



### Affidavit Evidence under the Surveys Act

It is a recognized standard on the part of professional surveyors to not only research and consider documentary evidence in the course of a boundary retracement survey, but to also attempt to obtain information and testimony of an oral nature from persons who might have knowledge in respect of the circumstances of a lost or doubtful boundary location. The Association of Ontario Land Surveyors' *Manual Relating to Surveys and Surveyors (1973)* included a sample affidavit which surveyors were recommended to obtain as a form of document for recording evidence pursuant to the powers contained in Section 7 of the *Surveys Act*. Appendix "A" is the suggested type of affidavit which appeared at Section 5.5 of the *Manual*.

Section 7 of the *Surveys Act*, R.S.O. 1990, c. S.30, states as follows:

#### **Examination re boundaries, etc.**

7. (1) Where a surveyor has reasonable grounds for believing that a person has information concerning a line, boundary, corner or post that may assist the surveyor in ascertaining its true position, or has a writing, plan or document concerning the true position of a line, boundary, corner or post, the surveyor may examine such person under oath or require such person to produce such writing, plan or document for the surveyor's inspection.

#### **Application of the *Public Inquiries Act, 2009***

- (1.1) Section 33 of the *Public Inquiries Act, 2009* applies to an examination under subsection (1).

#### **Statement under oath**

- (2) The surveyor may cause evidence taken by the surveyor under this section to be put in writing in the form of a statement under oath.

Section 7(2) certainly contemplates a surveyor taking oral evidence from a witness and reducing it to affidavit form.

Under the *Rules of Civil Procedure* an affidavit shall be confined to the statement of facts within the personal knowledge of the deponent "or to other evidence that the deponent could give if testifying in court" (*Rule 4.06(2)*). Information and belief may be included provided that the source of information and the fact of belief are specified (*Rule 39.01(4)*). When converting the content of an interview into an affidavit format it should be done in a way that presents the factual information of the deponent that is relevant to the matter in issue in a clear and concise manner. Care should be made to avoid the use of leading or suggestive language that might be construed as opinion, argument or conclusion.



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A related statute provides some guidance as to the form of such statement. Section 43 of the *Evidence Act*, R.S.O 1990, c. E.23 states:

43. Any person authorized to take declarations in Ontario may receive the solemn declaration of any person in attestation of the truth of any fact or of any account rendered in writing and the declaration and any declaration authorized or required by any Act of the Legislature shall be in the following form:

I, ..... solemnly declare that (state the fact or facts declared to), and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

DECLARED before me  
at the \_\_\_\_\_ of \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ .  
A Commissioner, etc.:

There is some discrepancy between the form of suggested affidavit in former Section 5.5 of the *Manual* and the wording of the form in Section 43 of the Ontario *Evidence Act*. Minor variations in the form prescribed in Section 43 would probably not be significant in the event of such declaration or affidavit being tendered as an exhibit in evidence at a later trial or administrative law proceeding. Subsequent use of a sworn affidavit or declaration may not be ruled inadmissible as to format if it is in the form mandated by Section 43 of the *Evidence Act*.

Although this should provide some comfort for the land surveyor in investigating and attempting to document all evidence relating to the location of a lost boundary, there remains a second hurdle.

In relying on an affidavit as proof of the information that it contains, one presumes that weight can be attached to the statements contained in the document. Traditionally, this is tested in civil trials and administrative law proceedings through the process of cross-examination. In other words, although a declaration or affidavit in the form prescribed by Section 43 of the *Evidence Act* may permit a document's admissibility, there remains the question of how reliable the contents of such affidavit or declaration will be considered by the trier of fact (a judge or tribunal) if the person making the affidavit or declaration is not produced in the proceeding for purposes of cross-examination. If the person making the affidavit or declaration is not produced, then cross-examination will simply not be possible. Elsewhere, the *Evidence Act* speaks about the admissibility and the reliability of affidavits or declarations sworn by persons who then died and reliance if sought to be made on such document when tendered as an exhibit in evidence. From the surveyor's point of view, the objective to bear in mind is that use of affidavits and declarations will establish a factual basis for the formation of opinions and conclusions which may subsequently be challenged in a judicial proceeding. There again, the surveyor neither "wins" nor "loses," but increases the likelihood of his professional opinion



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being reasonable, even if the witnesses in a proceeding are not found to be credible and his client "loses."

Under section 7(1.1) of the *Surveys Act*, Section 33 of the *Public Inquiries Act* applies to an examination of a boundary conducted by a surveyor. Section 33 of the *Public Inquiries Act* is reproduced in full as follows:

#### **Public Inquiries Act, 2009, S.O. 2009, c. 33, Sched. 6**

##### **Definition**

33. (1) In this section,

"inquiry" includes a determination, examination, hearing, inquiry, investigation, review or other activity to which this section is applicable. 2009, c. 33, Sched. 6, s. 33 (1).

##### **Standard procedure**

(2) This section applies where another Act or a regulation confers on a person or body the power to conduct an inquiry in accordance with this section or certain provisions of this section. 2009, c. 33, Sched. 6, s. 33 (2).

##### **Power to summon witnesses, papers, etc.**

(3) The person or body conducting the inquiry may require any person by summons,

(a) to give evidence on oath or affirmation at the inquiry; or

(b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13). 2009, c. 33, Sched. 6, s. 33 (3).

##### **Form and service of summons**

(4) A summons issued under subsection (3) shall be in either the English or French version of the form prescribed by the regulations and shall be served personally on the person summoned and he or she shall be paid at the time of service the like fees and allowances for attendance as a witness before the person or body conducting the inquiry as are paid for the attendance of a witness summoned to attend before the Superior Court of Justice. 2009, c. 33, Sched. 6, s. 33 (4).



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#### Stated case for contempt for failure to attend hearing, etc.

(5) Where any person without lawful excuse,

(a) on being duly summoned under subsection (3) as a witness at an inquiry makes default in attending at the inquiry; or

(b) being in attendance as a witness at an inquiry, refuses to take an oath or to make an affirmation legally required by the person or body conducting the inquiry to be taken or made, or to produce any document or thing in his or her power or control legally required by the person or body conducting the inquiry to be produced, or to answer any question to which the person or body conducting the inquiry may legally require an answer; or

(c) does any other thing that, if the person or body conducting the inquiry had been a court of law having power to commit for contempt, would have been contempt of that court,

the person or body conducting the inquiry may state a case to the Divisional Court setting out the facts and that court may, on the application of the person or body conducting the inquiry or of the Attorney General, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court. 2009, c. 33, Sched. 6, s. 33 (5).

#### Protection of witnesses

(6) A witness at an inquiry shall be deemed to have objected to answer any question asked him or her upon the ground that his or her answer may tend to criminate the witness or may tend to establish his or her liability to civil proceedings at the instance of the Crown or of any person, and no answer given by a witness at an inquiry shall be used or be receivable in evidence against him or her in any trial or other proceedings against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence. 2009, c. 33, Sched. 6, s. 33 (6).

#### Right to object

(7) A witness shall be informed by the person or body conducting the inquiry of his or her right to object to answer any question under section 5 of the Canada Evidence Act. 2009, c. 33, Sched. 6, s. 33 (7).

**Affidavit Evidence under the Surveys Act****No discipline of employees**

(8) No adverse employment action shall be taken against any employee of any person because the employee, acting in good faith, has made representations as a party or has disclosed information either in evidence or otherwise to a person or body conducting the inquiry under the applicable Act or to the staff of a person or body conducting the inquiry. 2009, c. 33, Sched. 6, s. 33 (8).

**Offence**

(9) Any person who, contrary to subsection (8), takes adverse employment action against an employee is guilty of an offence and on conviction is liable to a fine of not more than \$5,000. 2009, c. 33, Sched. 6, s. 33 (9).

**Application**

(10) This section applies despite any other Act and the oath of office of a public servant within the meaning of the Public Service of Ontario Act, 2006 is not breached where information is disclosed as described in subsection (8). 2009, c. 33, Sched. 6, s. 33 (10).

**Effective date**

(11) This section applies to representations made, and information disclosed, on or after June 12, 2000. 2009, c. 33, Sched. 6, s. 33 (1).

**Unsworn evidence admissible**

(12) A person or body conducting the inquiry may admit at an inquiry evidence not given under oath or affirmation. 2009, c. 33, Sched. 6, s. 33 (12).

**Privilege**

(13) Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence. 2009, c. 33, Sched. 6, s. 33 (13).

**Release of documents**

(14) Documents and things produced in evidence at an inquiry shall, upon request of the person who produced them or the person entitled thereto, be released to the person by the person or body conducting the inquiry within a reasonable time. 2009, c. 33, Sched. 6, s. 33 (14).

**Affidavit Evidence under the Surveys Act****Photocopies of documents**

(15) Where a document has been produced in evidence before a person or body conducting the inquiry, the person or body conducting the inquiry may or the person producing it may with the leave of the person or body conducting the inquiry, cause the document to be photocopied and the photocopy may be filed in evidence in the place of the document produced, and a copy of a document produced in evidence, certified to be a true copy thereof by the person or body conducting the inquiry, is admissible in evidence in proceedings in which the document produced is admissible, as evidence of the document produced. 2009, c. 33, Sched. 6, s. 33 (15).

**Power to administer oaths and require evidence under oath**

(16) A person or body conducting an inquiry has power to administer oaths and affirmations for the purpose of the inquiry and may require evidence to be given under oath or affirmation. 2009, c. 33, Sched. 6, s. 33 (16).

**Powers of multiple appointees**

(17) Where two or more persons are appointed to make an inquiry, any one of them may exercise the powers conferred by subsection (3), (4), (14), (15) or (16). 2009, c. 33, Sched. 6, s. 33 (17).

Surveyors are rarely known to resort to the power of an inquiry under Part II of the *Act*. It may well be a historical vestige, but its present day use leaves this as a potentially useful section. In the interest of properly documenting and acquiring all relevant evidence in respect of the re-establishment of a lost boundary, resort to the powers under Part II of the *Public Inquiries Act* may be considered. This seems especially relevant in light of recent developments attaching potential liability to a land surveyor in forming an opinion as to the location of a lost boundary when such opinion was formed on the basis of evidence which either was not sought out or was available only from a "hostile witness." Who may be a hostile witness in these circumstances and how their evidence might be obtained may be a complicated process and the obtaining of legal advice is recommended.



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Mere unwillingness or hostility on the part of a person to share relevant evidence should not remain a barrier to obtaining such information. Resort to the procedure in section 33 of the *Act* may well raise eyebrows, but if correctly observed and followed, may afford an opportunity to obtain relevant evidence.

Appendix "B" is a sample subpoena to a witness in the form prescribed by the *Rules of Civil Procedure*. Appendix "C" is a Tariff of fees to be paid to a witness as "conduct money." Two sample affidavits also follow to give the reader an idea of how an affidavit might be worded. Note that these are suggested formats only and content will, of course vary, depending on the nature of the evidence.

In future, consideration should be given to the use of Section 7 Affidavits by surveyors in documenting oral evidence. Resort to Section 33 of the *Public Inquiries Act* is perhaps extreme to recommend as a general procedure, but should certainly be kept in mind as a choice for the surveyor.



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#### Appendix "A"

#### 5.5

+ Type of Affidavit for recording evidence. Section 7 of the *Surveys Act* Affidavit

#### AFFIDAVIT

Township of Smith	)	
County of Peterborough	)	To Wit:
Province of Ontario	)	

I, (Name in Full), Retired Farmer, of the Township of Smith, make oath and say:-

1. That I am 86 years of age and that I have lived all my life on or in the vicinity of Lot 14, Concession 8, Township of Smith.
2. That I know the south east corner of the said lot, which is marked by a field stone place on edge in the fence corner.
3. That the said stone was shown to me by my father when I was a boy, who told me he had placed the stone where the original post had stood.
4. That the stone which I have shown to Ontario Land Surveyor \_\_\_\_\_ is the same stone and in the same position as it was when my father showed it to me.

Sworn before me in the	)	
Township of Smith, County	)	
of Peterborough, Province	)	
of Ontario, this _____	)	_____ (Signature)
Day of _____ 20_____	)	

\_\_\_\_\_  
(Signature) Ontario Land Surveyor





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Appendix "B"

**FORM 53a  
SUMMONS TO WITNESS (AT HEARING)**

(General hearing)

(Court seal)

SUMMONS TO WITNESS

TO (Name and address of witness)

YOU ARE REQUIRED TO ATTEND TO GIVE EVIDENCE IN COURT at the hearing of this proceeding on (day), (date) at (time), at (address of court house), and to remain until your attendance is no longer required.

YOU ARE REQUIRED TO BRING WITH YOU and produce at the hearing the following documents and things: (Set out the nature and date of each document and give particulars sufficient to identify each document and thing.)

ATTENDANCE MONEY for \_\_\_\_ day(s) of attendance is served with this summons, calculated in accordance with Tariff A of the Rules of Civil Procedure, as follows:

Attendance allowance of \$ _____ daily	\$ _____
Travel allowance	\$ _____
Overnight accommodation and meal allowance	\$ _____
<b>TOTAL</b>	<b>\$ _____</b>

If further attendance is required, you will be entitled to additional attendance money.

IF YOU FAIL TO ATTEND OR REMAIN IN ATTENDANCE AS REQUIRED BY THIS SUMMONS, A WARRANT MAY BE ISSUED FOR YOUR ARREST.

Date \_\_\_\_\_

Issued by \_\_\_\_\_  
Local registrar

Address of  
court office \_\_\_\_\_

This summons was issued at the request of, and inquiries may be directed to:

(Name, address and telephone number of  
solicitor of party serving summons)



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#### SAMPLE AFFIDAVIT

CANADA )  
 )  
 PROVINCE OF ONTARIO )  
 )  
 )  
 )  
 )  
 TO WIT; )

IN THE MATTER OF

I, John Doe, of the Township of Somewhere, in the County of Anywhere, make oath and swear as follows:

1. I have lived at Lot 5, Concession 10, in the Township of Somewhere from my date of birth in 1942. I was born on the farm and when I was 28 years old, my father and mother gave me a deed to the land.
2. I was one of 5 children and the only one who stayed at home and continued farming and have done so from the age of 28 to the present. I am now 73 years old.
3. In order to get a mortgage on the farm, our bank has asked me to provide a survey. I have hired \_\_\_\_\_, an Ontario Land Surveyor, to do this and he has asked me to swear this affidavit.
4. At the northwest corner of the farm there is an intersection of Sideroad 5 and the 10th Line, \_\_\_\_\_, OLS has shown me what appears to be a squared up chiseled stone, lying on its side.
5. I remember this stone when I was a boy. At that time, it was standing vertical and my friends and I would use it for smashing pop bottles against.
6. In the winter of 1958 my oldest brother was driving home late one night in a snowstorm and lost control of the car at this intersection. My parents and my other brothers and sisters saw the car the next morning, resting against the squared up stone which had been knocked over.
7. We did try to move or straighten the stone up and it has been left lying on its side since 1958.
8. I make this affidavit at the request of \_\_\_\_\_, OLS and for no improper purpose.

Sworn before me at )  
 the City of Anytown )  
 in the County of )  
 Anywhere, this \_\_\_\_\_ day )  
 of \_\_\_\_\_, 20 )  
 )  
 )  
 )  
 )  
 )  
 Ontario Land Surveyor )

\_\_\_\_\_  
 John Doe



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#### Appendix "C"

Attendance money actually paid to a witness who is entitled to attendance money, to be calculated as follows:

1. Attendance allowance for each day of necessary attendance, \$ 50
2. Travel allowance, where the hearing or examination is held,
  - (a) in a city or town in which the witness resides, \$3.00 for each day of necessary attendance;
  - (b) within 300 kilometres of where the witness resides, 24 cents a kilometre each way between his or her residence and the place of hearing or examination;
  - (c) more than 300 kilometres from where the witness resides, the minimum return air fare plus 24 cents a kilometre each way from his or her residence to the airport and from the airport to the place of hearing or examination.
3. Overnight accommodation and meal allowance, where the witness resides elsewhere than the place of hearing or examination and is required to remain overnight, for each overnight stay, \$75.

[**Note:** these rates, as a tariff, are subject to change and separate verification of the prevailing rates should be undertaken before attempting to compel a witness' attendance with service of a summons and conduct money].