



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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Determining an original subdivider's intention has become a critical factor in resolving boundary disputes. Where a dispute arises over the true location of a boundary, what form of evidence takes precedence in providing an answer to the location question: the metes and bounds description that appears in an original registered deed, information on a plan of subdivision, or the initial surveyor's original monuments? Which type of evidence provides a better indicator of a subdivider's intention? The wording of the description or the placement of a monument on the ground? How do the provisions of the *Surveys Act* dealing with "true and unalterable" lines come into play? These questions were at the heart of the recently released decision of the Divisional Court in *Murphy v. Longmore*.¹ Originally an application under the *Boundaries Act*, the appeal of the decision of the Deputy Director of Titles was dismissed by the Divisional Court who noted that when a description is correct and unambiguous, it governs but, as in this case, where the description was lacking in terms of its ability to correctly reflect the subdivider's intention, the decision maker must turn to other forms of evidence. In this case the question of what constituted the surveyor's "original monument" became a central question.

What is an "Original Post"? Monuments and a Subdivider's Intention

Key Words: *hierarchy of evidence, monument, registered description, subdivider's intention, true and unalterable lines, original post*

The hierarchy of evidence used in the reestablishment of boundaries gives primary rank to natural monuments followed by original monuments or traces thereof, then evidence of possession dating back to the original survey and finally measurements as shown on the plan of survey. The theory is to give the greatest weight to those features or forms of evidence that are

¹ *Murphy v. Longmore*, 2019 ONSC 2602 (CanLII), <http://canlii.ca/t/hzzgt>

the least likely to change over time. Arguably, with natural processes of erosion and accretion, the natural feature of a waterfront is actually quite likely to show some change in position over time. In the recent decision of the Ontario Divisional Court in *Murphy v. Longmore*, where a monument and registered description appeared to be inconsistent, the court was tasked with determining which of the two forms of evidence more accurately reflected the intention of the subdivider –some sixty plus years ago.

The case involved two neighbouring lakefront lots on Lake Haliburton, Ontario with the lots in question extending from the abutting roadway to a road allowance that ran along the lakeshore. The lots had been subdivided from a larger tract of land in the 1950s when the then owner retained OLS Webster to perform an initial survey. Shortly after the initial survey, another surveyor, OLS Stinson, was retained to follow up on the work of Webster and prepare a plan of subdivision that was registered on title as Plan 352. This plan showed an excluded parcel

described by metes and bound description and also referred to some monuments. A deed of the lot now owned by the respondents to another party was signed by the subdivider and registered as instrument HB823 on September 3, 1954. Plan 352 was also signed by that same original subdivider. The deed included a metes and bounds description of the parcel transferred but did not make any reference to any surveyor monuments. The appellant was the current owner of Lot 39 on Plan 352 that bordered the west side of the respondents' land. A copy of Plan 352 appears in Figure 1.

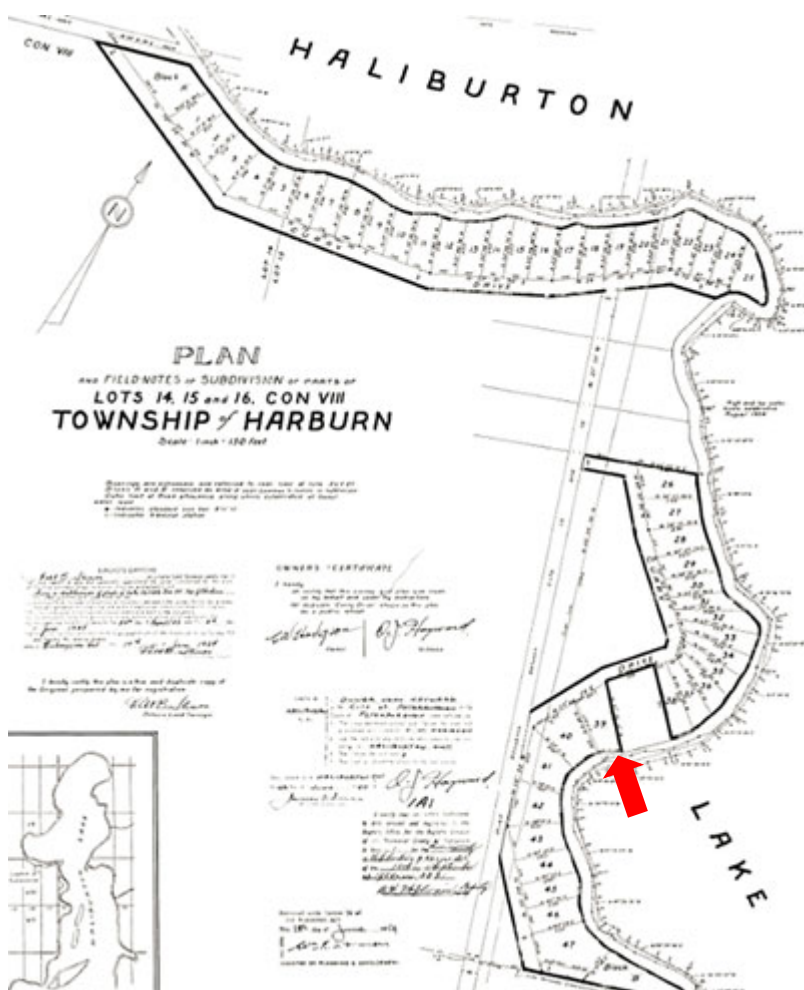


Figure 1: Copy of Registered Plan 352 and pointer to boundary in dispute.

More than thirty years following the transfer of the subdivided lot, another surveyor, OLS Wilson discovered a wooden surveyor's stake near the lake on the appellant's land about seven feet inside the boundary line first described by metes and bounds in the original deed. Which represented the true boundary line? Was the wooden stake an "original" monument? Both of the two neighbouring property owners had built structures very near to the boundary line and depending on the result, one or the other would be found to encroach.

The Deputy Director of Titles concluded from surveyors' field notes and other records of the surveys that the wooden stake was an "original post" planted by OLS Webster as part of his first survey.² Further, she found that the metes and bounds description of the boundary set out in the deed and the plan of subdivision contained a mathematical error. Correcting for the error, it was found that the description in deed HB823 and Plan 352 corresponded with the location of the wooden stake. On appeal, the court summarized the nature of the mathematical error as follows:

To create the metes and bounds description for the plan of subdivision, the surveyors needed to describe the angle at which the boundary line runs from Curry Drive toward the lake. The Deputy Director of Titles found that the surveyors made an error adjusting the angle that they measured so as to express it to agree with observations of the North Star. The angle described in the deed and the plan of subdivision was not rotated, as it should have been, by $1^{\circ}6'$. As a result, the boundary line described in the deed and the plan of subdivision drawn from the point where the boundary meets Curry Drive toward the lakeshore road allowance, runs slightly northeast (to the right on a map) of where it should. This creates a long, skinny, disputed triangular slice of land with its apex at the boundary at Curry Drive and with its base by the lake running more or less parallel to the lakeshore from the original wooden stake almost seven feet (to the right) to the mis-described boundary line in the deed and plan of subdivision.

The distance measured along the lakeshore from the original wooden stake across Mr. Murphy's land (to the left on a map) to the far boundary is 200 feet. This is the intended frontage of Lot 39 set out in the initial survey and is the intended frontage described in the plan of subdivision. Due to the error in the metes and bounds description however, Lot 39 as described in the deed and the plan of subdivision is more than 200 feet wide (by almost seven feet) by the lakeshore road allowance.³

[...]

² Importantly, there was evidence that allowed for the provenance of the wood stake and it was related to the field work of OLS Webster.

³ *Murphy v. Longmore* at paras 9-10

The appellant took the position that the original owner had sanctioned the boundary as described in Plan 352 and deed HB823 through signing these documents and giving them legal effect and that since no document made reference to the wooden stake that was not discovered until 1988, the court described the appellant's position that the stake was "just a stick in the mud and nothing more." To support this position the appellant relied on the decision in *Richmond Hill Furriers Ltd. v Clarissa Developments Inc.* which the court summarized as follows:

In the *Richmond Hill* case, the owners agreed to change the boundaries from the initial surveyed boundaries. A later owner argued that the initial surveyor's monuments should govern. The court held that since the surveyor's monuments were planted for a draft plan of subdivision that was never implemented or sanctioned by the owners, the registered instrument and the boundaries sanctioned unambiguously in the registered instrument governed. There was no uncertainty about what the grantor intended to describe in the plan in that case. There was no doubt that the legal documents correctly described the boundaries that the grantor intended to convey and that the boundaries conveyed were intended to be different than the boundaries initially laid out by the surveyor.

In discussing the state of the law in *Richmond Hill*, the court relied upon an 1871 decision of the Massachusetts Supreme Court in *Davis v. Rainsford*, 17 Mass 210, that included the following:

No rule of law can be more firmly established than the one relied on in the defence of this action. Whenever, in the description of land conveyed by deed, known monuments are referred to as boundaries, they must govern;

The appellant argues that this shows that monuments in deeds govern because they have been sanctioned by the owner by being included in the title instrument. Conversely, he argues that, where monuments are not referred to in a deed, the unambiguous description in the deed governs as it is only that description that has been sanctioned by the owner.

However, in *Davis* the court went on to note:

The only reason given, or which can be given, why monuments are to control the courses and distances in a deed, is that the former are less liable to mistakes. If, then, it appears that no mistake can reasonably be supposed to have been made in this case, no reason remains for the application of the rule.

...

It may be safely inferred from these considerations, that no mistake has been made in the admeasurement, and it truly describes the land intended to be conveyed. To this admeasurement we are bound to adhere, in order to effectuate the intention of the contracting parties ...

The Divisional Court concluded:

In our view, the “evidentiary” rule that posts govern does not apply where the intention of all parties is clear and manifest as to the boundary between the Lots...and the original posts were planted for a survey of subdivision other than that registered on title and, other than that conveyed and occupied.⁴

While in *Richmond Hill* the deed description was favoured over the monuments, this was because there was clear evidence that the monuments were planted for another survey. However in the situation before the court in *Murphy*, there was a description that did not correctly express the grantor's intention. The court went on to note that there is a vital difference between determining that a boundary was sanctioned by the owner and defining the boundary that is created by the sanctioned legal instrument. In the present case, the owner's signature on the deed and plans with the description indicated that the boundary was sanctioned by the owner, but an issue remained as to precisely where the owner intended that boundary to be located.

The court then summarized the findings from *Grassett* as follows: (at para 33):

- a. a deed that does not contain a description of the land conveyed but which refers to a plan of subdivision that does contain a description will be deemed to incorporate the description and boundaries set out in the plan;
- b. where the boundaries in a plan, as incorporated into a deed, do not express the grantor's intention (in that case because the land had been developed and changed) and the grantor's intention cannot be ascertained by other evidence, such as surveyors' original monuments for example, the court will look to conventional expressions of the boundaries adopted by the parties; and
- c. a party will be estopped from denying a conventional boundary to which she has agreed and on which a neighbour has relied.⁵

Anyone who has read a metes and bounds description of a parcel of land, even with training as a land surveyor, will appreciate how obtuse the language can be at communicating a location on the ground. For a lay person reading the same language, forming a picture in the mind's eye of the reader from a metes and bounds description is certainly a challenge. The court described this challenge in the context of the usual rule of giving high standing to the certainty of the written word.

⁴ Ibid. at paras 19-23

⁵ Ibid. at para. 33

One could understand a rule that gives primacy to the written document. Much of our civil law is based on the certainty of the written word. But, in this niche words often provide less certainty rather than more. As noted in *Davis*, in the case of boundary definitions, the location of surveyors' monuments are less liable to be mistaken than words describing those locations. The location of a monument planted by a surveyor is the point intended. However, the process of expressing in words the precise location of a point on the Earth's surface, describing in prose mathematical, geographic, and geometric relationships, is an exceptionally complex exercise. One need only attempt to read a metes and bounds description to readily understand the complexity and opaqueness of language needed to express the thought that is so simply understood visually. In contrast to the complexity of a metes and bounds description, the visual expression of a surveyor's post is translated in our minds into one word – "here". The law therefore allows for a review of whether the words used in a legal instrument express correctly and unambiguously the intention of the grantor as discerned from original posts and other evidence that, in this area of the law, can provide more certainty than the written word.⁶

The respondent's argument explored the meaning of an original post, noting that it need not be shown on the original survey but rather that to be "original" it need only to have been placed, planted or marked at the time of the original survey or the plan that was subsequently registered. The Divisional court agreed that the Deputy Director of Titles had made a finding of fact that the wooden stake found in 1988 was an original post placed by OLS Webster, a finding subject to deference on appeal. On this issue, there was a reliance on section 9 of the *Surveys Act*, which was set out by the court and explained as follows:

True and unalterable lines, etc.

9. Despite section 58, every line, boundary and corner established by an original survey and shown on the original plan thereof is a true and unalterable line, boundary or corner, as the case may be, and shall be deemed to be defined by the original posts or blazed trees in the original survey thereof, whether or not the actual measurements between the original posts are the same as shown on the original plan and field notes or mentioned or expressed in any grant or other instrument...

This section deems boundaries referred to in an original survey to be defined by the original posts despite the measurements expressed in the survey or the plan. It expresses a specific statutory preference and priority for the original posts planted by surveyors in their original surveys for a plan of subdivision.⁷

Does this section require that original posts be expressly referred to in the plan or even depicted thereon, in order to fall within the ambit of this section? The Divisional Court said no.

⁶ *Ibid.* at para 35

⁷ *Ibid.* at paras 38-39

The section does not say that the posts must be referred to in the plan. Rather, it is the border – the line, boundary or corner - that need be shown on the plan rather than the original posts. If there is a line or boundary shown on a plan, the section provides that the original posts define the “true and unalterable boundary” even where there are no measurements shown on the plan. The section has no purpose if it only refers to a boundary line that is already defined in a plan by specific reference to two or more original posts. The appellant’s interpretation would limit the section to just give priority to the measurement between two posts where the plan shows the posts but sets out the wrong measurements between them. However, the purpose of the section cannot be just to correct measurements between two posts shown incorrectly on a plan because the section says that it applies even where there are no measurements shown on the plan. The appellant’s proposed interpretation of s. 9 is not large and liberal. Rather, it is the narrowest possible construction and gives little or no meaning to the enactment. I prefer the interpretation underpinning the decision of the Chief Justice, that the section gives priority to the original posts to unalterably define the boundary lines sanctioned in an original plan.⁸

What is the difference between *sanctioning a boundary* and *defining a sanctioned boundary*? This became a question for the court and the distinction between the two became fatal for the appellant’s argument. Yes, the original owner had sanctioned the boundary through his approval of the deed, but putting that boundary in place on the ground was another matter, particularly because of the error in the final translation of the words of the measurements – an error that arguably one could not reasonably expect a lay person to catch when reading through a metes and bounds description. The Divisional Court upheld the decision of the Deputy Director of Titles noting:

The question is whether the boundary defined in the metes and bounds description correctly describes the boundary that Mr. Hodgson intended. Section 9 provides a legal answer assuming the section applies as I find. In any event, the Deputy Director of Titles held that there was ample evidence to lead her to conclude that the grantor’s intention was expressed by the original post planted by OLS Webster. On either basis, the decision is transparent, intelligible, and within the range of outcomes that were available to the Deputy Director of Titles.

There was no dispute that if the Deputy Director of Titles was entitled to look behind the deed and plan of subdivision, she correctly consulted the “hierarchy” of evidence as discussed by Dodd J. in *McPherson v Cameron* (1868), 7 NSR 208 (CA). The hierarchy directs triers of fact to evidence of the grantor’s intention in the following order of precedence:

- a. Natural boundaries;

⁸ Ibid. at para 42

- b. Lines actually run and corners actually marked at the time of the grant;
- c. Extension of lines and courses of an adjoining tract; and
- d. Courses and distances descriptions.

Once the Deputy Director of Titles was satisfied that the legal documents contained an identifiable error so as to fail to set out the grantor's intention, she properly consulted the hierarchy of evidence – favouring the surveyor's original post under heading (b) over a metes and bounds description that falls under heading (d). This aspect of her decision is manifestly reasonable, a point not seriously challenged by the appellant.⁹

A subdivider's intention is critical in boundary retracement and the hierarchy of evidence is used as a tool to aid the trier of fact in situations where that intention must be deduced. The importance of using the hierarchy in a world of "true and unalterable" boundaries under the *Surveys Act*, as with any framework, is to view it in the context of the full matrix of surrounding facts. In the present case, for example, the error in the description became a key factor in the decision making process.

Guest Editor: Megan Mills

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

The hierarchy of evidence is discussed in *Chapter 3: The Role of Intention in Retracing Boundaries* with reference to the *Richmond Hill Furriers* decision. The chapter as a whole provides a broader discussion on retracement addressing issues of ambiguity, admission of extrinsic evidence and cases of boundary misdescription.

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⁹ *Ibid.*, at paras 44-46

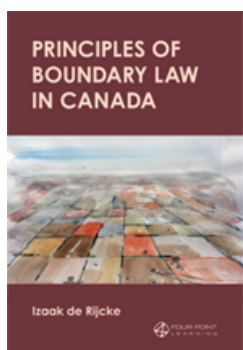
¹⁰ Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's [Registered Provider Guide](#) for Professional Surveyors in

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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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