

EVOLUTION OF THE SURVEYS ACT

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INTRODUCTION

This is the one-hundredth anniversary of the Association of Ontario Land Surveyors, yet land surveyors have been working in what we now call Ontario for over 200 years. Of course not literally the same surveyors, although the spirit of the early surveyors does live on!

Surveyors now are involved in many aspects of land use, and accordingly are familiar with many government regulations and laws. Two in particular, however, apply directly to land surveyors, namely the *Surveys Act* and the *Surveyors Act*. Both hail from the same source: legislation from the late 1700's and the mid-1800's. At this historic juncture in our development as a professional body, it should be instructive to look back at some of those early statutes. It will illustrate how the history of land use in Ontario is intertwined with the history of land surveying.

EARLIEST STATUTES

The earliest statute relating to land surveys in the Province of Quebec (which included present-day Ontario) was "An Ordinance Concerning Land Surveyors and the Admeasurement of Lands", enacted in 1785. It came at a time when that area of Quebec east of the Ottawa River was being opened up to United Empire Loyalists from the United States. The first aim of the government was to settle the immigrants on the land as quickly and as cheaply as possible. Many of the Ordinance's ten sections are reflected in some way in our present *Surveys Act* because they deal with the testing of instruments, with the oaths and financial securities of the surveyor and his assistants, with survey records, and with the necessity for, and sanctity of, boundary markers.

This latter section required that stone monuments with a length of one foot be used to mark boundaries. The monuments were to be buried no deeper than six inches; and "under the boundary mark shall be placed pieces of bricks or drofs of iron or pieces of earthenware". Evidently Quebec was experiencing a surplus of fine plates and bowls!

If the 1785 Ordinance was the godparent of the present *Surveys Act*, then its grandparent was born in 1798, when "An Act to ascertain and establish on a permanent footing the Boundary Lines of the different Townships of the Province" was enacted in Upper Canada. It gave explicit instructions that stone monuments or monuments of other durable material were to be placed at the township corners and at the ends of the concession lines.

This meant that stone monuments governed the boundaries and lines in the townships and concessions, regardless of distances or directions in any patent of grant or instrument. This *Act* was the first declaration that monuments took precedence over distances and bearings. It was also the first statute to prohibit the removal of boundary markers:

If any person shall, knowingly and wilfully, pull down, alter or remove any such monuments so erected, he or she or they shall be adjudged guilty of felony and shall suffer death without benefit of the clergy.

Tough words indeed. What the last bit means is that the transgressor would not be entitled to find physical sanctuary within a church.

The statute of 1798 had an interesting origin. The Township of Kingston was laid out in 1783 as the first township in Upper Canada. The east

boundary of Lot 25, Concession 1, Township of Kingston was the west limit of the lands of Fort Frontenac, of the Cataraqui Common and of the Town of Kingston. This boundary line was disputed by the Commanding Officer of Fort Frontenac, who argued that Lot 25 encroached upon the lands of the Fort. Furthermore, the boundary lines between Lots 23 and 24, and between Lots 24 and 25 were also disputed by the respective patentees. The result was:

That Lots numbers 23, 24, and 25 in the front Concession of Seignory Number One, now the Township of Kingston, became a seething turbulent cockpit. The patentees ran lines, disputed them and combatted each other, in the courts and otherwise, but history does not record what else they did. (Aylesworth 1928).

In fact, the three lots were surveyed no less than 13 times. The first *Surveys Act* of 1798 was enacted in order to resolve the boundary disputes among the three lots:

It was on account of these ruinous and exasperating disputes, and no relief being afforded by the Courts of Justice, that the Ontario heather was set afire, and prompted the then Legislators to apply themselves to provide a remedy. (Aylesworth 1928).

The 1798 legislation was necessary to assist surveyors in resolving boundary disputes, in the absence of a solid base of legal precedents on which to base a decision.

CHANGES IN THE EARLY 1800'S

The first change to the *Surveys Act* occurred with the *Act* of 1818 that

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repealed the 1785 *Act*, extended the provisions of the 1798 *Act* and further regulated the manner in which lands were to be surveyed. Among its 12 sections was a provision that all lines run and all monuments planted in the first survey are the true and unalterable boundaries. This is the first mention of true and unalterable boundaries in a statute, and has remained in the *Surveys Act* (as section 9) to the present. Another section of the 1818 *Act* provided that every Deputy Provincial Surveyor was to be examined by the Surveyor General as to his fitness and capacity.

In 1839 and in 1841, two further statutes were enacted that affected land surveying. The former extended the provisions of the 1818 *Act*, and also dealt with incompetence among land surveyors. The *Act* allowed for cases of ejectment or compensation in the event of unskilful surveys. The 1841 *Act* granted land surveyors the authority to administer oaths to people giving information as to boundaries and monuments. More importantly for land surveyors and for landowners, the 1841 *Act* forbid anybody from interrupting, molesting or hindering any surveyor in the course of his work.

1849 ACT AND SUCCESSORS

Up to this point, the land surveyor in Ontario was appointed by the Surveyor General. Then in 1849 "An Act to repeal certain Acts mentioned therein and to make better provision respecting the Admission of Land Surveyors and the Survey of Lands in this Province" was enacted. It repealed the four Acts which had been enacted between 1798 and 1841. In 52 comprehensive sections the *Act* set out various regulations and enactments.

The significant changes for land surveyors were that a Board of Examiners was established to serve both Upper and Lower Canada, an apprenticeship term of three years was introduced, and examination subjects were set out. These subjects included geometry, mensuration, geology, affidavits, descriptions and penmanship. As well as deciding who could practice as a

Provincial Land Surveyor and requiring a certificate of sobriety, the 1849 *Act* gave the Board of Examiners the power to dismiss or suspend a surveyor for gross negligence or corruption. These are powers that are reflected in the present *Surveyors Act*, although this latter power is seldom invoked!

Next, the 1851 *Act* appointed two Boards of Examiners, one each for Toronto and Montreal. The 1855 *Act* merely extended the 1851 *Act*, but the 1857 *Act* allowed surveyors to be trained in the universities. But these later Acts are little more than minor amendments to the 1849 *Act*:

The other sections of this (1849) Act which treat of the determining of sections and lots, and the running of the boundaries of the same, may be said to be parents of similar sections of our present Act. (Sankey, 1886)

Although this was written in 1886, it applies equally to the 1980 *Act*, soon to be the 1990 *Act*. The 1849 *Act* was, in essence, the parent of the present *Act*.

For instance, the prescribed monuments have varied only in material in the past 141 years. The 1849 *Act* mimicked the 1785 *Act* in requiring stone posts with bricks, iron, earthenware or broken glass buried underneath. In open country a squared timber post was to be placed in front of the stone monument. The 1859 *Act*, in turn, mimicked the 1798 *Act* by requiring stone monuments or monuments of other durable material. The next change was that trees marked in lieu of posts were allowed in the 1920 *Act*, which also allowed iron bars. Now, iron bars of various lengths and widths are the boundary monuments of preference.

BEST AVAILABLE EVIDENCE

A common thread runs through all versions of the *Surveys Act*. It is the principle that the land surveyor always obtain the best evidence available respecting the corner, boundary or side line. This reliance on obtaining the best evidence available is reflected in seven

sections of the 1980 *Surveys Act*. Only in the absence of any evidence, is the Ontario Land Surveyor to proceed according to the *Act* and the accompanying regulations.

The principle of best evidence is linked to the notion of certainty. It is ease of identification of a boundary line that is the foundation of all surveying: "Most weight should be given to those matters about which a person is least likely to be mistaken". Dale, 1976. Surveyors, after all, do not make boundaries, they only mark boundaries; property owners make boundaries. A property owner is entitled to know with certainty the status of his title to land.

Types of evidence include natural features such as the edge of water, trees, or cliffs; monuments set by surveyors such as stone markers, wood posts or iron bars; occupation such as houses and sheds; neighbouring properties; measurements from deeds and plans; field notes of past surveyors; affidavits from witnesses; and the reputation of the surveyor.

The principle and types of evidence have been refined by many court decisions, two of which are worth describing. In the 1878 Michigan case of Diehl v. Zanger, Chief Justice Cooley held that a well-established fence was better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey had disappeared. Because the boundary lines were located and the fences erected at a time when the original monuments were probably well known, they were clearly the best evidence available. It was ruled improper to ignore various landmarks produced by time, actual occupancy, improvements, usage or general acquiescence in favour of measurements. To do so would mean that:

The confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public

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calamity. (Diehl vs. Zanger, 1878).

A more recent case with a direct bearing on the *Surveys Act* is *Home Bank v. Might Directories Ltd.* (1914), which involved a dispute over ownership of the south wall of a building on Church Street in the City of Toronto. *Might Directories* claimed that the wall of the bank was a party wall, into which they were entitled to cut openings during construction of a building to the south. *Home Bank* disagreed, arguing that the boundary between the two parcels was the south face of the wall. Both the trial judge and the Appeal Court ruled in favour of *Home Bank*. The wall was held to be the best evidence of the side line, in the absence of any original monuments.

CONCLUSION

The last significant revision to the *Surveys Act* appears to have occurred in 1849. Of course there have been

numerous minor amendments and revisions since then, including the addition of a section on subdivision surveys after the *Home Bank and Might Directories Ltd.* decision in 1914. In addition, many of the provisions of the 19th Century Acts are reflected in the *Surveyors Act, 1987*. Nevertheless, to use a bit of artistic licence, we may assert that the 1785 *Act* was the god-parent, the 1798 *Act* was the grandparent, and the 1849 *Act* was the parent of the existing *Surveys Act*. The more things change, the more they stay the same!

That is, the requirements of the Ontario Land Surveyor remain the same: to mark boundaries and to re-establish boundaries using the best available evidence. For this, he or she must be, and is, an expert in evaluating boundary monuments. This very important role - a role indispensable to the orderly settlement of Ontario - has changed little in the last 100 years; indeed it has changed little since 1785!

SOME BACKGROUND STUFF

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- * Brotherhood et al., 1963. *The Surveys Act*. Report to the A.O.L.S. Annual Meeting.
- * *Diehl v. Zanger* (1878), 39 Mich 601.
- * Gibson P.S., 1891. *Difficulties in the Surveys Act*. Report to the Association of Provincial Land Surveyors (A.P.L.S.) Annual Meeting.
- * Gibson, P.S., 1906. *A Study of the Surveys Act*. Report to the A.O.L.S. Annual Meeting.
- * *Home Bank v. Might Directories Ltd.*, (1914). 31 O.L.R. 340, 20 D.L.R. 977.
- * LeMay, T.D., 1916. *Surveys Act*. Report to the A.O.L.S. Annual Mtg.
- * Sankey, V., 1886. *The Surveyors Act*. Report to the A.P.L.S. Annual Meeting.
- * *Surveys Act, R.S.O., 1980, c 493*