



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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There are times when multiple principles of boundary law intersect; these can be exciting illustrations of not only how complex the common law can be, but also give us further resources to consider. We may wonder if the rules and principles of boundary retracement are a “closed set,” or do they continue to evolve – much like the common law itself?

In April, the writer was one of many presenters at an Education Day event sponsored with the Eastern Regional Group.¹ One slide used in the presentation referred to an appellate decision in British Columbia² – and how it considered the treatment of a seafood quota or harvesting right in terms of constituting “property.” The BC case referred to a class action seeking compensation for the Minister of Fisheries’ decision to close Geoduck³ fisheries in designated Strict Protection Zones in Haida Gwaii. In this issue, we consider the relevance of case law from other common law jurisdictions and the applicability to water boundary retracement and location in ***Canadian tidal waters***.

Low Water Mark, the Foreshore, and Common Law Accretion

Key Words: *foreshore, accretion, natural boundary, tidal waters*

¹ The event theme was *Water Boundaries: a Climate Context*. The presentation title was ***The Impact of Climate change on “Slow and Imperceptible”: What are the Courts telling us?*** The entire day event is available as a CPD seminar at https://4pointlearning.ca/4PL/CPD-ERG_2024.pdf

² *Canada (Attorney General) v. Hideaway II Ventures Ltd.*, 2023 BCCA 223 (CanLII), <https://canlii.ca/t/jxh51>; leave to appeal to SCC dismissed at: *Hideaway II Ventures Ltd., et al. v. Attorney General of Canada*, 2024 CanLII 8235 (SCC), <https://canlii.ca/t/k2pwf>

³ <https://en.wikipedia.org/wiki/Geoduck>

Leave to appeal was sought by the Respondent after a decision from the BC Court of Appeal. The leave application was dismissed.⁴ But a consideration of the appellate decision raises interesting questions for land surveyors and lawyers alike. As mentioned, the case was referred to briefly in a slide used during a presentation as an example of how, even today, what was the common law of England at the time of its inception into Canada may lead to a consideration of court decisions in the UK, and other common law jurisdictions. The slide was:

THE COMMON LAW OF ENGLAND IN 1791 – A MODERN EXAMPLE

- In the 2016 House of Lords decision, *Lynn Shellfish Ltd & Ors v Loose & Anor*, the Privy Council ruled on the law of accretion and the test to be applied by referring to a number of earlier decisions – including *Southern Centre of Theosophy* originating in Australia, and a US Supreme Court decision from 1971 between Nebraska and Iowa:

“Whether one is concerned with the ownership of, or rights over, land, the principle that land can increase (or indeed decrease) as a result of accretion is well established. In the Privy Council, Lord Wilberforce described accretion in *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706, 716 as:

‘a doctrine which gives recognition to the fact that where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water. Where these changes are gradual and imperceptible (a phrase considered further below), the law considers the title to the land as applicable to the land as it may be so changed from time to time.’

Lynn Shellfish Ltd & Ors v Loose & Anor, <http://www.bailii.org/uk/cases/UKSC/2016/14.html>

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To be clear, the BC Court of Appeal did not adopt or apply the law in *Lynn Shellfish*⁵ or what the case stood for. But it also referred to the House of Lords case in *Southern Centre of Theosophy*

⁴ *Hideaway II Ventures Ltd., et al. v. Attorney General of Canada*, 2024 CanLII 8235 (SCC), <https://canlii.ca/t/k2pwf>

⁵ *Lynn Shellfish Ltd & Ors v. Loose*, [2016] UKSC 14, <http://www.bailii.org/uk/cases/UKSC/2016/14.html>

*v. The State of South Australia.*⁶ Readers may recall that *Southern Centre of Theosophy* has been applied as law by courts in Alberta⁷ and British Columbia.⁸

The approximate location of the disputed foreshore is illustrated below in Figure 1, and is situated in Norfolk, along the east coast of England.



Figure 1: The disputed foreshore area is drawn approximately in red.⁹

Privy Council decisions are usually accompanied by a “synopsis” or case summary from the Court. More than a headnote, these summaries serve to inform the public and the press. The synopsis for *Lynn Shellfish* is excellent, so liberty was taken to reproduce the summary below:¹⁰

BACKGROUND TO THE APPEAL

The Le Strange family (“the Estate”) is the owner of a substantial amount of land adjoining the east side of the foreshore (“the Foreshore”) on the east side of the Wash, on the west coast of Norfolk (“the Wash”), as well as holding an exclusive right to take cockles and

⁶ *Southern Centre of Theosophy v. State of South Australia*, [1981] UKPC 41, http://www.bailii.org/uk/cases/UKPC/1981/1981_41.html

⁷ *Nastajus v. Edmonton Beach (Summer Village) et al.*, 1987 CanLII 8441 (AB KB), <https://canlii.ca/t/g9wgk> and *Erik v. McDonald*, 2019 ABCA 217 (CanLII), <https://canlii.ca/t/j0sv2>

⁸ *Brydon v. Thom*, 2014 BCSC 1466 (CanLII), <https://canlii.ca/t/g8fsh>

⁹ From Google® Maps. All rights reserved.

¹⁰ From: [https://www.bailii.org/uk/cases/UKSC/2016/14\(image1\).pdf](https://www.bailii.org/uk/cases/UKSC/2016/14(image1).pdf) All rights reserved. Note: References in square brackets are to paragraphs in the judgment. The occasional comment appears as an added footnote to provide further context and relevance.

mussels from the Foreshore (“the Right”). In 1970, the Estate granted a lease of the Right to Mr John Loose, who is still holding over under that lease.

The appellants operate fishing boats out of King’s Lynn in Norfolk. During the summer of 2007, 13 of the appellants’ boats fished for cockles in locations claimed by the respondents to be within the area of the exclusive fishery vested in the Estate (“the Area”). Mr Loose and the Estate (“the respondents”) subsequently brought a claim in the Chancery Division of the High Court, alleging that the appellants had infringed the Right.

The parties accepted that the Estate is the owner by prescription of the Right, but were in dispute as to two issues relating to the extent of the Area. The first issue was which of the low water measurements should determine the location of the western, seaward, boundary of the Area. Four different types of low water measurement were contended for: **(i) mean low tide; (ii) mean spring low tide; (iii) mean neap low tide; and (iv) the lowest astronomical tide**,¹¹ the most extreme neap low water, which occurs every 18.6 years. At first instance, the High Court held that the mean spring low water represented the location of the western, seaward boundary of the Area; whereas the Court of Appeal concluded that it was the lowest astronomical tide mark.

The second issue between the parties was whether the Right extended to sandbanks which, having been previously separated from the Foreshore, became attached to it as a result of the gradual silting up of channels separating the banks and the Foreshore. The appellants contended that the respondents must establish that the Right extended to the relevant sandbanks before they became part of the foreshore; whereas the respondents contended that either the Right applied to the Foreshore as it was constituted from time to time, or, by the doctrine of accretion, the sandbanks were treated in law as added to the Area when it became attached to the Foreshore. The High Court and the Court of Appeal accepted both the respondents’ arguments on this issue.

JUDGMENT

The Supreme Court unanimously (i) dismisses the appeal regarding the seaward boundary, finding that the boundary is determined by the lowest astronomical tide, and (ii) allows the appeal in relation to the second issue, holding that the Estate’s right to fish does not extend to the sandbanks which attach to the Foreshore as and when they become so attached. Lord Neuberger and Lord Carnwath give a joint judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

There are two important principles which apply to both issues. The first principle is that unless it is taken away from them, the public have the right to gather fish and shellfish from the foreshore and since Magna Carta it has not been possible for the Crown, the owner of the foreshore, to grant a private fishery (which ousts the public right) [32-35]. The second principle is that, in order to establish that he has obtained a fishery (as with any right) by

¹¹ Emphasis added.

prescription, a person must establish that he has physically enjoyed the fishery “as of right” for the requisite period, so the extent of the right must be determined by the extent of the actual or probable use in the past, not by inquiring into the mind of the notional grantor [44-47].

The first issue: the seaward boundary

Resolving the first issue involves answering two questions. The first is whether the western boundary is fixed or whether it fluctuates with the relevant low mark, because, over time, the low water marks, marking the edge of the sea at low water¹² had moved further seaward [57]. The Court concludes that it is a fluctuating boundary. The evidence clearly establishes that during the substantial period during which the prescriptive Right to take shellfish from the Foreshore was exercised, the only way in which the shellfish were gathered was by individuals walking from the land when the tide was out [58]. In those circumstances, it was very likely that the putative Right would have been exercised over an area which was defined or limited by a shifting low tide mark [58]. It is not as if the existence of such a fluctuating right would have detrimentally affected any other interests of any significant value [60].

The second question is which of the suggested low water marks is the appropriate boundary [57]. The Court concludes that the most satisfactory low water mark is the lowest astronomical tide,¹³ as this means that all parts of the Foreshore which are at any time uncovered by the sea are included in the Area, whereas any other selection involves some of those parts being excluded from the Area [64].

The second issue: the previously separated sandbanks

As to the respondents’ first argument, the evidence does not establish that the Estate’s prescriptive Right extends to sandbanks which were not previously joined to the Foreshore as and when they become so attached [70].

There are two distinctions between the change in the Foreshore and the fluctuation of the low tide mark boundary. First, (while the silting up of channels which leads to the attachment is gradual), the actual attachment of sandbanks to the Foreshore itself will happen at one moment, whereas the shifting of the low tide mark will normally be gradual [71].

Second, and of particular significance, the public will have had the right to take fish, including shellfish, from such a sandbank. Unlike the position in relation to the fluctuating low tide mark, and notwithstanding the respondents’ contention to the contrary, it is by no means

¹² Note that low water is the relevant feature, rather than some “high water mark.” The foreshore, in tidal waters, is situated between high water and low water (however one may wish to define these features). It is the seaward boundary of the foreshore that was sought to be defined as marking the spatial extent of the exclusive right to harvest mussels and cockles.

¹³ The reason for defining low water mark as “the lowest astronomical tide” is specific to the circumstances that apply to this particular property right (a *profit-a-prendre*) and how that right was created or recognized in law. Readers in Canada may wish to compare *Lynn Shellfish* with the SCC decision originating in New Brunswick in *Municipality of Queen’s County v. Cooper*, 1946 CanLII 23 (SCC), [1946] SCR 584, <https://canlii.ca/t/fslkf>.

plain or obvious that, once a sandbank became attached to the Foreshore, the Estate would have exercised an exclusive Right to take shellfish from that former sandbank [72-73]. In fact, it appears unlikely that local fisherman would have been prepared to accept the Estate maintaining its exclusive Right to fish over former sandbanks which became attached to the Foreshore [73]. The fact that it is common ground between the parties that one of the sandbanks, Stubborn Sand, falls within the Area, is not inconsistent with the Court's conclusion [74].

As to the Respondents' second argument, based on accretion, the doctrine of accretion is concerned with gradual and imperceptible changes in a boundary; in the present case, however, there is a specific moment in time when the whole of a sandbank becomes attached to the Foreshore [78]. There is a difference in kind between the gradual extension of one recognised bank and the joining up of two formerly distinct banks. There is no room for the doctrine of accretion in relation to the sandbanks which became connected to the foreshore in the present case [80].

Conclusion

The Court would only be able to define the precise extent of the Area if the parties were able to agree it following receipt of the Court's judgment. In the absence of agreement, the Court considers that the best course of action would be to remit the proceedings to the Chancery Division to enable the precise extent of the Area to be identified [83].

The Privy Council is not a trial court. Like appellate courts in Canada, if a matter needs to be determined further and additional evidence and submissions are required, the matter is remitted back to a trial court. Such was the case for defining where, on the ground, the low water mark as "the lowest astronomical tide," would be located.

The treatment of shoals, rising out of the sea, becoming a dry sandbank and then "slowly and imperceptibly" becoming attached to the mainland as the channel between the sandbank and the mainland is not to be confused with the attachment of the entire sandbank to the mainland as "avulsive." The sandbank's origin and title remained intact and did not become part of the foreshore.

Editor: Izaak de Rijcke

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

A discussion of waterfront boundaries and accretion can be found in *Chapter 8: Natural Boundaries* and the formation of and issues related to *profits-a-prendre* are among the topics discussed in *Chapter 5: Boundaries of Easements*.

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.¹⁴ These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year’s quota.

Seminar at ANLS AGM

One of the CPD seminars presented at the AGM of the Association of Newfoundland Land Surveyors on May 31, 2024, is on the topic of *Maintaining Public Confidence and Trust in the Work of Surveyors*. Izaak de Rijcke will tackle the question: **How do we practise our profession in a manner that makes every survey and project be seen by clients and the public as the work of competent, trusted, unbiased and impartial practitioners?**

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](#).¹⁵

Course: *Survey Law 1*

Survey Law 1 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting September 4th. For more information, consult the [syllabus](#). Please go to Four Point Learning to [register](#).

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¹⁴ 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.

¹⁵ This webinar qualifies for 8 *Formal Activity* AOLS CPD hours.