



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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A short decision from the New Brunswick Court of Appeal underscores how easily water boundary terminology can lead to confusion. In *Poirier and Branch v. Minister of Environment and Climate Change*,¹ the court was asked to reverse a judge's decision² in an application for judicial review of a decision by the Minister of Environment and Climate Change. The judge had not interfered in the Minister's decision and upheld the refusal to set aside charges under the *Clean Water Act*.³

At a fundamental level, the decision turned on an interpretation of the feature described on the ground as "the shoulder of the bank," of a watercourse, while the legal boundary of the property was the "ordinary high water mark" of the same watercourse. How could both labels co-exist and did they describe the same feature?

"Shoulder" or "The Bank" of a Watercourse: Adding to the Confusion?

Key Words: *high water mark, natural boundary, setback distance, regulatory control*

In *Poirier*, the court stated the matter before it succinctly:

The Notice of Appeal raises only one ground of appeal, which can be summarized as follows: the application judge, by endorsing the Minister's use of the shoulder of the watercourse rather than the ordinary high-water mark to define the bank of the watercourse, erred in law and in fact in failing to recognize that the Minister's decision, in defining the legislative requirement of the "bank of a watercourse," was unreasonable, being based on an

¹ *Poirier and Branch v. Minister of Environment and Climate Change*, 2024 NBCA 147 (CanLII), <https://canlii.ca/t/k8g7k> (referred to herein as "*Poirier*")

² *Poirier v. New Brunswick (Environment and Climate Change)*, 2004 NBKB 167 (CanLII), <https://canlii.ca/t/k6dlb>
This citation is correct, but in fact the decision was released in 2024.

³ *Clean Water Act*, SNB 1989, c C-6.1, <https://canlii.ca/t/5648m>

erroneous legal definition, an arbitrary practice and an erroneous understanding of the facts and applicable law.⁴

This case arose out of alterations made along the waterfront and efforts to obtain necessary permits under the *Clean Water Act* to permit these changes. The body of water is the Big Tracadie River which is tidal and is connected to the Gulf of St. Lawrence. The site is illustrated below⁵ with a red arrow pointing to the location:



The appellants acquired the property in 2021 which fronted on the Big Tracadie River. The property was not developed and no structures were built thereon. With the intention of building their home on the property, the appellants added backfill onto their property.

The factual history leading to this appeal was explained by the court:

In order to calculate the 30-metre setback between the backfill and the Big Tracadie River, they used as their starting point the ordinary high-water mark indicated on their subdivision plan, which was prepared in 2021. According to the appellants, all the backfill was added outside of the 30-metre setback.

On December 14, 2021, the appellants submitted to the Department a first application for a watercourse alteration permit, to fill the land within 30 metres of the watercourse, that is, up to the [TRANSLATION] “edge of the existing bank,” and to build a riprap along the coast. The appellants were immediately informed that infilling is not allowed within 30 metres of the watercourse.

⁴ *Poirier*, at para 2. Only the pdf version of this decision has numbered paragraphs. See: <https://www.canlii.org/en/nb/nbca/doc/2024/2024nbca147/2024nbca147.pdf>

⁵ From <https://www.google.com/maps> All rights reserved.

On June 17, 2022, the Department rejected the application for a permit, being of the view that the proposed project could have a negative impact on water quality or on fish habitat. The letter of refusal stated that the Department had adopted operational practices pursuant to which, among other things: (1) infilling for the purpose of raising the level of undeveloped land is not permitted within 30 metres of the bank of watercourses subject to tidal variations; and (2) rock fill is only allowed where there is erosion on the bank that could compromise existing infrastructures or cause a loss of land, which is not the case for the appellants' property. No Notice of Appeal of this decision has been served on the Minister.

On September 13, 2023, the appellants submitted a second application for a watercourse alteration permit to place rock fill, level the land by adding backfill up to 15 metres from "the shoulder of the bank of the watercourse," install a boat ramp and add vegetation, all within the 30-metre setback from the watercourse. On September 29, 2023, the Department rejected the application for a permit to add rock fill, for basically the same reasons given in 2022, and suggested that bioengineered products be used and that the bank be stabilized using vegetation. No Notice of Appeal of this decision has been served on the Minister.

The appellants informed the Department that they wished to proceed with the project without adding rock fill and indicated that they wanted to make a gentle downward slope from the raised portion of the land up to 15 metres from the shoulder of the bank. The Department responded that since the suggested slope would require fill, which is not allowed within 30 metres of a watercourse, that part of the project was not permitted.

The appellants asked that an inspector from the Department visit the site to understand what was being requested. The Department's watercourse technician consulted the satellite images of the property which suggested that fill had already been added up to approximately 20 metres from the shoulder of the Big Tracadie River.

On October 16, 2023, an inspector visited the site. He took several measurements, placed stakes, and took several photos. He noted that fill had been added well within 30 metres of the shoulder of the bank, that is, closer to the 15-metre setback than the 30-metre setback.

On October 20, 2023, the inspector met with the appellants on their property for the purpose of issuing them an order. The appellants were of the view that the inspector used the wrong starting point to measure the 30-metre setback. They recommended using the ordinary high-water mark as the starting point, whereas the inspector informed them that measurements were to be taken from the shoulder of the bank. The inspector checked with the watercourse technician, who confirmed that measurements are to be taken from the shoulder of the bank.

The order issued to the appellants on October 20, 2023, indicates that they violated the *Act*, having altered a watercourse without a permit, and directs them to remove all fill placed less than 30 metres from the watercourse and restore the land to its original state.

The appellants appealed that order to the Minister who, in a letter dated December 14, 2023, confirmed the order, and set out the reasons for his decision. The appellants applied for judicial review of the decision. The reviewing judge determined the Minister's decision to

confirm the order was not unreasonable and dismissed the application. The appellants appeal that decision.⁶

After reviewing s. 15(1) of the *Act*, and quoting from definitions found therein, the court concluded that,

...the Act prohibits the adding of fill within 30 metres of the bank of a watercourse without a permit. The word “bank” is not defined in the *Act*. In the French version of the *Act*, the words “rive” and “berge” are used to render “bank.”⁷

However, the court’s analysis extended beyond the language in the *Clean Water Act*. Its focus turned next to policy, regulations and technical guidelines – as well as the French language versions of these:

The Department prepared a document entitled “Watercourse and Wetland Alteration Technical Guidelines” (Version 4 – January 2012) as a complement to the *Watercourse and Wetland Alteration Regulation – Clean Water Act*, N.B. Reg. 90-80. Like the *Act*, these technical guidelines provide that a permit is required to alter a watercourse and specify that alterations include not only those made directly in the watercourse, but also all activities that are carried out within 30 metres of the shoulder of the watercourse. The glossary of the Technical Guidelines defines the “shoulder of the watercourse” as the “point in the bank of a watercourse where the sharpest break in slope occurs and the steep sides slope down to meet the exposed mineral bed of the watercourse.” The “bank” (“berge” in French) is defined as “any elevated slope of earth that borders a body of water, especially the rising ground that confines a watercourse to its channel.”

Furthermore, in a document entitled “Source and Surface Water Management Branch – Development within 30 metres of a watercourse,” the Department adopted a policy in the form of an operational practice to serve as supplementary information to the technical guidelines to ensure consistent and transparent decision making while reviewing projects involving development within 30 metres of a watercourse. This operational practice provides that works such as adding fill (or infilling) for the purpose of raising an undeveloped property are not permitted within 30 metres of the shoulder of the bank of a watercourse that is subject to tidal influence.⁸

This is where this reported decision becomes really interesting. The appellants argued that only land surveyors are qualified in New Brunswick to legally delineate land boundaries, and that the **ordinary high-water mark** is one of the four boundaries of the property and can only be delineated by a land surveyor. While acknowledging that this may be correct, the Minister had submitted that this point was not relevant, explaining,

The Department, on behalf of the Minister, has the authority, under the *Clean Water Act* and the *Watercourse and Wetland Alteration Regulation – Clean Water Act* (WAWA Regulation),

⁶ *Ibid.*, at paras 7-16

⁷ *Ibid.*, at para 22

⁸ *Ibid.*, at para 23-24

to regulate watercourses and their 30-metre setbacks. This power does not interfere with the land surveyor's role in delineating properties. Measuring the 30-metre setback does not define the boundary of a property. Its purpose is to indicate the area in which no alterations can be made without obtaining a permit under the *Clean Water Act*.⁹

So how did the court respond to the submission made by the appellants that the 30 metre setback was to be measured from the *legal boundary*, rather than another line or feature that was otherwise defined? For licensed surveyors in New Brunswick, but also across Canada, this question has been a recurring one as waterfront owners try to reconcile their natural boundary on a survey plan with some other feature that is used for regulation or restriction of activities. The court explained:

The appellants argue that the “bank” has been defined by the courts as meaning the ordinary high-water mark. Like the reviewing judge, I am of the view that the case law referred to by the appellants is not relevant to the issues before this Court, that is, whether the definition given to the word “bank” by the administrative decision maker in its enabling statute is unreasonable, and I agree with the following comments by the application judge:

[TRANSLATION]

[...] Rather, the case law they cite is intended to define what the **ordinary high-water** mark is, which is used to delineate the extent of titles on land overlooking a tidal watercourse. Had the legislator wanted the 30-metre setback under the *Clean Water Act* to begin at the ordinary high-water mark, he would have used this known terminology instead of the term “bank”. [Emphasis in original; para. 47]

In the present case, the Court is not asked to determine the boundaries of the appellants' property, but to determine the starting point for measuring a setback to carry out work close to a watercourse. The respondent does not dispute that the appellants own the land in question up to the ordinary high-water mark. The prescribed setback does not limit the appellants' property; it restricts the activities that the owners can carry out on the property within the setback.¹⁰

The court noted the “fine print” guidance or cautions on the plan of subdivision and the Regional plan referred to in the appellants' evidence:

The appellants state that they relied on their subdivision plan and checked the limits and restrictions that apply to their property with the Acadian Peninsula Regional Services Commission (APRSC) and the Regional Municipality of Tracadie (RMT) before placing the fill. However, a small box on their subdivision plan indicates that a permit from the Minister is required in order to place fill within 30 metres of a watercourse. Furthermore, the RMT's rural plan prepared by the APRSC, to which the appellant Mr. Poirier refers in his affidavit, provides that distances are to be measured from the shoulder of the bank in the case of a

⁹ *Ibid.*, at para 27

¹⁰ *Ibid.*, at paras 28-29

tidal watercourse and from the ordinary high-water mark in the case of a body of saltwater. As mentioned, the Big Tracadie River is a tidal watercourse.¹¹

The court found that the Minister’s decision was not unreasonable. The appeal was dismissed. However, laypersons remain especially challenged when public authorities use reference lines relative to a body of water for regulatory control that are different from a natural boundary depicted on a survey plan prepared by a licensed surveyor. This challenge is certainly not unique to New Brunswick; similar discrepancies occur across Canada. Given the fact that so many precedents about a natural boundary’s location can be found from across many common law jurisdictions, the adding of further complexity by introducing yet another feature on the ground through regulation may be counter to what the public needs.

Editor: Izaak de Rijcke

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

Water boundaries and the features which define their location on the ground are discussed in *Chapter 8: Natural Boundaries*.

FYI

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Course: *Survey Law 2*

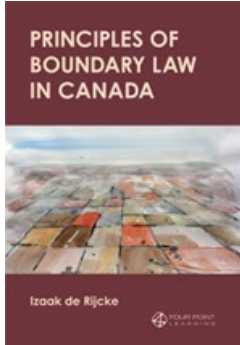
Survey Law 2 builds on *Survey Law 1* with a special emphasis on evaluation of evidence and special circumstances encountered in problematic and natural boundaries. *New to this course will be the consideration of AI and its impact on the solving of cadastral surveying problems – as well as creating new ones.* This course will be taught online Wednesday evenings by Izaak de

¹¹ *Ibid.*, at para 32

¹² Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd’s Registered Provider Guide for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

Rijcke, starting January 8, 2025. For more information, consult the [syllabus](#). Please go to Four Point Learning to [register](#).

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 need 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.) **This book qualifies for the tax holiday now in effect until February 15, 2025. It remains as a great [gift](#) for a lawyer colleague or an aspiring future professional surveyor! Shipping cost is included.**



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