

# Reflections on Proceedings Under the Boundaries Act – Part 1 – The Role of the Ontario Land Surveyor

By Jeffrey E. Streisfield, BA, LLB, MES

**W**ithout question, the Ontario Land Surveyor (“OLS”) has a very important role to play in a Boundaries Act (the “BA”) proceeding.<sup>1</sup> That role will evolve—from the initial field work and various land registry and other searches performed in connection with a parcel of land, to a recommendation to the client to proceed with an application for boundary confirmation, to preparation of the BA application, draft BA Plan and Surveyor’s Report and then to presenter of evidence as an expert witness. The final task will be to carry out any orders made under the BA in order to effect registration of the BA Plan. Going down this road—from beginning to end—is probably not the norm for most OLSs. Assuming the BA will be around for some time to come, what should the OLS know about the BA procedure and his/her role under it?

**The Starting Point:** The BA is a single, special purpose statute with the prime objective being to confirm one or more boundaries of a parcel of land. Section 3(1) of the BA states: “Where doubt exists as to the true location on the ground of any boundary of a parcel, an application, in the prescribed form, may be made to the Director to confirm the true location of the boundary on the ground”.<sup>2</sup> The general requirements for initiating such an application are prescribed by Regulation 60<sup>3</sup> made under the BA. The procedure “from soup to nuts” is also explained in the Boundaries Act Client Guide.<sup>4</sup>

The writer is not aware of any reported decision which interprets the phrase “where doubt exists as to the true location on the ground of any boundary...”. The writer has however been involved in a BA hearing where the objector’s counsel

brought a motion to stop the hearing from proceeding independently of a hearing under the Land Titles Act. The Deputy Director of Titles (the “Hearings Officer”) denied the motion ruling that doubt exists as to the boundaries at issue. The threshold for the question of “where doubt exists” as to the position of a boundary is very low.

**What am I getting into?** The OLS must accept that his/her work product and opinions on the position of a land boundary will be subject to the utmost scrutiny. The extent of the research performed, knowledge of all relevant documents, and true conviction in the opinions expressed will be tested in a judicial forum where arguably one’s professional credibility will be at stake. Providing clear, concise and understandable oral testimony in support of an opinion as to the position of a boundary is critical at a hearing.<sup>5</sup>

The OLS has been retained for professional expertise and will inevitably be qualified as “an expert” at the BA hearing. The opinions first expressed in the OLS’s written report must be delivered orally at the hearing where potentially every spoken word will be carefully measured by counsel for the parties and ultimately the Hearings Officer. In the end, the Hearings Officer will render a decision and issue an order. The evidence and opinions of one OLS will be preferred over another<sup>6</sup> with the potential (albeit rare) for costs to be awarded against a party to the hearing. As a practical matter, the Hearings Officer’s decision is final - the

Courts will not interfere with it.<sup>7</sup>

Recently, the Ontario Court of Appeal in *Nicholson v. Halliday*<sup>8</sup> commented on the purpose of the BA and more importantly, the Hearings Officer’s powers as follows:

...[the] apparent purpose of the *Boundaries Act*: to provide an expeditious, summary, cost-effective means for neighbours to resolve disputes. The legislature determined that the Director, experienced with boundary resolution concepts and equipped with broad powers, would best achieve an efficacious resolution of boundary disputes. The legislature gave the Director power in s. 9(1) “to dispose of any objection in such manner as he or she considers just and equitable under the circumstances” and to set boundaries as “he or she thinks it proper to do so.” The legislature intended to entrust significant decision-making authority to the specialized Director.<sup>9</sup>

The BA is not exclusive for the resolution of boundary disputes. Resort can still be had to the Ontario Courts to determine a boundary issue *or* to stop the Deputy Director from proceeding with a hearing under the BA.<sup>10</sup>

It is helpful to reflect upon a few circumstances which ultimately led to an application and then a hearing under the BA.

**Situation 1:** A sees B driving over his land. A writes to B


objecting to his right of passage. B's response is that he owns the land over which he is driving. B produces an old survey of his property to support his claim and right of passage. A consults a surveyor who in turn conducts extensive research into the matter. The surveyor retained to investigate the matter forms the opinion that the survey produced by B is inconsistent with the title record and specifically A's deed. The surveyor recommends proceeding with an application under the BA to resolve the boundary issue between A and B.

**Situation 2:** A purchases a waterfront property without the benefit of an up to date survey. A seeks clarification on the limits of his land. A retains a surveyor to investigate and provide an opinion as to the boundaries of the parcel. The surveyor undertakes extensive research in regards to title and survey history as well as field work in order to re-establish the limits of the parcel. The surveyor produces a plan and recommends an application under the BA to confirm the boundaries depicted on the plan. At the time the application is filed, there is no dispute between A and any of his neighbours, but a dispute arises as a result of the neighbour receiving notice of A's application for boundary confirmation.

**Situation 3:** A, a land developer, seeking to develop a plan of subdivision negotiates a land exchange with a municipality whereby an unopened road allowance will be closed and conveyed to the land developer, who will in turn dedicate and construct a road in a different location on its lands. B, a neighbouring land owner, objects to the municipality's intent to close the unopened road allowance and convey it to A because the lands depicted on the survey of the road allowance are owned by B and not the municipality (i.e. the position of the road allowance is not correctly shown on the survey plan). In light of the apparent conflict, A applies under the Act to confirm its east limit and, in essence, the limits of the unopened road allowance. A's development plans for a portion of its property were put on hold pending resolution of the boundary issue.

These are but a few situations in which an OLS could find him/herself. The OLS might be consulted by a lawyer or the landowner directly. Whether the OLS is recommending an

application under the BA or is supporting such a recommendation in consultation with legal counsel, it is imperative that the OLS undertakes extensive research into the matter, including field work, document searches for title information and other records such as surveys, field notes, aerial and site photography and, where possible, makes inquiries of others who may have knowledge as to the position of a boundary. Good research takes time and therefore costs money – it should be budgeted accordingly. There is no excuse for poor or inadequate research.<sup>11</sup>

Part II of this article, which will appear in a subsequent issue, will deal with objections and preparing for and attending a hearing. 

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<sup>1</sup> Boundaries Act, R.S.O. 1990 c.B.10

<sup>2</sup> Ibid, section 3(1)

<sup>3</sup> R.R.O. 1990, Regulation 60

<sup>4</sup> "Google" - - Boundaries Act - Client Guide, December 2003, Ministry of Consumer and Business Services or go to ([www.gov.on.ca/GOPSP/en/graphics/Stel02\\_165727.pdf](http://www.gov.on.ca/GOPSP/en/graphics/Stel02_165727.pdf))

<sup>5</sup> I recently came across the following tag line in an advertisement. It reads "Funny thing about expert testimony. People have to understand it before they can agree with it."

<sup>6</sup> The Hearings Officer is not bound to accept the opinion as to the position of a boundary advocated for by either the surveyor for the applicant or the objector, but may confirm a boundary in a position not advocated by either surveyor. This is what occurred in the Nightingale case (referred to in footnote 7 below).

<sup>7</sup> Although there is a right of appeal, rarely does the Court overturn the Deputy Director's decision. The most recent case to confirm that is Nightingale v. Brooks, 2008 CanLII 31811 (Ont. Div. Ct.); Brampton Court File DC-06-0117-00.

<sup>8</sup> Nicholson v. Halliday, 2005 CanLII 259 (ON C.A.); (2005), OR 74 O.R. (3d) 81 (C.A.).

<sup>9</sup> The Nicholson case received critical comment in both the Fall 2005 and Winter 2006 issues of Ontario Professional Surveyor.

<sup>10</sup> Foster et al. v. Clarke et al. Superior Court of Justice, Barrie Court File # 05-1293; unreported decision of Justice Wood 2006-09-07. This case had a unique feature in that it involved the interpretation of a sketch attached to a will.

<sup>11</sup> As legal counsel, I would like to see a draft of the BA Plan and surveyor's report and have an opportunity to review it with the surveyor and client, before it is filed under the BA.



## Letter to the Editor

Dear Editor:

I visited Trinity College, University of Toronto last week. The field hockey pitch is being re-graded. I asked the Bursar who the surveyor was: the grading contractor using GPS machine

control. Apparently, they went ahead with training without waiting for new Regulations...

If we want to integrate economically, we could just ask the backhoe operator for the coordinates, right? Maybe they are too busy making money with technology surveyors think is too expensive.

Sincerely,

*Phillip S. Swift, B.C.L.S., O.L.S.*