The Boundary Point
Volume 10, Issue 2, January 2022
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.

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Thanks in part to a complex legislative past, and also their ambulatory nature, there remains much uncertainty around waterfront boundaries which continues to present itself as disputes before Ontario courts. A decision of the Ontario Superior Court from the latter half of 2019 has recently been made available through the Canadian Legal Information Institute and addresses the question of title to waterfront lands. In *Municipality of North Bruce Peninsula v. Rauchfleisz*,[1] a dispute over the permitting requirements for a deck brought the question of title to the subject waterfront lands and, in so doing, the court provided a concise review of key principles in this area of law. In a bit of a twist, it was not the applicant that was seeking title to the disputed strip but rather the question centered on whether title to the disputed area was held by the municipality or the provincial crown. After a review of relevant caselaw on the topic, the court held that title to the disputed strip belonged to the municipality; thus, the placement of the deck was a trespass. And as noted in the decision itself, the case "highlighted a lack of clarity regarding the ownership of the beach"[2] and will be of interest to readers who have been following the development of the law of water boundaries in Ontario.

Ownership of Beach Lands – The Evolving State of Water Boundary Law in Ontario

Key Words*: high water mark, water's edge, water boundaries, title to shoreline*

The municipality of North Bruce Peninsula brought an application before the Ontario Superior Court for a declaration of the ownership of a strip of beach land. While the law on water boundaries is complex and continues to evolve, the dispute that gave rise to this application centered on very simple facts. These were described by the court:

[1] *Municipality Northern Bruce Peninsula v. Rauchfleisz*, 2019 ONSC 5460 (CanLII), https://canlii.ca/t/j2m7x

[2] *Ibid.*, at para 131

> The question arises in a simple factual context. The Respondent, Mr. Rauchfleisz, lives on property near the shore of Georgian Bay. Georgian Bay is just across the road from his home.
>
> There is a strip of grassy and sandy beach across the road ("the beach") bordering the waterfront. In 2015, Mr. Rauchfleisz built a structure on the beach, big enough to put chairs on (hereinafter referred to as "deck", as its primary purpose is to sit on). At the time of construction, the supporting posts were in the water. Mr. Rauchfleisz likes to sit on the deck to watch the sunset, particularly in the summer, and invites others to do so.
>
> Following a complaint from a neighbor of the Respondent, the Municipality ordered Mr. Rauchfleisz to remove the deck. It claims he is trespassing on municipal land, and that he built the deck without municipal approval. Mr. Rauchfleisz knows the deck is not built on his own land but disagrees that the Municipality owns the strip of beach. However, if the court declares the beach to be municipal land, Mr. Rauchfleisz agrees that he built it without municipal approval and will remove the deck promptly.[3]

There was disagreement on whether the strip of beach was part of the adjoining road parcel which is owned by the municipality, or the provincial crown. The respondent had made inquiries regarding the construction of the deck to the provincial authorities and was informed that no permit was required. However, if the municipality held title to the land, the deck was considered a trespass. An excerpt sketch based on the Reference Plan that appears in the reported decision is shown below at Figure 1.

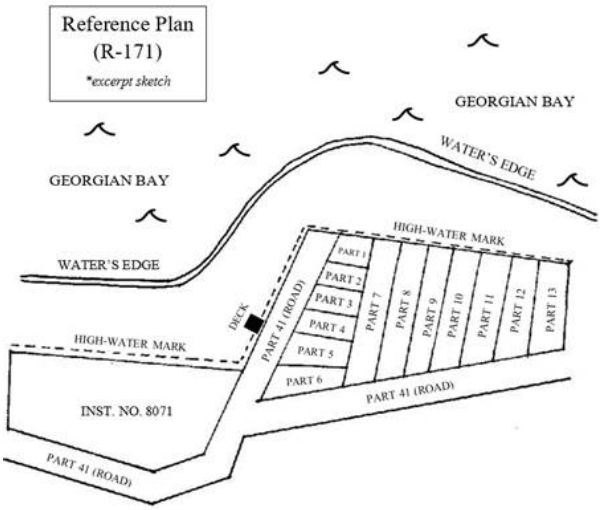


Figure 1: Sketch showing relative placement of deck on disputed land.[4]

An image of the deck at the shore appears in the air photo mapping product below at Figure 2. The court went through a fairly lengthy list of the conveyances involving the land in question and found inconsistency (or even silence) among the various conveyancing documents over the

[3] *Ibid.* at paras 2-3

[4] Image from the reported case, *Municipality Northern Bruce Peninsula v. Rauchfleisz*, 2019 ONSC 5460 (CanLII)

years as to whether the property terminated at the high water mark. To further complicate matters, there was no registered plan of subdivision, but only a Reference Plan.

Figure 2: The deck appears on the water side of a road.[5]

In addressing the question of title, the court first provided a contextual summary of the state of the law concerning waterfront boundaries in Ontario:

> The law surrounding the ownership of land between the high and low-water mark was uncertain and unsettled until 1974. On January 22, 1974, the Supreme Court of Canada released its decision in *Attorney General of Ontario v. Walker*, 1974 CanLII 3 (SCC), [1975] 1 S.C.R. 78. This decision affirmed the Court of Appeal for Ontario and trial judge's decisions on the issue of Provincial Crown ownership of waterfront property. As discussed below, the Supreme Court of Canada decided that the Crown did not own the area between the high and low-water mark, unless it had expressly reserved that ownership in the original Crown Grant.
>
> Before 1911, when the *Beds of Navigable Waters Act* was enacted, the common law established that the boundaries of waterfront property extended to the water's edge: *Attersley et al. v. Blakeley et al.*, 1970 CanLII 316 (ON CA), [1970] 3 O.R. 303 (County Ct.), at para. 6, aff'd [1970] 3 O.R. 303 at 313 (C.A.).
>
> However, as early as 1916, it was the policy of the Crown to own the bed up to the high-water mark: *Lackner v. Hall*, 2012 ONSC 3951, at para. 23, rev'd on costs 2013 ONCA 631.
>
> Further, as of 1931, perhaps earlier, and at least until 1959, and possibly also up until *Walker* in 1975, the Registry Office would not accept a plan of subdivision for registration if it did not reflect the high-water mark to show the Crown's title: see for

[5] From Bruce County Maps: https://maps.brucecounty.on.ca/Geocortex/Html5Viewer/index.html?viewer=BruceMaps

example *Lackner*, at paras. 29, 32; *Michnick v. Bass Road Beach Assn.*, 2015 ONSC 1936, at para. 10.

In 1940, the *Beds of Navigable Waters Act* was amended to include a definition of the high-water mark, which was defined as including any "navigable" body of water. This amendment was not helpful, mostly due to lack of clarity over where to locate the high-water mark, and the amendment was repealed in 1951. However, the Crown maintained its position that it owned the land between the high-water mark and low-water mark: *Lackner*, at para. 24; *Becker v. Walgate*, 2019 ONSC 2342, at paras. 54-55; *Tiny (Township) v. Battaglia*, 2013 ONCA 274, at para. 17.

Prior to the *Walker* decision, several courts determined that as of 1951, the law reverted to the common law position prior to 1911 – that is, that the boundary extended to the water's edge: *Todd v. Walker*, 1954 CanLII 274 (ON SC), [1955] 1 D.L.R. 495 (Ont. County Ct.). Though, as noted in *Lackner,* the Crown still maintained its position that it owned the land between the high-water mark and the water's edge. The *Todd* decision indicates that in 1955, there was still confusion over ownership on waterfront properties several years after the *Act* was amended.

In 1975, the *Walker* decision settled confusion in the law and determined that the Crown did not own the area between the high and low-water mark, absent an express reservation. That is, waterfront properties presumptively extend to the water's edge. In *Walker*, the original Crown Patent described the boundary as being "to the lake" or "along the shore", but subsequent conveyances used the high-water mark as the boundary of the property. Nonetheless, the court found that the lots extended to the water's edge.[6]

The court also went through a number of recent decisions concerning waterfront boundary determinations to inform its analysis of the matter at hand.

In *Battaglia*, the parties were disputing ownership over a strip of beach property along the shoreline of Georgian Bay in the Township of Tiny. In this case, the Court of Appeal for Ontario confirmed that the Crown Patent rule regarding the boundaries of lands abutting water is not limited to the original plan of survey, and applies to conveyances as well:

> Thus, in our opinion, the words of Justice Stark in *Ontario (Attorney General) v. Walker* [at p. 181], carry through for any conveyance: 'high water mark' only holds as a line creating a parcel that is not to be riparian where "the grant clearly reserves by description or otherwise … a space of lands granted and the water boundary." Sark J.'s further exception ("or unless the boundaries of the lot can be so clearly delineated by reference to an original plan of survey as to clearly except or reserve to the Crown a space between the lands granted and the water's edge.") applies, in our opinion, to *any* conveyance. …
>
> It follows that where, in subsequent divisions of land by written metes and bounds descriptions or by plans of subdivision, the owner has conveyed upland

[6] *Ibid.,* at paras 27-33.

> using the term "high water mark" not used in the Crown grant, reciting this in the description or as it is shown by a surveyor on a plan, the Crown has no claim to title between such line (whatever it is thought or found to mean) and the water's variable edge. If any space exists, the title would be in the grantee from the Crown or successor in title; or in the owners of the subdivision lots: at para. 98.

See also *Becker*, at para. 61; *Michnick*, at para. 54.

In *Battaglia*, the 1921 plan of subdivision indicated the boundary to be the high-water mark, with a separate area labelled "beach". Various legal transfers in the 1920s did not mention the beach, except for two transfers in 1926 that expressly included the beach in the lots – that is, the lots extended to the water's edge.

In *Battaglia*, the application judge held that the Town did not own the beach: the subdividers had intended to transfer all of their land, but had mistakenly believed that they did not own the beach. The application judge therefore extended the land in front of the beach to the water's edge. The Court of Appeal reversed, holding that the subdivider in fact knew he owned this beach, as indicated by, for instance, the fact that the subdivider's deed showed he owned up to the water's edge and that he expressly transferred the beach in two deeds in 1926. The area on the plan was also labelled "beach", showing a separate section distinct from the lots. Thus, the Court of Appeal held in that case that the land only extended to the high-water mark.

In *Lackner*, the Plaintiffs sought a declaration that the boundaries of specific lots in the Township of Torbolton extended to the water's edge of the Ottawa River. In that case, the original patent did not contain a reservation, and therefore the lots extended to the water's edge. A plan of subdivision was registered in 1931, but indicated that there was a strip of land – the "beach" – between the lots and the water's edge. The court heard expert evidence concerning the confusion in the law at the time surrounding who owned the beach. The evidence was that until the 1970s, the policy enforced on surveyors was that they include the high-water mark in the survey.

In *Lackner,* the court concluded that the conveyors likely believed that the beach was public land, given the state of the law and other evidence (e.g., there was a road leading to the beach indicating it was public and the conveyors' children indicated that their fathers believed it was public land). However, since, the conveyors' intention was to convey *all* the land they owned, and they mistakenly believed that they did not own this beach, the lot owners were entitled to a finding that the correct boundary was the water's edge.

In *Michnick*, the Deputy Director of Titles determined that the waterfront boundary of two lots in the Bruce Peninsula extended to the water's edge. In that case, the patent again did not reserve the beach, and the land therefore extended to the water's edge. However, a plan of subdivision was registered in 1959 which concluded that the boundary was the high-water mark. Subsequent deeds did not mention the boundaries of the lots.

In *Michnick*, the court noted that until the late 1970s, surveys would not be accepted by the Land Registry Office unless they showed the high-water mark. In this case, the subdivider did not know that he owned the beach. The beach was not named, unlike in *Ellard* (discussed below), and there was nothing in the plan indicating that he reserved the shore, as in *Battaglia*. In *Michnick*, the subsequent use of that land also showed that he likely believed it was public. However, since the conveyor intended to subdivide all his land, the court corrected his mistaken belief that he did not own the land and extended it to the water's edge.

In *Ellard v. Tiny (Township)*, 2012 ONSC 280, 295 O.A.C. 44 (Div. Ct.), the Applicants who were owners of cottage property on Lake Huron sought an order that their property extended to the water's edge, while the Respondent, the Township of Tiny, opposed. In this case, the Crown Patent, the original survey, and a Deed to George Kitching indicated that the lots extended to the water's edge. However, Mr. Kitching's plan of subdivision ("Plan 773") in 1931 used the high-water mark as the edge of the lots. The lots were sold according to Plan 773. The question was if Mr. Kitching's intention was to extend the lots to the water's edge or the high-water mark.

In *Ellard*, the Divisional Court found that Mr. Kitching's intention was to create lots with the high-water mark as the boundary. The evidence established the following: that Plan 773 labelled the waterfront as "sand beach"; that Mr. Kitching may not have believed he owned the beach; that it did not make commercial sense to sell the beach to the front lot owners, as the back lot owners would then not have access to the water; that his failure to make an express reservation of the beach was irrelevant, since he was not required to do so until *Walker* in 1975; and that the subsequent deeds indicated that the cottage owners and the public believed the beach belonged to the Town. The court therefore concluded that the Municipality owned the beach.

In *Gibbs*, a private land owner attempted to clarify ownership of the main beach on the shore of Lake Huron, located west of the south half of Grand Bend in the Township of Bosanquet in the County of Lambton. In this case, the Court of Appeal for Ontario determined that if there is a *patent* ambiguity in a deed – an ambiguity that is apparent on the face of the deed itself – extrinsic evidence is inadmissible to resolve that ambiguity: para. 38. However, if there is a *latent* ambiguity – an ambiguity that arises only when the deed is applied to the land it purports to describe, or an ambiguity that is revealed through extrinsic evidence – then extrinsic evidence may be used to determine the intention of the grantor. See also *Lackner*, at paras. 4-7, on this issue.

The cases outlined above all involve a latent ambiguity in which the court was required to determine the intentions of the parties to the transfer of land.

In *Lackner*, for instance, the trial judge determined that there was a latent ambiguity, as it was unclear on the plan of subdivision whether the original subdividers intended to leave the boundary of the lots at the water's edge or if they intended to retain the beach for themselves. Ambiguity in a plan of subdivision appears to be a common issue for the cases

described above, which may arise due to the historical context surrounding the creation of surveys in the 20th century.[7]

The court then articulated an analytical framework based upon the case authorities cited above:

> The following analytical framework is based on questions address by the decisions noted above. From these cases, and specifically from the analysis in *Battaglia*, the analytical framework is useful in considering whether or not a lot extends to the ordinary water mark of a non-tidal, navigable body:
>
> 1. Does the Crown Patent expressly reserve a strip of land between a waterfront property and the ordinary water mark?
>
>   - If the Crown Patent is silent or is ambiguous – e.g., by using such terms as "to the shore", "to the bank", "to the lake" – then the waterfront property presumptively goes to the ordinary water mark (or, in other words, to the "water's edge").
>
>   - If there is a clear reservation – such as a metes and bounds description retaining a strip of land between the property and the water – the waterfront property does not extend to the ordinary water mark. The analysis ends there.
>
> 2. If the answer to (1) is "no", the court must then determine if the original Crown Survey or any other conveyance limits the parcel to the high-water mark (or reserves a strip of land in front of the waterfront property).
>
>   - A "conveyance" in law typically refers to a written document that transfers legal title of a property from one person to another. This can include, for instance, a deed. However, it is clear from the case law that other documents may need to be assessed to interpret the deed – particularly any plan of subdivision.
>
>   - Although in *Battaglia* the court adopted the view that *Walker* applies to any conveyance, the law is not necessarily as clear to enable a finding of ownership based on the deed alone. Indeed, as noted, deeds are not necessarily determinative of boundaries. If there is conflict between that deed and other evidence, the intentions of the parties to that deed are paramount.
>
> 2. A) Before using extrinsic evidence to determine the intentions of the parties, the court must determine if there is a latent or patent ambiguity in the deed or other conveyance. If the ambiguity is patent, no such evidence may be considered.

[7] *Ibid.*, at paras 74-86.

2. B) If there is a latent ambiguity, the court may consider extrinsic evidence to determine the intentions of the parties in interpreting the conveyance. Whether or not extrinsic evidence is used, the court should be cognizant of the following:

    - There was confusion over ownership of the land between the high and low-water mark until *Walker*. Thus, for instance, plans of subdivisions and surveys in the 20th century frequently included a high-water mark line, which was a requirement in order to have the document registered. It may therefore be the case that the evidence shows that the parties intended to convey *all* that they owned, but mistakenly believed they did not own the beach, as in *Lackner* – in which case, the waterfront property may extend to the water's edge. However, there may also be cases – such as *Battaglia* – where even in the 20th century, it is clear the owners knew that they owned the waterfront strip and intended to reserve it, or to expressly convey it to another person. In such a case, the lots may not extend to the water's edge.
    - For non-tidal bodies, the terms "high" and "low" water mark are not necessarily applicable. As early as *Parker*, there was recognition that such terms do not truly apply to non-tidal waters, yet they continued to be used in the case law: *Parker*, at para. 17. Thus, even if a conveyance refers to such terms directly, such reference may not be determinative, given the inapplicability of those terms to non-tidal bodies.
    - A description of metes and bounds in a deed is not necessarily determinative of the boundaries of a parcel of land where it conflicts with the intentions of the parties: see *Gall v. Rogers* (1993), 1993 CanLII 5446 (ON SC), 15 O.R. (3d) 250 (Ont. S.C.), at para. 30.[8]

In applying the caselaw-derived analytical framework to the questions before it, the court looked first at the impact of the Reference Plan in place of a plan of subdivision. Under the particular circumstances it was held that the reference plan did in fact operate to subdivide the lots in this case because it was deposited on title during a brief three years statutory window in which lots could be subdivided and sold based on a reference plan alone. [9] Latent ambiguities were also present in that it was unclear from the reference plan whether the beach was retained, sold or attached to separate lots. As such, the court was permitted to admit extrinsic evidence.[10]

The court found that the Crown Patent did not include a reservation of the beach lands and went on to describe the impact of subsequent conveyances as follows:

[8] *Ibid.*, at para 87
[9] *Ibid.*, at paras 89-94
[10] *Ibid.*, at paras 95-96

> Until 1954, none of the conveyances indicated any express reservation. As such, given that no reservation was made in the Crown Patent, Mr. Hoath owned the land to the water's edge/ordinary water mark in 1954 when he signed the Deed transferring land to Mr. Lemcke.
>
> Therefore, the Ontario Crown would not own the beach in any scenario. As of 1954, either Mr. Hoath intended to expressly keep the beach, or he intended to transfer all of the land that he owned, but due to confusion in the law regarding ownership, mistakenly believed that he did not own the beach. In the first scenario, Mr. Hoath's heirs and assigns own the beach. In the second scenario, Mr. Lemcke owned it, and the court would then need to assess whether he also intended to transfer all of the land he owned to the lot owners as he subdivided the land.
>
> As there is a latent ambiguity in this case, the court is required to determine the intentions of Mr. Hoath and Mr. Lemcke in determining ownership of the beach, with reference to extrinsic evidence, if necessary. However, both of those individuals died some time ago.
>
> Based on a review of the record described above, I conclude that the parties intended to transfer all that they owned. That is, after R-171 was deposited on title in compliance with the law at the time, the lands extended to the water's edge and were transferred as part of each waterfront lot in the Reference Plan.
>
> The conveyance of the road ("Part 41") in 1976 to the Township of Eastnor therefore included the land to the water's edge. With the conveyance of the road, the Municipality also took title to any land which lay between the road and the water's edge. I therefore conclude that the Municipality owns the strip of beach between the road and the water.[11]

The court concluded that, similar to *Lackner* and *Michnick*, subsequent owners had intended to convey all that they owned and were not aware that they owned right out to the water's edge. When the land was transferred to the Municipality, and given that the road bordered the highwater mark, the Municipality owns the land to the water's edge as shown on the original Crown Survey. The deck was considered a trespass on municipal lands.

This decision reviews and tries to reconcile the often-confusing caselaw related to water boundaries in Ontario and in so doing employs an example of an analytical framework for working through such problems. The decision does not mention the involvement of any land surveyor testifying as an expert witness, although surveyors often play an important role in sifting through the complexity. Careful and thorough research by land surveyors is key to addressing the complex questions that can arise out of seemingly simple fact scenarios when water boundaries are involved.

Editors: Izaak de Rijcke and Megan Mills

[11] *Ibid.*, at paras 100-104

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

The law concerning water boundaries generally and the cases referenced by the court above in particular are discussed at length in Chapter 8: Natural Boundaries.

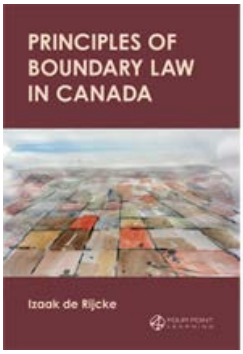
FYI

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.[12] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

Education Day at the AOLS AGM

On Thursday, March 3, 2022, the AOLS will have its Education Day at its virtual AGM. One of the sessions, ***Geomorphology at the Waterfront: The Law Struggles to Keep Up***[13] will build on some of the issues introduced in Four Point Learning's 7th Annual Boundary Law Conference: *Complex Cadastral Problems: Searching for Solutions* in the spring of 2021. This CPD session at the AGM will be presented by Dr. Colin Rennie of the Department of Civil Engineering at University of Ottawa, and Izaak de Rijcke, a lawyer in Guelph.

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*

[12] 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.

[13] See the AOLS AGM registration package for more details.

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ISSN: 2291-1588