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.

Ontario's numerous lakes and rivers have been indispensable in the development and exploration of the Province. Natural waterways have been crucial transportation routes for inhabitants for millennia and, more recently, controlled waterways have been important for transportation, power generation, movement of timber and the control of flooding. It is somewhat trite to say that the boundaries of waterfront properties have unique complexities. This has been discussed in *The Boundary Point* on a number of prior occasions. However, where controlled waterways are involved, there is a further added layer to this complexity. This further set of questions relating to controlled waterways was something which the Court of Appeal for Ontario was faced with in the recently reported decision in *Becker v. Walgate*[1] in which the key question at issue concerned a lot line between two properties on a reservoir lake. How and where should the terminus of a lot line be re-established? This was the key question and 100 feet of waterfront was at issue. The court allowed the appeal and returned the matter to the trial court for further determination. In so doing, it reminds us of the complexity of water boundaries in general and the added complexity that occurs when the water body in question is artificially controlled.

Natural Boundary Principles when Water Levels are Controlled: Clearing the Waters?

Key Words: *controlled water levels, high water mark, water boundaries, natural boundaries*

Land owners, surveyors, lawyers and the courts alike have all struggled to wade through the complexity that underlies questions related to waterfront boundaries. We have seen terms like high water mark, low water mark, beach, bank, bed, water's edge and shore allowance appear in prior issues of this publication and slowly, the common law is bringing clarity to these terms and developing a framework for addressing water boundary retracement questions. Most recently the decision of the Court of Appeal for Ontario in *Becker v. Walgate* dealt with

[1] *Becker v. Walgate*, 2020 ONCA 491 (CanLII), http://canlii.ca/t/j907l

boundary questions on properties fronting a controlled body of water in Ontario's Trent-Severn Waterway. Where does the lot line end and how does one determine same? The court introduced the question as follows:

> Jack Lake is a reservoir lake within the Trent-Severn Waterway. The lot line between the two properties – the most westerly parcel of Lot 41 and the most easterly parcel of Lot 42 – skews the water's edge and strikes the lake at an oblique angle. What water level is to be used in determining the termination point of the lot line?
>
> Does the lot line between Lots 41 and 42 ends where it intersects with the "High Water Mark" shown in Registered Plan 33 which created the lots in 1958 and which the trial judge found was the water's edge of Jack Lake at the Normal Controlled High Water Level, a contour elevation of 106.33 feet (assumed datum)?
>
> Or, as the appellant contends, must the determination of the terminus of the lot line begin with reference to the water's edge at the time of the 1902 Crown patent of lands of which the disputed lands were a part?[2]

The question ended up being returned to the trial court for determination after a finding that a reversible error had been made by the trial judge. While we may not have the certainty of a conclusive statement from the Appeal Court on the matter, the decision does offer insight and clarity on how determinations in this type of unique situation should be made, and the value of an expert surveyor's opinion in contributing to the decision-making process.

Basic facts that were not in dispute concerning the history and original subdivision of the properties were recounted by the court beginning with a description of the Crown patent:

> Prior to 1902, a "lumberman's dam" existed on Jack Lake.
>
> The chain of title to Lots 41 and 42 begins with a patent from the Crown, dated April 2, 1902.
>
> By way of the Crown patent, the Crown transferred a 152-acre parcel of Crown Land of which Lots 41 and 42 are part to Frances L. Robbins. The Crown patent describes the patented lands "as shown on a Plan of Survey by Ontario Land Surveyor Alfred J. Cameron" (the "Cameron Survey"). On the Cameron Survey, Mr. Cameron certifies that it is correct on September 23, 1901. There is no reference to or distinction made between high water or low water marks on the Cameron Survey.
>
> The Crown Patent contained the following reservation:
>
> saving, excepting and reserving nevertheless, unto Us, Our Heirs and Successors the free use, passage and enjoyment of, in, over, and upon all navigable waters which shall or may hereafter be found on or under or be flowing through or upon any part of the said Parcel or Tract of Land hereby granted as aforesaid, reserving also right of access to the shores of all

[2] *Becker v. Walgate* at paras 2-4

rivers, streams and lakes for all vessels, boats and persons, together with the right to use so much of the banks thereof, not exceeding one chain in depth from the water's edge, as may be necessary for fishery purposes.[3]

The survey plan on which the Crown Patent was based can be seen below in Figure 1.

Figure 1: 1901 Plan of survey prepared by Mr. Cameron, OLS on which the 1902 Crown patent was based.

The federal government decided to use Jack Lake for water storage and, in 1910, it replaced the lumberman's dam with what is referred to in the trial judge's reasons as the "Dominion Dam".

[3] *Ibid.,* paras 9-12

> In 1932, the Crown settled a claim by the successor in title of the patentee, paying her $400 to release the Crown from liability for damages caused by the Dominion Dam flooding the land. The release describes the lumberman's dam as having "held the water at a certain level during the Spring of the year, admitted of the said lake being later drained to its natural level". It also notes that the Dominion Dam has a crest that is 2'10" higher than the lumberman's dam.
>
> In 1958, the Jack Lake Land Company ("JLL") subdivided the land by Registered Plan 33, resulting in the creation of Lots 41 and 42. Registered Plan 33 was surveyed by W.A. Beninger between March 8, 1957 and May 30, 1958 (the "Beninger Survey"). His survey shows the line between Lots 41 and 42 extending to a heavy curved line marking the limit of Jack Lake which the Plan Legend indicates is the "High Water Mark". Mr. Beninger tried to retrace the Cameron Survey, but his field notes indicate that the Cameron Survey was poorly done, as it appeared that Mr. Cameron had only completed a rough shore traverse.
>
> On September 11, 1974, JLL transferred the appellant's property to Viceroy Construction Company Limited pursuant to the legal description in Plan 33. The parties' agreed statement of facts indicates, and the trial judge found, that after this transaction, JLL ceased to operate.
>
> In turn, the appellant and the respondents purchased their properties pursuant to the legal description in Plan 33. The appellant owns the most westerly parcel of Lot 41, and the respondents own the most easterly parcel of Lot 42.
>
> Since the registration of Plan 33, other surveyors have completed plans and surveys of lands within Plan 33, but the line between Lots 41 and 42 remains the boundary between the parties' properties. A further subdivision of Lot 41 on May 1, 1978 and a building location survey of Lot 41 by Thos. E. Lyons, dated February 22, 1989, also described the water boundary as the "High Water Mark."
>
> Plans of subdivisions of Lot 42 in 1987, 1991 and 2002 described the water boundary as "Normal Controlled High Water Level Contour of Elevation 106.33 (feet) Also Limit of Lot 42 Reg'd Plan No 33". The 1987 and 1991 plans also include the notation "The Original High Water Mark of Jack Lake cannot be determined with any certainty therefore a portion of Lot 27 Concession 9 may lie in front of Parts 1 and 3".[4]

At trial, both parties had called surveyors as expert witnesses to provide opinions as to the boundary location. The opinion evidence of the respondent's surveyor, which was preferred by the trial judge, concluded that the Normal Controlled High Water Level ("NCHWL") of the lake had not changed since the time of the survey for Plan 33. At Figure 2 a copy of the relevant portion of Plan 33 appears.

[4] *Ibid.* at paras 13-19

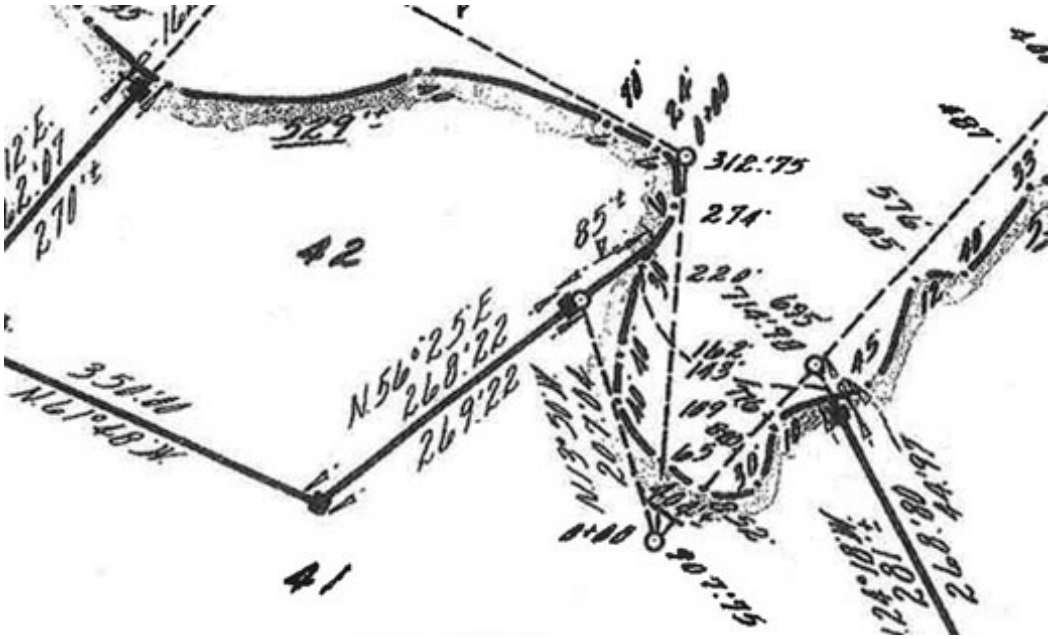

Figure 2: Registered Plan 33 – the Lake boundary was labelled "High Water Mark"

He wrote:

> […] on a controlled body of water the meaning of "high water mark" is clear: it is the NCHWL. Further, during the navigational season on the Trent-Severn Waterway, from the long weekend in May through to the Thanksgiving weekend in October, Parks Canada maintains the lake at the NCHWL, 106.33 feet (a.d.). During the remainder of the year, Parks Canada maintains the lake at the normal controlled low water level, approximately three feet lower.
>
> [It was] believed that Mr. Beninger's survey was completed in the winter of 1957-1958, that Mr. Beninger determined the High Water Mark based on a shore traverse at that time, and, accordingly, that what he marked as the High Water Mark on his survey was in fact the normal controlled low water level.[5]

The respondent's surveyor had further offered the opinion at trial that both the Cameron and Beninger surveys showed water being held back, evidenced by an island and bay that would not have otherwise been visible. How the water level had changed though was where there was a difference in opinion. The respondent's surveyor stated it was impossible to precisely determine the lake level in 1902 at the time of the original patent; the appellant's surveyor offered an estimate of the original water level. That estimate that was rejected at trial because, he "did not explain how he used the cross-sectional area of water flowing through the dam to

[5] *Ibid.* at paras 22-23

arrive at his opinion and, absent any explanation, it was impossible to assess the validity of his opinion or determine if it fell within his area of expertise, namely surveying."[6]

The Court of Appeal then went through the analytical process used by the trial judge for determining what water level should be used for the lot line termination point. The trial judge's analysis began with a review of case law on water boundaries, finding that the principles in *Walker* do not apply to controlled bodies of water and concluding that Plan 33 was unambiguous and the lot ended at the water's edge of the NCHWM:

> However, the trial judge found that *Walker* does not apply to controlled bodies of water:
>
> > *Walker* was not considering controlled bodies of water but inland non-tidal waters where "the distinction of high and low water marks *will not hold*". On a controlled body of water, the distinction *does hold*. There are regulated high and low water levels: maximum, minimum, normal high and normal low levels.
> >
> > On controlled bodies of water, in my view, "High Water Mark" presumptively refers to the line where the land meets the water at the normal controlled high water level, absent clear evidence that a water level lower than the NCHWL was intended to be conveyed.
>
> He then concluded that Plan 33 is not ambiguous: the line between Lots 41 and 42 terminates where it intersects with the "High Water Mark", which is the water's edge of Jack Lake at the NCHWL, 106.33 feet (a.d.). He stated that it was open to JLL to choose this boundary.
>
> According to the trial judge, the fact that "Mr. Beninger erroneously illustrated the location of the 'High Water Mark' line on the plan does not compromise his unambiguous adoption of a natural boundary. The line on the plan is only representative of this clear natural boundary."
>
> Further, he stated that if there were a latent ambiguity, his conclusion would not have changed:
>
> > Nothing in the extrinsic evidence available to me is inconsistent with my conclusion. The JLL Company intended to create waterfront lots. They provided for the construction of boathouses with boat slips. There was no admissible evidence permitting the court to determine that they conveyed all or retained some of their land.
>
> Finally, he concluded that if the lot line terminated beyond its intersection with Jack Lake at the NCHWL, the respondents (who were the applicants below) have a riparian right of access along the line beyond the intersection point with the NCHWL.

The appellate court found this conclusion to be incorrect for a number of reasons.

[6] *Ibid.* at para 25

First, Plan 33 did not define what was meant by High Water Mark, did not use the term "Normal Controlled High Water Level," or refer to the 106.33 feet (a.d.) level and further that the term was unambiguous seemed to been based on "his view that *Walker* has no application to controlled inland bodies of water. However his reasons for coming to that conclusion are unclear."[7]

In contrast, the court on appeal found that the reference to "High Water Mark" on Plan 33 created a latent ambiguity. The Appeal Court further found that the trial judge had erred in concluding that there was no admissible evidence permitting the court to determine whether JLL conveyed all of their land or retained some of their land – namely the consideration of Plan 33 in its historical context and the long and confusing history of the use of the term "High Water Mark" by Ontario surveyors.

As for a finding on the boundary of the lots and the terminus of the lot line, the Court of Appeal provided the following assessment of the trial judge's findings:

> There is no dispute that in the Crown patent the Crown did not except or reserve a space between the lands granted and the water's edge. Thus, given the intention of JLL to convey all the land that it owned, to determine the terminus of the lot line between Lots 41 and 42, the trial judge was required to begin by determining the boundary of what JLL owned: the water's edge of Jack Lake at the time of the Crown patent. While this was undoubtedly a difficult task, and perhaps impossible to determine with certainty, the trial judge was required to make a finding on a balance of probabilities based on the evidence before him.
>
> Although the trial judge made several findings of fact based on the release signed in 1932 and the other evidence, he did not determine what the water's edge of Jack Lake was at the time of the Crown grant. The findings he did make include:
>
> - from some unknown date before the Cameron Survey in 1901 until the construction of the Dominion Dam in 1910, the lumberman's dam held the water of Jack Lake at a certain level during the Spring and then drained it to its natural level;
> - the release signed in 1932 addressed additional flooding caused by the Dominion Dam, above that of the lumberman's dam;
> - the release does not state the elevation of the crest of either dam;
> - the Dominion Dam can hold Jack Lake to a level of 108.5 feet (a.d.);
> - the crest of the lumberman's dam was lower than 108.5 feet (a.d.) or there would have been no additional flooding from the Dominion Dam;

[7] *Ibid.* at para 40

- the crest of the Dominion Dam is 2 feet 10 inches higher than the lumberman's dam. Since the Dominion Dam is capable of holding Jack Lake to a level of 108.5 feet (a.d.), the crest of the lumberman's dam was at least 105.66 feet (a.d.), which is 108.5 less 2 feet 10 inches or 2.83 feet;
- the crest of the lumberman's dam was greater than or equal to 105.66 and less than 108.5 feet (a.d.); and
- the water's edge in the Cameron Survey could be at any level between 100.00 and 108.5 feet (a.d.).

The trial judge also concluded that it was possible that the lumberman's dam could have held Jack Lake in the springtime to the same level as the NCHWL of the new Dominion Dam, 106.33 feet (a.d.). (The trial judge presumably refers to the springtime level because, while the Cameron Survey was certified to be correct as of September 23, 1901, the Crown patent was granted on April 2, 1902.)

Further, he found that although Mr. Beninger erroneously illustrated the High Water Mark on the Beninger Survey and was unable to retrace the Cameron Survey, it was possible that Mr. Beninger used the same water boundary as Mr. Cameron.

However, as we have said, the trial judge made no finding about the water's edge of Jack Lake at the time of the Crown patent. The finding that it was possible that the lumberman's dam could have held Jack Lake in the springtime to the same level as the NCHWL of the new Dominion Dam, 106.33 feet (a.d.) is not a finding that the water level of Jack Lake at the time of the Crown patent was probably the NCHWL.[8]

The issue was returned to court for determination along with the issue of determining the impact of erosion or accretion (if any) on that boundary.

Readers will need to wait for the outcome of this matter now that it has been returned to the trial court for further determination. Clearly, despite significant progress in the past decade in developing a common law framework for the assessment of water boundary problems, water boundaries remain a complex issue and controlled waterways are a further piece of the puzzle. Thoroughly researched and reasoned input from knowledgeable land surveyors to support the courts' analysis will be critical for there to be any hope of clarity and resolution both at the level of the developing case law framework and also for the outcomes for individual land owners.

Editor: Megan Mills

[8] *Ibid.* at paras 50-54

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

Water boundaries are discussed at length in *Principles of Boundary Law in Canada* in the Natural Boundaries chapter. The book was referenced by the Appeal Court in the *Becker v. Walgate* decision.

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