WATER BOUNDARIES AND OTHER NATURAL BOUNDARIES

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In September, you received a questionnaire from the Association seeking your help in the research that Izaak de Rijcke and I are doing for a Manual on Water Boundaries.

We are looking for real problems; for evidence found and used; for court orders registered against title; etc. Most of this information can only be found in land registry offices and surveyors' records. It emerges by haphazard chance.

The following is an example that popped up, while searching records for quite different reasons, in the Gore Bay office.

TOWN PLOT - SHEGUIANDAH MANITOULIN ISLAND

The original survey of the Township of Sheguiandah by G. McPhillips, P.L.S., in 1864 was largely lost by forest fires. The plan of the resurvey after the fire by D.C. O'Keefe, P.L.S., dated September 1866, was copied for the Indian Department 16 January, 1867; this is probably the plan (signed 5 February, 1867, by A. Russell, Assistant Commissioner of Crown Lands) that became by a further copy, Registered Plan 29 of the Land Registry Office by registration 22 October, 1888. A 66 foot shore road allowance is shown along Bass Lake and Sheguiandah Bay, between which a town site was located. A stream is indicated between the Lake and the Bay, but no shore road allowance as the whole was designated "Reserve" and not the subject of survey by the township plan.

The Town Plot was next surveyed. The plan bears the notation:

"Department of Crown Lands - Ottawa - 1867 - Assistant Commissioner of Crown Lands"

and became Registered Plan 28 in the Land Registry Office by registration on 22 October, 1888. On this plan the connecting stream is detailed. A 66 foot "Street" is shown on the north side and a 66 foot "Road" on the south side with large blocks for Mill Sites 1, 2 and 3 straddling the stream and the roads.

In 1905, T.J. Patten, O.L.S., subdivided part of the northern section of Mill Site No.3 by Registered Plan 48 entitled:

"Dunlop Survey No. 2, Sheguiandah, being a Portion of Mill Site No.3."

Mill Street, as laid out on the north side of the stream is not the street of the 1867 survey. The "shore on original plan" is shown by Patten and the full extent of the shift in position is evident.

These two plans of survey, separated by 38 years, show a concept that perhaps existed in the last century about shore road allowances and shore reservations. The change in position of the natural boundary led, by the second survey, to a shift of the whole of the shore road allowance - the strip was made ambulatory.

This is not the way the Courts see the situation, even at the time of the second survey. In Survey Law in Canada, paragraph 6.81 and Note 92 in Chapter 6 give a brief summary of the legal position.

6.81 The inner limit of a shore road allowance, or any other shore reservation where the fee simple is retained by the Crown, is a different matter from a natural boundary, although it is dependent on the natural boundary at a particular moment in time, the time of the grant, with the exception noted below which is a feature of Ontario law. Generally, the fee simple owner of an upland parcel receives a parcel of fixed limits and the parcel is not riparian where there is a saving and excepting clause excluding the strip along the shore. The inner limit of such a shore reservation, reserved in fee simple by the grantor out of the whole parcel described, is fixed in position by the original survey marks, if found as evidence, and as at the date of the grant. The trick is for the surveyor to locate that original natural boundary where the grant may have been given 100 or more years earlier.

92 Where, in Ontario, road allowances were defined by the Crown surveys and never formed part of the township lots, they were shown on the township survey plans as extended parcels without a break. They were therefore bounded by an irregular line, distant the specified distance inland from the natural boundary as it existed at the time of the original Crown survey. The Ontario Surveys Act provides (at least since 1849, 12 Vict., c. 35, s. 32) that all side lines and limits of lots surveyed are true and unalterable and the courts have consistently held that the inland fee simple parcel is definite as to extent. This inner limit of the road allowance is not ambulatory as is the water boundary from which it was first defined by dimension. If this was not the case, there would be non-alignment of the road allowance lying in front of the lots granted. The Surveys Act speaks of lines and limits surveyed; regardless of the earlier comment that natural boundaries are not established by survey but represented as monuments in their own right. It would be trite to argue that the inner limit is of the same nature and therefore that the date of grant would prevail. On the other hand, in the general case, a grant of a parcel to the water boundary saving and excepting a road allowance or other strip must place the inner limit with relation to the natural boundary at the date of the grant and non-alignment may occur.

92 The notion of an ambulatory strip has some interesting history. The New Zealand case of Pipi Te Ngahuru v. The Mercer Road Bd. (1887), 6 N.Z.L.R. 19, held on the facts of erosion into a road reservation along a river that the public were entitled to a road of full width from the new bank. This stood until A.-G. and Southland County Council v. Miller (1906), 26 N.Z.L.R.348 where with the same facts and argument it was decided that the owner of the inland parcel had no liability to provide new land for the public road and that the Crown, if it wished to have full width, must acquire the land and pay compensation. See also Smith v. Renwick (1882), 3 L.R. (N.S.W.) 398 (Sup. Ct.F.C.);A.-G. for N.S.W. v. Dickson. [1904] A.C. 273 (P.C.); and McGrath v. Williams (1912), 12 S.R. (N.S.W.) 477 for similar Australian considerations on these shore reservation. The Ontario case of Herriman v. Pulling & Co. (1906), 8 O.W.R. 149 (T.D.), broached the question ("It may be upon a matter of nice law that the road reserved ... would shift ... over the accretion ... but this was not argued ....") and no answer was forthcoming. However, the earlier decision of McCormick v. Pelee (Township) (1890), 20 O.R. 288 (Ch.D.), rejected the notion of an ambulatory strip for a shore road allowance. The most recent Canadian decision on this subject is Re Monashee Enterprises Ltd. and Minister of Recreation & Conservation for B.C. (1981), 124 D.L.R. (3d) 372 (B.C.C.A.) where the concepts and the law are neatly presented. Per Seaton, J.A., delivering the judgment of the Court (at 374-375): "It seems to me that the inconvenience of a mobile boundary is such that it should only be found to exist where it is unavoidable. It is unavoidable at the shoreline, but it is not unavoidable at the upland side of the one chain strip." And: "The land gained by accretion is added to and becomes part of the strip."

Instances of this nature are what we are looking for, and we can not think of a better source than the surveyors of the province -the retired as well as the practicing.

Your direct contacts with the land registrars is another likely source.

Write to us at:

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WATER BOUNDARIES AND OTHER NATURAL BOUNDARIES - CONT'D.