



The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

Issues of *The Boundary Point* could focus on a single case comment, cover new trends, or offer a comparison of several recent cases. This e-newsletter is also a vehicle to announce new seminars, courses and professional CPD opportunities offered by Four Point Learning and other providers.

In this first issue, we consider the decision in *0759594 B.C. Ltd. v. 568295 British Columbia Ltd*¹.

Vertical Contour Line as Horizontal "Boundary"

Key Words: *land use regulation, development restriction, natural boundary, topography*

For every WalMart® store, there is a retail location that is established by a process of land development, and may involve such steps as a zoning application, and a host of other regulatory approvals that need to be implemented. Many of the needed approvals are identified through investigations and studies conducted by engineers, consultants and surveyors. It is therefore not surprising that the value of a site is tied to its development potential. So too, the ability of a buyer to realize that potential is often the subject of warranties given by a seller in a real estate agreement of purchase and sale.

In *0759594 B.C. Ltd. v. 568295 British Columbia Ltd.*, 2012 BCSC 1125, WalMart's real estate development arm, SmartCentres, had purchased a large tract of land for development as a shopping centre. When \$2 million in unpaid money due to the seller fell into default, the seller sued. In its defence, the buyer alleged damages that arose from its investigation of the site and its review of the availability of permits. SmartCentres argued that it discovered that the represented area available for development was considerably less than what was warranted by the seller.

¹ The full text of the *0759594 B.C. Ltd. v. 568295 British Columbia Ltd* case is available at: <http://canlii.ca/t/fs66m>

SmartCentres sued the seller by counter-claim for breach of warranties found in the real estate documents. The portion of the site that was expected to be developable was constrained by a need for permits and approvals that would not be forthcoming. In fact portions of the site were “frozen” for development as a result of the environmental considerations that applied below a certain elevation. The resulting area that remained being much less than what was represented prompted this litigation.

This was discovered after the seller had provided documents to be relied on by the buyer which the court described as,

[20] The Vendor Company provided SmartCentres with an information document titled “Salmon Arm, British Columbia, 60 Acre Commercial Development Opportunity” (the “Information Document”). The Information Document is a six page document which provides some basic information on the property.

[21] On the second page of the Information Document under the heading “Salmon Arm Lands Summary” there is a brief description of the 7 parcels comprising the Salmon Arm Property and then the following statement:

A topographical study has been completed by Browne Johnson Land Surveyors, a geotechnical study has been completed by Fletcher Paine Associates Ltd and Phase I and Phase II Environmental Studies have been completed by EBA Engineering. The Geotechnical study has confirmed that pre-loading will not be required for commercial development and the Environmental studies have confirmed that there are no areas of environmental concern related to the development of the Lands.

[22] The Information Document under the heading “Subject Properties Overview” includes the following statement:

Based on the topography of the site it is anticipated that the front half of the site would be suitable for commercial retail development with the balance of the lands suitable for residential development in some form (patio homes).

[23] The Information Document was provided to SmartCentres with a covering letter dated August 14, 2006, which included the following statements:

We have completed the topographical on the lands as well as Phase I & Phase II Environmental studies and a Geotechnical study.

The Phase II Environmental confirmed that there are no environmental areas of concern on the Lands and the Geotechnical report confirmed that we will not require pre-loading on the commercial lands, both of which are of course great news for us.

Part of the survey evidence relied upon identified the topography of the site but did not relate it to the line marking the extent of constraints imposed by “...the *Riparian Areas Regulation* which provided the following direction regarding the High Water Mark for Lakes”:

For ungauged lakes the high water is where the presence and action of annual flood waters area so common and usual and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself and includes areas that are seasonally inundated by floodwaters.

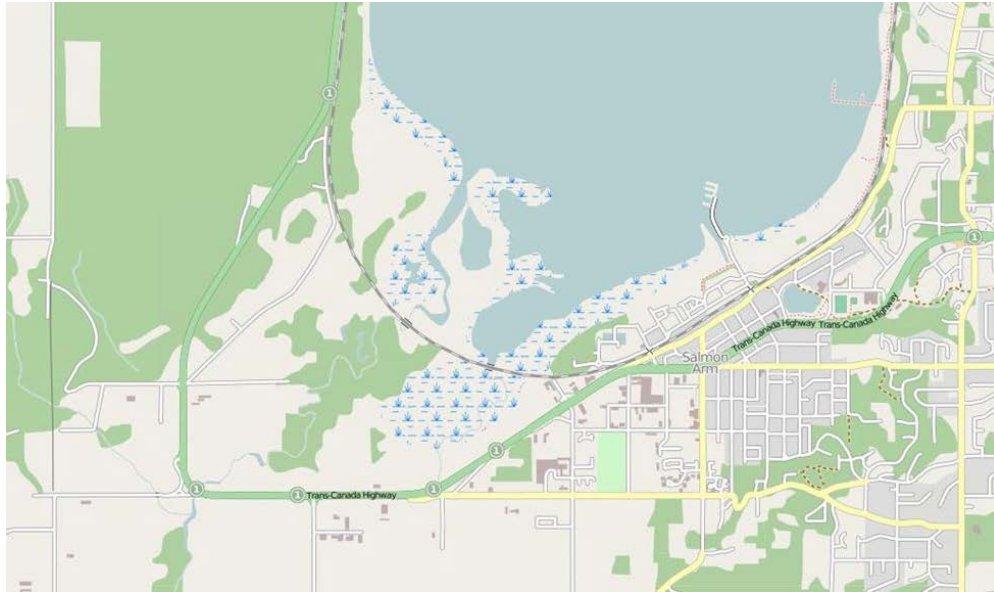
Where a lake is gauged and agencies have agreed on a calculated lake level, this value may be used as the HWM. The QEP needs to ensure that this agreed level includes those areas that are seasonally inundated more frequently than once in five years on average.

For reservoirs, full pool is considered the HWM.

The term “natural boundary” is used in surveys of lakeshores. The natural boundary does not always match the levels identified above for HWM for lakes and in some instances the surveys of natural boundary are out of date such that this line is below current water levels during much of the year. The definitions for HWM are provided such that a QEP can use these indicators to determine a more appropriate starting point for the SPEA on lakes.

This issue seems to arise often, since the limit of a development constraint defined by a contour line (dictated by topography), or a similar regulatory control line may not be a “legal boundary”. Nonetheless, the impact on the legal rights that can be enjoyed by an owner can be worth a lot of money – in this dispute, the amount exceeded \$3 million. Part of the reason why this is an interesting problem is because the “boundary” is not a property line – yet it is of keen interest to the client. There is no indication that the surveyor or engineer was made a party to this litigation – perhaps because the surveyor’s evidence was necessary and vital to the case. The location² can be appreciated in context here:

² Image of the location is from [Open Street Map](#) OpenStreetMap is *open data*, licensed under the [Open Data Commons Open Database License](#) (ODbL).



When reading the full text of the case, please consider the location topography³:



³ From Google® Maps: <http://goo.gl/maps/doo7c>

On closer inspection, the image shows existing retail outlets such as Rona®, Canadian Tire® and The Brick® appearing in close proximity to the site. One can imagine that the stakes were high. On closer reading, one realizes that the court had to determine the extent to which SmartCentres® had actually relied on the warranties as creating a duty on the part of the seller. Not only does this question arise in the context of what the seller did or did not know, it is also answered by the court in making these observations about the buyer's own research and due diligence:

[58] With respect to the conduct of the parties, it is clear that SmartCentres engaged its own experts to determine its riparian obligations. That is supported by the following evidence.

[59] On July 30, 2007, EBA Engineering prepared a preliminary RAR Assessment for SmartCentres. On May 6, 2008, SmartCentres received advice from the City of Salmon Arm that the July 30, 2007 RAR Assessment did not identify any setbacks from Shuswap Lake. SmartCentres then replaced EBA Engineering with a company known as "Stantec". On April 1, 2009, SmartCentres received a second RAR Assessment from Stantec. On June 2, 2009, Stantec produced a third RAR Assessment. On August 26, 2009, Stantec produced a fourth RAR Assessment. On September 11, 2009, there is correspondence from the Ministry of the Environment ("MOE") that the fourth RAR Assessment meets RAR reporting criteria.

[60] During this entire period, from July 2007 to November 16, 2009, while SmartCentres is receiving advice from its experts on the impact of riparian rights, there is no evidence that SmartCentres looked to the Vendor Company to redress its bargain. Had the bargain included warranties as broad as those claimed, why were these alleged warranties not raised by SmartCentres? The first time it is raised is November 17, 2009, immediately after SmartCentres has apparently defaulted on payment under the Purchase Agreement.

It is always interesting to reflect on the uses that a surveyor's work may be put to. In the hands of third parties, and for purposes of confirming the extent of development rights on the ground, there can exist significant risks – even if only to pay for the legal defence costs in ultimately proving that there was no liability. Judgment was ordered in favour of the seller in the sum of \$2million. SmartCentre's counterclaim was dismissed.

We rarely think of vertical elevation, or a topographic contour line as defining the horizontal location of a boundary. This may change as we encounter the horizontal definition of flood plains, ecologically regulated areas or land use controls being dictated by a vertical elevation. It may cause us to pause and reflect on the accuracy of that vertical data as well as its legal significance in defining horizontal position.

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