

**Re-establishing boundaries:  
Ambiguities and riparian rights**

**Association of British Columbia Land Surveyors  
Kelowna**

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## Part 1 - Ambiguity:

... clever people like me, who talk loudly in restaurants, see this as a deliberate ambiguity, a plea for understanding in a mechanized world ... But where is the ambiguity? It's over there in a box ... But is the truth, as Hitchcock observes, in the box? No there isn't room, the ambiguity has put on weight.<sup>1</sup>

### 1. Do surveyors define boundaries?

No – boundaries are defined by those (individuals, corporations, Crown) who enjoy legal rights in land. However, surveyors do play an integral role in demarcating boundaries on the ground and in delineating boundaries on plans.<sup>2</sup>

### 2. What causes boundary disputes?

Boundary disputes are caused by territoriality or by enmity. Territoriality – the desire to retain land – emerges as the clamour for resources escalates.<sup>3</sup> Enmity – dislike between neighbours – is a less predictable cause. The dislike is fought out on the boundary, allowing one party “the hateful privilege of vexing their neighbours”<sup>4</sup> and injecting an “element of hostility” in the litigation.<sup>5</sup>

### 3. What if a boundary has been neither defined nor demarcated?

No parcel exists and there is no boundary to dispute: “The plaintiff must make up his mind and set out in his pleadings exactly what declaration he seeks.”<sup>6</sup>

### 4. How are parcel descriptions to be interpreted?

The purpose of interpreting a description is to determine the intention of the parties - the grantor and grantee. If there is no ambiguity (uncertainty) then the principles to be used are similar to those used in interpreting statutes – the words are to be construed in their ordinary, grammatical sense and any errors or omissions are not to be inferred.

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<sup>1</sup> Monty Python's Flying Circus. Season 2, Episode 11. December 8, 1969.

<sup>2</sup> *South Australia v. Victoria*, [1914] AC 283 (PC).

<sup>3</sup> *Yukon Gold v. Boyle Concessions*, 1917 CarswellBC 144 (SCC).

<sup>4</sup> *Blundell v. Caterall* (1821), 106 ER 1190.

<sup>5</sup> *Warford v. Zyweck*, 2002 CarswellBC 952 (BCCA).

<sup>6</sup> *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700.

## 5. What if there is ambiguity?

If there is ambiguity, the following rules apply: First, interpret the description in the context of when and where it was drafted. The meaning that words and phrases had at that time should be used: “Know what has been done under a deed, and the meaning of the deed may become clear.”<sup>7</sup>

Second, give most effect to those things, in the description, which people are least likely to be mistaken about, in the following order:

- natural boundaries
- survey monuments (pits, mounds, posts, blazes, ...)
- fences and evidence of occupation put up along the boundaries
- boundaries of an adjoining parcel
- directions and distances<sup>8</sup>

## 6. How sacrosanct is this hierarchy of evidence rule?

Not very. If the intention of the parties is clear from the parcel description, then the hierarchy is not to be used:

The well-known rules that are applied to find the intent of a grantor where there is an ambiguity ... have no application whatsoever with respect to determining the boundaries if there is no ambiguity when the description is applied to the ground.<sup>9</sup>

## 7. To what extent can extrinsic evidence be used in interpreting a description?

The locations of monuments that are referred to in the parcel description are more certain than directions, distances and areas: “the principle is clear that where distances and monuments clash, in the absence of special circumstances, the monuments prevail; the context shows the boundary to be the dominant intent, the distance, the subordinate.”<sup>10</sup>

## 8. Can extrinsic evidence (such as diaries, reports and field-notes) be used to determine what the parties meant by reference to such monuments?

Yes; “we have the right to hear extrinsic evidence, not to vary or alter the plain meaning of words when such meaning is plain, but to explain the sense in which words, open to more meanings than one, have been used by the contracting parties.”<sup>11</sup> For a parcel

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<sup>7</sup> *AG v. Drummond* (1842), 1 Dr & War 353, at 368 (Ireland)

<sup>8</sup> *McPherson v. Cameron* (1868), 7 NSR 208 (NSCA); *Hawkes Estate v Silver Campsites Ltd.* (1991), 55 BCLR(2d) 145 (BCCA).

<sup>9</sup> *Herbst v. Seaboyer* (1994), 137 NSR (2d) 5.

<sup>10</sup> *Humphreys v. Pollock*, [1954] 4 DLR 721 (SCC).

<sup>11</sup> *Brady v. Sadler* (1890), 17 OAR 365 (Ont CA).

bounded on the west by “the old shore road,” when the road ceased to exist extrinsic evidence was admitted to ascertain its previous location.<sup>12</sup>

**9. To what extent does area influence the interpretation of a parcel description?**

If the description is so ambiguous that the boundaries are uncertain, then the parcel area can be used to re-establish the boundaries. However, if the boundaries are well-defined, then ignore area. The irrelevance of area in re-establishing boundaries is captured by the qualifier “more or less” on certificates of title,” has been affirmed by the courts,<sup>13</sup> and is set out in legislation.

**10. To what extent can a plan influence the interpretation of a description?**

If there is no ambiguity in the description and no reference to a plan, then ignore all plans. If a plan is referred to, either expressly or by implication, then the plan is incorporated into the description.<sup>14</sup> Apply the usual rules of construction to determine what is most certain and best reflects the intent of the parties.

**11. What if there is conflict between the plan and the words of a description?**

If an earlier metes and bounds description of a boundary used physical features such as a road and a lake, then a subsequent plan which provided a different description must give way to the earlier description, “physical features such as the road and a certain lake being more definite and convincing evidence of occupation.”<sup>15</sup>

**12. So, perhaps a plan should be ignored altogether?**

Yes. If a textual description is free from ambiguity and there is no difficulty in defining boundaries on the ground, then no effect is to be given to an annexed plan that differs from the textual description.<sup>16</sup>

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<sup>12</sup> *Re Risser’s Beach* (1975), 2 NSR 92d) 479.

<sup>13</sup> *Nicholson v. Halliday*, 2005 CanLII 259 (Ont CA); citing *Kingston v. Highland* (1919), 47 NBR 324.

<sup>14</sup> *Grasset v. Carter* (1884), 10 SCR 105 (SCC).

<sup>15</sup> *Thompson v. Fraser Cos.*, [1930] SCR 109

<sup>16</sup> *Briggs v. McBride*, (1879) NBR 202 (NB CA).

## **Part 2 – Rectilinear boundaries:**

“While you’re refreshing yourself”, said the Queen, “I’ll just take the measurements.” And she took a ribbon out of her pocket, marked in inches, and began measuring the ground, and sticking little pegs in here and there.<sup>17</sup>

### **13. Surely any line demarcated by a surveyor becomes the boundary of the parcel?**

Not necessarily. It might be that the line has been incorrectly demarcated by the surveyor, who then corrects the error before the boundary is accepted by the landowner. Such correction might mean that traces of the first cut line and monuments remain, but have no legal significance, and must be ignored as evidence of the boundary.<sup>18</sup>

### **14. So, not every post placed by a surveyor is a boundary monument?**

Correct. The thing placed in the ground by the surveyor must reflect the intention of the person creating the parcel; posts used to demarcate preliminary plans have no legal significance and thus are not boundary monuments.<sup>19</sup> The hierarchy of evidence is only an evidentiary principle, not a substantive rule, and the rule that posts govern does not apply where the intention of the parties is clear as to the boundaries.

### **15. What of a monument placed in the mistaken belief that it is in the plan location?**

The monument is the best evidence of the boundary. Thus, a DLS boundary monument (mound) that was 6 ch too far east (15% of the distance) and that resulted in a ¼ section of only 142 acres was held to be the original boundary monument.<sup>20</sup> Likewise, a white pine tree that was 500 feet too far south (7% of the distance) in British Columbia’s district lot system was held to be the original boundary monument.<sup>21</sup>

### **16. When is a fence the best available evidence of a boundary?**

It depends on the purpose for erecting the fence. If the fence was established in the same location as the monuments and was lived up to as the boundary, and the original monuments cannot be found, then the fence is the best evidence of the boundary.<sup>22</sup> If the

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<sup>17</sup> Lewis Carroll. *Through the looking-glass*. 1872.

<sup>18</sup> The Canada – United States boundary was incorrectly demarcated in 1860 and was not accepted. The boundary that was demarcated in 1861 was accepted: International Boundary Commission. *Re-establishment of the boundary between Canada and the United States*. Ottawa. p. 213. 1937.

<sup>19</sup> *Richmond Hill Furriers v Clarissa Developments* (1996), 7 RPR (3d) 54 (Ont Div Ct).

<sup>20</sup> *Kristiansen v. Silverson*, [1929] 4 DLR 252 (Sask CA).

<sup>21</sup> *Okanagan Radio Ltd. v. Registrar of Land Titles*, 1996 CanLII 2954 (BC SC).

<sup>22</sup> *Cain v. Copeland*, [1922] 67 DLR 581 (Sask CA).

purpose of the fence was merely to keep cattle in, without respect for the parcel boundaries, then it is not good evidence of the boundary.<sup>23</sup>

### **17. What if a boundary is not simply unknown, but also uncertain?**

There are two options. First, a boundary can be agreed to between the two parties, binding only them (*in personam*) and not running with the land (*in rem*).<sup>24</sup> Alternatively, if Party A encourages Party B to rely on a particular boundary by spending money (as in building a house, for instance) then Party A will be estopped from subsequently rejecting that boundary.<sup>25</sup>

### **18. What of encroachments over a rectilinear boundary?**

Section 36 of the *Property Law Act* sets out that if a survey shows that a building or a fence encroaches on another parcel, then the court may:

- grant an easement if compensation is paid;
- vest title if compensation is paid;
- order the encroachment to be removed.

### **19. Surely such provisions are rarely used?**

Wrong. In some parts of British Columbia encroachments are “endemic ... because of the rolling nature of the land, the directions of the lot lines, the curvatures of the road, and the trees and vegetation covering the lands.”<sup>26</sup>

### **20. So, what remedies have been ordered vis-à-vis encroachments?**

Remedies have been a function of the nature of the encroachment. Wood piles, lean-tos, grape vines and mobile homes have been removed; easements have been granted for sidewalks; fenced land (containing pools, driveways and sheds) has vested.<sup>27</sup>

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<sup>23</sup> *Les Soeurs de Misericorde v. Tellier*, [1932] 3 DLR 715 (Man CA).

<sup>24</sup> *Robertson v. Wallace*, 2000 ABQB 1020 (Alta QB).

<sup>25</sup> *Flello v. Baird*, 1999 BCCA 244.

<sup>26</sup> *Warford v. Zyweck*, 2002 CarswellBC 952 (BCCA).

<sup>27</sup> *Ferguson v. Lepine*, 1982 CarswellBC 334 (BCCA); *Svenson v. Hokhold*, 1993 CarswellBC 978 (BCCA); *Dattolo v. Merlo*, 1998 CarswellBC 1406 (BCSC); *Wheeler v. Piggford*, 1998 CarswellBC 1174 (BCSC); *Lalli v. Eng*, 2000 CarswellBC 956 (BCSC).

### **Part 3 – Riparian boundaries:**

“Don’t stop by the creek, son ...”<sup>28</sup>

#### **21. Is the survey of water boundaries a simple, mechanical task?**

No. Re-establishing water boundaries often means that complex questions of fact and law are involved and that “there is some arbitrariness and opinion involved in deciding exactly where to determine the natural boundary to be.”<sup>29</sup>

#### **22. Are riparian rights here to stay?**

Yes, those of interest to surveyors will likely remain. Although riparian rights can be changed by explicit legislation, the rights of access and accretion/erosion have not been changed, because they are relevant to using the riparian parcel.<sup>30</sup>

#### **23. Do those riparian rights apply only to natural watercourses?**

Sort of. Although a natural watercourse has a definite channel, banks, and a bed, where water runs seasonally or all year round, it can be “partially augmented by the hand of man” and still generate riparian rights.<sup>31</sup>

#### **24. How reliable are the watercourses shown on original plans?**

If the watercourse was not traversed in the original survey, then its location is only an estimate (eg. as interpolated between two section lines) and might well be in error.<sup>32</sup>

#### **25. What is an important piece of legislation in re-establishing a water boundary?**

Section 1 of the *Land Act* sets out that a natural boundary is the visible high water mark of a body of water “where the presence and action of the water are so common and usual, and so long continued in all ordinary years” as to cause a distinct change in the soil and vegetation between the bed and the banks.

#### **26. Is there any other legislation that is important?**

There sure is. Section 94 of the *Land Title Act* sets out that the Surveyor General may, if it is in the public interest, certify on a plan that includes land that adjoins Crown land

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<sup>28</sup> Stevie Ray Vaughan. Don’t stop by the creek, son. From: *Solos, sessions and encores*. 2007.

<sup>29</sup> *Harris v. Hartwell*, 1992 CanLII 1273 (BCSC).

<sup>30</sup> La Forest. Water law of the future. *Canadian Bar Review*. v51. p.307. 1973. Harvey. Riparian water rights: Not dead yet. *The Advocate*. v48 - n4. p.517. July 1990

<sup>31</sup> *Meyer v. McLennan*, 2005 CanLII 39858 (Ont CA).

<sup>32</sup> *Hextall v. Burns* (1911), 38 WWR 422 (Alta SC).

that:

- the land in question is lawfully accreted land, or
- the water boundary is the natural boundary.

### **27. Why is the Province's consent required?**

Section 55 of the *Land Act* sets out that the Crown in right of British Columbia has title to the beds and shores of watercourses not shown in red on a Crown grant. There are two exceptions – if expressly granted by the Crown or if the Surveyor General otherwise directs.

### **28. What is the relationship between s.55 and a certificate of indefeasible title?**

The former eliminates the *ad medium filum* doctrine from Crown grants,<sup>33</sup> and takes precedence over the latter.<sup>34</sup>

### **29. How is a watercourse distinguished from a marsh, swamp or slough?**

If bounded by a wetland (without a distinct channel, flow and gradient) then the parcel is not riparian and enjoys no riparian rights.<sup>35</sup>

### **30. What is the *ad medium filum* (amf) presumption?**

An upland riparian parcel is presumed to extend to the middle thread of non-navigable watercourses. The presumption was always rebutted by express language to the contrary in the parcel description (“excepting the bed of the river”).

### **31. Does the amf presumption apply to Indian Reserves in western Canada?**

Yes. The amf presumption applies to any IR bounded by a non-navigable watercourse, meaning that the parcel extends to the mid-point between the two banks. However, if the river is considered to be navigable *in toto*, even if not navigable at the point where it forms the boundary of the IR, then the amf presumption does not apply.<sup>36</sup>

### **32. Surely the upland riparian parcel must touch the water at all times?**

Au contraire. A riparian parcel need only touch the water during some seasons (as for many non-tidal boundaries) or during some portion of the day (as for tidal boundaries). Riparian status does not require that the parcel touch the water at all times.<sup>37</sup> The shore is

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<sup>33</sup> In reaction to: *Canadian Exploration v. Rotter*, [1961] SCR 15.

<sup>34</sup> *Miller v. British Columbia (Attorney General)*, [1975] 1 SCR 556.

<sup>35</sup> *Merritt v. City of Toronto* (1912), 27 OLR 1 (Ont CA).

<sup>36</sup> *R v. Nikal*, [1996] 5 WWR 305 (SCC); *R v. Lewis*, [1996] 5 WWR 348 (SCC).

<sup>37</sup> *Flewelling v. Johnson* (1921), 59 DLR 419 (Alta CA).

the area uncovered when the flow is below the bank (for rivers) or when the water is below the normal summer level (for lakes).

### **33. Does the upland riparian parcel include the shore?**

No. Although the spatial extent of the riparian parcel does not include the shore,<sup>38</sup> the parcel continues to enjoy the right of access across the intervening strip to navigable waters. This private riparian right of access, perpendicular to the watercourse, is distinct from the public right of navigation on the watercourse.<sup>39</sup>

### **34. What is the riparian boundary on a river?**

The banks of a river:

Are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the soil, or vegetation, or both, produced by the common presence and action of flowing water ... the line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks ... The banks being fast land, on which vegetation grows ...<sup>40</sup>

### **35. What is the relationship between the bank of a river and the natural boundary?**

They are one and the same. Note the extraordinary similarities between the *Land Act* definition and the *Clarke* judgment. The edge of river is often referred to as the “ordinary high water mark” (OHWM).<sup>41</sup> Emphasize “ordinary” rather than “high,” just as “common” and “usual” are emphasized, so as to re-establish:

- ☞ the river's “average height”<sup>42</sup>
- ☞ “the ordinary summer highwater mark”<sup>43</sup>
- ☞ “the boundaries of the stream in full normal flow, but not in flood.”<sup>44</sup>

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<sup>38</sup> *District of North Saanich v. Murray*, [1974] 1 WWR 179 (BCSC).

<sup>39</sup> *Nicholson v Moran*, [1950] 1 WWR 118 (BC); *Corkum v Nash* (1990), 71 DLR 391 (NS).

<sup>40</sup> *Clarke v. City of Edmonton*, [1929] 4 DLR 1010 (SCC), referring both to *Hindson v Ashby* [1896] 1 Ch 78 and to *Howard v. Ingersoll* (1851), 13 Howard (US) 381.

<sup>41</sup> *Flewelling v. Johnson* (1921), 59 DLR 419 (Alta CA).

<sup>42</sup> *Plumb v. McGannon*, (1871), 32 UCQB 8.

<sup>43</sup> *AG New Brunswick v. Town of Newcastle*, [1948] 1 DLR 47 (NBSC).

<sup>44</sup> *Scarboro Golf & Country Club v. City of Scarborough* (1986), 28 DLR (4<sup>th</sup>) 321 (Ont SC).

### **36. What is the riparian boundary on a lake?**

The boundary is the usual position of the water in ordinary years under natural conditions. For a large, stable lake this means that the boundary is the “edge” of the lake.<sup>45</sup> For all lakes the boundary is to be re-established “when the waters of the lake recede to the summer level.”<sup>46</sup>

### **37. What criteria must exist for a water boundary to be ambulatory?**

A riparian boundary is ambulatory if the change in its location is:

- slow, gradual and imperceptible;
- incremental (deposits at the water’s edge and not some distance out);<sup>47</sup> and
- caused either by natural forces (the action of water or wind),<sup>48</sup> or as the inadvertent effect of an artificial structure, legitimately built:

The fact that the increase is brought about ... by the water, as a result of the employment of artificial means, does not prevent it from being a true accretion, provided the artificial means are employed lawfully and not with the intention of producing an accretion, for the doctrine of accretion applies to the result and not to the manner of its production.<sup>49</sup>

### **38. What is the distinction between accretion and erosion?**

If the criteria are met and the water boundary moves out, then accretion has occurred and the parcel increases in area. If the criteria are met and the water boundary moves in, then erosion has occurred and the parcel decreases in area.

### **39. How is accretion apportioned?**

If two or more parcels have accreted land, then new side (common) boundaries must be established across the accretion. The Courts have referred to two methods:

Perpendicular from baseline - On the plan, draw “a line representing the line of the shore drawn at such distance seawards as to clear the sinuosity of the coast, and let fall a perpendicular from the end of the land boundary.”<sup>50</sup> The baseline should represent the average line of the shore.

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<sup>45</sup> *AG Ontario v. Walker*, [1975] 1 SCR 78 (SCC).

<sup>46</sup> *Merriman v. New Brunswick* (1974), 45 DLR (3d) 464 (NBCA).

<sup>47</sup> *AG BC v Neilson*, [1956] 5 DLR (2d) 449 (SCC); *Re: Bulman’s Petition* (1966), 56 WWR 225 (BCSC).

<sup>48</sup> *Southern Centre of Theosophy v. State of South Australia*, [1982] 1 All ER 283 (PC).

<sup>49</sup> *Clarke v. City of Edmonton*, [1930] SCR 137, at 144 (SCC).

<sup>50</sup> *Paul v. Bates* (1934), 48 BCR 473 (BCSC).

Proportional shorelines - “Equity is served,” if each parcel receives the same proportion of new water boundary as it had old water boundary.<sup>51</sup>

#### **40. Are the side boundaries merely projected?**

No. Both methods usually result in bends in the side boundaries and are informed by the principle of fairness. If the new shoreline is parallel to the old shoreline and the side boundaries are perpendicular to the water, then both methods result in merely prolonging the side boundaries across the accreted land.<sup>52</sup>

#### **41. How is accretion constrained by reference to a parcel (such as a 1/4 section)?**

Accretion is limited by the theoretical or legal section, quarter-section and legal subdivision lines within the relevant townships:

- œ Pitt’s parcel was described as all that portion of the NE quarter lying to the west of the Red Deer River. The Court held that “alluvial accretion” does not “extend the ownership of land beyond the original boundaries set forth in the Certificate of Title” and that “the change of the physical boundaries of the watercourse cannot create an expanded title overriding the boundaries of the title he received.”<sup>53</sup>
- œ On Buffalo Lake, land was uncovered by the gradual recession of the waters of the lake. If the recession took the water boundary outside the parcel referred to in each of the Certificates of Title, then the parcels were held not to extend beyond the section, quarter-section or LSD.<sup>54</sup>

#### **42. What of a lake, entirely within a parcel, that gradually ceases to be?**

The surrounding parcel (eg. all that portion of the NW ¼ “not covered by any of the waters of a lake”) gets larger, and the accreted land takes on the legal characteristics of the land to which it is accreted, including all reservations.<sup>55</sup>

#### **43. Does this mean that a parcel can cease to be riparian?**

Yes. If the parcel is not bounded by the water, then it loses all riparian rights.<sup>56</sup>

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<sup>51</sup> *Re Brew Island*, [1977] 3 WWR 81 (BCSC).

<sup>52</sup> *Nastajus v. Registrar, North Alberta* (1989), 64 Alta LR(2d) 300 (Alta CA).

<sup>53</sup> *Pitt v. City of Red Deer*, 2000 ABCA 281 (Alta CA).

<sup>54</sup> *Johnson et al v. Alberta*, 2005 ABCA 10 (Alta CA).

<sup>55</sup> *Eliason v. Registrar (Alberta)*, [1980] 6 WWR 361 (Alta QB).

<sup>56</sup> *Municipality of Queen’s County v. Cooper*, [1946] SCR 584 (SCC).

#### **44. How do meanders become oxbow lakes?**

There are two scenarios:

- If a river, that meandered at the time of the creation of the parcel, slowly straightens through natural forces so that the meander does not remain, then riparian boundaries along the river are ambulatory.
- If the river breaks through the neck of land at the base of the meander, resulting in a straight river channel and an isolated oxbow lake, then the change is not gradual. The avulsive (sudden) action of the river means that the boundary is fixed in location at the oxbow; the parcel on the outside of the old meander ceases to be bounded by the river.<sup>57</sup>

#### **45. What if huge chunks of the river bank suddenly cave in?**

A riparian boundary does not shift, thus rejecting the “extraordinary if ingenious suggestion” that the bank has been imperceptibly undermined.<sup>58</sup>

#### **46. What of shore road allowances?**

If a shore road allowance separates a parcel from the water, then the parcel is not a riparian parcel, does not have an ambulatory boundary, and can neither gain through accretion<sup>59</sup> nor lose through erosion.<sup>60</sup>

#### **47. What is the riparian boundary on tidal waters?**

The boundary is the “high tide line”<sup>61</sup> or mean high water mark (MHW), defined as the average of the high spring and high neap tides. Evidence of the MHW includes the state of vegetation and the accumulation of drift-wood and debris; a practice “generally accepted and followed” in British Columbia.<sup>62</sup>

#### **48. What is the foreshore on tidal waters?**

For tidal waters the foreshore is the area between the MHW and the MLWM; the area uncovered at low tide (the beach). It remains in the Crown in right of the province.<sup>63</sup>

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<sup>57</sup> *Robertson v. Wallace*, 2000 ABQB 1020 (Alta QB).

<sup>58</sup> *Yukon Gold v. Boyle Concessions Ltd.*, [1919] 3 WWR 145, at 147 (SCC).

<sup>59</sup> *Re: Monashee Enterprises and Minister of Recreation BC* (1981), 124 DLR (3d) 372 (BCCA).

<sup>60</sup> *Volcanic Oil and Gas Co. v. Chaplin* (1914), 31 OLR 364 (Ont CA).

<sup>61</sup> *King Island Clay Ltd. v Upton*, 1995 CanLII 3438 (BCCA).

<sup>62</sup> *Nelson v. Pacific Great Eastern Ry Co.*, [1918] 1 WWR 597, at 601 (BCSC).

<sup>63</sup> *Esquimalt and Nanaimo Railway Company*, [1918] WWR 356 (PC).

## Part 4 – Experts:

Who you jiving with that cosmic debris? Now what kind of guru are you, anyway? ... Is that a real poncho or is that a Sears' poncho?<sup>64</sup>

### 49. What is the primary role of a boundary expert?

To avoid “a protracted litigation out of all proportion to the importance of the subject-matter involved.”<sup>65</sup> Trials are time-consuming and expensive<sup>66</sup> with uncertain outcomes, and should be avoided in favour of a settlement. This is achieved by:

- œ Producing such powerful oral and written opinions, sufficient to persuade the other party of the folly of proceeding to trial; or
- œ Recognizing the strength of the opinion of the expert retained by the other party, and thus persuading your client of the folly of proceeding to trial.

### 50. Is the role of a boundary expert to win?

No. The role of an expert is to expose the truth by being impartial.<sup>67</sup>

The expert advises the client that the answer might not be what is sought. A reasonable client will welcome such a warning and recognize the merits of settling out of court. The expert must be intellectually honest, question all assumptions, appeal to reason, debate the issues, identify all facts and point to any authority in support. Absent such rigour, the Courts prefer the evidence offered by the other party.<sup>68</sup>

### 51. How should an expert proceed?

The expert devises a methodology to answer the question, interprets the available evidence, and forms an oral opinion that best fits the facts. The expert avoids unsubstantiated assertions and refrains from questioning an opponent's character, so as to evade threats of expert bias.<sup>69</sup>

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<sup>64</sup> Frank Zappa. *Cosmik Debris*. From: *Apostrophe*. 1974.

<sup>65</sup> *Yukon Gold Co. v. Boyle Concessions Ltd.*, 1917 CarswellBC 144 (SCC).

<sup>66</sup> Lavina Lanty claimed the right to drive on the beach in front of her cottage. She lost. The court ordered that she pay the other party \$133,800; she also incurred the costs of her lawyer and her expert surveyor: *Lanty v. Ontario (MNR)*, 2006 CanLII 1452 (Ont SC).

<sup>67</sup> *R v. Douglas et al*, 2004 BCPC 279. James Morton. Let's ditch the battle of experts in court, and just get the facts. *Edmonton Journal*. February 8, 2008.

<sup>68</sup> *Johnson et al v. Alberta*, 2001 ABQB 642, paras. 37 & 38. Affirmed 2005 ABCA 10.

<sup>69</sup> Anderson. Clear and partial danger: Defending ourselves against the threat of expert bias. *The Canadian Bar Review*. v.83 – n.2. pp. 285-308. September 2004.

## **52. What is the expert's role in court?**

The expert must be relevant<sup>70</sup> and prepared.<sup>71</sup> Expert evidence is only to be used to clarify or resolve an ambiguity, not to create an ambiguity that otherwise did not exist.<sup>72</sup>

## **53. Are experts slapped by the court if they are not rigorous, impartial and consistent?**

Yes.<sup>73</sup>

## **54. Who else gets slapped?**

Professional associations, when they put the commercial interests of their members ahead of their statutory duty to protect the public interest. The guardian will be chastised for only looking after the guardian. A self-regulating professional cannot have standards whose main purpose is to address concerns about competition.<sup>74</sup>

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<sup>70</sup> Do not be tempted to divert the trial with “surveying issues that may have presented problems more apparent than real”: *McLeay v Kelowna (City)*, 2003 BCCA 523.

<sup>71</sup> If not prepared, the expert risks misleading the court: *Regina v. Truong & Ung*, 2000 BCPC 0143.

<sup>72</sup> *Gibbs v. Grand Bend (Village)* (1995), 26 OR(3d) 644 (Ont CA).

<sup>73</sup> *Collingham v. Algonquin (Township)*, 2007 CanLII 1321 (Ont SC); *Lanty v. Ontario (MNR)*, 2006 CanLII 1452 (Ont SC); *Johnson v. Alberta*, 2001 ABQB 642 (Alta QB); *Robertson v. Wallace*, 2000 ABQB 1021.

<sup>74</sup> *First Canadian Title v. Law Society of New Brunswick*, 2007 NBQB (October 2007).