

Educational Corner “Stones” WALKING A FINE LINE

By John A. Middleton, O.L.S., C.L.S.
Consultant, Survey Review Department

During the course of comprehensive reviews, we see instances where surveyors have had real difficulty in remembering what a surveyor’s job really is. We see, on occasion, a surveyor making decisions about adverse possession which are not his or hers to make. We see plans where old fences, lines of eaves or edges of driveways have been adopted as evidence of a boundary where there is sufficient evidence to re-establish the limits elsewhere by more conventional means. Effectively, the surveyor has reported to the client an increase or reduction in the client’s holding on the belief that long occupation has conveyed title, having forgotten that long occupation may be evidence of the first running of a limit but, where there is better evidence of a limit, long occupation by itself does not convey title.

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An interesting example is a situation where survey monuments that had been set by a surveyor some time ago were moved several feet, shortly after they were established, onto a client’s property. In the interim, between the time the monuments were moved and a recent survey for the current owner, a fence had been erected by the neighbour along the rear third of the length of the line between the disturbed bars, and a low retaining wall built along the front third. No fence or wall existed along the middle third of the boundary between properties.

The surveyor assessed the age of the fence and wall as being more than ten years and prepared a reference plan showing the line of the fence and wall as the limit of the client’s property. The report to the client indicated that the land outside the line of fence and wall had been alienated by adverse possession.

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Apart from the fact that the surveyor knew that the monuments had been moved, and hence were not original monuments, the key issue is whether the surveyor exceeded his mandate by passing judgement on the merits of the fence and wall as possessory boundaries and illustrating the limits of his client’s property on the basis of that decision.

In this instance, the wall and fence may not, and likely would not, satisfy all of the criteria established by common law to constitute a possessory boundary, but even where there is little doubt of the merits of a case, it is not the surveyor’s decision to make. The surveyor’s job is to retrace the original boundary, to report to his or her client any obvious problems or contentious issues found to exist during the survey, and to make recommendations where appropriate. If, on the basis of those recommendations and advice of the client’s solicitor, the client decides to pursue a claim for the lands adversely occupied or to assert ownership of his or her lands which are adversely occupied, the surveyor can assist in that endeavour.

No provision is made in the Standards for Surveys for the establishment of boundaries on the basis of occupation, unless occupation is “evidence of the location of the original monuments” or “reasonably dating back to the creation of the boundary.” If occupation is not evidence of an original boundary or conventional boundary, it cannot be adopted arbitrarily as a possessory boundary without due process.

The surveyor walks a fine line in assessing fencing and other physical occupation. He or she must determine whether those features are signposts pointing towards the original location of boundaries or are simply features that need to be tied in, illustrated on plans, and brought to the client’s attention.

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In the future, as lands are converted to a modified Land Titles system through the implementation of POLARIS, the concept of adverse occupation and possessory title will change, especially in southern Ontario where the Registry Act has predominated. These changes however, should have little impact on the evaluation of evidence. Occupation that is evidence of the location of the original monuments will continue to be adopted as evidence of the location of a boundary, and other occupation will continue to be noted and brought to the client’s attention.

