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.

The statutory right of an owner of lasting improvements that have been mistakenly constructed on neighbouring land is a remedy that is available in almost all common law provinces across Canada. While the specific wording of the legislation varies somewhat from one Province to another, all require an element of "honest belief" that the land encroached on was that of the trespasser. The rightful owner is usually entitled to compensation for the land that has been lost. This makes sense. Were it not so, a trespasser could use the legislation to set about on a path of wilful trespass with a goal of using the encroachment to achieve a form of private expropriation.

Generally speaking, when the common law tests have been met under the legislation, a court-ordered transfer of title will often follow. Much of this is fact driven. In *Ontario Heritage Trust v. Hunter*,[1] we consider a decision that refused to order a transfer of title to land that was encroached upon by a dwelling, driveway, well and septic system, and ordering instead that all of these "improvements" be removed. The failure to use the services of a land surveyor to locate the property lines, and resorting to a hand drawn sketch of the lot that misrepresented the shape of the land parcel and location of the lot lines, was referred to by the court in finding that the encroachments were not the result of an "innocent mistake."

Failure to Use a Land Surveyor to Locate Property Lines and "Innocent Mistake": No Court Ordered Transfer of Title

Key Words: *encroachment, mistake, injunction, removal of improvements, indigenous sacred and cultural practices, fee simple title*

In *Ontario Heritage Trust v. Hunter*, an owner of a lot in a plan of subdivision had applied for a building permit to construct a dwelling in 2005. The lot in question (Lot 21) was part of a

[1] *Ontario Heritage Trust v. Hunter*, 2025 ONSC 3379 (CanLII), https://canlii.ca/t/kczgg

subdivision that had been registered in 1987 by Mr. Hunter's father and comprised some 25 lots in total, with 2 internal roads.

The court explained that archaeological investigations had occurred over a number of years and in several stages:

> In October 1989, archaeological resources were discovered on the subdivision lands. Alton Hunter gave a doctoral student, James Molnar, permission to investigate the site. Mr. Molnar investigated the site during the summers of 1990 to 1992. He and his study team recovered over 7000 artifacts, including shards from ceramic vessels, ground stone tools, and lithic pieces from time periods spanning 200 B.C. to 1600 A.D. They also identified large pits or depressions built on cobble beach ridges and recovered human remains from the surface of three discrete areas of the site.
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> Additional investigation was done in 1994, through which 28,166 objects were inventoried and additional human remains, including infant remains, were uncovered. The infant remains were found in circular depressions on the property that were considered to likely be burial pits. The Ministry of Culture, Nawash, and the Cemeteries Section of the Ministry of Consumer and Commercial Affairs were notified. The finding of the infant remains triggered the operation of the *Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4.
>
> The Registrar appointed under the *Cemeteries Act* mandated further investigations of the area. Investigations of Lots 9-22 took place in 1996. They recorded the locations of 131 circular and oval shaped depressions and 27 low-lying elongated mound features. The depressions and mound features were considered likely burial features.
>
> In 1997, the Registrar directed additional investigation. Two additional human burials were identified in close proximity to the infant burial. Additional investigation took place in the following years in consultation with the Chippewas of Nawash Band Council, and on the direction of the Registrar. A fourth human burial was identified.
>
> In 1999, the Registrar issued a Declaration, pursuant to section 71 of the *Cemeteries Act*, that a portion of the subdivision was an "Unapproved Aboriginal People's Cemetery". This portion did not include Lots 20 or 21.
>
> Alton Hunter was given notice of the declaration and was required by the *Cemeteries Act* to enter into negotiations with Nawash, the municipality, and the provincial and federal governments to sell Lots 9-20. The negotiations broke down in 2001. As discussed below, he eventually entered into an agreement to sell the lots in 2007.[2]

This proceeding was started as an application to the court for a declaration of trespass; the various encroachments onto a lot of land that is sacred and culturally important to the Anishinaabe, and which forms part of a larger piece of land recognized as an Aboriginal peoples' burial ground were sought to be removed entirely. In considering the response by the lot owner who had constructed the encroachments, the court explained,

[2] *Ibid*., at paras 13 to 18

> In May 2002, Mr. Hunter, who had purchased Lot 21 from his father in 1989, applied to the Niagara Escarpment Commission for a development permit to build a cottage on Lot 21. His evidence is that it did not occur to him at the time to get a survey done on Lot 21. Mr. Hunter acknowledges that his permit application contained inaccuracies. It relied on a hand-drawn map that depicted the lot as rectangular, rather than pie-shaped, and mis-stated the proposed set back for the cottage relative to the boundary between Lots 21 and 20, showing the cottage to be well back from the boundary line. It also depicted the driveway as being about 35 feet from the boundary line with Lot 20.
>
> In September 2002, Mr. Hunter's application was given conditional approval, subject to an archaeological assessment of Lot 21 being completed to the satisfaction of the Ministry of Culture. Mr. Hunter and Alton Hunter sought a reconsideration of the conditional approval. The requirement for the archaeological assessment was not altered.
>
> Accordingly, in April 2003, Alton Hunter had an archaeological assessment done of Lots 1-8 and Lots 20-21, in accordance with the Ministry's four-stage framework for archaeological assessment. The assessment found "scatters of cultural artifacts" that had "potential significance" and recommended additional assessment. That subsequent assessment resulted in the recovery of 79 artifacts from an area on Lot 20 referred to as Location 8. The archaeologist recommended that, "[d]ue to the potential significance and information potential of the material thus far recovered from Location 8, … this site be subject to additional Stage 4 avoidance or excavation in advance of any construction on the lot." However, no additional archaeological steps were taken.
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> In June 2004, the Ministry of Culture issued a final clearance for development for Lots 1-8 and Lot 21. The letter stated that archaeological concerns remained for the other lots (which included Lot 20) and that the *Ontario Heritage Act* prohibition on unlicensed alterations to archaeological sites remained in effect, including for Location 8 on Lot 20. Mr. Hunter was copied on the letter and his evidence is that he must have been told about the letter at the time.
>
> In May 2005, Mr. Hunter applied for a sewage system disposal permit. The application again showed Lot 21 as rectangular, not pie-shaped, and mis-stated the location of the cottage relative to the boundary between Lots 21 and 20, showing it to be set back 59 feet from the boundary line.
>
> In July 2005, Mr. Hunter applied for a building permit; the attached site plan again depicted a rectangular lot and showed a 59-foot side yard setback for the cottage from the boundary line with Lot 20.[3]

Clearly, the lack of any plan or sketch prepared by a land surveyor was a significant factor in the construction of the trespassing "improvements." The court noted this failure in explaining that,

> In determining the boundaries of Lot 21 prior to construction, he did not retain a surveyor. His evidence is that it did not occur to him to do so. Instead, he referred to Plan 3M-117, and

[3] *Ibid.*, paras 19 to 24

> walked the property. He believed he was constructing the cottage, driveway, and well on Lot 21, based on his understanding of the lot boundaries in Plan 3M-117 and his own familiarity with the land. The reasonableness of the steps Mr. Hunter took to discern the property boundaries before building are contested before me and discussed further below.[4]

That further discussion, referred to by the court, is discussed in the decision and will also be considered in turn. But first, the court reviewed the claim by the respondent that the injury can be estimated in money and adequately compensated by a small money payment. If this were true, a "private expropriation" might be the result, rather than (as was sought by the Trust and Nawash) a complete removal. In response the court decided,

> I find that the injury flowing from the Encroachments cannot be estimated in money or adequately compensated by a small money payment.
>
> The Trust, noting its statutory mandate to hold lands in trust for the people of Ontario, states that there is no monetary compensation that would adequately make up for the loss of land of such cultural and archaeological significance to the public.
>
> Nawash considers it a spiritual obligation to safeguard and care for the burial grounds of which Lot 20 forms a part. That obligation cannot be abandoned, as Nawash describes it, in exchange for monetary compensation. Anthony Chegahno, an Anishinaabe and member of Nawash, and Head Councillor of Nawash's Band Council, describes it as follows:
>
> > No amount of money could ever buy any part of the Nochemowenaing lands Nawash co-manages with [the Trust]. It's not like buying or selling a house. It is inconceivable for us to consider selling or swapping these sacred lands. This is a place our ancestors are resting. To disturb any gravesite is a very bad thing for us as Anishinaabe people.
>
> In *Armstrong*, the court contemplated that in some "unique case[s]", "the land is essential for a specific use that provides it with a qualitative identity that supersedes any monetary benefit that can be obtained from the forced sale of the land" (at para. 115(c)). In my view, this is precisely such a unique case. The land very clearly has a "qualitative identity," well described and supported in the record before me, which is inherently incompatible with the calculation of monetary damages.[5]

Mr. Hunter had title to the lot he had purchased from his father. Despite holding property rights flowed from holding fee simple title, the cultural and spiritual interest and practices of the applicants transcended the title to the land. This was a consideration reached by the court, but an overview analysis led to further findings of fact:

> Stepping back and viewing the equities of the situation as a whole, I note that the interests at stake for the Trust and Nawash transcend the concerns of ordinary property law. The Trust owns the property on which Mr. Hunter has erected the Encroachments. Nawash co-

[4] *Ibid.*, para 26

[5] *Ibid.*, paras 57 to 60

manages that property with the Trust. But in addition, and importantly, the Trust and Nawash are together concerned with protecting archaeologically and spiritually significant lands and safeguarding the ability of Nawash to carry out essential cultural obligations. These interests are profound and tilt the equities of the case in favour of the Trust and Nawash, when considered in addition to the Trust's existing property rights in respect of Lot 21. Mr. Hunter's concerns, by contrast, are rooted in his property law interest in a cottage that his family uses "not very often". I do not diminish his interests or his family's genuine affection for the cottage. But I am unable, in the circumstances of this case and based on the record before me, to equate his interests in the cottage with those of the Trust and Nawash in the land.

For these reasons, I am of the view that the injunction is properly granted. I do not suggest that injunctive relief is inevitable whenever there is an encroachment onto land held in trust by a public entity, or onto land of cultural or spiritual significance to Indigenous peoples. However, on the specific facts of the case before me, the preferred remedy of an injunction is appropriate, and damages are not.

Mr. Hunter's claim of honest but mistaken belief

I am buttressed in my conclusion by the evidence that Mr. Hunter's decision to construct the Encroachments was a result of his own failure to conduct reasonable due diligence.

Mr. Hunter submits that he made an honest mistake in building the Encroachments in Lot 20, and that injunctive relief is therefore not appropriate. It is uncontested that Mr. Hunter did not conduct a survey to confirm the boundary between Lots 20 and 21 before he began construction. His evidence is that it did not occur to him to retain a surveyor. Instead, he reviewed the subdivision plan and walked the property to determine the boundary line, relying on his familiarity with the land and his (mistaken) recollection that there was a horse barn on Lot 21. He says that in doing so, he honestly misapprehended the boundary line, and, as a result, made an honest mistake in building the Encroachments in Lot 20.

Mr. Hunter's explanation of his mistaken understanding of the boundary has evolved throughout this proceeding. His affidavit evidence is that he mistook a wooden stake along the eastern boundary of Lot 20 for a northern boundary marker. However, the evidence indicates that the stakes on the eastern boundary were only placed in 2018. As such, at the time Mr. Hunter built the Encroachments, no such stakes were in place.

Mr. Hunter acknowledged on cross-examination that this portion of his affidavit was erroneous and offered another explanation for his mistake. When he purchased Lot 21, he was aware that the corners of the lot's boundaries had been marked by iron bars that a surveyor had placed in the ground. These included a corner monument marking the southern boundary between Lots 20 and 21, closest to the lake, and three iron bars at the northern boundary point between the lots, which together demarcated the northern-most boundary point and the curved lot limits near it.

On the northern boundary between the lots, where the surveyor had placed three iron bars, the centre bar demarcated the property line between Lots 20 and 21. Mr. Hunter's position was that, when walking the property to delineate the boundary line, he mistook the right-

most bar for the centre bar. As a result, he misconstrued the northern boundary and mis-identified a portion of Lot 20 as belonging to Lot 21.

The evidence is that once he found the iron bar on which he relied, he did not search for the other two iron bars so that he could determine whether what he had found was in fact the centre bar marking the northern corner between the lots. Had he done so, in my view, he would have uncovered his error.

In any event, this explanation, even if I were to accept it, would still not account for the placement of all the Encroachments. Even if one were to draw a notional boundary line between Lots 20 and 21 based on Mr. Hunter's mistaken reliance on the right-most bar instead of the centre bar, a substantial portion of the gravel driveway would remain on Lot 20. Mr. Hunter thus built an encroachment over even what he thought the property line to be. I am therefore unable to accept, as a factual matter, that Mr. Hunter's explanation fully accounts for his stated misunderstanding of the property line.

On the southern boundary between the lots, it is now apparent that Mr. Hunter relied on the wrong marker. The iron bar marking the southern boundary was placed in 1985 and had gone missing by 2005, when Mr. Hunter walked the property to identify the boundary line. The marker that Mr. Hunter found, and relied on, is what is referred to by the parties as "traverse monument" that was installed in 1977 on land that goes farther into the lake, and which does not in fact demarcate the southern boundary. Mr. Hunter knew that monuments had been placed in both 1977 and 1985, but did not know that one of them – the actual boundary marker – had gone missing. Had he checked for both monuments when walking the property, he would have realized that one was missing and would likely have questioned whether the remaining monument was an appropriate marker of the boundary line. However, he acknowledges that he did not take that step.

Even if I accept that Mr. Hunter made an honest mistake by misapprehending the boundary line, I am forced to conclude that his mistake was borne of his own inadequate due diligence regarding the boundary line between the properties. I say this for several reasons.

As noted above, when identifying the northern boundary, he did not confirm that the iron bar on which he relied was in fact the centre bar marking the northern corner between the lots. When identifying the southern boundary, he did not confirm that the marker on which he relied was the actual boundary marker, which in fact had gone missing. In my view, given the importance of what he was doing – identifying boundaries before undertaking extensive construction, without the benefit of a survey and on land that was recognized as culturally and archaeologically important – this was a significant oversight.

I also observe that Mr. Hunter has worked in construction for decades. Part of his work involves constructing subdivision roads, for which he relies on surveys. Indeed, his evidence was that he would never construct such a road without reading a survey. However, he nonetheless proceeded without a survey, and says it did not even occur to him to get a survey, before building on what he believed to be his own lot.

Additionally, in the time between purchasing Lot 21 in 1989 and building on it in 2005, Mr. Hunter became aware of several developments in respect of the subdivision and Lot 20 that

would, in my assessment, have led a reasonable person to conduct a survey and take other steps to avoid inadvertently constructing on Lot 20.

Several of these developments had already taken place by the time Mr. Hunter applied for a development permit to build the cottage in 2002. For example, archaeological resources and human burials had been found in the subdivision in 1990-1992, 1994, 1996, and 1997. The record shows that in the 1990s, Mr. Hunter was periodically told by his father about the archaeological studies taking place in the subdivision. He knew about the discovery of human remains by Mr. Molnar in the 1990-1992 period. He was aware in general terms of the subsequent investigations. He was aware of the 1999 Declaration under the *Cemeteries Act* that a portion of the subdivision (not including Lots 20 or 21) was an "Unapproved Aboriginal People's Cemetery". He was aware that, pursuant to the *Cemeteries Act*, his father had been required to enter into negotiations with Nawash, the municipality, and the provincial and federal governments to sell Lots 9-20.

By the time Mr. Hunter began construction in 2005, there had been even more such developments. His father had had an archaeological assessment done of Lots 1-8 and Lots 20-21, which found "scatters of cultural artifacts" that had "potential significance" and recommended additional assessment. That subsequent assessment had been performed, and resulted in the recovery of artifacts from Location 8, on Lot 20. In addition, the Ministry of Culture had issued a final clearance for development certain lots, including Lot 21. The clearance provided that archaeological concerns remained for the other lots, including Lot 20, and that the *Ontario Heritage Act* prohibition on unlicensed alterations to archaeological sites remained in effect for those other lots. Mr. Hunter was copied on the letter and his evidence is that he must have been told about the letter at the time. His evidence is that he understood that he could not build a cottage on Lot 21 until the archaeological work was done, and that whether he could build would depend on what the archaeologist found. He agreed that his father likely told him about the results of the archaeologist's work when they were released.

Given Mr. Hunter's knowledge of these events, his extensive professional experience in construction, and his familiarity and expertise with surveys and his understanding of their importance, he should have conducted a survey to properly delineate the boundary between Lots 20 and 21 before proceeding to build. By not doing so, he failed to exercise the appropriate degree of due diligence. Having chosen to proceed without a survey, he should have exercised particular care when relying on the iron posts and other markers to try to identify the boundary line. He did not exercise such care.

In my view, these considerations underscore the appropriateness of injunctive relief. It would be inappropriate, and even absurd, to deviate from this preferred remedy in the face of the inadequacy of the "honest mistake" argument and Mr. Hunter's inadequate due diligence when determining the boundary line between Lots 20 and 21.[6]

[6] *Ibid.*, paras 75 to 92

The court found itself involved in a balancing of equities. The respondent had sought relief by way of a court-ordered expropriation of the land that had been encroached upon and invoked Ontario's *Conveyancing and Law of Property Act*:

> Mr. Hunter relies on section 37(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34 ("*CLPA*"), which permits a trespasser to hold onto trespassed land in certain circumstances. It provides:
>
> > 37 (1) Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.
>
> Mr. Hunter submits that this provision gives me discretion to intervene where, as here, a landowner has, based on a mistaken belief, made permanent improvements to land it does not own. He invites me to weigh the equities between the parties and consider the balance of convenience. The result, he urges, is to find that he may keep the cottage where it is, and provide a similarly sized piece of land from Lot 21 to the Trust in exchange.[7]

This claim was unsuccessful. After the balancing of equities, the court dismissed this claim made by the respondent, explaining,

> Moreover, I find that a weighing of the equities does not favour Mr. Hunter. I accept that he made good faith efforts to resolve this dispute with Nawash and the Trust and that he has permitted members of Nawash to walk down the gravel driveway on Lot 20 every year for the last 20 years so that they may perform an annual water ceremony. Nonetheless, ultimately, he asks me to weigh the public interest of the people of Ontario, and the spiritual and cultural obligations of the Anishinaabe, on the one hand, against his family's interest in, and occasional recreational use of, the Property on the other. Without in any way denigrating his family's affection for the land, I am unable to place it on par with the profound archaeological, spiritual, and cultural value of the land for the Anishinaabe and the people of Ontario.[8]

There are limits to fee simple title; when overriding considerations are found to apply, these may well "trump" a private owner's title. Indigenous cultural practices and spiritual beliefs are such considerations. Despite arguments that the certainty of fee simple title must always prevail, that notion did not succeed in *Ontario Heritage Trust*. Since the release of this decision,

[7] *Ibid.*, paras 97 and 98

[8] *Ibid.*, para 105

a subsequent ruling[9] in BC also involved a balancing of aboriginal title and fee simple title. In *Cowichan*, the court wrote,

> Rights exist in relation to and are limited by the rights of others. In *Chippewas of Sarnia*, the Court noted that the right asserted by the complaining party must be considered in relation to the rights of others: at para. 264. Likewise, private owners cannot automatically be granted entitlements in relation to Aboriginal title land without weighing the consequences of these actions for Aboriginal peoples: Borrows, "Aboriginal Title and Private Property" at 122. A recent example where that principle was applied to protect an Aboriginal interest in land is found in *Chippewas of Saugeen* ONCA, where the Ontario Court of Appeal held at para. 241: "There is no principled reason that a treaty-protected reserve interest of a First Nation should, in every case, give way to the property interest of a private purchaser, even an innocent, good faith purchaser for valuable consideration. Such an approach is inconsistent with this court's decision in *Chippewas of Sarnia*, fails to recognize the *sui generis* nature of Indigenous land interests, and would not move us closer to reconciliation.[10]

Readers can expect a further review of *Cowichan* in a forthcoming issue of *The Boundary Point*.

Editor: Izaak de Rijcke

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

The decision in *Ontario Heritage Trust v. Hunter* highlights the importance of boundary lines and the services of cadastral surveyors in clarifying their location to give certainty. The decision adds to the discussion in Chapter 9, *Boundaries and Aboriginal Title*, at page 402 and ff.

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.

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[9] *Cowichan Tribes v. Canada (Attorney General)*, 2025 BCSC 1490 (CanLII), https://canlii.ca/t/kdq92

[10] *Ibid.*, para 2181

[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.

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 3rd. For more information, consult the syllabus. Please go to Four Point Learning to register.

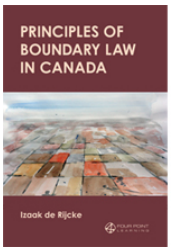
Seminar: The *Boundaries Act* in Practice – What Surveyors Need to Know

This 1-hour live seminar presented by Izaak de Rijcke at the South-Central Regional Group of AOLS meeting on October 23, will provide cadastral surveyors with insights in the making of applications under the *Boundaries Act*.

Coming Soon: A Practical Guide for Surveyors in Making *Boundaries Act* Applications

Drawing on speakers, resources and real-world examples, this 4-hour webinar will equip Ontario cadastral surveyors with the legal framework, practical requirements, procedural steps, and best practices for preparing, submitting, and managing *Boundaries Act* applications efficiently to bring boundary certainty for clients.

Principles of Boundary Law in Canada



This comprehensive treatment of the principles of boundary law lies at the intersection of law and land surveying. Although the textbook has its foundation in the law of real property in Canadian common law jurisdictions, it is intended as a resource which bridges two professions. For real estate lawyers, it connects legal principles to the science of surveying and demonstrates how surveyors' understanding of the parcel on the ground has helped shape efficient systems for property demarcation, conveyancing and land registration.

For land surveyors, it provides a structure and outlines best practices to follow in the analysis of boundary retracement problems through the application of legal principles. This textbook is not meant to be used as a "how to" guide for the answering of specific questions about boundary problems. Rather, it is intended to serve as a reference tool to support the formation of professional opinions by clarifying the framework for evaluating boundary and survey evidence.

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.*)

If you wish to contribute a case comment, email us at TBP@4pointlearning.ca.

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