



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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In April 2018, an appeal of a decision which simply projected township road lines by straight line extension across accreted land, was released and published on the CanLII reporting service and database. Within hours, it disappeared from CanLII and thereafter remained unavailable on the open source reporting service. The mystery was compounded by the appearance of the decision behind a paywall and assigned the citation: *Duarte v. Ontario*, 2018 CarswellOnt 6441, 291 A.C.W.S. (3d) 885, 91 R.P.R. (5th) 199. Possibly as a result of my inquiries into this matter, *Duarte*¹ has reappeared on CanLII in the last month.

The issues considered in *Duarte v. Ontario* are of interest to land surveyors and real estate lawyers alike since the Divisional Court found the decision below unreasonable and ordered the Minister's delegate to conduct the hearing further and to consider additional evidence and submissions to properly address all of the issues. Do township road lines which can be confirmed in a hearing under the *Surveys Act* include their extension or projection over accreted land? If they do, are the extensions simply straight line extensions or do such lines bend? How are the riparian rights of upland property owners to be considered in such an application under the *Surveys Act*?

Survey Fabric, Riparian Rights and Extensions of Road Allowances

Key Words: *riparian rights, accretion, surveyed lines, first running, true and unalterable*

Several mechanisms exist by which property owners in Ontario may have a determination made as to the true location on the ground of their property lines. These include the making of an application in the Superior Court of Justice for a declaration, starting a proceeding in the same court by issuing a Statement of Claim for a declaration as to boundary, or bring an application

¹ See: *Duarte v. Ontario*, 2018 ONSC 2612 (CanLII), <http://canlii.ca/t/hrnmg>

under the *Boundaries Act*. Municipalities in Ontario have an additional remedy available to them under section 48 of the *Surveys Act*.

A rarely used section, s. 48 of the *Surveys Act* allows a municipality to pass a by-law authorizing an application to the Minister of Natural Resources and Forestry to cause a survey to be made for the purpose of fixing the position of a disputed or lost line, boundary or corner that is in the municipality and that has been surveyed under competent authority or under the *Land Titles Act* or the *Registry Act*. The Minister then publishes a notice of a hearing at which the survey will be considered. Following the hearing, and upon considering all the evidence, the Minister may direct changes to be made to the survey, or make no changes. Thereafter, the position of the disputed or lost line, boundary or corner may be confirmed, making the line, boundary or corner a final and “unalterable” line, boundary or corner, subject to an appeal under section 49 to Divisional Court.

The factual context was explained by the Divisional Court:

The Appellants own property on Wymbolwood Beach in the Township, on the easterly shore of Nottawasaga Bay of Lake Huron. Recently, the waters of Nottawasaga Bay have receded. The Appellants and the Township disagree about two road allowances, and whether and where they should be drawn over the accreted lands.

Surveyor John Goessman completed the original survey of the subject lands in the 1820s. For the resurvey requested by the Township in its s. 48 application, the Minister retained [a surveyor]. The survey plan ... is dated September 5, 2013. It is the ... Survey that is the subject of the Order appealed from.

In short, the ... Survey extends the two disputed road allowances over the accreted lands in a manner that has the effect of cutting off the water access that the Appellants would otherwise enjoy as lakefront property owners.

These appeals are framed simply, as appeals against the Coordinator’s decision under the *Surveys Act* to confirm the ... Survey, but neither the materials filed on appeal, nor the arguments made before us were so simple or constrained. Yet this remains a matter under the *Surveys Act*, not an avenue for the Township to indirectly obtain property rights over the Appellants’ lands, avoiding proper claims by the Appellants...²

A schematic to illustrate the situation appears in Figure 1 below.

² *Duarte v. Ontario*, at paras. 2 to 5

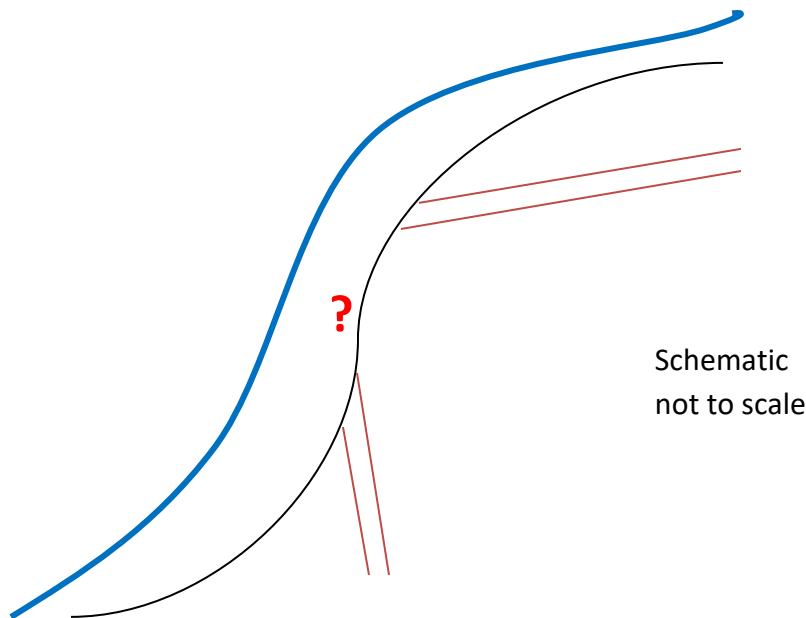


Figure 1: The straight line projection of two roads intersect on dry land that would have left the upland owner without water access.

The Court described the decision under appeal and referred to the decision maker as the “Coordinator.” A synopsis of the reasons for decision can be found in *Duarte* and deserves repeating:

With respect to the confirmation of the ... Survey, the Coordinator did acknowledge the important role of the original Goessman Survey:

It is important to note that a fundamental philosophy has been applied in this Municipal Resurvey decision under section 48 of the *Surveys Act* (the *Act*). That is that surveys of the original township fabric throughout Ontario, under the instructions of the Surveyor General, set down the fundamental framework into which all property transactions and future surveys fit. [emphasis added]

The Coordinator held that he must determine what was originally done on the ground by Mr. Goessman in 1821 (known as the “first running”, being the lines run, corners posted and acceptance by the public) and then determine “where the location of the road allowance should now be established.” He indicated that he also had to answer questions about the proper method of surveying to be used.

However, the Coordinator ultimately indicated that he had not relied on the Goessman Survey other than to accept that plan of survey as an indication that both the road allowances were originally surveyed by Goessman, whether physically run and measured on the ground or simply shown on the plan of survey. He reached that conclusion

notwithstanding an absence of evidence that the road allowance lines were physically run or measured to the water's edge.

The Coordinator noted ss. 3 and 9 of the *Act*, regarding the continued validity of the lines, boundaries and corners in original surveys, and the "methods" of re-establishing the survey fabric. However, the actual methods set out in detail under the *Act* and the related provisions of the *Act* as they may apply to the ... Survey, were not the subject of specific analysis in the Coordinator's decision.

The ... Survey showed the road allowances running straight, over the accreted lands, to the water's edge. At the hearing, the focus of the parties was whether or not there should be a bend in the road allowance before the water's edge ..., and whether it should be at the high water mark. The submissions in favour of a bend in the road allowances were made based on common law principles of accretion, requiring an equitable distribution of any additional shoreline.

The Coordinator found that introducing a bend in the road would result in unnecessary confusion and he was not persuaded that this was the intention of the Legislature. The Coordinator instead found that in order to re-establish the original fabric, surveyors are directed by the *Act* to the methods prescribed by the *Act* to re-establish that Township fabric, yet he did not address the methods specifically. He further noted that the Township had submitted that if there was no method under the *Act* that addressed a particular situation, then the Minister may "fix" the position of a disputed or lost line, boundary or corner, and in so doing regard should be had to "what was intended in the original survey." However, the Coordinator did not then proceed to address the related statutory or historical context.

The Coordinator noted that several plans referred to a high water mark limit, but that "such a limit was not created in the original township survey." The Coordinator adopted a passage regarding Crown patents from *Re Walker and A.G. Ontario*.³ That case found that any Crown patent that had a boundary of water established a boundary to the water's edge unless the grant clearly reserved a space between the lands and the water's edge. However, the Coordinator instead relied upon it as an indication of the extent of the township fabric based in part on the submissions of the parties. The Coordinator concluded that the lots, concessions and road allowance of the original "township fabric" extend to the water's edge.

The Coordinator rejected the submission that common law principles in relation to accretion should apply to the location of the boundaries of the road allowances. He stated he was not persuaded by the cases, which he found generally spoke to the equitability of private parcel limits and not to the fundamental structure of the township "survey fabric"

³ *Re Walker and A.G. Ontario*, [1971] 1 O.R. 151, at p. 177 (H.C.), aff'd [1972] 2 O.R. 558 (C.A.), aff'd [1975] 1 S.C.R. 78 (S.C.C.)

of Ontario. Instead, the Coordinator relied on *Walker* and on *Ontario (Attorney General) v. Rowntree Beach Assn.*⁴ The Coordinator found that the depiction of the end of a concession line is simply marking the direction and production of the line in the township lot fabric.

The Coordinator concluded that the cited case law did not support the existence of a bend on the road allowance nor give a persuasive argument for doing so, and that statute law clearly defined how the limits of a road allowance should be re-established.

On the effect of accretion, reliction, erosion or inundation, the Coordinator agreed with the Surveyor General's decision regarding another municipal survey—Municipal Survey No. 883. The Coordinator adopted the following passage regarding Municipal Survey No. 883:

After considering the evidence and the law provided I find that reliction/inundation, erosion/accretion have no impact on the location of the road allowance. The *Surveys Act* in Ontario was written to ensure the lot fabric is restored according to best evidence principles when lost. The objective is to put the lot fabric back where it was, providing certainty to land owners. If the common law principle of equitable distribution of accreted shore lands applies at all, it should be confined to the lot within which the property sits.

Importantly, this passage comes from the Surveyor General's decision that was challenged in the *Dale v. Tiny (Township)* case, but that was a decision regarding a different survey, over different geography, and entailing different issues.⁵

In considering the appeal, the Divisional Court considered a number of arguments in relation to the appellants' challenge of the decision made under the *Surveys Act*.⁶ In doing so, it framed the issues on appeal as follows:

1. failing to apply the relevant provisions of the *Act*;
2. finding that a survey line that had neither been illustrated nor run on the ground in the original survey could operate as a derogation from a Crown grant;
3. effectively finding that common law principles regarding the equitable division of accretion of riparian lands were entirely displaced by the *Act*;
4. with respect to the Plan 779 Owners, in failing to apply the equitable principle of estoppel against the Township and failing to address the estoppel argument altogether in the reasons for decision; and,
5. ignoring or misapprehending the evidence of [another surveyor].

⁴ *Ontario (Attorney General) v. Rowntree Beach Assn.* (1994), 17 O.R. (3d) 174 (H.C.J.). 2018 ONSC 2612 (CanLII).

⁵ *Duarte v. Ontario*, at paras. 40 to 50.

⁶ Although referred to and quoted from, the decision itself is not a reported case on any public database.

Each was considered in turn but, for purposes of this month's case comment, the following findings relate to the errors made by the Coordinator in respect of item No. 1 above:

The Coordinator failed to reasonably consider these other surveys and the absence of evidence that the road allowance lines were ever physically run to the water's edge or measured, as required by the *Act*. Significantly, he ultimately indicated that he had not relied on the Goessman Survey other than to accept it as an indication that both road allowances had originally been "surveyed by Goessman", "whether physically run and measured on the ground or simply shown on the plan of survey". He stated as follows:

I therefore, draw no distinction between a boundary that was actually or physically run and a line not run when referring to the methods under the Surveys Act. This is especially important when commenting on the road allowance between Lots 18 and 19, across Concession 7. The road allowance is a side road allowance and the limits were not actually surveyed by Goessman during the course of the original survey. However, the road allowance must be established or re-established in accordance with the Surveys Act and as intended in the original survey. [emphasis added in original]

Instead, the Coordinator was motivated in his decision, as he emphasized in his reasons and as is evident from his reliance upon the quotation from the decision in MS 883, to give precedence to governmental policy rather than the specific requirements of the *Surveys Act*. He specifically states, after acknowledging that the Goessman Survey was the original survey, that he is more strongly influenced by policy considerations than prior survey results. He stated:

It is important to note that a fundamental philosophy has been applied in this Municipal Resurvey decision under Section 48 of the Surveys Act (the *Act*). That is that surveys of the original township fabric throughout Ontario, under the instructions of the Surveyor General, set down the fundamental framework into which all property transactions and future surveys fit. The methods as described in the Surveys Acts, past and present, prescribe specific rules as to how that foundational fabric is to be redefined, perpetuated and extended as necessary to maintain the fabric and to have continuity and confidence in it.

In the result, despite the evidence that the Goessman Survey lines had not extended to the water's edge, the Coordinator nevertheless accepted the ... Survey, with its lines extending straight to the water's edge. He professed to be bolstered in this view by the ... Survey's adherence to the preceding "fundamental philosophy" that the Coordinator found is to be applied in all Municipal Resurvey decisions. In his view, the only issue was whether to amend that survey. He stated his position as follows:

In making a decision as to whether to amend the "... Survey", I must determine what was originally done on the ground by Goessman in 1821, commonly referred to as

the “first running”, being the lines run, corners posted and acceptance by the public and then determine where the location of the road allowance should now be established. It is important to note that the duty of all subsequent surveyors after the first running was to find and retrace that original work on the basis of best evidence. I must also answer a number of questions, which would give rise as to the proper method of surveying and establishing the limits of the road allowances under this application. These questions have been presented during the course of the tribunal hearing and in written submissions by the applicant and objectors.

In accordance with the survey requirements the “... Survey” has re-established the original limits of the road allowances and has shown those limits to extend to the water’s edge of Lake Huron. The issue to be now decided is whether a bend in the road allowance exists at some point, at the “high water mark” or at some other point between the “high water mark” and the water’s edge.

The Coordinator was also motivated in part to reach this conclusion by his observation that neither the Duarte Appellants nor the Plan 779 Appellants had any dispute with the road allowances as reflected in the ... Survey, upland of the high water mark. In our view, however, this provides little support for his decision to accept those lines as extended to the water’s edge, in the face of the contrary evidence of prior surveys and the absence of evidence that the portion of those lines between the high water mark and the water’s edge had ever been established. Neither is it surprising that the Duarte Appellants and the Plan 779 Appellants would not have objected to the upland portions of the road allowances as reflected in the ... Survey, since those portions had no impact on the status of their properties as waterfront properties. It is only the portion from the high water mark to the water’s edge that is at the core of this dispute.

As an alternative position, however, the Township contended that an analysis of the road allowance as conducted by [the surveyor] under s. 28 #1 supported the Coordinator’s decision to confirm the ... Survey. Section 28 of the *Act* was referenced in connection with the description of ... Survey and his testimony at the Hearing. It provides that a surveyor is to follow the process described in the legislation in establishing in a concession in a double front township, a sideline of a half lot that was *not* surveyed in the original survey. In particular, the method of performing the survey in paragraph 1 of s. 28 of the *Act* is described in Method 59 of the Regulation. The Regulation states that the sidelines of the half lots shall be established “on the same astronomic course as the boundary line of the concession at the end from which the lots are numbered, if so intended in the original survey.” On the basis of this provision and methodology, the Township argued that the Coordinator could confirm the boundaries in the ... Survey on the basis that they were “disputed”, whether or not they were the subject of the Goessman Survey.

In our view, however, *Surveys Act* proceedings under s. 48 are specific to “re-establishing” lines, not establishing new ones. The underlying principles also support the focus on the

original survey, rather than a new and unrestricted opportunity to address any boundary dispute. Moreover, even if the application of the astronomic course methodology is an acceptable surveying method to establish the extension of the road allowances beyond the points to which they were originally run or measured, and we do accept that it is, we find that method could not serve to effectively expropriate previously vested proprietary rights.

In conclusion, given the legislative framework and the surveying methodology it mandated, we find that the Coordinator's decision on this issue was not reasonable. Notwithstanding the deference he is due, it was not reasonable for him to confirm the use of the method described in section 24(2)5 of the *Act* in determining the boundary of Concession 7 beyond the water's edge as it existed in 1823, that is, in adopting [the surveyor]'s use of the projection of the Road Allowances between the high water mark and the water's edge. The methods are specific survey methods with very specific application to "re-establish" a boundary line that at some time must first have been "established."⁷

The remaining grounds of appeal deserve further reading. Please do so. The entire decision is now available and can be read through to its logical conclusion:

For the preceding reasons, our disposition of the appeals is as follows:

(i) We find that the Coordinator's decision to confirm the ... Survey and its extension of the road allowances to the shoreline of Nottawasaga Bay was not reasonable under the *Surveys Act*;

(ii) The appeals under the *Surveys Act* from the confirmation decision of the Coordinator are therefore allowed and this matter is remitted to the Office of the Surveyor General for a trial of an issue, in accordance with these reasons for decision, specifically regarding whether the ... Survey should be confirmed with or without amendments;

(iii) The trial of that issue under subparagraph (ii) shall be expedited and shall proceed by way of a continuation of the prior hearing, including all evidence previously accepted and such additional evidence and submissions as the Office of the Surveyor General finds fair and just to properly address the issues, or adopting such other court or arbitration or other procedure as the parties may agree on...⁸

We understand that a further hearing, as ordered, has taken place. The decision, having being reserved, will be eagerly anticipated by all parties.

Editor: Izaak de Rijcke

⁷ *Duarte v. Ontario*, at paras. 72 to 78

⁸ *Duarte v. Ontario*, at para. 117

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

The decision in Duarte raises many fundamental principle of boundary law, including the distinctions between survey fabric and boundary fabric. Chapter 2 deals with the basic principles, including the very nature of a boundary and the relationship to property rights.

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.⁹ These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year’s quota, and are expanding in number as more opportunities are added.

Course: Survey Law 2

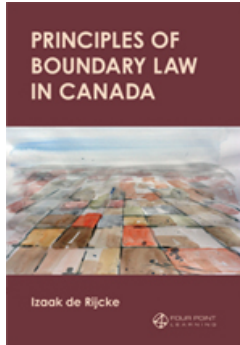
Survey Law 2 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This university-level course will be taught online Wednesday evenings by Izaak de Rijcke, starting January 8, 2020. For more information, see the [syllabus](#). Please note that registration and enrolment is via CBEPS: <https://cbeps-cceag.ca/resources/survey-law-2-online-course/>.

Coming Soon: Seventh Annual Boundary Law Conference

This next conference theme is in progress but tentatively framed as: ***Natural Boundary Principles for Regulated or Controlled Level Bodies of Water***. Just like last year, this conference will unfold as a series of weekly lunch and learn sessions exploring recent cases and new developments in the law regarding regulated level water waterbodies. Stay tuned for more information.

⁹ 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 would benefit from 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 to pay by credit card.)



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