



*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.

Waterfront property owners are generally vigilant in making sure that the riparian rights associated with their ownership are maintained. Of the various riparian “right” types that make up these incidents of ownership, there is included the right of access. But “access” is a right that is easier stated than it is applied in all circumstances. Are there boundaries to rights of access? Does access mean just “touching” water? Does it mean access to navigable deep water and, if so, how deep is deep enough? Does the right of access mean access from each point along the waterfront? In *Day v. Valade*,<sup>1</sup> the Supreme Court of Nova Scotia recently considered these questions and offers some guidance on how to approach answers.

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## Do Riparian Rights of Access Have Boundaries?

**Key Words:** *access, riparian rights, navigation, obstruction, nuisance*

The incidents of riparian ownership arise at common law from the fact of a parcel of land being in contact with a body of water. Of interest to land surveyors in particular, the question of riparian access may be perceived as a right belonging to the upland owner and therefore causing riparian boundaries to move so as to ensure that contact with water is maintained.

The rights of a riparian owner are listed in *Water Law in Canada – The Atlantic Provinces*,<sup>2</sup> in this manner:

- the right of access to the water;
- the right of drainage;
- rights relating to the flow of water;
- rights relating to the quality of water (pollution);
- rights relating to the use of water; and
- the right of accretion.

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<sup>1</sup> *Day v. Valade*, 2017 NSSC 175 (CanLII), <http://canlii.ca/t/h4j1d>

<sup>2</sup> La Forest, G.V., *Water Law in Canada a – The Atlantic Provinces* (1973), at p. 201

It is the first riparian right of “access” to the water that was at issue in the recent Nova Scotia decision in *Day v. Valade*.

The court offered a summary description of the problem which had given rise to this dispute:

Rocky Lake is located near Bedford, in the Halifax Regional Municipality. It is irregular in shape and bounded by a public highway, railway right of way, and forest. As its name would imply much of its shoreline is rocky with various sizes of rocks and boulders in areas of shallow water.

There is residential development adjacent to Rocky Lake. Some homes have water access which permits recreational use such as boating, fishing, and swimming. A number of homeowners have built fixed and floating docks to facilitate these activities.

[The Valades] have lived on Rocky Lake since 1996. The water in front of their property is very shallow with a number of exposed rocks which makes swimming and boating near the shore difficult. As a result, in 2000 they decided to build a wharf and floating dock from the shore of their property. The Valades made applications to the Nova Scotia Departments of Natural Resources and Environment as well as Fisheries and Oceans Canada for construction approval. The sketch which accompanied these applications indicated that the wharf and dock would extend 45 feet into Rocky Lake.

The Valades received permission from the provincial and federal governments to install the wharf and dock as proposed, provided that it could only be in place from June 1st to September 15th of each year.

Mr. Valade first installed the wharf and dock in 2000. Because of the presence of large and uneven rocks in the planned location he decided to move it further west. In doing so he extended the length in order to reach water that was at least five feet deep, which was the minimum depth he preferred for the swimming and boating activities which he intended to undertake. The result was a wharf and floating dock system which was 57 feet in length.

The Valades have put out the wharf and dock most summers from 2000 to date.<sup>3</sup>

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<sup>3</sup> *Day v. Valade*, 2017 NSSC 175 (CanLII), at paras. 1 to 6



*Figure 1: Wharf and floating dock system described as 57 feet in length.<sup>4</sup>*

The dock described by the court can be easily seen in Figure 1; it projects from the Valade waterfront into Rocky Lake a sufficient distance so as to clear the rocks and shallow water closer to shore

As noted, the permit obtained from government authorities required that the dock could only be in place from June 1st to September 15th of each year. As expected, an image of the same site outside this

window of time shows no dock in place in Figure 2.

*Figure 2: Wharf and floating dock system removed for most of the year.<sup>5</sup>*

Problems arose in 2012 when the Days purchased neighbouring property to the east. Again, the court gave a succinct description of the circumstances that lay at the heart of this dispute:

In September 2012 [the Days] purchased the home just to the east of the Valade property. Their shore frontage is a small inlet which they have named Huckleberry Cove. As with other owners, they use Rocky Lake for recreational purposes and, in particular, sailing their small boats. The Valade wharf and dock was not installed in 2013 or 2014, and so the first time the Days saw it was the spring of 2015. They were not happy because they felt it interfered with their access to the main part of Rocky Lake.



The Days complained to the Valades that **the wharf and dock crossed the line created by extending the common property boundary into Rocky Lake. They said it infringed their right to access Rocky Lake and affected the use and enjoyment of their property.** The Valades

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<sup>4</sup> From Google Maps. © Google Inc. All rights reserved

<sup>5</sup> From Bing Maps. © Microsoft Inc. All rights reserved

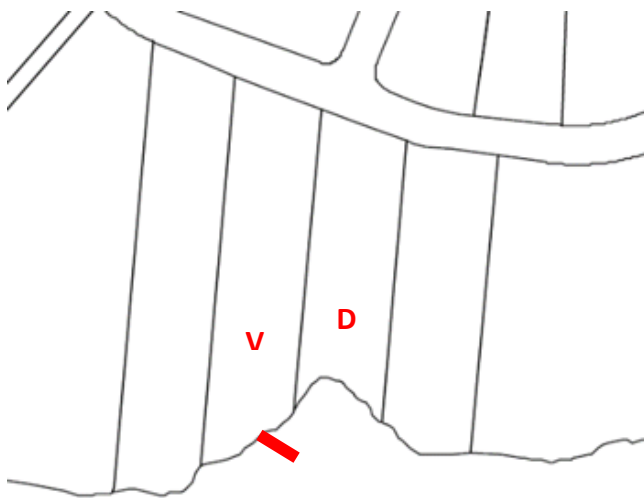
insisted that they were allowed to place the wharf and dock in that location. The Days have brought this litigation seeking an order enforcing their rights and requiring the removal of the wharf and dock.

As part of their evidence the Days presented a plan prepared by [a surveyor], who is a professional engineer and land surveyor. The plan shows the location of the wharf and dock in relation to the Valade and Day properties. [The surveyor] also carried out a sounding program and included contour lines showing the depth of Rocky Lake on the plan.

According to [the surveyor's] plan the dock and wharf is 57 feet in length and essentially perpendicular to the shore of the Valade property. The base of the wharf is approximately 42 feet from the common boundary. The plan also shows the hypothetical extension of this line into Rocky Lake. The wharf crosses this extension at a point that is 50 feet from the boundary survey marker which, according to [the surveyor], is 14 feet from the ordinary high water mark. This means the wharf is approximately 36 feet from shore at that location.

According to the plan the western tip of the floating dock is 26 feet east of the extended boundary line.<sup>6</sup>

It is possible to see the property lines from parcel fabric available from the local planning authority. Figure 3 below shows the relative position of the Valade (V) and Day (D) properties with the approximate position of the dock and wharf superimposed in red. When the court described the complaint by the Days as being based on it crossing “the line created by extending the common property boundary into Rocky Lake”, we can see the result in Figure 4.



*Figure 3: The parcel fabric and the Valade (V) and Day (D) properties with the approximate position of the dock and wharf superimposed in red.<sup>7</sup>*

The theory of the Days was that the riparian right to access had a spatial component to it and that it could be contained by a boundary – in this case, by extending the common property boundary south into Rocky Lake.

<sup>6</sup> *Day v. Valade*, 2017 NSSC 175 (CanLII), at paras. 7 to 11. (emphasis added)

<sup>7</sup> From *Land Use By-law, Schedule A – Zoning* at: [https://www.halifax.ca/sites/default/files/documents/about-the-city/regional-community-planning/Bedford\\_LUB\\_ScheduleAZoning.pdf](https://www.halifax.ca/sites/default/files/documents/about-the-city/regional-community-planning/Bedford_LUB_ScheduleAZoning.pdf) ©Halifax Regional Authority, All rights reserved.

The result can be appreciated by considering the effect in Figure 4 below.

*Figure 4: The extended property boundary projected south into Rocky Lake.<sup>8</sup>*

Did the court adopt this theory?

For an answer, we must turn to the reasoning adopted by the court. First, the court outlined exactly the nature of the Days' complaint and concerns.



The primary complaint by Mr. Day is the impact of the dock on his access to the deep water of Rocky Lake by sailboat. Both of his boats draw approximately three feet of water with the centreboard down. Depending upon the wind direction it may be necessary to tack or jibe to enter or leave the cove. This involves the boat traversing back and forth in a zig zag pattern. According to Mr. Day the presence of the dock reduces the area available for such a maneuver which makes it more difficult and raises issues of safety. He is an experienced sailor and did not describe any incident where his safety was at risk.

Mr. Day's primary safety concern is with respect to his young daughter who will be learning to sail. As a beginner sailor she may have more difficulty with the tacking and jibing maneuvers which could raise safety concerns. She will be six in July 2017 and Mr. Day expects that when she is ten she may be old enough to venture out in the boats on her own. Mr. Day's particular concern with respect to his daughter's safety was the possibility that her boat might get pinned against the Valade wharf and dock by the wind.

Although not mentioned in his affidavit, during his cross-examination at the hearing Mr. Day also raised concerns that the dock affects his family's access to the lake for swimming and fishing, and also impacts on their privacy because people on the dock have a better view of their backyard.<sup>9</sup>

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<sup>8</sup> From Google Maps. © Google Inc. All rights reserved.

<sup>9</sup> *Day v. Valade*, 2017 NSSC 175 (CanLII), at paras. 13 to 15

In some respects, readers will remember the distinction at law between the riparian right of access and the public right of navigation.<sup>10</sup> This distinction was addressed by the court by first clarifying exactly what the riparian right of access entailed. It quoted from the earlier decision in *Corkum v. Nash*<sup>11</sup> which, in turn, relied heavily on the previous cited text by G.V. La Forest:

The plaintiff, whose land adjoins the harbour, is a riparian owner. I refer to *Water Law in Canada - The Atlantic Provinces* (Ottawa: Queens Printer, 1973) by *Gerald V. LaForest and Associates* at p. 200:

The owner of land adjoining a river, stream or lake has certain rights respecting the water therein whether or not he owns the bed. These rights arise from his ownership of the bank, and from the Latin word for bank, *ripa*, they derive their name of riparian rights. The owner is similarly referred to as a riparian owner.

It is sufficient for the land to be riparian that it comes in contact with a body of water for a substantial part of every day in the ordinary course of nature, but such contact need not continue for the whole of the day. Thus land that comes in contact with the sea or a tidal stream at high tide is riparian land, and its owner is entitled to riparian rights in respect of it.

Riparian rights include the right of access to the water, the right of drainage, rights with respect to the quality of the water and rights relating to the use of the water.

The main complaint of the plaintiff relates to her impairment of access. LaForest states at p. 202:

A riparian owner has a right of access over the shoal waters of a lake to the deeper waters where navigation practically begins. *No one, not even the Crown, can erect any structure on the shore or otherwise permanently obstruct a riparian owner's right of access.* For example, a permanent boom of logs in front of a riparian owner's land or a neighbouring wharf that blocks his access would entitle him to a right of action.

The riparian owner's right of access exists in a direct line from every point along the whole frontage of his land on the water. It is, therefore, no answer to an action for

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<sup>10</sup> The court also referred to an Ontario Court of Appeal decision by explaining, at para. 29,

The relationship between the riparian right of access and the public right of navigation arose in the Ontario Court of Appeal decision in *Drake v. Sault Ste. Marie Pulp and Paper Company*, [1898] O.J. 30. The plaintiff was a fisherman living on a small farm located three miles from the mouth of a navigable stream which flowed into Lake Superior. He used his sailboat to travel to the lake and on to Sault Ste. Marie. He was sometimes hired by neighbours to deliver supplies and provisions. The defendants left large booms of timber at the mouth of the stream which cut off boat access to Lake Superior for an entire summer. The court concluded that the plaintiff had suffered damage peculiar to himself beyond that suffered by the rest of the public who were entitled to use the river and as a result awarded compensation. Because the plaintiff's access to the stream at his property was not affected there was no breach of his riparian rights.

<sup>11</sup> *Corkum v. Nash*, 1990 CanLII 4127 (NS SC), [1990] N.S.J. 423

damages for obstruction of the right that the owner can get to and from the water from another part of his land. (*emphasis added*)

In *Byron v. Stimpson*, [1878] S.C.R. 697, the defendant built a smokehouse and wharf in front of a 40-foot portion of the lot the plaintiff leased which had a 100-foot boundary on the high water mark of Possamaquoddy Bay and which obstructed access. It was the defence of the defendant that this was an arm of the sea and that navigable waters were common to all. The plaintiff was found to be a riparian proprietor because of his ownership in the bank of the bay and had rights of property beyond the rights of other subjects of Her Majesty and it is the same right enjoyed by those who abut a highway. At page 707, Fisher, J. comments:

Again he says a man who has a house opening upon a highway has a right to step from his house on the highway, and whether the highway be a highway of solid earth or a highway of water seems to be perfectly indifferent.

The court went on to find that the plaintiff, as riparian proprietor on the bank of the bay, an arm of the sea, had the unobstructed right of access from his land to the navigable waters of the bay. Although title to the shore was in the Crown, he had an unobstructed right of access from his land on the shore to the navigable waters when the tide was out. The plaintiff was awarded damages.<sup>12</sup>

Rocky Lake is a non-tidal body of water while the water at issue in *Corkum v. Nash* was tidal. This appeared to be of no consequence in how the court relied on the authority in *Corkum* to explain the nature of the riparian right of access.

In explaining the nature of the public right of navigation, the court turned to a British Columbia decision in *Nicholson v. Moran*,<sup>13</sup> in which the Supreme Court dealt with a dispute between two neighbouring riparian owners where one had constructed a marine railway and floating dock, making it more difficult for boats to access the other's boat house. Quoting from the English decision in *Chaplin & Co. v. Westminster Corporation*,<sup>14</sup> a pithy summary can be found:

A person who owns premises abutting on a highway enjoys as a private right the right of stepping from his own premises on to the highway, and if any obstruction be placed in his doorway or gateway, or if it be a river, at the edge of his wharf, so as to prevent him from obtaining access from his own premises to the highway that obstruction would be an

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<sup>12</sup> *Corkum v. Nash*, 1990 CanLII 4127 (NS SC), [1990] N.S.J. 423, at paras. 44 to 46

<sup>13</sup> *Nicholson v. Moran*, [1949] B.C.J. 102

<sup>14</sup> *Chaplin & Co. v. Westminster Corporation*, [1901] 2 Ch. 329

interference with a private right. But immediately he has stepped on to the highway and is using the highway, what he is using is not a private right but a public right.<sup>15</sup>

But what of the theory of the Days: the private riparian right of access extended into the water beyond their shore for an area contained by extending the common property boundary south into Rocky Lake? It was not accepted. The court explained as follows:

The Days' riparian right of access entitles them to place a boat in the lake at any point along their shoreline and travel directly out from the shore to reach a depth of at least three feet. If the Valade wharf and dock obstructs them from doing so, it is a breach of their riparian rights. It is clear from the sounding plan prepared by [the surveyor] and the photographs attached to the Day and Valade affidavits, that a boat launched at any point along the Day shoreline can reach depths in excess of four feet without any interference by the wharf and dock.

There was much discussion in the parties' written materials and at the hearing about the significance of the extended boundary line as drawn by [the surveyor]. The Days argued that this represents their "direct line" access to Rocky Lake as that term is used in *Corkum*. In my view such access refers to travelling in a direction that is perpendicular to the shore. The Day/Valade boundary forms an angle of approximately 45 degrees with the high water line, which means that the extension crosses the front of the Valade property. That is the reason for its intersection with the wharf which runs perpendicular to the shore. In this case the boundary extension drawn by [the surveyor] is irrelevant in determining the limits of the Days' riparian right of access which does not include travelling at a 45 degree angle from shore in front of the Valade property. As a result I must dismiss this aspect of their claim.

The Days did not argue that the Valade wharf and dock interfered with the public right of navigation resulting in special damages to them, nor does the evidence presented suggest this to be the case. At most, the wharf and dock would make sailing to and from the centre of Rocky Lake more challenging in some weather conditions. I believe that the East and West Rocks define a reasonable channel for access to and from the Day property. While Mr. Day said that he had sailed between the West Rock and the shore, the photographs and [the survey] plan make it clear that this area has a number of exposed and submerged rocks and is relatively shallow. Sailing in that location would be a challenge for all but the most experienced person. I doubt that Mr. Day would permit his daughter to go in that area as a junior sailor once she starts going out on her own in a few years.

The placement of the Valade wharf and dock reduces the width of the available channel between the rocks by approximately 12 feet or 14 percent of the total distance. In my view this limited restriction could not support a special damage claim.<sup>16</sup>

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<sup>15</sup> *Ibid*



Interestingly, the straight line extension was not accepted because it skewed in front of the Valade waterfront at a 45 degree angle. Did this mean that there is in fact a boundary off shore for the riparian right of access – but perpendicular to the shore? The Court did not say so, preferring to consider the specific circumstances that were found to apply. Clearly, inconvenience is not the same as an obstruction. Remedies exist for interference with both the private riparian owner’s right of access and the public right of navigation. It is a technically complicated area of law and involves not only the property rights of a riparian owner, but also a characterization of the problem as a nuisance. The mere drawing of a survey line on a plan appears to be inadequate in representing the spatial extent of complicated interests that attach to a riparian property.

*Editor:* Izaak de Rijcke

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

Chapter 8: Natural Boundaries, in *Principles of Boundary Law in Canada* included a subsection at page 294 entitled: *The Right of Access to the Water*. As noted in the book and also above, the right of access to water is separate from the public right of navigation. The decision in *Drake v. Sault Ste. Marie Pulp and Paper Company*, [1898] O.J. 30 was used as an authority in Nova Scotia for the proposition that the riparian right of access and the public right of navigation are distinct and separate rights and accordingly, the remedy for an alleged breach of either or both rights is to be considered under separate frameworks. The idea that a simple boundary line can be used to spatially define the right of access to water was not endorsed by the court.

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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>17</sup>

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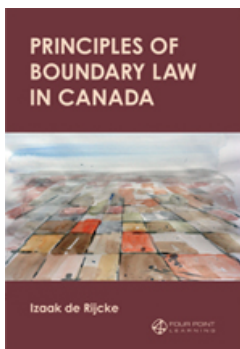
<sup>16</sup> *Day v. Valade*, 2017 NSSC 175 (CanLII), at paras. 31 to 34

<sup>17</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

This year's conference theme: [Waterfront Properties in Ontario: Best Practices for Reducing Ownership Conflict](#), responds to the confusion created by a series of seemingly inconsistent decisions concerning waterfront properties over the last decade. Presenters – lawyers, surveyors and government representatives – will explore a common set of recent court cases and provide insight and analysis focused on problem-solving waterfront ownership and boundary issues from their unique professional perspectives. The day will end with a multidisciplinary panel discussion that aims to establish broad consensus on emerging best practices to reduce conflicts among stakeholders, mitigate the risk for professionals, and minimize uncertainty for members of the public in this consistently complex area of boundary law. A draft agenda with topics for this one day event (November 13, 2017) is now available and *early bird* registration is open.<sup>18</sup>

## 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 (as a regulated profession with norms codified in statutes) 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** [purchase](#) online. (NB: A PayPal account is not needed to pay by credit card.)



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<sup>18</sup> This conference qualifies for 12 *Formal Activity* AOLS CPD hours.

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