INTRODUCTION TO THE SEMINAR

The LETTERS PATENT granted to the Institute of Survey Technology of Ontario by the Ministry of Consumer and Commercial Relations dated 23 October 1987 sets out the objects for which the Institute was brought into being.

Section 6.1. To assist members of the Association of Ontario Land Surveyors in carrying out the practice of professional land surveying in the province of Ontario and in connection therewith:

a. To define, develop, recognize and promote a body of knowledge, skill and standards pertaining to the practice of professional land surveying in the Province of Ontario that are, or may be, of assistance to surveyors in their practice of professional land surveying which standards shall be less than the skills, knowledge and standards required by surveyors;

b. To provide education and training in the standards;

c. To subdivide the standards into appropriate levels, to set and administer qualifications for each such level, and to certify, discipline or decertify those persons set out in paragraph (b) in respect of their qualifications at each such level; and

d. To do or cause to be done such further acts or things as the Directors or Executive Members deem appropriate to accomplish the objectives set out in paragraphs (a) and (c) above.

Section 6.2. To do or cause to be done such further acts or things as the Directors or Executive Members of the Institute deem appropriate to promote the Institute and its objects or to promote recognition of the standards.

This Seminar is directed to be part of the objective of the Institute.

This Seminar is designed to review your awareness of the retracement of Boundaries and to promote a better understanding of past Court Decisions which affect how we undertake retracement surveys.

The retracement and recognition of what constitutes a boundary is a basic knowledge that all Land Survey personnel must have to enable them to carry out their function as part of the Land Survey Team.
BACKGROUND

The Land Survey Party Chief is responsible for the conduct of the field work involving all types of surveys under the direct and continuing supervision of the Ontario Land Surveyor. Apart from the creation of new parcels of land by means of Registered Plans of Subdivision and Reference plans for new severances the work in legal surveys involves the retracement of boundaries that were previously set by others.

It is in this sphere of operations that we face our greatest challenge because we must recognize that the retracement of boundaries is very much governed by the previous decisions handed down by the Courts respecting the legal concepts of evidence.

Land Survey personnel must thoroughly understand the legal implications of what they do, and always bear in mind that any solution arrived at is only an opinion, not a decision, because whenever any type of retracement is to be finally and absolutely decided, that decision rests with the Court.

This is why any retracement we are involved with must be done with due consideration of all the evidence we can find - both documentary and physical - and then assessed in the same manner as will be done in a court of law.

Today we will concentrate on this legal aspect of Land Surveying and try to clear up any problems you have.
In any discussion we may have respecting the term "BOUNDARY" we must be very clear in our understanding of the legal definition within the meaning of the many statutes and regulations under which we do our surveys.

A general statement defines the term "BOUNDARY" as a line of division between two parcels of land. A second statement defines the term "BOUNDARY" as the physical features or objects by reference to which the line of division is described.

We use both of these definitions when we are describing the extent of ownership by using such words as "the limit between Lots 149 and 150", and, "along the south face of the stone wall of the building".

In doing so we must always ask the question -

"How did these boundaries get to be where they are?"

We can all accept as fact that the boundary of a continent such as Australia is limited by the land lying above sea level.

When we view the longest undefended border in the world we realize that it was created by man and therefore required surveyors to mark it on the ground. The proposed location was established by treaty, put in writing, and defined on the ground reasonably well, - at least west of the Lake of Woods anyway - by a line of latitude.

Boundaries between Provinces were established by Statute and again it was up to the surveyors to monument these lines on the ground.

In Ontario, beginning with the Crown Instructions for Settlement Surveys of 1783, and the Ordnance of 1785, surveyors laid out Townships with their tiers of concessions divided into lots, although as a point of interest, how this was to be accomplished was set out in the 1798 and 1818 Statues of Upper Canada.

All students of the profession of land surveying in Ontario know these facts, and can quote Section 2 of the Surveys Act (R.S.O. 1980, Chp. 493) which states: -

"No survey of land for the purpose of defining, locating or describing any line, boundary or corner of a parcel of land is valid unless made by a surveyor or under the personal supervision of a surveyor."

The key word in that section is the word "valid". But, here we come to the main point regarding the retracement surveys of separated parcels of land. Nowhere in any Statute does it state that a survey creates a "BOUNDARY".
What does create a "BOUNDARY" is the proper actions of owners, operating under the aspects of common law, when they identify and mark out the limits of land to which they hold title, actually possess the land, and by their actions actually use it.

There is reference to this concept in Form 4 of Ontario Regulation 75/82 under the Land Titles Act which the surveyor signs to accompany the plan of survey for Application for First Registration.

Form 4 states: -

1. That, at the time of making the survey for the plan I examined the land and found,
   i. no evidence of any easement affecting the land (except ...)
   ii. no monument, fence, building or other structure, or fixture which would indicate any person other than the applicant(s) has any right in any part of the land (except ...) and
   iii. that ...... and ...... was/were in actual occupation of the land.

Notice the phrase "actual occupation".

"BOUNDARIES" can only exist by the actions of owners who have legal validity to the use of the land and we must remember that there are two distinct, but nevertheless complementary, parts to ownership of land.

1. The Quality of Title to the holdings, and
2. The Extent of those holdings.

So, here the concept of what is the boundary of a parcel of land becomes just a little clouded.

We have on one hand the title documents for the land and on the other hand we have the physical boundary on the ground.

Differences between the two can turn out to be just a little awkward to explain to owners and solicitors, but, as defined by many court decisions: -

"It is by the work executed on the ground, not as projected before execution or represented on a plan afterwards, that the boundaries are actually determined."

When we get involved with the retracement of boundaries and are invariably faced with the problem that the occupational evidence may or may not be the boundaries, and the related record in the title documents may or may not be accurate, it is up to us to solve the problems.
And, for each boundary we must view the problem from two sides,

1. What constitutes the extent of a boundary of land is a question of law, and
2. Where the boundary actually is situate on the ground is a matter of fact in the legal sense.

These two statements naturally lead us into the start of our work - which is RESEARCH.

You cannot make any decision regarding the location of a boundary without knowing the complete history of it, both documentary and physically. The documentary evidence is the written proof of ownership, the visible and physical evidence on the ground is proof of actual possession.

Here I must stress, and it is a most important point, that boundaries once settled and agreed to by adjoining owner must not be upset by any type of statutory rule, especially the Surveys Act.

In general then, we can state that where a boundary is initially to be set is pure conjecture, but, once it is used in a document of some type it does then become the boundary and some fixing of it must be done on the ground - and it does not necessarily have to be done by a surveyor.

This seminar has, as its main theme, the actual retracement of previously set boundaries and how we go about doing it within the parameters set out in the many Canadian Court Decisions.

To get a true perspective on this subject I must refer to Greenleaf's Commentaries on the Law of Evidence. This American legal writer has often been quoted in Canadian Courts, and especially his comment: -

"Where there is an ambiguity in a grant, the object is to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is to give most effect to those things about which men are least liable to make mistakes. On this principle, the things by which the land granted is described are thus ranked according to the regard which is to be given to them: -

1. Natural boundaries.
2. Lines actually run and corners actually marked at the time of the grant,
3. Lines and courses of an adjoining tract if these are called for and if they are sufficiently established, to which the lines will be extended,
4. Courses and distances, giving preference to one or the other according to the circumstances."
This is very good advice and is a very logical way of regarding how things in the past were actually done.

In an article "The Survey and the Real Estate Transaction" by N.L. Petzold, O.L.S., these rules of what we term the "Hierarchy of evidence" are slightly changed to read: -

1. Natural boundaries
2. Original monumentation
3. Evidence of original monumentation
4. Measurements

Both sets of wording have their place in my viewpoint so I regard this hierarchy of evidence as: -

1. Natural boundaries;
2. Original monuments, provided they can be proved to be in their original location;
3. Evidence of the lines actually run and marked on the ground;
4. Measurements contained in the documentation.

Here are many cases in Canadian Law pertaining to the re-establishment of boundaries where these rules regarding the hierarchy of evidence have been quoted and decisions rendered based upon them, and without delving into those specific cases yet, it is worthwhile to review just exactly what they mean within the context of Canadian Law.

Natural Boundaries, as a generality, are those geographical features which we are least liable to mistake in recognizing; the top of an abrupt escarpment (even though it may erode over time); the centre line of a creek even though it may move over time); the waters edge of a lake, stream or rill (which may move overtime and is a particular branch of survey law all to itself). All these are rather noticeable and very apparent.

Original Monumentation, provided that it is in its original position. In this regard I must make the comment that the original field notes of the where, when and how the monument was planted is most important. This is why I am such a fanatic about Field Notes being Clear, Concise and Capable of no Misunderstanding the reason is quite clear. Field Notes will be used by others to replace and extend the survey fabric you have created and there must be no doubt in the mind of the user of those notes as to what you actually did on the ground, how you did it and why you did it. This is why I am almost a paranoid about the Party Chief including a Report of the Field Survey in his field notes.

Evidence of Original Monumentation, can include all the physical, man-made settlement of the boundary and include such items as the original field notes, verbal evidence taken under oath, and of course, the physical things done on the ground which can be related back to the original settlement of the boundary under review.
Actual measurements came last in this hierarchy of evidence, and I feel it is quite evident why this is so.

Original descriptions of parcels of land were compiled from what the originator thought was to be conveyed, and, even if the parcel of land was actually surveyed the dimensions were subject to such things as compass error, lack of a standard measure, and the somewhat haphazard method of doing things.

When we look back at the surveyors of the late 1700's and early 1800's, and what they did in such a short period of time, we must marvel at their tenacity and capability. The pressure on them for the physical division of land was enormous as the emphasis was to get the land divided up to accommodate the great influx of settlers onto the land. A few feet here or there did not mean very much to a settler whose greatest need was to clear the land, plant crops in order to survive, and build some shelter at the same time. The physical demarkation of his land came as low priority on "Things to do Today". All of you must have, at some time, come across an old stump fence and will therefore realize what I mean.

Now, what I have been talking about - this hierarchy of evidence - the concept of Natural Boundaries, original Monumentation, Evidence of the Original Lines, and Measurements contained in documents is what we mean when we ask - "Is this the best evidence available?"
COMMENTARY

To put this concept of "the best evidence available" into perspective let me run through an easy case, we will get to the more difficult ones later.

You are required to produce a Reference Plan covering the north 100 acres of Lot 4, Concession 2, in the Township of Woodhouse.

The Registrar will not accept the description as it was never described as such in a Crown Patent. You are wide awake enough to realize that it is the North 100 acres and not described as the North half. Your office staff have researched the area quite extensively and all they can find is copies of the original field notes and the township plan.

The Registry Office records show the title has been held by the same family since the parcel was originally separated from the township lot in 1825. You personally check all the data and note that you will be working in a Single Front Township and the north limit of the lot will be the rear limit of the Concession.

However, you have been through this type of battle before, and need to know more before you go out on the ground, so you delve into your source of well documented Ontario Base Maps to find other data which may be of help to you.

The original field notes and plan indicate 24 lots in the Concession with Road Allowances every 6 lots and lot sizes of 29.80 chains by 67.40 chains with the angle at the front of the Concession being 97 degrees and 10 minutes in the north-east quadrant.

Your scaling from the Base Map shows the Concession to be 1350m. deep and the six lots you will be working in as a block all scale 600m. wide. So far things are working out rather well. But, you do notice that the rear 25 acres of your parcel and the rear 25 acres of the south 100 acres are shown as being in trees.

Out on the ground you check the distances between Road Allowances, picking up the fence lines as you go, and note that the fences which could be lot lines are only apparent on the south side of the road, but do measure about 0.67km. on your odometer. There are no fences on the north side of the road that you can define at this stage as it is all bush, and you do not see any fencing to define the north side of the road.

From the fencing on the south side of the Road Allowance at the fences you have decided to accept to delineate the east and west limit of your property you measure 29 feet north to the centreline of the roadbed, and a further 29 feet north to a line of tufts of grass which are normally associated with the line of page wire fences.

Your keen and inquisitive field crew locate the fence lines running north through the bush which you immediately recognize as the lot lines in Concession 3.
While your field staff are setting up the Road Allowance you visit the owners of the north 100 acres and the south 100 acres of the lot and find that they are in agreement that the line between their lands is marked by an old barbed wire fence.

After checking with your field crew to ensure they have set the Road Allowance at 66 feet wide, and have set the angles in the road on the split angle from the lot angles on the north side of it, you trace the side fences back to and through the bush and finally locate old rusted remains of barbed wire embedded in trees.

You decide to accept the side line fences with its bend and jogs, and the weaving line of the old barbed wire, and monument them according to the standards. All you require now is a Bearing Reference.

Now, let us look at what you did in the light of Survey Law and how a judge would examine your methods.

The original township field notes show monuments planted at each lot angle on the front of each Concession with Road Allowances 1 chain in width. You have found physical evidence of the centre line of the roadbed being in the centre of a fence on the south side and evidence of a fence on the north side, and set the road width in keeping with the original field notes, and in keeping with the rule laid down respecting the inviolate ownership of the Crown.

In accepting the actual location of the fences surrounding the lands under survey you have followed the precept set out in Bateman and Bateman vs. Pottruff which stated: -

"The original posts or monuments not being in existence and there being no direct evidence as to their position, some other mode of ascertaining the boundaries of the lot must be resorted to: and in such cases the best evidence is usually to be found in the practical location of the lines made at the time when the original posts or monuments were presumably in existence and probably well known.

It was said by the Supreme Court that a re-survey made after the monuments of the original survey have disappeared is for the purpose of determining where they were and not where they ought to have been; and that a long established fence is better evidence of actual boundaries settled by practical locations than any survey made after the monuments of the original survey have disappeared."

And then, from Ogilvie vs., Strickland: -

"Where a boundary line has been accepted as marked and has been occupied by the respective owners for more than thirty years, such line cannot be considered doubtful, uncertain or disputed."
In the next scenario I wish to give you we find a request for a Surveyor's Real Property Report regarding Lot 5, Registered Plan 22.

From the research data in the file you find a print of Registered Plan 22 and note that the plan is dated in 1867, shows no monumentation, but indicates that the ten lots on the plan are 1 chain wide by 2 chains deep and lies between Fern Street and Rider Street which are both original with Registered Plan 10. Plan 22 does not show any bearings but the sidelines appear to be at right angles to the street. Among the data in the file are numerous surveys on Fern Street and Rider Street which show monuments at the south-east and south-west corners of Plan 22, and, a Plan of Survey of Lot 5, Registered Plan 22 dated 1960 which shows the lot to be monumented on all corners.

On the ground you find all of these monuments and those referred to up and down Fern Street and Rider Street and agree reasonably well with the documentary data. You find the monuments at the rear of the plan of survey are at right angles to the street and 132 feet therefrom. The distances across the lots on the plan check within hundredths.

But, you also find a very old chain-link fence around the property. However, it does not fit the monuments, being 0.4 feet west of the street monuments and 6.4 feet west of the rear monuments on both sides.

You canvass all the residents up and down the block regarding the fences but none can give any answers as they are all new to the area. The owner of Lot 5 had rented the premises for six years prior to buying the house last month and did not know about the monuments as they were 2 to 3 inches below grade.

So, prior to finalizing your report you request the office staff to acquire copies of the original field notes of Lot 5, and further research at the Registry Office to determine priority of title to conveyances in Registered Plan 22.

The title documents show Lot 5 as being the first conveyance from the Registered Plan.

When you get a copy of the field notes you see that the fences were in existence at the time of the survey of 1960, but were not shown on the plan. There is no Report of Survey available and the surveyor responsible for the work has retired and is living in Italy.

You have pursued all the avenues you can think of and must now come to a decision.
Marshalling all the facts and the evidence you can state: -

1. The fence was erected between 1870, the date of the conveyance of Lot 5, and 1960, the date of the survey of Lot 5.

2. The owner of Lot 5 and the adjacent owners' have always accepted the fencing as witnessed by their acquiescence to its location and the evidence of flower beds, bushes and trees, and cut grass.

In other words, claim of title has always run with possession.

You remember the quote from the case of Equitable Building and Investment Company vs. Ross:-

"....... long occupation acquiesced to by adjoining owners will be taken by the Court as convincing evidence that the lands occupied are the lands granted, notwithstanding that they cannot be made to tally with the plans ......."

However, the plan did not specify any bearings so how can you be sure it does not tally with the plan.

Then you recall McLean vs. Jacobs which said:-

"Where the owners of adjoining properties acquiesce in a certain dimension line over a period of sixteen years, and fence according to it, they are bound by it, even though it may not be the true line according to the title deeds."

But, that does not really cover this situation, except to indicate that the fences govern what is owned.

We can state with confidence that the old rusted fence does enclose the land we are to survey, but the next question that arises is:-

"Do the fences constitute the actual lot line, or do we treat the description as a misdescription?"

The Surveys Act embodies the common law principle that the first running of a line is true and unalterable, even though it was not done by a surveyor.

I would have no qualms whatsoever in saying that the fence lines were the lot lines.
This particular situation makes things rather awkward in that your conclusion will decry the work of a surveyor who laid out the supposed limits of Lot 5. But, the argument will carry weight. The plan did not specify the direction of the lot lines and the survey of 1960 assumed them to be at right angles to the street.

The fences were in existence prior to the survey.

The fences were the first running of the lot lines.

The first running of the lines make them true and unalterable.

And to convince you of this let me quote from Dennison vs. Chew:-

"I do not conceive that the Surveys Act can be resorted to, to undo what mutual arrangements, or the lapse of time and long continued actual possession, may have accomplished."

The courts always have the last word and have always made the point that where the evidence shows the acceptance of a boundary by adjoining owners, then the boundary will be the dividing line, and also the lot line if that was the intent in the grant.

When we approach retracement surveys we must follow the hierarchy of evidence, which also includes not only proving each monument we locate to be in its original location, but also view other physical evidence in the context of Canadian Law.

With regard to fences as boundaries it is imperative that we follow the direction given in Kingston vs. Highland:-

"The surveyor should inquire when fences originated, how and why the lines were located as they were, and whether claim of title has always accompanied possession."

And, in this particular scenario you should remember the wording in R.S.O. 1980, Chap. 230, Sec. 141(22) which states:-

"The description of registered land is not conclusive as to the boundaries or extent of land."

A classical example of this statement from the Land Titles Act is found in, what I call, "The DeMorest Cast"; which was brought before the Director of Titles under the Boundaries Act in 1966.
You are all familiar with the Boundaries Act so I will just refresh your knowledge of it as to content. It came into being almost 33 years ago as a means of deciding boundary problems without the need of the cost and time consuming process of a Court Hearing. In 1980 it was completely revised and is the legislation we follow today. The revisions in reality only changed the administrative procedures and did not alter the basic concept of confirmation of boundaries.

An application under this act can be made where doubt exists as to the true location on the ground of any boundary of a parcel of land, or where a road authority wishes to confirm the true location of the boundaries of a public highway.

The persons who may make an application are set out in the Act as:-
1. the owner of an interest in the parcel
2. any Minister of the Crown
3. with the consent of an owner with an interest in the parcel, a surveyor.

An up-to-date plan of survey showing the boundaries to be confirmed must accompany the application.

The hearings themselves are much more informal than a court of law, and are open to the public.

However, to get back to the Boundaries Act Hearing of 04 October 1966 - The DeMorest Case. It contains so much information respecting all the aspects of the re-establishment of boundaries, how required evidence is to be found and used, that I personally suggest it should be studied in detail by everyone in the land survey profession.
In BA-168, dated at Toronto 4th October 1966, we come across an amount of quotations from previous hearings by the courts, and, an interesting highlight into how surveys used to be done. The application concerns the boundary between the east and west halves of Lot 2, Concession 5, Township of Waters. I will mention here that part of Lot 2 is covered by the waters of Kelley Lake.

The initial facts are quite easy to understand. The line was run by P.W. DeMorest, O.L.S. in 1897, but surveyors in the area were not aware of this until 1963. (An interesting fact as we shall see later.)

The existing fence running north and south was used by the adjoining owners as the property line. Evidence was given that although the fence was not complete for its entire length, and is of varying age in different sections, there had been no alteration in its location other than by reconstruction from time to time, or any dispute over the location since occupation which pre-dated the DeMorest survey.

(Ah-ha you say. That is it. The fence represents the first running of the property line. Maybe that is true, But is it the line between the east half and the west half as called for in the patents?)

Some surveying was done in 1939, which field notes referred to the fence line as "fence probably not on half lot line", however, survey stakes were set in this fence, thereby using the fence as the boundary between the east and west portions of the lot.

(It is worth noting the Directors use of the word "portion" in the transcript at this time, rather than the word "halves". Successive Directors of Title all show a very "preciseness" in their choice of words.)

During 1954 and 1955 M.T.O. surveyed a by-pass highway across the south part of Lot 2, and the field notes found the stakes in the fence from the 1939 survey. However, the report of survey notes the half lot line in question was to be set by dividing the lot area in half after subtracting the area under water and running the line on the governing bearing in accordance with the Surveys Act for un-run lines. M.T.O. did not physically survey or monument this line.

In 1961 and 1962 surveys were performed in the vicinity of the south limit of Lot 2 and both surveyors show the line set by M.T.O. with the qualifying note "line between east half and west half according to M.T.O." on one plan, and "east limit of west half of Lot 2 as shown on M.T.O. Plan ..."
Both surveyors wrote to the owner of the east half of Lot 2:-

"...we have examined the work performed by M.T.O. ... and from the evidence they have shown we cannot certify that this is the true position of your west limit. The only way to settle this matter properly would be by having a Boundaries Act survey performed and having the Director of Titles confirm the position of your west limit."

and the other surveyor wrote:-

"... as stated to you earlier there is a possibility that the location of this line as established by area will be in doubt. There is a conflict between an existing fence and if this fence is built on a survey line or can be proved to be of long standing, then there is a possibility that the line between the east and west halves could be relocated."

At this stage of the hearing the Director gives us some history:-

"The running of DeMorest's line in 1897 did indeed precede the date of patenting which occurred in 1900 and 1914, but I find nothing unusual in this situation in that a survey of the lands of the intending patentees was commonly a prerequisite of patenting as were the clearing and settlement of lands and the building of a dwelling of a certain standard. In reviewing the survey by DeMorest it is necessary to consider and understand the economic conditions and practices existing at the time ... Ontario had by statute licensed O.L.S. to define and retrace any boundaries in the Province that the public might require ...

The O.L.S. enjoyed a respect and position in the community which defined him as a professional, as an educated man, a person whose technical decisions were not in any real manner questioned or challenged. In these circumstances then, Mr. DeMorest was employed in 1897 to run the dividing line between the east and west parts of the lot in question.

This he did by setting the line mid-way between the corners of the lot and planting a balsam corner-post thereon and labelling this line on his field notes, the line between the east and west halves of Lot 2 ...
This line which apparently was subsequently fenced and is in fact still fenced today, divided Lot 2 into two equal halves based on the total land and water contained by the unbroken limits of Lot 2 ... under the provisions of the Surveys Act, a half lot is required to be half of the land area .... this in fact is what M.T.O. did. The question is raised therefore as to whether or not Mr. DeMorest made a mistake and whether or not therefore his line should be rejected ...."

(I personally find this last remark rather strange in the light of the circumstances and evidence so far presented, or, should I be reading into the transcript of the hearing that the Director is giving everyone who reads it a lesson in surveying?)

The Director suggests to the hearing that there may be two explanations for what occurred in 1897.

1. Local usage of the term half lot ... meant half the frontage. In this regard it would appear that a surveyor authorized by the Crown to define boundaries did in fact define the boundary and that the Crown Agent in all likelihood inspected the defined boundary and concurred in it prior to the issuing of Patents. The error therefore could have occurred at the attempt of the Crown to turn into words the lands as located and applied for.

2. The error might be laid directly on the shoulders of the surveyor. In my experience, especially in Southern Ontario, surveyors today still refuse to follow the Surveys Act definition of a half lot where it is broken by lakes and rivers. In a Boundaries Act hearing before me on January 6th 1966 a surveyor ... stated that it was common practice .... to locate broken lot half lot lines in exactly the same manner as Mr. DeMorest did in 1897.

He also states that "In 1897 his decision might well have been considered practicable, economical and reasonable. In this regard it is important to note that the Surveys Act of today is not the same Act of 1897."

Then comes some more historical data which is very interesting. "Can lots still be treated as four sided figures even when they contain lakes and such? Or, are the areas of lakes to be subtracted before dividing the area?" Common practice of 1860 to 1900 seems to infer that as far as the practising survey profession was concerned the first simple method was used.

"A measure of the confusion in this regard can be taken from a court case of 1912, Williams vs. Salter and Karwick which ruled that a lake within a lot need not be considered in patented aliquot part decisions if the lake was non-navigable."
The 1913 amendment to the Surveys Act to state "When lakes excluded from area of Lot" is indicative that the Act in 1897 was not clear and "considerable restraint must be exercised before the precise and neat wording of today is applied retroactively to 1897." (- and gets away from navigability) "The Surveys Act of today in its first statement of survey principles demands that we look first to the original survey at the time it occurred."

"The reasons behind the DeMorest location of 1897 are however purely speculative and at this late date it is extremely doubtful that it is possible to reach any definite conclusion."

And now we get down to the actual decision:-

"Nevertheless, the line was surveyed and monumented by a licensed land surveyor, was fenced, acquiesced in and peacefully accepted by all subsequent locates, patentees and owners, and on this basis alone is, in my opinion, absolute and unalterable. Even without the support of the common law rules of retracement or the statutory principles that apply to it, and without considering equitable estoppel, I have no hesitation in declaring the DeMorest line immovable."

That being said, we would expect the hearing end, but no, the Director then goes into detail about various aspects of surveying. I got the impression that he was very well prepared and would suggest he is giving a lecture to lawyers and surveyors alike regarding how the statutes, and case law, must be viewed with respect to the retracement of boundaries. This is why I have chosen to go into the hearing in some detail. He delves into the principle of equitable estoppel, how original patents are to be treated, the Surveys Act, M.T.O. Survey policies, the understanding of areas mentioned in documentary data, what is meant by Peaceful Settlement, and adverse possession with respect to the Land Titles Act - in other words a Short Course in Surveying.

I have compiled a list of the court cases frequently referred to in Boundaries Act Hearings, and, because they will re-occur during the progress of these commentaries, have added them as Appendix A. However, I will quote some of the "lecture" because the points that were brought out are significant.

The rule of equitable estoppel can be stated as:-

"When one of two persons must suffer a loss, it must be borne by that one of them, who by his conduct, acts or omissions has rendered the injury possible."

This is from the case North River Bank v. Aymer.
The Director also refers to Berhoefer v. Fraser, Kitchen v. Chantland, Cutler v. Callison and Cavanaugh v. Jackson. (all noted in Appendix A) and what he is saying is that if an owner sets out a boundary, and either he or the adjoining owner knew it is in the wrong place, yet both of them live up to and possess up to the line knowing that it is in the wrong place, then neither one can at a later date come along and put it in the right place.

When the Director reviewed the problem with Patents he re-stated his previous position, "in this case .... reference in the patent descriptions to the east and west halves of the lot must be deemed misdescription, an unfortunate but nevertheless not unusual error ...." "However erroneous may have been the original survey, the monuments that were set must nevertheless govern ...." (Here again we get back to that phrase "It is what was done on the ground, etc....)

In reference to the Surveys Act, which I feel we are all aware has undergone certain changes since its inception in Ontario, the Director keeps on repeating that we must always be aware of the methods used by surveyors at the actual time of the survey which first created a boundary, and he goes on to quote ".... the first survey made under the authority of an owner .... shall define the true and unalterable line .... all posts and monuments planted at the front or rear angles shall be the true and unalterable boundaries .... whether the same be more or less than shown on the original plan and field notes or mentioned or expressed in any letters patent, grant or other instrument ...."

And, one last quote from the Director in his explanation of the Surveys Act:-

"The Surveys Act indeed fixes the limits of the lands under the jurisdiction of the M.T.O. but it cannot be construed to fix lines between owners ...."

In comments respecting M.T.O. policies it was pointed out that in 1954 the northern Land Titles Offices refused plans where lines were based on fences ... lines were run according to the Surveys Act and would generally disregard fences .... with the result that old survey lines, which were re-monumented with fences over the years, were mistakenly rejected as evidence of the original lines, due to the fact that the Land Titles Act did not recognize adverse possession.

(Here I must draw your attention to the Land Titles Act which does state:-

"The description of registered land is not conclusive as to the boundaries or extent of the land." [R.S.O. 1980, c. 230, s. 141])

However, all three agencies, the survey profession, the Land Titles System and M.T.O. now recognize the legal significance of fences.
In his comments re: areas the Director made his point by quoting from four of the more well known court cases:-

\( R \ v \ v. \ Day \) (1835);
\( Pleadwell \ v. \ Brenan \) (1857);
\( Fraser \ v. \ Cameron \) (1854);
\( Kristianson \ v. \ Silverson \) (1929)

I will reiterate two of these here to make his point clear. In \( R \ v. \ Day \) we find "Where in the description of a Crown grant there is a statement of quantity at the end thereof, it can never be admitted to control the previous definition of boundary.", and from \( Pleadwell \ v. \ Brenan \) - "Where a grantee takes possession under such a survey, and holds and improves for a length of time to the bounds so laid down, his title to the premises comprised within them can be disputed ...."

When he got around to Peaceful Settlement the Director quoted \( Ogilvie \ v. \ Strickland, Might Directories v. Home Bank Ltd., \) and \( Diehl \ v. \ Zanger, \) but his last remark is the one for us to remember:-

"The Land Titles Act does not recognize adverse possession, but in order for adverse possession to occur, there must be a true boundary and that is the question before this hearing. Occupation to the true boundary cannot be considered adverse."

Then, finally, comes the Directors summary - and he had a field day. Quoting lengthily from \( Equitable Building and Investment Company v. Ross \) (1886), and little tid-bits from:-

\( Kristianson \ v. \ Silverson \)
\( Bateman \ & \ Bateman \ v. \ Pottruff \)
\( Cain \ v. \ Copeland \)
\( Davidson \ v. \ Kinsman \)
\( Berhoefer \ v. \ Fraser \)
\( Palmer \ v. \ Thornbeck \)
\( Stewart \ v. \ Carleton \)
\( Diehl \ v. \ Zanger \)
\( Ou pont \ v. \ Starring \)

with quotes from Greenleaf on Evidence and the Judicial Functions of surveyors.

It was without doubt a meaningful hearing for all in attendance and for all of us who take the time to read and comprehend the full transcript.
SKETCHES PERTAINING TO SYNDICATE SOLUTIONS

re: BOUNDARIES AND THE LAW
APPENDIX "A"

to

COMMENTARIES ON

BOUNDARIES ACT HEARINGS

EXTRACTS FROM BOUNDARIES ACT HEARINGS

QUOTING CASE LAW
B.A. 51
CAIN v. COPELAND

Where it is sought to establish the boundary line between adjoining properties the submission of evidence as to the existence and location at one time of a certain original mound, according to the rules governing surveys is a proper way of establishing the boundary line and such as will control the description.

KRISTIANSON v. SILVERSON

Recourse must be had not to patents, certificates of title or other instruments, but to the several mounds, posts, monuments or boundaries, created, marked, placed or planted in the survey, the evidence of which can be found on the ground.

GREENLEAF ON EVIDENCE*

The general rule to find the intent where there is any ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake.

On this principle, the things usually called for in a grant, that is, the things by which the land granted is described, have been marshalled:

FIRST, the highest regard had to natural boundaries;
SECOND, to lines actually run and corners actually marked at the time of the grant;
THIRD, if the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established;
FOURTH, to courses and distances, giving preference to the one or the other according to circumstances.

* See also Hocay v. Tripp; Merritt v. Toronto; McPherson v. Cameron
JUSTICE COOLEY

It will probably be admitted that no man loses title to his land or any part thereof merely because the evidence has become lost or uncertain. It may become more difficult for him to establish it against an adverse claimant, but theoretically the right remains: and it remains as a potential fact as long as he can present better evidence than any other person.

B.A. 53

Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when none other is attainable.

BATEMAN & BATEMAN v. POTTRUFF*

The original posts or monuments not being in existence and their being no direct evidence as to their position, some other made of ascertaining the boundaries of the lot must be resorted to: and in such cases the best evidence is usually to be found in the practical location of the lines made at the time when the original posts or monuments were presumably in existence and probably well know. It was said by the Supreme Court that a re-survey made after the monuments of the original survey have disappeared is for the purpose of determining where they were and not where they ought to have been; and that a long established fence is better evidence of actual boundaries settled by practical locations than any survey made after the monuments of the original survey have disappeared.

* See also Home Bank v. Might Directories Limited

B.A. 96

PALMER v. THORNBECK

In all actions brought to determine the true boundary between properties the burden of proof lies upon the plaintiff who seeks to change the possession.
McLEAN v. JACOBS

Where the owners of adjoining properties acquiesce in a certain dimension line over a period of sixteen years, and fence according to it, they are bound by it, even though it may not be the true line according to the title deeds. It is not a conveyance of land requiring any writing under the Statutes of Frauds, but merely a consent to interpret the deeds in a certain way.

OGILVIE v. STRICKLAND

Where a boundary line has been accepted as marked and has been occupied by the respective owners for more than thirty years, such line cannot be considered doubtful, uncertain or disputed.

DIEHL v. ZANGER

A supposed boundary line long acquiesced in is better evidence of where the real line should be than any survey made after the original monuments have disappeared.

KITCHEN v. CHANTLAND

The rule of law is well settled that if there be doubt or uncertainty, or a dispute as to the true location of a boundary line, the parties may by parol agreement fix a line which will, at least, when followed by possession with references to the boundary so fixed, be conclusive upon them, although the possession may not have been for the full statutory period.

CAVANAUGH v. JACKSON

It is well settled that when the owners of contiguous lots by parol agreement mutually establish a dividing line, and thereafter use and occupy their respective tracts according to it for a period of time, such agreement is not within the Statute of Frauds, and it cannot afterwards be contraverted by the parties or their successors in title.
CUTLER v. CALLISON*

While it may be regarded as well settled that the title to real estate cannot be transferred by parol agreement, yet it is a principle well established that the owners of adjacent tracts of land may, by parol agreement, settle and establish permanently a boundary line between their lands, which, when followed by possession according to the line so agreed upon, is binding and conclusive, not only upon them, but their grantees.

* See also Kitchen v. Chantland & Cavanaugh v. Jackson

STEWARD v. CARLETON

In a legal controversy the law as well as common sense must declare that a supposed boundary line long acquiesced in is better evidence of where the real line should be than any survey made after the original monuments have disappeared.

B.A. 168

EQUITABLE BUILDING & INVESTMENT COMPANY v. ROSS

... long occupation acquiesced in by the adjoining owners will be taken by the Court as convincing evidence that the lands occupied are the lands granted, notwithstanding that they cannot be made to tally with the plans on the grants.

... likewise, that even under the Land Transfer Act possession should be the best evidence of title.

B.A. 186

SHARRON v. PEARSON

To enable the defendant to recover he must show an actual possession, and occupation exclusive, continuous, open or visible and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose.
DAVIDSON v. KINSMAN

In fact the actual location of these 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 on the land - no writing can be substituted for it - but whether it be 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 on the land, neither party shall be permitted to dispute it.