

THE APPLICATION OF LEGAL PRINCIPLES TO AN ASSESSMENT  
OF FENCES IN A PRACTICE IN NORTHERN ONTARIO

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In considering the topic of fences it is significant firstly to note that this seminar was designed to provide input from both the northern and southern areas of the Province.

To many, Northern Ontario represents all that unfenced wilderness lying north of Severn Bridge but to one who practices in Northeastern Ontario, encounters with fences and problems associated therewith are experienced presumably in a manner basically consistent with other areas of the Province, with notable differences in some instances, however, being related to age of fencing, type of development and rate of development.

This portion of the Province has historically been referred to as New Ontario, and those portions thereof reported in the original township outline surveys to be considered suitable for settlement were subsequently subdivided into township lots and concessions employing the 1000 acre and 640 acre sectional systems.

Although both systems of land registration in Ontario are available in this area, the majority of patents and leases issued for the purpose of alienating an interest from the Crown were registered under The Land Titles Act, with description of the lands alienated being entered in respective parcel and leasehold parcel registers.

In an endeavour to quickly span the years from date of the original township subdivision survey to date of any significant amount of settlement and fencing relating thereto, it is appropriate to note that settlement commenced slowly following the original township surveys but gained momentum once access was established through construction of primitive colonization routes and subsequently railroads. Access prior to this time was dependent basically upon water routes and overland packing trails. Early development revolved primarily around activities associated with the timber industry, with settlement progressing therewith to include agricultural and mining interests. With property ownership and development, particularly as it relates to agricultural and residential pursuits, comes the need for establishment of fencing and the inherent problems associated therewith including where to fence, what to fence and how to fence.

Unlike many portions of southern Ontario, age of development and fencing in Northeastern Ontario cannot be counted in terms of centuries, or for that matter, in terms of very many generations. Much of the area cannot boast of any appreciable amount of development at all, and rate of development in Northeastern Ontario, by comparison, has been quite low. Although many areas of highly developed agricultural lands do exist, significant also to the subject of fences is the fact that many homesteads representing appreciable attempts at development during the earlier years of this century have now been abandoned following depletion of timber reserves on the lots, and unsuccessful, small

scale agricultural ventures. Bearing in mind that this evidence of lot structure is no less valuable to Surveyors, the evidence at this date relating to the abandoned holdings is often found in the form of overgrown, fallen and generally unmaintained fencing nearing a state of physical obscurity. Also characteristic of Northeastern Ontario is the vastness of the area through which the sparse population is scattered, and directly as a result thereof, the large area covered both during early years of development and currently by private practitioners.

Survey records, most often in the form of superior calibre field notes of survey, reflect dates commensurate with date of development throughout the area and relate in particular to many of the lots and aliquot parts thereof developed for agricultural purposes. Common observations when regularly comparing and reviewing information contained in records prepared by early practitioners in this area, suggest that:

- many lot lines and aliquot part lines were run by Surveyors employing methods found acceptable during that era, although contrary in part to methods advocated by The Surveys Act in effect today relating to lines being established for the first time;
- the surveys were dated in many cases shortly after the date of patent and lend credence to the belief that settlers were concerned about locating true boundaries of farm lots prior to fencing and land clearing;
- calibre of endeavour and dedication demonstrated by the few and

very distinguished surveyors responsible for the majority of work conducted during the early development era is abundantly apparent by the results achieved and by the care taken when attempting to perpetuate and reference key evidence;

- despite limited travel facilities and inconvenience obviously experienced during this era, the principal practitioners managed to provide service over a broad area, and, through their efforts and records permit excellent opportunity during current practice involvement to perpetuate much of the original survey fabric;

- fences are regularly noted in the early field notes of survey and often a brief but appropriate explanation is provided with respect to the origin, status and reliability of the fence. Often fences found having irregular alignment can be related by early field notes of survey and current measurements to alignment of the original township survey fabric;

- many parcels of land created as severances from the original township lots were established and monumented by survey with methods, results and key reference ties clearly illustrated in the field notes of survey, even though no plans may have been drawn, or in the alternative, no reference to a survey or plan may appear in the respective registered description;

- field notes of survey relating to abutting surveys completed years subsequent to the initial severance surveys often clearly illustrate fences built in conformity with staking found in place for the initial severances, despite discrepancy being found in the description tie from the initial severance to the lot corner.

When applying legal principles to an assessment of fences, the fences usually being assessed have been divided into three groups as follows:

- fences on lot lines not run in the original survey,
- fences on lot lines run in the original survey or during lot surveys, and
- fences and legal descriptions.

When occupational evidence such as a fence exists in the approximate position of where an unrun line would be were it established in accordance with the appropriate method as set out in The Surveys Act, obtaining "the best evidence the case admits of" includes finding answers to the questions relating to:

- how old and regular is the fence?
- how did the fence originate?
- is the fence old enough or did it replace a fence of sufficient age that it can be reasonably assumed that the fence was initially constructed at a time when evidence of the original survey was still available at the lot corner?
- does the direction of the fence suggest that the original fence may have been located on a line

surveyed in accordance with the law and practice of that day even though a record of any such survey has not been found and included in the research information?

- do the adjoining property owners or other persons who have resided in the area for a long time and who have knowledge of the particular fence, recognize and acknowledge the fence as a lot line?

The answers to these questions, and others appropriate to particular circumstances, are assessed and are duly recorded in survey returns in support of the decision regarding status of the fence. It is significant to suggest that hard and fast rules for the interpretation of evidence in cases such as this cannot be laid down, and that every case is found to have conditions peculiar to it alone, and must be resolved on the basis of the particular evidence.

Data relating to the fence encountered on the unrun line is collected methodically by the party chief with particular concern that comments relating to the status of the fence made by local people, and in particular by the parties abutting the fence line, be noted. Having thoroughly researched the file, and with well established knowledge of the area, often decisions are made by the surveyor based on information noted during the course of a survey by experienced technical personnel. Regularly, however, complications are experienced requiring further site attendances and extensive investigation by the surveyor. Possibly a recent experience would be appropriate wherein research conducted on the

file would suggest that the lot line in question should not fall in this category at all, but in the category relating to fences on lines run in original surveys or during subsequent lot surveys.

Two plans dated within a few years of each other showed monumentation along the lot line. The first plan, being a plan of survey, illustrated a large severance from the lot on the west side of the line. The second plan, being a reference plan, illustrated a large severance from the lot on the east side of the line. No reference was made on the second plan to points of monumentation on the first plan. Since we were involved with the entire length of the line, the work was commenced with the thought that the line would be re-established making reference to existing monumentation by the two prior plans. This thought was soon made obsolete upon finding that the monumentation by the first and second surveys did not correspond even closely, in fact monumentation overlapped to the extent that lands purportedly within the severances from the respective adjoining lots overlapped by approximately sixty feet. Also found on the ground, well obscured by alder slash, was a very old fence running for the depth of the lot, with exception of the first few feet near the front of the lot, and running within the sixty foot overlap area common to the two purported severances.

The fence line was cut out and found to be straight throughout. The line of fence was projected to intersect the retracement line established along the front of the lot and the point of intersection was found to correspond well when comparing measured and original distances for one lot width each side of the line.

Furthermore the direction of the fence line was found to correspond within minutes of the theoretic bearing of the lot line. The abutting owners were aware of the location of their respective corner bars, but until now had not been aware of each others corners, or that the fence possibly constituted best evidence for establishing the lot line. They were aware of the fence but had discounted it in favour of the respective lines as monumented by surveyors retained for the severance surveys.

You will conclude at this point that, based on the monumentation to date, each owner stood to gain considerable land by discounting the fence line. In an endeavour to resolve the issue, the respective surveyors were provided with an account of findings to date with anticipation that evidence assessed could be re-assessed and the final position of the line agreed upon. The surveyor involved with the first severance corresponded from his office in Southern Ontario stating that no field notes or report was available relating to the matter. Details of discussion with the surveyor involved with the second severance, although seemingly appropriate to many areas of disciplinary activity by our Association, will not be reviewed at this time and may be summed up in his statemnt to the effect that I should forget that he was there'. So much for professional responsibility and the protection of the public that we are authorized and trusted to serve.

Following further assessment of the evidence, the lot line was treated in the same manner as an unrun line, only in this case ties were taken to all monumentation as found, a Report of Survey position of the fence as best evidence of the lot line, and the

adjoining owners were provided with a full account of our endeavours and mutually agreed without reservation at the conclusion of the statements to that effect signed by the adjoining owners. Rectification of the respective parcel registers was effected based on results as described, without benefit of assistance from the surveyors involved with the prior severances.

With respect to fences on or in the vicinity of lot lines run in the original survey or during lot surveys, a much more direct authority is attached to the fence. Remarkably favourable and consistent comparisons are regularly found between measurements illustrated in old survey records throughout the area and measurements presently being obtained to fences serving as monuments to these surveys. Problems encountered relating to these fences invariably occur not in assessing the legal status of the fence, but in dealing with numerous subsequent surveys that have disregarded the fence as evidence of lot structure.

Throughout one era of development, survey methods adhered to and results of record by some surveyors suggest constant use of The Surveys Act during establishment of lot boundaries and aliquot parts thereof regardless of existing fences, whether or not the position of the fences resulted from surveys dating back to days of original development.

Registered plans resulting from these surveys, on occasion, involved rights-of-way extending across entire townships, and forming the basis for surveys, plans and descriptions of new parcels. Problems relating to assessment of evidence come into

sharp focus upon arriving at the conclusion, following research and preliminary field investigation for a comparatively small survey, that data in old field notes corresponds directly to location of fencing and bears no appreciable resemblance to the theoretic lines established.

On the premise that the professional is held responsible to exercise his profession with skill or accept the consequences of legal liability and discipline, and on the premise that assessment of evidence must be carried out in the same manner as it might be assessed in a court of law, the existing old fences in these cases are accepted as better evidence of the lot boundary and aliquot part lines than the line positioned theoretically.

Inconvenience, extra cost and scheduling problems are often experienced under these circumstances. Normally, scheduling does not permit time necessary for amendments to the theoretic involvement and therefore costs are apparent, and the client experiences inconvenience in the pursuit of his endeavour.

Invariably, the issue is dealt with by re-establishing that portion of the lot structure relevant to the survey at hand, making direct reference to the old field notes of survey, and disregarding the theoretic lot retracement of record. The remainder of the theoretic boundaries are left unamended unless the surveyor responsible acknowledges the need for amendment and acts accordingly, or until individual small surveys are completed affecting other portions of the theoretic survey.

Adherence to evidence in the form of fencing on lines surveyed and supported by records of survey is the accepted principle regardless of evidence established by theoretic methods. Substantial costs are sometimes involved, much to the discouragement of the client and the surveyor, but unless the issues are squarely faced and dealt with as they occur, the problems associated therewith multiply. Although remuneration is not inconsistent with the modern concept of professionalism, the dominant motive in the practice of a profession is the service to the client, which subordinates the pursuit of making money.

When considering fences and legal descriptions, most often relating to parcels out of township lots, consideration is directed towards the manner in which the intent expressed in the metes and bounds description was established. Under The Registry Act, ambiguous descriptions are often encountered. Fences existing along well established and observed boundaries regularly serve as monuments to and best evidence of the agreement made between the two parties originally.

Under The Land Titles Act, registered descriptions, particularly throughout an era prior to introduction of Assistant Examiners of Surveys as part of the Ministry of Consumer and Commercial Relations office staff complement, were treated often in a manner suggesting that every description was perfect and related exactly to the situation on the ground regardless of fences or any other form of occupation not cited in the description. Although numerous discussions evolve with respect to interpretation of legal descriptions, it is significant and essential to

differentiate in all cases between adverse possession and misdescription.

Current practice is to illustrate registered and measured values on reference plans for the purpose of relating parcel register values to physical evidence of survey controlling the parcel boundaries, inasmuch as fences found to be originating from early surveys, but in conflict with details of metes and bounds parcel descriptions, are used as evidence of the parcel boundaries if the fences are mutually agreed upon by the abutting owners. Registered owners of lands abutting the fenced boundaries shown on the plan are requested to sign the plan to the effect that they do mutually agree to the boundaries illustrated. The registered and measured ties shown on the new reference plan serve as a method of updating details of registered title, and provide a logical and recommendable alternative in many instances to the method of holding registered description ties as the gospel in all cases, and involving The Planning Act and numerous conveyances of parts identifying the slivers of land lying between boundaries by description vs occupation.

In cases where registered descriptions do not correspond to respective parcel boundaries as fenced, and abutting owners fail to agree on the boundaries to be used, recourse to The Boundaries Act is encouraged. On rare occasion a parcel is found fenced and occupied, but upon survey is found to be totally outside of the area described in the parcel register. In these instances the area fenced is treated as a new severance and new title is created, subject to first establishing Ministry of Housing severance approval relating to the area fenced. Fences are used

as limits of occupation when defining boundaries of forced roads for the first time both on the ground and on title, unless specific circumstances or documentation in the form of By-laws, etc., should dictate otherwise.

Tracing the origin of fences is a constant problem in assessing the legal status of fences. In concluding, I make reference to two instances which serve to underline difficulties in establishing origin, and ironically relate to situations occurring long before I had any aspirations about becoming involved with surveys.

As a boy growing up in a rural environment I had the opportunity by chance to listen to two abutting farmers methodically discussing where to build a fence for the first time involving the aliquot part boundary dividing their farms. The east boundary of the lot was assumed to be in the centre of the straight, level road running for miles north and south of the lot. It was decided that they should measure off half a mile northerly along the centre of this road from the intersection of roads in the vicinity of the southeast corner of the lot. Once that was accomplished, and using knowledge obtained from some source, they would build a right-angled frame to be set on saw horses for the purpose of lining up one side of the right angle with the east boundary of the lot by carefully sighting north and south along the centre of the road at the half mile point, and having satisfied themselves that the sighting was done properly, they would then use the alignment of the other arm of the right angle, without disturbing the position of the frame, and commence setting pickets for the purpose of running the boundary between their farms prior to fencing.

The fence was built with similar care, and has been faithfully maintained by each of the farmers since that time, and now bears appearance at least of a long established boundary, although I am sure, if approached properly, both farmers in this instance would be proud to relate how they had built the fence. I am certain, however, that they would also show the same eagerness to find out where the line really would be by survey, and would realign their fencing to respect the 'true' boundary without hesitation.

This example therefore may serve to indicate legal involvement potentially to be experienced by a surveyor automatically assuming that this particular fence constituted best evidence of the aliquot part line.

During another instance relating to origin of fencing occurring during the same era, I was attracted by chance at the site of an elderly and respected citizen of the township as he untangled a surveyor's chain. He volunteered that he was about to measure across a farm lot, and upon noticing that the chain would have to be held at both ends, I offered to help, not knowing that the elderly gentleman would quickly reply that this was serious work to be conducted by responsible people of mature age. Shortly after making that remark two assistants arrived and, following a short briefing, placed the chain and a long spruce pole in the back of the elderly man's half-ton truck. As they drove away the pole bounced off the truck and they then stopped and suggested that if I really wanted to help I could sit in the back of the truck and hold onto the pole. Upon reaching their destination, the men methodically began measuring across a farm lot purportedly to satisfy some minor argument relating to what

length of fence was to be maintained by each party to a common boundary. As the two men used the chain, the third man took the pole from the back of the truck and, having grasped the pole at approximately mid-distance from the ends, began walking along the line carefully flipping the pole end over end.

As it turned out, in their practical endeavour, the man with the pole performed an independent check on the measurements obtained with the chain, as the 3 inch diameter pole had been cut at a length of 16 feet 3 inches, and as the man used the pole in the end over end manner, he picked up the other three inches necessary to make a rod for each pole length.

Apparently these 3 gentlemen although not officially fence viewers as we would refer to under The Line Fences Act, often found occasion to demonstrate their particular expertise, hopefully for not too much pay, and again may well have originated the location of fences used as practical boundaries for many years, even though the fence lines were in many instances observed by the abutting owners as not necessarily the real boundary.

So as a word of caution, and on the premise that the difference between good and bad is effort, after you have faithfully researched all information pertaining to a boundary, and have assessed to the best of your ability the legal status of a fence, don't be surprised if some elderly gentleman arrives at the scene and suggests that this is serious work, to be conducted by responsible people of a mature age.