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.

The land surveyor's process in the assessment and weighing of evidence in a boundary retracement and arriving at an opinion on boundary location has been described as quasi-judicial in that many of the same considerations and the nature of the process itself, hold some similarities to the judicial process of a court weighing the evidence before it and arising at a conclusion. There are, of course, significant differences. Surveyors themselves take on the task of collecting the evidence upon which they will rely in informing their opinion. The key elements of that process are set out in statute and refined by the common law. In the majority of instances – unless prescribed otherwise – the work product that a surveyor provides comes in the form of an opinion rather than a *final* decision on boundary location. In a recent decision of the Federal Court of Appeal in *Ahousaht First Nation v. Canada*[1] and its review of an earlier decision of the Specific Claims Tribunal, we see the court's process for reviewing a tribunal decision on claims related to procedural fairness and alleged errors. We also see, through the underlying claim, the historic work of a land surveyor and commissioner in establishing a reserve being viewed through the lens of procedural fairness: did what the surveyor and the commissioner determined on the ground in 1889 meet the minimum standard? Ultimately, the decision of the Specific Claims Tribunal was held to be reasonable and the application for judicial review was dismissed – but for the land surveyor the broader question of understanding the duty of fairness and the source of such a duty is brought to mind.

Procedural Fairness: Was it part of the Duty of the Crown in Reserve Creation?

Key Words: *duty of fairness, procedural fairness, judicial review, Specific Claims Tribunal, reserve creation, duty of the Crown*

[1] *Ahousaht First Nation v. Canada (Indian Affairs and Northern Development),* 2021 FCA 135 (CanLII), https://canlii.ca/t/jgw11

The recent decision of the Federal Court of Appeal in *Ahousaht First Nation v. Canada* is part of ongoing litigation concerning reserve lands on Flores Island in Clayoquot Sound and raised the question specifically about the duty of care that is owed by the Crown and agents acting on its behalf in the provision of reserve lands. The background to the facts underlying the dispute was set out by the court in the opening paragraphs of the decision which included copies of a historical sketch and early map:

> In June 1889, Commissioner Peter O'Reilly (O'Reilly) of the Joint Indian Reserve Commission (JIRC) set off by boat from the port of San Juan on the west coast of Vancouver Island northwest to the Clayoquot Sound area on a week-long trip during which he, with the assistance of Commission surveyor Ashdown Green (Green), laid out 29 Indian reserves. Some of these were for the applicant Ahousaht First Nation (Ahousaht). One, no. 15, was called Marktosis, and is located on the southeast shore of Flores Island. This reserve is hereinafter referred to as IR 15.
>
> IR 15 was laid out on June 22, 1889, a day that started out with heavy rain, but during which O'Reilly and Green laid out several reserves. Later, O'Reilly composed Minutes of Decision dated June 24, 1889 in which he defined the area of IR 15 as follows:
>
> > Mark to sis, a reserve of two hundred and thirty (230) acres, situated on the southeast coast of Flores Island, Clayoquot Sound, and at the head of Matilda creek.
> >
> > Commencing at a Spruce tree, marked Indian Reserve, and running West sixty (60) chains, thence North eighty (80) chains, thence East to the seacoast, and thence following the shore in a southerly direction to the place of commencement.

A rough sketch of the reserve made contemporaneously by Green looked like this:

The bold word "Spruce" indicates the starting point for measuring the boundary of the reserve. This spruce, which was marked "Indian Reserve", is also referred to as the Commissioner's Tree. The two "x" marks near the Commissioner's Tree indicate graves, as noted by the word appearing adjacent thereto. The word on the left side of the sketch is "Matilda", indicating the name of the creek that enters the reserve. The series of dots on the thin piece of land indicates the village, and the word adjacent thereto is "church", which was located at the "x" in the village.

A more precise map prepared four years later as part of the formal survey of IR 15 (see below) showed the area of the reserve shaded in pink. The brown marks

indicate elevation change.

The dispute in this appeal concerns an area to the south of IR 15 originally known as aauuknuk and later called Lot 363. This is an area of about 140 acres to the south of, and contiguous with, the southern boundary of IR 15, which includes the lake shown in the map above. There is no dispute today that Lot 363 was part of the Ahousaht's land when the reserve was defined. However, there was doubt about this for many years. Lot 363 was not included in IR 15. It was provincial Crown land until 1904 when it was purchased by the Board of Trustees of the Presbyterian Church of Canada for use as a mission and school site. In 1953, title in Lot 363 was transferred to the United Church, which then sold off portions to a series of private owners. By 1995, MacMillan Bloedel, which was later acquired by Weyerhaeuser Company Limited (Weyerhaeuser), owned a portion of Lot 363. It acquired the remaining portion in 2000. In 2009, Lot 363 was set aside as an addition to IR 15, apparently with the consent of Weyerhaeuser.[2]

In 2002 the Minister had rejected the Ahousaht claim that Canada, through the actions of Commissioner O'Reilly, had breached its fiduciary duty of care in connection to reserve creation. This claim was rejected again in 2009; however Lot 363 was added to the reserve as noted above. The Ahousaht then filed a Declaration of Claim with the Specific Claims Tribunal (SCT) in 2012 claiming the Crown breached its obligation by failing to include the disputed lot as part of the reserve *when it was originally laid out* and failing to correct the error for many decades thereafter. The matter was heard by the SCT which found that O'Reilly's actions did not breach the Crown's fiduciary duty. While it was recognized by the SCT that the Ahousaht had a "cognizable" interest in Lot 363 at the time of reserve creation, it was concluded that O'Reilly did not know of that interest at the time, in spite of acting with ordinary diligence.

[2] *Ibid*., at paras 1 to 6

That decision, *Ahousaht First Nation v. Her Majesty The Queen In Right of Canada,*[3] was then appealed.

In reviewing the decision of the SCT, the Court set out the nature and extent of the instructions given to Commissioner O'Reilly and the land surveyor, Green, who had participated in the process:

> The JIRC under which O'Reilly worked was established in 1876, with the approval of Canada and British Columbia, to address the question of Indian land in British Columbia. Commissioners like O'Reilly were tasked to "visit … each Indian Nation … in British Columbia and after full enquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it." Commissioners were also instructed to:
>
> > […] be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians; and in the case of each particular Nation regard shall be had to the habits, wants and pursuits of such Nation.
>
> Article 13 of the Terms of Union referred to in the above-quoted passage stated:
>
> > The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
> >
> > To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.
>
> In *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83 at para. 80 (*Williams Lake*), the Supreme Court of Canada ruled that the Crown's fiduciary duty in interests in land is grounded in land "capable of being known or recognized", i.e. cognizable.
>
> At paragraph 43 of the Decision, the SCT considered that the Crown's fiduciary duty is "to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regard[s] as the best interest of the beneficiaries" (citing *Williams Lake* at para. 55). The SCT

[3] *Ahousaht First Nation v. Her Majesty The Queen In Right Of Canada*, 2019 SCTC 1 (CanLII), https://canlii.ca/t/hxgdr.This lower decision was also referred to in Ballantyne, Brian, *Surveyors as Expert Witnesses: From Stellar to Egregious*, Ontario Professional Surveyor, Summer, 2021, 20, at p. 23: https://www.aols.org/site_files/content/pages/about/media/ops-magazine/2021summer.pdf

went on at paragraph 49 to state that ordinary diligence "imposes a standard of conduct on the Crown in its dealings with a beneficiary, thus requiring adequate inquiry by the Crown into the affected beneficiary's interests in land."

As stated at paragraph 51 of the Decision, "the question in the present matter is not whether the Ahousaht had a cognizable interest, but whether it was apparent to Commissioner O'Reilly or, if acting with ordinary diligence, would have been apparent to Commissioner O'Reilly."

The SCT looked at the instructions that were given to O'Reilly concerning his work. Among other things, he was told the following upon receiving his Commission in 1880:

> The Government considers it of paramount importance that in the settlement of the land question, nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached. Their fishing stations should be very clearly defined by you in your reports to the Dept. and distinctly explained to the Indians interested therein so as to avoid further future misunderstanding on this most important point. You should in making allotments of lands for reserves make no attempt to cause any violent or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in; you should on the contrary encourage them in any branch of industry in which you find them so engaged.

These same instructions also referred to an 1878 report of the previous Commissioner, G.M Sproat, which report contained further guidance. The SCT reproduced the following extracts therefrom at paragraph 119 of the Decision:

> The first requirement is to leave the Indians in the old places to which they are attached. The people here so cling at present to these places that no advantage coming to them from residence elsewhere would reconcile them to the change.…
>
> The British Columbian Indian thinks, in his way and in a degree, as much of a particular rock from which his family has caught fish from time immemorial as an Englishman thinks of the home that has come to him from his forefathers. This strong feeling which is well known, but the force of which I did not, until this year, fully appreciate, cannot be justly or safely disregarded.
>
> …
>
> …I am sorry, as a matter of historical truth, to have to say that the facts disclosed in several of my Field Minutes forwarded from different places are inconsistent with the fair and reasonable attention to Indian business which might have been expected from the British Columbia government in pre-confederation days, and which was enjoined upon the colonial authorities in repeated dispatches from the Home government.

…

> It is almost unnecessary to say that the manners and customs of the native population must be understood before land reserves can be satisfactorily assigned for their use…. None of the rulers of British Columbia since Sir James Douglas left office seem to have appreciated this fact….
>
> …
>
> I have solved several apparently insoluble problems this year by discovering, that what the Indians really wanted was not so much good ploughland, as some old "places of fun" up in the mountains or some place of fishing-resort where, at certain seasons, they assemble to fish, dig roots and race their horses….
>
> …
>
> As a sample of what I mean by too "summary" procedure, I may mention that, in assigning a compact reserve in a district, proper arrangements do not, in all cases, seem to have been made to obtain the intelligent consent of the Indians to the change…

The SCT also noted instructions to field surveyors involved in setting reserves (like Green) to point out, on the ground, the boundaries of the reserve to the chief and head men in order to permit the Commissioner to hear any objections.

Citing *Williams Lake* at para. 55 and *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 97, the SCT defined the fiduciary duty on O'Reilly as follows:

> […] Prior to the acquisition of a "legal interest" in land that is subject to the reserve creation process, the Crown's sui generis fiduciary duty is "to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regard[s] as the best interest of the beneficiaries" […][4]

In summarizing the evidentiary findings of the SCT, before assessing same against the reasonableness standard of review, the court highlighted the following:

The SCT noted that O'Reilly had indicated (in a letter to the Superintendent General of Indian Affairs (SGIA) dated March 5, 1890) that he had a long conversation with the "Chief" and many of his people in June 19, 1889. They discussed where the reserves should be situated, and O'Reilly invited them to accompany him to the relevant locations, either on his steamer or being towed in their canoes. He indicated that they gladly accepted. It is not clear whether the Chief identified here was Noukamis, then Chief of the Ahousaht. However, O'Reilly's diary indicates that on the day that he defined the boundaries of IR 15 (June 22, 1889) he had a long chat with Chief Noukamis.

The SCT also found that Chief Noukamis was present when O'Reilly and Green visited the Marktosis village. This finding was based on two things. First, Chief Noukamis was aware of

[4] Ibid. at paras 11-18

> the importance to his people of securing their fishing stations and villages, and of his responsibility to ensure that this was done (see paragraph 181 of the Decision). Second, locating the southern boundary of IR 15 just south of burial sites located in a forested area would have required input from the Ahousaht (see paragraph 167 of the Decision).
>
> The SCT found that it was not clear how the starting point for the southern boundary of the reserve, the Commissioner's Tree, was chosen. It was not set at one obvious point, the outer limit of the village. It was set further south. The SCT found that there was no evidence for any distinction between the forested land just north and just south of the southern boundary, and concluded that it must have been set based on consultation with Chief Noukamis. The SCT also found that the location of the southern boundary just south of burial sites indicated that O'Reilly was sensitive to the need to include them in the reserve and inquired as to their location (see paragraph 166 of the Decision).
>
> With regard to the lake located on Lot 363, not far from the southern boundary of the reserve, the SCT concluded that O'Reilly and Green were likely not aware of it. The SCT noted that (i) it was in a forested area, (ii) there was an area of elevated land between the lake and the Commissioner's Tree, and (iii) it was raining heavily the day the reserve was laid out (see paragraphs 168 and 170 of the Decision).
>
> The SCT also noted that there was no evidence that O'Reilly was told of the value of Lot 363 (see paragraph 174 of the Decision). The SCT concluded that the absence of notes by O'Reilly attributing fishery, timber or other values to Lot 363 (as had been made in respect of other reserves) strongly implied that O'Reilly was not informed of them (see paragraph 179 of the Decision).[5]

The conclusion reached by the SCT following its evaluation of the evidence before it was that it had not been established that Commissioner O'Reilly failed to exercise the requisite ordinary diligence – he had made the necessary inquiries, but was not informed or aware of the particular value of Lot 363 when he did not include same in the reserve area. The Appeal Court held that the conclusions drawn by the SCT based on the evidence before it were reasonable, citing the standard of review set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1. With respect to the errors claimed, the appellate court stated the following:

> In respect of all of the alleged errors, they concern inferences of fact that were drawn by the SCT based on the evidence. I address each of the issues below, but my overall conclusion is that the inferences in question were open to the SCT, even though different inferences might also have been made. The SCT's inferences do not demonstrate any irrational chain of analysis or any logical fallacies.
>
> (2) The Commissioner's Tree

[5] *Ibid*., at paras 19-23

As indicated above, the SCT inferred that the Commissioner's Tree delineating the southern boundary was chosen based on consultation with Chief Noukamis, and in order to ensure that burial sites were included in the reserve. The basis for these inferences is discussed at paragraph 21 above.

The Ahousaht note that the formal survey of IR 15 prepared four years later noted many more grave sites than those identified by Green. The Ahousaht also note that there was evidence of people being "buried" in trees south of the southern boundary. In my view, neither of these assertions impairs the inferences that the SCT drew from the evidence. The SCT was clearly aware of the practice of burial in trees (see paragraphs 67, 81 and 84 of the Decision), and there is no indication in the evidence that O'Reilly knew or should have known of any graves south of the southern boundary of IR 15.

I am not convinced that the inferences the SCT drew with regard to the selection of the Commissioner's Tree were unreasonable.

(3) Presence of Chief Noukamis

As discussed at paragraph 20 above, the SCT found that Chief Noukamis was present when O'Reilly and Green visited the Marktosis village. The Ahousaht argue that there is no evidentiary basis for this finding. Though O'Reilly's diary indicates that he met with Chief Noukamis earlier on the day that he visited Marktosis, it does not record that Chief Noukamis accompanied him there. The Ahousaht argue that this omission implies that Chief Noukamis was not present at Marktosis with O'Reilly, especially considering that O'Reilly did identify in his diary those who accompanied him to some other locations. The SCT acknowledged the lack of direct evidence of the presence of Chief Noukamis at Marktosis with O'Reilly (see paragraph 181 of the Decision), but drew inferences from the evidence despite this. The SCT was entitled to do that.

The Ahousaht argue that there would be no reason for Chief Noukamis to travel to Marktosis, and that the implication from the evidence is that he did not accompany O'Reilly and Green there. I disagree. The SCT found that Chief Noukamis was present when O'Reilly and Green visited the Marktosis village, and explained the basis for this finding, including his responsibility as chief to be present. The Ahousaht do not dispute this responsibility. I am not convinced that this was an unreasonable finding, even though different findings might have been made, as suggested by the Ahousaht. It is not the role of this Court to reweigh the evidence.

The Ahousaht question the reliability of some of the information provided by O'Reilly as to who he met and when during his June 1889 trip. They ask this Court to infer from a comparison of O'Reilly's diary and his March 5, 1890 letter to the SGIA that he may have misremembered or embellished what he did. Once again, it is my view that the existence of such possible alternative findings do not lead to a conclusion that the SCT's findings were unreasonable.

The Ahousaht also ask this Court to conclude that O'Reilly's comments give the impression that his invitation to members of the tribe to accompany him to the locations where the reserves would be laid out was considered by them more of an adventure or a lark than a serious attempt to gather information. Firstly, it is not the task of this Court to reach such conclusions. Rather, we focus on the SCT's reasons and consider whether they are flawed. In any case, I see no basis, other than speculation, for the conclusion that the Ahousaht urge here. Moreover, such a conclusion would conflict with the SCT's reasonable finding that the Ahousaht understood that the setting of reserves was an important matter.

(4) The Lake

As noted in paragraph 22 above, the SCT concluded that O'Reilly and Green were likely not aware of the lake located on Lot 363 just south of the southern boundary of IR 15. The Ahousaht argue that O'Reilly and Green had a duty to traverse the southern boundary, and would have seen the lake if they had. They also argue that, had O'Reilly seen the lake, he would have understood its value to them as a source of fish, and would have included Lot 363 as part of IR 15.

The Ahousaht offer little support for a duty to traverse the southern boundary, and I do not accept that the SCT erred in not finding a breach of the fiduciary duty to the Ahousaht in the failure of O'Reilly and/or Green to traverse the southern boundary of IR 15.

The Ahousaht also argue that, even if O'Reilly was unaware of the lake when he visited Marktosis, he could not have claimed ignorance of it once he saw (and signed) the formal survey prepared a few years later. I accept that O'Reilly may have seen the lake on Lot 363 on the map in the formal survey, but I am not convinced that doing so would necessarily have required him to make further inquiries with a view to modifying the boundaries of IR 15. I am not convinced that the SCT erred in not including such a step as part of the fiduciary duty owed to the Ahousaht. The mere indication on the map of a body of water near the border of IR 15 would not, without more, indicate that either the body of water or the land surrounding it were necessarily of value to the Ahousaht. This is especially so in view of the SCT's reasonable finding that Chief Noukamis was present when O'Reilly visited Marktosis in order to indicate the lands the Ahousaht used.

The Ahousaht make several arguments concerning evidence that would have been treated differently by Justice Whelan than by Chairperson Slade. Examples include (i) oral history concerning the suitability of timber on Lot 363 for canoes, and (ii) a visit to IR 15, which would have shown just how close the lake is to the southern boundary of IR 15. However, the SCT was clearly aware of this evidence. The oral history, which was provided by Elder Louis Frank Sr., was discussed in the Decision at paragraphs 55 to 62, and the value of the timber on Lot 363 was discussed at paragraphs 171 to 175. I see nothing unreasonable in the SCT's treatment of the evidence.

The proximity of the lake to IR 15 is clear from the evidence (the formal survey indicates that it was 3 chains – about 60 metres – from the southern boundary), and the SCT noted this at

> paragraph 171 of the Decision. More importantly, it is not clear to me how a site visit to see this proximity in person could have affected the outcome. The SCT's conclusion that O'Reilly and Green had not seen the lake was based on the distance and terrain from the Commissioner's Tree, not from the southern boundary of IR 15. In addition, it is not clear to me that a site visit in 2018 would have assisted Chairperson Slade to imagine what would have been apparent to a visitor in 1889.[6]

The Federal Court of Appeal also examined claims made by the applicant that the SCT itself failed to meet certain elements of procedural fairness. Such allegations trigger a more stringent standard of review, namely, at a level of correctness. In this appeal, the applicants were again unsuccessful; the Court found that there had been no breach of procedural fairness.

The benefit of this decision for land surveyors is how it offers some insight to how "procedural fairness" offers an element of the Duty of the Crown when initially setting out reserves called for in a treaty or other instrument. As surveyors, we might view this as irrelevant to our work today. Yet, while the Federal Court of Appeal dismissed this appeal, it raises the spectre of such arguments being brought forward in the future. These considerations might well require the surveyor to think about the process and considerations that were adopted in reaching a determination of reserve location and boundaries.

In the modern context, a land surveyor is always expected to discharge duties to the public and clients. These duties are governed to some extent by the standards of practice and code of ethics established by statute or by-laws adopted by the relevant governing body through which a land surveyor is licensed. For example, the Canada Lands Surveyors Regulations, include a *Code of Ethics* at section 2-3 and definitions of professional misconduct that speak in general terms to issues of both duty of care and *procedural fairness* in order to maintain standards of integrity for the profession and public trust in same. Similar provisions govern members of the various provincial and territorial surveying professional associations.

Editors: Izaak de Rijcke & Megan Mills

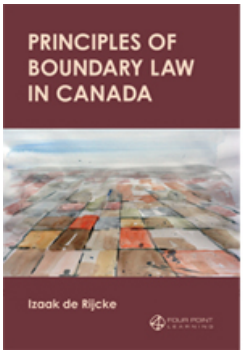
Cross-references to *Principles of Boundary Law in Canada*

A discussion of Codes of Ethics for land surveyors in particular and professionals in general can be found in *Appendix 3*.

[6] Ibid. at paras 46-58

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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