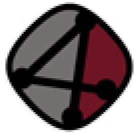

The Boundary Point
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CASE COMMENTARIES ON PROPERTY TITLE AND BOUNDARY LAW

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.

In this issue we discuss a case that should be of interest to land surveyors and real estate lawyers across Canada. Every few months we encounter a reported case that involves many aspects of boundary law and property rights. The trial decision in *Brydon v. Thom*[1] is just such a case, touching on the elements needed to establish an enforceable agreement affecting rights in land, riparian rights, and the nature of a natural boundary when erected by joint owners who have different understandings.

Riparian Rights, Access to Foreshore and an Ambulatory Boundary[2]

Key Words: *riparian rights, high water mark, intention, natural boundary, foreshore*

The opening sentence in *Brydon v. Thom* sets the unfortunate stage for what started out as the best of intentions between friends:

> The facts in this case provide a cautionary tale for anyone considering purchasing recreational property with friends.[3]

Yet, this warning may not be either correct or fair as a generalized statement. A reading of this decision will disclose that the underlying problems were not attributable to the purchase of recreational property with friends *per se*, but instead arose after giving little attention to legal formalities in purchasing what began as a land development opportunity with the shared use of

[1] *Brydon v. Thom*, 2014 BCSC 1466 (CanLII), http://canlii.ca/t/g8fsh

[2] Natural boundaries remain one of the most contentious and difficult topics encountered by land surveyors. Part of this challenge is due to the fact that case law, as a resource for finding guiding principles on this subject, tends to be jurisdiction-specific and fact-specific. In this issue the topic is selected in the decision *Brydon v. Thom* because it draws from a multiplicity of jurisdictions – tidal and non-tidal, high water mark and otherwise. This poses a danger in creating confusion but, nonetheless, the topic can be neither ignored nor avoided for this reason alone. Caution is recommended, as is a reading of the full decision itself.

[3] *Ibid.*, at para 1

certain choice waterfront property after the rest had ben subdivided. The property was located in central Vancouver Island, just northwest of Victoria, British Columbia on the shores of Lake Cowichan. After 16 days of trial time, the disputed issues and facts were described by the court in summary fashion as follows:

> The parties to this action were friends and neighbours in Victoria, British Columbia. In 1992 they jointly purchased lakefront property on Cowichan Lake near Youbou, British Columbia. Between 1992 and 1996 they shared the use of the property, built a dock as a means to access the lake and shared rental income from vacation rentals.
>
> Just prior to the time of the subdivision which was registered in September 1996, the plaintiffs say that they entered into an agreement with the defendants relating to the adjoining properties. The agreement related to the parties' respective share of the costs of subdivision, division of jointly held chattels, and their rights and responsibilities as neighbours, including view protection, fences and how they would share lakefront amenities including a walkway, ramp and dock. The plaintiffs were unable to produce a final copy of this agreement at trial. The copy that was introduced into evidence has "Draft" written in handwriting at the top of the document.
>
> The plaintiffs have brought this action since they argue that the defendants have breached the agreement and interfered with the plaintiffs' right of access to Cowichan Lake.
>
> The defendants deny that such an agreement was made and argue that although there were lengthy discussions over a number of months leading up to the subdivision, no such agreement was reached. The defendants say that there has never been a dispute about the joint ownership of the lakefront amenities; it is their respective rights as landowners that are in dispute. The defendants say that there is no interference with access to Cowichan Lake and that the plaintiffs have misstated the principles surrounding riparian rights.

This description could set the stage for a land surveyor's nightmare or it may instead serve as a "teachable moment".[4] The location can be identified as two parcels at the south end of Price Street and fronting on Lake Cowichan's North Arm as illustrated in Figure 1 below.

The problems between the parties arose after the subdivision of the lands bought together into 5 separate lots. As noted in Figure 1, the parties retained ownership of 3 of the lots and disposed of the other two. Clearly, waterfront amenities and continued use of these amenities were considered not only valuable – these defined the reasons for the original interest and

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[4] From: http://en.wikipedia.org/wiki/Teachable_moment

> "A teachable moment, in education, is the time at which learning a particular topic or idea becomes possible or easiest… The phrase sometimes denotes … that moment when a unique, high interest situation arises that lends itself to discussion of a particular topic. It implies "personal engagement" with issues and problems."

purchase of the property more than 20 years ago. Based on the court's description of the facts, what unfolded next was an unfortunate series of events once the dock had been constructed. In that respect, the dock and associated ramps and walkways were the key amenities which were the focus of this dispute. The judge's description of the dock's construction is telling:

Figure 1: Location of disputed area on Lake Cowichan[5]

> Dr. Vinnels testified that it was the parties' common intention to build a dock that served both families and that the first order of business was to locate it. He described in evidence how they did that: by pacing off the top of the bank on the lakefront, dividing it in two, and then pointing straight out at 90 degrees. In his evidence, he acknowledged that the process was a rudimentary one.
>
> The parties agreed to construct a three-part dock consisting of (1) a wooden walkway (occasionally referred to as the "wharf" at trial) running from the raised portion of the bank over a portion of the beach and terminating at a gazebo, (2) a ramp connected to the

[5] Mapping obtained from Cowichan Valley Regional District Map Viewer at: http://cvrd.geocortex.com/SilverlightViewer_1_9/Viewer.html?ViewerConfig=http://cvrd.geocortex.com/Geocortex/Essentials/CVRD3140/REST/sites/CVRD/viewers/CVRD/virtualdirectory/Config/Viewer.xml All rights reserved.

wooden walkway by a hinge that allowed it to adjust to changing lake water levels, and (3) a "float" located on the surface of the lake.

At trial both defendants testify that the original plan was to have the ramp and dock go half and half down the Property. This accords with common sense since ultimately the intention was to divide the Property. Sometime in late 1992 or early 1993, Mr. Thom drew onto a copy of a survey plan where he thought the wooden walkway would be located.

The construction of the wooden walkway began sometime in the first half of 1993. Dr. Vinnels did much of the labour (since he had the most time available) while Mr. Thom provided his cement mixer and showed Dr. Vinnels how to operate it and how to build the concrete forms. During the process of building the lakefront structure the defendants gave the plaintiffs some railway trusses as a wedding gift that were used as part of the construction.

Once the structure was completed, Dr. Vinnels obtained some logs to serve as "boom logs" to protect the structure from waves.

The dock was completed and useable by the end of the year 1995.[6]

The dock structures and related improvements can be seen in the aerial image at Figure 2.

Figure 2: The dock structure with its protective log boom is readily apparent[7]

Much analysis in this decision appeared to hinge on the interpretation of what "riparian" meant in terms of access to amenities along the waterfront. In considering this problem, the court

[6] *Brydon v. Thom*, *supra*, footnote 1, at paras 24 to 29

[7] From Google® maps. All rights reserved. Use is subject to: https://www.google.com/intl/en_ca/help/terms_maps.html

noted that the parties had framed the question for the court to decide as the second issue: "*Do the Plaintiffs, as Owners of Lot 4, have Riparian Rights of Access to Lake Cowichan and if so, where is the Location from which those Rights Begin?*"[8]

Citing *Corkum v. Nash,*[9] the court began this analysis by stating the basic proposition:

> There is no doubt that, as the owners of Lot 4 and Lot 5, the plaintiffs have riparian rights. Riparian rights are common law rights that attach to a piece of land which is in contact with a body of water for "a substantial part of every day in the ordinary course of nature"[10]

However, the plaintiffs' claim was based on the correctness of an interpretation of their riparian rights as meaning that useful physical access to the waterfront amenities was included. This interpretation was problematic for the court in that its earlier analysis had dismissed the enforceability of an unsigned "draft" contract and had also dismissed the plaintiffs' claim based on their legal riparian rights as extending beyond their natural boundary and into the waterfront area in front of the defendants' property. A wooden walkway served as a means of access for the plaintiffs to the dock in Cowichan Lake. The question therefore became whether this physical means of access included the area of the foreshore[11] of Cowichan Lake in front of the defendants' Lot 3, which was needed to be crossed by means of the wooden walkway.

When the parties had subdivided their jointly owned property in 1996, the survey plan showed a portion of the wooden walkway as located entirely on the defendants' Lot 3. This set the stage for interesting arguments about the significance of a natural boundary shown on a plan of survey. If the plan was conclusive, this could be the end of the plaintiffs' case. If the plan was incorrect, other options were available to correct the plan. The court considered these two options in the following extract, before turning to a third option…

> If the Title Plan is correct the plaintiffs have no right to use the portion of the walkway located on the defendants' lot as a means of access to Cowichan Lake; the frontage of the plaintiffs' property (Lots 4 and 5) would not extend far enough westward to provide them a right to access this portion of the lake.
>
> Both parties agree that the Title Plan is just a reflection or representation of what is actually on the ground and that when a title document refers to a natural boundary it is the location of that boundary in the field that is determinative of the bounds of the properties

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[8] *Brydon v. Thom*, *supra*, footnote 1, at para 92 and following

[9] *Corkum v. Nash* (1990)*,* 1990 CanLII 4127 (NS SC), 98 N.S.R. (2d) 364 (S.C.) at para. 44, aff'd 1991 CanLII 2461 (NS CA), 109 N.S.R. (2d) 331 (C.A.)

[10] *Brydon v. Thom*, *supra*, footnote 1, at para 92

[11] Foreshore is described in *Brydon v. Thom* as "the area between the high water and low water mark", citing *District of North Saanich v. Murray* (1975), 54 D.L.R. (3d) 306 (B.C.C.A.), para. 1

> described: “The registered instruments give title, but the location of the subject property is determined not by them but by what is on the ground”, *Hegel v. British Columbia,* 2011 BCCA 446 (CanLII), at para. 27.
>
> The plaintiffs say that the Title Plan does not properly indicate the natural boundary of the Property. Their arguments is that the edge of the lots, as defined by the natural boundary of Cowichan Lake, is further landward with regard to Lot 3 and 4 and lakeward with regard to most of Lot 5 and consequently that the frontage of their Lot 4 is greater than indicated on the Title Plan. If true, the majority of the walkways would be located on the foreshore and they would have the right to use them as a means of access to Cowichan Lake.
>
> The plaintiffs identify two possible explanations for inaccuracy of the Title Plan; either it was drawn up incorrectly or the lake has subsequently eroded portions of both the plaintiffs’ and defendants’ land. If the boundary changed due to erosion, they submit the new boundary applies whether the erosion occurred as a result of natural or unnatural causes.
>
> It is clear to me that this Court has the authority to amend the Title Plan if I am satisfied that it is incorrectly drawn or has changed due to erosion or accretion.[12]

The third option alluded to above was attributable to the ambulatory nature of water boundaries. Citing case law and an extract from *Survey Law in Canada*, the court continued its analysis as follows:

> Justice Sigurdson specifically addressed imprecisely drawn water boundaries on a plan in *Westwood Plateau Partnership v. WSP Construction Ltd.* (1997), 1997 CanLII 2085 (BC SC), 37 B.C.L.R. (3d) 82 (S.C.). At para. 92 he quoted the following passage from David W. Lambden “Water Boundaries - Inland” in *Canadian Council of Land Surveyors, Survey Law in Canada* (Toronto: Carswell, 1989) at p. 45-46:
>
>> The original plans of the Crown’s original surveys ... show the natural boundaries of lakes and rivers. An erroneous notion arose that the natural boundaries of land/water by the original survey were also “true and unalterable” in position like the land lines of the system ...
>>
>> The argument is taken out of context in the various Survey Acts and loses track of the essence of the Acts. Natural boundaries are not established by survey; they are objects of representation. They are monuments in their own right, as is emphasized by the priorities of evidence that give the determination of boundaries. Nevertheless, the argument is often raised and consequently has been considered by the courts which have, with a consistency to be expected, ruled that natural boundaries are paramount as monuments and that the

[12] *Brydon v. Thom*, *supra*, footnote 1, at paras 96 to 100

> water boundary is ambulatory in nature and not fixed by surveys. The Survey Acts do not override the common law about natural boundaries. [emphasis added]

This passage suggests that ambulatory water boundaries, because of their nature, will shift over time. I have also been referred to numerous cases involving the principle of accretion (for example: *Andriet v. Alberta,* 2008 ABCA 27 (CanLII); *Southern Centre of Theosophy Inc. v. State of South Australia,* [1982] 1 All ER 283). In these cases, riparian owners adjoined bodies of water owned by the Crown. Over time, the water receded, causing land to accrete in between the water and the riparian owners' land. The courts in these cases held that as riparian owners, these persons had a right to retain continued access to the water. As such, the courts made declarations that they now owned the portions of land between the water and the former boundary of the property.[13]

The analysis turned to a consideration of the correctness of the water boundary location as shown on the 1996 survey plan. To assist the court, each side called a licensed BC land surveyor to give a report and provide testimony as an expert. The plaintiffs' surveyor concluded that no portion of the walkway was on the defendants' Lot 3; it was located entirely on the "foreshore". This opinion was based on a determination of a high water mark boundary which was further inland than appeared on the 1996 subdivision plan. Interestingly, this was related to evidence from another expert witness called by the plaintiffs. That witness was a Senior Environmental Specialist and his approach to defining the location of the high water mark was

…based on the definition of high water mark from the *Riparian Area Regulation*, B.C. Reg. 376/2004 ("RAR"), a regulation of the *Fish Protection Act,* S.B.C. 1997, c. 21. RAR defines high water mark as:

> "high water mark" means the visible high water mark of a stream where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the stream a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself, and includes the active floodplain. [emphasis added]

This definition appears to be substantively the same as the definition of natural boundary in the *Land Act,* with the exception of the added words "includes the active flood plain". However, I am not convinced that the terms have the same meaning. First, I note that [the plaintiffs' surveying expert] in preparing his report does not give the terms the same meaning, and plots them in different places. Secondly, the RAR and the *Land Act* have

[13] *Ibid.*, at paras 101 and 102

> different goals, the RAR is concerned with preserving fish habitat, whereas the *Land Act* is concerned with property ownership.[14]

This analysis is helpful in understanding how the definition of a term in the context of certain legislation may not be a reliable basis for defining that same term for a different purpose and under a different statute.

In contrast, the defendants' expert concluded that the 1996 subdivision did portray the natural boundary correctly. The court accepted his evidence after noting that in

> …his report he notes that when searching for a natural boundary on the ground he looks for the following features: changes in colour, vegetation, soil or rock composition, or in profile of the site. However, he also notes that unnatural changes to the land can affect how he completes his survey:
>
> > Since the *Land Act* tells me that the natural boundary is created over a period of time defined as all ordinary years I must also consider whether the characteristics I am seeing have been impacted by conditions that are not the result of "all ordinary years". For example if the ground has been altered by the hand of man or if, after some research, I determine that an unusual natural event has occurred. If that is the case then I will need to rely on other information such as previous legal survey plans or aerial photography to assist me.
>
> [The defendants' expert's] testimony is that [the defendants] informed him that they have been clearing brush from the beach for a number of years. His opinion is that this interference with the natural vegetation would impact the relevance of any physical characteristics on the ground and that consequently the natural boundary was no longer discernible. He says this causes him to question [the plaintiff's expert's] opinion and the accuracy of his survey.[15]

In dismissing the plaintiffs' claim, the court continued its analysis with the following conclusion. When reading this extract, readers might be surprised at the importance attached by the court to the certification made by a land surveyor and found on the 1996 survey plan…

> I find [the defendants' surveyors'] evidence preferable. I do not think his credibility as a witness was undermined. In forming his opinion he was aware of the extent of unnatural alterations that had been done by the parties. He identified the features he would look at to form an opinion on the water boundary, and then went on to realize that the alterations that had been done made such evidence unreliable. In saying this I have considered the

[14] *Ibid.*, at paras 109 and 110

[15] *Ibid.*, at paras 118 and 119

> plaintiffs' submission that erosion is effected regardless of whether the change in boundary was caused by natural or unnatural causes. This is not what [the defendants' surveyor] is referring to here. He is saying that unnatural features in fact make the natural boundary itself difficult to find.
>
> Because the natural boundary is unclear the next best evidence is the Title Plan. The Title Plan contains the following statement signed by Gerald W. Lindberg, a British Columbia Land Surveyor:
>
> > I, Gerald W. Lindberg, a British Columbia Land Surveyor of the City of Duncan, in British Columbia certify that I was present at and personally superintended the survey represented by this plan and that the survey and plan are correct. The survey was completed on the 11 day of April, 1996.
>
> The onus is on the plaintiffs to show that the natural boundary is incorrectly reflected on title. In light of the certification of Mr. Lindberg and the conflicting expert opinion evidence, I am simply not prepared to accept that the natural boundary is different from what is depicted on the Title Plan.
>
> The consequence of my finding that the lot boundaries are as depicted on the Title Plan is that the portion of the steel bridge and the portion of the wooden walkway demarcated by the "No Trespassing" sign are located on the defendants' property. As such, the plaintiffs have no right to use those portions of the wooden walkway as a means of access to Cowichan Lake.
>
> I therefore dismiss the plaintiffs' claims arising from their alleged riparian rights…[16]

Implicit in this outcome is the limitation of extent to which riparian rights are spatially contained by the boundaries shown on an original plan. In British Columbia, as accretion extends the dry land comprising a "foreshore", and an ambulatory boundary (the high water mark) moves outward, the right of riparian owners to access this newly formed dry land appears to be settled. However, this right does not include the legal entitlement to cross the private property of other riparian owners – even if that crossing of others' land is the only practical or physical means by which the foreshore can be reached.

Editor: Izaak de Rijcke

[16] *Ibid.*, at paras 125 to 129

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[17] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

Second Annual Boundary Law Conference — Online Version

For the convenience of professionals who reside in northern Ontario or otherwise were unable to attend in person, this online version of the conference *Linking Parcel Title and Parcel Boundary: Improving Title Certainty*[18] held November 2014 includes the presentations, papers and slide decks from presenters as well as a forum for discussing ethical issues in the delivery of professional services. The purpose of the conference was to explore new paradigms in bringing certainty and predictability in the location of parcel boundaries on the ground.

Please mark the date of the *Third Annual Boundary Law Conference* in your calendar: Monday, November 16, 2015.

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[17] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

[18] The conference qualifies for 12 *Formal Activity* AOLS CPD credits.