



IZAAK DE RIJCKE LAW OFFICE

Barristers, Solicitors & Notaries Public
122-355 Elmira Road North, Guelph, ON N1K 1S5
Telephone (519) 837-2551
Facsimile (519) 837-0958
Web - www.izaak.ca

Izaak de Rijcke, B.Sc., O.L.S., LL.M.
E-mail: izaak@izaak.ca
Certified Specialist (Real Estate Law)



Megan E. Mills, B.Sc., LL.B.
E-mail: megan@izaak.ca

November 21, 2013

Via Fax No. 1-705-730-0009

John I. Barzo
Barrister and Solicitor
60 Collier Street, Suite 205
Barrie, ON L4M 1G8

Dear Sir:

Re: Lawrence Dale et al v. Township of Tiny
Appeal to Ontario Superior Court of Justice, Divisional Court

Please find enclosed the Notice of Appeal and Certificate Respecting Evidence from the appellants, Lawrence Dale and Betty Dale, which are served upon you pursuant to the Rules of Civil Procedure and the provisions of the Surveys Act. Once we have a court file number, we will apprise you of same.

Yours truly,

Kathy Caguiat
for Izaak de Rijcke
Barrister and Solicitor

IdR:sb
Enclosures
cc: Client

TOTAL PAGES FAXED: 14 PAGES

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
Divisional Court

IN THE MATTER of an application under Section 48 of the Surveys Act, R.S.O. 1990, Chapter S.30 by the Corporation of the Township of Tiny for a Municipal Resurvey of the Road Allowance between Concessions 18 and 19, across Lots 9, 10, 11, 12 and Part of Lot 13, Geographic Township of Tiny, County of Simcoe.

AND IN THE MATTER of a Survey Report and Plan of Survey to re-establish and mark with permanent monuments, the Road Allowance between Concession 18 and 19, across Lots 9, 10, 11, 12 and Part of Lot 13, Township of Tiny, County of Simcoe, by John Goltz, Ontario Land Surveyors, dated August 30, 2011.

AND IN THE MATTER of an appeal from the Order and Decision of the Surveyor General of Ontario dated October 24, 2013, pursuant to Section 49 of the *Surveys Act*, R.S.O. 1990, c. S.30, as amended.

B E T W E E N:

LAWRENCE DALE
and BETTY DALE

Appellants

-and-

THE CORPORATION OF THE TOWNSHIP OF TINY

Respondent

NOTICE OF APPEAL

THE APPELLANTS, LAWRENCE DALE and BETTY DALE, appeal to the Divisional Court from the Order and Decision of the Surveyor General of Ontario dated October 24, 2013, confirming that the Plan and Field Notes of the Survey prepared by John F. Goltz, OLS, amended as therein directed, accurately and truly determines the position of the Road Allowance between Concessions 18 and 19, across Lots 9, 10, 11, 12 and 13, in the Township of Tiny, County of Simcoe.

THE APPELLANTS ASK that the Decision and Order of the Surveyor General be set aside and an Order be granted as follows:

1. an Order confirming the position of the said Road Allowance on the Plan of Survey prepared by John F. Goltz, O.L.S., dated September 25, 2013, be amended to conform to the position of that Road Allowance, as depicted on the Plan of Survey by Ronald J. Stewart, OLS, dated August 27, 2012, and as further described in the Report of Mr. Stewart;
2. in the alternative, an Order confirming the position of the said Road Allowance in the position as shown on a Plan of Survey by Ronald J. Stewart, OLS, dated August 27, 2012, and as further described in the Report of Mr. Stewart, only insofar as it affects the lands of the Appellants;
3. In the further alternative, an Order directing the Respondent, The Corporation of the Township of Tiny, to file an application pursuant to the *Boundaries Act* for a determination of the boundaries with respect to the position of the road allowance between Concessions 18 and 19, across Lots 9, 10, 11 and 12 and part of Lot 13, as contemplated by the Order of the Honourable Madam Justice Allen dated July 5, 2010 in respect of an action commenced in the Ontario Superior Court of Justice between Betty Dale and the Estate of Sadie Moranis, as Plaintiffs, and The Corporation of the Township of Tiny and George Cornell, as Defendants, and designated as Court File No. CV-09-386834;
4. costs of this appeal on a substantial indemnity basis; and
5. such further and other relief as counsel may advise and this Honourable Court order.

THE GROUNDS OF APPEAL are as follows:

LACK OF JURISDICTION

1. The Surveyor General of Ontario lacked jurisdiction in this proceeding altogether because prior to petitioning the Surveyor General in its application under the *Surveys Act*, the Respondent had committed and agreed to bring an application under the *Boundaries Act* for the **north boundary of its road allowance** as a companion application to an application to be brought by the Appellant, Betty Dale. This was specifically contemplated in the Order made by Justice Allen dated July 5, 2010, but instead, and contrary to the commitment and agreement of the Respondent, the Respondent Township improperly pursued the application below under the *Surveys Act* for **both boundaries of its road allowance**. The Respondent Township failed to do as contemplated and as agreed and it is the Director of Titles under the *Boundaries Act* who, therefore, has and had at all material times, exclusive jurisdiction to hear and determine this matter.

ERRORS OF LAW AND FACT

2. The Surveyor General of Ontario ("Surveyor General") made a number of errors of law and fact and errors of mixed law and fact, including:

The Wrong Test

- (a) Surveyor General correctly stated that her task was to "determine what was originally done on the ground by Goessman in 1821, commonly referred to as the 'first running'", but then instead the Surveyor General erred by adopting many other factors inconsistent with her mandate, including:
 - (i) a wish to avoid "unnecessary confusion for landowners";

- 4 -

- (ii) rejecting a "best fit" distance to the water's edge of Thunder Bay and the edge of a steep slope descending into Thunder Bay;
- (iii) ignoring the existence of a jog in the position of the road allowance east of the baseline and misapprehending its significance;
- (iv) failure to understand and apply the significance of a jog in the road allowance position east of the baseline; and,
- (v) rejecting the significance of a Crown Patent as establishing "riparian" rights and stating that this right can be "lost" if the original position of the road allowance is found to have never permitted such riparian rights in the first place;

The Wrong Evidentiary Standard

- (b) Surveyor General erred in determining that the "hierarchy of evidence" applies in assessing conflicting evidence and, rather than attaching the highest weight to the position of a natural boundary, dismissed both the water's edge of Thunder Bay and a steep ridge as reliable natural boundaries, stating that "Thunder Bay is bowl shaped with no unique features, lacking rock outcrops or points of land". To the contrary, these were and remain, natural features which were identified by, and measured to, on the parts of all surveyors giving evidence. These features were also recorded by surveyors working in the 1800s;

Breach of the audi alterim partem principle

- (c) Surveyor General erred in considering the decision in *Pitt v. City of Red Deer*, 2000 ABCA 281 and admitted that she was guided by it without first affording the

- 5 -

Appellants any opportunity to make any submissions as to law or as to the relevance or non-relevance of this decision thereby denying the Appellants the opportunity to be heard, which is one of the fundamental principles of justice and natural justice;

No Reasons

- (d) Surveyor General requested and received written submissions from the Appellants and these written submissions appropriately included the legal arguments and respectful submissions which made extensive and specific reference to the evidence before the Surveyor General at the hearing and, the specific points of law which applied to same. However, in the reasons and decision appealed from below, Surveyor General erred in failing to make any reference to same and, moreover, she further erred in failing to address any of the factual and legal submissions in her reasons, which is tantamount to having "no reasons" in the decision of the Surveyor General appealed from;

Comingling of Different Tests under Surveys Act and Boundaries Act

- (e) Surveyor General acknowledged correctly that her jurisdiction under the Surveys Act was different from the jurisdiction of the Director of Titles under the *Boundaries Act*, but the Surveyor General erred in failing to fully explain why. Furthermore, the Surveyor General erred by comingling the two different tests under the two statutes (*Surveys Act* and *Boundaries Act*) in evaluating the evidence before her as well as the law and methodology of survey to be used in disposing of the application by the Township of Tiny before her.

- 6 -

- (f) Even if she had jurisdiction under the *Surveys Act*, the approach adopted by the Surveyor General would incorrectly establish two separate legal boundary fabrics in the Province of Ontario: one being the survey fabric arising from the retracement of block lines and concession lines under the *Surveys Act*; and the other arising from the boundaries of parcels in the private ownership of individuals constituting the public at large within the Province of Ontario. Simply put, this would place, and has placed, the already uncertain boundary fabric in this province in a complete state of disarray;

Disregard for Evidence on Ground in Preference for a Theoretical Method

- (g) Surveyor General stated that she was obligated to follow Method 47 in Regulation 1029 and she erred by applying the mathematical solution prescribed therein, without first obtaining and considering "the best evidence available respecting the corner and boundary"..., as prescribed in Method 47 and re-establishing the boundary from such available and sufficient evidence;
- (h) Surveyor General erred when she confused her role in acting under the *Surveys Act* as if the "lost" road allowance needed to respect settled occupation and possession, when in fact there is no authority for doing so and there was no evidence of any settled possession by any pioneer settler in this locale at the time when the first surveyors appeared after Goessman's work in 1821, Burnet in the 1870s, and Fitton in the 1880s;
- (i) Simply put, it was Mr. Goltz and Mr. Stanton who speculated that Burnet was following a blazed line, for which there was absolutely no evidence. Furthermore, Surveyor General erred when she ignored the fact that **Fitton found**

- 7 -

original monuments, but Burnet did not. She also erred when she concluded that distances to the top of the ridge (slope) could not be trusted as it was shown that distances were unreliable when, in fact, it was Mr. Goessman's distances that were unreliable. Fitton's distances **were** reliable, and using Fitton's distances to the top of bank would place the line about 50m north of the Burnet line. This was coherently and compellingly explained by Mr. Stewart in evidence at the hearing below, but was completely ignored in the Reasons for Decision of the Surveyor General.

Improper Rejection of the Effects of Accretion

- (j) Surveyor General erred when she concluded that the *Surveys Act* Methods were intended to cover all possible scenarios, and the legislature never intended for any lines to bend in that there was no evidence that the legislature in drafting the *Surveys Act* ever contemplated the effects of accretion and erosion and there was no evidence that the *Methods* were ever meant to accommodate the effects of accretion and erosion.

Improper Rejection of the Test in Andriet

- (k) Surveyor General erred by rejecting the principles set out in *Andriet v. Strathcona* on the basis that the Surveyor General thought that "it wasn't helpful" without outlining any reasons for doing so. In view of the fact that the *Surveys Act* did not consider the effects of accretion and erosion, the Surveyor General further erred when she failed to adopt and apply the "common law" for guidance, which would have avoided loss of the riparian rights of the private property owners. Had the Surveyor General properly applied the principles set out in *Andriet v. Strathcona*, private property owner's riparian rights would have been preserved if, as she was

- 8 -

obliged and mandated to do, she varied and bent the property lines in order to take into account accretion, which would have been appropriate and required by the common law.

Rule in Brown v. Dunn

- (l) Surveyor General erred in her assessment of the testimony of the Appellants' expert, Mr. R. J. Stewart, OLS, by characterizing it as "admitted speculation" on several occasions, when in fact Mr. Stewart never admitted this and the evidence was to be contrary, and to make such a finding by the Surveyor General was contrary to the Rule in *Brown v. Dunn*; and,
- (m) such further and other grounds as counsel may advise and this Honourable Court permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- 1. Section 49 of the *Surveys Act*;
- 2. Sections 18 and 19 of the *Courts of Justice Act*;
- 3. Rule 61 of the *Rules of Civil Procedure*; and
- 4. The Order appealed from is final and leave to appeal is not required.

THE APPELLANTS request that this appeal be heard at Divisional Court, 130 Queen Street, Toronto, Ontario.

Dated: November 21, 2013

Izaak de Rijcke

Barrister and Solicitor
355 Elmira Road North, Unit 122
Guelph, ON N1K 1S5
(LSUC No. 22684E)

Tel (519) 837-2551
Fax (519) 837-0958
Solicitor for the Appellants, Lawrence
Dale and Betty Dale

- 9 -

TO: **The Honourable David Oraziotti**
Minister of Natural Resources
Whitney Block, 6th Floor, Room 6630
99 Wellesley Street West
Toronto, ON M7A 1W3

Tel (416) 314-2301
Fax (416) 325-1564

AND TO: **Susan F. MacGregor, O.L.S., O.L.I.P.**
Surveyor General for Ontario
Ministry of Natural Resources
Geographic Information Branch
Office of the Surveyor General
300 Water Street, 2nd Floor North
Peterborough, ON K9J 8M5

Tel (705) 755-2128
Fax (705) 755-2149

AND TO: **The Corporation of the Township of Tiny**
c/o John I. Barzo
Barrister and Solicitor
60 Collier Street, Suite 205
Barrie, ON L4M 1G8

Tel (705) 733-6245
Fax (705) 730-0009

Solicitor for the Respondent

LAWRENCE DALE, ET AL
Appellants

and

THE CORPORATION OF THE TOWNSHIP OF TINY
Respondent

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceedings commenced at Toronto

NOTICE OF APPEAL

IZAAK DE RIJCKE
Barrister and Solicitor
355 Elmira Road North, Unit 122
Guelph, ON N1K 1S5

LSUC No. 22684E
Tel: (519) 837-2551
Fax: (519) 837-0958
E-mail: izaak@izaak.ca

Solicitors for the Appellants, Lawrence Dale
and Betty Dale.

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
Divisional Court**

IN THE MATTER of an application under Section 48 of the Surveys Act, R.S.O. 1990, Chapter S.30 by the Corporation of the Township of Tiny for a Municipal Resurvey of the Road Allowance between Concessions 18 and 19, across Lots 9, 10, 11, 12 and Part of Lot 13, Geographic Township of Tiny, County of Simcoe.

AND IN THE MATTER of a Survey Report and Plan of Survey to re-establish and mark with permanent monuments, the Road Allowance between Concession 18 and 19, across Lots 9, 10, 11, 12 and Part of Lot 13, Township of Tiny, County of Simcoe, by John Goltz, Ontario Land Surveyors, dated August 30, 2011.

AND IN THE MATTER of an appeal from the Order and Decision of the Surveyor General of Ontario dated October 24, 2013, pursuant to Section 49 of the *Surveys Act*, R.S.O. 1990, c. S.30, as amended.

B E T W E E N:

**LAWRENCE DALE
and BETTY DALE**

Appellants

-and-

THE CORPORATION OF THE TOWNSHIP OF TINY

Respondent

APPELLANTS' CERTIFICATE RESPECTING EVIDENCE

THE APPELLANTS certify that the following evidence is required for the appeal, in the Appellants' opinion:

1. All of the oral and documentary evidence heard and considered by the Surveyor General of Ontario in the proceeding appealed from;
2. All exhibits including any transcripts or recordings of oral evidence obtained by the Surveyor General of Ontario in the course of the proceeding appealed from;
3. Such further and other documents as contemplated by Rule 61 of the *Rules of Civil Procedure*; and

- 2 -

4. Such other documents as counsel may advise and this Honourable Court permit.

Dated: November 21, 2013

Izaak de Rijke

Barrister and Solicitor
355 Elmira Road North, Unit 122
Guelph, ON N1K 1S5
(LSUC No. 22684E)

Tel (519) 837-2551
Fax (519) 837-0958
Solicitor for the Appellants, Lawrence
Dale and Betty Dale

TO: **The Honourable David Oraziotti**
Minister of Natural Resources
Whitney Block, 6th Floor, Room 6630
99 Wellesley Street West
Toronto, ON M7A 1W3

Tel (416) 314-2301
Fax (416) 325-1564

AND TO: **Susan F. MacGregor, O.L.S., O.L.I.P.**
Surveyor General for Ontario
Ministry of Natural Resources
Geographic Information Branch
Office of the Surveyor General
300 Water Street, 2nd Floor North
Peterborough, ON K9J 8M5

Tel (705) 755-2128
Fax (705) 755-2149

AND TO: **The Corporation of the Township of Tiny**
c/o John I. Barzo
Barrister and Solicitor
60 Collier Street, Suite 205
Barrie, ON L4M 1G8

Tel (705) 733-6245
Fax (705) 730-0009
Solicitor for the Respondent

LAWRENCE DALE, ET AL
Appellants

and

THE CORPORATION OF THE TOWNSHIP OF TINY
Respondent

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceedings commenced at Toronto

APPELLANT'S CERTIFICATE
RESPECTING EVIDENCE

IZAAK DE RIJCKE
Barrister and Solicitor
355 Elmira Road North, Unit 122
Guelph, ON N1K 1S5

LSUC No. 22684E
Tel: (519) 837-2551
Fax: (519) 837-0958
E-mail: izaak@izaak.ca

Solicitors for the Appellants, Lawrence Dale
and Betty Dale.