



*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.

The distinction between title questions and boundary questions is not artificial: it is real in law and in academic analysis and in teaching of legal and boundary subjects. The distinction is defined in parallel to what makes the practice of law different from the practice of cadastral surveying. However, in practical terms and having regard to what is actually found on the ground, maintaining the distinction may lead to absurd results.

In this issue we consider a decision in the form of a consent Order in an appeal from a decision of the Deputy Director of Titles under the *Boundaries Act* (Ontario). The parties in the appeal had initially been Applicant and Objector in an application under the *Boundaries Act* - but the decision confirmed a boundary on the ground that left the Applicant with no water frontage when the water level in Georgian Bay had dropped to a low level. The consent Order disposed of an Appeal to Divisional Court by restoring a lake-ward boundary at the water's edge and adjusting the sideline boundary with the Objector.

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## Title and Boundaries at the Waterfront

**Key Words:** *natural boundary, accretion, apportionment, title, riparian*

Seldom does a decision in respect of title and boundary questions at the waterfront lend itself to a simple summary. Instead, there is usually an excess of detail in which the main facts are easily lost. An unreported decision<sup>1</sup> in Ontario from a tribunal under the *Boundaries Act* offers an opportunity to consider the relevant principles that are alive when seeking a resolution of competing claims to the waterfront. The setting for the dispute in *Krull v. MacDonald and Irwin*,<sup>2</sup> was a parcel of land at the south end of Roberts Island, a large island in Georgian Bay near Honey Harbour. Roberts Island had been subdivided into lettered lots by a plan of survey in 1907. A copy of a portion of the plan appears in Figure 1 with the site of the properties in dispute being found in Lot "I".

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<sup>1</sup> *Krull v. MacDonald and Irwin*, Order and Reasons in File B-1235 dated July 6, 2016, set aside by Order of Divisional Court, File No. 663/17 at Toronto, dated November 20, 2017.

<sup>2</sup> *Ibid*

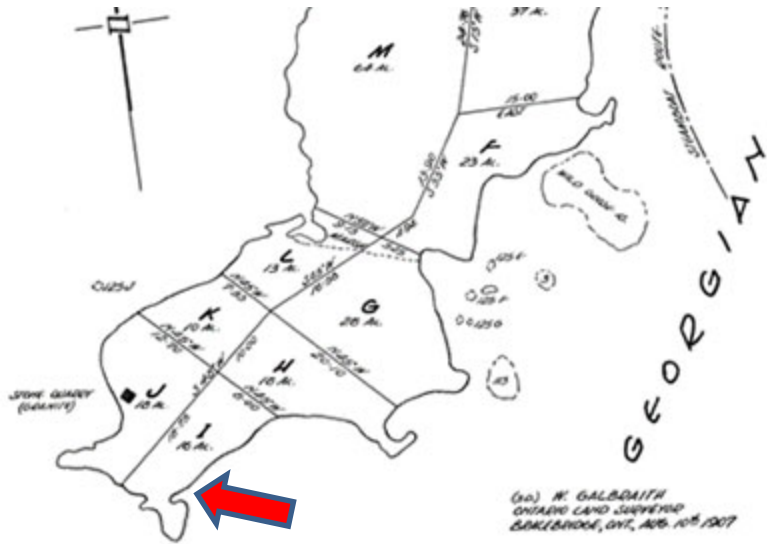


Figure 1: Partial copy of Plan T-784 with location of site in Lot “I”

Over time, Lot “I” was further subdivided by deeds containing metes and bounds descriptions. Records and deeds in the land registry office were converted to a qualified Land Titles status in 2007 and electronic mapping enabled the depiction of individual parcels of land on “Block Maps.” The Applicant’s property, designated as PIN 48014-0541(LT), appears in Figure 2 below.



Figure 2: Partial copy of Block Map showing PIN 48014-0541(LT) shaded in green.  
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Readers will appreciate the consequences of straight prolongation of the sidelines as eventually leaving no contact with the water. The problem is summarized in the Tribunal’s own order:

The dispute between the parties in this case revolves around the gradual and imperceptible recession of the water levels of Lake Huron in Georgian Bay giving rise to what it is claimed as being accreted land included in the extent of the applicants' lands.<sup>3</sup>

Water levels in the Great Lakes, of which Georgian Bay is a part, fluctuate many feet and the effect at times can lead to submerged areas emerging as dry land and *vice versa*. This is known as dereliction and diluvion respectively and the two operate at law in the same manner as accretion and erosion. The latter (accretion and erosion) are the result of soil being deposited or removed without a need for a change in water level whereas the former (dereliction and diluvion) are the result of changes in water level. In *Krull v. MacDonald and Irwin*, the presence of dry land in front of the upland parcels owned by the parties was the result of extraordinarily low water levels in Lake Huron in recent years and what first emerged as rock islets from the water, came to be attached to the upland parcels as an uninterrupted expanse of rocky dry land. An image of the waterfront can be seen in Figure 3, together with the placement of boardwalks over the newly emerged dry land to reach docks in open water further out.



*Figure 3: 2013 aerial photography showing exposed dry land at the waterfront with boardwalks and docks.<sup>4</sup>*

Apportionment of the dry land added to the fronts of the two neighbouring parcels became an obvious task for the Tribunal to resolve – but only after first determining the entitlement to the dry land at the waterfront. A partial copy of the survey plan submitted in support of the

<sup>3</sup> Decision in File B-1235 dated July 6, 2016, at p. 2

<sup>4</sup> From: District Municipality of Muskoka Webmap at: <http://map.muskoka.on.ca/Exponare/RestPublicApplication.aspx> All rights reserved.

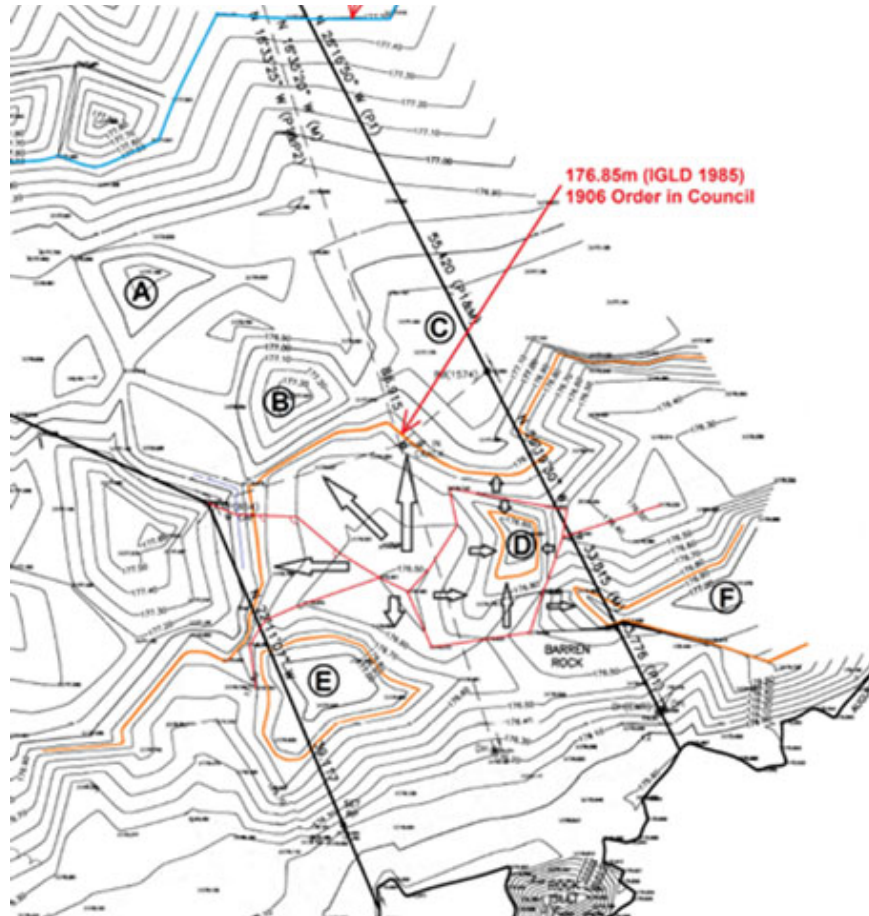
application under the *Boundaries Act* appears in Figure 4. The image has been annotated with yellow to illustrate the two approximate lines of the water's edge when the property was first patented, and the current water's edge in 2014.



Figure 4: Annotated partial copy of BA Plan<sup>5</sup>

At this point, history becomes relevant to answering questions of title to the rock islets that were identified as having emerged first from the waterfront when water levels had been much higher. The tribunal identified these small rock islets by letters “A” through “F” on a marked up portion of a topographic survey of the waterfront. This survey is attached to the Tribunal’s Reasons for Decision and appears below at Figure 5.

<sup>5</sup> From: Plan of Survey in MGS File B-1235, dated January 15, 2014, by Chester Stanton, OLS. Consent to reproduction is gratefully acknowledged. All rights reserved.



*Figure 5: Annotated copy of topographic survey<sup>6</sup> of the waterfront showing rock islets A through F and the red lined location of the water's edge at different points in history based on the IGLD 1985 datum.*

As a result of earlier treaty making with First Nations, jurisdiction over islands in Georgian Bay at this location had been transferred by Order in Council to Crown Canada in 1906 and this was a consideration for the Tribunal in approaching its analysis of the two central issues that were stated as:

The first issue to be determined is whether the rock formations identified as areas A through F on Exhibits 14 and 32, further illustrated on Appendix "B" and "C" attached to these Reasons, once submerged at high water level and then re-emerged with the lowering of the water level are, and always have been, part of the extent of the applicants' lands.

Once the first issue is resolved, the second issue is to determine the apportionment of the land that has attached to the applicants' lands designated as PIN 48014-0541(LT) as a result of the recession of the water levels of Lake Huron.<sup>7</sup>

<sup>6</sup> From Reasons for Decision in MGS File B-1235 dated July 5, 2016, at Appendix "B"

The existence of the rock islets lettered “D” through “F” as distinct and separate parcels that were separated from the mainland led the Tribunal to conclude that these entities – even as they grew and eventually merged with the upland as the water level dropped to today’s elevation – remained in a separate Crown title and did not form as accretions to the upland parcel by dereliction. Of course, as a direct consequence, this meant that the upland owner (*Krull*) had lost riparian status for its lands; the Crown owned land at the waterfront separated their upland title from the water. Although the Reasons for Decision make reference to some authority for this proposition, it meant that the Plan of Survey in Figure 4 above would need to be changed. The Tribunal concluded,

...a riparian parcel may, in certain circumstances, be cut off from water and therefore cease to be riparian.<sup>8</sup>

The Tribunal’s search for answers to apportionment principles in the context of an intervening Crown-owned area along the waterfront made for an especially complex situation. Again, extensive references to case law and authorities were made in canvassing the principles to be applied. After quoting from decisions in *Andriet v. Alberta* and *Paul v. Bates*, the Tribunal concluded:

Strictly speaking, these cases dealt with claims to accretion when the accreted land is simultaneously occurring in front of adjoining properties. As there are no guidelines or statutory provisions directing how the accretion is divided among adjacent riparian owners, these cases simply provided a series of common methods to divide up accreted land and with the intention that the selected method would best provide an equitable division of the accreted lands. Equity is the accepted principle in these cases.

What is contemplated for application as “principles” relied upon by [the Applicants’ surveyor], are, in fact, simple mathematical methods that should be applied to specific circumstances. In the case before me the facts are different: with the lowering of the water, the extent of the accreted land and the proper allocation of such to the upland are influenced by the location of areas A to F at the time of the 1906 OIC. I conclude that the physical environment which prevails along the applicants’ land does not appear to have been made subject to such detailed consideration by [any one of the land surveyors giving evidence].<sup>9</sup>

The Tribunal concluded that it had no jurisdiction to make an Order awarding title to islets marked “D”, “E” and “F” and explained,

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<sup>7</sup> From Reasons for Decision in MGS File B-1235 dated July 5, 2016, at pages 18-19

<sup>8</sup> *Ibid.*, at page 24

<sup>9</sup> *Ibid.*, at page 27



...the provincial Crown is the “owner” of all these areas as long as they are part of the bed of Lake Huron and for as long as they are covered by water but the legal effects of such rock formations becoming slowly submerged and then re-emerged from the lake bed over time are not very clear. I found no Canadian legal guidance applicable to the facts under my consideration. The tribunal has no jurisdiction to make a determination of ownership/jurisdiction nor does it have any authority to award any land to the applicants that they do not already own.<sup>10</sup>

In Figure 6, a drawing of the final determination of the boundary at the waterfront, and as between the parties, can be found marked on a portion of the topographic survey. This result, that the Applicants’ title was no longer riparian, also meant that the prospect of converging property boundaries would not need to be addressed. Presumably, if the areas labelled as “D”, “E” and “F” *had been* found to be accretions to the upland parcels, then by similar analysis, the upland title of the Applicants would have lost their riparian status.

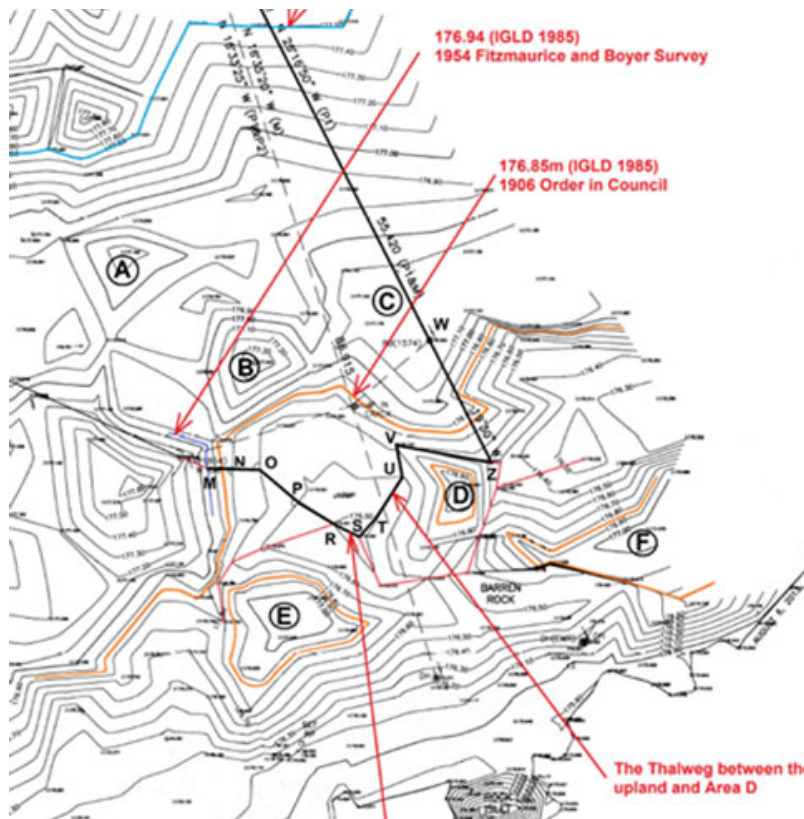


Figure 6: Confirmed boundary locations on the ground as referenced to features on the annotated Topographic survey.<sup>11</sup>

<sup>10</sup> *Ibid.*, at page 29

<sup>11</sup> From Reasons for Decision in MGS File B-1235 dated July 5, 2016, at Appendix “C”

The Applicants appealed the decision of the Tribunal to Divisional Court under the Act.<sup>12</sup>

The appeal was ultimately settled by a consent Order that directed the Deputy Director of Titles to confirm and accept the boundaries under application as shown on a Plan of Survey attached as a Schedule to the Order. Figure 7 is a partial copy of the survey attached to the consent Order.

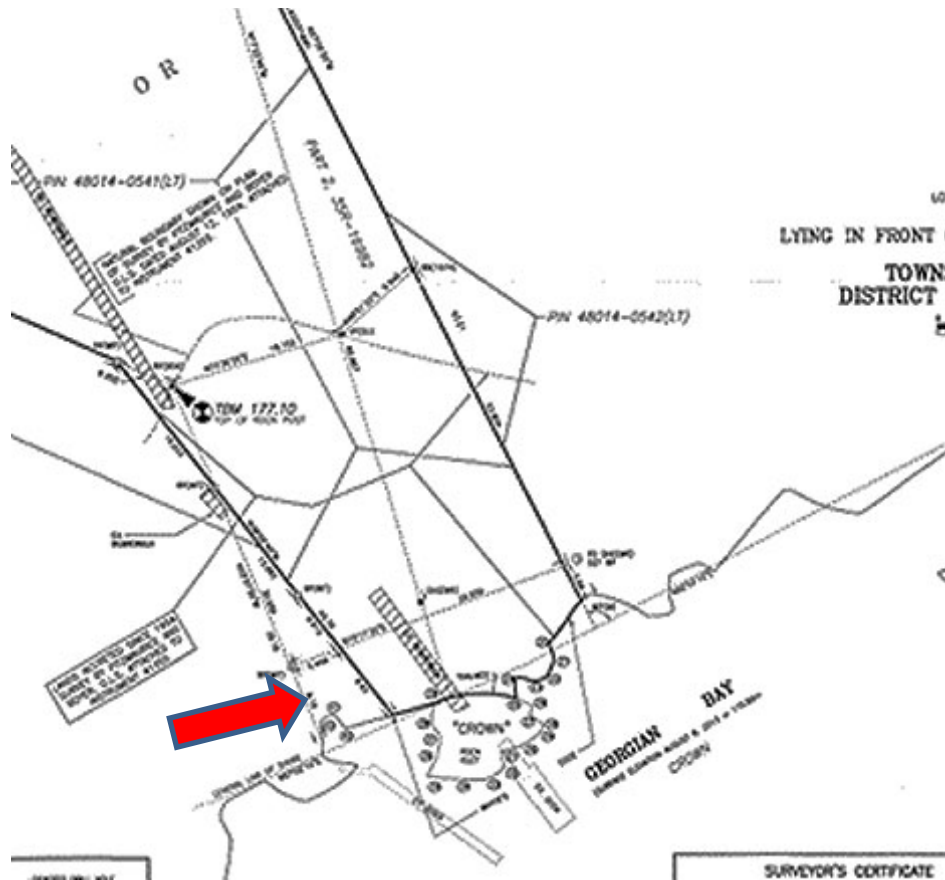


Figure 7: Partial copy of survey attached to Order showing point of deflection from original line under application at red arrow.<sup>13</sup>

A comparison of the survey as first submitted (illustrated above in Figure 4) and the version of the survey as attached to the appellate court Order in Figure 7, discloses a shift in the direction

<sup>12</sup> Section 12(1) allows for an appeal by a party under the *Boundaries Act*, RSO 1990, c. B.10, to Divisional Court. The jurisdiction of the Court on an appeal is found in section 12(2) and allows the Court to “decide the matter on the evidence before it or direct the trial of an issue or may dismiss the appeal or order that the survey and plan be amended and confirm the location of the boundary or boundaries as shown on the amended plan.”

<sup>13</sup> From: Plan of Survey dated August 17, 2017, and attached to Divisional Court Order in File No. 663/17 at Toronto, dated November 20, 2017, by Chester Stanton, OLS. Consent to reproduction is gratefully acknowledged. All rights reserved.



of the line between the parties as it approaches the water over the accretions. The red arrow shows the line having been positioned further northeast.

However, the more significant difference between the location of boundaries shown on the plan at Figure 7 and what was confirmed by the Tribunal at Figure 6 is the inclusion of all of the 6 rocky islets as part of the accreted lands. On this point, both parties could presumably agree – and neither Crown Canada nor Crown Ontario had expressed any opposition to the evidence available to the Tribunal on this point, or before the Court.

The indirect effect of the consent Order was to make a determination of title to the waterfront for both owners and to implement a negotiated settlement of the boundary between them across the accretions.

*Editor:* Izaak de Rijcke

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## **Cross-references to *Principles of Boundary Law in Canada***

Chapter 8 in *Principles of Boundary Law in Canada* deals with Natural Boundaries and the division of accretions is addressed at page 352 and thereafter. The example found in *Krull v. MacDonald and Irwin* and discussed in this issue of *The Boundary Point* advances the insights needed for practical solutions in this difficult area of real estate law and cadastral surveying.

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## **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.<sup>14</sup> 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.

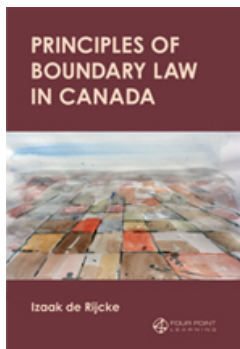
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<sup>14</sup> Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's [Registered Provider Guide](#) for Professional Surveyors in Canada. 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.

## Fifth Annual Boundary Law Conference – Postponed

This year's conference [Waterfront Properties in Ontario: Best Practices for Reducing Ownership Conflict](#) – to provide clarity to a conflicted topic and to establish a broad consensus on emerging best practices to reduce conflicts among stakeholders, mitigate the risk for professionals, and minimize uncertainty for members of the public – is undergoing a re-set in terms of resources and the issues and positions from different professional perspectives. A road map – a *common ground* framework – is needed to problem-solve waterfront ownership and boundary issues. To that end, an expanded group of presenters will be participating in the development of this road map with the view of refocusing their contributions accordingly. We are almost ready to announce the new date, with an enriched agenda in the coming week or two. You will be notified shortly!

### *Principles of Boundary Law in Canada*



In the context of (1) the complex and ever-evolving nature of boundary law, (2) the challenges of doing legal research in this area, and (3) the constant interplay between land surveying practice and common law principles, land surveyors would benefit from a current reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable. See [Principles of Boundary Law in Canada](#) for a list of chapter headings, preface and endorsements. You can mail payment to: **Four Point Learning** (address in the footer of the first page of this issue of *The Boundary Point*) with your shipping address **or** pay online



(NB: A PayPal account is not needed to pay by credit card.)



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