Comment on the case of *Nicholson v. Halliday,* 74 O.R. (3d) 81, (Ont. C.A.)

By Robert A. Stocker, Barrister & Solicitor, (Ontario Land Surveyor from 1965 to 2004)

A recent decision of the Ontario Court of Appeal raises a number of issues about which both surveyors and lawyers might want to be aware. This case was about the ownership of a 13 acre, pie-shaped piece of bushland on Manitoulin Island in the Province of Ontario. As the Divisional Court said, the simple issue to be determined in this Boundaries Act case was whether a run-down, dilapidated, snake rail fence between the properties was in fact a boundary fence or merely a fence of convenience. A survey by Mr. Nicholson, O.L.S., accepted the fence line as the boundary. A survey by Mr. Halliday, O.L.S., adopted a much different boundary, lying about 830 feet to the east of Mr. Nicholson's line at it's northerly extremity. The Deputy Director of Titles decided that the fence was the boundary of the lot. The Divisional Court set aside that decision. The Court of Appeal reinstated it.

The four points, which this article advances, are as follows:

1) The Court of Appeal came to an incorrect decision because it was misled into thinking that there was no issue of law that needed to be resolved.
2) As a result, the Court of Appeal incorrectly concluded that the appropriate standard of review was reasonableness, rather than correctness.
3) The Boundaries Act decision was not reasonable anyway.
4) The decision is not a binding precedent.

At the outset it should be made clear that this case has nothing to do with adverse possession. Such a claim might possibly have been made but, in fact, it was not.

1. Was there an issue of law that needed to be resolved by the Court?

The Court of Appeal stated that no issue was taken (by the parties) with the Deputy Director's factual findings or his analysis of the law and thus proceeded as if there was no issue of law for it to resolve. I submit however that the Deputy Director made an error of law by relying on an incomplete and therefore erroneous test to determine if the fence line was the true boundary of the lot.

At the end of his reasons, the Deputy Director says he has "... come to the conclusion the snake rail fence and its prolongation ... represents the **best available evidence of the original running of the line** between Lots 22 and 23, Concession 1, Township of Tehkummah." (Emphasis added.) These bolded words derive from Stortini J. in Thelland v. Golden Haulage Ltd., [1989] O.J. No. 2303 (Dist. Ct.), a case relied upon by the Deputy Director. But I submit that the statement by Stortini J. is not sufficient legal justification in itself for concluding that the fence is the true boundary of the lot. Simply because you find evidence of the original running of the line doesn't mean you have necessarily found the true boundary. It may be that the first running of the line is incorrect. There must also be evidence, or the possibility of a reasonable inference from the facts, that the fence was constructed along or started from some original evidence of the lot line (such as an original blazed line or an original lot corner post). To suggest that, by itself, the first running of a township lot line is enough to conclusively establish the true location of the lot line is an oversimplification of the law. You can't simply extract a bald statement from a court case and rely on it as being a true statement of the applicable law.

In order for the Deputy Director's conclusion to be valid, he had to be able to say that the fence line represents the **best available evidence of the original running of the line from the best available evidence of the original lot corner post.** But the evidence in this case does not support this longer sentence.

The principle that original lot corner posts govern the true location of lot corners, is stated in section 9 of the Surveys Act, c.S.30, R.S.O. 1990, and has a long history in Ontario legislation. Section XXXII of the 1849 Act respecting the Survey of Lands (12 Victoriae, CAP. 35) stated, "... all posts or monuments, which have been placed or planted at the front angles of any lots or parcels of land, provided the same have been or shall be marked, placed or planted under the authority of the Executive Government of the late Province of Quebec or of Upper-Canada, or under the authority of the Executive Government of this Province, shall be and the same are hereby declared to be the true and unalterable boundaries of all and every of such ... lots or parcels of land, ... ".

Cases such as Home Bank of Canada v. Might Directories Ltd., (1914), 31 O.L.R. 340, 20 D.L.R. 977 (Ont. C.A.) or Bateman v. Pottruff, [1955] O.W.N. 329 (C.A.), both referred to by the Deputy Director, do not detract from the above principle. They simply indicate that, when it is reasonable to conclude that an old wall or fence likely commenced from the position of the original post, it is then reasonable to accept the wall or fence as the best evidence of the original position of the boundary.

A problem with indiscriminately

accepting fence lines as lot boundaries is that there are a number of different types of fences. There are "cattle fences" (or fences of convenience); there are fences marking the limits of adverse possession; there are fences, which are based on evidence of original boundary lines; and there are fences termed "conventional boundary lines," which are based on principles of estoppel. In this article only the last two types will be considered.

Let me first set out two propositions with which I think most Ontario Land Surveyors would agree.

a) A surveyor, or even two adjoining property owners, can attempt to run a township lot line by blazing trees or building fences and, if s/he or they do a half decent job of it and come reasonably close to the proper location of the line, their line will likely be held by the courts to be a valid boundary line as long as there is no other better means of establishing the true position of the line. This is an example of a situation where the concept of "the original running of the line," as supported by cases like Home Bank and Bateman, supra, can legitimately apply. In this type of situation it can be reasonably inferred that the line or fence was established based on original evidence of the position of the line and, accordingly, the fence will be deemed to be the true lot line or boundary.

b) Conversely, it is possible that a township lot line can be run and fenced incorrectly, nowhere near the true location of the lot line, by, for example, two owners who have no idea what they are doing, or perhaps even an incompetent surveyor. In this type of situation, because it's not reasonable to infer that the line or fence was based on original evidence of the position of the lot line, the concept of "the original running of the line" cannot legitimately apply and therefore the fence will not be deemed to be the lot line or boundary.

So why did the Deputy Director conclude as he did?

I suspect that the problem arises from the unfortunate mixing up of what has been said (a) in those cases such as Home Bank, or Bateman v. Pottruff, supra, where walls and fence lines were judged to be the best evidence of the location of original boundaries, and (b) in those cases which deal with "conventional boundaries" and/or with the resurveying of deed lines, rather than lot lines.

Two of the cases relied upon by the Deputy Director and also referred to by the Court of Appeal were Davison v. Kinsman, (1853), 2 N.S.R. 1 (C.A.), a case about conventional boundaries and Kingston v. Highland, (1919), 47 N.B.R. 324, a case about both a conventional boundary and the re-establishment of a deed line.

But the facts in these two "conventional boundary" cases were very different from the facts in Nicholson. It follows that those cases do not really apply to the Nicholson situation where the lot corner post was planted by a Crown surveyor during the original township survey, and the Surveys Act sets out specific rules governing how the lot corner is to be re-established if that post is lost.

The Nicholson fact situation has significant similarities to the situation in Bea v. Robinson, (1978) 18 O.R. (2d) 12, a case in which the court carefully considered the principles supporting conventional boundaries but ultimately did not rely on them in coming to its decision.

Bea v. Robinson was a case involving a dispute over the fencing of about 4 feet, 5 inches of land between two lots on a plan of subdivision. The court held that the boundary between the two lots was not uncertain, it was merely unknown, and that it was possible to determine by survey the true boundary between the adjoining subdivision lots. As a result the fence did not qualify as a conventional boundary.

The court said, "The conventional line appears to be an American device which has frequently been employed in the Maritime Provinces to resolve boundary disputes." Boland J. stated, " ... the principle of a conventional line is a just and equitable doctrine with much appeal, but one that has application only **where there is no other means of establishing the boundaries of adjoining properties.** ... That would not be in any case where the true boundaries could be determined by reference to the descriptions in the deeds of the two properties." (Emphasis added)

In the Supreme Court of Canada case of Grasett v. Carter (1884),10 S.C.R. 105, a case which found a fence to be a conventional boundary line, Henry J. stated, "The law applicable to conventional lines, I take to be, that if a line is agreed upon and one party acts upon it and erects a house, or an expensive fence, or holds and improves the land, the other party is estopped from saying that the line is not the right one. If however, nothing is done on the land, and there is no change of position in any way, it is, I take it, within the power of

one party or the other to prove that a mistake was made in the running of the lines or the adoption of them. "Grasett points out that a prerequisite for finding a conventional line is that there must be uncertainty and that the uncertainty must be resolved by the agreement of the parties.

The Grasett case concerned a dispute over four inches of land in the City of Toronto. Carter, the owner of Lot 8 on a private plan of subdivision prepared in 1831, claimed that the house built by Grasett, the owner of Lot 9, extended 4 inches into Lot 8. The Supreme Court of Canada reversed the decision of the Ontario Court of Appeal and upheld the original decision that Grasett's house did not extend into Lot 8. Grasett was correct in building to the fence line that both he and Carter had agreed was the true boundary line. Important facts were, (1) "... there (was) no evidence of any kind to show that the lines of the lots were ascertained at the time of the original survey and marked upon the ground," (2) until 1869, Lots 7, 8 and 9 were owned by the same owner, (3) there was a surplus distance of about one foot across Lots 7, 8 and 9, and (4) that the court decided, " ... it is now impossible to ascertain with the minute degree of accuracy required to determine this dispute, as to four inches of land, where the exact boundary line prescribed by the deed is to be drawn."

Strong J. commented, "In construing the description contained in the deed, in cases where land is conveyed by a private owner, and **where no statutory regulations apply,** but the deed has to be interpreted according to common law rules of construction, extrinsic evidence of monuments and actual boundary marks found upon the ground, but not referred to in the deed, is **inadmissible** to control the deed, but, if reference is made by the deed to such monuments and boundaries, they govern, although they may call for courses, distances, or computed contents which do not agree with those stated in the deed." (Emphasis added.)

In the Nicholson case **the statutory provisions of the Surveys Act** were applicable and **there was another means of establishing the lot boundary** rather than by using the fence. The Surveys Act provides that the boundary has to be run from the best evidence of the position of the original lot corner post. As will be further clarified under Point 3, below, it would be patently unreasonable to conclude that the fence line was run from the position of the original lot corner post since the Deputy Director accepted that the fence was run from the southerly lot boundary where there never was an original lot corner post. Accordingly there was no valid reason to accept the fence as the lot line and resort should instead have been made to the procedures prescribed by the Surveys Act in order to re-establish the position of the original lot corner post.

It is unfortunate that in Nicholson the Court of Appeal quoted so extensively from the case of Davison v. Kinsman, a case pertaining to a conventional boundary. Nicholson was not about a conventional boundary. The facts to support a conventional boundary argument did not exist.

Contrary to the Court of Appeal's quotes from the Davison case, there was

no evidence in Nicholson (a) that the Crown Surveyors who surveyed Tehkummah Township "were not remarkable for their accuracy," (b) that settlers in the area had to rely on guesswork to locate their boundaries, or (c) that "if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation."

Instead, the evidence in Nicholson was that the original township survey work appeared to be quite accurate and, secondly, that the fence line in question seemed to be the only fence in the general area which had a strange location and bearing.

So to repeat, the Deputy Director relied on an erroneous test to determine if the fence line was the true boundary of the lot. The correct test required that he find as a fact that the fence line was run from the best evidence of the original post. He did not specifically make this finding of fact nor can it be reasonably implied that he made such a finding of fact, because the evidence in this case doesn't realistically support such a finding.

I therefore submit that he made an error of law in deciding that the fence was the boundary line.

2. Should the Standard of Review have been "correctness?"

Much has been written by the Supreme Court of Canada in recent years about the standard of review of administrative decisions. At paragraphs 26 to 35 of Dr. Q v. College of Physicians and Surgeons of British Columbia [2003] 1 S.C.R. 226, the Supreme Court thoroughly discusses the required "pragmatic and functional" approach. (Space does not permit quoting from this case but it is readily available for any one to read on the Supreme Court of Canada website.)

Bearing in mind this "pragmatic and functional" approach, I would suggest that, as this Boundaries Act case (a) involved a question of law, (b) was in the nature of a judicial decision which could impact on the vested ownership rights of two adjacent landowners, and (c) was the kind of issue which the court was well qualified to decide by itself, the test should have been "correctness." Even if it had just been brought to the Court's attention that there was an issue of law to be resolved, I suspect that the Court might very well have applied the "correctness" rather than the "reasonableness" test.

Something else to be considered is that the Court places much emphasis (at paragraph 44) on the fact that the Director is a surveyor and concludes from this that his expertise is recognized by the Boundaries Act. What doesn't appear to have been brought to the Court's attention is that the Land Titles Act mandates that the Director of Titles must be a lawyer, not a surveyor. This makes sense because the decisions s/he has to make about boundaries are legal decisions. It just happens that today the Director's designates are surveyors. But this is not what the Boundaries Act originally intended.

3. Is the Boundaries Act decision reasonable?

Even if the appropriate standard of review is only "reasonableness" rather than "correctness", I submit that the Boundaries Act decision is not reasonable because the Deputy Director relied upon an erroneous test and, secondly, had no evidence from which he could reasonably infer that the fence line started from the position of the original lot corner post.

In Nicholson the Divisional Court majority felt that, in order for the fence to be a boundary fence, it was sufficient to find that the fence was accepted and **used** as a boundary fence. But, with respect, the point to be decided is not whether it was **used** as a boundary fence, or people thought it was a boundary fence. The point to be decided is whether it **was** a boundary fence. It could only be a boundary fence if it was run from the best evidence of the position of the original post. If it was so run, and if it was run reasonably competently, then the concept of the "original or first running of the line" would likely apply and constitute the fence as the boundary, even if the fence deviated somewhat from where it should have been built. In Bea v. Robinson, supra, the fence **was** used as a boundary fence for about nine years but the court nevertheless held that the fence was not the true boundary. (Emphasis added.)

In Nicholson there was only one original post ever planted on the lot line in question and that post was planted at the northerly corner of the lots. The Deputy Director found that the survey of the fence started from the southerly, rather than the northerly boundary. Therefore the fence could not have started from the position of the original post.

Also, there **was** good evidence of the position of the original lot corner post. Halliday's report indicated that his measurements agreed closely with the Crown surveyor's original recorded field note measurements across the lots in the section, making these measurements very good evidence of the position of the original lot corner post.

Therefore, since under the circumstances it would be patently unreasonable to conclude that the fence line was run from the position of the original lot corner post, I submit that it is also patently unreasonable to conclude that the fence line is the true boundary of the lot.

Consider the following example, which might help to make the point that the first running of a boundary line fence can't reasonably be accepted as the proper boundary if it starts from the wrong point.

Assume the same fact situation as in Nicholson but with the scenario being that the appeal period has not yet expired and therefore the Boundaries Act decision has not yet been confirmed.

As in Nicholson, the Deputy Director accepts the fence as best evidence of the first running of the line. In my example however, a third surveyor, acting on a hunch, goes out and finds the remnants of the original post situated 66' (or one chain) to the west of surveyor Halliday's proportioned corner. Now it's clear that neither Halliday nor Nicholson is correct

in his re-establishment of the line. Even if the fence was truly the first running of the boundary line, that's not enough to make it the correct boundary because sections 31 and 34 of the Surveys Act mandate that the line be run southerly on the governing bearing from this original post.

In this example, the original running of the fence line now means nothing because the line has been run from the wrong starting point. For the same reason I submit that the fence means nothing in the Nicholson case.

But some will argue that, in my example, there was evidence of the original post, while in Nicholson that wasn't the situation. This is not true. In Nicholson the measurements in the original field notes were excellent evidence of the location of the original lot corner post.

The idea that measurements are never better evidence than old fences just does not make sense. The so-called "hierarchy of evidence", referred to in Thelland and other cases such as Kingston v. Highland, comes from situations where surveyors were retracing deed lines. If a hundred years ago Mr. Smith decided to sell Mr. Brown a parcel of land described as 210.5' north from the road to a fence post, thence westerly 150' to the old apple tree, thence north 315' to the river, etcetera, certainly the fence post, the tree and the river would govern over the distances. But this Boundaries Act case was not dealing with the interpretation of a deed. It was dealing with a township lot line surveyed under competent authority by a Crown surveyor.

This Boundaries Act decision failed the test of reason by accepting this fence for the lot boundary based only on finding that the fence represented the first running of the lot line and was used as a boundary fence.

4. Does this Court of Appeal decision make the Boundaries Act decision a precedent?

Apparently it does not.

In the case of Essex County Roman Catholic School Board v. O.E.C.T.A., (2001) 56 O.R. (3d) 85 the issue for the Ontario Court of Appeal was " ... whether it was patently unreasonable for an arbitrator to reach a result different from a judicially affirmed "entirely reasonable" result reached by a fellow arbitrator. The Court of Appeal said, " ... it remained open for a different arbitrator to make a different award, provided that it was not patently unreasonable." It also said the following:

> Where a decision of an arbitrator (or an administrative tribunal) is reviewed on the standard of correctness, the court's decision on judicial review will determine the "correct" interpretation – i.e., the *only* interpretation.
>
> Where a decision of an arbitrator is reviewed on the standard of patently unreasonable, the effect of the court's decision is entirely different. All the reviewing court decides is whether the challenged award is patently unreasonable. .... In deciding that issue, the court does not decide whether the award was the only possible award or the best possible award. ...
>
> The correctness standard is premised on a legislative intent that disputes be resolved by the courts. The premise of the patently unreasonable standard is the opposite.

So it would seem that, even if another Boundaries Act decision comes to an opposite conclusion on very similar facts, if the reviewing court concludes that the Boundaries Act tribunal has made a reasonable decision in the new case, that new decision will stand even if it is opposite to the tribunal's decision in Nicholson v. Halliday.