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.

Certainty in property law is seen as an overarching goal in limiting forms of tenure and the proliferation of claims to spurious "rights." This is augmented by the finality of court decisions that have settled a question of title or boundary; absent an appeal, the decision is binding on the parties and applies to the parcel of land in question for all time. The doctrine of *res judicata*[1] is relevant and if a decision is one that is "*in rem*,"[2] it attaches to and applies to the land for all time.

These principles formed the basis of an attempt by Canada to dismiss an action brought by a First Nation for a declaration of the area and boundaries of a reserve that had been created by treaty in 1850. The issues had been litigated in 1889 and, after a 5 day trial, judgment was rendered. That judgment was not appealed, making it final. In refusing to dismiss the claim, the Court considered the history of the dispute, the relevant legal principles and ultimately exercised its discretion to refuse Canada's motion.

Relitigation of a Reserve Boundary: What are the Applicable Principles?

Key Words*: reserves,* res judicata*, treaty rights, boundary interpretation*

In 1889, a court delineated the boundaries of a reserve, created by the Robinson-Huron Treaty. There was no appeal, and a Judgment was issued by the Court.[3] Today, the First Nation challenged the location of the boundaries set out in the Treaty, and asserted in a fresh claim that the Reserve, as set out in a Schedule to the Robinson-Huron Treaty was wrong. Today, the

[1] Spencer Bower and Hadley, in *Res Judicata, 4th ed*., para. 1.01 states, "Res judicata is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes once and for all the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment."

[2] ***in rem*** means "relating to a legal action that deals with property rather than a person." From: https://dictionary.cambridge.org/dictionary/english/in-rem

[3] *Francis v. Attorney General of Ontario* (1889), [1980] 4 CNLR 5, 1889 CarswellOnt 21 (Ch Div). This decision is not available in CanLII

First Nation seeks a declaration from the Court delineating the correct position of the boundaries on the ground.

The Court explained,

> The Plaintiff currently occupies 174 square kilometers (43,000 acres) in the Sudbury basin as its reserve lands. In this action, it seeks, *inter alia*, a declaration of title and an order of possession for an additional 2,670 square kilometers (660,000 acres), which it claims were wrongly left out of its reserve by the 1889 decision in *Francis*.[4]

The central issue was posed by the Court as a question:

> Can a 19th century Ontario case, *Francis v. Attorney General of Ontario* (1889), [1980] 4 CNLR 5, 1889 CarswellOnt 21 (Ch Div), which delineated the boundaries of the Plaintiff's reserve lands, and was never appealed or otherwise set aside, be reconsidered 135 years after the decision was rendered and a Judgment issued?[5]

The position of the parties was stated succinctly by the Court at the outset:

> The Plaintiff submits that the *Francis* decision, which considered and fleshed out the boundaries of Item 6, can be revisited because it is old, unfair, and wrong. The Attorney General of Canada, on the other hand, says that the *Francis* decision cannot be revisited because it is old and long in force, right or wrong.
>
> …
>
> Canada moves to dismiss the core of the Plaintiff's claim – that is, the request to re-delineate the boundary of the Plaintiff's reserve. It is, in effect, a partial summary judgment motion, although the other issues not considered here are, for want of a better description, discrete and subsidiary to the central question of the boundaries of the Plaintiff's reserve created by Schedule Item 6 to the Treaty.
>
> Counsel for Canada contends that the Plaintiff's boundary claim amounts to a collateral attack on the *Francis* judgment and an abuse of process, all by virtue of the fact that it seeks to re-litigate a matter that was decided with finality last century. The other Defendant, the province of Ontario, played an important role in the *Francis* action and generally supports Canada in the present action. However, it took no part in the present motion.[6]

The location of Whitefish Lake Indian Reserve No. 6 appears in Google Maps in Figure 1 below:

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[4] *Atikameksheng Anishnawbek v. Canada*, 2024 ONSC 4012 (CanLII), https://canlii.ca/t/k6j8p, at para 8

[5] *Ibid.*, at para. 3

[6] *Ibid.*, at paras 7, 9 & 10

Figure 1: Location of Reserve in darker shade.[7]

The reserve lands are also depicted in two recent surveys, of which cropped views of the plans appear in Figures 2 and 3 below.

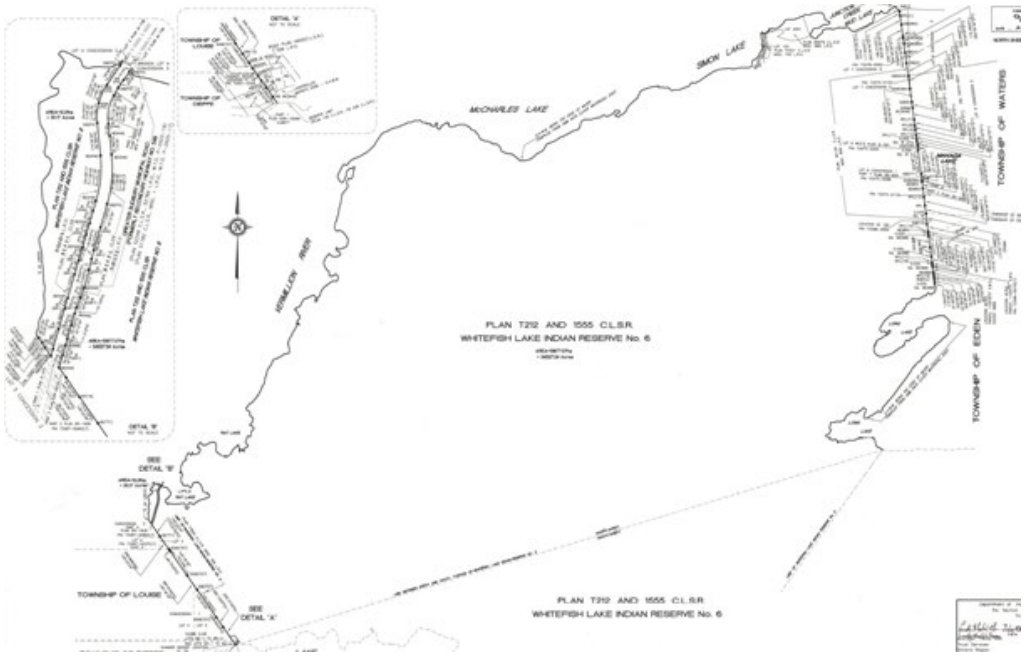


Figure 2: CLSR survey plan extract for north part.[8]

[7] From GoogleMaps® https://www.google.com/maps All rights reserved.

[8] From CLSR Plan Search at: https://clss.nrcan-rncan.gc.ca/clss/plan/image/id/683083 All rights reserved.

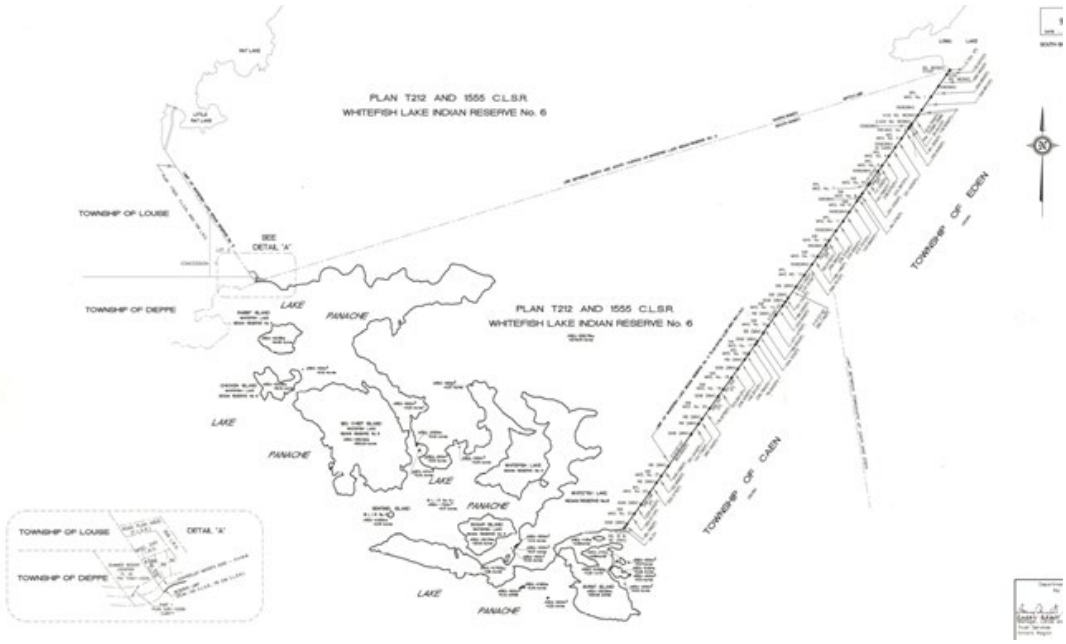


Figure 3: CLSR survey plan extract for south part.[9]

The Court described the Francis decision in 1889 and the effect of the trial judgment issued at its conclusion by Justice Ferguson:

> As indicated, the *Francis* action arose as a result of a dispute over timber rights on what Canada considered to be the Plaintiff's reserve land and what Ontario considered to be land lying outside of the reserve's boundaries. In bringing its claim, Ontario requested "that the true locality of this reserve should be declared". At trial, Justice Ferguson considered a mapping out of the Schedule Item 6 reserve lands that to be the central issue, and declared that his "duty in this respect is to fix the boundaries of the reserve as well as I can upon the evidence.
>
> During the course of the trial, Justice Ferguson heard evidence from a number of witnesses – both First Nations and non-indigenous witnesses. These included provincial government surveyor G.B. Aubrey and federal Department of Indian Affairs official Lawrence Vankoughnet. The witnesses also included a member of the Plaintiff's community, Coucroche, who Justice Ferguson described as having "the best memory as to occupation of places for long periods for particular purposes". Evidence was also presented by the Plaintiff's then leader, Chief Mongowin, who testified that as a youngster, nearly 40 years prior to the trial, he had accompanied his father, Chief Shawenakishichik, in the treaty negotiations with the Crown's representative, William B. Robinson.
>
> Justice Ferguson found the First Nations witnesses to be highly credible. He determined that Mongowin was privy to, and had accurately recollected, the Plaintiff's council's instructions

[9] From CLSR Plan Search at: https://clss.nrcan-rncan.gc.ca/clss/plan/image/id/680514 All rights reserved.

to Shawenakishichik in respect of the negotiations he conducted with Robinson over the Treaty's reservation of land on their behalf.

More specifically, Chief Mongowin identified in his testimony nine landmarks negotiated by Shawenakishichik as being encompassed by the Plaintiff's land. With the help of Coucroche's evidence, these landmarks were traced on the survey provided by Aubrey and became the defining points for Justice Ferguson's detailed boundaries – with the exception of a 7,000 acre tract of land north of the current reserve which had been included in the reserve lands by Aubrey but eliminated by Justice Ferguson (and which is not in issue in the present action as compensation for that lost acreage has been resolved in the Specific Claims process).

Putting all of the testimony together, Justice Ferguson stated in his reasons for decision that he adopted the evidence of Coucroche and Mongowin as the foundation for his Judgment:

> I was and I am entirely satisfied that the evidence given by Coucroche and the other witnesses in regard to occupation is true. There is not an agreement in every particular, but there is as nearly this as one often finds in evidence involving long recollection of witnesses. I think their testimony remarkably satisfactory in this respect.
>
> I find, and I have no hesitation in finding, that the meeting of the Council of the Band was held as stated by Mongowin, the present chief; that the instructions given by the council to Shawenakishick were as he has stated; and that these were stated to Mr. Robinson on the occasion of the making of the treaty, as stated by this witness.

In the result, Justice Ferguson issued a declaration as to the meaning of the reservation described in Item 6 of the Treaty. The Judgment issued in *Francis* begins as follows:

> [T]he Court doth declare that the Indian Reserve referred to in the Treaty mentioned in the second paragraph of the Plaintiff's Statement of Claim and designated in the Schedule attached to said Treaty known as the Robinson Huron Treaty as follows 'Sixth, Shawanakishick and his band a tract of land now occupied by them and contained between two rivers called White Fish River and Wanabitasebe seven miles inland' is properly described as follows…

The Judgment then goes on to describe, in detailed metes and bounds, the boundaries of the Plaintiff's reserve. That description conforms with the Plaintiff's reserve as it exists today. It does not, however, conform with the Plaintiff's view of their historic lands or what was promised them in Item 6 of the Treaty. It is their view that although Justice Ferguson held in favour of what he took to be Mongowin's and Coucroche's evidence about the Plaintiff's lands, the boundaries he drew do not coincide with the lands they had actually occupied "between the two rivers called White Fish River and Wanabitasebe.[10]

Turning to the merits of Canada's motion to dismiss, the Court described Canada's basis for seeking a dismissal as the result of it being characterized as either a collateral attack on *Francis* or an abuse of process by re-litigation.

[10] *Atikameksheng Anishnawbek v. Canada*, 2024 ONSC 4012 (CanLII), https://canlii.ca/t/k6j8p, at paras. 15 to 21

First, the Court explained what a "collateral attack" is, and why this is prohibited:

> In *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 SCR 594, at 599, the Supreme Court of Canada summarized the prohibition on collaterally attacking an existing judgment:
>
> > It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally – and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.
>
> The rule has been articulated as a broad one rather than a technical one. It exists as a matter of principle in the administration of justice: *Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd*., 2007 ONCA 695, at para 37. As Justice Binnie put it in *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 (CanLII), [2001] 2 SCR 460, at para. 20, "a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it."
>
> Accordingly, the rule against collateral attack is relevant wherever "the validity of the order comes into question in separate proceedings" other than those in which the original judgment is directly challenged: *Garland v. Consumers' Gas Co*., 2004 SCC 25 (CanLII), [2004] 1 SCR 629, at para. 71. The rule thereby embodies the principle that a judgment by a court of competent is "binding and conclusive on all the world until it is set aside, or varied on appeal", and "must receive full effect according to its terms": *Wilson*, at 599-601, 604.[11]

The Court continued and found the action to be a collateral attack:

> Counsel for Canada further argue that where, as in *Francis*, an action results, in "a determination of the title to property or some interest therein […] the action would result in a judgment *in rem*": *G.P.I. Greenfield Pioneer Inc. v. Moore*, (2002), 2002 CanLII 6832 (ON CA), 58 OR (3d) 87, at para. 26 (CA). Accordingly, it was registered on title to the Plaintiff's reserve lands as formal notice to all; as indicated earlier in these reasons, it is in the land registry that Canada's researcher located a full copy of the Judgment.
>
> In general, a judgment *in rem* is "applicable against the whole world", not just as between the parties to it: *R. v. Greco*, (2001), 2001 CanLII 8608 (ON CA), 155 OAC 316, at para. 9 (CA). Since Justice Ferguson ruled that the title of the lands within the boundaries of Treaty item 6 is vested in the federal Crown as reserve lands, the judgment in *Francis* is "binding *erga omnes* as a matter of precedent, according to the ordinary rules of *stare decisis*": *R. v. Sullivan*, 2022 SCC 19, at para. 53.
>
> Finally, Canada's counsel submit that a change over time in the state of the law, or in approaches to treaty interpretation, does not affect the rule against collateral attack. After all, "[i]f final orders were to be set aside when there was a change in the law, there would be

[11] *Ibid*., at paras. 63 to 65

> no finality to litigation": *Ipex Inc. v. Lubrizol Advanced Materials Canada, Inc*., 2015 ONSC 6580, at para. 24.
>
> Moreover, the passage of more than a century does not weigh in favour of permitting a collateral attack on the *Francis* Judgment. In fact, the Court of Appeal has said that the finality of a judgment becomes increasingly important with the passage of time, so that "[w]hen an action has been disposed of in favour of a party, that party's entitlement to rely on the finality principle grows stronger as the years pass": *Giant Tiger*, *supra*, at para 38.
>
> Given the finality of Justice Ferguson's ruling, and the way in which the present action seeks to have its central issue – the boundaries of the Plaintiff's reserve under Item 6 of the Treaty – reconsidered, the action fits the definition of a collateral attack. While the action has one party – the Plaintiff – whose members were witnesses in *Francis* but who did not participate in the *Francis* trial as a party with a legal interest of its own, the Judgment in issue was rendered in circumstances where it applies *in rem*.
>
> Accordingly, the entire world, including the Plaintiff, has adhered to the *Francis* judgment since it was decided in 1889. The Judgment defined more than the rights of the two government parties *inter se*; it defined the reserve land itself. It can no longer be appealed or challenged in a direct way.
>
> The present action, which seeks to revisit the boundaries of the reserve lands, on its face challenges collaterally what is not, and cannot be, attacked directly. In the most literal sense of the term, it is a collateral attack on prior judgment.[12]

Second, the Court considered whether or not allowing the action to proceed would amount to an "abuse of process." This argument, advanced by Canada, was generally found to favour a dismissal of the action. The Court explained:

> … although the doctrine carries the label "abuse", motive is not part of the abuse of process by re-litigation analysis; the bar to re-litigation is not about *male fides*: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 SCR 77, at para. 51. As Justice Pepall explained in *Flores*, at para. 24, "The doctrine is related to the common law doctrines of *res judicata*, issue estoppel and collateral attack, but is more flexible…
>
> Accordingly, while the abuse approach "is similar to issue estoppel in that it can bar litigation of legal and factual issues 'that are necessarily bound up with the determination of' an issue in the prior proceeding, abuse of process also applies where issues 'could have been determined'": *Winter v. Sherman Estate*, 2018 ONCA 703, at para. 7, citing *Danyluk v. Ainsworth Technologies Inc.*, *supra*, at para. 54. Counsel for the Crown sums up the idea in its factum, submitting that if to be successful in the new litigation, a party must challenge the findings of fact or law made by a court in a previous proceeding, the new action is an abuse of process: see *Caci v. Dorkin* (2008), 2008 ONCA 750 (CanLII), 93 OR (3d) 701, at para. 15 (CA).

[12] *Ibid*., at paras. 69 to 75

> The present action fits that description. The question posed by the Ontario government to the court in *Francis*, at para. 19, was precisely the same question as that posed by the Plaintiff in the present case: "that the true locality of this reserve should be declared". Thus, counsel for Canada asks, rhetorically, "Could the trial judge in this Action find that the Claimed Lands are the intended boundaries of the reservation described in Schedule Item 6 without making findings of fact and law that are different from Justice Ferguson's?"
>
> To pose the question in the context of this action is to answer it. The tasks set for Justice Ferguson and for a court trying the present action are self-evidently the same.
>
> The relief sought by the Plaintiff in the Fresh As Amended Statement of Claim includes: "A declaration of title and an order of possession of all lands within the Whitefish Reservation Lands…" Appendix 'A' to the pleading is a map of the Whitefish Reservation Lands that engulfs and is by several orders of magnitude larger than the Plaintiff's present reserve land as delineated in *Francis*. The rest of the relief sought in the pleading has to do with whether the Crown breached its duties of trust and good faith to the Plaintiff in arriving at the boundaries ultimately drawn in *Francis* which, the Plaintiff contends, deprived it of lands that were rightfully part of the Schedule Item 6 reserve. It is the redefinition of the boundaries that is at the heart of the claim."[13]

Third, the Court considered and applied its residual discretion in refusing to dismiss the case. The basis of this discretion and how it was applied is best explained by turning to the words of the Court:

> The basic due process, or fairness concerns have been further combined with a number of more pragmatic policy considerations to be taken into account when approaching the prospect of re-litigation. These features of judicial process were elaborated on by the Supreme Court in *Toronto v. C.U.P.E.*, *supra*, at para. 51, where they were seen to equally inform the narrow scope of discretion which courts retain to re-consider what otherwise would be a finally decided point:
>
> > First, there can be no assumption that re-litigation will yield a more accurate result than the original proceedings. Second, if the same result is reached in the subsequent proceeding, the re-litigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly and additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
>
> All of this must, then, be taken into account where the court's residual discretion to proceed with a case otherwise barred as re-litigation of a prior case is invoked. Here, in particular, the Plaintiff's absence as a party in the *Francis* case must be factored into the analysis of each of the legal and policy concerns.

[13] *Ibid*., at paras. 77 to 81

For example, re-litigation may or may not yield a "more accurate result" than the result in *Francis*, but a re-visiting of the issues in a new trial will include extra input by the Plaintiff as a party to the action that will inform the judgment. Even if the resulting reserve boundaries turn out to be the same, the extra judicial resources will, in my view, have been worthwhile as an effort to add legitimacy to the resolution of a First Nation's treaty claim. After all, the Supreme Court of Canada has acknowledged that we are in an era when "Canada has abandoned its policy of assimilation in favour of a policy of reconciliation": *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families (Bill C-92)*, 2024 SCC 5, at para. 12.

On the other side of the coin, if the result at trial expands on the *Francis* boundaries, the inconsistency can only help enhance, not undermine, the credibility of the judicial process. It may be true, as the Supreme Court has said on other occasions, that "[t]rue reconciliation is rarely, if ever, achieved in courtrooms": *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (CanLII), [2017] 1 SCR 1069, at para. 24. But allowing the Plaintiff a voice in determining its own reserve land will be a step in the national imperative of seeing that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy…": *Bill C-92 Reference*, at para. 3.

In the civil litigation context, autonomy and recognition of First Nations' peoplehood would be reflected in the Plaintiff's equality of participation with the other two governments in the case. Accordingly, in litigating the Plaintiff's reserve lands, the Plaintiff and Canada must be situated in a way that reflects the Supreme Court's vision of "Indigenous governing bodies and the Government of Canada work[ing] together to remedy the harms of the past and create[ing] a solid foundation for a renewed nation-to-nation relationship": *Ibid*., at para. 20.

The Plaintiff is a rights-holding entity seeking a remedy under a Treaty in which it is a partner, Chief Shawenakishichik having agreed to the Treaty on the Plaintiff's collective behalf. The Plaintiff's equality of stature with the other parties to the litigation – and the mutuality of the legal rights and obligations in issue – is a first principle of legal process and of the law surrounding treaty interpretation and enforcement: Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(l)(a), 1155 UNTS 331, 333; *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 SCR 1025.

This sense of equality before the court ties into the understanding voiced in *Prenner*, at para. 41, that parties are barred from relitigating a prior case, but only as long as they received the opportunity to present their case in the first place. And while not every type of proceeding affords the full panoply of courtroom rights to the litigants, ordinary conceptions of due process preclude allowing one side one side to present its case in a manner from which the other party was effectively barred.

In a trial such as *Francis*, it is fundamental that each side have the opportunity not only to present evidence, but to cross-examine the opposing side's witnesses and to argue its case: *Innisfil Township v. Vespra Township*, 1981 CanLII 59 (SCC), [1981] 2 SCR 145, at 160. These process rights were enjoyed by the governments of Canada and Ontario in *Francis*, but not by the Plaintiff whose land was in issue. Coucroche and Mongowin testified as witnesses for

> Canada, but they did not have counsel to cross-examine the government surveyor and other officials or to argue the case for a more expansive interpretation of the Treaty's Schedule Item 6."[14]

In summary, the court concluded that there was a residual discretion to override the re-litigation prohibition in the right circumstances. It exercised that discretion in concluding that this action should proceed to trial on all issues.

Readers will appreciate that this decision is potentially very impactful. It certainly is for the parties in this action, but also for other First Nations in which the settlement of Reserve boundaries took place through litigation in which Canada acted on behalf of a First Nation – but the First Nation did not have its own counsel. The unfairness of the judicial process and the stated objectives explained in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families (Bill C-92)*, 2024 SCC 5, at para. 12, means that conventional barriers preventing re-litigation on the basis of collateral attack and abuse of process, may not apply.

Editor: Izaak de Rijcke

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

A discussion of issues related to equity is discussed in *Appendix 1: The Canadian Context of Common Law for Land Surveyors*. See also *Chapter 9: Boundaries and Aboriginal Title.*

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

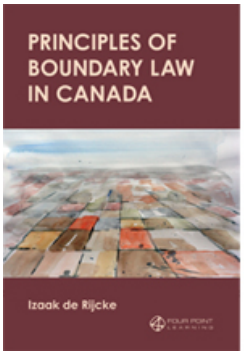
[14] *Ibid*., at paras. 90 to 97

[15] 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.

Eastern Regional Group of AOLS "Education Day" Webinar

The theme of the Eastern Regional Group (ERG) of AOLS "Education Day" held on April 30, 2024 was *Water Boundaries in a Changing Climate Context*. Four Point Learning co-hosted the event which is now available as a CPD webinar.[16]

Principles of Boundary Law in Canada



A boundary is an attribute of every parcel of land in Canada – a parcel cannot exist without boundaries. Providing secure and predictable results in recording title and identifying the extent of title are elements that operate hand in hand in order to give certainty to the immense value tied up in real estate 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 need a current reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable. Moreover, the education and training needs of new members to the cadastral surveying profession are best served by a reference work that not only provides comprehensive coverage of the material but is organized and indexed in a manner that supports the formation of professional opinions.

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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[16] This webinar qualifies for 8 *Formal Activity* AOLS CPD hours.