and 32 took place and in light of the evidence presented in the hearing, consider the probable method used to divide the lots into the east and west halves, taking into consideration the testimony of witnesses and evidence of occupation.

Section 43 of the 1887 Act specified that a description in an instrument purporting to be for any aliquot part of a lot or parcel of land shall be construed as the aliquot part of the area contained within the lot or parcel; but as mentioned earlier there is no direction as to the manner in which that aliquot part line was to be established. Even if the direction of the dividing line was specified, to effect a mathematical aliquot part division it would be necessary to re-establish all the exterior boundaries of Lots 31 and 32, calculate the area and lay down on the ground a line dividing the area into two equal halves. In my opinion, when the land was relatively inexpensive, parties to the original division of these lots or a surveyor would apply a more practical conventional meaning to the east and west halves, as distinguished from a literal meaning of these terms.

It is most probable that the original division was carried out by a line joining the midway points of the north limit of Lot 31 and the south limit of Lot 32.

The area of the east halves of Lots 31 and 32 along this dividing line works out to approximately 12232 square feet; and for the west halves approximately 12262. Equality of these areas could be achieved by moving the north or the south terminus of the division line by approximately 0.20 feet, a trivial amount in 1889. I am, therefore, of the opinion that this method of division of the lots into east and west halves was the basis for the original aliquot part division of these lots.

The line thus established, it was argued, would be 0.56 feet east of Surveyor S.'s monument at the north end of the common boundary and 1.30 feet east of the monument on the common boundary at the southerly end. It is possible, in my opinion, for the fence to have moved unintentionally by these amounts, caused perhaps by periodic repairs. It was also pointed out that the line thus established would go through the middle of the twin maple tree shown on the plan. I do not view this as significant, since the tree may possibly have been planted on the common boundary many years prior to 1945 and may have grown equally on both sides of the common boundary.

Assisted by the draft plan and field notes of Surveyor M., I therefore find the true position of the easterly boundary of the lands described by Instrument 378454 to be a line joining the midway point on the northerly boundary of Lot 31, with the midway point on the southerly boundary of Lot 32 to its intersection with the southerly boundary of Instrument 378454 all as re-established by surveyor M. and shown on his draft Plan.

Accordingly, the objection by G. H. and E. H. is allowed, in part.

Confirmation and Condominium Section
Survey Standards & Title
Examination Section
January 1986. ●

SURVEY LAW SEMINAR SESSION 4

**MONDAY
JUNE 16**

**CHIMO INN
TORONTO**