



*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.

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In many remote areas of Ontario in the late 19<sup>th</sup> century, Crown patents were issued for land which had not been entirely surveyed, and original deeds conveyed lots in general language but lacking the particulars of a description. At the time, surveys at the lot level were not readily available and purchasers often would not have had the financial resources to retain a surveyor to run these lines. Boundaries between lots would be roughly agreed to by neighbouring owners and marked with fences. Imprecise as this process may have been, it served a very practical purpose in regions where the expense of calling in a surveyor to monument boundary lines may have exceeded the monetary value of the land itself. A hundred or more years later, after one or both of the properties may have been surveyed in the interim, disputes between neighbours over a boundary location may come before the courts. At this point a surveyor's opinion on boundary location is sought to inform the decision. This opinion will be based on a careful weighing of often contradictory evidence against common law principles and an understanding of regional and temporal approaches that surveyors may have taken in the intervening decades.

In this month's issue, we explore the decision of the Ontario Superior Court in *Walker v. Director of Land Titles*,<sup>1</sup> a decision in which the court relied significantly on the evidence of the land surveyor as an expert witness in dismissing the applicant's application and finding that the remains of an old post and rail fence marked the true boundary line between the properties at issue. The decision shows the value of the surveyor's report, the importance of thorough and comprehensive research in preparing such a report and the nature of the rigorous analysis that is required when the court is faced with a boundary location dispute.

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## The Surveyor's Opinion – Weighing Conflicting Evidence in Boundary Retracement

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<sup>1</sup> *Walker v. Director of Land Titles*, 2021 ONSC 6930 (CanLII), <https://canlii.ca/t/jk3p9>

**Key Words:** *fence, hierarchy of evidence, local custom, boundary retracement, surveyor as expert witness*

When courts are faced with a dispute involving a boundary retracement problem, the land surveyor may be called upon to research and gather relevant evidence, evaluate this (sometimes contradictory) evidence against established principles, and provide the requisite technical and professional insight within the scope of the surveyor's expertise. The resulting expert report and evidence is submitted to assist the Court in making its ultimate decision on boundary location. In *Walker v. Director of Land Titles*<sup>2</sup> we see the Ontario Superior Court faced with a dispute over boundary location drawing upon the evidence of a land surveyor expert witness, and putting this evidence into the context of boundary law principles.

The decision concerned two applications brought before the court concerning the precise location of the boundary of rural properties in the District of Manitoulin. Common to both applications was the status of an aged fence described as being in "various states of disrepair." Two neighbours sought to rely on the fence as indicating the boundary between their properties and that of the third neighbour – the applicant/respondent Walker. A portion of that fence is shown in Figure 1 below.



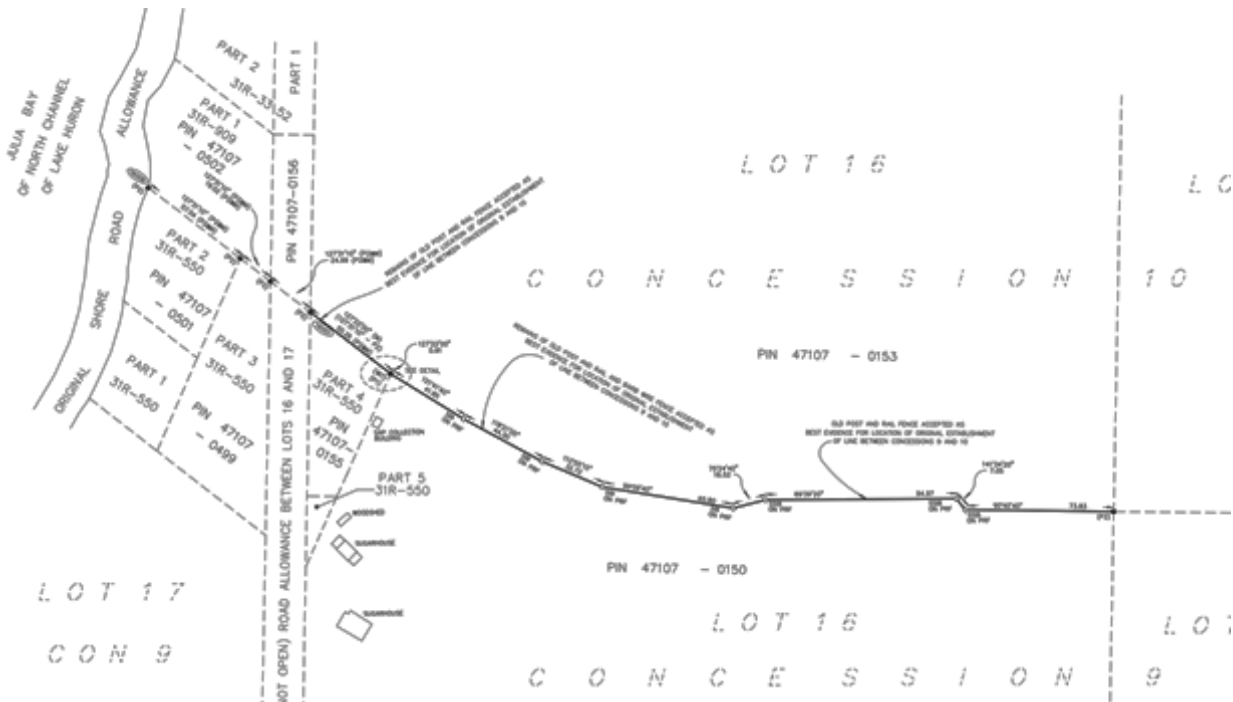
**Figure 1:** Rail fence - north side of Part 3, Plan 31R-550<sup>3</sup>

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<sup>2</sup> *Walker v. Director of Land Titles, Ibid*

<sup>3</sup> From Survey Report of R. Halliday, O.L.S., C.L.S., Tulloch Geomatics Inc. All rights reserved.

Figure 2 below depicts an image excerpted from a plan prepared by the surveyor retained by the owners of Lots 16 and 17 Concession 9. The reader will note the northward curve of the proposed boundary across Lots 16 and 17 Concession 9 to the south and Lot 16 Concession 10 to the north. This boundary follows the remains of the historic fence as is aligned with the topography of the lots in a departure from the strict grid that would have been theoretically created at the time of the Crown patent.



**Figure 2:** Excerpt from Plan<sup>4</sup>

The uncertainty in boundary location giving rise to the disputes stemmed from the absence of early survey activity and monumentation in the area. The court, referring to the report of the surveyor expert witness noted:

[T]he Township of Gordon was originally surveyed in 1870. It was divided into sections and lots, and the sections normally consisted of 10 lots of 100 acres each, thereby comprising a total of 1000 acres per section. The problem is that only the section boundaries were actually surveyed; none of the interior lines was physically surveyed. At issue in this case is the “blind” line between Concessions 9 and 10, which was never surveyed until two Plans of Survey attempted to do so in the 1970s. And in fact, contrary to common practice, the east and west ends of the un-surveyed concession lines were not even marked with posts.<sup>5</sup>

<sup>4</sup> Prepared by R. Halliday O.L.S., C.L.S., All rights reserved.

<sup>5</sup> *Ibid.* at para. 8

While the lands were not surveyed until a century after the original Crown patents, there was evidence of a historic fence that had been constructed more or less along the line between concessions 9 and 10. What status does this fence hold in the present day and how does one weigh this status against the assertions of boundary location in the surveys completed in the 1970s which showed an inconsistent conclusion?

The court outlined a chain of title evidence relating to all the three of the impacted properties, as well as evidence of parties familiar with the treatment of the fence by various predecessors in title.

The key elements of two surveys completed in the 1970s were summarized by the court as follows:

In the 1972 Plan, Bolan based the northerly and easterly boundaries of property in Lot 17, Concession 9 on fencing, which he observed separating the Riles lands from the rest of what he found to be in Lot 16, Concession 10. However, he had then used a proportional method to establish the NW corner of Lot 16, Concession 9, and disregarded the easterly extension of the same fence for use as the northern boundary of Part 3, which involved also rejecting its use as boundary evidence for the line between Lot 16, Concession 9 and Lot 16, Concession 10. Bolan determined the boundary line by proportioning distances along road allowances.

In the 1976 Plan, Emon retained Bolan's monuments for the outline of the lands being surveyed, but reconfigured interior boundaries. He too disregarded the fence near the NW corner of Lot 16 in the vicinity of the north boundary of his Part 4 as being evidence for the location of the original boundary. He did use the fence at issue as evidence for the NE corner of Lot 16. The distance south from that corner to the SE corner of Lot 16 was thereby 3236 feet, only 64 feet less than the nominal 3300-foot distance based on the original Township survey. This in fact strengthens the argument for the significance of the fence.

The 1972 Plan identified fencing along the northern boundary of what is now Parts 3 and 4 in the 1976 Plan. The boundary runs along the course of a "fence". The easterly boundary of Parts 4 and 5 of the 1976 Plan follows the same course as a fence described in the 1972 Plan as a "snake rail fence". The 1976 Plan does not refer to fences, but the fences described in the 1972 Plan were located by Halliday in his surveying.

Local custom in the initial establishment of boundaries, the role of fences and the treatment of fences (or rather lack thereof) in retracement at the time of these surveys was described by the expert witness and acknowledged by the court.

[...][T]here was "a general tendency toward a lack of concern about the precise location of boundaries for the properties in this area when they were being created." Rather, there was [...] a "handshake mentality" when parcels were first sold off, in order to obviate the expense of bringing in a surveyor. He had also had occasion to note the use of fences as the best evidence for the original establishment of the line between Lots. Fences were built by

agreement of adjacent property-holders, who lived up to those boundaries. It was modern and accurate surveying methods that showed how poorly done were attempts by early settlers to delineate the properties.

[...][The local] approach, acquired at a time that was more reliant on the *Surveys Act*, was less respectful of the evidence offered by old fences and more focused on mathematical solutions. This caused such surveyors often to simply dismiss a fence that did not align with boundaries calculated using mathematical precision as “a fence of convenience” or a “cattle fence”.

The court was then tasked with determining the status of the fence and the validity of the boundary as depicted in the 1972 Plan which had relied on a mathematical proportioning of the distances. The applicable legal principles employed by the court in doing so reflect a very pragmatic approach that gives effect to the longstanding agreement and intention of owners in the absence of conclusive evidence on monumentation by land surveyors. The principles giving rise to this approach and the value of old fences as evidence of the true boundary location was described by the court as follows:

In practice, the determination of boundaries is much more focused on what has actually happened on the ground than on the measurements in a registered deed. So, in *Gall v. Rogers*, at paras. 13-15, the Court approved the following principles from the practice of land surveyors:

- a. Deed descriptions in metes and bounds are merely evidence to be considered. The description of the originating parties in describing the land boundary is paramount;
- b. The description has to be applied to the ground in a way that is consistent with what has happened on the ground;
- c. The usage of conveyed lands by abutting landholders establishes the boundary as a fact on the ground, even if that differs from the description on the deed;
- d. A boundary position is best governed by the expressed intention of the originating parties. If that intention is uncertain, the subsequent behaviour of the parties pursuant to any such express or implied intention can determine the boundary;
- e. A “bound” is what is intended to set a limit to the extent of a boundary. What constitutes a “bound” for any particular boundary is a question of law.

Where a boundary is in issue, courts may be guided by a ranked “hierarchy of evidence” to be used in determining the issue, a hierarchy developed by surveyors. Measurements are the evidence of last resort. As stated in *Nicholson v. Halliday* (2005), [2005 CanLII 259 \(ON CA\)](#), 74 O.R. (3d) 81 (Ont. C.A.), at para. [28](#): “in the absence of natural boundaries and original monuments, the surveyor would look for fences or possession before resorting to measurement.” In the same paragraph, the Court reproduces the surveyor’s hierarchy, from

most compelling to least compelling, as adopted from *Thelland v. Golden Haulage*, [1989] O.J. No. 2303 (Dist. Ct.). That hierarchy is as follows:

- a. Natural boundaries;
- b. Original monuments;
- c. Fences or possession that can reasonably be related back to the time of the original survey;
- d. Measurements (as shown on a plan or as stated in the metes and bounds description).

At para. 30 of *Nicholson*, the Court of Appeal found the focus on what was done on the ground to be particularly applicable to land on Manitoulin Island, as original deeds conveyed lots, but did not offer the particulars of lots, since surveys were scarce:

Where a line was accepted as a boundary and relates to the original survey, the surveyor will re-establish that line as the boundary. The reasons for this basic principle are evident from earlier authorities. When lands such as the bush lands of Manitoulin Island were settled, the original deeds only conveyed lots: particulars of a lot's description were not available. Not only were there no existing surveys, purchasers were not in a financial position to retain a surveyor; the expense of a survey would often have exceeded the value of the land at issue.

Indeed, the Court of Appeal in *Nicholson*, at paras. [31-36](#), goes on to describe that life on the ground required alternatives to strict measurement in determining boundaries. Neighbours who could not see the value in hiring surveyors or afford to do so would agree to a satisfactory boundary line between their lands, and landholders would erect fences to represent their inexact understanding of boundaries, “even though such a boundary was not in accordance with survey measurements.” So, at para. 32, the *Nicholson* Court noted that: “The settler determined his own lot line by locating the original monument, or otherwise determining the location of the lot limit, and, using a compass, following and marking a lot line either by blazing a trail along its length or by erecting a fence.” And it has been the business of the courts to protect landholders who have relied upon such imperfectly set boundaries from the chaos that would ensue as a result of their correction by later exact measurement: *Kingston v. Highland* (1919) 47 N.B.R. 324 (K.B.), at 329-30.

Fences are unique as evidence of the original intention of those seeking to establish boundaries. Given the passage of time, the fence often offers the only evidence of the intention of landholders from the distant past. Parties are not required to call direct or clear evidence of the fence-builder's purpose. The history of the fence, as known from other facts, and the acceptance of the fence by subsequent landholders, is the evidence from which the original purpose of a fence can be inferred. A boundary line that has long been acquiesced in by adjoining parties is better evidence of where the actual boundary line lies than any after-

the-fact survey made once original monuments have disappeared: *Nicholson*, at paras. 58-59, 66-67.<sup>6</sup>

The court was in agreement with the opinion of the land surveyor, finding it was supported by the above noted legal principles. In explaining the rationale for this conclusion, the court went through numerous pieces of evidence that support the ongoing reliance by a range of different parties on the fence as marking the boundary. Deeds relating to a number of transactions occurring in the 1920s described the bounds of the lands with reference to a fence as representing the northern boundary of Concession 9; there was no evidence of a dispute between the applicant and previous owners of the adjacent lands, the applicant seeming to have acquiesced to the fence as marking the boundary and recollections from numerous parties connected to predecessors in title referred to reliance on the fence as the boundary. The differences in vegetation and topography on either side of the fence were also considered to offer an explanation for the choice of fence location.<sup>7</sup>

Based on this evidence, the court was dismissive of the alternate opinion provided by the surveyor called as a witness for the applicant, namely that the fence was one of convenience and did not serve to mark the boundary. This opinion was inconsistent with the references to the fence in deeds and as it was described by witnesses.

The local Manitoulin custom at the time that the fence was built was for landowners on the ground to establish their boundaries based on local conditions in the absence of initiating surveys of Lots and Concessions. If the fence that marks the northern boundary of the Riles property and of Bainborough's land veered significantly off the true blind line between the Concessions, that boundary was relied upon by subsequent owners and cannot in fairness be ignored or "corrected" now.<sup>8</sup>

This decision demonstrates the value to the court of the evidence of a land surveyor as expert witness. The court, in making the ultimate decision on boundary location, weighs the totality of the evidence; in this decision, there seemed to be a significant effort to consider and get at the mindset of the predecessors in title in terms of understanding the status of the boundary evidence on the ground.

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<sup>6</sup> *Ibid.* at paras. 71-75

<sup>7</sup> *Ibid.* at para 77

<sup>8</sup> *Ibid.* at para 8

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

The various mechanisms by which boundaries are created, including conventional lines, are discussed in Chapter 2: *How Boundaries are Created*. Chapter 3: *The Role of Intention in Retracing Boundaries* explores the numerous considerations of the modern surveyor engaged in the act of boundary retracement including understanding intention, applying the hierarchy of evidence.

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The overall purpose of *Survey Law 2* is to build on the *Survey Law 1* course with a special emphasis on evaluation of evidence and special circumstances encountered in problematic and natural boundaries. Understanding the workings of the legal system and the legal process is essential for regulated professionals entrusted to make ethical and defensible opinions that have the potential of being reviewed by a court. This university-level course will be taught online by Izaak de Rijcke starting January 12, 2022. For more information, consult the [syllabus](#). Please note that registration is via [AOLS](#).

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