

BOUNDARIES AND LAND REGISTRATION

(PART 1)

By A. C. McEWEN, O.L.S.

(The following is the first part of a two-part series on Mr. McEwen's presentation as a member of a panel on the Ontario Law Reform Commission's Report on Land Registration, held during The Canadian Bar Association (Ontario Branch) mid-Winter meeting in Toronto, February, 1972. Part two will be carried in the next issue of the quarterly. This part deals with the relationship between title and boundaries).

The geographical basis of title to land in Ontario is the township system. These townships, many of which were originally surveyed in the late 18th and early 19th centuries, were each intended to be a mathematical figure whose outline and internal divisions conformed to a regular and systematic design. Every township was measured and marked on the ground by a surveyor, acting under instructions from the Surveyor General. In some types of township, the surveyor was not required to measure every line, nor to plant a survey monument at every lot corner.

The records indicate that much of this early work was performed with the magnetic compass, an instrument incapable of yielding results of high accuracy. It must also be recognized that some of the early surveyors were men whose technical proficiency fell short of the desirable standard.

This is no criticism; great expenditure of effort and money could not have been justified during a period when the immediate objective was to place settlers on land which had little economic value at the time.

Origination

Yet it is most important to appreciate that all present-day titles and boundaries stem from and reflect the quality of those early township surveys, the original lines and monuments of which are declared by statute to be true and unalterable, regardless of their theoretical position.

For example, the intention in the township survey may have been to give each lot a width of 20 chains (1,320 feet), but if the original monuments marking the lot corners can be found, they must govern the width of the lot, whether or not this is shown to be substantially different from the recorded measurement of 20 chains.

For this reason, a conveyance for example, of "all of Lot 20, Concession III, Township of Blank", does not necessarily indicate to the purchaser the exact extent of the land he is acquiring, even though the dimensions of the lot are shown on the original township

survey plan.

Confusion Exists

The principle of making original monuments true and unalterable extends also to registered plans of subdivision. Here again, the monuments planted to mark the lot corners control the size of the lot, regardless of its theoretical dimensions.

Confusion sometimes exists when the land is registered under **The Land Titles Act** (R.S.O. 1970, c.234), where a purchaser, knowing that the title to his land is guaranteed by the province, expects that the boundaries should also be guaranteed.

In Ontario this is not the case; Section 159(2) of the Act states that the description of registered land is not conclusive as to the boundaries or extent of the land.

The reason behind this apparent paradox of providing an affirmation of title, without a corresponding affirmation of boundaries, seems to be that Ontario in basing its statute on the English **Land Transfer Act** of 1875, accepted the English concept of "general boundaries".

This concept does not exist in jurisdictions, such as the western provinces of Canada, which have adopted the Torrens system of land titles, a system in which boundaries are guaranteed either expressly or by implication.

Boundary Disputes

A closer examination of the extent to which affirmation of boundaries is necessary and desirable might prove to be rewarding. Perhaps it can be said that as a country becomes more developed, uncertainty regarding boundary location tends to diminish.

John Elmsley, Chief Justice of Upper Canada, said in 1798: "In the old countries disputes about boundaries are as rare, as disputes about titles are frequent. In a new country the case is reversed, and the titles are generally as clear as the boundaries are confused." It is worth testing this statement by comparing the respective situations in England and Ontario.

Left Undetermined

England, like Ontario, is partially covered by a land titles system; the principal legislation being the **Land Registration Act** of 1925, (15 & 16 Geo. 5, c.21), and the Rules made thereunder.

Except in the very few instances where "fixed boundaries" are established, the boundaries of all registered land are deemed to be "general", that is to say, the exact line of the boundary is left undetermined, without stating, for example, whether it includes a hedge or wall or ditch, or runs along the centre of a wall or fence, or along its inner or outer face, or whether or not the registered land includes or excludes the whole or any part of an adjoining road or stream (Rule 278).

This rule applies, notwithstanding that the whole or any part of the wall, fence, ditch, road, stream or other boundary is expressly included in or excluded from the title. At first sight, the application of this rule appears troublesome, but English practice seems to show that practical difficulties do not often arise.

Two explanations can be offered for this. First, the Ordnance Survey, a government organization, produces and continually revises accurate large-scale maps, showing all physical features such as buildings, fences, streams, etc., and these maps are used as the basis for conveyancing.

Normally it is sufficient if the size and location of the property can be scaled from the map, since extreme precision in the measurement of a property is neither expected nor required for the purpose of guaranteeing its title. Second, the limits between properties in England are almost always physically marked by hedges, walls or fences, and these become the visible and accepted boundaries.

The visible nature of the boundaries which tends to restrict encroachment, is a stabilizing element of land ownership, since proprietors can see what they own, without reference to theor-

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Boundaries and Land Registration

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etical lines, and boundary litigation is therefore uncommon.

True Extent of Title

In Ontario, on the other hand, a survey of property boundaries leads inevitably to a search for the location of original monuments in order to determine the true extent of title. In making a proper search the surveyor must make use of every available piece of evidence, including surveys and descriptions relating to the land adjoining the parcel with which he is concerned.

In this respect he is not limited to a forty-year search, such as might be adequate to show a good and sufficient chain of title, but he must, if necessary, pursue his investigation as far back as the original township survey and the first Crown grant.

Assume a situation where the surveyor is instructed to survey a parcel of land, described by metes and bounds, and forming part of an original township lot registered under **The Registry Act**. Even if, by some happy accident, he discovers no discrepancy between the description

of his parcel and the descriptions of the adjoining lands, he is still faced with the problem of locating the described boundaries on the ground.

This will involve a retracement of part of the township survey fabric, the original monuments of which consist of wooden posts which were planted perhaps 150 years ago and have long since disappeared.

The Surveys Act (R.S.O. 1970, c.453) sets out certain rules which a surveyor must follow in attempting to re-establish old township lines, but it by no means covers every possible situation that he might meet. In some instances he may be able to obtain guidance from a previous court decision based on a similar set of facts; in other instances he must rely on his own training and judgment.

When he is finally satisfied of having established the township lines in their original position, he may still discover that they do not coincide with old fences or other occupational limits. In such circumstances, all the surveyor can do is to report the facts to his client, who may strongly object to paying what he considers an excessive fee for an in-

conclusive result.

If, on the other hand, the surveyor were merely to go on the ground and without further investigation accept the fences or other occupational limits as the existing boundaries of the property, he might produce a survey which would be satisfactory to the neighbouring owners, but he would at the same time be evading his professional responsibility by failing to consider the wording of the recorded description.

Not Rare

Problems such as this are by no means uncommon, and their solution frequently depends on harmonious co-operation between landowner, surveyor, lawyer and land registry official. From the survey point of view, the situation is particularly acute in the rural parts of the province, where the re-establishment of old township lines can be prohibitively expensive in comparison to the value of the land.

Less uncertainty may exist in urban centres though this is usually offset by the increased value of the land which demands boundary location within more precise limits of accuracy than may be needed for rural areas.

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C. C. LINDSAY, C.E., Q.L.S.

(Mr. Lindsay is an Honorary Member of the Association of Ontario Land Surveyors, and this profile chronicles his distinguished career. Mr. Lindsay resides in Montreal).



C. C. LINDSAY, C.E., Q.L.S.

Born in Quebec City on November 26, 1889, Mr. Lindsay is the son of Lt.-Col. Crawford Lindsay, who served as chief English translator to the Quebec Legislature.

He was educated at the Quebec Commercial Academy and McGill University where he graduated with a degree of Bachelor of Applied Science in civil engineering in 1915.

While still a student, Mr. Lindsay worked at many jobs across Canada relating to engineering and surveying; as a chainman, rodman and surveyor in Quebec and New Brunswick, as a miner in Ontario, and as a rodman, topographer and surveyor in Manitoba, Saskatchewan and Alberta.

Served Overseas

Upon his graduation from McGill, he enlisted as a sapper in the Sixth Field Company of the Canadian Engineers and proceeded overseas where he was commissioned as a second lieutenant in the Royal Engineers. Although wounded and evacuated during the battle of the Somme, he returned to France and at war's end was acting major in command of the 202nd Field Company of the Royal Engineers. He was awarded the Military Cross and Croix de Guerre.

Mr. Lindsay returned to Canada and passed examinations for admission to practice as a land surveyor in April, 1919. He joined the Department of the Interior, Ottawa, and was assigned to survey several large lakes in Alberta to ascertain the feasibility of lowering their levels to obtain farmland.

After completion of this assignment in 1920, he was appointed pit superintendent and engineer for Bennet-Martin Asbestos and Chrome Mines, Thetford

Mines, and remained with them until 1924. Mr. Lindsay subsequently joined Price Brothers in the Saguenay region as surveyor in charge of field surveys and timber limit boundaries.

Private Practice

He left Price Brothers in 1933 to enter private practice as a consulting engineer and Quebec Land Surveyor in Montreal. In the years that followed, he took part in scores of major developments in Montreal and throughout Quebec.

These included the construction of pipelines between Portland, Maine and Pointe aux Trembles; development of Mont Tremblant ski resort facilities, surveys for Place Ville-Marie, Place Victoria and other major Montreal centres; layout and municipal engineering for the towns of Val d'Or and Bourlamaque, the water filtration plant and distribution system for Rosemere; design and construction of the Riviere St. Pierre trunk sewer draining the towns of Cote Saint-Luc, Montreal West, Ville St. Pierre and Lachine through the Montreal outfall sewer, municipal engineering for Cote Saint-Luc, Montreal West and Preville; and design and construction of 10 miles of Eastern Townships autoroute.

Established Boundary

Mr. Lindsay was chairman of the Board of Expert Surveyors appointed by the courts in the Bornage Judiciaire which established the boundary between properties of Hydro-Quebec and Canadian International Paper Company Limited. It established this boundary as being the ordinary high-water mark of the Ottawa River at Pointe Calumet. This Bornage established jurisprudence in the province for the establishment of ordinary high water of navigable rivers.

He is the last surviving member of the former Montreal Tramways Commission, past-president of the Corporation of Engineers of Quebec, past-president of the Canadian Institute of Surveying, and past-chairman of the Montreal Branch of the Engineering Institute of Canada.

Many Memberships

As well as being an honorary member of the Canadian Institute of Surveying, he is an honorary member of the Ontario Association of Land Surveyors and the Association of Land Surveyors of Nova Scotia, and a life member of the Engineering Institute of Canada, and the American Congress on Surveying and

Mapping. Mr. Lindsay is a member of the University Club of Montreal, the Faculty Club of McGill University where he lectured from 1943-47, and a past director of the Rotary Club of Montreal.

He has delivered papers before several prestigious bodies, including the Massachusetts Association of Land Surveyors and Engineers, The Canadian Institute of Surveying, the American Society of Photogrammetry, and the American Congress on Surveying and Mapping.

Mr. Lindsay, whose wife Mary Margaret Hearn died in 1968, has two sons, Dr. C. Crawford Lindsay, B.A., M.D., F.R.C.S., and Robert John Lindsay, B.A., B. Eng., M. Eng., Q.L.S.

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Part of the difficulty seems to arise from our heavy emphasis on the measurement of land as the basis for its selling price.

In England, where the application of the general boundaries rule means that boundaries can usually be scaled to no better than the nearest foot or so, measurements are necessarily approximate, but because of the visible boundaries the purchaser can at least see what he is buying.

But in Ontario, where land may be sold for, say \$20,000 an acre, and areas are often recorded by the surveyor to the nearest 0.01 acre, it can be readily seen that disagreement concerning the value of the last decimal place could have a significant effect on the purchase price.

Modern survey instruments permit the measurement of land with a rapidity and to a degree of precision unattainable in the past, but there is the danger that obsession with measurement may lead to attempts at unjustifiable precision in boundary location. Survey plans of urban properties usually show measurements to the nearest 0.01 foot, but instances can be found where the nearest 0.001 foot is being used.

Further improvements in measuring equipment and techniques may permit measurements to be made to an even higher degree of precision, but how far should the process be carried? Obviously some practical limit exists, but if affirmation of boundaries is to be considered, it is necessary to determine a legal limit, and this should reflect social utility rather than technical capability.