NATURAL BOUNDARIES . . .

ACCRETION AND EROSION

BY D. W. LAMBDEN

Professor of Survey Science, University of Toronto

In the Winter 1981 issue of **"The Ontario Land Surveyor"** (Vol. 24, No. 1, p. 27) there was published a lightly edited version of a Boundaries Act order (recorded as B.A. 66 in the Office of the Director of Titles) dated 10 November, 1964 concerning certain lands in North York where the issue was the natural boundary of a stream that had apparently ambulated some 60 feet across flat valley bottomlands from the first representation of the stream as a boundary by a survey plan of 1874.

In the following Spring 1981 issue of the journal (Vol. 24, No. 2, p. 38) there was printed the text of a letter from M. J. M. Maughan, O.L.S., to T. C. Seawright, O.L.S., Deputy Director, Legal and Survey Standards Branch of the Ministry of Consumer and Commercial Relations.

This letter states concern about the possible incorrect opinion that a reader might take about the effect of accretion and erosion to land parcels that are riparian; in this case, the lands were riparian by virtue of the natural boundary of the centre line of the creek.

My own reaction on first reading this material in the Winter 1981 issue was one of some dismay that it, of all orders, had been selected for publication without the addition of some words of commentary to clarify the situation or criticize it.

In certain respects the orders of the Director under the Boundaries Act must be seen in the same light as the decisions of a court. They are final statements of the issue; neither a judge nor the Director will, or should, discuss a decision again for anything that an enquirer might feel is controversial or incomplete or misleading. The legal process provides for contention to be tested under the rules set forth for appeal of a decision; the Boundaries Act provided at that time a period of 20 days to do this. (Now 30.) If no appeal is lodged the decision is then final. It is to be noted also that Boundaries Act orders are not used as precedents for subsequent issues. Each order must rest on the precedents of the courts of law, the latter providing the foundation by interpretation, restatement and analysis of the common law as well as the statute law. Once stated, a court decision stands as a potential precedent until tested for its truth as law in litigation in a later, fresh and different issue - a matter of frequent enough occurrence; or the decision will stand until changed by legislative enactment, and again there are numerous instances; for example, the Beds of Navigable Waters Act (1911) set the present Ontario position as a legislative reversal of the decision, by the common law, of the Court of Appeal in **Keewatin Power Co. v. Kenora,** (1908) 16 O.L.R. 184, varying 13 O.L.R. 237.

These several points are noted here to emphasize that Boundaries Act orders are not precedents at law. At the same time it must be said that they are first-rate illustrations of the solutions to boundary problems and with few exceptions they recite the precedent law that is the foundation of the order.

This order No. 66, however, cites no precedents. It is an order, one of many selections, given to students of the Survey Law courses at the University for them to consider and reconcile in comparative analysis with the case law. Practitioners may well ask what the student does learn by these studies and to this end there is reproduced below a question of the April 1981 examination in Boundary Law that dealt specifically with natural boundaries. It is a subject that receives thorough treatment in the course.

> A Township lot, as originally laid out and granted by the Crown (circa 1830) in accordance with the original township plan, was bounded on the South by a navigable lake. The water level of the lake is not controlled. After many years, the shore-line has changed due to slow and imperceptible natural accretion and erosion. The owner of the lot asks you to survey all boundaries of his property, as a request is being made by him for a large mortgage on his land.
>
> As you are aware, this is a subject of considerable variation of opinion, and arguments on the issues must be known to surveyors engaged in legal surveys. State your opinion as to what feature constitutes -
>
> a. the South boundary of your client's property,
>
> and b. the South boundary of the Township lot, treating in particular terms the issue of whether a. and b. are one and the same thing or different things. Your answer must provide not only the reasoned argument for the position you take but provide a refutation of alternative arguments. The citation of statute law and case law is important to your answer.
>
> For the above lands, discuss the possible boundary situations that may arise where a water lot has been granted (by the Crown as original owner of the bed) to a party other than the owner of the Township lot, this water lot lying in front of the township lot. The description of the water lot (there is no plan of survey), as contained in the patent dated 1900, places it directly offshore from "the high water mark".

A number of students provided answers assessed for the full 40% on this question alone. Several more received high honour grades on their answers. Particular mention is made here of the work of Hugh Jones, Alison Parsons, David Armstrong, Robert Jordan, William Snell, Paul Cheeseman, Les Frederick and Ed Herweyer. With minor editing and provision of the citation of cases, the following is a student's answer.

"My interpretation of the question is that the intent of the Crown was to grant a lot whose limit abutted the navigable body of water and it is my opinion that the southern boundary of the lot and of the client's property is the water's edge in its normal state.

"In broader consideration, it is necessary to look first to the Crown patent. Considering the given date of 1830 the patent description may have been 'the broken lot' or may have included a metes and bounds description with such wording as 'the bank', 'the edge of the lake', 'the shore', or similar words, and an interpretation of these terms is needed. There is an abundance of case law to guide us. Two New Brunswick cases **Burke v. Niles** (1870) and **Merriman v. New Brunswick** (1974) and the Ontario case of **Attorney-General for Ontario v. Walker** (1971-1974) reach similar conclusions that these terms in a grant are synonymous and mean to the water's edge unless there is a specific indication to the contrary - for example, if banks are reserved to the Crown as in **Georgian Cottagers' Association v. Township of Flos and Kerr** (1964). The **Burke** and **Walker** cases also clear up any misunderstanding as to the status of a monument placed 'on the bank': the intent of such a monument is to control

the course of the actually surveyed side lines and the monument does not limit the position of the natural boundary.

"Thus, the feature which marked the southern boundary of the original lot was, barring specific words to the contrary, the position of the water's edge at that time. The lot could not extend further because the Beds of Navigable Waters Act states that in the absence of an express grant or a decision of the courts prior to 1911 (the date of enactment) the title to the bed of a navigable water is deemed to be vested in the Crown. The property is therefore riparian and without interest in the bed of the navigable lake but with all riparian rights.

"What then, is the boundary now after the shoreline has been changed by erosion and accretion? The common law rule, one of great antiquity in the English law, upheld in **Toronto General Trust Corpn. v. Delaney** (1908), **Burke v. Niles** and many other cases, and more recently in **Chuckry v. the Queen in right of the Province of Manitoba,** (1972-73) is that an upland riparian proprietor gains or loses as soil is added to or subtracted from the property by the slow and imperceptible action of nature, the natural boundary moving accordingly. Thus the water's edge is still the southern boundary of the client's property, however altered from the original 1830 position.

"I very much doubt that there would be serious dispute on this point. In considering the southern boundary of the township lot a different opinion is quite possible as matters stand now in Ontario. Two matters must be treated - the water boundary generally and the term high water mark specifically.

"The Surveys Act of Ontario states that a boundary line of an original township lot is 'true and unalterable'. The prevailing view of the government seems to be that if a township lot is patented as having a water boundary then the **original position** of that boundary at the time of grant is for all times 'true and unalterable'. This is the position as recorded in the M.T.C. **Precis on Evidence** and by Donald Lamont (1972).

"While the government accepts the common law rule on accretion and erosion, it has in the past, because of the wording of the Surveys Act, required a a riparian proprietor to apply to the authorities for actual title to the accreted lands and to have the title description changed so as to include or except the accreted or eroded lands. Thus if accretion occurred the description would be amended to read, for example: "All of Lot -- together with that portion of the bed of Lake X, lying above water and adjoining the said Lot" -- or words to that effect. On this basis it could be argued that for a riparian proprietor to gain title to accreted lands a grant from the Crown is necessary and this has, in fact, happened. I find no common law to uphold this position.

"In Boundaries Act Order Number 66 a similar view is apparent. A riparian proprietor to the centre line of a stream was deemed to have his boundary fixed by the original position of that stream; his lot per se did not include the subsequently accreted land nor did his title include the increment. I disagree with this order for many reasons of the common law. Applied to the present question, I consider that the limit of the township lot should be ambulatory in the same way as is the client's southern property boundary. The two are not to be distinguished.

[Marker's note: Crown grants for accreted lands have been issued in the past in enough instances to be disturbing but the fact that these lands are designated as part of the bed of the lake (rather than as part of the lot) does not automatically imply that a Crown grant is required. In certain circumstances some formal hearing at which evidence to prove accretion can be presented may be needed and taking a Crown grant may be seen as an easy way out of a legal contest on the character of the accretion. In the Boundaries Act hearing the position of the original boundary was sought and in this it succeeded. Subsequent to the order, the title to the accreted land could have been resolved by a first application, **if the legitimacy of the accretion had been called into issue and proven.** The order itself does not test this matter and, while one can conclude that the movement of the stream was gradual, this was not the matter in issue in the hearing. This is discussed further below].

"The first argument against the preceding interpretation of the words 'true and unalterable' is that nothing in these terms indicates that a natural boundary must be in fixed position. There is nothing in the Surveys Act to refute the common law rule in this regard - a specific statement to that effect is necessary in law - and natural boundaries are of highest priority in re-establishing intent. The original plan, as I read the question, shows no strip of upland between the lot and the lake, and title and lot must both be construed as extending to the water.

"The second part of the question raises the matter of the 'high water mark' terminology as the patent of the water lot in 1900 places it directly offshore from the 'high water mark'. The expression unfortunately bears much ambiguity and is of improper usage on inland non tidal waters.

"The AOLS manual states a definition of the term 'high water mark'. It says the 'high water mark' is that mark defined by a change in the condition of the soil or vegetation caused by the action of water under long sustained, i.e., 'normal' conditions. However, the term has traditionally been used, and properly, only in tidal waters. Mr. Justice Macaulay seems to have given the term some popularity in Ontario by his judgement in **Parker v. Elliott** (1852) and although the two other judges on the court of Appeal disagreed emphatically with his use of the term the case has been quoted for Macaulay's opinion which would place the high water mark at some point above the water's edge.

"Many surveyors and judges seem to agree that the 'high water mark' differs from the 'water's edge' as is brought out plainly in both the expert survey witness' testimony and Mr. Justice Stark's remarks in the lower court decision of **Attorney General of Ontario v. Walker** (1972).

"Regardless of where the 'high water mark' (stated in the question) is located, or what it is, the fact remains that in this case the Crown has already granted the upland to the water's edge and, as it cannot derogate from its previous grant, the water lot boundary is limited to going no further inland than the southern boundary of the lot, that is, the water's edge. This view is also stated in the **Walker** case under the heading 'Water Lots'.

"The boundary of the water lot that is distant from the shore is a limit fixed in position which may be tied to monuments on the shore, or perhaps with great difficulty must be re-positioned by the best evidence that can be gained of the original 1830 water boundary. In no way does this outer limit move through the change of the shoreline by erosion or accretion. (Nor, by the same principle, does the inner limit of a shore road allowance move since the upland property, like the water lot, is not riparian).

"The side lines of the original township lot are fixed as to the distance which separates them and their termination at the original water boundary, but their distance and direction to the present water boundary are subject to the ambulatory nature of that boundary and principles set forth in various precedent cases".

References in Order of Citation:

Burke v. Niles (1870), 13 N.B.R. 166 (C.A.)

Merriman v. New Brunswick (1974), 7. N.B.R. (2d) 612. 45 D.L.R. (3d) 464 (C.A.)

Attorney General for Ontario v. Walker (1974), 42 D.L.R. (3d) 629, 1 N.R. 283 **(Sub nom.** Re Walker), affirming **(sub nom.** Re R. and Walker) [1972] 2 O.R. 558, 26 D.L.R. (3d) 162, which affirmed **(sub nom.** Re Walker and A. G. Ont.) [1971] 1 O.R. 151, 14 D.L.R. (ed) 643 (Can.)

Georgian Cottagers' Association Inc. v. Township of Flos and Kerr, [1962] O.R. 429.

Toronto General Trust Corpn. v. Delaney (1908) 12 O.W.R. 116.

Chuckry v. R., [1973] S.C.R. 694, [1973] 5 W.W.R. 339, 35 D.L.R. (3d) 607, 4 L.C.R. 61, reversing [1972] 3 W.W.R. 561, 27 D.L.R. (3d) 164, 2 L.C.R. 249 (**Sub nom.** Re Chuckry and R.)

Parker v. Elliott (1852), 1 U.C.C.P. 470, 491n (C.A.)

Reference to Donald Lamont 1972: Lamont, Donald H. L. **Real Estate Conveyancing.** Law Society of Upper Canada, Toronto, 1976.

Students who learn to analyse problems in this manner, and support their contentions by precedent cases, will be a credit to the surveying profession in the years ahead.

To return to Boundaries Act order No. 66, what the student has spotted is an apparent anomaly in the decision that takes it on a tangent from what would be expected from the known principles of the common law.

The student's answer gives enough of the law for consideration of this problem. There are different ways to look at the situation depending on views held of two principles: firstly, of the 'true and unalterable' concept so applied as to forever fix a natural boundary in position and, secondly, of the nature of "rights which may have been acquired in and around boundaries".

The order recounts that an objection was made to the applicant's current survey of the original 1874 location of the stream alleging that the original surveyor must have made an error in preparing his plan and incorrectly located the stream. The hearing was adjourned twice and consideration given to firstly, whether the stream could in fact, ever have been physically in the represented original position (to which the answer was yes) and secondly to test various recorded measurements, all of which were found quite reasonable.

It is recorded that one objection was lodged stating that where gradual and imperceptible movement of the stream occurs the extent of title to the upland must vary accordingly.

If the accretion had indeed been of gradual character (and the order does not specifically and clearly treat of this matter) then my own reaction would be acute dissatisfaction with the order because I find no cases that do not position a natural boundary with an ambulating stream where the movement is natural, slow and imperceptible. The right to the accretion, as the loss by erosion, rests in the common law; the extended lands by accretion are inherent in the very definition of land. A vesting order is neither needed nor appropriate. However, as earlier noted, some formal hearing at which evidence to prove accretion can be presented may be required in certain circumstances. The onus would appear to lie on the objector and it is appropriate for the title registration system to advise the owner of the bed and the adjoining upland proprietors. The proven accretion may lie in front of several properties and the manner of its division is then raised. Herein lies the reason for finding the 'original position' and perhaps for the argument that the designation of the **lot** as such only extends to that original position of the natural boundary. (It must be noted that this situation is quite unlike rights by adverse possession which are entirely the creation of statute law and for which the full title of a claim can only be gained by a vesting order). I would maintain that in these circumstances the order did not go through to a correct conclusion in recognizing the boundary shift on the proof of the legitimate accretion.

> The Director's order has an important paragraph towards the end.
>
> It was pointed out to Surveyor 'C', that the Boundaries Act is not concerned with rights which may have been acquired in and around boundaries, but is concerned only with the true location on the ground of lost boundaries; such boundaries being re-established according to the best available evidence of their original positions. My decision as to the location of the creek appearing on Registered Plan 357 is in no way concerned with title to the lands which the creek crosses. My concern is only as to where in actual fact the creek shown on Plan 357, was located on June 4, 1874.

As stated earlier, all we have to work with is the written order of the Director. We are not entitled to go behind it at this later time and however it may appear by the text that the change in position was gradual the point does not seem to have been adequately presented in evidence nor sufficiently argued and consequently was not resolved in the order itself. Taking this approach, the order may be seen to have followed an entirely correct course in determining the original position of the stream because that is a necessary first step. If there is no proven original position there is, of course, no possibility of change in position; finding the original position permits the proceedings to go to the next stage wherein the tribunal should settle whether the accretion fulfilled the legal requirements of being natural, slow and imperceptible.

The fact that this was even raised, of course, leaves the uncomfortable feeling that the tribunal failed to pursue it to an end and that the quoted paragraphs from the order are, in this common law matter, incorrect in the view that "the Boundaries Act is not concerned with rights that may have been acquired in and around boundaries". Such, however, was the Director's interpretation of his powers under the Act, and since the courts are the ultimate place to test the physical fact of accretion as a legitimate feature varying the boundary position the Director's caution can be appreciated. (It should be noted that this legal process is unquestionable where the distant boundary is to be set for a claim of adverse possession and also where the navigability of a waterway is an issue for the determination of the bank or the middle thread as the limit of title).

What followed the order is important to the story. An appeal should have been lodged **to test the Director's interpretation of his powers.** This was not done and the decision became binding on the lapse of the 20 day appeal period.

Several years later in 1967 the City of Toronto, with a tax interest in lands to the east, lodged an appeal on the issue of an application to bring part of the westerly parcel (that by the Boundaries Act order had retained the original boundary position) under the Land Titles Act. The decision of Mr. Justice Fraser of the Ontario High Court dealing with the actions taken under the Land Titles Act and the Tax Sales Confirmation Act are entirely logical and anticipated. **(Re Mitchie Estate and City of Toronto,** [1968] 2 O.R. 376, 69 D.L.R. (2d) 375). Here again, it would seem that counsel for the City in the **Mitchie** case could profitably have argued for the accretion when the title issue was tested on the basis that the Director had abdicated from the exercise of his full and legitimate powers and alternatively that the original position having been determined by the Director within his rightful powers, the accretion was next in line for judicial assessment. There is nothing in the judgement to suggest that this approach was even considered.

We do have an eminently workable legal system and, quite rightly, those who fail to exercise proper preparation on a first hearing or fail to act on contentious matters within an allowed appeal period must accept the finality of the decision made. A knowledge of the law is the right of all citizens and a particular responsibility of surveyors in these matters. Lawyers have never claimed or sought the sole right to know it. The late Marsh Magwood, Q.C., when Director of Titles, had pertinent advice. In essence it is this: "the lawyer is the expert in the chain of title; the surveyor must be the expert in the extent of title." This is considered a prime goal of the University's Survey Science Programme. Furthermore, the effort is made to teach some concepts of the legal process and the role of legal counsel. Nevertheless, I feel that the surveying profession should be knowledgeable and much more competent where their activities and interests are interwoven with those of the legal profession.

Footnote: We could raise a further point on the jurisdiction of the Boundaries Act. If indeed the law respecting accretion and erosion is so settled as it appears, then the Director may very well have no jurisdiction in these conditions of boundary displacement and the creation of those new boundaries arising from the division of the accretion, simply because the Act may be used only "Where doubt exists as to the true location on the ground of any boundary of a parcel". A water boundary is hardly to be described as lost or in doubt except in those rare circumstances where the waters have dried up and disappeared altogether. The same problem may arise where the definition is open to contest on the issue of the navigability of a waterway. My own preference would be to have the broadest possible interpretation of the Director's powers, and much greater application of rights of owners to consent to boundary re-definition. It is obviously a matter for much more study. ●