PROTECTING SURVEY MONUMENTS

By Will O'Hara and Anna Husa

Introduction

There is a large guard dog watching over survey monuments in Canada. No matter how remote the monuments may be, this brave dog guards them day and night, ready to snarl at anyone who threatens to harm them and bite anyone who does. This fierce, all-seeing beast is sometimes called by its nickname - the *Criminal Code.*

Every one who wilfully pulls down, defaces, alters or removes anything planted or set up as the boundary line or part of the boundary line of land is guilty of an offence punishable on summary conviction.[1] This is the law across Canada and most common law jurisdictions. It is also the law in many jurisdictions in the United States, although our American neighbours have a patchwork of statutes and by-laws that define the offence, rather than one specific provision. Unfortunately, it is law that is rarely enforced in Canada for a number of legal and policy reasons. This article will examine the statutory provision, the reasons for it and consider why it is honoured more in the breach than in fact.

History

The concept of protecting survey monuments dates back to Biblical times. The Old English translation of Deuteronomy reads: Thou shalt not remove thy neighbour's landmarks which they of old times have set.[2] The modern translation would read very much like the present Criminal Code.

The same provision became the law in Ontario in 1798, shortly after the Province of Upper Canada was separated from the Province of Quebec, in *An Act to Ascertain and Establish on a Permanent Footing, the lines of Different Townships of this Province.*[3] The penalty at that time was far more severe than today, calling for "death without the benefit of clergy". Despite the Draconian words used in the statute, it meant only that criminals with minimal religious knowledge could avoid the death penalty by reciting the "neck verse."[4] By 1953 the Criminal Code provision had been reduced to the summary offence which it is today, as set out in section 442 of the Criminal Code. A more serious indictable offence remains in s. 443 of the Criminal Code for wilfully destroying boundary markers marking any international, provincial, county or municipal boundary, or a boundary mark lawfully placed by a land surveyor to mark any limit, boundary or angle of a concession, range, lot or parcel of land. The maximum sentence for that offence is five years.

The point of the offence should be obvious to the readers of this article but it was articulated clearly by Haliburton, Co. Ct. J. in *R. v. Stevenson*[5] as follows:

> The object of the section clearly was to maintain peace and order between neighbours by the preservation of ancient boundary markers which distinguished the division line between their respective properties and property interests.

Peace between neighbours is an important aspect of Canadian society that needs to be preserved and protected. These are noble goals, but are they being protected?

Although reported cases dealing with section 442 of the Criminal Code are few, they illustrate the limits on the section which presumably parliament intended to include in the law.

What is a boundary line?

This question was considered in *R. v. Stevenson*[6] where the accused had deliberately removed metal survey markers from his hay field that were placed by a land surveyor to mark a proposed right of way. The right of way depended on subdivision approval from the Planning Authority. The court considered the meaning of a boundary within the meaning of s. 442 of the Criminal Code and noted that a boundary was a line of division between two parcels of land. In this case there was no division between two parcels of land as the accused owned the land where the markers had been placed. The proposed right of way would not form a boundary until the subdivision plan was approved. The court observed that this was a case "where someone had trespassed upon the land of an owner and placed survey markers without the owner's consent." Since the accused did not interfere with a "boundary line" he had not committed the offence charged.

Before we jump to the conclusion that the accused got off on a technicality it is important to recall the purpose of the statute as described by the trial judge – maintaining peace between neighbours. "Near" boundary lines and "soon to be" boundary lines are not boundary lines. To assert that they are is to dispute an existing boundary and to destroy the peace that the statute aims to preserve.

A similar result was reached in the case of *R v. Hatt*[7] where the accused had removed a fence placed across a road by a municipality. Although the municipality had attempted to close the road it did not do so according to law. The court determined that the fence was an illegal obstruction across a highway, rather than a boundary line, and the accused was right to remove it.

The case of *Morisette v. St Francois Xavier Parish*[8] reached the same conclusion in a civil action involving

similar facts. The municipality had adopted a resolution calling for a new boundary between the plaintiff's land and a highway but it did not set the new boundary according to law. The municipality had appointed a land surveyor to place new markers on the plaintiff's property and the plaintiff pulled up the markers. The court held that the actions of the plaintiff were proper because the actions of the municipality and the land surveyor were illegal.

What is a "boundary line of land"?

Section 442 refers to "boundaries of land". How far does that wording extend?

The Registrar of Deeds in Halifax used to collect examples of dubious legal descriptions of properties registered in Nova Scotia. Her favourite was a metes and bounds description from the 19th Century that began at a blaze on a tree and went a number of paces in a northerly direction past the shoreline and ended at a point marked by the "rock on the ice". Suppose that this was a legitimate boundary and the ice was still on the lake during the first winter when the rock was placed as a "monument". A criminal who intentionally removed the rock from the ice would not likely be convicted because the boundary was not a "boundary of land". This example will have very few applications in real life, but it may be relevant to water lots or fish farming pens. Do fences for salmon in a water lot enjoy the same protection as fences for cattle on a land lot? Probably not.

What does "wilfully" mean?

Criminal Code offences generally require a *mens rea* or intention to commit the crime before a conviction can be entered. This prevents convicting people who do bad things accidentally, in their sleep, or in a state of delusion. Wilfullness is the requirement that the act be intentional. The term is defined in s. 429 of the Criminal Code:

Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

If the Crown fails to prove that the boundary was destroyed "wilfully", or intentionally, the accused will not be convicted. A rose gardener who moves an ancient pile of rocks from one side of the garden to the other, not knowing it to be a survey monument, will not be convicted of this offence.

Colour of right

Even if the boundary was a legitimate boundary, the law provides a defence to charges under s. 442 which is referred to in s. 429 of the Criminal Code as "colour of right".

No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right.

An accused who wants the benefit of this defence must prove that he believed in a state of facts which, if it actually existed, would have constituted a legal justification or excuse.

Take the case of an animal lover who turned his property into a wildlife sanctuary and was bothered by a dog that frightened wildlife in the sanctuary. He tried to chase the dog away by firing a shot at it, but he accidentally shot the dog instead, seriously wounding it. He was so distressed by the dog's suffering that he took another shot at the dog and put it out of its misery. The animal lover was charged with shooting the dog. He avoided a conviction by saying that his first shot was an accident and his second shot was for humanitarian purposes. His honest belief that the dog could not be saved provided him with colour of right – even though it was proved at trial that the dog could have been saved if it had been given proper medical care.[9]

What does that mean for a person who removes boundary markers from his land that he wrongly believed should not have been there? If he proves at trial that he honestly believed that the markers were put on his land by a trespasser with no right to do so – even if he is proven wrong at trial - he can use the colour of right defence and avoid a conviction. As indicated below, there are limits on how far this defence can be stretched, but the defences available under the *Criminal Code* will give a Crown prosecutor reason to think long and hard before laying a charge under this section.

Convictions and sentences

Why are there so few reported cases of convictions of persons who wilfully destroy survey markers or monuments? One decision is *R. v. Ross*[10] where the accused was convicted of the offence after wilfully removing monuments on a disputed boundary. In 1985 when the case was decided the offence was an indictable offence punishable by up to five years in prison. Mr. Ross was given an absolute discharge which meant he received no criminal record. The case was subject to some criticism. In an article by J.F. Doig entitled "Open Season on Monuments"[11] the author asks whether the removal and destruction of a boundary marker ought to remain and offence within the *Criminal Code.* The offence was later changed to a summary offence which is much less serious than an indictable offence. It may be a distinction with a difference as the effect of a conditional discharge is the same in both – no criminal record.

On sentencing the court was advised that Mr. Ross's conviction for the offence was "the first of its kind in Canada, apparently." It should be noted also that the court rejected Mr. Ross's defence of colour of right in the circumstances as the offence "would be nugatory". In other words the offence would have no effect at all if the court permitted the deliberate destruction of boundary markers where the boundary was in dispute. There clearly was no urgency in the Ross case

as there was in the case of the injured dog. The message was that landowners should use the courts to resolve disputes rather than attempting to hide behind colour of right defences.

Conclusions

There are many reasons why there are few cases dealing with this section of the *Criminal Code*. The wording of the section limits its application to a very narrow scope; the act of destroying a boundary marker in the course of a boundary dispute opens the door to a defence of colour of right even if the facts on which the act is based are wrong; destroying markers that are improperly placed by a land surveyor is not an offence under the act; and sentences for people convicted of the offence appear to be minimal. All of these factors affect prosecutorial discretion, with the result that few changes are laid by the Crown and fewer convictions are obtained.

But does it make any difference to society? Are we giving up peace and order between neighbours by not enforcing the preservation of ancient boundary markers? Perhaps the mere fact that this offence is in the *Criminal Code* acts as a sufficient deterrent to people who would wilfully destroy boundary markers. There is no question that the destruction of boundary markers occurs in Canada, but the extent of destruction is not clear. The authors have learned of a recent case where a landowner allegedly destroyed an ancient split rail fence marking the disputed boundary between properties while an application under the Boundaries Act was under way. This does little to maintain peace and order between neighbours.

If the destruction of boundary monuments were a serious problem in our society parliament would presumably change the wording of the section to make a conviction more likely and increase the punishment on conviction. That might encourage law enforcement officials to take steps to enforce the law. Until then the loyal and hard-working *Criminal Code* will remain to guard boundary monuments like a toothless dog whose bark is worse than its bite.

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[1] *Criminal Code,* R.S., 1985, c.C-46, s. 442
[2] Deuteronomy 19:14, referred to in *Survey Law In Canada,* Carswell, Toronto, at page 495
[3] See: *Survey Law in Canada,* Carswell, Toronto, at page 496
[4] See: D.W. Thompson, *Men and Meridians: The History of Surveying* (Ottawa: Canadian Government Publishing Centre, 1966, Volume 1, page 233
[5] [1991] N.S.J. No. 714 at para 9 (N.S. Co. Ct.)
[6] *Ibid.,* at paras. 12-14
[7] (1915), 25 C.C.C. 263 (N.S. Co. Ct.)
[8] (1911), 18 C.C.C. 291 (Que. Sup. Ct.)
[9] *R. v. Comber* (1975), 28 C.C.C. (2d) 444 (Ont. Co. Ct.)
[10] This case is cited in *Survey Law in Canada,* Carswell, Toronto, as *R. v. Ross* (1985), 72 N.S.R. (2d) 381 (C.A.), but the citation appears to be in error. The case does not appear in the case reports.
[11] J. F. Doig, "Open Season on Monuments?" (1986) 40-3 *The Canadian Surveyor* 291, at 291-296

Extraordinary Business Achievement

The Markham Board of Trade held their premier event and celebration of Markham's business excellence on October 30, 2006 in Markham, Ontario. During this gala event **First Base Solutions Inc.** was honoured with the Extraordinary Business Achievement Award.

Insurance Advisory Tips for Members *Tip #2*

Surveyors are reminded that any claim made against a surveyor must be reported ***immediately*** to the *Program Adjuster.* This is a condition precedent to coverage, and if you delay or fail to report a claim, the insurer could possibly deny coverage. A ***Claim*** is defined as follows:

…any notice to the Insured of any facts or circumstances which may give rise to one or more claims and/or any notice to the Insurer of one or more claims made against the Insured.

We encourage surveyors to err on the side of caution rather than take the chance that a situation will repair itself over time. A claim is not an incurred claim until money is paid to settle a problem.

Very often when a matter is reported out of an abundance of caution, *"incident reports"* are created to establish a paper trail for situations that might or might not become a claim in the future.

Remember, it does not cost anything to report an incident but failing to report could cost you dearly.