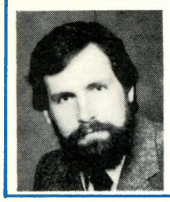

CONVENTIONAL LINES: ESTOPPEL AND BOUNDARIES

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THE BOUNDARIES ACT decision published in the Winter 1983 edition of the Quarterly does indeed, as the article says, raise "a number of questions". Those questions and the analysis given are certainly worth close examination by the Ontario Land Surveyor; the aspects of the problem demand a thorough knowledge of the foundations of legal boundary expertise. I wonder, though, if another question might be raised?

Mr. Justice Cooley of the Michigan Supreme Court categorically referred to the land surveyor as one who "has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible to accurate solution . . ." Hence it is true that as surveyors we are "not a little impatient when [we are] told that, under certain circumstances, [we] must recognize inaccuracies, and govern [our] actions by facts which lead [us] away from the results which theoretically [we] ought to reach".

Because we must recognize that inaccuracies may (and usually do) exist, boundary surveying becomes an art; the exact sciences are relegated to the status of mere tools, having less importance than laymen or even some surveyors realize.

How many times has the prospective purchaser looked at the posts marking the lands involved in transfer and subsequent to purchase claimed to have "bought 100 feet" on the faith of a written or graphic description? How many times have surveyors tried to lay off deed or proportioned distances to the detriment of long established occupation and possession?

We have all heard the experts echo the statement: "Give me specific facts" or "there are no clear rules in boundary retracement" when questioned by our surveying colleagues. While it is true there are no absolutes (but One), it may be possible to theorize principles or rules to a degree. This has been done for us already; the courts have built a kind of reality around certain practical surveying problems.

The doctrine of estoppel is admittedly abstract and controversial to the surveyor but is surprisingly evident in the fundamental reasoning involved in boundary law. It is defined in Osborne's Law Dictionary as "the rule of evidence or doctrine of law which precludes a person from denying the truth of some statement formerly made by him, or the existence of facts which he has by words or conduct led others to believe in. If a person by a representation induces another to change his position on the faith of it, he cannot afterwards deny the truth of his representation."

When dealing with case law studies involving estoppel, we often see the word "equitable" as a modifying adjective. It seems to me that the words are equivalent; estoppel is a legal tool which evolved with the purpose of overriding injustice. It's very definition is built around equity. In fact equity is, in my view, the basis of many common law doctrines: e.g. adverse possession, laches, priority of evidence, etc.

The Boundaries Act decision in the Quarterly mentioned that "a conventional boundary" may have been represented by the fence and that the fence would then "have to be judged by the common law rules applicable." It is this doctrine which I would like to briefly examine.

The law regarding conventional boundaries and especially the effect of estoppel in concluding parties involved is aptly rendered in **Grasett v. Carter** (1884) 10 S.C.R. 105.

> Ritchie, C.J.:
> "I think it is clear law, well established at any rate in the Lower Provinces where I came from, and I believe it must be established everywhere, that where there may be a 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 two properties."

> Strong, J.:
> "I take the law to be well settled, that if adjoining land owners agree to a dividing line between their respective properties, and one of them, knowing that the other supposes the line so established to be the true line, stands by and allows him on the faith of such supposition to expend money in building upon the premises according to the line assented to, he is estopped from showing that he was mistaken, and from denying that he is bound by the line which he has thus induced the other party to rely upon."

> Henry, J.:
> "There is no doubt in my mind on the evidence, that that line was agreed upon. The law applicable to conventional lines, I take to be, that if a line is agreed upon and one party acts upon it and improves the land, and the other party is estopped from saying that the line is not the right one."

It should be noted that the fixing of the conventional line in **Grasett v. Carter** did not affect the title of the lands. It merely defined the extent of the title of the adjoining owners. The Boundaries Act decision refers to "the principles set down in **Bea v. Robinson** 3 R.P.R. 154" and specifically to the section quoted by counsel:

> "In Grasett v. Carter one of the prerequisites for finding a conventional line was that there be uncertainty as to the dividing line of the two lots and that the uncertainty be resolved by the agreement of the parties. In that case it was impossible to determine the true boundary of the properties because of errors made in the original and subsequent surveys and because the land had been physically altered. In my view when the parties do not know the location of the line because they have made no inquiries or other attempts to discover it, that is not an uncertain boundary that can be varied by agreement. In the case at bar although there had been some problems with surveys, it is clear that it was possible to determine the true boundaries, and from this fact I conclude that the boundaries of the adjoining lots were not uncertain, they were merely unknown. I doubt therefore that the facts support a finding of a conventional line that could be en-

forced as against the true boundary. If the true boundaries were determined and found to differ from the agreed line, to enforce the agreed line would result in a transfer of title to the property situate between the true and agreed lines."

The conventional boundary in Grasett v. Carter, however, was not established by the surveyor, but by parol agreement between the parties. It is important to underline this fact. The principle is further expounded in **Davison v. Kinsman** (1853) 2 N.S.R. 1, 69 (C.A.)

Haliburton, C.J.:
"In fact the actual location of those settlers was almost a matter of guesswork, but they did locate themselves on what they supposed to be the lot granted or conveyed to them, and adjusted their boundaries with each other as best they might . . . This would have produced a fruitful field of litigation had not the Court upheld the principle that where the parties had mutually established the boundary between them upon the land, they should be bound by it . . . If to save that expense, the parties in mutual ignorance of where the line between them would in strict accuracy run, agreed to establish such a line as was then satisfactory to both of them the Court would not allow either to depart from it. This is a thing that must be done upon the land - no writing can be substituted for it - but whether it is done by measurement, by reference, by agreement between themselves, like all things else, is liable to mistakes . . . I can see no end to it, but by adhering to the principle that where a line has been settled and adjusted in good faith upon the land, neither party shall be permitted to dispute it . . . They in fact did nothing themselves but what they might have authorized a surveyor or arbitrators to do for them, and surely an act done by themselves cannot be less binding than an act done by others by their authority."

It is essential to notice that the adjoining parties only did what they might have authorized a surveyor to do and nothing more. If the parties involved will bind themselves by the actions of a third party agent, how much more should they be bound and estopped by their own actions. It was confirmed in **Dell v. Howe** (1857) 6 U.C.C.P. 292 (C.A.) that unalterable boundaries can be created by parties who are not registered land surveyors.

The exclusive nature of Section 2 of the **Surveys Act** should be interpreted as controlling quality of agency only and not to create mischief when surveyors find supposed errors in settled possessions.

It follows that a close scrutinization of Bea v. Robinson is necessary. The Editor's Note in the Real Property Reports states in part:

"The decision of Boland J. has narrowed the applicability of the principle, at least in Ontario, almost to the point of rejecting "a just and equitable doctrine with much appeal" altogether. Boland J. concludes that an agreement for a conventional line is only enforceable where it can be deemed to establish the true and ancient boundary. Where the true boundaries can be established by reference to a registered plan or deeds, or by any other means, a contradictory line established by conventional line is unenforceable."

While the decision in Bea v. Robinson is not questioned an analysis of the court's reasoning for disputing the fact of a conventional line is required.

Madame Justice Boland first stated that a conventional boundary could only exist where it marked the true and ancient limit between contiguous parcels. The court further stated that this was not the case because it was "clearly possible" to determine the "true" limit by survey. However, the court failed to question the validity of the survey. On examination of the subject survey fabric and the records of surveyors involved, it is evident that the positioning was done by purely mathematical methods; those methods being only an opinion of the surveyor involved. Other surveyors may have used other mathematical methods resulting in different positioning. In other words, original monuments of the subject line were not found and the boundary was not just merely "unknown" but was truly lost as defined by Section 1 of the Surveys Act. This being the case, the owners may not have needed to employ a surveyor when settling the boundary between their properties. As we have previously discussed, they should be bound by their own actions even more than they would be bound by the actions of a third party agent.

From this we can conclude that no transfer of title has taken place. Robinson and Bea in building the fence may have peacefully marked the boundary between their respective existing estates. Thus, Madame Justice Boland's application of the statute of Frauds cannot apply; there is a definite distinction between "title" (an intangible entity) and "extent of title" (a tangible entity). Further, successors in title must know that "caveat emptor" applies. A vendor can only sell what he owns and no more. If a boundary is settled between parties, then successors in title must be bound by that positioning. A mischief is created when peaceful agreements are later denounced.

In arguing that conventional boundaries cannot disagree with plans or deeds, Boland J. fails to see the true purpose of a legal description, especially if that description was written to portray an original physical fixing of a boundary. It seems clear that the cases mentioned earlier imply that deed or plan descriptions are not monumented boundaries; only in special circumstances can boundaries be precisely defined on paper only. The purpose of a description is to give an approximate location of the property in question; boundaries must be settled separately. If land is severed by an unmarked line set out by plan or deed, the true physical location of that line may not precisely exist until adjacent owners agree upon it, whether they rely on the professionalism of a surveyor or not. The key here is that both owners must agree to the marking of the line. Suppose a situation where a non-resident owner conveys a part of his lands to another without monumentation, with the intention of transferring a specific width or dimension. If the parties do not visit the property or do any act to mark the line of division on the ground, then there is no question that the line has been fixed by the conveyance and a surveyor's responsibility, if acting for one or both parties, is to run that line exactly as described. The intention of the parties in this case is clear; a negligent surveyor may end up "buying" a fence, or worse, an apartment building. The fact that an unmarked boundary does certainly exist is not argued here; it is the precise physical definition of the boundary outside of special circumstances that is in question.

Another example is expedient:

Let us suppose that a square Lot 30 on Registered Plan 1457 as monumented conforms precisely with the plan description - i.e. 200 feet frontage on the northerly limit of an East-West Road Allowance by 200 feet deep. Suppose then that owner A conveyed the East Part of Lot 30 to owner B without monumentation by a metes and bounds description which describes the land as 100 feet frontage by 200 feet deep. Owner A then conveyed the remainder of Lot 30 to C again without monumentation and again by metes and bounds description which describes a parcel with 100 feet frontage by 200 feet deep. There is no question that there is a point where B's estate ends and C's estate begins even though that limit has not been monumented. Let us now suppose that B & C wished to determine that line and in so doing hired a surveyor to

mark the line out for fencing. The surveyor performed his function with reasonable care but, alas, as is possible in all circumstances, a mistake of one foot was made. The owners then viewed the line with approval and built their fence on the line as marked. Buildings were subsequently erected with reference to that marked line.

Applying the law previously referred to, the owners B & C in acquiescing to the surveyor's line (the longer the time period, the better) have fixed that boundary notwithstanding the unambiguous nature of the descriptions. Further, if they wished to save the expense of a survey, they might run that line themselves. Why should either party be allowed to later decide that another position for the boundary is possible? Any such claim would certainly be contradictory to equitable principles established by the courts.

In Madame Justice Boland's own words "conventional lines . . . resolved boundary disputes with a great deal of justice. Equity prevented the parties from going back on their agreement".

It is interesting that the Boundaries Act Tribunal quoted from the Canadian Encyclopedia Digest to support its decision. It should be noted that the quoted statement was found in the case **Hooey v. Tripp** (1912) 25 O.L.R. 578 (C.A.) and was taken from the judgement of Middleton, J. who happened to give the dissenting judgement in the court.

While the principle stated may be law, it's application might only be construed to affect contractual covenants within the deed. A description should be recognized as only an addendum to the contract and not as an absolute indicator of intention. Middleton, J. attempted to apply the principle to the description; the majority of the court decided otherwise. In the same case Latchford, J. in his judgement stated: "I should be prepared - were it necessary to go so far - to disregard such rules rather than sanction by following them an act of injustice, if not dishonesty." While this statement was made in reference to strict application of area proportionment, it clearly reveals the equitable posture of the judiciary.

Mr. Wilkins, Counsel for the defendant in the Davison v. Kinsman case had a similar position to that of the Tribunal in his losing argument: "A conventional line, in opposition to that defined in a deed (description is the proper word), could not, upon principle, be established upon parol evidence"; and further: "extrinsic evidence contradicting any part of it (the deed) is inadmissable, unless, to give effect to the deed, it is indispensable to have recourse to it." It is important to notice that this was the losing argument.

However, to reinforce that which has previously been stated, the following is quoted from the judgement of Richmond J. in **Equitable Building and Investment Co. v. Ross** (1886) 5 N.Z.L.R. 229 (S.C.): "Neither the words of a deed, nor the lines and figures of a plan, can absolutely speak for themselves. They must, in some way or other, be applied to the ground." and further: "In any case it will be found impossible in the long run to dispense with the reference to possession as one of the bases of title to land. It would be intolerable that after an unquestioned occupation of twenty, or it may be fifty years, the person who has supposed himself to be the owner of a house should be told by a Court of law, on the evidence of surveyors, that he has no title to the eight or nine inches of land on which one of his outer walls is standing."

In quoting these passages reference must be also be had to the Tribunal's statement that "No evidence was presented to indicate that the parties to the original conveyance of Parcel 3270 had defined on the ground the lands to be conveyed, either by themselves

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or by a surveyor on their behalf, and that the land was then incorrectly described in words in the subsequent conveyance." I must submit that from the information presented in the article, it appears that no evidence was presented to indicate otherwise. Following Gwynne, J. in **Palmer v. Thornbeck** (1877) 27 U.C.C.P. 291 (C.A.): "As to the true boundary line between lots, the onus probandi lies upon the plaintiff who seeks to change the possession." Although it is admitted that Boundaries Act decisions cannot and should not be used as precedents, the ruling in application B-114 stated that lacking evidence to the contrary, occupational lines reflect the site of an original survey of the boundaries made in accordance with the relevant instruments of title. Query: How is it now that deed lines, which seem not to ever have been marked until some 34 years after the possessory boundaries are fixed, are confirmed as true and unalterable?

While it is most probable that facts and evidence not mentioned in the article have given the Tribunal reason to believe that a conventional boundary was not established, we must as surveyors be careful and selective in reading any material which purports to demonstrate legal principles in boundary retracement. It must be remembered that land registry systems, which initiated the need for paper and descriptions in conveyancing, must not govern the facts on the ground. The registry systems must be recognized as administrative servants to land ownership; not vice-versa. As surveyors it is incumbent on us to act equitably in our quasi-judicial function and not be swayed to tangible numbers by our mathematical minds. Let us not be mere technicians but true professionals. ●