

## Perimeter Fencing ~ Who owns it?



**By Brian Madigan LL.B.**

That's a good question and it's not easy to figure out. Well, it starts out easy, but then fences fall down, get repaired or replaced and people move. So, eventually no one seems to know the answer.

Let's start with a simple subdivision and a series of rectangular lots. Bob, Jack and Brenda live side by side on 50 foot by 125 foot lots. They back onto Wilma, Ismail and Robin, each on similar lots.

So, let's have a look at Jack's situation. He fronts onto the north side of Main Street. Bob is his neighbour to the west, and Brenda is his neighbour to the east, and rear of his property (at the north) meets the rear of Ismail's property.

There is complete perimeter fencing and you as the purchaser buy this property from Jack, 15 years after the fences have gone in. Only one little problem, after you move in, Brenda says she owns the fence to the east, Bob says he owns the fence to the west and Ismail says he owns the fence at the north. This could be a problem!

Who really owns the fence? What legal rules apply? What evidence is needed? What about the boundary of the property? Who has to repair the fence if it falls down?

First, let me remind you that there are two different legal systems in Ontario when it comes to property ownership. The answer will depend upon which legal system applies to your particular property.

The two systems are:

- 1) Registry, and
- 2) Land Titles.

It is important to note, that in Registry the boundary of the land can move around in accordance with the laws of adverse possession, just like they did in medieval times. In Land Titles the boundary stays in place.

Adverse possession is a principle of law designed to rectify and clarify boundaries between properties. If one landowner erects a fence, encloses the neighbour's

property with his own, for a period of time and excludes the true owner of the property from exercising rights of ownership, then that person is entitled to a Court Order confirming that he owns the property that has been “stolen” from the neighbour. In Ontario, the time period is 10 years. The occupation of the neighbour’s land must be open, continuous and must not have been with the neighbour’s permission.

Initial ownership of the fence is somewhat easy. Whoever builds it owns it! But, that’s perhaps a little too simplistic. Sometimes neighbours contribute to the construction of the fence either by helping to build it, or contributing to its cost. These two matters may effect the decision as to who owns it at the outset.

### **Ten years later, who owns it?**

Again, let’s go back to the time the fence was erected. Bob said he didn’t need a fence. He wouldn’t contribute to the cost. Ismail at the rear helped build it and contributed one –half of the cost. Brenda paid for half. She says she owns it outright because Jack has moved, and she gets his share (just like joint tenancy).

Let’s go around the perimeter once more. Bob has no initial rights concerning ownership. Ismail owns half and Brenda owns half. Unless there is a very clear document in writing setting out the transfer of Jack’s one half upon the sale, then nothing can happen, Jack still owns one half of the fence and it is transferable in accordance with the provisions of the *Conveyancing and Law of Property Act*.

But the real question, relates to 10 years after, and the answer here depends on the system of laws that apply.

### **Registry**

Bob does not own the fence. But, the rules of adverse possession apply. If Jack’s fence was over on Bob’s property by 8 inches, then Jack owns that 8 inch strip. It was open and continuous, but if Bob knew about the encroachment and consented, then, Bob still owns that 8 inch strip. In fact, Bob now owns the fence. It’s entirely on his property, and he still owns the 8 inches on the other side of the fence because he never relinquished it.

So, Jack built it, paid for it in its entirety and Bob now owns it.

What about Ismail? Here, we have a joint fence, with co-ownership. The rules of adverse possession do not apply. So, even if it’s over by 8 inches, Jack doesn’t get to keep the extra land, since he had Ismail’s consent right from the beginning.

What about Brenda? This situation would be treated in the same way as Ismail’s. But, things might be a little different if she contributed more than half.

## **Land Titles**

All the boundaries stay in place and don't get moved around. The ownership of the fence depends upon who constructed it and paid for it in the first place.

So, if you are considering purchasing a property with some perimeter fencing, you may have some questions to ask.

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