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Statute and common law work together to create the legal framework in which we function and in which judicial decisions are made. Through the vehicle of the common law, courts incrementally clarify legal principles and the law evolves – sometimes slowly, sometimes quickly – over time. Changes in statute may further clarify or even override the common law principles developed by the courts. It then falls back to the courts to interpret the meaning of statutes as challenges to their application arise. The interplay between these two sources of law function in somewhat of a dynamic feedback loop. In this month’s issue we will review a short decision from the Ontario Superior Court released earlier this year which looks at the newly clarified definition of navigable waters found within the recently amended *Canadian Navigable Waters Act*.¹ What does this newly established definition mean for the previously developed common law test for what constitute “navigable waters?” The decision in *Blackwell v. Genier*² though brief, provides interesting insight into how a court interprets the intention of a statute and introduces a shift in the framework for how future cases will be determined when a question of navigability arises.

A New Definition of Navigable Waters: Implications for the Common Law Test

Key Words: *navigable waters, riparian ownership, ad medium filum, trespass, constitution*

Throughout Canada, and in northern Ontario in particular, waterways have been critical networks of transportation for centuries. As we approach summer, thoughts for many will turn to the recreational use of waterways for boating and canoeing. Generally speaking, one may think of this “aqueous network” as being supported by the public right of navigation – but is trespass over a waterway possible? This was the underlying question in the recent decision in

¹ *Canadian Navigable Waters Act*, RSC 1985, c N-22; <https://lois-laws.justice.gc.ca/eng/acts/N-22/>

² *Blackwell v. Genier*, 2020 ONSC 1170 (CanLII), 149 O.R. (3rd) 669; <http://canlii.ca/t/j5db9>

Blackwell v. Genier.³ The facts of the dispute were quite simple, and were summarized by the court as follows:

All parties own recreational properties on Silver Lake in the District of Cochrane. They have a major disagreement as to how they can use the lake.

The applicants own the five parcels that comprise the lion's share of the bed of Silver Lake, as well as the adjacent shoreline and abutting lands of over 90% of the lake.

There was a long-standing verbal agreement between the various riparian owners, which allowed mutual access to the entirety of the lake but limited the use of motorized watercraft in the interest of preserving the tranquillity of the lake and its environmental integrity.

According to the applicants, this all changed on June 14, 2013, when the respondents [...] purchased a property that abuts the applicants' property and includes a small sliver of Silver Lake and its shoreline at its southeast corner.

The [respondents] began to use jet skis on Silver Lake. The applicants were not pleased with that. They claim that these activities interfere with their reasonable enjoyment of the property and are inconsistent with the long-standing agreement for the collective use of Silver Lake.

Unable to work out their differences, the applicants brought this application, which seeks, among other things, an injunction to prevent the respondents from trespassing on "their portion" of Silver Lake by navigation or otherwise.⁴

An image of the lake appears below in *Figure 1*, taken from the Ontario Ministry of Natural Resources and Forestry *Crown Land Use Policy Atlas*. Note the lake is relatively isolated and disconnected from any other waterways, save for what appears to be a small creek on the west side.⁵

In Ontario, the test for finding a navigable waterway has developed at common law. A finding of navigability is important from an ownership perspective because of provincial statutes such as the *Beds of Navigable Waters Act*⁶ through which ownership of the bed of waters found to be navigable are deemed to have been retained by the provincial Crown. This mechanism,

³ *Blackwell v. Genier, Ibid*

⁴ *Ibid.*, at paras 1-6

⁵ What is interesting about this dispute is that the ownership of the bed of the lake is divided among the riparian property owners. Whether that was due to specific language in the crown patent, thereby falling into an exception to the deemed presumption created by the *Beds of Navigable Waters Act (Ontario)*, or if the bed was the subject of a separate grant to a water lot is not known. It was not discussed in the decision.

⁶ *Beds of Navigable Waters Act*, RSO 1990, c B.4; <https://www.ontario.ca/laws/statute/90b04>

discussed in *The Boundary Point* issue “Navigability and Determining Title in Ontario”⁷, can create severances of properties that are bisected by a navigable watercourse in which ownership of the bed remains vested in the provincial Crown. At common law, the principles for a finding of navigability are very function oriented and have been summarized as:



Figure 1: Silver Queen Lake, Cochrane District⁸

- 1) navigability in law requires that the waterway be navigable in fact. It must be capable in its natural state of being traversed by large or small craft of some sort;
- 2) navigable also means floatable in the sense that the river or stream is used or is capable of use for floating logs or log rafts and booms;
- 3) a river may be navigable over part of its course and not navigable over other parts;
- 4) to be navigable, a river need not in fact be used for navigation so long as it is realistically capable of being so used;
- 5) a river is not navigable if it is used only for private purposes or if it is used for purposes which do not require transportation along the river (i.e. fishing);
- 6) navigation need not be continuous but may fluctuate with the seasons; and
- 7) where a proprietary interest asserted depends on a Crown grant, navigability is initially to be determined as of the date of the Crown grant.⁹

⁷ *Navigability and Determining Title in Ontario*; [https://4pointlearning.ca/4PL/TheBoundaryPoint_vol1\(9\).pdf](https://4pointlearning.ca/4PL/TheBoundaryPoint_vol1(9).pdf)

⁸ From: Ontario Ministry of Natural Resources and Forestry, *Crown Land Use Policy Atlas*, at: <https://www.ontario.ca/page/crown-land-use-policy-atlas> All Rights Reserved.

With recent amendments to the federal *Canadian Navigable Waters Act*, however, a simpler definition has been created and the application of that definition was recently considered by the Ontario Superior Court in *Blackwell v. Genier*.

Earlier versions of the *Canadian Navigable Waters Act*, previously titled as the *Navigation Protection Act*, contained only minimal references to a definition for navigable waters. The interpretation section simply confirmed that such waters included bodies created by human alteration:

navigable water includes a canal and any other body of water created or altered as a result of the construction of any work.¹⁰

The present version of the *Act* contains a more comprehensive definition:

navigable water means a body of water, including a canal or any other body of water created or altered as a result of the construction of any work, that is used or where there is a reasonable likelihood that it will be used by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes, or as a means of transport or travel for Indigenous peoples of Canada exercising rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and

- a) there is public access, by land or by water;
- b) there is no such public access but there are two or more riparian owners; or
- c) Her Majesty in right of Canada or a province is the only riparian owner.¹¹

Unlike the common law definition used in Ontario for a provincial determination of navigability for Crown title, and which focuses on use, the emphasis on the federal statutory definition appears to be on access. The court determined that the *Act* applies broadly, to any body of water within Canada, and which meets the definition of navigable water as set out in the *Act*. The court then turned to examine the scheme and object of the *Act*, and Parliament's intention in enacting the modern version of the *Act*. In exploring this latter question of parliamentary intention, the court turned to a number of documents published at the time of the legislative amendments:

⁹ These principles were set out in *O'Donnell v. Ontario (Attorney General)* and *Obratoski v. Ontario (Attorney General)*, 2013 ONSC 590 (CanLII), at paragraph 4, referencing *Canoe Ontario v. Reed* (1989), 1989 CanLII 4237 (ON SC), 69 O.R. (2d) 494 (H.C.) at paragraphs 28-35, and *Coleman v. Ontario (Attorney General)*, [1983] O.J. No. 275 (H.C.) at paragraph 15.

¹⁰ *Navigation Protection Act*, RSC 1985, c N-22, at s. 2

¹¹ *Canadian Navigable Waters Act*, RSC 1985, c N-22, at s. 2. Note, however, that the potential still exists for a true "private" lake where one might find a body of water completely contained within a parcel of land, and with only a single riparian owner.

A five-page document entitled “Open, accessible and transparent processes” last modified on August 4, 2017, indicates three separate times that Transport Canada, in reviewing the changes to the *Navigation Protection Act* intends to clarify the criteria used for the aqueous highway test to determine whether water is navigable.

In a 11-page handbook entitled “The *Canadian Navigable Waters Act* – Restoring Lost Protections and keeping Canada’s Navigable Waters open for public use for years to come”, last modified on February 8, 2018, the Government of Canada indicates that once adopted, the new *Act* will restore lost protection so that recreational boaters can continue to travel Canada’s vast network of rivers, lakes and canals for years to come. The document states that one of the purposes of the changes to navigation protection legislation is protecting the public right of navigation on all navigable waters in Canada and that the new *Act* includes new criteria and a better process for adding navigable waters to the list.

A 15-page document entitled “Protecting Canada’s navigable waters”, produced by the Government of Canada and last modified on February 19, 2018, states that the *CNWA* delivers on the Government of Canada’s promise to better protect the right to navigate on all Canada’s navigable waters. The document also specifies that the proposed *CNWA* will modify the navigability test from the common law test (water must be part of an aqueous highway) to a new, more comprehensive definition of “navigable water”.

Finally, in a document last modified on November 19, 2019, entitled “Works on navigable waters in Canada”, Transport Canada states that the public right to travel on navigable waters is protected by law in Canada and that it applies to all waters that the public may use for travel or transport.

Having read the *CNWA*, having compared it to the previous legislation (the *NPA*) and having considered the various documents published by the Government of Canada regarding the *CNWA*, I find that the intention of Parliament in enacting the *CNWA* is clear. Parliament intended to protect the navigation rights of Canadians on more bodies of water by adopting a new and more comprehensive definition of “navigable water”.¹²

The Court reviewed the current version of the *Act*, the previous version of the *Act* and the documents supporting and explaining the process of the amendments and held that there was a clear intention to expand the application of the protection of navigation rights to more bodies of water by adopting a more comprehensive definition.¹³ Furthermore the new definition, if

¹² *Blackwell* at paras 23-24. Note that the documents and sites referenced by the Court can all be found online at: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/nav-handbook-e.pdf>; <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/navigation-protection.html> (archived); and <https://www.tc.gc.ca/eng/works-navigable-waters-canada.html>

¹³ *Blackwell*, at para 27

applied in the proceedings, could prevent the obstruction in the form of an injunction for trespass.

Should Silver Lake meet the definition of “navigable water” under the *CNWA*, the *Act* would prohibit the applicants from physically obstructing or interfering with the navigation rights of the public, including the respondents on that lake. In the circumstances, it would be unjust and unreasonable that the applicants would, however, be able to prohibit navigation altogether on over 90% of Silver Lake through a permanent injunction as a result of the court relying on a different definition of “navigable water” – the common law navigability test – in this proceeding.¹⁴

The decision did not represent a final adjudication on the application, merely a ruling on the question of whether the new definition of navigable waters would apply in deciding whether or not to grant an injunction. The trespass question will wait for future adjudication but we may see a shift away from the common law definition of navigability that focused on function of the water body as an aqueous highway, to a broader definition, consistent across the country. There also seem to be subtle implications arising from how the Court considered the question of navigability in *Blackwell*. Canada has constitutional jurisdiction to legislate on matters of navigation. The provinces have jurisdiction to legislate on matters of property and civil rights. Ontario’s *Beds of Navigable Waters Act* has never defined “navigability” as it is intended for that statute. Land surveyors may wish to remain cautious about the application of *Blackwell* and how a court in the future may simply adopt a federal definition of navigability in determining what is or is not a provincially-owned bed of a waterway.

Guest Editor: Megan Mills

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

For a discussion of the *Beds of Navigable Waters Act*, water boundaries and riparian rights see *Chapter 8: Natural Boundaries*.

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¹⁴ *Blackwell*, at para 32