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 process of treaty making and the setting aside of reserves between First Nations and the Imperial Crown involved a series of steps – negotiation of treaty lands as well as a determination of the lands to be set aside for reserves. Surveying and the formal marking of boundaries of these reserve lands would often not take place until some time after the signing of the treaty; the Crown surveyor purportedly relying on the descriptions set out in the treaty, for the language of what to mark out on the ground.

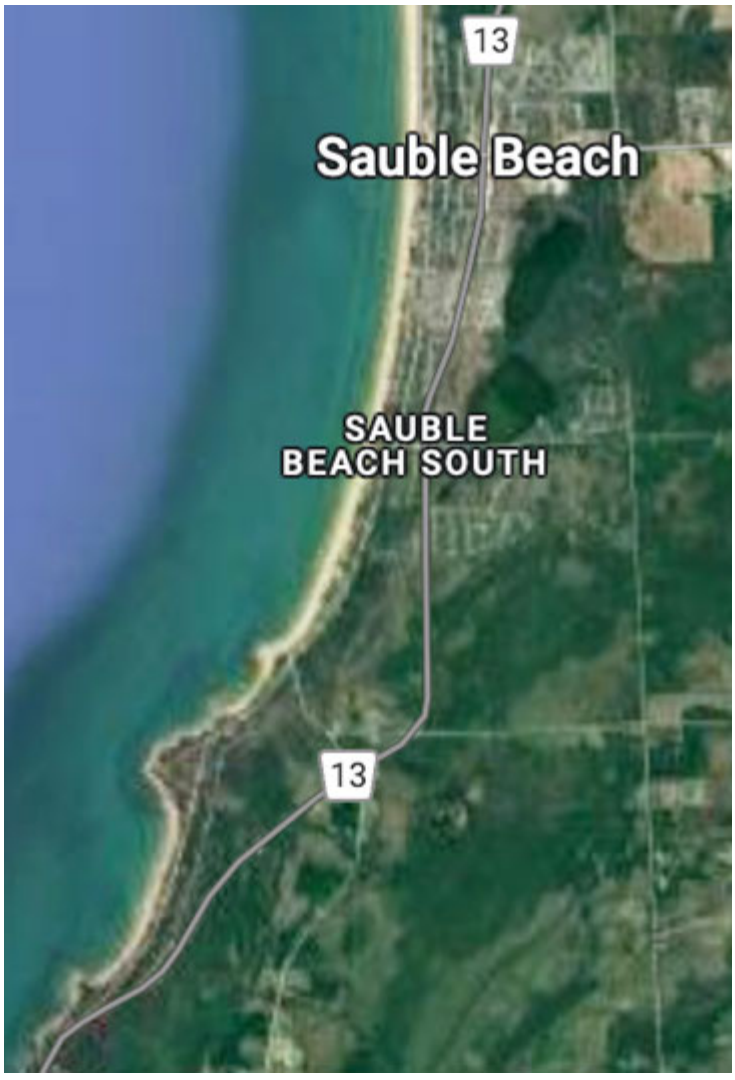
An ongoing court matter stemming from a claim by the Chippewas of Saugeen First Nation over beach lands along the shore of Lake Huron stemmed from a discrepancy between treaty language and what boundary was demarcated on the ground. Key issues were the intention of the parties at the time of treaty making, latent ambiguity and early placements of the boundary. The uncertainty has resulted in a prolonged dispute over the non-inclusion of about 1.4 miles of coastline at the north end of the reserve. In *Chippewas of Saugeen First Nation v. South Bruce Peninsula (Town)*,[1] *a* recent decision from the Ontario Court of Appeal, the trial judge's decision against the Crown and others was upheld, finding that there had been an improper exclusion of the disputed lands. While the decision did not end the proceedings in their entirety (the matter has an additional litigation "Phase" to deal with damages, cross claims and other issues), it did address key issues of treaty interpretation and the Honour of the Crown. In doing so, the decision includes an interesting discussion of surveyors' work as needing to accurately reflect the intention of the parties to a treaty and the challenges that can arise in interpreting historic field work – particularly when water boundaries are involved.

Honour and Duty of the Crown in Laying Out Reserves: Treaty Interpretation and the Actions of Crown Surveyors

[1] *Chippewas of Saugeen First Nation v. South Bruce Peninsula (Town),* 2024 ONCA 884 (CanLII), https://canlii.ca/t/k8938

Key Words*: treaty interpretation, intention, post-treaty conduct, latent ambiguity, honour of the Crown, fiduciary duty of the Crown*

Treaties made between First Nations and the Crown establish and govern the rights and obligations related to certain areas of land held by first nation communities, the establishment of reserve lands and ongoing rights and obligations into the future. In honouring the terms of these agreements, the Crown has a fiduciary duty to First Nations and is obligated to act honourably. Such duties also extend to the Crown's actions in formally setting out and honouring the boundaries that are described in the treaty itself in accordance with the treaty terms.



The recently released Ontario Court of Appeal decision in *Chippewas of Saugeen First Nation v. South Bruce Peninsula (Town)*[2], concerned an ongoing dispute over 1.4 miles of Lake Huron coastline which the First Nation claimed had been improperly excluded from the Saugeen Reserve. This wrongful demarcation was argued to be a breach of the Honour of the Crown and its fiduciary duties.

The disputed land is about 1.4 miles of beach known as "Sauble Beach" on Lake Huron. The disputed beach and nearby developed area can been seen below in Figure 1. A survey plan of the area appears in Figure 2.

Figure 1. Aerial image of disputed beach and surrounding area. From Google maps (all rights reserved.)

[2] *Ibid*

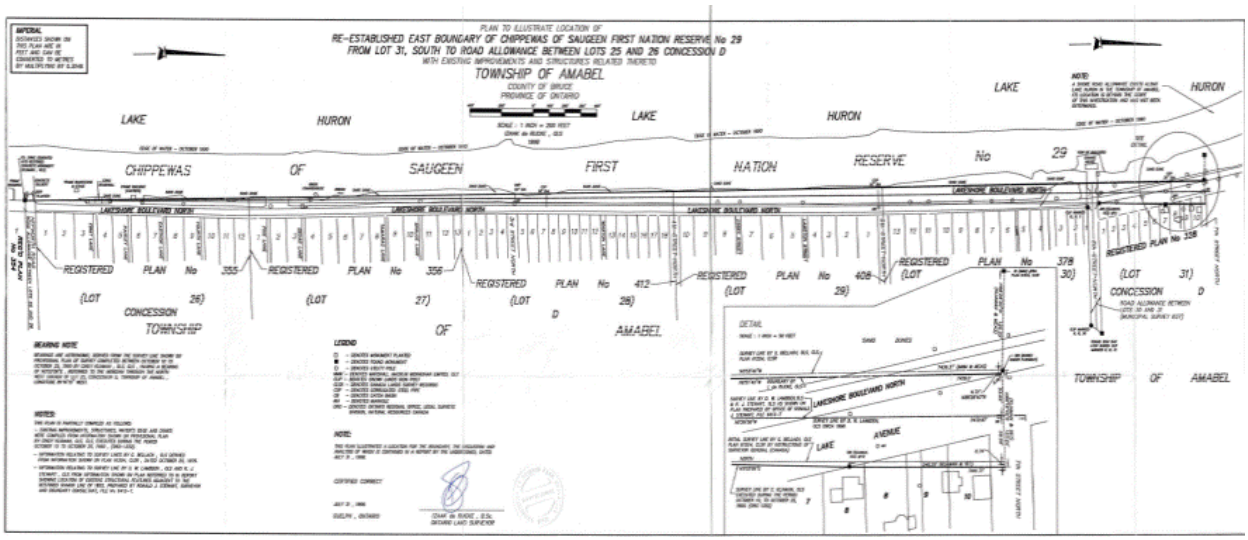


Figure 2. Survey plan of the Disputed Beach (attached as Appendix A to the reported decision)

The coastline is known to the First Nation as Chi-Gmiinh and had been used traditionally for sustenance and commercial fishing by the Saugeen before and at the time of the Treaty. In the early 1850s, much of the Bruce Peninsula had not been ceded by the Saugeen to the Crown. Treaty 72, signed in 1854 and confirmed by an Order in Council in 1855, ceded much of the Saugeen lands and set aside two reservations. The text of the Treaty setting out the reserves was set out in the Court of Appeal decision and reads as follows.

> 1st. For the benefit of the Saugeen Indians we reserve all that block of land bounded West by a straight line running due north from the river Saugeen at the spot where it is entered by a ravine immediately to the west of the village and over which a bridge has recently been constructed to the shore of Lake Huron. On the South by the aforesaid northern limits of the lately surrendered strip; on the east by a line drawn from a spot upon the coast at a distance of about (9 ½) nine miles and a half from the Western boundary aforesaid and running parallel thereto until it touches the aforementioned northern limits of the recently surrendered strip; and we wish it to be clearly understood that we wish the Peninsula at the mouth of the Saugeen river to the west of the western boundary aforesaid to be laid out in town & park lots and sold for our benefit without delay, and we also wish it to be understood that our surrender includes that parcel of land, which is in continuation of the strip recently surrendered, to the Saugeen River.[3]

The text was found to explicitly describe the western, southern and eastern boundaries and the preliminary survey of the Reserve boundaries began shortly after Treaty signing in 1854.

> According to the survey journal, Rankin set out on foot to traverse the Reserve's boundaries on October 20, 1854. He completed his initial traverse on November 3, 1854. Rankin then

[3] *Ibid*. at para.19

surveyed other areas of the Saugeen Peninsula until December 1854, when snow limited his ability to continue.[4]

When work resumed in May of the following year by the surveyor's assistant, there was some objection by the Saugeen to the boundary placement.

> Beginning in May 1855, Rankin's assistant, George Gould, conducted his own preliminary survey of the Reserve. Gould began his work by marking the western boundary of the Reserve in a line running "due north". Saugeen formally objected to this orientation in a band council resolution passed May 5, 1855. In this resolution, Saugeen argued that the western boundary should run along a dirt pathway that went towards Lake Huron in a roughly northwesterly direction, rather than due north. This pathway would later be referred to as Copway Road. In its petition, Saugeen stated:
>
> > That the wording of the late Treaty is not in accordance with the map laid before the council the night the Treaty was discussed, which we are prepared to show.
>
> The "due north" western boundary (which effectively runs in a direct line north from the southwest corner of the Reserve to the shore of Lake Huron) would have shortened the amount of lakefront abutting the Reserve. This interpretation would have also had the effect of excluding from the Reserve homes built by the Saugeen on the other side of the "due north" western boundary.[5]

As a result of the dispute, there were further meetings and a request that one boundary be changed to reflect the Saugeen's interpretation. The adjustment was formally approved by an Order in Council and referred to as the "Copway Road Amendment." The surveyor, Rankin, continued with the official survey of the eastern boundary which, according to Treaty language, was to follow *a line drawn south from a "spot on the coast" of Lake Huron about 9.5 miles from the western boundary*.

Figure 3. The "Trace Map" (attached as Appendix D in the reported decision)

[4] *Ibid.* at para. 23
[5] *Ibid.* at paras 24-25

There was some dispute about whether Rankin planted the post exactly upon "the spot" as he was dealing with wet sand. The trial judge found that Rankin planted the post, about 1.5-2 chains from the water's edge, to protect it from the lake shore. Also of note, and visible in Figure 1 above, is the concavity of the shoreline, which created a challenge to running the boundary on dry land. The report on the survey was submitted to Indian Affairs in May 1856 along with the "Trace Map" seen in Figure 3 below, which was said by Rankin to depict the Saugeen proposed alterations to the Reserve boundaries. Patenting, subdivision and the sale of abutting lots began shortly thereafter.

Later Plans of Subdivision creating lots owned by the families that were part of the proceeding did not include the Disputed beach; they are separated from the beach by what is now Lakeshore Road.

The Saugeen began raising concern about the eastern boundary and northern terminus in 1877 and made further public declarations expressing dissatisfaction with the location of the coast boundary in a series of band council resolutions between 1886 and 1930. Local Crown agents were aware of the complaints. In 1931 a resurvey of the eastern boundary was requested by Indian Affairs and completed by Walter Russell White OLS and DLS who relied on surveyor Rankin's field notes rather than physically surveying it himself. Saugeen rejected the resurvey and requested permission to use band funds to resurvey the boundary themselves. The request was rejected and further complaints were registered by Saugeen in the 1950s. A further survey was completed on the ground in 1974 by OLS and DLS Guenter Bellach who concluded that the disputed beach had been excluded because it was too narrow to be considered "valuable enough at the time to create it as a unit of land." The effect was that the Reserve's coastline was reduced by 1.4 miles. A Sketch Plan of part of the Township, also depicting the Reserve Boundaries from 1951.

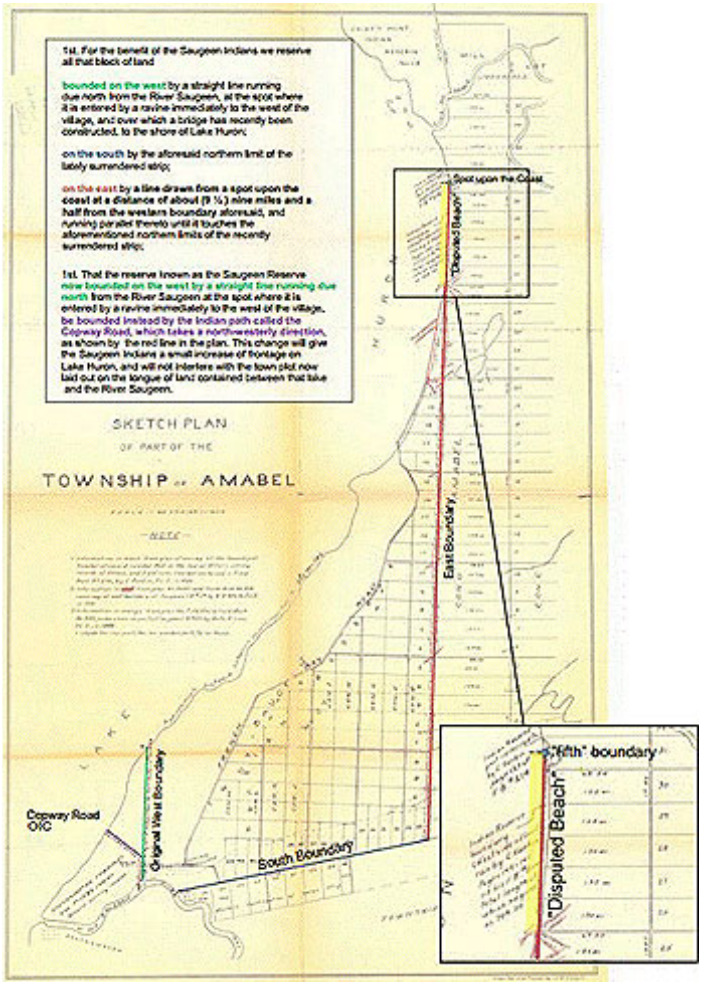


Figure 4. Depiction of Reserve Boundaries (Attached as Appendix B to the reported decision labelled as "Sketch Plan of Part of the Township of Amabel" (1951)

The trial judge had found that Rankin excluded the wet sand strip (the disputed beach) from the land set aside for the reserve in the Treaty, as a consequence of adjusting for the concavity of the beach - a decision that resulted in a treaty breach. Instead, it was held that the parties' common intention was for the reserve to include the coastline extending to the "spot on the coast" which would have been about 9.5 miles from where the west boundary met Lake Huron Furthermore, "the spot" would have been known to the Saugeen First Nation members because of their intimate knowledge of the coast. It was also found that it would have been very important to the Saugeen to retain as much of the beachfront as part of their reserve because of its value for fishing and the launching of canoes. The Crown on the other hand, would have had little interest in the strip.

What arose in the process of Rankin's survey was described as a latent ambiguity.

> The trial judge found further that when Rankin began surveying south from the "spot", as the Treaty required him to do to establish the Reserve's eastern boundary, he encountered a "latent ambiguity which arose when he was marking the boundary on the ground." She explained:
>
> > Rankin found that in order to run his survey line south in a straight line from the "spot" at Lot 31, he crossed wet sand between Lot 31 and 26 (the Disputed Beach), which he likely deemed to be unusable land to Saugeen. The latent ambiguity arose as a result of the concavity of Lake Huron's coastline which curved inland east to Lot 30 before curving back westward at around Lot 25/26 road allowance.
>
> Rankin may not have considered it acceptable for the eastern boundary of the Reserve run over wet sand. The trial judge explained:
>
> > PLS Rankin had two choices to rectify the latent ambiguity. He could either create a short north boundary to connect the east and west boundaries and move the "spot" slightly inland to his post or he could move the "spot" further south to a point where the east and west boundaries intersected and he could mark the boundary due south on dry land. PLS Rankin chose the second option. He exercised his discretion to resolve the latent ambiguity by moving the "spot upon the coast" south by approximately 1.4 miles, in accordance with acceptable boundary principles of the day as applied to deeds. However, in so doing, he deprived Saugeen of their unsurrendered reserve coastline promised in Treaty 72 (though the movement of the east boundary south resulted in some additional interior lands).
>
> While the trial judge identified these two options as ones Rankin could have adopted while he was conducting his survey, she noted that he also had a third option: namely, stopping his survey and seeking instructions from his instructing client about how to proceed. Alternatively, Rankin could have completed his survey but later drawn the Imperial Crown's

attention to the problem presented by the concave coastline and to his proposed solution. However, the trial judge concluded that:

> When faced with this ambiguity, PLS Rankin failed to seek further instructions from the Imperial Crown due to the time pressure the Crown imposed on him to finish the survey so that the surrendered lands could be put up for public auction. He also did not alert the Crown to his decision to demarcate the north terminus of the east boundary further south along the coast. Nonetheless, the Crown *de facto* sanctioned Rankin's decision when the Crown Lands Department accepted Rankin's final Plan of Survey and his records for deposit as marking the boundaries of [the Reserve].

The trial judge concluded:

> Saugeen did not surrender the Disputed Beach and thus, this beach is Saugeen reserve land. Under the terms of Treaty 72 Saugeen was entitled to have the east boundary of [the Reserve] extend up to a point along the coastline that is within Lot 31, Concession D, Township of Amabel.

By failing to ensure that their surveyor properly followed the agreed-upon and Treaty defined boundaries, the Crown acted in a manner contrary to the honour of the Crown and breached their fiduciary duty to protect the Reserve from encroachment.

On appeal, a number of issues were raised with respect to the trial judge's interpretation of the Treaty as well as issues concerning costs and procedural fairness. On the question of treaty interpretation, the Court of Appeal referenced the special principles of interpretation that have developed out of the Supreme Court of Canada. Briefly, treaties are a unique type of agreement that represent a solemn and sacred exchange of promises between the Crown and the First Nation.

> The trial judge began her analysis of the Treaty with a comprehensive summary of the legal principles applicable to treaty interpretation. Her summary quoted the nine principles enumerated by McLachlin J. at para. 78 of *Marshall and referenced the two-step approach endorsed by McLachlin J. at paras. 82-83 of that decision.* The trial judge's summary of the applicable principles also drew on the majority decision in *Marshall,* other decisions of the Supreme Court, and this court's decision in *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 D.L.R. (4th) 1 ("*Restoule (ONCA)*"), rev'd in part, 2024 SCC 27, 494 D.L.R. (4th) 383 (the Supreme Court's decision in *Restoule (SCC)* had not yet been released at the time of the trial judgment). In her summary of the principles, the trial judge repeatedly described her ultimate task as to consider the various possible interpretations of the Treaty based on the text of the Treaty and the cultural and historical context, and to choose the interpretation which best reconciles the "common intention" of the First Nation and the Crown.
>
> Near the end of her correct summary of the principles of treaty interpretation, the trial judge wrote: "After going through this exercise [i.e., consideration of the text and the cultural and

> historical context], the court is to choose from the available reasonable interpretations the one that reflects the most generous reading of the treaty in favour of the First Nation."[6]

The Appellant Ontario took issue with the last sentence above, arguing that the trial judge had erred in choosing an interpretation that favoured Saugeen rather than one that best reconciled the interests of both Saugeen and the Crown. The Court of Appeal noted that while read in isolation, the impugned sentence is not a correct statement of the law, it must however be read in the context of the decision as a whole and the footnoted decisions that were included with the statement. The Court of Appeal was satisfied that the correct principles of treaty interpretation had been applied, and in particular that the interpretation sought would reconcile the common intentions of both parties to the Treaty.

> The fact that the trial judge considered not only the interests of Saugeen but also those of the Crown supports the conclusion that she was not looking for an interpretation of the Treaty that favoured Saugeen. Rather, she was looking for the interpretation that best reconciled the intentions of both parties in forming the Treaty.
>
> Second, in this portion of the reasons, the trial judge repeatedly referred to the "common intention of the Treaty parties", as she did throughout her reasons and her outline of the relevant legal principles. Indeed, the first passage Ontario relies on, at para. 400 of the trial judge's reasons, does not refer to "the best interests of the Saugeen" in isolation, but rather links it to the common intention of the parties to the Treaty:
>
> > In so doing, Rankin failed to discharge his surveying task and resolve the ambiguity arising from marking the Treaty boundaries on the ground with regard for the best interests of the Saugeen and the common intention of the Treaty parties. [emphasis added.][7]

It was further held that the trial judge did not err in giving the text undue weight over the context in which it was written.

> The structure of the trial judge's reasons as a whole, and their substance, demonstrate that she did not give the text undue weight over cultural and historical context or limit herself to interpretations of the Treaty that are available on the text alone. Rather, she carefully considered the extensive cultural and historical record before her. Specifically:
>
> i) After setting out the legal principles governing treaty interpretation, the trial judge began by considering the portion of the Treaty text which described the boundaries of the Reserve and how that portion of the text fit within the Treaty as a whole;
>
> ii) She then considered the ethnohistorical context of Saugeen's culture and way of life. This included Saugeen's traditional system of government, and their fishing (both sustenance and commercial), hunting, trapping, and harvesting activities

[6] Ibid. at paras 83-84
[7] Ibid at paras 92-93

on the Saugeen Peninsula and in particular in the area around the Disputed Beach. She placed particular emphasis on Saugeen's herring fishery on the Disputed Beach using seine fishing in the shallow waters and using the beach to dry fish;

iii) She then considered the archival record from 1836 leading up to the negotiation of the Treaty. This included other treaties negotiated in the Saugeen Peninsula prior to the Treaty at issue, the Royal Proclamation of 1847, the Free Trade Agreement of 1854 between the Imperial Crown and the United States, and previous attempts by the Imperial Crown to negotiate a surrender of the Saugeen Peninsula;

iv) She then considered the written record of the Treaty negotiations; and

v) Finally, she considered the historical record after the Treaty was concluded, including the initial survey of the Reserve boundaries, complaints and petitions by Saugeen about the survey and the boundaries, the Allenford Council of July 1855 and subsequent Order-in-Council in September 1855 changing the western boundary of the Reserve (the Copway Road Amendment), and the subsequent conduct of the parties to the Treaty after the final plan of survey was completed.[8]

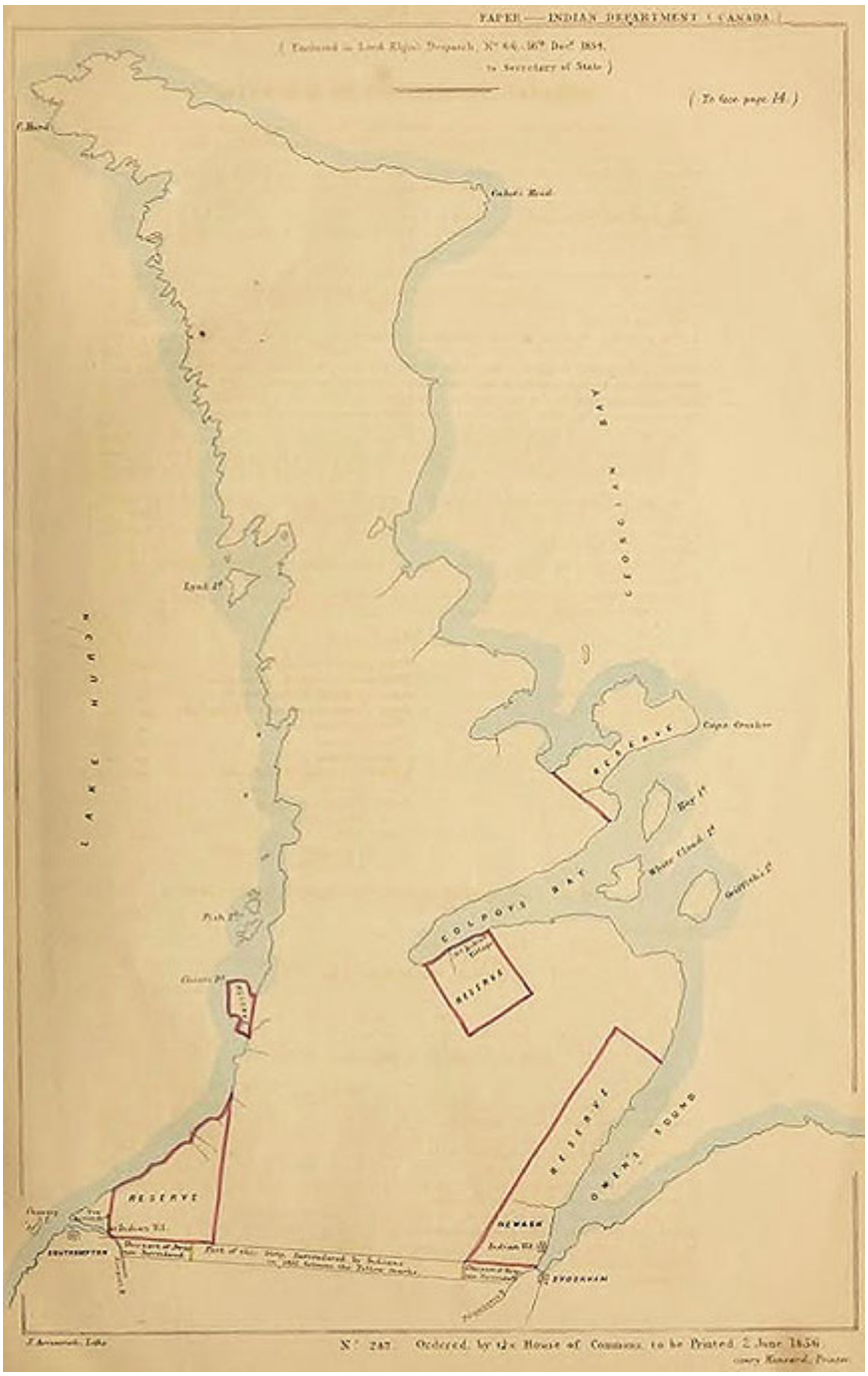
The Court of Appeal also found that the historical and cultural evidence and history of the treaty negotiations before the trial judge supported the finding that the Saugeen knew the coast, the beach and "the spot upon the coast" that was referenced in the boundary description.

> There was no necessity that the Treaty text refer to a specific natural physical landmark in order for the trial judge to find that Saugeen knew what the "spot upon the coast" in the Treaty text referred to.[9]

The Court of Appeal also rejected Ontario's argument that the trial judge had erred in fining that the Trace Map (which includes both the "Boundary according to Treaty" and the "Boundary desired by Alexander") did not represent the common intention of the Treaty parties or in her treatment of related evidence. In discussing the trial judge's consideration of the Trace Map (Figure 3 above) the Court of Appeal noted:

> […] The trial judge considered the Trace Map in the context of all the evidence and rejected Ontario's argument that it showed an intent by Saugeen to sacrifice coastline at the north end of the Reserve in exchange for more inland territory to the southeast. In particular, she noted that when Rankin returned the survey to the Crown, he included at copy of the Trace Map "at the request of the Saugeen Indians". He described the map as showing "an alteration" desired by Saugeen to the eastern boundary of the Reserve, but recommended

[8] Ibid. at para. 109
[9] *Ibid.* at para. 134



against accepting the proposed alteration, describing it as "unreasonable". The trial judge found that if Rankin had understood there to be a dispute about the eastern boundary under the Treaty, as opposed to a proposed alteration to it, he would have said so in his report to the Crown. She further found that if Rankin had understood the "Boundary desired by Alexander" to be what had been agreed to when the Treaty was negotiated, he would not have called it "unreasonable" and declined to recommend it.[10]

There was also found to be an appropriate consideration of the Sketch Map (Figure 5 below) though the trial judge had found that little could be concluded from the Sketch Map, it being drawn by a lay person and being without scale and of questionable accuracy.

Figure 5. The Sketch Map circa 1856, attached as Appendix C to the decision.

The Court of Appeal also rejected the argument put forward by the Town and the families that the judgement would adversely impact landowners not party to the litigation by casting doubt on the status of the land to the east of the current eastern boundary of the Reserve. The Court of Appeal held that the scope of the trial judge's declaration was not as broad as the families

[10] *Ibid*. at para. 141

contended, instead the declaration impacted only the lands to the west of the Lakeshore Boulevard, between a point in the road allowance between lots 25 and 26 and up to a point in Lot 31 to the north.[11] It was found that the language used in the declaration was linked directly to the definition of the Disputed Beach that appeared earlier in the reasons and the statement of claim and was accordingly limited in scope. The language of the declaration of "valuable fishing landing ground fronting on Lake Huron" was further found to be limited to beachfront, rather than interior land.

The Court of Appeal also addressed the rationale behind the crafting of a remedy in the circumstances, recognizing the intention of the treaty as well as the change in coastline since the time of the treaty.

> The court's goal in crafting an effective remedy is not to speculate about how the Imperial Crown would or should have drawn the boundaries in 1856 if it had approached the job differently: that is, if Rankin had consulted the Crown about the latent ambiguity resulting from the concavity of the shoreline, and the Crown had acted in accordance with the Treaty partners' common intention. Moving the end point of the eastern boundary due north will give Saugeen the land that was important to them when the Treaty was signed, and that remains important to them now. Such a remedy will fully achieve the dual goals of restoring the honour of the Crown and promoting reconciliation between the Crown and its Treaty partner, Saugeen.
>
> In sum, the trial judge found that the Treaty entitled Saugeen to approximately 9.5 miles of Lake Huron coastline as part of the Reserve. They did not receive it. The failure to include the Disputed Beach in the Reserve was a breach of the Treaty promise and was inconsistent with the honour of the Crown and the Crown's fiduciary duty toward Saugeen. One method of fulfilling the Treaty promise in 1855 would have been to survey the eastern boundary further to the east, so that it could be surveyed entirely on dry land. But that was not the only way the Treaty promise could have been fulfilled. What Saugeen are entitled to under the Treaty is not determined by colonial survey practices or colonial ideas about which types of land are valuable.
>
> In considering the appropriate remedy now, the trial court was faced with changes to the coastline in the form of accretion moving the edge of the beach west, and an inability to determine exactly where the edge of the beach was in 1855 or where a survey line could have been run entirely on dry land south from lot 31. The forward-looking remedy crafted by the trial judge of making a declaration that Saugeen are entitled to have the Disputed Beach (as defined in her reasons for judgment) form part of the Reserve fulfills the Treaty promise, restores the honour of the Crown, and promotes reconciliation between the Treaty partners.[12]

[11] *Ibid.* at para. 165
[12] Ibid. at paras. 224-226

The appeal court also held that while the trial judge had improperly limited the availability of the *bona fide* purchaser defence by not finding it available to the land owners who had acquired their properties through inheritance, there was no erring on part of the trial judge in balancing the competing interests of the parties under the principles of reconciliation and denying the application of the *bona fide* defence in this instance. Other issues raised by the appellants regarding procedural issues and costs were also dismissed.

The decision, though somewhat lengthy and only addressing Phase 1 issues, is an interesting read for land surveyors as it provides a thorough account of the trial judge's treatment of historical survey evidence in the context of Treaty interpretation as well as the role of the land surveyor in bringing a treaty to life (so to speak) in laying out the boundaries on the ground in a way which fulfills the obligations associated with the fiduciary duty and honour of the Crown. Many experts gave evidence at trial, but their testimony was not determinative of the outcome in the trial decision, or on appeal.

Editor: Megan E. Mills

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

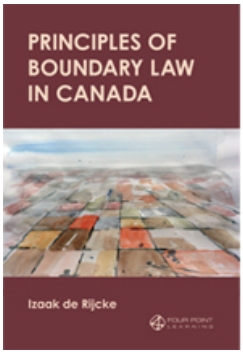
Reserve Lands are discussed in *Chapter 9: Boundaries and Aboriginal Title*, starting at page 390.

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

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

Principles of Boundary Law in Canada



In the context of (1) the complex and ever-evolving nature of boundary law, (2) the challenges of doing legal research in this area, and (3) the constant interplay between land surveying practice (as a regulated profession with norms codified in statutes) and common law principles, land surveyors 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. Shipping cost is included.***

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