The Boundary Point

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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

One of the concepts in real property law that is sometimes misunderstood is the distinction between title and boundary when neighbours both claim ownership of a disputed strip of land. This is especially evident when references are made to a "boundary by adverse possession" or a boundary "moving as a result of adverse possession." In either case, it is either a claim to a disputed title *over* a boundary or, after the dispute having been resolved, a "new" boundary results from *title having been adjusted*. Lawyers can be forgiven when using terminology that makes loose application of the underlying principles when in fact, legal authorities and texts can also be faulted for the same lack of clarity.

In a recent Ontario decision, no current survey plan was reported as having been obtained, no surveyor testified or submitted a survey report, and the Court was left to make determinations entirely on the basis of testimony from lay witnesses who were expected to recall events from more than 40 years ago. The opening words from the decision are telling: "This action is essentially a boundary dispute where the plaintiff is claiming ownership of a portion of land by adverse possession."[1]

Can Surveyors Draw a Negative Inference When Assessing Evidence?

Key Words: *evidence, boundary dispute, adverse possession, retracement*

The neighbour dispute in *McKay v. Vautour*[2] involved a contest to the same strip of land; the plaintiff asserting a claim based in adverse possession and the defendant resisting the claim on the basis that the test for adverse possession had not been met. When no expert testifies on title and deed interpretation and no land surveyor is called to give opinion evidence on the

[1] *McKay v. Vautour*, 2019 ONSC 1312, at para. 1, http://canlii.ca/t/hxqq6

[2] *Ibid*

boundary, we are given an opportunity to read how a Court will evaluate the evidence and make a determination based on findings of fact. Especially relevant for what surveyors do is the Court's articulation of how evidence is evaluated, weighed and either accepted as reliable and trustworthy, or rejected as not sufficiently cogent. Land surveyors are expected to apply the same principles when retracing a boundary for neighbours so an explanation from the Courts of "how it is done" will always add to the body of knowledge.

However, what happens if there is "no evidence" on certain key points? Can a negative inference be drawn? What is an "inference" and how does it apply?

Sometimes called an "adverse inference," the concept is based on the assumption that in an adversarial system of dispute resolution,[3] a party will call all witnesses who can give reliable evidence that is helpful to their case.[4] But care must be taken in how this evidentiary principle is applied. There is a difference between "no evidence" in terms of a witness not being alive or available who might be able to testify and a witness who is known to exist and not called to testify. It is the latter that serves as a basis for the proper imputation of a negative inference.

In *McKay v. Vautour*, the plaintiff first acquired an interest in her property in 2005; the defendant bought his property in 2011. Since conversion from *Registry Act* to *Land Titles* on a qualified basis took place in 2003. Accordingly, for the plaintiff to succeed in adverse possession she had to demonstrate that all elements of the test had been met by 2003, which meant the running of time for ten years, or dispossession of the true owner since 1993.

The dispute began in 2012 when the defendant built a new fence which the plaintiff claimed was 8 feet closer to her house than where a previous fence had stood for a long time. A survey plan dated 1980 was noted as being available at trial, but neither party had a copy of the survey, or considered it when purchasing their property. The Court described the plaintiff's claim and referred to information on the plan:

> The eastern boundary of the disputed property is the boundary between lots 10 and 11. The western boundary is marked by a line made up of X's and elongated dashes. (x ---------- x -------- x etc) During testimony, the line made up of X's and elongated dashes was described by numerous names including original, cedar, horse or paddock fence.

[3] "The adversarial system or adversary system is a legal system used in the common law countries where two advocates represent their parties' case or position before an impartial person or group of people, usually a jury or judge, who attempt to determine the truth and pass judgment accordingly." From: https://en.wikipedia.org/wiki/Adversarial_system

[4] In *Buksh v. Miles*, 2008 BCCA 318 at para. 30, the court noted that, "the notion of adverse inference is related to the best evidence rule. The inference should only be drawn in regard to the non-production of witnesses whose testimony would be superior in respect of the facts to be proved."

> The plaintiff testified that since she owned the property she maintained the property between the surveyed lot line and the paddock fence. This would have been after 2005.
>
> The plaintiff said she had numerous discussions with [the plaintiff] over the paddock fence … These discussions would have taken place prior to the new boundary fence erected by the defendant...
>
> It appears that there may have been some discussions between the plaintiff's former husband and the defendant but he was not called to testify. What is clear from the plaintiff's perspective, is that sometime in April 2012, when they were away for the weekend, the defendant commenced construction of his fence and completed it the following weekend.
>
> The plaintiff understands that her predecessor in title, the Marslands, owned [her property] since 1999. They were not called to testify.
>
> It is the plaintiff's position that during the time she owned the property she maintained the disputed property to the exclusion of the owner of Lot 10. In addition, it was always her understanding that the fence marked on [the] survey by a series of X's and elongated dashes was the *defacto* lot line.
>
> There was no evidence that [the plaintiff] ever asked where a lot line was, requested a copy of the survey or looked for any survey stakes to assist her in her understanding when she purchased the property.[5]

The reported case is not long. The Court summarised the testimony from witnesses and the closing arguments of the parties before making its findings:

> The plaintiff has a difficult task. To succeed, she must present evidence of how the owners of Lots 10 and 11 treated the disputed strip of land between June 16, 1993 and June 16, 2003.
>
> Her immediate predecessors in title, the Marslands, who owned the property from 1999 to 2003 were not called to testify, nor were the owners of the property prior to the Marslands called to testify.
>
> How the plaintiff and defendant have treated the disputed property since they obtained ownership does not assist the court.[6]

In Figure 1 below, the location of the paddock fence appears relative to the boundary.

[5] *McKay v. Vautour*, at paras. 12-18

[6] *Ibid.*, at paras. 61-63

Figure 1: The red arrow points to the "paddock fence" which is about 8 feet away from the boundary.[7]

The "lack of evidence" played a factor in how the analysis continued and, to ultimate disposition:

> Based on [plaintiff's predessor]'s evidence, it appears that someone other than the [defendant's predecessor]'s cut the grass on the disputed property, however she can only recall seeing someone cut the grass on one occasion, approximately 42 years ago.
>
> There is no evidence of anyone constructing anything on the disputed property except for the "wood fence built by neighbour". There is no evidence of anyone planting a garden on the property or using the property for storage of anything such as a camping trailer or erecting no trespassing signs.
>
> Although [plaintiff's predecessor] testified that she did not have a recollection of the "wood fence built by neighbour," she testified that there was a predecessor fence in the same spot

[7] From: 2010 orthophoto imagery from GRCA mapping application at: https://www.grandriver.ca/en/Planning-Development/Map-Your-Property.aspx All rights reserved.

> running along the same portion of the lot line between Lots 10 and 11. Surely this would put the plaintiff on notice of where the lot line was/might be, rather than the paddock fence which was described as essentially broke down.
>
> Based on the evidence before this court I find that the "wood fence built by neighbour" was built by a predecessor in title to the plaintiff. I make this finding, based to a great extent, on Deckers' evidence or lack of evidence, that her family did not have anything to do with the construction of the fence.
>
> …
>
> On the facts of this case it appears that neither the owners of Lot 10 or 11 really cared who accessed the disputed property. There is certainly a lack of any evidence of "open, notorious, peaceful, adverse, actual and continuous" acts of actual possession by the plaintiff's predecessors in title.
>
> Therefore, the court can come to no other conclusion than the plaintiff's predecessor in title knew of the lot line and built a wooden fence accordingly. If that predecessor in title had ever thought that the lot line followed the paddock fence, he/she would have built the wooden fence where the paddock fence was and not on the lot line.
>
> In this case I find that the wooden fence effectively trumps the paddock fence as "cogent evidence" as set out in the *Raab* case.
>
> There is no evidence that the plaintiff's predecessors in title treated or viewed the paddock fence as a boundary line between Lots 10 and 11.
>
> For the foregoing reasons, I dismiss the plaintiff's case with costs.[8]

Of the many tools available to land surveyors in performing a survey, the interviewing of witnesses and taking of evidence in the form of a sworn declaration are but a few of what can be used to collect and record evidence. The decision in *McKay v. Vautour* is a helpful reminder of the importance of what is *not* recorded or documented, compared to what in fact is stated. A negative inference might be drawn at a later date if the evidence is not completely and thoroughly documented.

Editor: Izaak de Rijcke

[8] *Ibid.*, at paras. 64-73

Cross-references to *Principles of Boundary Law in Canada*

A discussion of claims based in adverse possession can be found in *Chapter 4: Adverse Possession and Boundaries*.

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[9] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added.

Course: Survey Law 1

Survey Law 1 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting September 4th. For more information, see the syllabus. Please note that registration is via CBEPS: https://cbeps-cceag.ca/resources/survey-law-1-online-course/.

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[9] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.