



*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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The act of forming an opinion on boundary retracement requires the land surveyor to view and weigh evidence through the lens of the “hierarchy of evidence” – with natural boundaries and original monuments taking a position of primacy over evidence of possession and measurements in deeds. The list is well known, but how is this hierarchy applied where there may be inconsistent elements, particularly where there may be evidence that calls into question whether monumentation is in fact original? In a decision of the Ontario Divisional Court released earlier this year, *Cook v. Corporation of the Township of Strong*,<sup>1</sup> the panel was faced with just such a question when addressing an appeal from the decision of the Surveyor General on a retracement. There was conflicting evidence on whether a monument was “original.”

The Court dismissed the appeal and held that the findings of the Surveyor General were supported by the evidence. In doing so, the decision reminds readers of a surveyor’s role in collecting and interpreting evidence in a boundary retracement exercise; it is generally well understood. In particular, this decision confirmed the importance and thoroughness of that duty when it comes to elevating a monument to the status of an “original monument” and setting that evidence in a primary place within the hierarchy.

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## Applying the Hierarchy of Evidence

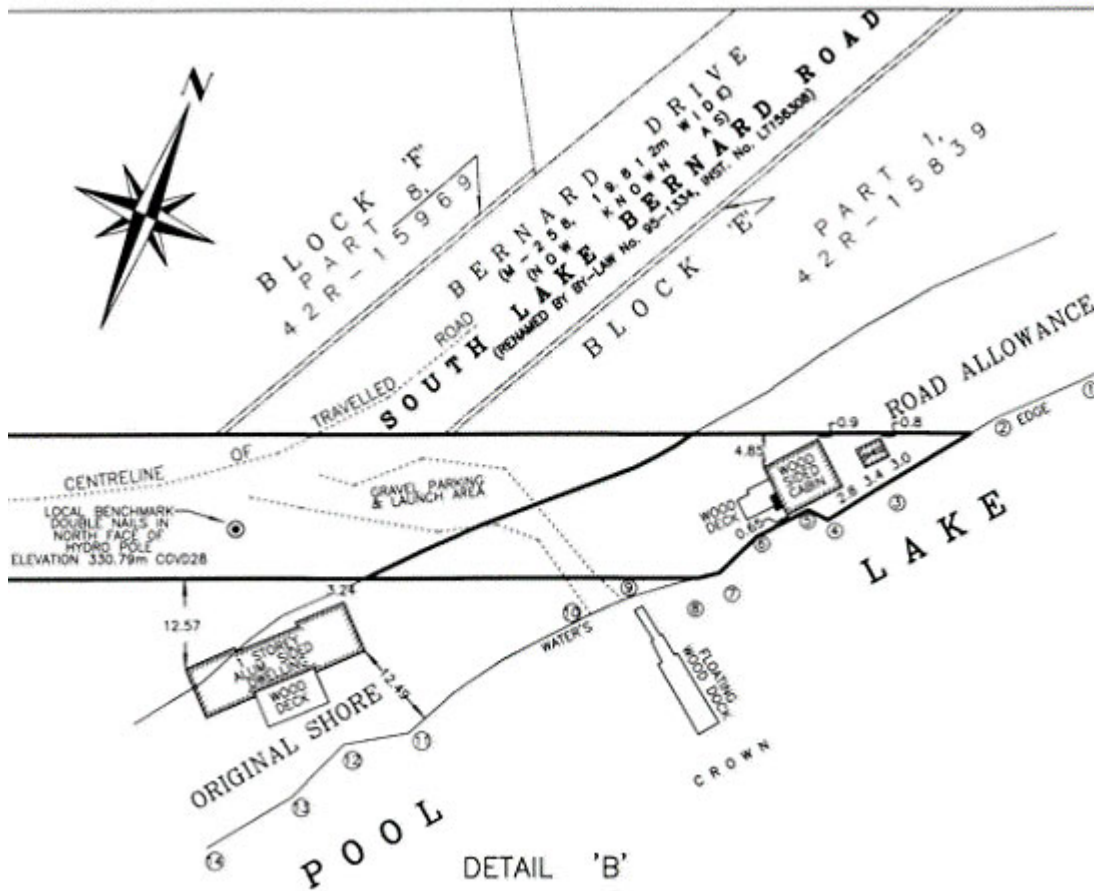
**Key Words:** *hierarchy of evidence, original monuments, verification, corroborative evidence*

On the understanding that those indicators least likely to change over time should be given the greatest weight in a retracement question, original monuments enjoy a high ranking in the hierarchy of evidence, second only to natural features. In *Cook v. Corporation of the Township of Strong*, an appeal from the decision of the Surveyor General, under the *Surveys Act*, there

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<sup>1</sup> *Cook v. Township of Strong*, 2020 ONSC 4194, <http://canlii.ca/t/j8kb3>

was consideration of how a surveyor determines whether a monument has status as “original.” This fell against the backdrop of two conflicting surveys intended to fix the location of a concession road allowance and a shore road allowance cutting across the appellants’ property, a broken lot upon which a home, cottage and other buildings were located. Depending on the location of the road allowances, there may have been some encroachment by structures built on the site. A detail insert from the final plan showing buildings on the shore road allowance appears in Figure 1 below.



**Figure 1:** Copy of detail from deposited Plan GR133267<sup>2</sup>

The property’s boundaries and its recent survey history were described by the court as follows:

Pool Lake bounds the property to the south and east. A concession road allowance bounds the property to the north. Concession 3 is to the north of the road allowance. In 2016 the Appellants obtained two surveys prepared by Peter Raikes. He retraced the road allowance

<sup>2</sup> Plan GR133267, prepared by Dearden and Stanton Ltd. All rights reserved. The contribution by Chester Stanton, OLS, in bringing this plan and decision to our attention is gratefully acknowledged.

between Concessions 2 and 3 and the shore road allowance, locating the shore road allowance in a different location from that shown on previous surveys.

As a result, the Township passed a by-law in 2017 authorizing an application to the Minister of Natural Resources and Forestry to determine the position of the concession and shore road allowances in relation to the Appellants' property pursuant to s. 48(1) of the *Surveys Act*, R.S.O. 1990, c. S.30 (the "Act"). Subsection 48(1) states,

The council of a municipality or the board of trustees of an improvement district, upon its own motion, may, or upon the petition of one-half of the landowners affected shall, pass a by-law authorizing an application to the Minister to cause a survey to be made under his or her direction 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*.

A survey was carried out by Ontario Land Surveyor J.C. Stanton in 2018. He fixed the concession road allowance between Concessions 2 and 3 across Lot 19 and part of the shore road allowance in front of Lot 19. His survey placed the buildings on the Appellants' property partly within the shore road allowance.<sup>3</sup>

The Surveyor General's decision, issued in 2019, confirmed the Stanton plan with some modifications, concluding that a short standard iron bar ("SSIB") was the best evidence of the inner limit of the shore road allowance. The land owners appealed, taking the position that an original monument dating to the first survey of the property in 1875 was not accepted as "original." The crux of the appeal was summarized as follows:

The Appellants take the position that there is an original monument on their property dating to the first survey conducted by Walter Beatty in 1875 and examined in 1876 (the "Beatty survey"). They claim that at one time there was a post in a cairn in the vicinity of the old family cottage. The rotten wood of the post was replaced with an iron bar by E.J. Williams in a 2015 survey. The Appellants argue that this monument marks the intersection of the centre line of the concession road allowance and the inner limit of the shore road allowance. The Raikes survey had treated this as an original monument. However, the Surveyor General concluded that this was not an original monument in its original location.

The Appellants argue that the Surveyor General erred in law by failing to follow the legal principles that govern a survey. In particular, they emphasize that a surveyor is to respect a hierarchy of evidence. Here, the Surveyor General should have considered the original

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<sup>3</sup> *Cook v. Township of Strong* at paragraphs 3-5

monument as evidence of boundaries, and she erred by instead relying on conflicting evidence from subsequent surveys.<sup>4</sup>

This was rejected by the Divisional Court which instead found that no error in law had been made either in statement, or the application of the principles of the hierarchy of evidence, and that the evidence supported her conclusion that the disputed monument was not in fact original. The court continued,

I see no error of law on the part of the Surveyor General. She carefully set out the common law principles to be applied at p. 10 of her Reasons, stating,

The courts have provided surveyors with clear direction on what constitutes the hierarchy of best evidence and the rigour they must use when retracing boundaries. Though the exact wording varies in the caselaw, in general terms, surveyors are to give the most weight to those things that are least likely to be mistaken, being natural features, original monuments in their original location, evidence of lines run and marked on the ground, and finally measurements made by the original surveyor in his original notes.

Her statement of the legal principles is consistent with what the Divisional Court said in *Richmond Hill Furriers Ltd. v. Clarissa Developments Inc.* (1996), 1996 CanLII 11805 (ON SC), 31 O.R. (3d) 529 at pp. 273-74.

However, the Appellants submit that while the Surveyor General may have set out the proper principles, she then failed to apply them properly. In effect, they say, she worked backwards, looking at subsequent surveys, particularly the retracement survey of F.C. McKergow in 1959, rather than work forward from the original monument.

I disagree. The first evidentiary question for the Surveyor General, as she properly pointed out at p. 3 of her Reasons, was whether the disputed monument was an original Beatty monument in its original location. She found as a fact that the disputed monument was not an original Beatty monument.

To overturn this finding of fact, the Appellants must show that the Surveyor General made a palpable and overriding error. They have failed to do so. The Surveyor General gave careful and detailed reasons explaining why she did not find, on a balance of probabilities, that the disputed monument was an original Beatty monument. For example, she examined the instructions given to Mr. Beatty, which required him to plant wooden posts where a concession road met the shore allowance and to place stones around the posts only at the corners of the township, if stones could be found. She considered Mr. Beatty's notes as to the way the concession line was run, as well as subsequent surveys, from 1910 through to 2018. She explained that the "first surveyors were obligated to find the work of Beatty and

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<sup>4</sup> *Ibid.* at paras 10-11

to re-establish Beatty's lines as originally surveyed on the ground using the principles of best evidence" (Reasons at p. 5).<sup>5</sup>

The decision is an important reminder of the analysis required before conferring on a monument the status of "original monument." It falls upon the surveyor to also go through this process. In her decision, the Surveyor General commented as follows on the surveyor's assessment of evidence in determining the status of a monument:

A land surveyor performing a boundary re-establishment is responsible for acquiring and analyzing all available survey evidence, occupation and title information, which often includes verification of the original demarcation and subsequent re-establishments. It includes an exhaustive search for original monuments marking a boundary or for physical evidence of their position.

When monuments are found, the surveyor should not lightly assume the monument or evidence is authentic but must assemble and record corroborative evidence sufficient to prove the validity of his or her adoption of the monument as both authentic and its being in its original location.<sup>6</sup>

With this in mind, the Surveyor General did not accept that Beatty had built the cairn, based on his instructions, notes and the timeline.

She also explained why she did not accept the Cook family evidence that this was an original monument. She then concluded (at p. 12):

Given the evidence of how Beatty ran the line, the absence of any contemporaneous evidence that the cairn was an original monument, the inconsistency between what Beatty set as monuments and the cairn that we find today, on a balance of probabilities, I am unable to accept the Disputed Monument as an original monument in its original position.

This was a conclusion that she was entitled to reach on the evidence and the application of the governing legal principles.<sup>7</sup>

The process of weighing evidence takes place at every step of a boundary retracement - whether by the land surveyor conducting the research and forming of an opinion or the formal decision-making of the Surveyor General or another decision maker in an adjudicative role. Such processes work with legal frameworks – such as the hierarchy of evidence – in a dynamic way to prevent a rote and rigid application of "rules."

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<sup>5</sup> *Ibid.* at paras 12-15

<sup>6</sup> Decision of the Surveyor General, Case No. 885, June 20, 2019 at page 10

<sup>7</sup> *Cook v. Township of Strong*, at para 18

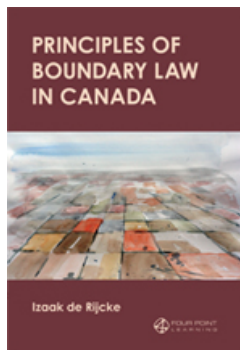
## Cross-references to *Principles of Boundary Law in Canada*

Chapter 3, the *Role of Intention in Retracing Boundaries* includes at section 3, a discussion on the hierarchy of evidence and the care that should be taken when it is being applied to a retracement problem.

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### FYI

#### *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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