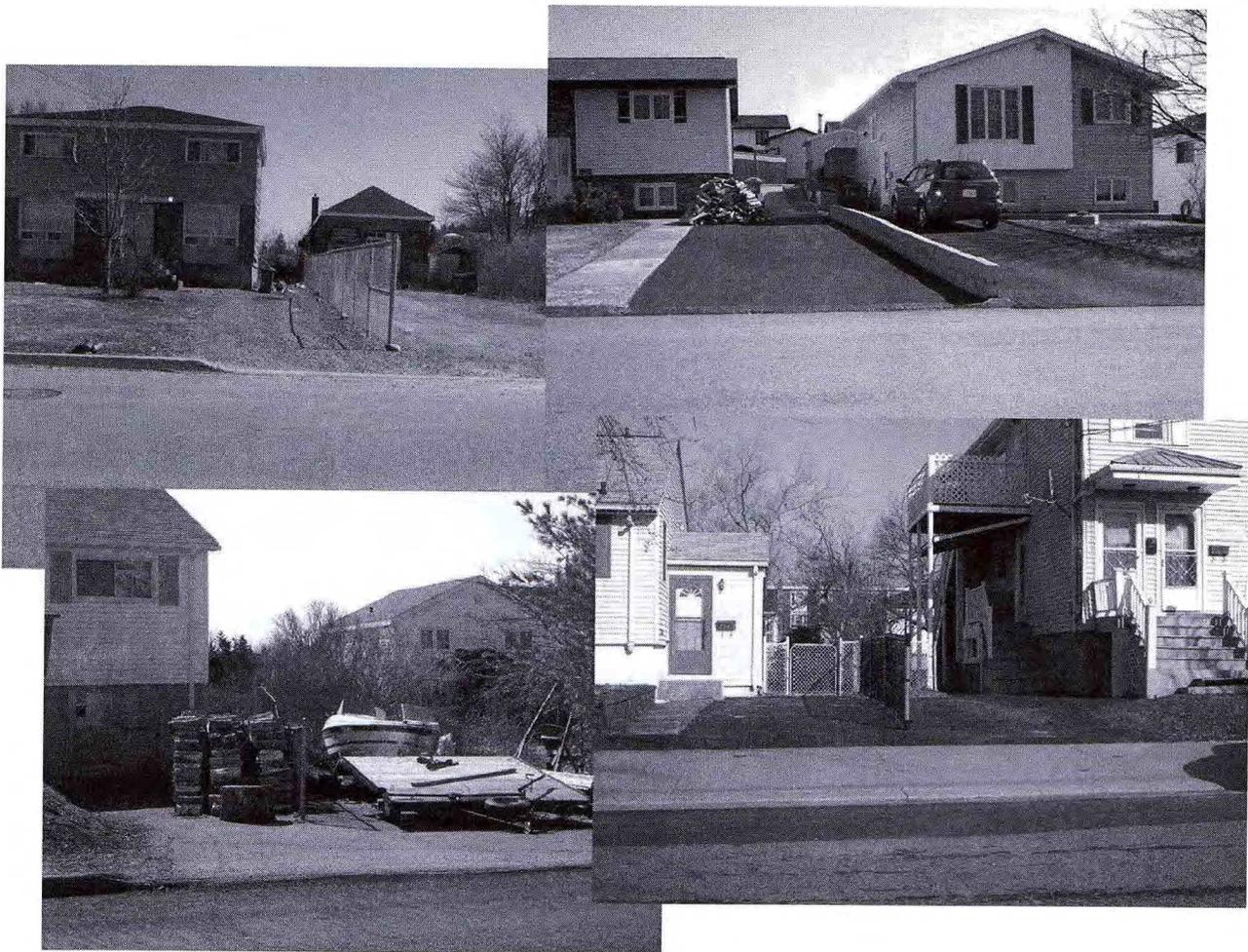


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SPRING 2006

No. 176

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## THE NOVA SCOTIAN SURVEYOR

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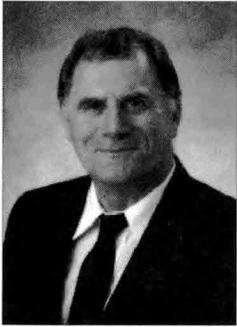
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## PRESIDENT'S REPORT

Garry S. Parker, NSLS, CLS, P.Eng.



Since our AGM in October, 2005, the first major activity for me was to chair the first meeting of the new Council on November 18, 2005. I will mention just two items

discussed at that meeting which may be of interest to members.

- First, there was a discussion of two incidents of what could be considered the illegal practice of land surveying. Both incidents involved plans used as instruments of subdivision by someone who was not a land surveyor. Council asked our Executive Director to contact legal counsel to discuss possible prosecution. The instrument was prepared under provisions of the Municipal Government Act (MGA), but the certification seems to put it in conflict with the Land Surveyors Act. If members are aware of any instruments of subdivision that may have exceeded the authority of the MGA, or have caused hardship to the public, then they are asked to provide the association office with the details.

- Second, Council approved an expenditure for a workshop for members of the Complaints and Discipline Committees. Council felt this was desirable due to the nature of the committees' work and the impact that can result for the member. Since then, discussions took place between the lawyers who would be the presenters, the Executive Director and the Continuing Education Committee. It was decided that a seminar would be held on October 12, 2006, the day before the annual meeting, for the whole membership on the broad topic of complaints and discipline.

As I'm sure is the case with most of you, our firm has been taking advantage of the good winter weather

we have been blessed with this year to conduct field work that would normally be restricted by snow. As a result, unfortunately, I have not gotten up to speed on our progress on Strategic Planning as I had planned to do. Strategic Planning was often mentioned at the AGM meetings I have been attending but not discussed in much detail. Generally speaking, several provincial associations are well into the implementation stages of their Strategic Plans. New Brunswick appears to be roughly at the same stage of development as Nova Scotia. I will make it a point to have something more informative to report on this subject in the next issue.

Most of my time as president of the association has been in attending the AGM's of our sister associations. I have attended three, New Brunswick in January, British Columbia in early February, and Ontario in late February. A very brief outline of some issues raised at those AGM's is as follows:

### New Brunswick

New Brunswick is in the process of studying the feasibility of a recommended minimum tariff to be charged for various services provided by members. It will be interesting to see if they follow through with a policy.

Another initiative by the ANBLS is a proposal for standards for Conventional Boundary Agreements which they anticipate could be included in their by-laws.

### British Columbia

A motion was made before the members of the ABCLS for a change in a by-law which would provide that a surveyor retained on a project on which another surveyor had provided services but had not been paid, could request the first surveyor on the scene to provide information and file material, and that the first surveyor must comply with the request. The motion was hotly debated and defeated.

The ABCLS passed motions with respect to establishing a Geomatics Professional category of member-

ship for the association.

### Ontario

Ontario is actively considering the creation of an advocacy group to promote their profession. The group would act independently of the AOLS so as not to conflict with the "Public Good" aspect which the AOLS must consider in the actions it undertakes.

A significant amount of focus at the AGM was spent on the "Future of the Profession". A presentation was made to discuss alternatives which ranged from downsizing to expanding to a new model of a geomatics professional group.

Ontario is also struggling with the issue of underground utilities which has become a major obstacle in the conduct of survey work particularly in areas where natural gas pipelines exist.

The annual meeting of the Maine Society of Land Surveyors was attended by Vice-President, Tom Giovannetti. Tom reports that there was an interesting presentation by Knud Hermansen on boundary law which may be of interest to the Continuing Education Committee.

All provincial associations are wrestling with the issue of declining membership. Various methods for attempting to deal with the situation are being discussed. Some of the methods under consideration are: promoting the profession directly in schools at the lower grade levels, encouraging technical schools to become accredited to the point where students can carry on to become a licensed surveyor, attracting geomatics professionals as members of associations, advertising and lobbying.

In closing I will just say that the first four months in this position have been interesting and rewarding. I'm sure the remainder of the term will be just as positive. I would recommend to any that are interested that they volunteer for any open position on Council. The time spent is worthwhile even if you think you don't have enough of it to spare. ❏

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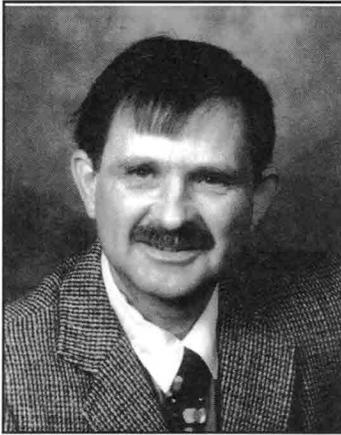
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## EXECUTIVE DIRECTOR'S REPORT

*F.C. Hutchinson, BA, NSLS, CLS*



The term “professional responsibility” can have many different meanings depending on whom you ask. For the purpose of this report, I will deal only with the self-governing legislated organizations and their memberships.

In Canada, the various provinces provide legislation that allows professional associations to operate as self-governing entities. The common thread in all of the legislation is the protection of the public and the advancement of the profession. These associations, through self-governance, manage the entrance requirements, membership fees, code of ethics, regulations, by-laws, complaint reviews, discipline hearings and member suspensions. Anyone who wishes to be a member has a right to become a member if all entrance requirements are met, but continued membership is both an obligation and a privilege. The member must abide by the rules of the organization and the scrutiny of the public. Membership can be suspended, but not without due process.

The Land Surveyors Act, Regulations and By-laws are the operating documents that guide

the Association of Nova Scotia Land Surveyors and its members. Engineers, doctors, accountants, nurses and lawyers are examples of other professions regulated by self-governing statutes. There are two sides to the “responsibility coin” when you look at an association. First, there is the mandate of the association to provide a home for its members so that the profession can be regulated for the public good. The other side of the coin is the goal of the member to earn a living and maintain a good-standing membership.

These two sides of the coin often result in different viewpoints of responsibility. The elected officers and employees are responsible to implement policy and to insure that the rules are followed. Keep in mind that the associations’ role is to protect the public and advance the profession. The members’ role is to create policy, abide by the rules and provide the best service possible. I don’t think that too many would argue that a patient’s health might suffer if the local doctor does not keep abreast of the latest medical technology.

The two sides of the coin work well together when there is cooperation between the organization and the member but not when there is conflict or dissension in the ranks. A member of any organization has a right to challenge the rules of conduct and, if flawed, has an obligation to bring issues forward. Both parties are bound to conduct business in a diplomatic and parliamentary fashion where the majority rules. You may not have voted for the elected official but you have to accept the results.

The issue of mandatory continuing education is certainly a topic of discussion for many self-governing organizations. The association is obligated to promote and insure that its members participate in continuing education activities if such regulations or by-laws have been approved by the membership. Statute law also mandates the obligation that such memberships have to the public. An association member may not like having to comply and report continuing education activities but does have to comply or choose not to be a member.

Many members may feel that they have adequate education or are responsible enough to know when they need more education. An interesting activity to note is that we all know how to talk and carry on a conversation, but individuals continue to enroll in public speaking courses. Such courses instruct on vocabulary, posture, presentation and appearance and critique one’s performance with the goal of self-improvement. ☒

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## SRD MANAGER'S REPORT

*by Gerry Bourbonniere, NSLS*

### The Application of Conventional Lines (Boundary Agreements)

During the past year we received questions on the application of boundary agreements from Association members, Development Officers and representatives of Service Nova Scotia (Land Registry). During this same period I observed plans showing boundary agreements which raise concerns about possible improper application of this long-standing and accepted principle.

Sections 8.30 to 8.45, inclusive, of *Survey Law in Canada* cover the **doctrine of conventional lines** very thoroughly. The following excerpts are offered to provide the reader with some basic highlights which should be considered before quickly applying the doctrine. It is recommended that the readers review all the above-mentioned sections.

Section 8.30 states; “... if a boundary line has been lost and is **not just unknown because sufficient enquiry has not been made nor surveys performed**, then adjoining owners may, between themselves, agree upon a boundary line dividing their lands.”

Section 8.31 states; “Perhaps only within recent years has there been

the awareness that the doctrine had at least **the potential to be in conflict with subdivision regulations and with planning acts**”. This should not be overlooked as Section 268(1) of the Municipal Government Act, together with the definition of “subdivision”, indicates subdivisions must receive approval. Section 268(2) provides 14 possible reasons, which I understand are the **only** acceptable ones, for exemption from approval.

Section 8.32 states; “... A plan of survey, signed by both proprietors, ought to give conclusive evidence of the agreement. Fuller assurance might be given by the exchange of quit claim deeds after fixing the location of the mutual boundary, **though legal opinion should first be secured to ensure a planning act is not violated by the exchange of deeds.**”

Section 8.36 relates to “boundary discoverable”. There are several items in this section which lead to the following statements. “The conventional line has the obvious attraction of being a simple solution to a problem as opposed, **otherwise, to spending time, effort, and money** on the complexities of occupation, estoppel and interpretation of deed descriptions. ... The surveyor should only counsel the con-

ventional line **after he has satisfied himself that such action is proper, having made diligent search for evidence of the line both on the ground and in the records.**”

Section 8.37 identifies the essentials for conventional lines. It is stated, “**Above all else, the boundary must be lost; that is, its location must be unknown to the title holders on either side of the line.**” I suggest if the surveyor has performed his duty properly, he will know if the boundary is indeed lost or, perhaps due to ambiguity contained in the relevant documents, cannot be placed with any certainty in a unique position.

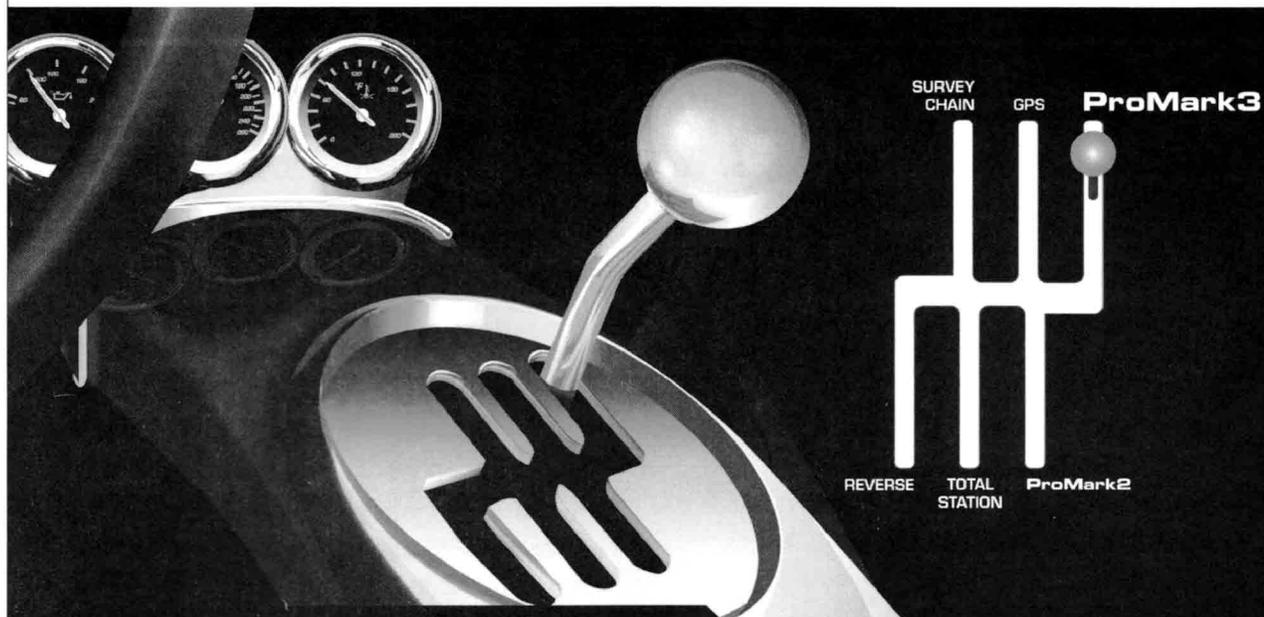
At times it may be necessary to use a conventional line to define a boundary of a parcel being subdivided. In this case, if the plan of subdivision is also being used to identify the boundary agreement, the Development Officer must be aware that the agreement has indeed been made. They cannot be requested to approve lots of which some boundaries appear to be unsettled. If the parties involved have not signed the plans but the agreements are in documents which refer to the plan, I suggest copies of the signed documents accompany the request for approval. ☒



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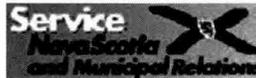
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**Excerpt from “History of Pictou County”, Chapter 9.**  
Submitted by John Ross, NSLS. The entire article can be found at  
[http://www.rootsweb.com/~nspictou/elect\\_text/Patterson/patterson\\_11.htm](http://www.rootsweb.com/~nspictou/elect_text/Patterson/patterson_11.htm)

We may add here that in subsequent years, the county suffered much from litigation, especially regarding boundary lines, owing in a great measure to the manner in which the surveys for the early grants were conducted. Sometimes the surveyors were incompetent, but more frequently the system was to blame. The one rule adopted was to give more land than was named. Some of this was put down, as “allowance for roads, &c.,” while such excuses as slack chainage or hilly land formed pretexts for further additions. But besides this, surveyors exercised a sort of princely liberality, as it was regarded, in giving as if the land were their own, a considerable surplus. This was deemed kindness to the settlers, but from the disputes which these extra quantities produced, it would have been a real kindness to the county if each man’s quantity had been exactly measured. Then sometimes the lines were not run round the whole lot, but merely corners set, and the courses marked, and thus the settler was often left to his own conscience how much he would appropriate. Again grants were given nominally for a certain amount, but to a certain boundary or some other grant, without the distance being measured, though it might include an additional quantity, as large as was originally intended. Then the possessor of the next grant might consider himself equally entitled to the land between them, and perhaps would get a surveyor to run his lines, so as to interfere with the other’s. Or sometimes a second surveyor coming on the same lot, instead of endeavouring to trace the line made by his predecessor, would make a new one of his own. Such proceedings led to endless disputes, with the worst results. Two neighbours have gone to law about a piece of land till both lost their farms. We have known a litigious man ruin himself, and two neighbours in succession, upon the same adjoining lot. Then family connexions and friends would take sides in the quarrel, and the strife thus extend through a whole community.

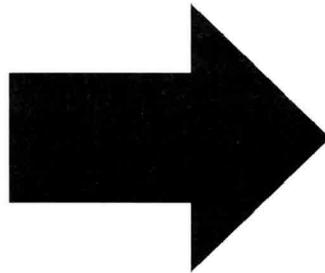


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# The Tax Deed

by Stephen Estopinal, PE, PLS

*As seen in Professional Surveyor Magazine, October 2005. Reprinted with permission from the publisher.*

*These stories from the E-Files (E for Experience) are true; names and some details have been altered to ensure confidentiality.*

“There’s a packet on your desk,” Marie called to me as I came in. The packet consisted of a note and a deed. The note informed me that Mr. Rails was in the process of purchasing a parcel of land in a stretch of coastal Louisiana known as “Bois du Lac”. He was going to build a fishing and hunting camp on the site. New “camps” in the area were running at \$300,000, rivaling the best homes in swank neighborhoods.

“Great!” I said out loud as I unfolded the deed. It was a tax deed. There are only a few reasons that a property becomes available through a tax sale:

1. The owner died without any heirs. (Not likely in this procreative world, and particularly so in south Louisiana where extended families keep close ties.)
2. The land was worthless. (Bayou fronting property is far from worthless.)
3. The land did not exist.

I didn’t recognize the surname of the individual that lost the land to taxes; but when I saw that the present owners were the heirs of Jonathan Browne, a fourth possibility became a probability. Jonathan Browne was the grandson of a carpetbagger, Ethan Browne. Ethan was a Major on the staff of General “Spoons” Butler, Commander of the Union occupational forces that held New Orleans. General Butler gained the nickname “Spoons” because everywhere his staff went, silverware and other valuables disappeared from the homes of the wealthy, almost wealthy, and formerly wealthy. After the war, Ethan resigned from the Union Army and stayed in New Orleans. He purchased land at reduced prices from impoverished former Confederates or their widows. The final irony was that he paid these unfortunates with money raised from the sale of valuables he had confiscated from them. Eventually, Ethan became a wealthy land owner, investor, and an

aristocratic resident of the snobbish “Garden District”.

His grandson, Jonathan, inherited the Browne fortune and propensity for sharp dealings. The Great Depression of 1929 was in full swing when many a subsistence farmer in Bois du Lac simply pulled up stakes and left. Browne was one of only a few people with the money and inclination to buy abandoned lands at tax sales. Browne never re-introduced the land to commerce nor visited the sites. He allowed parcels so acquired to remain fallow. Now his heirs were converting these scattered parcels into cash.

The deed was as vague as any I have seen. The body of the description was, “That certain one arpent parcel of land located in Bois du Lac on the right descending back of Bayou Lapin, bounded above by A. Gonzales and below and in the rear by R. Gonzales.” That was it! Bois du Lac was settled during the Spanish Colonial period. The Gonzales surname dates back to 1778 and is very common to the area. “One arpent” could refer to the width or the total area. I had no idea where the land was located.

“Marie, did Rails have any additional information on this parcel?” I asked hopefully. There would not be a previous survey because, to my knowledge, Browne never even visited most of the land he acquired through tax sales.

“I was lucky to drag that tax deed from him,” Marie replied. “He said he wants to meet you and show you where the land is.”

“Wonderful! I’m supposed to issue a certified Land Boundary Survey of a parcel based solely upon parole evidence provided by the buyer – that dog don’t hunt,” I sputtered. “All I know is that the boundaries are A. and R. Gonzales. You can’t swing a dead cat in Bois du Lac without hitting a Gonzales.”

Marie gave me that “don’t blame the messenger” look and I retreated to my files.

A search of everything I had on Bois du Lac, including a comprehensive cadastral compiled by an oil exploration company, produced many parcels owned by A's and R's Gonzales, but none of them were contiguous or divided by another tract. Of course, the cadastral was compiled in 1952 and the sale was in 1932. Many of the parcels were labeled "J. Browne", but none of these were one arpent wide and on the right descending bank of Bayou Lapin.

I was stumped. A visit to the Clerk-of-Court did nothing to improve the situation. J. Browne was listed in the vendees (COB 15, Folio 234) as acquiring the parcel in a tax sale in 1932. The previous owner was Valentor Vonzelli, a name I have never seen before nor since. His acquisition was not to be found. A courthouse fire in 1878, of dubious origin, had destroyed all of the records between May of 1856 and December of 1877, so the Vonzelli purchase may have been during that period.

Next, I visited the assessor's office. A book of maps had been prepared by an aerial photography company in the early 80s that had the apparent parcel boundaries and their tax identification data superimposed on 1" = 1000' photos. There it was, COB 15, Folio 234, the tract in question! It was shown as a small square on the bank of Bayou Lapin surrounded by COB 23, Folio 34.

I went back to the Clerk-of-Court. COB 23, Folio 34 was the property of Emile Robert (pronounced row-bear). A survey was attached! I couldn't believe my luck. I copied all that I thought relevant and went back to the shop to digest the information.

The survey of the Robert tract was done in 1955 by Stewert. It conformed with the deed filed in COB 23, Folio 34. The deed called for the Robert Tract to front Bayou Lapin for 5 arpents by 40 arpents deep. Stewert showed the tract to be 953.52 feet wide, a little less than 5 arpents, and 7,679.76 feet, exactly 40 arpents, deep. There were no less-than's or excepts. It showed no square parcel on the bayou. What evidence did the assessor's mapmaker use to determine the location of 15/234?

"Mr. Rails and Ronald Browne are going to meet you here at 1:00 pm tomorrow," Marie said. "Mr. Browne is the attorney for the present owners and he said he knows where the land is." I knew that Browne was also one of the eight heirs of Jonathan Browne.

At 1:00 pm the next day, Mr. Robert Rails came in and introduced himself. At 1:30, Ronald Browne arrived and, after the standard pleasantries, I followed Browne and Rails to the site of 15/234. They did indeed lead me to the location shown by the assessor's map. It proved to be a grown-up and fenced in square surrounded by an orange orchard.

"This is the lot," Browne said. "All we need from you is a plat showing the size and location of this lot."

"What makes you think that this is the lot?" I asked. "What I see is easily twice what the deed calls for."

Even though Browne was slightly shorter than I, he managed to look down his nose as he said, "The assessor's map is clear. This fence is very old. So, if there is any doubt about the location, we've been paying taxes on it for over 30 years. It's ours by adverse possession. You're just the surveyor. I'll rule on title."

Browne and Rails drove off and left me to wonder how the State of Louisiana determines who becomes a member of the bar. Just then a tractor appeared between a row of orange trees. The driver, seeing me parked on the shoulder of the road and looking lost, stopped to ask if I needed help.

"Do you know the owner of this grove?" I asked.

"Yea, I do. I'm Beau Robert," Mr. Robert said as he extended his hand.

"Glad to meet you," I said. Then trying to appear nonchalant, I added "Whose lot is this one?" I pointed to the fenced in area.

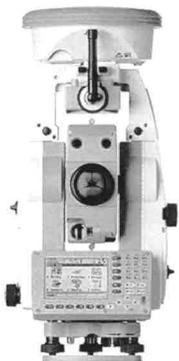
"That's not a lot," Robert replied. "That's where the construction company that re-surfaced the highway had their asphalt batch plant. They left it a mess and I've been trying for years to get them to clean it up so I can plant it."

"Did you have a formal lease?" I said.

"Mais oui! It even had a clean-up clause, but it didn't do me any good," he said.

I asked if Robert could send me a copy of the lease, gave him my card and departed.

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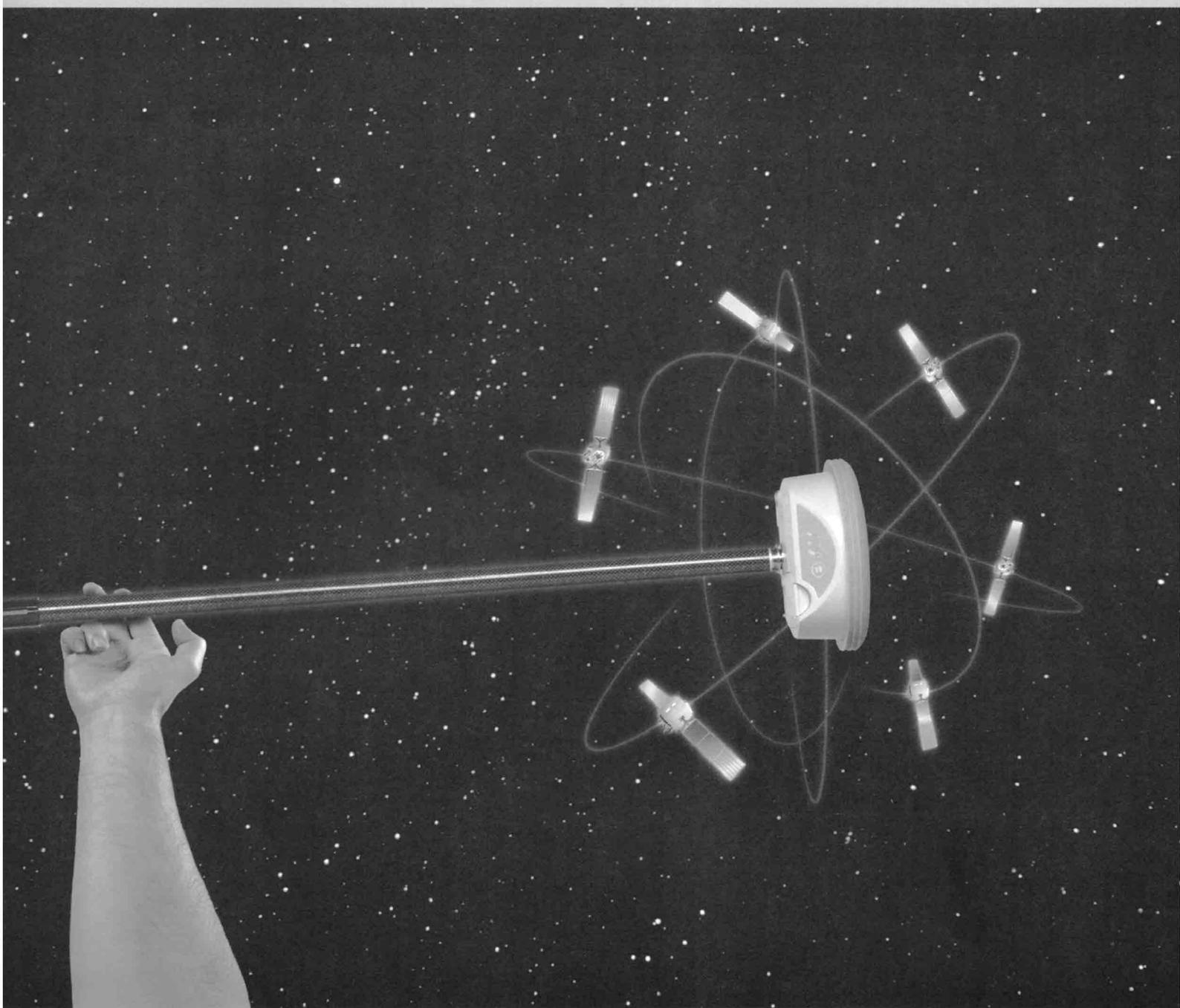
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About one week later, Mr. Rails and I were sitting at the conference table. We were waiting for Ronald Browne, who arrived just as I was spreading out a copy of a portion of the assessor's map.

"The assessor's map had incorrectly located that parcel," I said. "The folks who prepared the map were cartographers, not land surveyors. The small rectangular parcel here is an abandoned asphalt batch plant, and it stands out like an Angus bull in a flock of sheep. I think that after the cartographer had accounted for all deeds he had fronting Bayou Lapin, he just assumed that 15/234 had to have been here."

"Here's a copy of the lease," I said, as I showed them the file. "Gauthier Construction had leased 3 acres for the mixing plant in 1965 from Robert. Part of the lease requirements was that the 3-acre site be fenced in."

"Does this mean that the land Ronny is selling me isn't where he says it is?" Rails asked.

Ronald Browne looked as if his best hunting dog had died. "I don't understand it," he said. "The chain of title was unblemished and we've been paying taxes on it since day one. Now you're telling me it's not where the assessor says it is. How can that be?"

"I know it's hard to accept, but you're just an attorney and the written record is all you see. I'm the surveyor. It's my job to match the written record to the ground."

-----

*Steve Estopinal is the owner of Estopinal Surveying and Engineering, Inc. in Chalmette, Louisiana. He has been involved in the practice of Land Surveying for more than 30 years and is the author of A Guide to Understanding Land Surveys 2<sup>nd</sup> ed. John Wiley & Sons, Inc. 1993. ✕*

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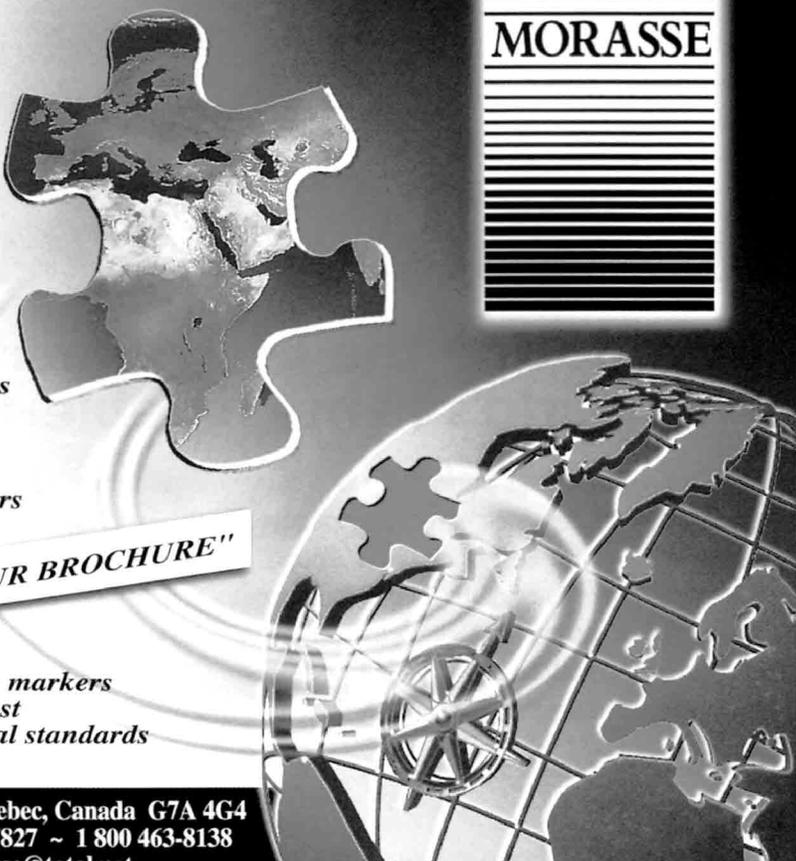
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# Rules for Investigation

by Donald A Wilson, LLS, PLS, RPF

*As seen in Professional Surveyor Magazine, November 2005.  
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Searching for boundary evidence is an investigation. It is an investigation into a scene, not a crime scene, but a scene nonetheless, where the investigator is searching for evidence, and for clues when evidence is absent, or not readily visible. Crime scene investigators are highly trained for their tasks, and sophisticated scientific techniques are usually employed. Other investigations, if taken to the same level, and applying appropriate techniques, can also be very successful in locating valuable evidence.

Many of the same techniques can be employed to both types of investigation, even if the evidence sought and the tools employed might be quite different. One thing doesn't change – the thought process and the scientific process of reasoning. Sherlock Holmes made a habit of explaining his reasoning throughout his stories. Today's sleuths have attained higher levels, and reference materials demonstrating and analyzing methods of reasoning are readily available. Learning this part of the investigative process is like learning the multiplication tables for the first time. There did not seem to be any immediate practical value to the fact that 2 times 2 is equal to 4, but it did make sense that it might be useful at some time in the future. Such it is with the science of reasoning, especially when translated into practical rules, and more so when illustrated with examples.

Good investigators know that lists of questions from officially issued procedure manuals have limited use. Reading the signs and asking questions at a site does not involve completing a form or responding to circumstances by following pre-established rules. Each site, perfectly preserved or irrevocably compromised, has unique elements that modify the ques-

tions and define the playing rules for that particular site. Asking the right questions, of oneself or of others, depends on identifying the rules of each new challenge.

Reasoning backward analytically at a scene involves discovering the rules while playing the game. Sherlock spoke of that in *A Study in Scarlet*: "In solving a problem of this sort, the grand thing is to be able to reason backwards. That is a very useful accomplishment, and a very easy one, but people do not practise it much. In the everyday affairs of life it is more useful to reason forward, and so the other comes to be neglected. There are fifty who can reason synthetically for one who can reason analytically."

There is no place for guesswork in an investigation, it is much too serious for that. Thinking logically does not involve guessing. Guessing is blind and riddled with doubt. Guessing is merely desperate, and is not necessary where there are ordinary facts, as facts raise no doubts. Gil Grissom, the team leader of the popular TV show *CSI*, is quoted as saying, "concentrate on what doesn't lie: the evidence."

Yesterday, Sherlock Holmes, and today, scientific reasoners, employ the art of *Abductive Reasoning*. Abduction is the process of finding a best explanation for a set of observations and it leads to subtle implications for evidence evaluation. It is about certainty and the logico-computational foundations of knowledge. *Abduction* can be described as "inference to the best explanation", which includes the generation, criticism, and possible acceptance of explanatory hypotheses. What makes one explanatory hypothesis better than another are such considerations as explanatory power, plausibility, parsimony,

mony, and internal consistency. In general, a hypothesis should be accepted only if it surpasses other explanations for the same data by a distinct margin and only if a thorough search was conducted for other plausible explanations.

Ask any forensic investigator to name the biggest problem that they encounter on the job and you will consistently hear the same response – crime scene contamination by others. Surveyors encounter that on almost every scene, and the older the scene, the more likely the contamination or compromise. Developers won't even hire a surveyor until the soil testing is completed. Backhoes have an uncanny way of seeking out the corner evidence and running over it. Rule Number 1: Protect the scene. Once evidence is lost, opportunities are lost. And the investigator may never know what was lost when a scene is not controlled. State guides for police practice on crime scenes state, "once the scene has change, you cannot change it back."

Most investigators will not visit a scene alone. It is always a good idea to take someone on an investigation with you. Another person, or preferably more than one, will most likely see something that you may not. It is always good to have independent corroboration of a scene.

A good investigator will keep his or her perceptions clear. If on the scene for awhile, bring something to eat and drink. Avoid anything that could impair the senses, like alcohol.

Most investigators will do their research first, trying to find out as much about the site as possible. Without research, you cannot know what you should be looking for, nor can you know what you have when you do find something.

Some investigators make it a practice to arrive at the scene with skepticism. While one should always maintain an open mind, remember that there just may not be anything out there. By doing the homework first, one gets an idea as to what to expect.

Beware of false readings. Measurements, mathematical closures, magnetic attraction, errors in reported information can all lead to false conclusions or provide false leads. Make sure that equipment is working properly, that the operator knows what he or she is doing, and that you are on the right parcel of land, not the neighbor's land or some place totally irrelevant.

Most investigators will take lots of photographs, digital or otherwise. Make certain you have plenty of film and you know how to take good pictures, with or without a flash. If you are not a good photographer, bring along someone who is. The next time you visit the site, the conditions may have changed – dramatically, or the evidence may have been totally obliterated.

The above rules, at the very least, should be second nature to any successful investigator. Sometimes it is easy to find and locate the evidence, but explaining procedures or a lack of success to a judge or jury may be entirely another matter. People watch television, and they watch shows like *CSI*, and have come to expect from the practitioner what they see and hear on television. The well-advised will make certain that good and careful work, successful or otherwise, is not compromised or discounted by those who have a different expectation.

---

*Don Wilson is president of Land & Boundary Consultants, Inc., a New Hampshire-based firm specializing in land records research and evidence investigation. He is the lead instructor in Surveyors Educational Seminars and a member of the Professional Surveyor / Red Vector Dream Team providing on-line courses for continuing education. He has also been a regular instructor in the University of New Hampshire Continuing Education System for 25 years.*



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## COMMENTS ON PROFESSIONAL RESPONSIBILITY

by

Knud E. Hermansen, PLS, PE, Ph.D., JD

An ongoing debate among professional surveyors focuses on the responsibility of the surveyor toward the client. Part of this debate focuses on where the surveyor's responsibility ends and where the attorney's begins. In other words, at what point does the surveyor stop practicing surveying and begin practicing law. Unfortunately, where the two seem to meet, there are no fixed rules or bright lines of professional conduct to guide the surveyor between the practice of law and practice of surveying. As a result, the concept of proper professional behavior varies between surveyors, attorneys, and clients. For example, some surveyors, attorneys, and clients feel the surveyor's professional responsibility should take the form of a "fact gatherer"; that is, someone who gets information but does not give an opinion. At the other end (some would say extreme end) are the surveyors, attorneys, and clients who feel the surveyor should be the client's "hired gun". This takes the form of a surveyor who feels it is their professional obligation to zealously advocate their client's position, right or wrong. There are, of course, shades of these and others, with every surveyor having a slightly different opinion.

In order to begin and understand, let's start where most surveyors agree. Most surveyors agree that the surveyor's responsibility in regard to a boundary retracement survey is to "follow in the footsteps of the original surveyor". This maxim can be expanded by saying the surveyor's professional responsibility is to: "identify the location of boundaries, verify the location of boundaries, or help resolve conflict among conflicting boundary locations (i.e., gather data for litigation)". Applying this definition to the three recognized boundary categories, the surveyor's responsibility is to identify, verify, or help resolve conflicting locations among or between record, possession, and ownership boundaries. To further help determine where the practice of surveying stops and the practice of law begins, the following maxims are useful and worth considering:

*Surveyors Are Trained to Deal With Questions of Fact, Not Questions of Law:* Surveyors are trained to gather and analyze facts and apply them to a situation, using as guides legal principles and rules of law. Therefore, any decision the surveyor makes should be founded on questions of fact (guided by principles of law), not questions of law. An example to show this dichotomy is where one surveyor shows the location of a fence and calls it a possession boundary, while another surveyor shows the location of a fence and calls it the client's ownership boundary (based on the surveyor's understanding of adverse possession). The first is an opinion based on the facts, the second involves a factual opinion coupled with a legal assumption the client has marketable, fee-simple title (adverse possession generally requires an action to quiet title in order to give marketable title). The courts have held that boundary location generally involves the application of facts, while adverse possession involves a question of law. As one early survey practitioner said in the 1800s: "Old fences must generally be accepted by right of possession; though such questions belong to the lawyer [rather] than to the surveyor".<sup>1</sup>

*Be Knowledgeable But Prudent:* Surveyors should not be reluctant to give an informed opinion to their client – that is why the client has hired a professional. (Most jurisdictions allow the surveyor to give his or her professional opinion on the location of the boundary even if the opinion appears to answer the ultimate question in dispute.<sup>2</sup>) However, the surveyor should refrain from opinions or action in areas where the surveyor lacks the training, knowledge, or experience. As a general rule to avoid undue liability and problems, surveyors should avoid acting on or giving unrestricted opinions when: (1) the matter is outside the scope of the contract with the client; (2) the surveyor is made aware of a potential problem that is outside of the scope of the surveyor's training or experience; and (3) the surveyor suspects a problem but may not be sure, does not have, cannot obtain, or refuses to get additional facts.



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*Start From the Proper Assumptions:* Surveyors frequently find themselves working or having to come to a decision in a situation beyond the scope of their professional knowledge because they have incorrectly diagnosed the client's problem at the outset. This situation frequently occurs where the surveyor has assumed the client's problem is a boundary dispute rather than a title dispute or vice versa. A title dispute involves an area that is encompassed (or thought to be encompassed) in two or more deeds. Where there should be one common boundary between the parcels, there are, instead, two separate and recognizable boundaries, each, when properly located, resides on land that appears to belong to the other landowner. (In fact, one party has title to the area and the other party has "color-of-title".) Title disputes are normally resolved in favor of the landowner with senior title, although adverse possession and estoppel may provide for a different outcome. On the other hand, a boundary dispute is where there is only one boundary but each party feels the boundary should reside in a different location. This problem is generally resolved by gathering the facts, applying principles of law, and coming to a decision based on the preponderance of evidence.

*Keep Your Client Informed:* Lack of or poor communication between the client and surveyor is the common basis for most complaints to surveyor registration boards. Therefore, one important maxim is to keep the client informed. Professionals should, and are generally required to, keep their client informed. In some cases, professionals are required to obtain their client's consent before taking certain actions that may be detrimental to their health or their property (Doctrine Of Informed Consent). This doctrine in no way suggests that the surveyor act as a hired gun or an advocate for the client's position if it runs counter to the surveyor's professional opinion. On the contrary, the surveyor is expected to perform services in a competent manner; arrive at a professional opinion based on his or her knowledge, training, and experience; and communicate the favorable or unfavorable opinion to the client. As a general rule, the surveyor should inform the client any time

the surveyor's opinion, recommendations, or actions: (1) could initiate or increase the possibility of litigation, (2) conflict with or depart from another plausible boundary location, or (3) run counter to another professional surveyor's opinion.

*Practice as a Professional:* The last maxim is to remember surveying is a profession and the surveyor should act as a licensed professional. A professional is someone who possesses some particular knowledge and skill that is beyond the ken of the average member of the public. Licensing of professionals is done to compensate for the public's lack of knowledge and thereby protect the public by insuring that any person offering his or her professional services has the requisite minimum knowledge and skill to provide professional services in a competent manner. In theory, licensing should eliminate the concept of *caveat emptor* that is generally paramount when members of the public deal with peers and tradesmen.<sup>3</sup>

With these comments in mind, hopefully it should be easier to determine the surveyor's professional responsibility and define where the practice of surveying ends and the legal practice begins. In all cases of doubt or where legal problems could be involved, it is always good practice to recommend (in writing) that the client consult with an attorney.

#### References:

1. Gillespie. *A Treatise on Land-Surveying* at page 155 (Appleton & Company, New York, NY: 1881)
2. See e.g., *Koenig v. Skaggs*, Missouri, 400 S.W.2d 63, 67 (1966) also see *King v. Browning*, 246 Ga. 46, 268 S.E.2d, 653, 655 (1980)
3. Rona, *The Rise and Fall of the Learned Professions*, at page 6 (College of Engineering, West Virginia University, Morgantown: 1977)



**MINUTES OF THE 55<sup>th</sup> ANNUAL GENERAL MEETING  
Held at Pictou Lodge Resort, Pictou County, Nova Scotia  
October 14 & 15, 2005**

**Friday, October 14, 2005**

1. The morning session included greetings from the Province, Pictou County and Pictou Lodge; introduction of out-of-province delegates and exhibitors. This was followed by a presentation on effective communication by PowerTalk Communications.

2. President John Ross called the meeting to order at 2:10 pm.

3. **Introduction of Council Members:** President Ross introduced the members of Council for the past year: Zone 1 - Mark Whynot; Zone 2 - John Logan; Zone 3 - Emerson Keen; Zone 4 - Frank Gillis; Zone 5 - Stewart Setchell and Raymond MacKinnon; Zone 6 - Robb Ashley, Terry MacGillivray, Kevin Brown and Brian Wolfe; DNR representative - Keith AuCoin; Vice-president - Garry Parker; Past president - Jeff Fee.

4. President Ross asked that everyone stand and observe a moment's silence in memory of former members, J. Roy Hale, NSLS # 38, and Robert G. Cameron, NSLS # 286, who passed away during the last year. He offered his and the association's condolences to all those who lost loved ones this year.

5. President John reviewed the order of business and meeting agenda. The order may be altered if there are no objections. The meeting is governed by Robert's Rules of Order and common sense.

6. **Secretary's Report on Convention Attendance and Membership:** Fred Hutchinson reported that there are 130 NSLS's registered for the meeting. There are more than 35 members present at the meeting, which exceeds the quorum requirement. Fred reported on membership and dues as follows:

Year	Dues	Reg	Life	Ret	Std	Hon	Assc	Non-Pr	Total
2005	\$800	177	20	39	24	4	2	0	266
2004	\$800	187	20	35	24	4	0	0	270
2003	\$800	197	18	34	21	4	0	0	274
2002	\$800	203	16	35	21	4	0	1	280
2001	\$670	208	16	36	19	4	0	1	284
2000	\$670	216	16	35	17	3	0	1	288
1999	\$670	221	15	35	18	3	0	3	295

Year	Dues	Reg	Life	Ret	Std	Hon	Assc	Non-Pr	Total
1998	\$670	225	15	34	14	3	1	3	295
1997	\$670	227	14	33	15	3	3	3	298
1996	\$620	239	14	31	15	3	3	3	308
1995	\$600	246	14	36	16	3	6	3	324
1994	\$600	254	13	31	14	4	7	3	326
1993	\$550	261	14	27	12	4	10	4	332

7. **Approval of the Minutes of the 54<sup>th</sup> Annual Meeting:** The minutes of the 2004 annual meeting were published in the Spring 2005 issue of *The Nova Scotian Surveyor*.

Amendments:

- Item 12: Returning Councillors for Zone 6 should be Robb Ashley and Terry MacGillivray.
- Item 19: The 2005 AGM dates should be Oct 13-15, 2005.

It was moved by Phil Milo, seconded by Ray Pottier that the minutes of the 54<sup>th</sup> annual meeting, held on October 15 and 16, 2004 at Oak Island Resort, Western Shore, Nova Scotia be approved as amended.

Motion carried.

8. **Business Arising from the Minutes:** There was none.

9. **Report of Council Activities** Council meetings were held on November 26, 2004, March 4, 2005, June 10, 2005 and September 9, 2005.

Issues that were dealt with in 2004-2005:

- \* Mandatory Continuing Education and seminar presentations
- \* Land Registration Act and the Registry 2000 project to implement land titles in Nova Scotia
- \* Review of financial statements and budgets
- \* Strategic Planning Committee
- \* Sale of vacant lot
- \* Paying off the mortgage
- \* Redemption of building shares
- \* Boundary confirmation legislation
- \* All Canadian sister survey association meetings were attended with the exception of New Brunswick's, when the weather prohibited travel.
- \* Gerald Pottier attended the Quebec AGM on behalf of ANSLs.

**10. Report from the secretary of the Board of Examiners:**

Fred Hutchinson reported. The Board meets twice yearly. There were no new members sworn in since the last annual meeting.

There are 24 active student files plus one new application.

Members of the Board for 2004 were: John MacInnis (Chairman), Kevin Fogarty, Forbes Thompson, George Sellers, Keith AuCoin (DNR Appointee), Paul Slaunwhite (APENS Appointee) and Bruce Gillis (Barrister Appointee).

I would like to thank all the Board members for their time and expertise. Members of the Special Examining Committee for the past year were John MacInnis, Doug MacDonald and John Conn.

**11. Treasurer's report:** The 2004 audited statement was published in the Fall 2005 issue of *The Nova Scotian Surveyor*. Fred Hutchinson reserved the rest of his report until the review and approval of the 2006 budget.

**12. Report from the Survey Review Department:** Gerry Bourbonniere, SRD Manager, noted that his report is as published in the Fall 2005 issue of *The Nova Scotian Surveyor*.

Update on sales and submissions to September 30, 2005 compared to September 2004: SLC's are down 500, plans are up by 189.

Members are keeping their accounts up-to-date.

**13. Report of Scrutineers:** Fred Hutchinson reported. Vacant positions for Vice-President and Councillors in Zones 2, 3, 5 and 6 were filled by acclamation. Zone 4 member, Gary Wadden, has been appointed by Council to complete the term of Frank Gillis.

New members of the Executive and Council for 2005-2006 are:

President Elect	Garry Parker
Vice-President	Tom Giovannetti
Past-President Elect	John Ross
Councillor Zone 2	John Logan
Councillor Zone 3	Gary Grant
Councillor Zone 5	Joe Harvie
Councillor Zone 6	David Alexander
Councillor Zone 6	Daniel Gerard

Retiring members of Council were thanked for their service and presented with plaques. They are:

Zone 2	John Logan, who has reoffered for another 2-year term
Zone 3	Emerson Keen
Zone 5	Stewart Setchell
Zone 6	Robb Ashley and Terry MacGillivray
Past President	Jeff Fee

Returning Councillors are:

Zone 1	Mark Whynot
Zone 4	Gary Wadden (replacing Frank Gillis)
Zone 5	Raymond MacKinnon
Zone 6	Kevin Brown and Brian Wolfe
DNR Rep.	Keith AuCoin

**14. CCLS Report:** NS Director, Ray Pottier, reported on the CCLS AGM held in Winnipeg on September 17-18, 2005. A copy of the report is available at the ANSLs office. Ray noted that anyone who would like to serve on a CCLS committee should contact him.

Bert Hol, CCLS President, noted that Nova Scotia's members are active within CCLS. Individuals include Gerald Pottier, Phil Milo and Lester Berrigan. The next CCLS AGM will be held in conjunction with the Nova Scotia AGM in Wolfville in October 2006.

Lester Berrigan is a member of the CCLS Professional Liability Insurance Committee (PLIC). He reported that the committee meets twice yearly with Encon in Ottawa to review all surveyors' claims greater than \$20,000. There are approximately 800 surveyors across Canada who participate in this program.

At the meetings, the PLIC advises and makes recommendations on claim settlements and negotiates the policy renewal terms. Premiums are based on total income, the number of licensed surveyors covered, the number of claims against an individual or company and the type of work done by the company. Some types of work are considered higher risk and would have higher premiums. Last year the PLIC was successful in negotiating a 2-year policy.

Last winter the PLIC undertook an actuarial study on the number of claims, the dollar amount of claims, premiums and insurance industry's profit from this policy. With some 800 surveyors involved in the group, self-insurance through CCLS or partial coverage by CCLS may be possible.

**15. Committee Reports:** The following committee reports were published in the Fall 2005 issue of *The Nova Scotian Surveyor*: Administrative Review, By-Laws, Complaints, Continuing Education, Convention, Discipline, Land Titles,

NSCRS Task Group, Regulations, SRD Advisory, Statutes.

Land Titles Committee: Bruce Mahar, chair, provided an update as follows:

"I'll give a quick update in addition to the report published in the "Surveyor", then Zone 5 has a presentation regarding the Land Titles System.

There is also a handout which includes the wording for a proposed change to the regulations under the Land Registration Act. The handout includes some examples of "problem migrations". (A copy of the handout is available at the ANSLs office).

In the Land Titles Committee report that appeared in the "Surveyor", it was mentioned that the External Working Group (EWG) was to meet on September 22<sup>nd</sup> to discuss, in part, the proposed regulation which is on the first page of the handout.

At that meeting, the EWG spent about 1½ hours discussing the proposal. The end result was that representatives of the Bar Society and RELANS were not able to accept the proposed change. After much discussion, they reached the conclusion that there is likely no wording that would be acceptable to them. The best alternative would be time spent in educating lawyers about descriptions and in which situations a surveyor's expertise should be used.

This is the current situation. The EWG meets on a monthly basis. We'll try again and continue to push for the addition of a compliance box regarding description alterations. This is a measure which would serve as a flag to any user of Property Online as to whether a description was altered at the time of migration.

Regarding problem migrations - we are looking for additional examples. Currently we have examples from Zones 2, 3 and 4. We'd like examples from all the zones to assist in our discussions with the Province and the lawyers in order to demonstrate that problems exist across the province. If any member in Zones 1, 5 and 6 has examples, please send them to Fred Hutchinson at the ANSLs office.

Stewart Setchell, Councillor for Zone 5, has an initiative respecting the Land Titles System which he would like to propose on behalf of the members of Zone 5."

Paul Harvey, member from Zone 5, noted that members in that zone have been discussing the LRA since May 2005. They have seen a number of problems and the members feel

that it is time for surveyors as a group to become more proactive.

He presented the following motion for consideration:

**Be it resolved** that the Land Titles Committee be directed to put together a presentation outlining our concerns with the existing policy of description approval through the LRA, to be given to the 3 or 4 caucuses of the Provincial government.

Moved by Paul Harvey, seconded by Ray MacKinnon.

Motion carried.

NS Board of Examiners: John MacInnis reported on the Atlantic Provinces Board of Examiners for Land Surveyors (APBELS). APBELS met this year for the first time in 2-3 years. All is in order. He will put together some statistics for presentation to the members at a later time. Exams will be written at the ANSLs office next week.

### Saturday, October 15, 2005

Strategic Plan Presentation - Keith AuCoin: Keith made a presentation to update members on the current status of the Strategic Plan. He covered such items as progress to date, key features of the plan, the mission statement, committees to cover the 3 strategic issues (public awareness, governance, membership), the goals of each committee, committee work plan, process for the first year.

The chairs of the 3 strategic committees plan to meet during the week of October 21<sup>st</sup>, with committees appointed by early November.

16. Fred Hutchinson did a presentation on Ambiguities and Deed Descriptions.

### 17. Introduction of the New Executive and Council:

President Ross introduced the Executive and Council for 2005 - 2006:

President Elect	Garry Parker
Vice-President	Tom Giovannetti
Councillor Zone 1	Mark Whynot
Councillor Zone 2	John R. Logan
Councillor Zone 3	Gary Grant
Councillor Zone 4	Gary Wadden
Councillor Zone 5	Joe Harvie
Councillor Zone 5	Raymond MacKinnon
Councillor Zone 6	Kevin Brown
Councillor Zone 6	Brian Wolfe

Councillor Zone 6     David Alexander  
 Councillor Zone 6     Daniel Gerard  
 Past President         John Ross

**18. New Business:** President elect, Garry Parker, assumed the chair. Garry presented the past president's pin and plaque to past president elect, John Ross.

**19. Motions for Consideration:**

2006 Budget: Fred Hutchinson presented the 2006 budget for approval.

**Be it resolved** that the 2006 budget be approved as printed in the Fall 2005 issue of *The Nova Scotian Surveyor*.

Moved by Emerson Keen, seconded by Ray MacKinnon.

Motion carried.

Nomination for Life Membership: A nomination for Life Membership in the ANSLs for Keith AuCoin was presented to Council and approved by at least 75% of Council. Mr. AuCoin has fulfilled the terms for Life Membership as noted in section 12.2 of the By-Laws.

**Be it resolved** that Life membership be granted to Keith P. AuCoin, P.Eng., NSLS, CLS

Moved by Robert Feetham, seconded by Allen Hunter.

Bob Feetham spoke to the motion and provided the members present with background and biographical information about Mr. AuCoin's career and contributions to the survey profession and to his community.

Motion carried unanimously.

Mailout Ballot:

In July 2005 a ballot respecting a proposed amendment to the Land Surveyors Act regarding the period of time allowed for payment of dues, fees and levies was mailed out to members. 90 ballots were returned with 62 in favour of the motion and 28 opposed. The ballots must be destroyed.

**Be it resolved** that the ballots respecting a proposed amendment to the Land Surveyors Act, re: payment of dues, fees and levies mailed to the membership in July of 2005 be destroyed.

Moved by Phil Milo, seconded by Ray Pottier.

Motion carried.

Unauthorized Amendments to Survey Plans: Paul Harvey presented an item of concern. Since the LRA was proclaimed, there have been amendments done by lawyers to existing survey plans. He proposed the following motion

**Be it resolved that** no plan shall be recorded at the Registry of Deeds unless it bears an original signature of a Nova Scotia Land Surveyor (NSLS). In the event that the original surveyor cannot be found to sign the plan, any surveyor can certify that the plan appears to be unaltered and can be recorded.

Moved by Paul Harvey, seconded by Stewart Setchell.

Paul Harvey spoke to the motion. This will ensure that no survey plans are photocopied and / or manipulated in any manner, then recorded with unauthorized changes.

Parliamentarian, Phil Milo, suggested that because this affects legislation that a motion by our members cannot update or effect, the motion be amended to make the preamble a recommendation to the ANSLs Council to pursue that policy through a committee.

Motion amended as recommended with permission of the mover and seconder. Motion carried.

**20. Other Business:** There was discussion regarding the preparation of short form deed descriptions.

There was discussion regarding the sale of survey markers by ANSLs as an additional source of revenue. Comments were sought and given by out-of-province delegates whose associations currently sell survey markers.

**21. Out-of-province delegates thanked** Past President Ross and the ANSLs and invited members to attend their 2006 AGM's.

**22. The 2006 AGM will be held** on October 12-14, 2006 at the Old Orchard Inn in Wolfville, NS.

At 3:55 pm, it was moved by Rod MacInnis, seconded by Phil Milo that the meeting be adjourned.

F.C. Hutchinson, BA, NSLS, CLS  
 Executive Director

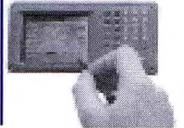


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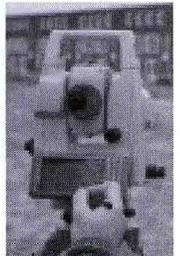
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