WHEN IS A FENCE A FENCE,
WHEN IS A FENCE A MONUMENT

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I went to a place just the other night,
A house set high on a hill
Where surveyors came to scrap and to fight
Over problems they just couldn't kill.

Well armed for the battle before them
They hooted and hollered with glee
The foe was about to be shaken
Their problems forever to flee.

The first one came in with "The Act" in his hand
The next a T-2 at his breast
The third held a sack where case law was crammed
The fourth came in pulling a fence.

The battle was fierce, it seemed straight out of Hell
'till finally they came to their sense
As peace settled over the house on the hill
Four surveyors sat on the fence.

1. "The surveyor is a fact finder. He goes to the land armed with all documentary evidence that is available and searches for

markers, monuments and other facts - the surveyor must come to a conclusion from these facts - which monuments can be accepted and which must be rejected. The ability to arrive at a conclusion, and answer such questions elevates the land surveyor from the status of a technican to that of a professional man. He is exercising independent judgement. He is constantly interpreting what the statutes say, but such interpretation is correct only to the extent to which the courts will uphold it. He is in the unfortunate position of being a middleman who must determine for a client what he thinks the court will accept." (Brown - Boundary Control and Legal Principles)

It would appear then, that our job is to determine when, in fact, a fence is a fence and when a fence is a monument.

The American Heritage Dictionary describes a fence as "an enclosure, barrier or boundary made of posts, boards, wire, stakes or rails". If we were to analyze this definition carefully, we would see that it embodies many fundamental principles which will aid us in deciding if a fence is a monument.

A fence is an "enclosure". It is intended to keep the dog under control. It encloses the land or holding which I consider to be mine. By putting up a fence I stand up before the whole world and announce that "this is my property - if you come over here you'll have to contend with me". As a boy, I was brought up on a small subsistence farm in the Bancroft area. I remember an incident that brought this point home to be very forcibly. I had

a black and white spotted pony which I called "Donny". He antagonized our neighbour to no end by rubbing his behind on the fence between our properties. One day he decided to do this while I was with him. Alas - the fence fell down and my pony, my best friend, was captured by our neighbour. I learned the lesson well. The fence was a boundary and we dare not trespass. My pony was kept by the neighbour until my Dad fixed the fence.

A fence is a barrier. It impedes the progress of the masses. It says "you may come this far, but now you must deal with me". No wonder the courts put such a strong emphasis on occupational evidence. Possession is 9/10 of the law. A fence is a boundary - it marks clearly the territory I intend to defend. This is the point I would like to develop in the next few moments. A fence is more than just a fence when we recognize it as a boundary marker or monument.

We do have a statute in Ontario which, in a way, recognizes the importance of fences to a land owner. It is called the "Line Fences Act" and, in fact, it has just recently been rewritten and revised. Section 3 states, "An owner of land may construct and maintain a fence to mark the boundary between his land and adjoining lands". People have always recognized the need to mark their boundary, and under this Act they are given statutory approval. In reading through the Act recently, I was surprised at the number of times they refer to the fence as "the line fence marking the boundary of the adjoining lands". It is not only the surveyors who must recognize the importance of fences - citizens and governments alike must stand up and take notice.

A fence viewer appointed under this statute to arbitrate over a fence dispute has no jurisdiction to resolve boundary disputes. He is able to make an award respecting the matter in dispute, such as the size, shape, cost or even the existence of a fence. One important point to note is that both owners must sign a form saying that the boundary is not in dispute. Do you feel that an acknowledgement such as this could affect the way in which you carry out your survey?

The criteria used in choosing fence materials has not changed substantially down through the years. People are still basically concerned about:

a) the cost of the fence,
b) the type and availability of fence materials,
c) whether or not the neighbours will like the fence and share in the cost of having it erected,
d) if the materials chosen reflect general trends for fences in the neighbourhood or block,
e) if the fence will be substantial enough to satisfy local by-law requirements,
f) if it will afford the family the desired privacy,
g) whether or not it is placed entirely on one property or on the property line,
h) whether or not a surveyor should be called to establish the line before it is built.

With these points in mind, we are able to examine an existing fence, old or new, and allow it to help us form an opinion as to

why and for whom it was constructed. If the fence is not able to speak for itself, you will undoubtedly want to question local, longtime residents about neighbourhood fences. They have their heads crammed with details that will aid you in your search for the truth. Take the time to inquire. It may save you much time and money down the road.

Let us look briefly at four situations in which fences play an important role in defining the location of a property limit.

In the first instance, original survey monuments in a subdivision have long since disappeared and all that remains are various forms of occupational evidence including fences, hedges and tree lines. All of the original field notes are lost; you have a five foot error in a block; you have in your hands a reference plan prepared by another surveyor who has laid out one lot in the middle of the block with no regard for occupational evidence. You, in the meanwhile, are displaying the usual discomforts associated with this type of situation - heart palpitations, sweaty palms, hands full of grey hair and sharp pains in the vicinity of your pocket book. What do you do?

If you can establish that a fence was erected when original monuments were in place and their position was well known, you have gone a long way in determining whether or not the fence is

a monument. This principle is supported in case law, eg., Diehl v. Zanger, 39 Mich 601. The surveyor, in this case, in re-surveying a well established subdivision of 20 years, set out the lots according to the original plan. The problem was that his survey differed consistently from occupational lines by 4 to 5 feet. The courts finally decided that the long acquiesced in boundaries (occupational limits) should stand. Justice Cooley, after soundly rapping the surveyor's knuckles by saying that he had missed the point altogether, remarked that:

> "The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. If they (the original stakes) are no longer discoverable, the question is where were they located; and upon that question, the best possible evidence is usually to be found in the practical location of the lines made at the time when the original monuments were presumably in existence, and probably well known. As between old fences and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot acually are".

To these comments I would hasten to add that a fence cannot be accepted as a lot line just because it sits in the approximate location of a lot line. We must be fully satisfied that if we were to follow back along the historical path of this fence, it would lead directly to the time and place where Mr. X, Ontario Land Surveyor, was grubbing about on his knees putting in a survey monument.

The comments of Justice Cooley should also alert us to the situation where we encounter a recent erroneous survey where monuments were planted at a significant distance from a fence that would otherwise govern because it was the best evidence of the original survey. In this situation, after consultation with the other surveyor, you may choose to accept the fence and ignore the incorrectly placed survey posts. Why would you bother to consult the other surveyor in this case? Well, he may know something about that boundary that you don't. For example, if the previous surveyor found an original monument in its original position and replaced it because it was decayed, then this new monument will govern as if it were the original monument and will, therefore, bear more weight than the fence as evidence of the original line.

The second situation involved fences which are constructed by the owners after a severance has been made without the benefit of a survey. The fence marking the line of severance is not the best evidence of the original survey because this property was never surveyed.

However, the fence may be the best evidence of the "intention" of the original parties who agreed on that particular line, and, therefore, it could be the boundary. An example of this situation is the case of Kingston v. Highland (1919 47 N.B.R. 324). The evidence presented in the case established beyond doubt that, not only did the original owner of the whole parcel decide on and mark a line between himself and his brother, but they and their successors had peacefully lived up to and maintained the dividing line. The courts decided that the

surveyor had erred in his reestablishment of the property line by deed description because... "it was undoubtedly true that even without the surveyor it is quite competent for adjoining properties to establish their dividing line where they choose".

In this case, an old fence and blazed line was held to be the boundary and the fact that the deed disagreed with the line was immaterial. Justice Barry points his finger at surveyors and says "Occupation, then, especially if long continued, often affords satisfactory evidence of the original boundary, (or may I add "the intent of the original parties") when no other is attainable; and the surveyor should inquire when it originated, how and why the lines were then located as they were, and whether claim of title has always accompanied possession, and give all facts due force as evidence".

The third situation where one may consider a fence a monument occurs when two parties agree to the establishment of a Conventional Boundary and then take some action, such as the construction of a house, garage, of perhaps even a fence, in respect of that conventional boundary. This is one point for which you must be very careful. Please note, that in this case a dispute is not necessary, and there is no specific time period or limitation. If there has been agreement to a line and some action in respect of that line, a conventional boundary could well have been established.

In the classic case, Grasett v. Carter, the requirements to establish such a line are discussed.

Ritchie C.J. states:

> "I think it is clear law well established... that where there may be doubt as to the exact true dividing line of two lots, and the parties meet together and then and there determine and agree on a line as being the dividing line of the two lots, and, upon the strength of that agreement and determination and fixing of a conventional boundary, one of the parties builds to that line, the other party is estopped from denying that, that is the true dividing line between the properties."

And also by Hughes, J. in Wilbur v. Tingley:

> "No length of time is necessary after an agreement has been reached. The erection of a fence on the agreed line is not necessary. Delay in objecting may and frequently does establish acquiescence. Such agreement does not involve a breach of the Statute of Frauds. It does not require a conveyance of any land from one party to another. It is simply an agreement acknowledging the correct location of the boundaries and settling a dispute."

The fourth situation where one may consider a fence as a monument is in the case of - you guessed it - adverse possession. The comments on this subject that I have heard recently from various surveyors range from "Squatters' rights are a thing of the past", to, "every 10 years the boundary changes" and may I add,

everything in between. I will not belabour this point any more than to say that you can only have adverse possession when parties are aware of the position of a property line and one of those parties without force, without secrecy and without permission decides to extend his possession over that boundary and he, in fact, does possess that land continuously for at least 10 years. So when you go to the field and do the survey, no one is particularly surprised to find that the line you have re-surveyed differs from the old fence by 20 feet.

If you feel that this is clearly a case in adverse possession, speak to your client, advise him to see his lawyer and then prepare a plan which clearly indicates both the limits of occupation and deed lines or lot lines.

The point that I have been striving to make in outlining the foregoing, is that fences are important. Yes, they are very important. I asked a local surveyor, one whom I greatly admire, what he does in a situation where a deed limit is significantly different from an old fence line. He simply said, "I get very nervous". And well we might. A fence is tangible, visible and touchable. A court is very reluctant to push that aside in favour of a theoretical line.

If you are dealing on a daily basis with many of the problems I have outlined above, you may be feeling that much of what I have said is just "old hat". For any who would feel that way today, I would like to introduce a couple of age-old problems - namely fences governing road or railway right-of-way widths. These are topics which will undoubtedly give us fuel for discussion.

The re-establishment of railway boundaries can be a tricky business when it is found that fence limits do not agree with other forms of primary evidence such a survey monuments and old railway tracks. In the Spring issue of the Ontario Land Surveyor, 1976, Mr. W.J. Quinsey sets out the CNR's view of how a surveyor should approach the problem of conflicting evidence along railway limits. I feel strongly that some of his statements require close scrutiny. He states the following:

> 2. "Fences were constructed by Railway work crews under the direction of a section foreman or engineer who had a sketch or plan showing distances to the limits at certain plus stations. Fences were generally constructed about one foot inside the Railway's deed limit as a precaution against encroachment on the part of the Railway. When portions of fences on opposite sides of the right-of-way seem nearly as old as, or can be dated from the original construction of the railway, and when these portions are found by measurement between them to nearly contain the original plan or deed width, these portions are considered to be primary evidence for determining the original position of the right-of-way... Errors in the Railway's positioning and construction of fences have been made, some increasing and some decreasing the occupied width of the right-of-way... There are a few cases where there may be good evidence that the old existing limit fence was originally built by the Railway within their deed limits, and where the resulting strip of land beween

fence and deed limit has subsequently been both occupied by the adjoining owner and included by description in his registered ownership. In these cases... certain court decisions have ruled in favour of the Railways...to the effect that the Railway cannot be dispossessed of lands which are necessary for the purpose of railway. In other situations there may be conflicting evidence and uncertainty as to the original position of the Railway's deed or plan limit. In these cases where your method of re-establishment results in any portion of the railway's fence being outside of the Railway's deed or plan limit, we suggest that your plan of survey should show the said portion as being the railway boundary by occupation. We consider that the construction of a fence by the Railway work crew can be deemed an act of open, notorious possession on the part of the Railway in regard to any portions of the fence which might have been constructed outside of the deed limit. Even in cases where there is no uncertainty as to the Railway's deed limit, we suggest the fence be shown as the Railway boundary by occupation".

In a nutshell, the CNR is saying that their limits extend to the fenced limits or the deed limit, which ever has the effect of giving the greatest right-of-way width.

Before proceeding with an examination of these statements, it seems abundantly clear to me that we must answer two very important questions:

1. Has the CNR or any other railway company acquired any additional legal rights for the protection of its boundaries as a result of it being a Crown Corporation?

2. Should your basic approach to the use of fences in surveying change when we encounter limits of Railway lands?

The answer to the first question is, NO. The railway companies have not acquired additional legal rights for the protection of its boundaries. They do, however, have the authority to expropriate lands thereby acquiring full right title and interest in them without permission.

The answer to the latter question may depend on your daring spirit, your search for adventure, your client's financial stake in the matter, or the extent of your desire to see justice prevail.

I would estimate that in 99.9% of all cases where there could be a legitimate dispute over the position of a Railway boundary, there is not enough land up for grabs to make the dispute worthwhile. You should recognize this situation and point it out to your client. The railway will object to your plan even when the amount of encroachment of a railway fence over a deed limit is less than one foot. They object because they wish to prevent the possibility of future expense to the Railway in moving its own fence to the deed limit.

The Railway companies are not above the law and in the past have been forced by the courts to move their fences to agree with the

deed line. You must weigh the facts of the case very carefully, taking into consideration the financial and time constraints of your client while at the same time respecting the rights and power of the CNR. If your client wishes to have his options left open and you feel uneasy about accepting one limit ahead of another, prepare the reference plan in such a way that it shows the disputed portion of land as a PART on the plan.

As a general rule, I have reluctantly accepted the CNR's rather dogmatic stand on this matter. To some this may sound like heresy, and to others it may be observed as the only practical solution.

Idealism is best tempered with a practical approach.

The problems of railway rights-of-way are miniscule in relation to those encountered when re-establishing the limits of old roads.

Generally speaking, I do not accept a fence along a road as a monument as readily as a fence along a railway limit. This, of course, would depend on the type of road being surveyed.

One must be very careful in accepting fences along the limits of a road allowance because the distance between these fences often varies and seldom agrees with the width of the road allowance.

3. Initially, fences were probably erected to mark the limits of the road allowance, but in time the original fences deteriorated and had to be replaced. Rather than

remove the old fences the landowner merely erected the new fence in a new position. Seldom were these fences erected further onto the owner's land, but rather within the limits of the road allowance, hence the distance between them is usually less than the actual width of the road allowance.

One should take into consideration the age and condition of these fences, along with their relationship to the position of existing road grades and ditches, when using the fences to establish road allowance limits. Township by-laws often permitted owners to put fences out on a road allowance by a specific amount. A search of the by-law Book might yield some required information.

The type of survey system used originally to lay out the township should also be considered.

For example, if the distance between fences on the limits of a road allowance in a "Single Front" Township measured more or less than 66 feet, it is likely that 33 feet measured from the fence on the run line is closer to the position of the centre line of the road allowance than the position arrived at by splitting the fences.

Conversely, in "Double Front" or some sectional systems, fences on both sides of the travelled road along the road allowance would be equally important in the re-establishment of the road allowance. In such cases, "splitting the fences" is probably the best method of establishing the centre line of the road allowance.

When you consider forced roads the situation changes once again. In this case, the fence is very important because it is often the only evidence available for the re-establishment of the limit. It is an occupational limit as expressed by the adjacent owner. Case law seems very clear on this point, generally giving the benefit of any doubt to the private land owner. You must be certain, however, that the fence includes all those portions of the road being used. There is no basis for establishing them at any prescribed width such as 66 feet. Generally if they are defined by fences, the fence location will mark the limits of the road. This must be done with a certain amount of discretion. Before you can accept a fence as a road limit, you must establish beyond a reasonable doubt that it was intended to mark the road limit.

In the case of provincial highways which have been acquired by expropriation or deed, the fences are of little effect. Fences should only be used as a last resort and in consultation with M.T.C. personnel.

While acting as a surveyor for the M.T.C., I found many situations where fences did not agree with highway plan limits, however, in every case arrangements were made to have the fences moved to the deed line. The M.T.C. has a low priority right-of-way inspection program which involves the inspection of highway monuments and fences. If they are not in agreement or if monuments are missing, appropriate corrective measures are taken. From the 1930's the DHO had a program whereby widenings were taken, and in compensation for this, fences were constructed. However, the documentation for these transactions is very poor.

You should consult the M.T.C. if you suspenct that this has happened. They will generally act very quickly in rectifying the situation, or at least in advising you on the proper course of action.

How do the economic factors present in operating your private practice influence your treatment of, or attitude towards, fences? I have personally found that when surveying the aliquot part of a lot an old fence is like a breath of fresh air. I suppose the real question here is whether or not you and I are willing to spend the time and money to investigate problems with fences and property lines. Investigation can be expensive and bothersome. It can also be emotionally and financially rewarding to see a problem through to the end... especially if it ends up in court and you are on the winning side. Above all, do not jump on a "always theoretical" or "always fences" bandwagon. Find out the facts of the case and take the time to write them down. If you are still unsure as to which way you should go, ask another surveyor whom you respect for an opinion.

When I receive field returns from the crews I make it a point to question the Party Chief about fences. I expect a statement about the type, age, condition, and regularity of the fence. If I am dealing with a person who has not had sufficient experience in dealing with these matters, I will accompany him to the field for further inspection. As a general rule, if I start getting nervous, I check it out. This investigation will also include a call to my client's neighbours.

You have at your fingertips a very powerful tool for finding out

the truth about a boundary. Section 7 of the Surveys Act gives you the power to examine a person under oath. The affidavit should be clear, precise and to the point. For example:

AFFIDAVIT

Township of Tay)

County of Simcoe)

Province of Ontario) To Wit:

I, ..., of the Township of Tay make oath and say: -

That I am 74 years of age;

That the north limit of my property is marked by an old post and wire fence;

That this fence has been in the same position as that shown to ....., Ontario Land Surveyor, for over 30 years;

That to the best of my knowledge the position of this fence has never been in dispute.

Sworn before me in the)

Township of Tay, County of)

Simcoe, Province of Ontario)

this 21st day of February, 1981)

_____

Signature
John G. Doe

_____

P.J. Stringer, Ontario Land Surveyor

The time has come to pause and reflect for a moment on what has been said. When is a fence a fence and when is a fence a monument?

You make the same type of decision every day concerning other forms of evidence. Use the same tried and proven principles here as well. Arm yourself properly with the facts -- weigh them carefully, take a decisive step and document your conclusion.

I trust that these few words about fences have, in some way, helped you to formulate opinions about the proper approach to take when, tomorrow, you are confronted with a dirty, old, broken down fence. You may want to hang your hat on it.

Thank you.