

A Guide To The *Line Fences Act*



Note to Users

This publication is not intended as a substitute for the legislation. Reference should be made directly to the *Line Fences Act* and its regulations, where necessary. These can be found at www.e-laws.gov.on.ca.

This advisory Guide provides information to municipalities and fence-viewers and does not account for particular or local facts or circumstances. Accordingly, this Guide should not be relied upon as a substitute for legal or professional advice, and the user is responsible for how the Guide is used or applied.

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Part One

Introduction

Part One provides a brief summary of the *Line Fences Act* and the *Line Fences Act Guide*.

Purpose of the Act

The purpose of the *Line Fences Act* is to provide a procedure for the resolution of line fence disputes between the owners of adjoining properties. Line fences are fences that mark the boundary between properties and are often referred to as boundary or division fences. The Act does not deal with disputes about fences that are not on a boundary line.

The *Line Fences Act* is one of Ontario's most historic pieces of legislation.

In those parts of Ontario that are not organized for municipal purposes, the arbitration of fencing disputes is the responsibility of the Ministry of Municipal Affairs and Housing. Information about the procedure in unorganized territories may be obtained from the Ministry's offices in Sudbury and Thunder Bay or by reviewing Regulation 716, which can be found with the *Line Fences Act* at www.e-laws.gov.on.ca.

When is the Act Applicable?

The arbitration procedure is applicable to two situations where the owners are unable to reach agreement:

- Where no fence currently exists at the boundary between the two properties, and one owner wants a new fence to be constructed to mark the boundary; or
- Where a line fence already exists, and one owner believes that it needs to be reconstructed or repaired.

In such cases, an owner can request that a municipality assign "fence-viewers" to resolve the dispute and issue a decision which is called an "award". The fence-viewers are authorized to only address one or both of the following issues in such situations

- The apportionment of responsibility for the fencing work between the two adjoining owners; or
- The description of the fence that is to be constructed or reconstructed on the boundary line, including the materials to be used.

When is the Act Not Applicable?

The arbitration procedure is not applicable if one owner, on his or her own initiative, has constructed a new line fence or has reconstructed or repaired an entire existing line fence, and then wants to use the arbitration procedure to force the adjoining owner to pay part of the cost of the completed work.

It is also important to note that the arbitration procedure deals only with disputes about fences and does not provide a means of determining the location of the boundary line between adjoining properties. Such disputes must be resolved by the owners themselves as municipalities and their fence-viewers have no jurisdiction to deal with boundary issues. As many municipal staff members and fence-viewers are aware, property owners involved in a boundary dispute often approach the municipality in the hope that the matter can be resolved without the need for them to obtain legal advice and a survey (this issue is discussed in more detail in Parts Two and Three).

Informal Resolution of Disputes

Although many property owners approach their local municipality about line fence matters, they are usually able to reach agreement with their neighbour without the need for a formal viewing. An informal discussion between a municipal staff member or the adjoining owners can often help to resolve a dispute, especially where the owners are not on good terms. In addition, owners normally become more willing to resolve their dispute themselves once they are made aware that they will be required to pay for a viewing and its related costs.

Purpose of the Guide

This Guide deals only with the arbitration of fencing disputes in those parts of Ontario organized for municipal purposes, where the arbitration of fencing disputes is a responsibility of local municipalities. Owners of adjoining properties who are unable to reach agreement about a line fence may apply to their local municipality to have the dispute arbitrated by three fence-viewers who are appointed by the municipal council.

In most municipalities, fence-viewers do not conduct viewings frequently. As a result, both they, and the municipal staff members involved in the arbitration process, are often uncertain about the procedures that must be followed under the Act. It is impossible to catalogue every possible situation in a document of this type. Nonetheless, it is hoped that the information provided here will prove helpful.

References to the Municipal Clerk

The term “clerk” has, in most cases, been used throughout this Guide when referring to the administration of the arbitration procedure. This has been done because the Act itself assigns this responsibility to the “clerk of the local municipality”. It is recognized, however, that this responsibility can be delegated and that in many municipalities, it is someone other than the clerk who administers the procedure. As a result, all references to the “clerk” in this Guide should be interpreted broadly to include every municipal staff member who has been assigned responsibility for part or all of the administration of the arbitration procedure.

Part Two

Five Basic Questions

Part Two is intended primarily for the municipal clerk and other municipal staff members who are involved in the administration of the arbitration procedure. It provides answers to five key questions.

Part Two: Five Basic Questions

Question 1: What is Council's Role?

Members of local councils should be aware that fence-viewers are performing a type of judicial function and that the council has no authority to provide instructions to fence-viewers or to review their decisions. The Act provides an appeal procedure and councils have no role in this. Local councils do, however, have a number of important roles and responsibilities under the Act, which are described below. (Councils of upper-tier municipalities have no role under the Act.)

Appointing Fence-Viewers (Section 2 of the Act)

Unless a municipality has passed a by-law providing that the *Line Fences Act* does not apply to the municipality (see below), a council is required to appoint fence-viewers. It cannot tell an owner that the municipality has no fence-viewers or no way for a fencing dispute to be arbitrated.

Setting the Remuneration of Fence-Viewers (Section 2 of the Act)

A council is required to establish the remuneration to be paid to its fence-viewers, which may be an hourly or daily rate, or a rate for each time that they are called upon.

Prohibiting Proceedings during the Winter (Subsection 5 (2) of the Act)

A council may ban proceedings requiring the attendance of the fence-viewers for all or part of the period between November 1st of one year and March 31st of the next year.

Establishing Administrative Fees (Section 17 of the Act)

A council may establish reasonable administrative fees by by-law to be paid to the municipality by the two owners involved in arbitration. The fees can reflect the municipality's actual costs in arranging a viewing, or they can be in the form of a flat fee.

Delegating the Clerk's Responsibilities (Subsection 4 (2) et al of the Act)

Although the Act makes the clerk responsible for the administration of the arbitration procedure, it permits a council to designate another person for the purpose of giving certain notices. Subsection 228 (4) of the *Municipal Act, 2001* and subsection 178 (5) of the *City of Toronto Act, 2006* authorizes the clerk to delegate, in writing, any of his or her powers and duties under any Act to any person, other than a member of council. This provision permits another staff member, such as the chief building official, to be made responsible for the administration of the entire arbitration procedure.

Non-Application of the Act (Section 26 of the Act)

Sections 11 and 98 of the *Municipal Act, 2001* and sections 8, 11 and 109 of the *City of Toronto Act, 2006* permit a council to exempt part or all of the municipality from the *Line Fences Act* and, instead, to pass a by-law apportioning the costs of line fences between adjoining owners. If this occurs, the *Line Fences Act*, other than section 20, does not apply to the area that is subject to the by-law. A council cannot exempt itself from section 20 of the Act, which sets out the fencing responsibilities of owners of former rail lines in locations where a farming business is carried out on the adjoining land.

Question 2: Who Should be Appointed As Fence-Viewers?

Who to Appoint

Rural municipalities tend to appoint individuals with a farm background and urban municipalities tend to appoint those with a background in construction. As society evolves, however, it becomes increasingly important that councils appoint fence-viewers who are broadly representative of the groups who live in that community.



Number of Fence-Viewers

The Act requires three fence-viewers to be present at a viewing. It is, however, advisable for a council to appoint more than three fence-viewers so that the clerk can exercise discretion in assigning fence-viewers to each viewing without being accused of bias in favour of any owner. For example, a fence-viewer who is a relative or friend of one of the owners should not be involved in arbitrating that dispute. If a municipality includes both rural and urban areas, it is also advisable that the roster of fence-viewers reflect this fact to permit the clerk to assign the appropriate fence-viewers to each viewing.

The question of who to appoint is up to the council.

Timing of the Appointments

Many municipalities appoint their fence-viewers, along with their other appointees, at the beginning of each year, whereas others appoint them at the start of each term of office. If a municipality has not had an application for a viewing for many years, its council may decide to wait until an application is received before appointing fence-viewers. The difficulty with this approach is that a viewing has to be held no later than 30 days from the date of receipt of an application, which does not leave much time for a council to make the appointments.

Eligibility to Serve as Fence-Viewers

The Act does not specify who can serve as a fence-viewer. There is no requirement that a fence-viewer be a resident or elector of the municipality or even a Canadian citizen. It is up to each council.

The question as to whether council members can be appointed to serve as fence-viewers often arises. Council members may be appointed, but it is probably not advisable, given the many other demands on their time.

Some councils have appointed a roster of fence-viewers composed partly or even entirely of municipal staff members. The one situation in which it would be inappropriate for a municipal staff member to be involved in a viewing is where the municipality itself is one of the adjoining owners. Municipalities that rarely receive an application for a viewing might consider appointing the fence-viewers of a neighbouring municipality to also serve their municipality, should it be required.

The clerk determines if the Act applies to both properties.

Question 3: When is the Act Applicable?

An example to illustrate this issue is as follows: The owners (not the tenants) of two adjoining properties have been unable to reach agreement on the sharing of the costs of a line fence or on the type of line fence to construct. One owner has applied for a viewing by submitting a completed Form 1, Request for Fence-Viewers, to the clerk. The clerk must then assess a number of issues before agreeing to proceed with a viewing.

Is the Act Applicable to Both Parties?

For example, is the Act applicable if the applicant owns a residential or agricultural property and the adjoining property is:

- **Another residential or agricultural property?** The Act is applicable in this situation.
- **A municipally-owned property, other than a highway?** The Act is applicable in this situation because subsection 23 (1) says the Act applies to lands owned by municipalities and local boards as defined in the *Municipal Affairs Act*, including conservation authorities.
- **A municipal highway, other than an unopened road allowance?** The Act is not applicable in this situation, because subsection 25 (1) states that the Act does not apply to a public highway, which includes a highway under municipal jurisdiction. Although the clerk must reject an application for a viewing in this case, subsection 25 (2) authorizes the municipality to enter into an agreement with the adjoining owner for a fence to mark the lateral boundary of the highway.
- **An unopened road allowance (i.e. one originally laid out by a Crown surveyor)?** The Act is applicable to this situation provided that the Act also applies to the property on the other side of the road allowance and council gives its approval to a viewing. In this situation, the fence-viewers are required to divide the allowance equally between the two owners. Their award does not confer any title to the allowance upon the owners nor does it interfere with the municipality's rights. (Section 68 of the *Municipal Act*, 2001 and section 55 of the *City of Toronto Act*, 2006 enable a municipality to pass a by-law requiring a person to remove the fence enclosing part or all of an unopened road allowance).

- **A public school?** The Act is applicable to this situation because the definition of “local board” in the *Municipal Affairs Act* includes a school board. Paragraph 34 of subsection 171 (1) of the *Education Act* permits a school board to “erect and maintain any wall or fence considered necessary by the board for enclosure of the school premises”. If a board is not prepared to bear the entire cost of such a fence, a municipality may proceed with a viewing.
- **A provincially-owned property, other than a highway?** The Act is applicable to this situation except for unpatented Crown lands (i.e. lands “that at no time have been disposed of by the Crown by letters patent, deed or otherwise”). Unpatented Crown lands are managed by the Ministry of Natural Resources under the *Public Lands Act*. For provincially-owned lands, other than unpatented Crown lands, a municipality may proceed with a viewing. Subsection 24 (3) says, however, that a fence-viewers’ award cannot make the Province responsible for more than half of the cost of the work on a fence.
- **A provincial highway?** As noted above, subsection 25 (1) says the Act is not applicable to a public highway, which includes a highway under provincial jurisdiction. The clerk must reject an application for a viewing in this situation. The Ministry of Transportation (MTO) has its own fencing policies for different classes of highways, and owners of adjoining properties should contact MTO directly.
- **A federally-owned property?** The Act is not applicable to federally-owned lands because the Government of Canada is not generally subject to provincial legislation. The clerk must reject an application for a viewing in this situation. Owners of adjoining properties should contact the relevant federal department or agency directly.
- **An Indian Reserve?** Indian Reserves are owned by the Government of Canada in trust for First Nations. As a result, the Act is not applicable to Reserves and the clerk must reject an application for a viewing in this situation.
- **A railway corridor?** The *Line Fences Act* is not applicable to an active rail line and the clerk should reject an application for a viewing from an owner whose land adjoins a railway corridor. Fencing of most active rail lines is governed by federal legislation and is therefore not subject to provincial legislation. The *Railway Safety Act* (R.S.C., 1985, c.32) includes provisions that permit the Government of Canada to make regulations dealing with the prevention or restriction of access to rail lines by means of fences, signs or other measures.
- **A former rail line?** As of January 1, 2007, the *Line Fences Act* is applicable in most cases to former (i.e. “abandoned”) rail lines that have been sold in their entire width to a new owner. As a result, the clerk can accept an application for a viewing from an owner whose land adjoins a former rail line except in one particular situation, which is described in subsection 20 (1) of the Act.

The one case in which the clerk cannot accept an application for a viewing occurs where a former rail line adjoins land on which a farming business, as defined in subsection 20 (2), is carried out. In this situation, the owner of the former rail line becomes responsible for fencing that part of the former rail line that adjoins the agricultural land. This responsibility for fencing applies to every person who owns a former rail line, including the Province or a municipality, unless that person is also the owner of abutting land. The fencing work, however, does not have to be carried out unless the owner of the land on which a farming business is carried out gives notice to the owner of the former rail line requesting that it be undertaken.

Is the Boundary Line between the Two Properties in Dispute?

The clerk’s second task in responding to an application for a viewing is to determine whether there is agreement about the boundary line between the two properties. This is why Form 1 requires an owner applying for a viewing to confirm that the boundary line is not in dispute. If there is a genuine dispute about the boundary line, the clerk must reject the application. A municipality cannot determine the location of the boundary between two properties. This is a civil matter that must be settled by the owners.

Who Determines Whether the Boundary is in Dispute?

This is the responsibility of the clerk, and it can be a difficult decision. The situation is simple when an owner who is applying for a viewing admits that the dispute is really about the boundary line rather than the actual fence. But, in some cases, one of the owners may simply be claiming a boundary dispute in order to prevent a viewing from being held. In such situations, the clerk should require the owner to provide some evidence, such as a survey, that conflicts with the survey of the adjoining owner.

If in doubt, the clerk can take a cautious approach by rejecting the application for a viewing. Alternatively, if not convinced that the alleged boundary dispute is genuine, the clerk can permit the viewing to proceed in order to give the fence-viewers an opportunity to examine the situation. If the fence-viewers decide to make an award in such circumstances, the owner who claims that the boundary is in dispute will then have an opportunity to appeal the fence-viewers’ award.

What if an Existing Fence is Not on the Surveyed Boundary?

Many line fences, especially in rural areas, are not located on the surveyed boundary line. If neither owner objects to the location of the fence, it is not the responsibility of the municipality to determine whether or not there is a boundary dispute. In such cases, the clerk may proceed with a viewing.

Question 4: When Do Fence-Viewers Have Jurisdiction?

Referring to the examples above, the clerk has now determined that the *Line Fences Act* applies to both properties, and the boundary line between the properties is not in dispute.

The clerk's next task, before agreeing to schedule a viewing, is to look at the particular circumstances of the case. This can be a difficult issue, but can be mitigated if the clerk requests more detailed information from the owner who is applying for a viewing.

It is important to remember that it is the clerk's responsibility to determine whether the fence-viewers have jurisdiction to arbitrate (i.e. to make an "award") based on the specific circumstances.

What if There is No Line Fence in Place?

Section 4 of the Act makes it clear that fence-viewers have jurisdiction in these circumstances.



What if an Entire Line Fence Needs to be Repaired or Reconstructed?

Section 4 makes it clear that fence-viewers have jurisdiction in these circumstances as well.

What if One Owner has Already Constructed a New Fence?

As noted in Part One, this is a straightforward situation. Fence-viewers have no jurisdiction to arbitrate a dispute if one owner has already constructed a line fence. In this case, the dispute is between the two owners, and the clerk must reject the application.

Sometimes an owner will attempt to use the provisions of the Act to force the adjoining owner into paying half the cost of a fence that has already been constructed. What happens more frequently is that one owner, after constructing a new fence on the basis of a verbal agreement with the adjoining owner, will apply to the municipality for a viewing when adjoining owner refuses to honour the agreement. In such cases, the aggrieved owner should apply to Small Claims Court rather than to the municipality, which has no jurisdiction over the matter if the fence has already been constructed.

What if One Owner has Already Begun to Construct a New Fence?

This is a somewhat trickier situation, especially if the dispute is about the type of fence that is to be constructed. Some clerks refuse to proceed with a viewing if any construction work has been done, whereas others are more flexible. If the work that has been done on a fence is sufficiently advanced that it would dictate the type of fence that is to be built, it would seem reasonable for the clerk to decide that the fence-viewers have no jurisdiction and to reject the application for a viewing. On the other hand, if the work done is minor, it would seem reasonable for the clerk to permit the viewing to proceed.

What if One Owner has Already Repaired or Reconstructed an Existing Line Fence in its Entirety?

This is the same as the situation where one owner has already constructed a new fence before applying to the municipality for a viewing. In such circumstances, the fence-viewers have no jurisdiction to arbitrate and the clerk must reject the application.

What if One Owner has Repaired or Reconstructed Half of a Line Fence?

What often happens, especially in agricultural areas, is that two adjoining owners have an informal agreement that each will maintain half of their common line fence. There are situations when the fence needs to be repaired or reconstructed, and one owner does his or her share of the work, while the other fails to do his/her share. In such a situation, only the half of the fence that has not been repaired or reconstructed is the subject of the dispute between the owners, and the fence-viewers have jurisdiction to arbitrate in these circumstances.

What if One Owner Wants to Replace an Adequate Line Fence with a Different Type of Fence?

This is another difficult situation. In an urban setting, an owner who installs a swimming pool in his or her backyard may be required by the municipality's fencing by-law to construct a different type of fence. In an agricultural setting, an owner with a specialized type of livestock operation may require a different type of fence.

For example, the owner who needs the new fence wants to construct it on the property boundary in place of the current line fence, which is in good condition. When the adjoining owner refuses to agree to share the cost of the replacement fence, that owner applies to the municipality for a viewing.

Some people are of the opinion that the fence-viewers have no jurisdiction to arbitrate in these circumstances because there is already an adequate line fence between the two properties. On the other hand, subsection 4 (1) permits an owner to apply to have an existing line fence “reconstructed”, which could be interpreted as including the replacement of an existing fence. It appears that a reasonable case can be made that the fence-viewers have jurisdiction to arbitrate in such circumstances. If fence-viewers are required to make an award in this unusual type of situation, they will have to decide how the cost of the work is to be apportioned between the two owners. This issue is discussed in Part Four.

Question 5: What are the Responsibilities of the Clerk?

The clerk has a number of roles and responsibilities in connection with a viewing. Many of these are required by the Act while others are optional. Therefore, some of the following comments are intended only as suggestions. The clerk has a number of other responsibilities, such as sending out copies of the award, which are described later in this Guide.

To Encourage the Owners to Settle their Dispute Informally

Before scheduling a viewing, it is highly desirable, although not mandatory, that the clerk or another staff member talk to both owners, as most fencing disputes can be settled without a formal viewing. In many cases, an owner who approaches the municipality about a fencing dispute is not on speaking terms with the adjoining owner, and having a neutral party serve as a mediator by discussing the issues with both owners can often lead to a resolution. It is particularly important that the owners are made aware that if the municipality’s fence-viewers conduct a viewing, there may be costs to one or both of the owners for the work on the fence and, potentially costs of the proceedings.

A copy of the *Line Fences Act* can be found at www.e-laws.gov.on.ca.

To Ensure that Form 1 is Filled Out

As noted earlier, the use of Form 1 is mandatory. The clerk should make every effort to ensure that it is filled out completely and accurately. The clerk may also wish to ensure that a copy of the completed Form 1 is provided to the adjoining owner, although it is not mandatory. The advantages of this are:

- An accurate description of the two properties is essential for the formal notices sent by the clerk to both owners (Form 2) and to the fence-viewers (Form 3), and for the award (Form 4);
- Form 1 includes wording that requires an owner who applies for arbitration to certify that the boundary line between the two properties is not in dispute; and
- Providing a copy of the completed Form 1 to the other owner to make it clear who is applying for the arbitration. It may also encourage both owners to resolve their dispute without the need for a formal viewing.

To Provide Copies of Relevant Material

It is important that the clerk provide the fence-viewers with all documents that are relevant to the viewing. These include:

- Any fencing by-laws in force in the municipality, as the description of the fence in the award has to conform to such by-laws;
- The notice that was sent to the owners (Form 2) together with proof of service, in case one of the owners questions the validity of the notice; and
- The wording necessary to administer an oath, in the event that the owners and any witnesses are required to be sworn in.

When conducting a viewing, some fence-viewers attempt to persuade the two owners to reach an agreement, and avoid the need for them to make a formal award. It may be useful to provide the fence-viewers with a copy of Form 14 used for agreements between owners.

It may also be helpful to provide the fence-viewers with a copy of the *Statutory Powers Procedure Act*, which sets out certain procedural rules that are applicable to the conduct of a viewing by fence-viewers.

To Schedule the Viewing

Subsection 4 (2) requires the clerk to set the date and time of the viewing, which is held on the lands of the two adjoining owners. Subsection 4 (3) specifies that the date of a viewing must be “not more than thirty days” from the date that Form 1 is submitted to the clerk. This requirement was included to ensure that fencing disputes can be settled expeditiously, especially in the spring when property owners are anxious to undertake fencing work. If, however, the municipality has a by-law prohibiting proceedings during the winter months, the clerk cannot schedule the viewing until the end of the “prohibited period.” In this case, the thirty-day deadline would not apply until after the prohibited period was over.

To Arrange for the Attendance of Fence-Viewers

Subsection 4 (2) requires three fence-viewers to attend a viewing. If a municipality has appointed more, the clerk is responsible for designating the three that are to attend. Clerks can also designate one or more standby fence-viewers who can step in if necessary.

It should be noted that designating standby officials is not a common practice. However, having a standby fence-viewer can help avoid cancelling or rescheduling a viewing.

If a municipality has not appointed a sufficient number of fence-viewers, the clerk is responsible for advising council to do so. In order to meet the time limits set out in the Act, council may consider appointing staff members, the fence-viewers of an adjacent municipality, or the “citizen” members of one of its committees.

For example, one urban municipality that received its first-ever application for a viewing appointed the members of its Committee of Adjustment to serve as fence-viewers.

To Send Out Formal Notice of the Viewing

Section 4 requires the clerk to send notices of the viewing to the two owners (Form 2) and to the fence-viewers (Form 3). These notices must be served at least one week before the date of the viewing. Notice to the owners may be given by registered mail or by personal delivery. Notice to the fence-viewers must be given by registered mail (see Subsection 4 (3)).

To Meet with the Fence-Viewers Before the Viewing

Although not mandatory, it is advisable for the clerk to hold an informal meeting with the fence-viewers shortly before the date of the viewing. In some cases, it may be useful to include other staff members such as the chief building official or municipal law enforcement officer. Advice from the municipality’s solicitor may be needed if there are unusual legal issues.

At such a meeting, the procedures to be followed for conducting a viewing and the particular circumstances of the case should be reviewed with the fence-viewers. They should also be reminded that all three viewers must be present for the viewing to proceed.

To Ensure that the Fence-Viewers are Paid

The clerk should ensure payment of the fence-viewers fees by the municipality. Subsection 18 (2) states the fees for a viewing are to be paid after the appeal period for an award expires. Should there be an appeal, the fee should be paid after it has been dealt with by the referee or deputy referee.

Subsection 18 (2) also says that if the fence-viewers decide not to make an award or if they conduct a second viewing for the purposes of enforcing an award, their fees are to be paid when they have submitted either a certificate of default under subsection 12 (4) or subsection 13 (7), a determination with directions under subsection 13 (9), or a decision not to make an award under section 14. Enforcement issues are described in Part Six.

Part Three

Conduct of a Viewing

Part Three provides information and practical suggestions to fence-viewers on conducting viewings. Some of the information in this part is also intended for municipal clerks.

Part Three: Conduct of a Viewing

Part Three deals with:

- Postponing a viewing;
- Procedural issues at a viewing;
- Hearing evidence;
- Keeping a record;
- Preparing the award; and
- Sending out copies of the award.

This information is intended to provide practical suggestions based on issues and situations raised over the years. It is not intended as legal advice. Municipalities and fence-viewers should consult their own solicitor(s) if legal advice is needed.

In conducting a viewing, it is essential that the fence-viewers be open to the evidence they see and hear. They should not prejudge the outcome of the viewing or give the owners any indication their minds are already made up. It is also essential the fence-viewers be aware that the conduct of their viewing is subject to the provisions of the *Statutory Powers Procedure Act*. This statute establishes procedural rules that are relevant to a viewing (e.g., that each owner is entitled to be represented by counsel or an agent, to call and examine witnesses, and to conduct cross-examinations of the other owner's witnesses). This legislation can be found at www.e-laws.gov.on.ca.

Postponing a Viewing

Viewings must be postponed and rescheduled under the following circumstances:

Weather or Ground Conditions

Subsection 5 (1) of the Act states the clerk can postpone a viewing if “weather conditions or ground conditions make it impracticable” for the fence-viewers to conduct a viewing. In this event, the clerk is required to:

- Notify the owners and fence-viewers immediately, preferably by telephone or e-mail;
- Set a new date for the viewing, no more than fifteen days after the original date; and
- Provide notice of the new date to the owners (Form 2) and fence-viewers (Form 3) in exactly the same manner as the previous notice.

Viewings Prohibited During the Winter

Subsection 5 (2) permits viewings to be banned during the winter months in areas where snow conditions make it impractical. A local council may pass a by-law stating that no viewing (or other proceeding) is to be held between the 1st day of November and the 31st day of March of the following year, or during a shorter period between those dates. This means that if one owner applies for a viewing just before or during the “prohibited period,” the viewing has to be postponed until the expiry of the period.

Fewer than Three Fence-Viewers Attend

It is mandatory for three fence-viewers to attend a viewing. Should one of the fence-viewers cancel at the last minute, the fence viewers have no choice but to re-schedule the viewing and notify all parties. The clerk is then responsible for setting a new date and for providing notice to the owners and fence-viewers (Forms 2 and 3). Although the Act does not set a deadline in this case, the clerk should attempt to reschedule the viewing within fifteen days of the originally scheduled date.

Three fence-viewers must be in attendance at a viewing.

If a viewing has to be postponed because there are fewer than three fence-viewers in attendance, the municipality cannot charge the costs of the proceedings to the owners.

Procedural Issues at a Viewing

The following are examples of situations that may occur and possible resolutions that may be useful to fence-viewers who might find themselves in similar situations.

Only One Owner is in Attendance

If one of the owners (usually the one who did not apply for the viewing) does not attend, there is no need for the fence-viewers to stop the proceedings. The notice sent to both owners (Form 2) states that the viewing may proceed in the absence of one owner. Owners might deny they have been notified, so it is important that the fence-viewers have copies of Form 2 with them at the viewing, and evidence of how the notice was served.

In this situation, fence-viewers can knock on the door of the absent owner to advise them the viewing will be taking place, even though this is not required by the Act.

The only time the fence-viewers might consider adjourning the viewing is if they learn the absent owner has been away from home for some time and may not have received notice of the viewing.

One Owner Disputes the Boundary Line

As noted earlier, an owner who applies for a viewing is required to certify on Form 1 that the boundary line is not in dispute. If this is raised by an owner during the viewing, the fence-viewers have to make a judgment as to whether there is a legitimate boundary issue or whether the owner is simply trying to disrupt the viewing. The fence-viewers should ask the owner in question to provide some evidence, such as a survey, to back up his or her claim of a boundary dispute. In the absence of such evidence, they should proceed with the viewing.

If it appears there may be some basis to the claim, the fence-viewers have two options. The first is to proceed with the viewing and to put the onus on the dissatisfied owner to appeal the award on the basis of the boundary issue. This option has the advantage of moving the procedure forward.

The second option is to adjourn the viewing until the boundary issue can be sorted out and the viewing can be rescheduled.

Part or All of the Fence has been Constructed

The fence-viewers may find that one owner has already constructed the line fence as a pre-emptive action prior to the viewing. This can sometimes occur when the dispute is about the type of fence that is to be built. As noted earlier, fence-viewers have no jurisdiction to arbitrate in a situation where the work has been completed. In this case, the fence-viewers have no choice but to adjourn the viewing without making an award. This also applies if the fence-viewers find that one owner has already completed the repair or reconstruction of an existing line fence in its entirety.

If, however, the fence-viewers find that only part of the necessary work on a new line fence has been completed, they have to decide whether they can proceed. As noted earlier, if the dispute is about the type of fence and one owner has done sufficient work to predetermine the type of fence to be built, it would be reasonable to adjourn the viewing. If the amount of work done is minor, it would seem reasonable to proceed.

The Owners Do Not Want an Award

Sometimes fence-viewers arrive for a viewing only to be advised by the two owners that they do not want the viewing to proceed. This can occur when the owners have, for example, agreed:

- On the division of responsibility for the fence;
- They no longer want a line fence; or
- They have a boundary dispute that needs to be resolved.

In these situations, the fence-viewers have no option other than to adjourn the viewing. Subsection 14 (1) requires them to use Form 13 to explain why they cannot make an award, and to allocate the costs of the proceedings to the two owners.

Hearing Evidence at a Viewing

The ideal situation is one in which both owners attend the viewing, present their evidence in a reasonable and concise manner, and treat everyone with respect. The reality can be very different if the two owners are not on good terms. The following are some practical suggestions to help minimize problems. As noted earlier, fence-viewers should remember that the provisions of the *Statutory Powers Procedure Act* are applicable to the hearing of evidence by fence-viewers.

Hear the Owners Together

Ideally, each owner should have an opportunity to present his or her evidence with the other owner present to hear the evidence and respond to it. The fence-viewers should give both owners the opportunity to present their respective positions, even if some of the information presented is repetitive. The fence-viewers should also avoid participating in any debate or disagreement with either owner about the information being presented, nor should they give any indication they have already made up their minds on the issues being arbitrated.

If Only One Owner is Present

Often one owner does not attend the viewing. In this situation, the fence-viewers should hear the evidence presented by the owner who is in attendance. If the other owner has not made an appearance, the fence-viewers can terminate the viewing and proceed to consider their award.

Many fence-viewers, however, attempt to provide an opportunity for the absent owner to participate. They will check if the owner is at home and listen to any evidence the owner is prepared to provide. In this case, fence-viewers should ensure that both owners are treated equally. For example, once they have heard the evidence of the second owner, they should not return for another discussion with the first owner or accept any hospitality before leaving.

Hearing Evidence from Witnesses

Both owners are entitled to call witnesses to provide evidence. This can be very helpful at a viewing, especially if the adjoining owners are new to the area and their witnesses are long-time residents. The evidence of such witnesses can help to clarify the history of a fence, including which owner was responsible for which portion in the past. Either owner can call witnesses to present evidence and can examine the other owners (if they give evidence) and their witnesses. As a result, the material that is provided by the clerk to the fence-viewers should include the wording necessary to administer an oath since all witnesses should be sworn in.

Other Practical Matters

Fence-viewers should consider their own safety when conducting a viewing. For this reason, they should conduct their fence-viewings on the side of the fence line of the owner who applied for the viewing, unless the other owner invites them onto his/her property.

There have been instances of violent or unruly behaviour at fence-viewings. If this is a possibility, the fence-viewers can consider having a police officer accompany them.

Fence-viewers should also exercise patience in listening to the evidence of the owners and their witnesses. In some cases, evidence may become lengthy and repetitive. Any attempt by the fence viewers to bring matters to a close can lead to accusations of an unfair process by one or both owners. Fence-viewers should, therefore, permit both owners and their witnesses to tell their stories, even if this results in a longer viewing.

Keeping a Record

Although it is not absolutely essential for the fence-viewers to prepare formal notes on each viewing, it is a recommended practice for which the clerk might wish to provide forms. Such notes can be helpful to the fence-viewers in preparing the award or for providing evidence at an appeal hearing. It is therefore desirable that they prepare a brief written record of each viewing and not rely on memory. This is to avoid different recollections from fence-viewers about the reasons for their award at an appeal hearing.

The notes should include the names of the owners who attended the viewing and any witnesses. The major concerns of both owners should be recorded, along with any special factors raised, such as the history of the disputed fence. Any unique circumstances should be recorded, such as the nature of the terrain, the particular needs of the owners, and the nature of other fences in the locality. The reasons for the award should also be recorded, especially if the fence-viewers have varied from the fifty/fifty rule in dividing responsibility for the fence between both owners. This is particularly important in the event of an appeal, because fence-viewers are not required to provide reasons for their award in Form 4.

Preparing the Award

The fence-viewers do not need to rush their decision, especially if the situation is a complex one. In particular, they should avoid giving any verbal indication to the owners at the viewing as to what their decision might be. They should advise the owners that they will receive a decision in due course.

The fence viewers can subsequently meet at the municipal office or another convenient location to discuss their decision and to complete Form 4. The decision on the issues being arbitrated is the exclusive responsibility of the fence-viewers.

Ideally, the decision should be unanimous, with the award signed by all three fence-viewers in attendance. If an unanimous decision is not possible, subsection 8 (1) provides for an award to be signed by only two of the three fence-viewers who attended the viewing. If this occurs, it is particularly important for the fence-viewers to prepare notes on the reasons for their lack of unanimity in making the award.

Sending Out Copies of the Award

Once the award has been completed and signed by at least two of the fence-viewers, subsection 9 (1) requires them to take it to the clerk's office. The clerk is then responsible for sending certified copies of the award to the two owners and any occupants of the two properties by registered mail. Subsection 9 (3) says that copies of the award are deemed to have been received seven days after they are mailed. This provision is important in terms of the appeals procedure, explained in Part Five.

Registration of an Award

An award may be registered by an owner in the local land registry office, in which case it becomes a charge on the land. An agreement in writing in Form 14 may also be registered by an owner, with the same effect.



In Summary: Conduct of a Viewing

When conducting a viewing, the fence-viewers should:

- Be open to the evidence seen and heard at the viewing.
- Give both owners and their witnesses a full opportunity to present their evidence, even if the information presented is lengthy and repetitive.
- Treat both owners in exactly the same manner.
- If an unusual situation occurs during a viewing, do not hesitate to take a brief break to discuss it among yourselves or by phone with the clerk.
- If fewer than three of you attend or you find, for whatever reason, that you cannot make an award, adjourn the viewing immediately.
- Do not give a verbal decision at the end of the viewing. Wait until you have had an opportunity to prepare your award.
- Make some notes on key elements of the viewing, including the reasons for your award.
- Once you have prepared your award and at least two of you have signed it, deposit it with the clerk, who is responsible for sending certified copies to the owners and occupants of the two.

Part Four

The Fence-Viewers Award

Part Four focuses on the award of the fence-viewers (which is made via Form 4 after completion of the viewing) and raises a number of issues that the fence-viewers should consider in making their decision.

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The award is required to provide direction to the two owners on the:

- Matters to be considered;
- Location of the fence;
- Description of the fence;
- Division of responsibility;
- Start and completion dates; and
- Allocation of the costs of the proceedings.

Matters to be Considered

Subsections 8 (2) and 8 (3) require the fence-viewers to take the following matters into account when making their decision:

The needs and wishes of both owners: These can include the need for measures to contain various types of agricultural animals, children or dogs, or to provide privacy, sunlight or ventilation to a property.

The nature of the terrain: It may be more difficult to construct a fence on one portion of a boundary line because of rock outcroppings.

The benefit to both owners of having a line fence: Owners can forget the benefits of a line fence when they are in a fencing dispute. Reminding both owners of the benefits of a fence such as, provision of boundaries, privacy, sunlight or ventilation to a property, enclosure of animals and children, aesthetics, etc. can be noted in the decision.

The nature of other fences in the locality: This can be particularly relevant in residential areas, where one owner is requesting a fence that is completely out of character with other existing fences.

The fencing by-laws in force in the municipality: The award has to conform with any by-laws restricting the height of fences or the use of materials such as barbed wire, and any requirements for fences around swimming pools, dangerous locations, or other kinds of land use.

Other factors that they consider relevant: This can be any matter raised by one of the owners or by the fence-viewers.

Location of the Fence

If there is no line fence, the fence-viewers are required to specify in their award that the fence is to be located “upon the line between the lands of the adjoining owners,” as taken from the description of the lands provided in Form 1. If there is an existing fence in need of repair or reconstruction, this issue may not be as clear-cut. Many fences, especially in rural areas, are not located precisely on the boundary line. But if the two owners are content with the location, the fence-viewers should specify that the fence is to remain in its current location. Problems can arise, as discussed in Part Three, when one owner expresses concern about the location of the fence, claiming that it is not on the proper boundary line.

Subsection 8 (4) permits the fence-viewers to specify in their award that a fence is to be located on the land of one of the owners where, because of the “formation of the ground by reason of streams or other causes,” it is not practical to locate it on the boundary line. The legislation specifies that “such location shall not in any way affect the title to the land.” In this situation, subsections 8 (5) and 8 (6) authorize the fence-viewers to employ a surveyor to describe the location of the fence for their award, and the surveyor’s fees become part of the costs of the proceedings. This is the only case in which the fence-viewers are authorized to obtain the services of a surveyor. In all other cases, they are required to use the description of the lands provided in Form 1, when specifying the location of the fence in their award.

Description of the Fence

The fence-viewers are required to provide a description of the fence in their award. This can be as contentious as the division of the costs of the fence, so it should be given careful consideration.

The fence-viewers should make their description of the fence as detailed and specific as possible in order to minimize future misunderstandings and conflict. This is particularly important if both owners are being made responsible for a portion of the fence. The lack of detailed provisions in an award can result in ongoing conflict between the two owners. The following provisions are intended as examples only:

Length: If a fence is to be constructed only on certain portions of the boundary line (e.g., in the rear yards of two urban properties), and not on other portions (e.g., through swampy areas or woodlands in rural areas), the exact location (i.e., the precise starting and stopping points of the fence) should be described in the award.

Height: This is frequently a source of conflict between owners, especially where one owner wants a much higher fence than the other. The total maximum height, including any decorative materials or barbed wire at the top, should be specified in the award.

Materials: If the fence-viewers want to ensure that only new materials are used in the fence, this should be specified in the award.

Posts: Matters such as the distance between posts and measures to ensure stability at the end of fences, should be specified in the award.

Special Requirements: If the owners are concerned about who gets the “good side” of a fence, this should be dealt with in the award in a manner that is fair and equitable to both of them.

Painting or Staining the Fence: If the colour of the paint or stain is an issue between the owners, this should be dealt with in the award.

Division of Responsibility

The fence-viewers are required to determine how the responsibility for constructing, reconstructing or repairing a line fence is to be divided between the two owners. This includes responsibility for the future maintenance of the fence. Traditionally, this has been the most contentious issue for fence-viewers to deal with, as adjoining owners often disagree on this issue.

No Benefit: One owner may claim that he/she does not want or need a fence and that, if one is to be built, the adjoining owner should be made entirely responsible for it. This difference of opinion normally arises when one owner in a rural area has livestock and the adjoining owner does not, or when one owner in an urban area has children or large dogs and the adjoining owner does not.



Cannot Afford: One owner may claim he or she cannot afford to share responsibility for a fence and if the adjoining owner is determined to build one, he/she should be entirely responsible for it. This argument is sometimes put forward by owners who have just incurred major expenses moving to a new house or by owners who have limited financial resources. When faced with such a claim, it is difficult for fence-viewers to determine whether it is valid, or whether it is being put forward in an effort to avoid sharing the responsibility.

Ways to Determine Division of Responsibility

Fifty/Fifty Rule

The general rule for fence-viewers when making their decision is to make both owners responsible for half of the line fence between their properties. This rule has been in effect since 1979 when the *Line Fences Act* was amended to make it more “user friendly.” Under what is often described as the “right-hand rule,” the two adjoining owners would face one another at the centre of their common boundary line, and each would then agree to assume responsibility for the portion of the fence to the person’s right.

In implementing the fifty/fifty rule, the fence-viewers have two options:

Option 1: The first is to make each owner responsible for a “designated one-half of the fence”, which is then described in the award. This approach is most appropriate where both owners are able to work on their own.

Option 2: The second option is to make the owner who applied for the viewing (Owner A) responsible for the entire line fence, and to make the other owner (Owner B) responsible for reimbursing Owner A for half of the cost of the work, including half of future maintenance costs. The option is most appropriate where Owner A wants the fencing work to be completed as soon as possible. If Owner A has the skills necessary to do the fencing work, the fence-viewers can make Owner A responsible for doing it. If, however, neither Owner A nor Owner B has these skills, the fence-viewers can require the work to be undertaken by a contractor. A common practice, in such cases, is for the fence-viewers to require the owner who wants the work completed (i.e. Owner A) to obtain three bids, choose the lowest bid and divide it equally between the two owners.

If one of the adjoining properties is provincially-owned, subsection 24 (3) states that the fence-viewers cannot make the Province responsible for more than 50 per cent of the cost of the work in their award.

Varying from the Fifty/Fifty Rule:

Subsection 8 (1) authorizes fence-viewers to make an exception to the fifty/fifty rule if, “in the circumstances of the case,” they believe an equal division of responsibility would be “unjust”. In that event, they can divide responsibility for a line fence between the two owners in whatever manner the fence-viewers consider appropriate.

This is a complex issue because adjoining owners often have very different ideas about what is “just” when they have to underwrite the cost. The following are some examples of hypothetical situations in which fence-viewers might be justified in making an exception to the fifty/fifty rule.

One Owner Needs or Wants a More Elaborate Fence: This situation can arise in both rural and urban areas. A farmer may need a fence that is stronger than the standard page wire fences surrounding other farms in the locality to contain the type of farm animals that are being raised. An urban resident may need a fence that is considerably taller than the simple fences surrounding other properties in the locality to contain a pair of very large dogs. If fence-viewers are required to arbitrate in such cases, their award should specify the more elaborate fence be constructed. In such situations, the practice of many fence-viewers is to make both owners responsible for half of the cost of the simpler type of fence that would normally be constructed in that locality. They then vary from the fifty/fifty rule by making the owner who needs the more elaborate fence responsible for all of the additional costs incurred in constructing it.

One Owner has Not Completed Work on Half of a Common Line Fence: Fence-viewers are sometimes called out to deal with a situation where, for many years, two adjoining owners (A and B) have each accepted responsibility for a designated half of their common line fence. The fence now needs to be repaired or reconstructed, but only Owner A has done the necessary work to his or her half and Owner B has done nothing to the other half. As a result, Owner A has applied to the municipality for a viewing. In this case, the fence-viewers are dealing with only half of the line fence, as they have no jurisdiction to deal with the half that has already been reconstructed. In such a situation, it would be appropriate for the fence-viewers to vary from the fifty/fifty rule by making Owner B responsible for the entire half of the fence that needs to be reconstructed. The result of such an award is that both Owner A and Owner B would be made responsible for half of the total line fence between their properties.

One Owner Wants to Replace an Adequate Line Fence: This is a variant of the first example and reflects the fact that the use of lands is not static. A farmer who plans to convert to a different type of livestock operation needs a specialized type of fencing and therefore wants to replace the existing line fence. Similarly, an urban resident who plans to install a back yard swimming pool needs a fence that complies with the municipality’s by-law requirements and therefore also wants to replace the existing line fence. The adjoining owners in both situations have refused to share the cost of replacing the existing fences because they are suitable to their needs and are in good repair. As a result, the owners who need new fences have each applied to the municipality for a viewing. In this situation, it would be appropriate for fence-viewers to vary from the fifty/fifty rule by making an owner who wants to replace an adequate existing fence responsible for most or even all of the costs.

One Owner is Being a Nuisance: Owners who are not on good terms with an adjoining owner will occasionally use the Act to cause a nuisance for other owners. In one case, an owner asked the fence-viewers to require a fence to be constructed on a property boundary that ran through a private woodlot, where neither owner wanted a line fence. In another case, an owner asked the fence-viewers to require a fence be constructed on a property boundary, despite the fact that the adjoining owner had recently constructed a fence just inside the boundary line.

In such cases, it is appropriate for fence-viewers to vary from the fifty/fifty rule by specifying that, if the owner who is being a nuisance insists on such a fence, that owner will pay for most of it. Although the Act does not authorize fence-viewers to refuse to require a fence, this type of award will often cause the owner who is being difficult to cease his/her action.

One Owner Receives More Benefit: As noted earlier, this is a very difficult issue for fence-viewers to deal with since adjoining owners often disagree about which one of them receives more benefit from a line fence. Their positions are usually based on property use. If fence-viewers are convinced one owner does indeed receive more benefit than the other from having the boundary marked by a fence, the fence-viewers would be justified in varying from the fifty/fifty rule by making that owner responsible for more than half of the cost.

Before making such a decision, however, fence-viewers should recognize that both owners receive benefit from having their boundary marked by a line fence, regardless of current land uses. Fence-viewers also need to consider that a new line fence will last for a number of years. This means they should be careful about basing their award solely on current land uses and ownership, since these can change many times over the lifetime of the fence.

In this context, fence-viewers may wish to note the Ontario Federation of Agriculture's (OFA) policy, adopted by Board resolution in February 1984, that states: "The OFA believes that both property owners should be awarded a part of the cost of building and maintaining their line fence, regardless of one owner's perceived need for it, but the allocation of cost should be no greater than two-thirds, one-third."

Starting and Completion Dates

The Act requires the fence-viewers' award to specify the starting and completion dates of the work. The starting date can be a helpful reminder if the owners are doing the work themselves, instead of hiring a contractor.

It is absolutely essential that the fence-viewers specify the completion date in the award if both owners are being made responsible for doing a portion of the work. If the fence-viewers neglect to do so, the award cannot be enforced in the event that one of the two owners fails to do the work required. In such a situation, an award without a completion date is of no value.

Allocation of Costs to the Proceedings

Clause 8 (1) (e) requires the fence-viewers' award to specify the costs of arranging and conducting the viewing and how these costs will be divided between the two owners. These costs include:

- The remuneration and expenses paid to the fence-viewers;
- The administrative fees of the municipality, if the council has passed a by-law to establish such fees under subsection 17 (1); and
- The surveyor fees (only applicable where the fence-viewers have hired a surveyor under subsection 8 (5) to provide a legal description of a fence that is to be located other than on the boundary line).

If an award makes both owners responsible for half of the fence, it may be appropriate for the costs of the proceedings to be divided equally between the two owners.

However, this is a matter for the fence-viewers to decide based on the circumstances of the case.

If, for example, one owner has refused to co-operate, complicating the process, the fence-viewers could decide to make that owner responsible for a larger portion of the costs of the proceedings or even the total costs. Whatever the fence viewers' decision, it is important that all costs be paid by the two owners involved, and not by the taxpayers of the municipality.



In Summary: The Fence-Viewers' Award

In making their award, the fence-viewers should:

- Consider all of the relevant factors and circumstances of the case;
- Complete the award (Form 4) in its entirety and ensure that it is signed by at least two of them;
- Provide a detailed description of the fence;
- Not be wedded automatically to the fifty/fifty rule in every case;
- Be cautious about varying too much from the fifty/fifty rule except where it is genuinely warranted by the particular circumstances;
- Specify the date by which the work is to be started and completed; and
- Allocate the costs of the proceedings to the two owners.

Part Five

The Appeal Procedure

Part Five provides a brief explanation of the process for dealing with appeals from owners who are dissatisfied with an award.

Part Five: The Appeal Procedure

Section 10 of the Act establishes an appeal procedure, under which every appeal from an award of municipal fence-viewers is heard by a provincially-appointed line fence referee or deputy referee. The appeal hearing can be conducted in many places (e.g., a local municipality's office, a public library, an arena) but is usually conducted in a municipal office.

An owner who is dissatisfied with an award has fifteen days from the date of receiving a certified copy of the award to initiate an appeal. An award is deemed to have been received seven days after being sent by registered mail. Only the original award of the fence-viewers can be appealed.

How the Appeal Procedure Works

- The owner who wishes to appeal an award (Owner A) is required to file a notice of appeal in Form 5 with the adjoining owner (Owner B) by registered mail or personal service.
- Owner A is required to file a copy of this notice of appeal with the clerk, together with an affidavit of service of the notice in Form 6.
- Owner A is required to submit the required appeal fee to the clerk, payable to the Minister of Finance. Please refer to the Ministry of Municipal Affairs and Housing's website for the current fee amount at www.mah.gov.on.ca.
- The clerk submits copies of the award (Form 4), the notice of appeal (Form 5), the affidavit of service (Form 6), and Owner A's cheque or money order to:
Ministry of Municipal Affairs and Housing
Municipal Programs and Education Branch
777 Bay Street, 3rd Floor
Toronto, ON M5G 2E5
(416) 585-7296
- The Ministry forwards the three documents to the line fence referee who decides whether he/she or one of the deputy referees will conduct the appeal hearing.
- The referee sends a formal acknowledgement of the receipt of the appeal documents to the clerk which indicates who will be conducting the appeal hearing.
- The referee or designated deputy referee then contacts the clerk to establish a time and date for the appeal hearing and to provide administrative instructions.
- In accordance with the Act, the clerk is required to provide the notice of the appeal hearing to the owners by registered mail or personal delivery and to the fence-viewers by registered mail at least one week prior to the hearing.
- In accordance with the instructions of the referee or deputy referee, the clerk should also provide:
 1. A suitable room for the hearing to accommodate up to 15 people;
 2. A Bible or other religious text suitable for swearing oaths;
 3. Certified copies of the notice of the appeal hearing as well as an affidavit confirming the date, time and method of service, the award in Form 4, the notice of appeal in Form 5, and the owner's affidavit of service in Form 6;
 4. Any fencing by-laws in force in the municipality; and
 5. A survey extract from an assessment map or aerial photo outlining the properties and indicating the names of the owners, the lot and concession (or lot and plan), and north/south directions.
- At least one of the fence-viewers who participated in the viewing should attend the appeal hearing to provide evidence if called upon by the referee or designated deputy referee.
- The referee or designated deputy referee hears the appeal on the appointed day "and may set aside, alter or affirm the award." This decision is final.
- The municipality is responsible for providing all necessary support services at the hearing (section 28) including, if requested, typing up the appeal decision.
- The clerk is required to send a copy of the appeal decision by registered mail to both owners and to the Ministry of Municipal Affairs and Housing.

Once the arbitration procedure has been completed, the implementation of the award becomes the responsibility of the two owners. If, for example, they agree not to do the work specified in the award or to construct a different type of fence than specified in the award, they are entitled to do so provided the fence complies with the municipality's by-laws. It is important to note that the municipality is not required to ensure the award is implemented if the two owners decide not to do so.

Part Six

Enforcement Issues

Part Six provides information on the enforcement of a fence-viewers' award and on other enforcement issues.

Enforcement of an Award

The enforcement procedures set out in the Act can be utilized at the request of one of the two owners involved in a dispute. If, for example, one owner (Owner A) wants the award to be implemented and the other owner (Owner B) is unwilling to cooperate, Owner A can utilize the enforcement procedures, applicable to the following situations.

The Work Done by One of the Owners Does Not Comply with the Award

An award makes both owners responsible for constructing, reconstructing or repairing a designated portion of the fence by a certain date. Both owners complete what they believe to be the work specified in the award by the assigned date. Owner A, however, believes the work done by Owner B does not comply with the award. To determine whether Owner B has complied with the award in this type of situation, the fence-viewers are required to reconvene under section 13 of the Act.



Owner A is required to send a notice to Owner B by registered mail or personal delivery requiring Owner B to take action to bring the work into compliance with the award. If Owner B does not complete this work within two weeks, Owner A can apply to the clerk to have the fence-viewers reconvene to review the work that has been done. The clerk is responsible for setting a time and date for this re-viewing which, has to be held not more than thirty days from the date of Owner A's application. The clerk is also responsible for notifying the owners by registered mail or personal delivery in Form 2 and the fence-viewers by registered mail in Form 3, at least one week before the re-viewing.

If the fence-viewers find the work done by Owner B does not comply with the award, they are required, under subsection 13 (6) of the Act, to make a determination with directions in Form 12 specifying the action Owner B is to take to make the work comply with the award and the date by which it is to be completed. The clerk is responsible for sending a certified copy of this determination with directions to the owners and occupants of the lands by registered mail. If Owner B does not complete the work by the specified date, Owner A can then do the necessary work, and is entitled to enter Owner B's property for this purpose. The Act makes it an offence for Owner B to obstruct Owner A from entering Owner B's property in this case. Once the work has been done, Owner A can institute proceedings to recover the value of that work from Owner B.

If the fence-viewers decide that the work done by Owner B does comply with the award, they cannot make a determination with directions in Form 12. Instead, they must use Form 13 to explain the reasons for their decision and to allocate the costs of the proceedings to one or both of the owners.

One Owner Does Not Do the Work Specified in the Award

An award makes both Owner A and Owner B responsible for constructing, reconstructing or repairing a designated portion of the fence by a specific date. Owner A completes the necessary work by the completion date, but Owner B does not. To enforce the award, Owner A is required, under subsections 11 (1) to (5) of the Act, to send a notice to Owner B by registered mail or personal delivery requiring Owner B to obey the award. If Owner B does not complete the work within two weeks, Owner A can then do the necessary work, and is entitled to enter Owner B's property for this purpose. The Act makes it an offence for Owner B to obstruct Owner A from entering Owner B's property in this case. Once the work has been done, Owner A can institute proceedings to recover the value of that work from Owner B.

Many people think the fence-viewers are required to review before Owner A can do the work for which Owner B was made responsible for in the award. In fact, the fence-viewers are not required to become involved in this situation until Owner A has completed the work Owner B was responsible for.

Before starting any work in this situation, however, Owner A should ensure that he/she can provide evidence that Owner B did not carry out the work specified in the award. This can be done by taking dated photographs or by asking a friend or neighbour to act as a witness. Such evidence is crucial if there is disagreement between the two owners about what work was or was not done by each of them.

One Owner Does Not Pay His or Her Share of the Work

An award makes Owner A responsible for constructing, reconstructing or repairing the entire fence, and makes Owner B responsible for paying a portion of the cost of the work to Owner A. Owner A completes the necessary work but Owner B does not pay Owner A for his or her share. To enforce the award, Owner A is required, under subsection 11 (6) of the Act, to send a notice to Owner B by registered mail or personal delivery requiring Owner B to obey the award. If Owner B does not pay the amount owed within twenty-eight days, Owner A can start proceedings to recover this amount from Owner B.

Certification of the Amount Owed

To recover the costs of the work in all three situations, Owner A is required, under subsections 11 (7) to (10) of the Act, to apply to the clerk to have the fence-viewers reconvene. The clerk is responsible for setting a date and time for the re-viewing and for notifying the two owners by registered mail or personal delivery in Form 7, and the three fence-viewers by registered mail in Form 8. If one of the original fence-viewers is unable to attend, the clerk is required to notify another fence-viewer. These notices have to be served at least one week before the re-viewing.

If the fence-viewers are satisfied that Owner B has failed to obey the award, they are required, under subsections 12 (1) to 12 (4), to prepare a certificate of default in either Form 9 or Form 10 certifying Owner B's default and specifying the amount that is payable by Owner B to Owner A. The clerk is responsible for sending a certified copy of this certificate of default by registered mail to the owners and to any occupants of the lands.

If, however, the fence-viewers are unable to determine that Owner B has failed to obey the award, they cannot prepare a certificate of default. Instead, they must use Form 13 to explain the reasons for their decision and to allocate the costs of the proceedings to one or both of the owners.

If Owner B pays the amount certified by the fence-viewers to Owner A, the matter is completed. If, however, Owner B fails or refuses to do so, there are three possible ways Owner A can collect this amount, outlined below.

Collection of the Certified Amount

Collection in the Same Manner as Taxes

Owner A can apply in writing to the clerk to have the amount certified added to the collector's roll, in which case the Act requires the municipality to ensure this is done. This amount is then collected from Owner B in the same manner as taxes, together with interest at the same rate as unpaid taxes. Under this method of collection, Owner A receives the amount certified, with interest, when it has been collected from Owner B. Under this method the municipality does not receive the amount until it has been collected from Owner B.

An amount added to the collector's roll under subsection 12 (5) does not have the status of real property taxes for the purposes of the tax sales provision in Part XI of the *Municipal Act, 2001* and Part XIV of the *City of Toronto Act, 2006*. As a result, those tax sale provisions are not applicable to this situation.

Immediate Payment by the Treasurer

Owner A can apply to the treasurer of the municipality for immediate payment of the amount certified, but only if the council has passed a by-law permitting this. The amount is then paid to Owner A by the treasurer, and is added to the collector's roll and collected from Owner B in the same manner as taxes, together with interest at the same rate as unpaid taxes. Under this method the municipality does not receive the amount until it has been collected from Owner B.

An amount added to the collector's roll under subsection 12 (7) does not have the status of real property taxes for the purpose of the tax sales provisions in Part XI of the *Municipal Act, 2001* or Part XIV of the *City of Toronto Act, 2006*. As a result, these tax sale provisions are not applicable to this situation.

Action in the Small Claims Court (Subsection 12 (9))

Instead of applying to the municipality, Owner A can file a certified copy of the certificate of default (Form 10) and the original award (Form 4) with Small Claims Court. Once filed, the amount certified may be levied against the goods and chattels and lands of Owner B.



Part Seven

Forms

There are a number of forms that may be required to be completed, depending on the circumstances. The forms are available on the Government of Ontario Central Form Repository at www.forms.ssb.gov.on.ca.

Part Seven: Forms

Form 1: Request for Fence-Viewers

Form 2: Clerk's Notice to Parties (Dispute)

Form 3: Clerk's Notice to Fence-Viewers (Dispute)

Form 4: Award

Form 5: Owner's Notice of Appeal from Fence-Viewers' Award

Form 6: Affidavit of Service of Notice of Appeal

Form 7: Clerk's Notice to Parties (Certification)

Form 8: Clerk's Notice to Fence-Viewers (Certification)

Form 9: Certificate of Default (Work Not Done)

Form 10: Certificate of Default (Payment Not Made)

Form 11: Treasurer's Notice of Amount Owed to Municipality by Defaulting Owner

Form 12: Determination with Directions

Form 13: Decision of Fence-Viewers Where No Award, Certificate, etc., is Made

Form 14: Agreement

Form 15: Agreement (Where One Party is a Municipality or Local Board)

Appendix 1: Checklist for the Clerk

The answer to each question must be “yes” except for questions noted as “optional”.

Before Agreeing to Schedule a Viewing

- Is the applicant for a viewing the owner of one of the two adjoining properties and not a tenant? (See subsection 4 (1) of the Act)
- Has the applicant completed Form 1: Request for Fence-Viewers in its entirety before submitting it? (See subsection 4 (1) of the Act)
- Does the description of the lands in Form 1 appear to be “sufficient for registration in the appropriate Land Registry Office”? (See Form 1)
- Does the applicant want a line fence to be constructed or, if there is an existing line fence, is all or part of it in need of repair or reconstruction? (See subsection 4(1) of the Act)
- Is the boundary line between the two properties not in dispute? (See Form 1)
- Does the Act apply to both properties? (See Part Two of the Guide)
- If there is an unopened road allowance between the two properties, has the municipal council authorized a viewing to proceed? (See section 19 of the Act)
- Does the municipality have a by-law in place appointing at least three fence-viewers and setting their remuneration? (See section 2 of the Act)
- Have the owners made an effort to settle their dispute informally, without the need for a formal viewing by the fence-viewers? (Optional)

Scheduling a Viewing

- If there is a by-law prohibiting viewings during the winter, does the date of the viewing comply with this by-law? (See subsection 5 (2) of the Act)
- Does the date of the viewing comply with the requirement that it be “not more than thirty days” from the day that Form 1 was submitted by the applicant? (See subsection 4 (3) of the Act)
- Have the two owners been notified in Form 2 of the date, time and place of the viewing by registered mail or personal delivery? (See subsections 4 (2) and (3) of the Act)
- Have at least three of the municipality’s fence-viewers been notified in Form 3 of the date, time and place of the viewing by registered mail? (See subsections 4 (2) and (3) of the Act)
- Have the owners and fence-viewers been notified at least one week before the viewing? (See subsection 4 (2) of the Act)

Prior to the Date of the Viewing

- Have the fence-viewers been given copies of the completed Form 2 along with proof of service? (Optional)
- Have the fence-viewers been given copies of any by-laws that regulate fences in the municipality? (See subsection 8 (3) of the Act)
- Have the fence-viewers been given a copy of any by-law that establishes administrative fees for proceedings under the Act? (See section 17 of the Act)

- Have the fence-viewers been provided with the wording to administer an oath so that they may hear evidence from the owners and their witnesses under oath? (See section 7 of the Act)
- Have the fence-viewers been provided with a copy of the *Statutory Powers Procedure Act*? (Optional)
- Has the clerk or the designate met with the fence-viewers, together with any other relevant persons, to discuss the circumstances of the case? (Optional)

On or Immediately Before the Day Scheduled for the Viewing

- If it becomes necessary to postpone the viewing because of weather, ground conditions or any other reason, have the two owners and fence-viewers been notified by telephone or e-mail? (See clause 5 (1) (a) of the Act)
- If this occurs, is the the new viewing date no later than fifteen days after the postponed viewing, as required? (See clause 5 (1) (b) of the Act)
- Have the owners been notified in Form 2 of the new viewing date by registered mail or personal delivery? (See subsections 4 (2) and (3) of the Act)
- Have the three fence-viewers been notified in Form 3 of the new viewing date by registered mail? (See subsections 4 (2) and (3) of the Act)
- Have the owners and fence-viewers been notified at least one week before the new viewing date? (See subsection 4 (2) of the Act)

After the Viewing

- If the three fence-viewers who attended the viewing decided they had jurisdiction to make an award, have they completed their award in Form 4, signed by at least two of them? (See subsection 8 (1) of the Act)
- Have the fence-viewers deposited their award in my office, and have certified copies of it been sent to the two owners and any occupants of their lands by registered mail? (See subsection 9 (1) of the Act)
- If the three fence-viewers in attendance at the viewing decided not to make an award, have they completed Form 13 giving their reasons for this decision and specified how the costs of the proceedings are to be apportioned between the two owners? (See subsection 14 (1) of the Act)
- Have the fence-viewers deposited the completed Form 13 in the clerk's office, and have certified copies of it been sent to the two owners and any occupants of their lands by registered mail? (See subsection 14 (2) of the Act)

Appeal Procedure

- Have both owners been advised of their right to appeal the award? (Optional)
- Has one owner submitted a copy of a Notice of Appeal (Form 5), together with an Affidavit of Service of the Notice of Appeal (Form 6) to the other owner, and a cheque or money order payable to the Minister of Finance? (See subsection 10 (1) of the Act)
- Has the Notice of Appeal been submitted within 15 days of that owner having received a copy of the award, (i.e. no later than 22 days after the day the award was mailed)? (See subsections 9 (3) and 10 (1) of the Act)
- Has the owner who is appealing the award served the Notice of Appeal (Form 5) on the other owner by registered mail or personal delivery? (See subsections 10 (1) and (2) of the Act)

- Have copies of the Award (Form 4), Notice of Appeal (Form 5), Affidavit of Service (Form 6) and the cheque or money order been forwarded to the Ministry of Municipal Affairs and Housing? Please refer to the Ministry of Municipal Affairs and Housing's website for the current fee amount at www.mah.gov.on.ca. (See subsection 10 (9) of the Act)
- Has the clerk's office complied with the instructions of the referee or deputy referee by arranging a suitable room for the appeal hearing and by providing all required materials and documents? (See section 28 of the Act and Part Five of the Guide)
- Has notice been provided to the owners by registered mail or personal service and to the fence-viewers by registered mail at least one week before the hearing, in accordance with section 10 and the instructions of the referee or deputy referee? (See subsections 10 (1) and (2) and (3) of the Act)
- Have arrangements been made for at least one of the fence-viewers to attend the hearing to provide evidence, if necessary?
- After the hearing, has the clerk's office typed a copy of the decision of the referee or deputy referee, if requested to do so? (See subsection 28 (2) of the Act)
- Has a copy of the decision of the referee or deputy referee been sent to the two owners and to the Ministry of Municipal Affairs and Housing by registered mail? (See subsection 10 (9) of the Act)

Payment of the Fence-Viewers' Fees

- Have the fence-viewers' fees been paid at the end of the appeal period or, if an appeal has been filed, after a decision on the appeal has been made by the referee or deputy referee? (See subsection 18 (2) of the Act)

Appendix 2: Checklist for Fence-Viewers

Prior to the Viewing

- Have the fence-viewers been notified of the date, time and place of the viewing in Form 3 by registered mail at least one week before the viewing? (See subsections 4 (2) and (3) of the Act)
- Have the fence-viewers been provided with copies of the completed Form 2 along with proof of service? (Optional)
- Have the fence-viewers been provided with copies of any by-laws that regulate fences in the municipality? (See subsection 8 (3) of the Act)
- Have the fence-viewers been provided with copies of any by-law that establishes administrative fees for proceedings under the Act? (See section 17 of the Act)
- Have the fence-viewers been provided with the wording necessary to administer an oath, in case they hear evidence from the owners and their witnesses? (See section 7 of the Act)
- Have the fence-viewers been provided with a copy of the *Statutory Powers Procedure Act*? (Optional)
- Have the fence-viewers met with the clerk and any other relevant persons to discuss the circumstances of the case? (Optional)
- If the fence-viewers are not able to attend the viewing, have they advised the clerk of this as soon as possible? (See subsection 4 (2) of the Act)

At the Viewing

- Are three fence-viewers in attendance at the viewing? (See subsection 4 (2) of the Act)
- If fewer than three fence-viewers are in attendance, has the viewing been adjourned and have the clerk and the two owners been notified? (See subsection 4 (2) of the Act)
- If the two owners do not want the fence-viewers to make an award, (e.g. because they have come to an agreement), have the fence-viewers adjourned the viewing and notified the clerk and the two owners? (See section 14 of the Act)
- If the fence-viewers decide that they do not have jurisdiction to make an award, (e.g. because there is a genuine boundary dispute), have they adjourned the viewing and notified the clerk and the two owners? (See section 14 of the Act)
- If the fence-viewers find that one owner has constructed, reconstructed or repaired the entire line fence prior to the viewing, have they adjourned the viewing and notified the clerk and the two owners that they cannot make an award in these circumstances? (See subsection 4 (1) of the Act)
- If there is an existing line fence, are the fence-viewers satisfied that part, or all of it, is in need of reconstruction or repair? (See subsection 4 (1) of the Act)
- If an existing fence does not appear to be on the surveyed boundary line between the properties, are both owners willing to continue to have the fence in that location? (See Part Two of the Guide)

Conduct of the Viewing

- Have the fence-viewers examined the premise (i.e. the boundary line), preferably from the applicant's side of the fence? (See section 7 of the Act)
- If both owners are in attendance, have the fence-viewers given them an opportunity to listen to each other's evidence and to respond? (See Part Three of the Guide)

- Even if both owners are not in attendance, have the fence-viewers made every effort to treat them in exactly the same manner? (See Part Three of the Guide)
- Have the fence-viewers provided both owners and their witnesses, if any, a full opportunity to present their evidence? (See Part Three of the Guide)
- Have the fence-viewers been open to the evidence that they have seen and heard at the viewing? (See Part Three of the Guide)
- Have the fence-viewers heard the evidence and examined the owners and their witnesses, if any, under oath? (See section 7 of the Act)
- Have the fence-viewers considered the needs of both owners, the nature of the terrain, the benefit to both owners of a line fence, the nature of fences in the locality, and any other relevant factors? (See subsection 8 (2) of the Act)
- Have the fence-viewers kept a record of the viewing, including notes on such matters as the names of those in attendance, the positions of the two owners, and any other relevant circumstances? (See Part Three of the Guide)
- At the end of the viewing, have the fence-viewers advised the owners that they will receive the decision in due course, rather than giving them a verbal indication of what the decision will be? (See Part Three of the Guide)

After the Viewing

- Have the fence-viewers met soon after the viewing, perhaps with the clerk, to consider the contents of the award? (See Part Three of the Guide)
- Have the fence-viewers completed the award in Form 4 in its entirety and dealt with all of the following matters: (1) the location of the fence, (2) the description of the fence, (3) the division of responsibility for the fence, (4) the start and completion dates and (5) the apportionment of the costs of the proceedings between the two owners? (See subsection 8 (1) of the Act)
- Have at least two of the fence-viewers signed the award? (See subsection 8 (1) of the Act)
- If the fence-viewers believe that it would be unjust to make both owners responsible for fifty per cent of the fence, have they varied from the fifty/fifty rule in the award? (See clause 8 (1) (b) of the Act and Part Four of the Guide)
- If the fence-viewers varied from the fifty/fifty rule in the award, have they made notes on the reasons for this decision? (See Part Three of the Guide)
- If one property is provincially-owned, have the fence-viewers limited the province's responsibility for the work to 50%? (See subsection 24 (3) of the Act)
- If there is an unopened road allowance between the two properties, have the fence-viewers divided it equally between the owners? (See subsection 19 (1) of the Act)
- If there is a fencing by-law, does the description of the fence specified in the award conform to that by-law? (See subsection 8 (3) of the Act)
- If there is a by-law establishing administrative costs, have the fence-viewers included these in the costs of the proceedings, in addition to the fees of the fence-viewers? (See section 17 of the Act)
- If, because of streams or other causes, it is necessary for the fence to be located other than on the boundary line, have the fence-viewers employed a surveyor to provide a description of this location? (See subsections 8 (4) and (5) of the Act)
- If a surveyor has been employed for this purpose, have the fence-viewers included these fees in the costs of the proceedings? (See subsection 18 (1) of the Act)

- Have the fence-viewers deposited the award (Form 4) in the office of the clerk? (See subsection 9 (1) of the Act)

If No Award is Made

- If the fence-viewers made no award either because they did not have jurisdiction or because the owners did not want an award, have the fence-viewers completed Form 13 giving reasons for this decision and apportioning the costs of the proceedings between the owners? (See subsection 14 (1) of the Act)
- If there is a by-law establishing administrative costs, have the fence-viewers included these in the costs of the proceedings, in addition to the fees of the fence-viewers? (See section 17 of the Act)
- Have the fence-viewers deposited the completed Form 13 in the office of the clerk? (See subsection 14 (2) of the Act)

If The Award is Appealed

- Have the fence-viewers received notice by registered mail at least one week before the hearing, in accordance with section 10 and the instructions of the referee or deputy referee? (See Part Five of the Guide)
- Have arrangements been made for at least one of the fence-viewers to attend the hearing to provide evidence, if necessary? (See Part Five of the Guide)

Appendix 3:

How can Further Information be Obtained about the Act?

To obtain more information, please contact your local municipality or one of the following Municipal Services Offices of the Ministry of Municipal Affairs and Housing.

Municipal Service Offices

Eastern Municipal Services Office

Rockwood House
8 Estate Lane
Kingston ON K7M 9A8

General Inquiry: 613 545-2100 (Frontenac, Leeds & Grenville, Lennox & Addington)
Toll Free: 1 800 267-9438 (Ottawa, Prescott-Russell, Prince Edward, Stormont, Dundas/Glengarry, Kawartha Lakes, Renfrew, Peterborough, Haliburton, Hastings, Lanark, Northumberland)

Fax: 613 548-6822

Central Municipal Services Office

2nd Flr
777 Bay St
Toronto ON M5G 2E5

General Inquiry: 416 585-6226
Toll Free: 1 800 668-0230 (Dufferin, Durham, Halton, Hamilton, Muskoka, Niagara, Peel, Simcoe, Toronto, York)

Fax: 416 585-6882

Municipal Services Office – North (Sudbury)

Suite 401
159 Cedar St
Sudbury ON P3E 6A5

General Inquiry: 705 564-0120
Toll Free: 1 800 461-1193 (Cochrane, Algoma, Manitoulin, Sudbury, Parry Sound, Nipissing, Timiskaming)

Fax: 705-564-6863

Municipal Services Office – North (Thunder Bay)

Suite 223
435 James St S
Thunder Bay ON P7E 6S7

General Inquiry: 807 475-1651
Toll Free: 1 800 465-5027 (Thunder Bay, Kenora, Rainy River)

Fax: 807 475-1196

Western Municipal Services Office

2nd Floor
659 Exeter Rd
London ON N6E 1L3

General Inquiry: 519 873-4020
Toll Free: 1 800 265-4736 (Brant, Bruce, Chatham-Kent, Elgin, Essex, Grey, Haldimand, Huron, Lambton, Middlesex, Norfolk, Wellington, Waterloo, Perth, Oxford)

Fax: 519 873-4018

