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.

Volume 7, Issue 12 of *The Boundary Point*, released in December, 2019, addressed the decision of the Ontario Divisional Court in *Duarte v. Ontario*[1] The decision was the result of an appeal from a decision of the Coordinator at the Crown Lands Division of the Surveyor General (the "Coordinator"). The key questions in that decision concerned whether or not concession and township road lines which can be confirmed in a hearing under the *Surveys Act* include their extension or projection over accreted land and, if they do, whether the extensions are simply straight lines or bend to accommodate the riparian rights of upland property owners. In what we will call *Duarte #1*, the decision of the Coordinator was set aside and a new hearing was ordered. The Surveyor General conducted that new hearing which led to yet another appeal. Recently, a different panel of Divisional Court released its decision[2] in the appeal of the Surveyor General's decision under section 48 of the *Surveys Act*, from that second decision. We will refer to it as *Duarte #2.* That appeal was dismissed for the reasons set out below and the decision of the Surveyor General on the new hearing now stands. These decisions are of interest – in part because the standard of review on appeal changed in the intervening period between the two appeal decisions. Further implications are discussed below.

Re-Establishment of Township Lines and Extensions over Accreted Lands

Key Words*: accreted lands, standard of review, findings of fact, Surveys Act, projection of lines*

Two hearings, both appealed to the Divisional Court, concerned the determinations made by the statutory decision maker under the *Surveys Act* in an application brought by a municipality for the re-establishment of township lines that had become lost of obliterated. The

[1] *Duarte v. Ontario*, 2018 CarswellOnt 6441, 291 A.C.W.S. (3d) 885, 91 R.P.R. (5th) 199, https://canlii.ca/t/hrnmq

[2] *Duarte v. Ontario (MNDNRF)*, 2022 ONSC 2262 (CanLII), https://canlii.ca/t/jnn5n

municipality's application involved a concession line and a road allowance which, if both were projected out to the water's edge of Georgian Bay, would cut off any contact with the water. The core issue of the matter was summarized by the Divisional Court in *Duarte #1* as follows:

> The Appellants own property on Wymbolwood Beach in the Township, on the easterly shore of Nottawasaga Bay of Lake Huron. Recently, the waters of Nottawasaga Bay have receded. The Appellants and the Township disagree about two road allowances, and whether and where they should be drawn over the accreted lands.
>
> Surveyor John Goessman completed the original survey of the subject lands in the 1820s. For the resurvey requested by the Township in its s. 48 application, the Minister retained Mr. Robert D. Halliday, O.L.S. The survey plan prepared by Mr. Halliday is dated September 5, 2013 (the "Halliday Survey"). It is the Halliday Survey that is the subject of the Order appealed from.
>
> In short, the Halliday Survey extends the two disputed road allowances over the accreted lands in a manner that has the effect of cutting off the water access that the Appellants would otherwise enjoy as lakefront property owners."
>
> […]
>
> The two road allowances at issue are the following: (i) between Concessions 6 & 7 in front of Broken Lot 19, Concession 6, and Broken Lot 19, Concession 7 ("Concession 7"); and, (ii) between Lots 18 and 19, Concession 7, in front of Broken Lot 19, Concession 7, lying north of the road allowance between Concessions 6 & 7 ("Dunsford Lane").
>
> […]
>
> The Halliday Survey provides that the boundaries of the two road allowances should extend, continuing along their diagonal path, across the accreted lands to the current water's edge. The Appellants object to the confirmation of the Halliday Survey because the extended road allowances (which are not perpendicular to the water's edge) as shown in that resurvey cut across or in front of their properties and result in them no longer owning waterfront properties.
>
> […]
>
> The Reynolds Survey introduces a bend in the road allowance at the location of the water's edge in 1866 (at the time that the land was patented). The Duarte Appellants submit that this approach equitably apportions accreted lands amongst property owners in accordance with the width of the shoreline frontage of their property, as well as for the two road allowances.
>
> […]
>
> Section 48 of the *Act* has rarely been used, although it has been put forward and was evidently called upon in this case as a method for the municipality to avoid individual

> *Boundaries Act* disputes with individual owners, in favour of a broader more comprehensive approach to resolving boundaries.[3]

We repeat the schematic to illustrate the situation as it appeared in Figure 1 of *TBP* 7(12) below:

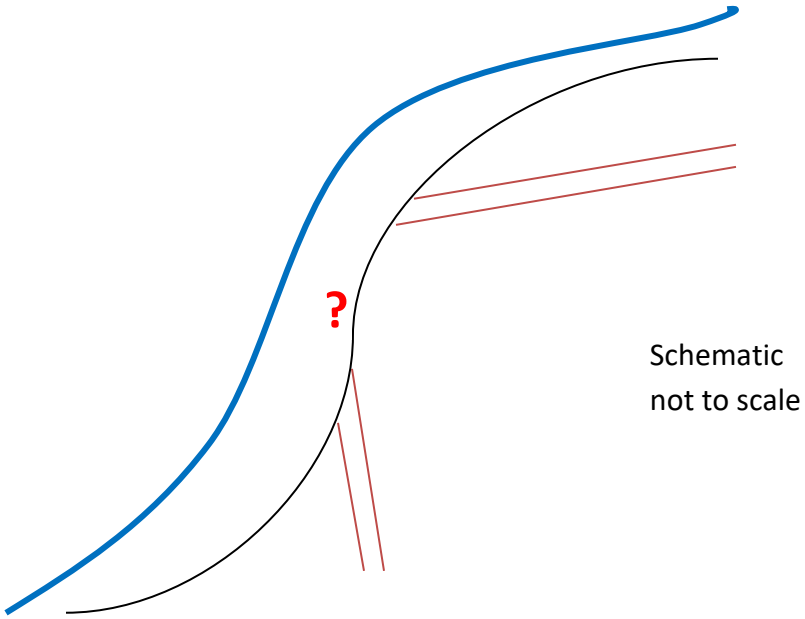


Figure 1: The straight line projection of two roads intersect on dry land that would have left the upland owner without water access.

The appellants in *Duarte #1* opposed confirmation of the resurvey on a number of grounds including the common law right of accretion. The Divisional Court summarized the decision of the Coordinator as follows:

> With respect to the historical evidence before him, the Coordinator began with reference to the Goessman Survey, noting the following:
>
> > The Township of Tiny was originally surveyed by John Goessman, PLS, Deputy Surveyor 1821-1822 under instructions issued by the Surveyor General dated August 18, 1821. The township was originally subdivided under the "double front" system of survey as defined in the Surveys Act. The subject road allowance between Concession 6 and 7 and the road allowance between Lots 18 and 19 are original road allowances which originate from the original survey fabric.
>
> With respect to the confirmation of the Halliday Survey, the Coordinator did acknowledge the important role of the original Goessman Survey:
>
> > It is important to note that a fundamental philosophy has been applied in this Municipal Resurvey decision under section 48 of the *Surveys Act* (the Act). That is

[3] *Ibid.*, at paras 2-11

> that surveys of the original township fabric throughout Ontario, under the instructions of the Surveyor General, set down the fundamental framework into which all property transactions and future surveys fit. [Emphasis added]
>
> […]
>
> The Halliday Survey showed the road allowances running straight, over the accreted lands, to the water's edge. At the hearing, the focus of the parties was whether or not there should be a bend in the road allowance before the water's edge (as reflected in the Reynolds Survey), and whether it should be at the high water mark. The submissions in favour of a bend in the road allowances were made based on common law principles of accretion, requiring an equitable distribution of any additional shoreline.
>
> The Coordinator found that introducing a bend in the road would result in unnecessary confusion and he was not persuaded that this was the intention of the Legislature. The Coordinator instead found that in order to re-establish the original fabric, surveyors are directed by the *Act* to the methods prescribed by the *Act* to re-establish that Township fabric, yet he did not address the methods specifically. He further noted that the Township had submitted that if there was no method under the *Act* that addressed a particular situation, then the Minister may "fix" the position of a disputed or lost line, boundary or corner, and in so doing regard should be had to "what was intended in the original survey." However, the Coordinator did not then proceed to address the related statutory or historical context.[4]

The Divisional Court in *Duarte #1* held that the Coordinator's conclusion was unreasonable and a rehearing was ordered.

> The Coordinator was also motivated in part to reach this conclusion by his observation that neither the Duarte Appellants nor the Plan 779 Appellants had any dispute with the road allowances as reflected in the Halliday Survey, upland of the high water mark. In our view, however, this provides little support for his decision to accept those lines as extended to the water's edge, in the face of the contrary evidence of prior surveys and the absence of evidence that the portion of those lines between the high water mark and the water's edge had ever been established. Neither is it surprising that the Duarte Appellants and the Plan 779 Appellants would not have objected to the upland portions of the road allowances as reflected in the Halliday Survey, since those portions had no impact on the status of their properties as waterfront properties. It is only the portion from the high water mark to the water's edge that is at the core of this dispute.
>
> […]
>
> In our view, however, *Surveys Act* proceedings under s. 48 are specific to "re-establishing" lines, not establishing new ones. The underlying principles also support the focus on the

[4] *Ibid.,* at paras 38-45

> original survey, rather than a new and unrestricted opportunity to address any boundary dispute. Moreover, even if the application of the astronomic course methodology is an acceptable surveying method to establish the extension of the road allowances beyond the points to which they were originally run or measured, and we do accept that it is, we find that method could not serve to effectively expropriate previously vested proprietary rights.
>
> In conclusion, given the legislative framework and the surveying methodology it mandated, we find that the Coordinator's decision on this issue was not reasonable. Notwithstanding the deference he is due, it was not reasonable for him to confirm the use of the method described in section 24(2)5 of the *Act* in determining the boundary of Concession 7 beyond the water's edge as it existed in 1823, that is, in adopting Mr. Halliday's use of the projection of the Road Allowances between the high water mark and the water's edge. The methods are specific survey methods with very specific application to "re-establish" a boundary line that at some time must first have been 'established.[5]

Duarte #1 set aside the decision of the Coordinator because of a finding of fact that the water level in Lake Huron was lower than when Goessman did his survey and as a result, land had accreted to the upland property owners and attached to the upland riparian titles. As such, accretion that occurred after Goessman's initial survey in the 1820s was not dry land that was available to Mr. Goessman to survey because he stopped at the water's edge. In view of the Coordinator's finding of fact that there was accretion, the Coordinator's determination that the line under application was simply to be extended to the water's edge, constituted an error of law because his jurisdiction under the *Surveys Act* was limited only to "re-establishment" and this was in direct contrast to "establishment" or running a line for the first time. Accordingly, Divisional Court in *Duarte #1* determined that equitable principles were engaged in regards to the division of the accreted lands as between upland riparian owners and the matter was returned for a rehearing based on a proper application of legal principles and not a method under the *Surveys Act*.

Duarte #2 was the more recent result - again from Divisional Court - but from an entirely different panel than what had heard the appeal in *Duarte #1*. The Coordinator was no longer available for hearing the application as directed by Divisional Court in *Duarte #1* and accordingly, the Surveyor General conducted the hearing which led to a decision pursuant to section 48 of the *Surveys Act*.

A number of things changed between the time of the hearings in *Duarte #1* and *Duarte #2*. First and foremost is the fact that the standard of review on appeal had changed as a result of evolving jurisprudence. For a statutory appeal, *Duarte #2* confirmed that the standard of

[5] *Ibid.,* at paras 75-78

review is correctness on a question of law and palpable and overriding error on a question of fact, citing *Vavilov* and *Nikolaisen*.[6]

Second, the Surveyor General may have been alive to the fact that the previous decision made by the Coordinator resulted in a finding of fact that accretion had taken place. This issue was never engaged because, a factual conclusion was reached that there was no accretion. This was based on the evidence available and a consideration of water level records in Lake Huron going back to 1860 (but remember: Goessman's survey was in the 1820s). The Surveyor General concluded that the water level today is the same as the water level was in Lake Huron when Goessman conducted his survey. The issue of dividing accretions was therefore never before the Surveyor General and it was not an issue dealt with by Divisional Court in *Duarte #2*.

The issues that ***were*** before Divisional Court in *Duarte #2* were stated by the court as follows:

> The Surveyor General identified the issues before her as:
>
> 1. What was run (established) by Goessman and subsequent surveyors for the Concession Road and where does the line terminate?
> 2. What was run by Goessman and subsequent surveyors for the side road and where does the line terminate?
> 3. Has there been accretion to the shore of Lake Huron in this location and how do we address accretion in Ontario when considering the geographic lot fabric of a township created by an original survey?
>
> The Surveyor General answered the first two questions by confirming the Halliday survey, which showed the side road and concession road in question to terminate at the water's edge of Lake Huron. As to the third question, she found as a fact that there had been no accretion of land to the shore. As a result, it was not necessary for her to decide how to address such accretion.[7]

Divisional Court in *Duarte #2* summarized the previous appeal of the Coordinator's decision as follows:

> It allowed the appeal, holding that that the Coordinator's decision was unreasonable in that
>
> a) he resorted to surveying methods prescribed in the Act without first finding the location of the original boundaries, relying on Ministry policy instead of the requirements of the *Surveys Act*;

[6] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), https://canlii.ca/t/j46kb

[7] *Duarte v. Ontario (MNDNRF)*, 2022 ONSC 2262 (CanLII), https://canlii.ca/t/jnn5n

b) he ignored evidence that the original survey had not placed the limit of the road allowance at the water's edge and concluded that the road allowances ended at the water's edge without sufficient evidence to support that conclusion; and

c) he found that the Act entirely displaces the common law principle that accretions become the property of the owner to whose property they are attached, and that accreted land should be equitably allocated to preserve each owner's access to the water.

It then remitted the matter for trial of an issue "in accordance with these reasons, specifically whether the Halliday survey should be confirmed with or without amendments."

Consistent with jurisprudence in the pre-*Vavilov* era, the court did not substitute its own views for that of the decision-maker. […][8]

The rehearing was to be done in "accordance with [the] reasons" of the Divisional Court in *Duarte #1*, more particularly with its findings as to law. The Divisional Court did not give reasons on findings of fact, and the question of whether land had accreted to the properties was a question of fact. On this question of fact, the Divisional Court in reviewing the Surveyor General's decision in *Duarte #2* found:

The Surveyor General decided that it had not. She found that Lake Huron's edge is about where it was 200 years ago. The water's edge goes back and forth with the seasons. In coming to this conclusion she considered evidence from the National Ocean and Atmospheric Administration about water levels from 1860 to date. She also considered the evidence of surveyors Halliday and Stanton and Reynold's evidence from the earlier hearing. The way she resolved the contradictions among them was open to her. The layout of the lots broken by Lake Huron that existed in 1822 is much the same as it is today. Her finding of fact is based on evidence and cannot fairly be characterized as erroneous, let alone as a palpable and overriding error.

Given this finding of fact, common law principles relating to the treatment of accreted land are not applicable and Mr Reynolds' opinion that the road allowances must bend to take them into account cannot be sustained.[9]

In *Duarte #2*, Divisional Court answered the question, "did the Surveyor General err in finding that Goessman established the limits of the road allowances at the water's edge?," beginning at paragraph 33:

The Surveyor General found that Goessman ran (established) the concession road allowance to the lake. (He was not instructed to run the side road allowances. Instead he

[8] *Ibid.*, at paras 27-29

[9] *Ibid.*, at paras 31-32

planted posts at the front corners of the lots to show the location of the side road allowances. The side roads' courses were governed by the base line: they were parallel to it. They were actually run in 1928 by A.G. Cavana.)

On Goessman's original plan the concession road allowances and the side road allowances intersect the edge of Lake Huron.

Section 9 of the *Surveys Act* provides:

> 9. Despite section 58, every line, boundary and corner established by an original survey and shown on the original plan thereof is a true and unalterable line, boundary or corner, as the case may be, and shall be deemed to be defined by the original posts or blazed trees in the original survey thereof, whether or not the actual measurements between the original posts are the same as shown on the original plan and field notes or mentioned or expressed in any grant or other instrument, and every road allowance, highway, street, lane, walk and common shown on the original plan shall, unless otherwise shown thereon, be deemed to be a public road, highway, street, lane, walk and common, respectively.

The concession road allowance, then, having been established (run) by an original survey and shown on an original plan, is true and unalterable. The concession road allowance and the side road allowance, having been shown on the original plan, are deemed to be public highways.

The Surveyor General did not make the error identified by the Divisional Court in the previous decision. She recognized that the survey conducted under s.48 of the *Act* is to re-establish boundaries, not to set new boundaries using statutory surveying methods. She confirmed that Halliday re-established the concession road allowance that had been established by Goessman (and re-established by Gaviller in 1891) and the side road allowance that had been established by Cavana.[10]

The difficulty with this analysis though, may be the finding of fact that Goessman's "water's edge" in 1822 is the same as "water's edge" in the year 2020. In the result, Divisional Court dismissed the appeal in *Duarte #2*. Therefore, the decision of the Surveyor General under section 48 of the *Surveys Act* - namely that the concession line and road extend to the water's edge today - stands.

In reflecting on the decisions in *Duarte #1* and *Duarte #2*, we may well wonder if the decision in *Duarte #1* is still valid or if it was "reversed." In this regard, it may be helpful to remember that the factual basis for the Coordinator's decision appealed in *Duarte #1* and the factual basis for the decision appealed in *Duarte #2* were different. Moreover, *Duarte #2* was not an appeal of *Duarte #1* – that could only be taken to the Ontario Court of Appeal. It was not. In the end, the two decisions stand on their own, on their own separate set of facts, and must be seen as not

[10] *Ibid.*, at paras 33-38

to conflict with one another. The implications for this for land surveyors will of course include the importance of ***researching for all of the evidence*** in order to ensure that the factual matrix can be correctly supported in reaching a boundary opinion.

Editor: Megan E. Mills

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

The decisions in *Duarte #1 and Duarte #2* raise many fundamental principles of boundary law, including the distinctions between survey fabric and boundary fabric. Chapter 2 deals with the basic principles, including the very nature of a boundary and the relationship to property rights. Chapter 8, *Natural Boundaries*, includes a discussion of accretion and the division of accreted lands between neighbouring owners.

FYI

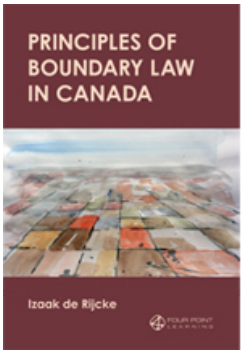
There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[11] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

CPD at National Surveyors Conference in Ottawa: May, 2022

Izaak de Rijcke will be presenting a CPD session for Professional Surveyors Canada in a concurrent session on the morning of May 12 on the topic: *Issues in Recent Court Cases: Indigenous title, Shared natural boundary factors and Revisiting co-ordinates.*

[11] 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.

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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