The Boundary Point
Volume 9, Issue 9, September 2021
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.



Decisions from courts in Canada dealing with boundaries are always welcome in offering further guidance for land surveyors. This is especially the case when a decision involves reasons from an appellate court – and that pertain to the location of a natural boundary and the interpretation of a Crown patent. In *Herold Estate v. Canada (Attorney General),*[1] we have just such a decision.

*Herold Estate* reversed and set aside a ruling made by the Court of first instance and gave clear guidelines for doing so. Three errors of law were identified in the lower court ruling and in setting the decision aside, the Court considered the effect of flooding of a waterway, turning it into a "lake", and how this impacted the title and boundaries of land which were initially shown as forming a part of a lot in the original survey and on the resulting Township plan. A patent based on the Township plan ensued.

---

## Flooded Lands, Treaty Lands and Patented Lands: Resolving Complex Claims to Title and Boundaries

**Key Words**: *intention, patents, Honour of the Crown, flooding, original survey*

In Ontario, the Trent-Severn Waterway is a reminder of the infrastructure built many decades ago to serve as a strategic means for travel between the Great Lakes without exposure to a military or naval risk from the Americans. Also serving as a means of commerce with numerous dams, mills and locks along the way, it remains to this day as an important attraction for recreational boaters.

The waterway is a combination of lakes, rivers and diversions, with many controls installed to ensure safe boating in summer and the reduction of damage along the shores in winter and

[1] *Herold Estate v. Canada (Attorney General)*, 2021 ONCA 579 (CanLII), https://canlii.ca/t/jhp4x

spring. This has meant the introduction of many controls which have allowed for the regulation of many bodies of water in terms of artificial elevation, dredging and adhering to rule curves for the management of the waterway by Parks Canada. This artificial regulation has also led to uncertainty of legal ownership and the legal boundary location for many properties along the waterway. *Herold Estate* started as an application in which the ownership of certain islands in a lake were claimed as being in the ownership and title of the adjoin township lot owner on the mainland. In essence, the lake was formed by the installation of a dam on a river and the water which backed up flooded some of the land. In respect to the site of this dispute, islands resulting from elevated water were held by the court of first instance as still forming part of the underlying township lot; neither artificial flooding nor erosion changed this. In Figure 1 below, the location of the flooded land and the resulting islands as claimed, are illustrated.


Figure 1: The Otonabee River is part of the Trent-Severn Waterway[2]

In its Reasons, the Court of Appeal for Ontario summarised the context succinctly, as well as the disposition:

> This litigation concerns the ownership of three islands (the "Islands") located in Lake Katchewanooka, which is part of the Trent-Severn Waterway. The Islands are in close proximity to each other. The largest is referred to as Island 27; the two smaller islands were at one time part of Island 27 but are now separated from it as a consequence of flooding and erosion.

[2] From: Google maps: https://www.google.com/maps All rights reserved.

> In the decision under appeal, the application judge held that the respondent, the Estate of William Albin Herold (the "Estate"), owns the Islands by virtue of its ownership of Lot 35, Concession 11, in the Township of Smith, County of Peterborough ("Lot 35").
>
> The application judge found that when Lot 35 was first surveyed in 1818, the land that became the Islands was a headland or peninsula connected to Lot 35's mainland. In 1868, the Province of Ontario, by Letters Patent, granted Lot 35 to Alexander Rose, the Estate's predecessor in title. Although he was not satisfied that in 1868 the Islands were still physically part of the mainland of Lot 35, and the Letters Patent made no reference to any islands, the application judge declined to determine the intention of the parties to the Letters Patent. Instead, he concluded that since Island 27 had, by 1855, separated from the mainland as a result of changes in water levels brought about by dams erected in the 1830s, it was included as a matter of law in the Letters Patent's conveyance of Lot 35. He further held that ownership of the Islands was not affected by treaties between the appellant First Nations (the "First Nations") and the Crown made in 1818 and 1856. He interpreted the treaties, by which the First Nations had surrendered their title to a vast tract of land in what is now Central Ontario, to include a surrender of the property in issue in this litigation, giving the Crown the right to sell. Accordingly, as the Islands had been sold as part of Lot 35, when the Estate became the owner of Lot 35, it also became the owner of the Islands.
>
> The First Nations and the Attorney General of Canada ("AG Canada") both appeal. For the reasons that follow, I would allow the appeals.
>
> In my view, the application judge's determination that the Letters Patent conveyed the Islands as part of the conveyance of Lot 35 is not subject to deference, since he made extricable errors of law. The application judge failed to follow the fundamental principle of interpretation – to determine the meaning of the Letters Patent in accordance with the intentions of the parties, objectively ascertained from the language they used in light of the relevant factual matrix. He also erred in treating a legal principle about the effect of sudden changes in water levels on boundaries between different owners as applicable and determinative. Finally, he failed to properly consider the Crown's obligations to the First Nations in determining what the Crown intended to convey by the Letters Patent.
>
> Properly interpreted, the Letters Patent did not include any conveyance of the Islands. As Mr. Rose did not obtain ownership of the Islands when he received a conveyance of Lot 35 under the Letters Patent, the Estate did not obtain ownership of them when it obtained ownership of Lot 35.[3]

In order to understand all of the evidence, a chronological summary was used by the court in giving a step by step sequence of events. This would serve as bringing order to the "matrix of evidence" and also allow for the better understanding of the critical facts and boundary principles. The Court described the effect of the first Treaty made by the Crown with First

[3] *Herold Estate v. Canada (Attorney General)*, at paras. 1 to 6 (footnotes omitted).

nations in making the land available for survey and sale to settlers. The treaty and township survey were almost contemporaneous:

> **Treaty 20**
>
> In 1818, the Crown and the First Nations entered into the Treaty of Newcastle ("Treaty 20"). It provided for the surrender to the Crown of a vast tract of land in what is now Central Ontario. Although the description in Treaty 20 was general, the application judge found that it included the property in issue in this litigation.
>
> Although there was no express exclusion in Treaty 20 of any islands, the evidence before the application judge, which he accepted, was that the First Nations had requested that any islands in the waterways within the surrendered lands be excluded, and the Crown's representative had assured them that the request would be communicated to the King who would no doubt accede to it.
>
> **The Wilmot Survey**
>
> At about the same time as Treaty 20 came into effect, the southern part of the Township of Smith was surveyed by Samuel Wilmot. The 1818 survey he prepared (the "Wilmot Survey") showed bodies of water, concessions, and lots; of particular relevance is its depiction of Lot 35.
>
> The Wilmot Survey depicts Lot 35 as a mainland lot roughly triangular in shape. Its northern boundary is the concession line separating Concessions 11 and 12; its western boundary is the division between Lots 34 and 35; and its southeastern boundary is the water's edge of Lake Katchewanooka. The Wilmot Survey does not show any distances between the fixed boundaries on the north and west, and the southeastern water's edge boundary.
>
> The application judge noted that there was some concern about the precision of the Wilmot Survey's depiction of the southeastern area of Lot 35, as the surveyor had noted that the "waters are not traversed only sketched". However, according to evidence that the application judge accepted, at the time of the Wilmot Survey, what came to be the Islands was a headland or peninsula on part of the mainland of Lot 35.[4]

In Figure 2, a portion of the Wilmot Survey for part of the Township of Smith is shown and illustrates what the Court described in relation to Lot 35.

[4] *Ibid.*, at paras. 7 to 11

Figure 2: Lot 35 shown next to Otonabee River on Township plan[5]

Dams were installed on the river in 1835 and caused flooding. A survey of the river in 1855 showed an island where before the township survey plan had the former entire Lot 35 in somewhat triangular shape.

The summary of events by the court chronicled further significant occurrences:

> **Treaty 78**
>
> In 1856, the Crown and the First Nations entered into the Islands of the Trent Treaty ("Treaty 78"). The application judge found that "Treaty 78 addressed any uncertainty there may have been regarding the status of the islands in the waters in question flowing from the wording of Treaty 20 in 1818". Under Treaty 78, the First Nations conditionally surrendered to the Crown, "in trust, to [be] sold or otherwise disposed of to the best advantage for ourselves and our descendants forever … all islands and mainland … in the Newcastle and Colborne Districts, including the islands in Rice Lake which have not heretofore been ceded to the Crown" with the "principal arising from such sales to be safely funded and the interest accruing therefrom to be paid annually to us and our said descendants for all time to come."
>
> The application judge found that the description of land covered by Treaty 78 "would include the Township of Smith where the subject property is located".

[5] From: Plan of Smith Township (SR 2121), Office of Surveyor General, Ontario Ministry of Natural Resources and Forestry, Peterborough.

**The Letters Patent**

> In 1868, by Letters Patent, the Province of Ontario granted Lot 35 to Mr. Rose, from whom the Estate ultimately derived its title. The Letters Patent describe what was conveyed "as being composed of Lot Number Thirty five in the Eleventh Concession of the … Township of Smith". An approximate acreage is provided but it is unclear if it is 21 or 71 acres. There is no express mention of any islands. The Letters Patent provided for the consideration to be paid by Mr. Rose – $17.00 – and did not allocate it between the mainland and any islands.

**The 1893 Resolution**

> In 1893, the federal Crown issued a Resolution (the "1893 Resolution") approving a request by the First Nations that certain islands, including Island 27, not be sold under Treaty 78, but instead be reserved for their use.[6]

Appellate courts will generally be guided by "giving deference" to findings of fact made by the court of first instance. This is consistent with appellate courts not being "trial courts" and needing to hear all of the evidence again. As a result, appeals usually proceed on the basis of "errors of law" allegedly made by a lower court in its analysis of the evidence. However, if the evidence cannot support a finding of fact, the deference normally given to a decision under appeal does not apply. In *Herold Estate*, the Court of Appeal for Ontario identified three such errors made by the court below:

> In my view, the application judge made three extricable legal errors in his approach to the question of whether the Islands were included in the conveyance by the Letters Patent. First, he failed to follow the fundamental principle of interpretation, which is to determine the meaning of the Letters Patent based on the parties' intentions, objectively derived from the words they used in light of the factual matrix. Second, he erroneously relied on a legal principle about a sudden change in water levels fixing boundaries between different owners; in the circumstances, that principle was neither applicable nor determinative. Third, he failed to consider how the apparent disconnect between the obligations of the Crown concerning a sale of an island covered by Treaty 78, and the terms of the Letters Patent, bore on the question of whether the Province of Ontario intended to include the Islands in the Letters Patent.[7]

Each of the errors were reviewed and explained by the Court. After explaining the overall principles applicable to the interpretation of a grant of an interest in land, the Court explained,

> These general principles apply equally to the interpretation of an instrument that creates or conveys an interest in land. I draw that conclusion for three reasons.

[6] *Ibid.*, at paras. 15 to 18
[7] *Ibid.*, at para. 35

First, the Supreme Court of Canada has noted that the construction of an easement – clearly an interest in land – is a question of mixed fact and law as it must be interpreted in light of the entire factual matrix: *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, 450 D.L.R. (4th) 105, at para. 101. In support of that proposition, the Supreme Court cited both *Robb v. Walker*, 2015 BCCA 117, 383 D.L.R. (4th) 554, at paras. 30-31 (which held the principles in *Sattva* to be applicable to the interpretation of an easement) and *Sattva* itself. There is no apparent reason to distinguish the principles applicable to the interpretation of an instrument granting or conveying an easement from those applicable to a different type of interest in land. Determining the objective intentions of the parties is thus equally the goal of interpreting a conveyance, as that is the overriding concern of interpretation as identified in *Sattva*.

Second, the need for certainty and finality in conveyancing is respected by determining the objective intentions of the parties to the instrument through examining its words in light of the factual matrix that illuminates their meaning, in accordance with the principles in *Sattva*.

Third, this approach is in line with this court's holding in the leading case concerning the interpretation of conveyances by deed or Crown grant: *Gibbs v. Grand Bend (Village)* (1995), 1996 CanLII 2835 (ON CA), 129 D.L.R. (4th) 449 (Ont. C.A.). Although expressed in pre-*Sattva* language, the basic principles articulated in *Gibbs* do not vary, in any respect that is material to this case, from those articulated in *Sattva*. Those principles equally focus on determining the intention of the parties to the deed or grant.

Under *Gibbs*, the primary determinant of the meaning of a conveyance, whether by deed between private parties or by Crown grant, is its language: *Gibbs*, at p. 461. This is consistent with the role played by the text of a written agreement under *Sattva*: at para 57. Extrinsic evidence cannot be used to contradict the unambiguous terms of a conveyance made by deed or Crown grant (*Gibbs*, at p. 461), just as it cannot be used to contradict the meaning of the language of any contract (*Sattva*, at paras. 59-60). But just as evidence of factual matrix or surrounding circumstances can be used to ascertain contractual intention when it is difficult to do so by looking at the words alone (*Sattva*, at para. 47), in the case of a deed or Crown grant, extrinsic evidence can be used "to explain the sense in which words, open to more meanings than one, have been used by the contracting parties", and thus to give effect to the grantor's intention: *Gibbs*, at p. 461 (citations omitted).[5] The purpose of reviewing such evidence is "to permit the court to carry out the intentions of the parties": *Gibbs*, at p. 463.

*Gibbs* refers to the requirement that a latent ambiguity must exist in a deed or Crown grant before extrinsic evidence will be considered: at p. 461. *Sattva* permits the consideration of factual matrix or surrounding circumstances in any contractual interpretation, recognizing that it may be difficult to determine intention by the words alone. In this case, this is a distinction without a difference. The test for a latent ambiguity, and thus for the admission of extrinsic evidence under *Gibbs*, is met in cases where the description of the land in the deed

> or grant, when applied to the land itself, raises an issue about the location of a boundary. Clearly, that test is met in this case.[8]

The court below allowed for the admission of extrinsic evidence to aid in the interpretation of what was intended by the Crown and the first patentee. However, it was unclear whether this was considered to determine the subjective or the objective intentions of the parties. As a result, the appellate court held that the judge in the court below failed to consider and apply the correct principle of interpretation – which was the first extricable legal error.

The second error involved an incorrect application of boundary law principles. The court explained,

> The application judge found that the Islands separated from Lot 35 in a lengthy and gradual manner:
>
> > I am also satisfied that the configuration of the subject property was radically altered by the installation of man-made dams on the river. This was a lengthy and gradual process which commenced in the 1830s with the Herriot dam, continued through the construction of the Trent Severn Waterway in the middle years of the 19th century, culminating in the more significant damage caused by the flooding in the 1870s which led to the damages paid by the Crown to Jane Rose, as evidenced by the release registered on title of the subject property in 1885 as Instrument Smith 3160. The Baird drawings and the Haslett survey are the only evidence available regarding flood conditions at the subject property in the mid-19th century. Those documents, particularly the Haslett survey, support the notion that water levels on the river at the point in question had risen by as much as 2.5 feet by the mid-1850s. [Emphasis added.]
>
> After making these findings, he set out the Flooding Principle by reference to p. 44 of the Surveyor General Publication,[9] which states that it applies where water levels rise quickly through a process that is not gradual:
>
> > Watercourses regulated for navigation or reservoir (millpond) purposes have higher levels, which remain somewhat constant throughout the year (e.g. many lakes in Ontario). Such levels are upstream of dams and remove impediments to navigation such as rocks and reeds. This means that discharge varies greatly throughout the year. If water levels are quickly raised (through a process that is not gradual), then erosion has not occurred and the boundary is fixed in location at the time of encroachment. The upland parcel is partially (or completely) submerged. [Emphasis added.]
>
> The application judge's factual finding of a gradual and lengthy process by which water levels changed over approximately 25 years was not a finding of a quick rise in water levels through

[8] *Ibid.*, at paras. 44 to 49

[9] Note: this is a reference to what the court cited as, Natural Resources Canada, Surveyor General Branch, *Water Boundaries on Canada Lands: That Fuzzy Shadowland,* (Edmonton: Her Majesty the Queen in Right of Canada, 2016).

a process that was not gradual, as necessary for the application of the Flooding Principle he described. Nonetheless, without explanation of this discrepancy, the application judge concluded:

> What does persuade me that Island 27 and the two smaller islands were [what] was conveyed to Alexander Rose in 1868 is the [principle] set out in the [Surveyor General Publication] to the effect that <u>when, as here, water levels are quickly raised through a process that is not gradual</u>, then the boundary of the property in question is fixed in location at the time of encroachment. That principle is set out in an article produced and published by no less an authority than the Surveyor General Branch of Natural Resources Canada. That same principle was also applied by this Court in the *Gall v. Rogers* case, also referred to above. In my view, that is the governing law. That being the case, I find that the applicant has met its onus and has established on the balance of probabilities that Island 27, as well as the two smaller islands which formed immediately adjacent to Island 27, were conveyed by the Crown to Alexander Rose by the Letters Patent of 1868. [Emphasis added.]

Although the application judge used the words "as here", he did not make any factual findings that the change in water levels was non-gradual. He found the opposite – that the property was altered through a "lengthy and gradual process". This characterization is also in line with what he described as the only evidence of the change in water levels and alteration of Lot 35, namely, that approximately 25 years after the dams were erected, Island 27 existed as depicted by the Haslett Survey, and that the water level had increased by 2.5 feet over the course of those years. There was no evidence of water levels in 1818 or the effect on them in the 1830s when the dams were erected.

The flooding principle requires a <u>sudden</u> alteration or displacement of land or water: *Neilson*, at p. 826; *McLeay et al v. City of Kelowna et al.*, 2004 BCSC 325, 27 B.C.L.R. (4th) 344, at para. 20.

The Estate seeks to support the application judge's conclusion by relying on the cause of the rise in water levels having been artificial – the result of dams. However, the fact that the cause of a rise in water levels was artificial does not on its own make the Flooding Principle applicable if the rise was not sudden. Nor is the Ambulatory Principle inapplicable if accretion or erosion is the result but not the intended effect of a lawful artificial structure: Surveyor General Publication, at p. 29; *Clarke v. Canada (Attorney-General)*, 1929 CanLII 38 (SCC), [1930] S.C.R. 137, at p. 144. A change in water levels somewhere may be the natural result of a dam. But the inference that the dams erected in the 1830s were intended to cause erosion at, and to take land away from, Lot 35 was not one that the application judge drew. Nor is such an inference properly available from the fact that water levels were different, and Island 27 had separated from the mainland, some 25 years after the dams were erected.[10]

[10] *Ibid.*, at paras. 68 to 73

A third reviewable error made by the court below was its failure to properly interpret the patent in a manner consistent with the duties of the Crown undertaken in its treaties with First Nations. In that respect the appellate court noted,

> The fact that the Crown had undertaken separate obligations in connection with islands, and the nature of the obligations, should have shed light on whether a sale of Island 27 was objectively intended by the Province by Letters Patent that referred only to Lot 35. The Crown is not presumed to act in a manner that ignores its duties: *Badger*, at para. 41. The fact that the Letters Patent neither identified Island 27 separately, although surrendered to the Crown in trust and on conditions, nor allocated any of the sale price to Island 27 (a seemingly necessary first step toward investing those proceeds for the benefit of the First Nations as the terms of Treaty 78 required) were facts that were objectively inconsistent with the inference that the reference to Lot 35 was intended to include Island 27.[11]

In summary, the court set aside the decision below and dismissed the Estate's application for a declaration of ownership and title to the disputed islands. The court concluded,

> The effect of the application judge's interpretation is that the Letters Patent were meant to convey land with a boundary defined not by the water's edge at the time of the Letters Patent, but by a point defined by a historical event. In my view, this would not be a reasonable assessment of the parties' intentions in these circumstances, as it would not be consistent with water boundary principles and would exclude from consideration all other factors noted above. Given that Island 27 was physically separate at the time and known by a designation, it seems highly likely, given the objectives of certainty in a conveyance, that if the parties had intended to include Island 27 in the conveyance, they would have simply said so.[12]

*Editor*: Megan Mills

---

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

A discussion of water boundaries and intention can be found in Chapters 8 and 3 respectively.

[11] *Ibid.*, at para. 83
[12] *Ibid.*, at para. 88

# FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[13] These resources are configured to be flexible with your schedule, ranging from only a few hours of CPD to a whole year's quota.

## Seventh Annual Boundary Law Conference

We thank all who attended this year's conference: *Complex Cadastral Problems: Searching for Solutions*.[14] Using the perspective of "surveyor as expert witness" as the overall connector, this series of eight weekly lunch and learn sessions delved into "processes" guided by principles established through legislation, the courts, and standards of practice to address complex cadastral surveying scenarios in a changing environment. The webinar version of the conference includes the annotated readings, slide decks, and recorded presentations.

## Land Registration Research Cybrary

AOLS members can now benefit from a searchable catalogue of material covering the underlying principles of research in the land registration system, what records are available, how they are organised and made accessible, and how the research can be completed in the context of history and a surveyor's quest to find the best evidence of a boundary. Access to the cybrary requires an enrolment code provided by completing the associated form in the External Training webpage.

---


ISSN: 2291-1588

[13] 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 Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

[14] This conference qualifies for 12 *Formal Activity* AOLS CPD hours.