



OFFICE OF THE SURVEYOR-GENERAL

Principles underpinning application of apportionment

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Fundamental, Fundamental Principle

Section 3.2.2.4 Survey Directions, Tasmania (emphasis added) :

*In reinstating boundaries, the intention expressed in the instruments providing for their creation **must be determined from the best evidence that the nature of the case admits.** A **guiding principle** is that **most effect is to be given to that evidence about which there is least likelihood of a mistake having originally been, or now being made.***

The location of a boundary on the ground is a FACT that is determined following evaluation of best available EVIDENCE.

Fundamental Principle of Re-instatement

Griffiths C.J. in *Overland v Lenehan* (11 Q.L.J 59) (1901) noted that

“... a certificate of title does not rest upon a pinnacle by itself but is an ordinary written instrument, and that, although its operation is far reaching and in some aspects exceptional, it must be construed with the ordinary rules for the construction of documents of title. Without extrinsic evidence to identify its subject matter it has no intelligible meaning. Extrinsic evidence is, therefore, admissible, and must be admitted, and, when admitted, must be applied in precisely the same way as in the case of any other document of title”.

There is no entitlement to a distance on a plan of survey

Fundamental Principle of Re-instatement

There is no entitlement to a distance on a plan of survey

Jeffrey N. Lucas describes it thus:

“This is when the confusion I was having in my mind about issues I was facing in my surveying practice began to clear up. I started wrapping my brain around the concept that the title documents do not dictate location, they simply provide the means for location.”

‘It is not the office of a description [in a deed] to identify the premises, but to furnish the means by which they can be identified.’ Sengfelder v. Hill, 21 Wash. 371, 379 (Wash. 1899).’

<https://www.xyht.com/surveying/legal-boundaries-monuments-and-corners/>

Fundamental Principle of Re-instatement

*A common misjudgement occurs however, when data is laid from unreliable start points in preference to occupation adoption. Often the proximity of the old occupation to the data position is not recognised as indicating the occupation is the best evidence of the corner. **Illogically, the unadopted occupation in some of these cases is just as good, if not better, evidence than the start point the data was laid from.** This start point is itself usually occupation adopted on the current or previous survey.*

https://dpti.sa.gov.au/_data/assets/pdf_file/0005/717989/Cadastral_Survey_Guidelines_-_V4_-_24_August_2020.pdf

Starting from a point that is not primary
evidence is subject to doubt

“A Little More or less”

“ . . . a little more or less" is a legal and not a survey term. A surveyor might define a “... little more or less" in terms of closure error or as a representative fraction relating the probable error to the length of line. Some would relate it to the closures permitted under Survey regulations extant at the time the survey was made. More sophisticated means might be by determining the size and shape of the [sic] "error ellipse“ dictated by the equipment used and the configuration of the survey traverse.

Lawyers on the other hand will take a much more liberal and somewhat flexible or, dare I say it, elastic interpretation of the term.

McRae JA (1985), *The “guarantee of parcels” and “a little more or less”*, New Zealand Surveyor February 1985

https://www.surveyspatialnz.org/Attachment?Action=Download&Attachment_id=3468

Legal Principle of Proportion

*“One meaning of the word ‘proportion’ is the correct relation that one thing bears to another. When something is in proportion it may be said to have achieved a correct balance. The term is employed **in many disciplines, including mathematics**, musical theory and philosophy. **In law, proportionality is employed** as a concept and an ideal; **as a test and as a conclusion.***

Its basis as a legal rule is reason.”

Justice Susan Kiefel AC, (2012), *Proportionality: A rule of reason*, 23 PLR 85, quoted in *Proportionality in Australian Public Law*, Justice Peter Davis, (2021), Australian Institute of Administrative Law seminar.

Principles for Apportionment

Statutory law on apportionment in Canadian provinces

“Land surveyors must often decide whether or not to re-establish a lost boundary monument by proportionate measurement. Statutory provisions which permit that method are normally available only as a last resort. Physical occupation, such as an old fence, may be better evidence than proportionate measurement, but only where the occupation represents the most probable location of the original boundary.”

McEwen A (1996), *Boundary re-establishment by mathematical proportioning*, Geomatica, Volume 50, no. 1

Numerous court decisions have over-ruled a surveyors reliance on statutory apportionment clause, finding other evidence was available

Principles for Apportionment

Statutory law on apportionment in Canadian provinces

“The proportioning method is correctly applied to compensate for relatively small, consistent errors, and only when there is no better evidence of boundaries. Evenly distributing a discrepancy resulting from a blunder (as opposed to consistent error) would not logically be a valid replacement of an original posting. For example, if the "starting points" that the proportioning is based upon, even if undisputed, are of questionable origin, and a large discrepancy in overall measurement is found, then blind application of the principle as a "rule" will not serve the underlying purpose.”

Stewart RJ (2003), *Making sense of Proportioning*, The Ontario Land Surveyor

Principles for Apportionment

Cases from USA highlight two principles commonly applicable

FIRST CONDITION - Failure of Retracement (**No other evidence**)

...apportionment is applied only after retracement fails to discover the location of the original corner. Where tangible evidence of the original lines exists, the rule has no basis and does not apply.

SECOND CONDITION – read the paper...

THIRD CONDITION - Parcels Created Simultaneously (**measurements must be under same conditions, reflecting a title distance does not sit on a pinnacle**)

Boundary lines of parcels created successively are determined according to the seniority of title doctrine. Any excess or deficiency over the whole tract is borne by the parcel last to be surveyed. The apportionment rule applies only when the several parcels comprising the whole tract have been created simultaneously. (**the basis of proportion as a legal rule is reason, not mathematics. E.g. Rule of construction against the grantor is applicable and it is likely ignored in a simple mathematical proportion solution**)

Griffin RJ (1960), *Retracement and Apportionment as Surveying Methods for Re-establishing Property Corners*, Marquette Law Review, 43: 484-510

General Principles underpinning Apportionment

- Dimensions are not an entitlement, they are one source of evidence amongst many different sources of evidence concerning the location of a boundary and the general principle is evidence on the ground is a better indicator of intent.
- The basis of proportion as a legal rule is reason, not mathematics.
- Doubt about the location of start points is a consideration before “blind” application of the principle.
- There must be no other evidence – it is utilised after all other efforts at retracement and search for evidence have failed.

Facts v Evidence

Discussion