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## Real Property Law Section

# Rectification Resurrected: *MacIsaac v. Salo*

**SPEAKERS:** **Craig Carter, C.S.,**  
Fasken Martineau DuMoulin LLP  
**William Snell, OLS, CLS,**  
Examiner of Surveys, ServiceOntario  
Policy & Regulatory Services

**PROGRAM CHAIR:** **Ian Speers,** Makooli Prekupec LLP

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Wednesday, March 20, 2013  
Twenty Toronto Street Conferences and Events

# **OBA**

## **Real Property Section**

### **Rectification Resurrected: *MacIsaac v. Salo***

#### **Program Participants**

##### **Craig R. Carter**

Craig is a Partner with the law firm of Fasken Martineau DuMoulin LLP and is certified by the Law Society of Upper Canada as a specialist in Real Estate Law. He practises commercial real estate law with an emphasis on mortgage remedies and opinions on solicitor's practice. He has chaired the OBA programs Real Estate on the Waterfront (1992, 2000); Long Term Leases, lecture series; Agreements of Purchase and Sale, the Definitive Analysis; Title Insurance; Mortgage Law; Options and Rights of First Refusal and Cottage Law. Has also twice chaired the Law Society Loss Prevention program on residential real estate and the Canadian Institute programs Mortgage Remedies, Real Estate and Public Utilities and Real Estate and Mortgage Law Update and the Law Society's Six-minute Real Estate Lawyer since 1998. Craig has given papers for the OBA, Insight and the Canadian Institute on foreclosures, land transfer tax, powers of sale and taking possession of property by a mortgagee, title insurance and agreements of purchase and sale. He is past chair of the OBA Continuing Legal Education Committee, past chair of the OBA Real Property Section and past chair of the CBA Real Property Section. Also, co-editor of Butterworths book Agreements of Purchase and Sale and author of the CCH Real Estate Guide's chapter on Land Transfer Tax. As well as, contributing author for Falconbridge on Mortgages. He has taught the Bar Admission Course on Real Estate, Business Law at Ryerson, Real Estate Transactions at Queen's Law School and an LL.M. in Real Estate Finance at Osgoode Hall Law School. Currently he is an adjunct professor at Osgoode Hall Law School. Craig was the 2002 recipient of the Award for Excellence in Real Estate given by the OBA. He received a B.Sc. from the University of Toronto, 1974. His LL.B. from the University of Toronto, 1977 and LL.M. from Osgoode Hall Law School, 1986. Craig was called to the Bar of Ontario in 1979

##### **William D. Snell**

Bill was commissioned as an Ontario Land Surveyor in 1986, a Canada Lands Surveyor 1998 and is a graduate of Wilfrid Laurier University and the University of Toronto. He has professional experience with the private sector as well as the federal and provincial governments. Bill was the Registrar of the provincial land surveying professional regulatory body, the Association of Ontario Land Surveyors, from 1993 to 1999. He is currently the Examiner of Surveys, Deputy Director of Titles and acting Director of the Regulatory Services Branch of ServiceOntario, Ministry of Government Service. Bill is the author of several papers relating to the self governance in the surveying profession and has given lectures to solicitors and surveyors relating to condominium registration, easements, and the land registration automation and conversion process.

### **Ian Speers (Program Chair)**

Ian Speers is an associate of Makooli Prekupec LLP, with a solicitor practice concentrating on real estate, wills, and estate planning. A 2005 graduate of Queen's law school, Ian also holds a bachelor's degree from the University of Toronto in ancient and mediaeval history. Ian is the 2012-13 Program Coordinator of the Ontario Bar Association's Real Property Section. He has also volunteered extensively at Law Help Ontario, a civil court duty counsel project operated by Pro Bono Law Ontario, assisting self-represented parties in litigation. Prior to practising law, Ian worked extensively in Canadian interuniversity sport media relations, and is a past Sports Information Director of the University of Toronto. He has been actively involved with the Vanier Cup, Canada's national university football championship, since 1998. Having significant historical expertise on the development of Canadian football in the 19th century, Ian is a co-author of the book, 150 Years of Football at the University of Toronto: 1861 to 2011, in addition to a number of other articles and monographs.

**Maclsaac vs Salo aka Spencer vs Salo**

**Rectification in Land Titles Resurrected**

**Craig Carter**  
**March 20, 2013**



- Caselaw :
- *United Trust Co. vs. Dominion Stores Ltd.* [1977] 2 S.C.R. 915
- *Durrani vs. Augier* (2000) 50 O.R.; (3<sup>rd</sup>) 353 (S.C.)
- *Lawrence vs. Wright* (2006) 51 R.P.R. (4<sup>th</sup>) 1 (O.C.A.)
- *McCormack vs. Ciampanelli* (2012) 19 R.P.R. (5<sup>th</sup>) 162
- *719083 Ontario Ltd. vs. 2174112 Ontario Inc.* (2013) ONCA 11

- *Morrison vs. Van Den Tillaart* (2012) BCSC 383

# Introduction

- Surveyor admits to mistakenly depositing a Reference Plan for an access right of way showing the right of way in wrong location
- Part on Reference Plan does not follow existing gravel driveway but goes through rock outcrop
- Servient owner grants of right of way to dominant owners based upon Parts on inaccurate Reference Plan
- Dominant owners use driveway for at least fifteen years
- Fight over increased use of driveway by dominant owners and damage to driveway and servient blocks driveway where it doesn't coincide with inaccurate reference plan
- Surveyor brings motion to rectify reference plan so it will follow on the ground gravel driveway
- Lower court says once servient owner Salo registered, no ability of court to rectify title register - period. Title indefeasible
- Real Property Section of OBA concerned on behalf of its members that a Land Titles system with no power to rectify mistakes made for a less credible Land Titles system and meant real estate lawyers would be unable to rectify their clients' titles leading to increased liability for lawyers

- OBA intervened to ensure that the Court of Appeal appreciated that rectification was available in circumstances such as actual notice, fraud, constructive trust, subrogation, mistake
- OBA intervened to ensure that the trial judge's misreading of the *Durrani* case was corrected
- On all counts the OBA was entirely successful
- The court stated

**(a) *Rectification Provisions in the Land Titles Act and the Principle of Actual Notice***

“38. The OBA suggests that the motion judge's reasons indicate that the remedy of rectification as described in ss. 159 and 160 of the *Land Titles Act* is not available where a *bona fide* purchaser for value has actual notice of a competing interest in property. I agree to the extent that the motion judge's reasons fail to make it clear that the statutory remedy of rectification is available where a party has actual notice of an interest in land that varies from the interest shown in the register.”

39. The motion judge's reliance on *Durrani* for the established legal principles is incomplete. To be precise, he did not refer in his reasons to the discussion in *Durrani*, at para. 52, to the effect that equity continues to have application to claims governed by the *Land Titles Act* and that the Act has not abrogated the equitable principle of actual notice, citing *United Trust Co. v. Dominion Stores Ltd.*, [1977] 2 S.C.R. 915, at pp. 952-53. At para. 58, Epstein J. held : "It is always a necessary precondition for valid title that the purchaser or mortgagee be a *bona fide* or good faith purchaser for value without notice." This principle was reiterated by Moore J. in, 2012 ONSC 3815, aff'd 2013 ONCA 11, at para. 28: "only *bona fide* purchasers ... for value without notice obtain that protection of indefeasibility of title which is the essence of the land titles system."

40. Moreover, the motion judge’s statement that the registration of an interest in land is conclusive of the state of title and that there is no jurisdiction to order rectification of a mistake in the registry fails to recognize that the equitable principle of actual notice remains enshrined in the land titles system.”

and

“54. The court’s powers of rectification under ss. 159 and 160 of the *Land Titles Act* are qualified by reference to the indefeasibility of title that follows from registration. A purchaser only obtains the benefit of indefeasible title if he or she is a *bona fide* purchaser for value without notice. This continues to be the law in Ontario, despite any suggestion to the contrary by the motion judge.”

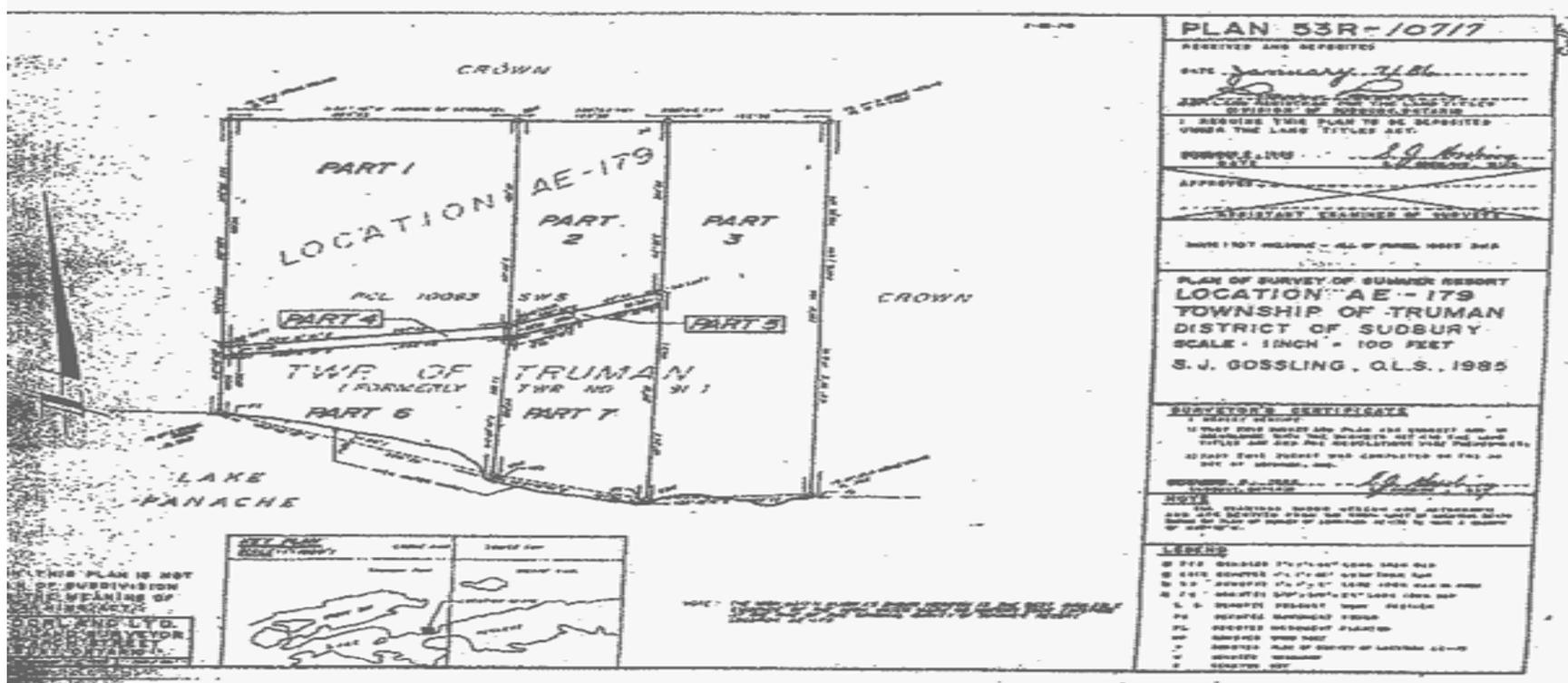
- Having succeeded in our purpose, it became clear to the Court of Appeal that the evidence of actual notice by the servient owner was entirely deficient due the appellant's failure to identify this issue during the cross examination of affidavits stage of the proceedings.
- The Court of Appeal wanted to overturn the trial court because the result was just too inequitable and using actual notice was going to be problematic for the Court of Appeal, not impossible, but difficult.
- Instead, the Court of Appeal cleverly approached overturning the trial judge using a different approach not argued by either the appellant or the respondent.
- The Court of Appeal held that since Land Titles did not guarantee the quantity of title (just the quality of title) it was not precluded from rectifying the size or location of the easement

When reviewing the case, keep in mind the following:

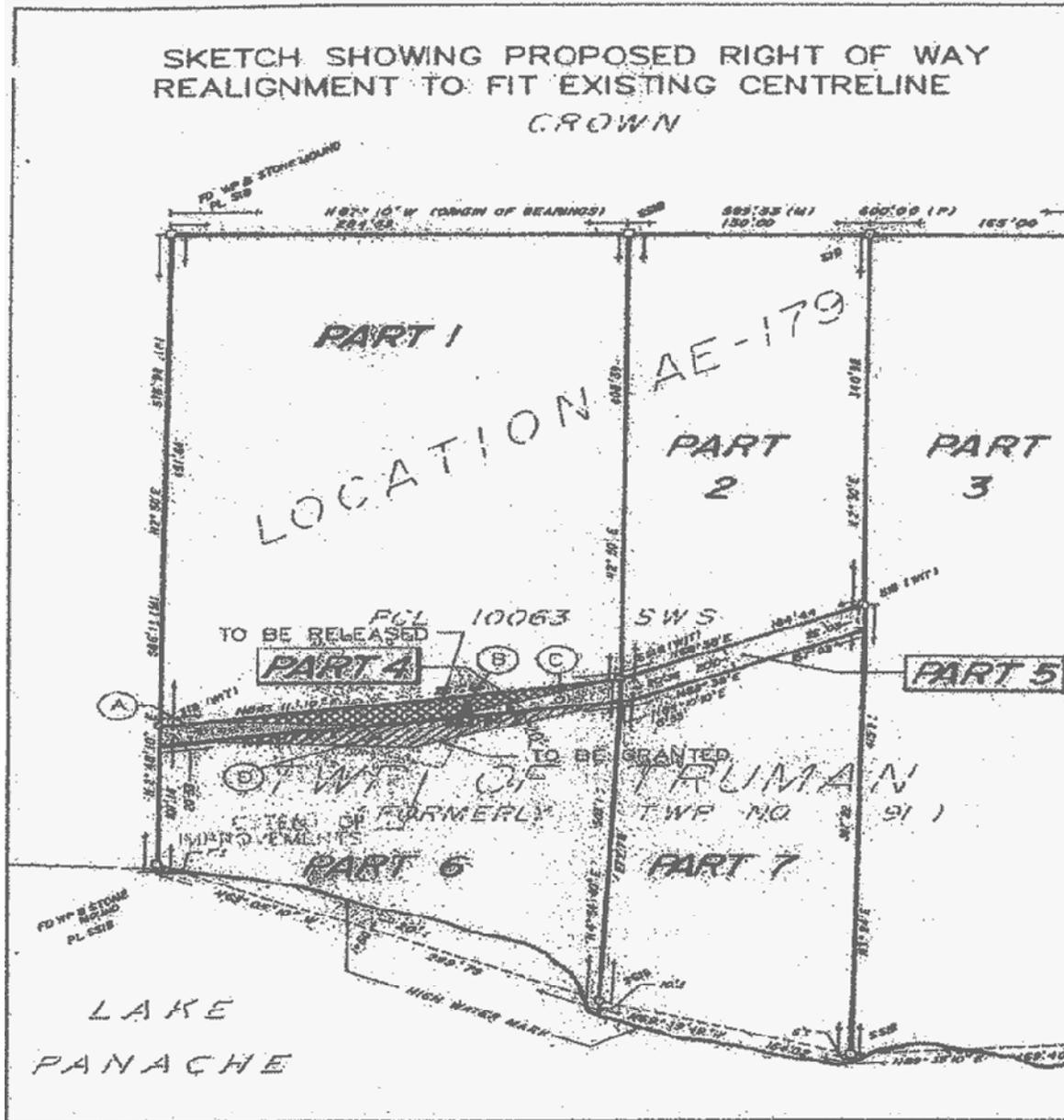
- 1) The OBA achieved exactly what it intervened to achieve;
- 2) The parties, not OBA, argued the factual issue of actual notice;
- 3) The parties, not OBA, were charged with fashioning a remedy;
- 4) While the OBA supported overturning the lower court decision because it was inequitable, it strove to protect the integrity of the indefeasibility of title concept in Land Titles to permit real property lawyers to rely on the parcel abstracts. The OBA felt actual notice was the best approach to achieving both results.
- 5) The Court of Appeal, hamstrung with evidentiary gaps in actual notice, chose to approach the case based on misdescription, not actual notice. In doing so, the Court of Appeal highlighted, emphasized and really trumpeted the fundamental legal flaw in relying upon Land Titles parcels that is that there is no guarantee of boundaries in Land Titles. You own something, but what you own is not guaranteed.
- 6) The challenge now is to determine the impact of the Court's analysis
- 7) Bad facts make bad law – hopefully the case will not seriously affect our reliance on the system

## FACTS:

- In 1985 Kivikangas owned a parcel of land (the “**Original Parcel**”) on Lake Panache near Sudbury described as location AE-179 Township of Truman, District of Sudbury being approximately 600’ x 400’
- Access to the Original Parcel was on west side of property to a public highway
- In 1985, a gravel driveway existed crossing the Original Parcel in an east/west direction about 100 to 300 feet north of Lake Panache (see R-Plan)
- Kivikangas severs the Original Parcel into three new parcels (see R-Plan)
- Two most easterly new parcels are landlocked
- Kivikangas requests the surveyor to prepare the R-Plan following the gravel driveway so he can grant easements for access to two landlocked parcels
- Surveyor prepares the R-plan but doesnot follow gravel driveway



SKETCH SHOWING PROPOSED RIGHT OF WAY  
REALIGNMENT TO FIT EXISTING CENTRELINE  
CROWN



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- In 1990 Kivikangas sold to Maclsaac the middle parcel (the “**Maclsaac Parcel**”) being Parts 2, 5, and 7 on the R-Plan – subject to an easement for access over Part 5 in favour of the most easterly parcel (the “**Johansen Parcel**”) and together with an easement for access over Part 4 on the most westerly parcel (the “**Salo Parcel**”);
  - Kivikangas told Maclsaac he was getting an easement over the gravel driveway for access;
  - Maclsaac did not check on closing that Part 4 matched the gravel driveway; It did not.
  - Part 4 ran through a rock outcrop and legally was unusable
  - Maclsaac used the gravel driveway for the next 15 years without complaint from the servient owners (Hawthorne and Salo)

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- In 1992, Kivikangas sold the Salo Parcel –parts 1, 4 and 6 on the R-Plan to Joseph Hawthorne subject to an easement in favour of the Maclsaac Parcel and subject to an easement in favour of the Johansen Parcel retained by Kivikangas
  - The easement was over Part 4 on the R-Plan which ran through the rock outcrop
  - Kivigangas told Hawthorne that Salo Parcel was subject to the easements over the gravel driveway
  - Hawthorne did not check this on closing nor obtain a survey

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- In 2000, Kivikangas sold the Johansen Parcel to Johansen together with the easement over the Salo Parcel being Part 4 on the R-Plan and together with an easement over the Maclsaac Parcel being part 5 on the R-Plan
  - Kivikanagas told Johansen that he had access over the gravel driveway; which he didn't.
  - Johansen did not obtain a survey
  - Johansen used the gravel driveway for 7 years without complaint from the servient owners Hawthorne and Salo

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- In 2004, Hawthorne sold the Salo Parcel to Salo subject to the easements in favour of Maclsaac and Johansen over Part 4
  - Salo's evidence was that she never saw the gravel driveway when she inspected the Salo Parcel because it was covered in snow and Hawthorne did not tell her about it
  - Salo's evidence was that the first time she heard of an easement over the Salo Parcel was on closing when her lawyer pointed it out to her based upon his title search
  - After closing Salo allowed Maclsaac and Johansen to continue using the gravel driveway because she believed they had an easement over it

- Salo improved the driveway where it gave access to her home.
- MacIsaac drove heavy trucks over the driveway causing Salo to fear damage to her improvements to the driveway
- MacIsaac obtained a survey in 2005 showing the Part 4 discrepancy
- Salo obtained the survey in 2007 and discovering the discrepancy blocked the driveway where it deviated from Part 4 on the R-Plan
- Everybody sued everybody, an interim injunction was granted permitting access
- The surveyor at the request of the court brought a motion for rectification under section 160 of the Land Titles to rectify the R-Plan based upon mistake

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- The trial judge rejected the motion for rectification on the basis that
  - i) there was no right to rectify title against Salo who was a bona fide purchaser
  - ii) if there was a mistake Salo was not a party to it (nor were MacIsaac and Johansen- the mistake was between Kivikingas and his surveyor)

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- The motion judge reviewed section 78(4) of the Land Titles Act which embodies a transfer in the register and Sections 159 and 160 of the Act which gives the court a right to rectify
  - Section 159 and 160 start with the language “Subject to any estates or rights acquired by registration under this Act”
  - The motion judge concluded that Salo’s transfer was embodied in the register and could not be rectified because she obtained an estate or right in part of the gravel driveway free of any easement in favour of Maclsaac or Johansen except over Part 4 of the R-Plan
  - The judge stated “ Accordingly, the court does not have jurisdiction to rectify the register if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest registered”

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- In the Court of Appeal the Court approached the matter this way:
  - First - the Court stated that a reference plan does not create an interest in land it is merely descriptive
  - **Comment:** No issue with this concept. The easement is created in the grant of easement not the deposit of the reference plan. It is the grant of easement, or the grant of the fee simple free of the easement to Salo that section 160 speaks to. As we will see the Court may have ignored this or merely glossed over this to allow it to rectify the R-Plan
  - Second – the Court confirms that the *Land Titles Act* does not guarantee the extent of title referring to section 140(2) of the *Land Titles Act*.

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- The Court states (quoting *Lumme*) “The *Land Titles Act* only guarantees the quality of one’s title, not the extent of it”
  - **Comment-** Again no issue with this concept as this seems to be a fundamental tenet of the *Act*.
  
  - Third - The court confirms that section 140(2) of the *Act* qualifies section 78(4) so that the concept of indefeasible title that you get when registering a transfer does not extend to the description in the transfer. Descriptions are subject to being amended under the *Boundaries Act* by the Director of Titles or by the court on a rectification motion.

- Fourth - the court really emphasizes this point and warns lawyers and purchasers to make sure they get surveys
- “Indeed, prospective purchasers of property in the land titles system must understand that the parcel description of a property – including an incorporated reference plan – is not definitive of the boundaries or the extent of land. Only an up-to-date survey can confirm the location of boundaries of a parcel of land as they exist on the ground.”
- **Comment** – What is on the ground counts not what is on the title. And what is on the ground can only be determined by a surveyor giving an opinion as to her best opinion as to what was intended when the grant was made.

- In this case when Kivilingas conveyed to MacIsaac and Johansen he intended to give them a right of way over the gravel driveway. When he conveyed to Hawthorne he intended to give him title subject to an easement over the gravel driveway in favour of MacIsaac and Johansen.
- But he didn't do that. He conveyed title to Hawthorne subject to an easement over Part 4. Part 4 was a determinable piece of land. It did not comply with the parties' intention but was a real grant of real land in a real location. Now as between MacIsaac, Johansen and Hawthorne the grants of easement could clearly have been rectified because it was not the real intention to convey an easement over part 4 and all parties had actual notice of the real intention
- But what about Salo. Salo said I registered my transfer with actual notice of an easement over part 4. The dimensions of

of that easement were clear as they were marked as such on the R-Plan. There is no question that the delineation of that part on the reference plan matched what was on the ground. And Salo had no intention to be subject to any other right.

Fifth – The court then states that the words “Subject to any estates or rights acquired by registration under this Act” which opens section 159 and 160 is just not engaged at all.

**Comment** – remember it is these words that led the motion judge to reject rectification. The Court of Appeal says these words are not engaged at all. Why. Because those words go to quality of title not to quantity of title. The estates or rights acquired cannot include the boundaries of those estates or

rights because the Act doesn't guarantee boundaries. Indefeasibility doesn't go to boundaries so that no matter how many registrations exist boundaries are never secure. However, there was a grant of a right of way to Maclsaac over Part 4. By rectifying, the Court took away Maclsaac's right of way over the disputed part. His grant of a right of way, the quality of his ownership of the disputed land was not indefeasible. He had no right. This is ok re Maclsaac because he had actual notice that he was not entitled to a right of way over the disputed part. But what about Salo. Her transfer conveyed fee simple title free of encumbrance over the disputed part. It was not subject to any right to Salo's actual knowledge. Yet Salo's indefeasible right to title to the disputed part free of Maclsaac's easement was rejected

What this highlights is the vague overlap between quality and quantity of title. It is not at all clear that these are two distinct concepts as suggested by the Court.

Now the Court could have instead of rectifying the R-Plan, gone back and rectified the grants of easement on the basis that they didn't coincide with the common intention. The Court would then have had to rectify title to the Salo Parcel based upon actual notice or on strictly equitable grounds.

Note that the court stated "I am satisfied that there is no injustice in ordering rectification of the register in this case. It is clear all the parties, including the Salos, believed that the plaintiffs had the benefit of the right of way.... Indeed, if there is a risk of injustice, it would be if rectification were not ordered in these circumstances."

- Sixth – having dispensed with the qualifying words in section 160, the court found that section 160 gave authority to the courts to rectify titles whenever the issue related to boundaries. This is a statutory right over and above the equitable right of rectification for mistake.
- Seventh – the court makes it abundantly clear that the right to rectify boundaries in registered transfers, easements, leases and other registered documents is independent of any issues of actual notice. The test is whether a party is aggrieved, whether the “on the ground” interest is proven to be different from the registered right or whether any party is prejudiced by the rectification. This is a great opportunity for rectifiers.
- Eighth – In obiter, the court held that the *Boundaries Act* applied to establishing the boundaries of easements.

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- So what lessons can we take from MacIssac.
  
  - 1) get a survey
  - 2) consider your title insurance coverage. In light of MacIssac should you ask for clearer protection for the legal description in your transfers, leases or easements. Would it be wise to superficially reference section 140(2) or is the language of the survey endorsement sufficient. Is this a matter that would have been revealed by an up to date survey or is that going to be limited to encroachments. Remember you have a legal description attached to your policy. The court can rectify your legal description to give you more or less. How does that affect your coverage

3) is it time to add more into the survey qualification in your title opinions to cover off Maclsaac type issues.

4) Can you utilize these broader rectification rights to fix *Planning Act* issues, agreement of purchase and sale discrepancies, lease discrepancies etc.

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- Final Comments
  - Maclsaac may be a revolutionary sea change in the reliability of the Land Titles system. We have been moving away from a true Torrens system. Recent fraud amendments have watered down indefeasibility of title and Maclsaac may have extended the unreliability of the titles. Mr. Justice Winkler might argue that this was always the case and if we didn't know that we were uninformed. He may be right. But less certainty means more trouble for lawyers.



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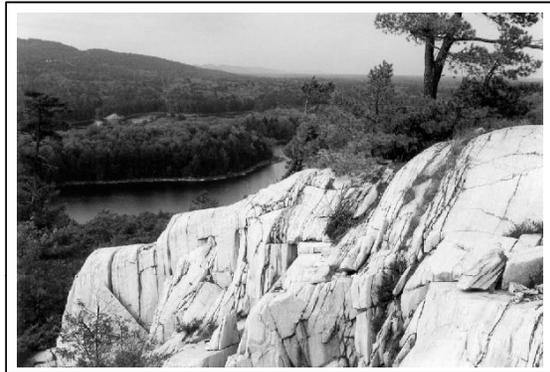
# **MacIsaac v Salo** **A Surveyor's Perspective**

OBA Real Property Section  
March 20, 2013



## Extent of Title

- ▶ Subsection 140(2) of the *Land Titles Act*:
  - *“The description of registered land is not conclusive as to the boundaries or extent of the land.”*



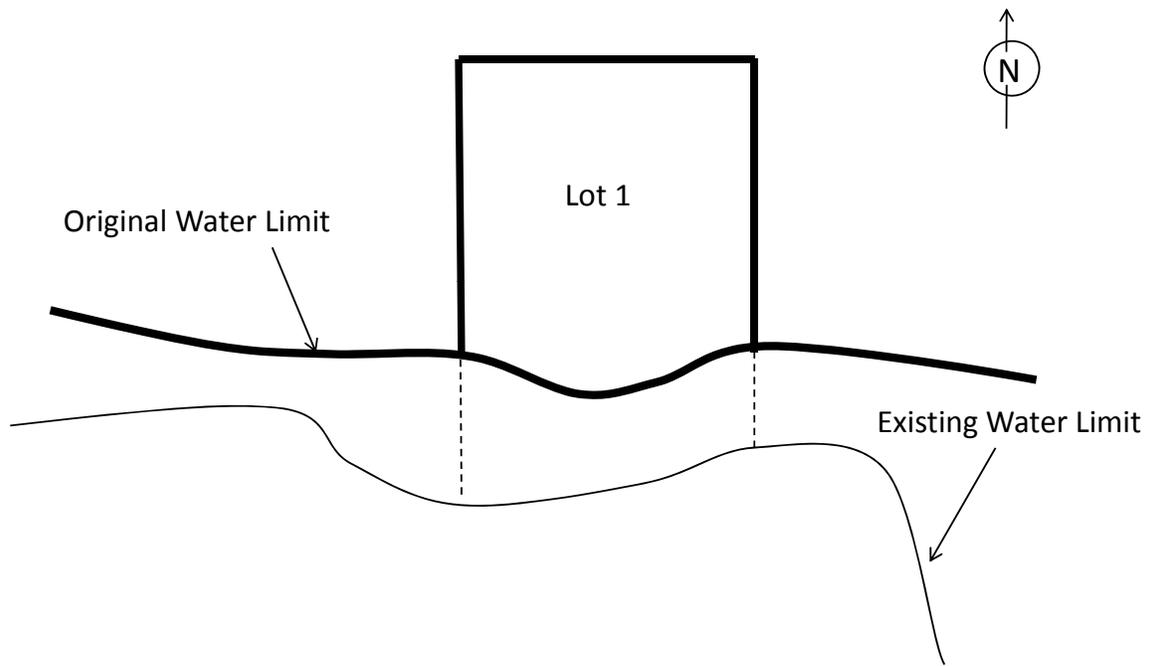
## Hierarchy of Evidence

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- ▶ Natural Boundaries
- ▶ Original Monuments
- ▶ Fences or Possession
- ▶ Measurements

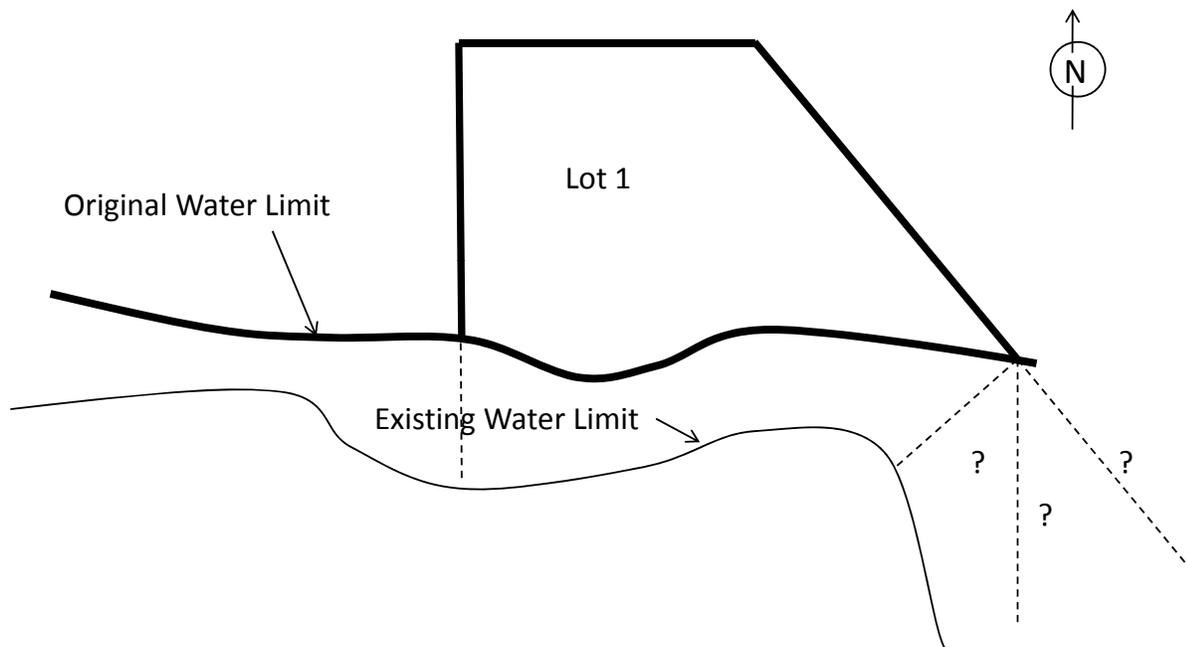
# Natural Boundaries

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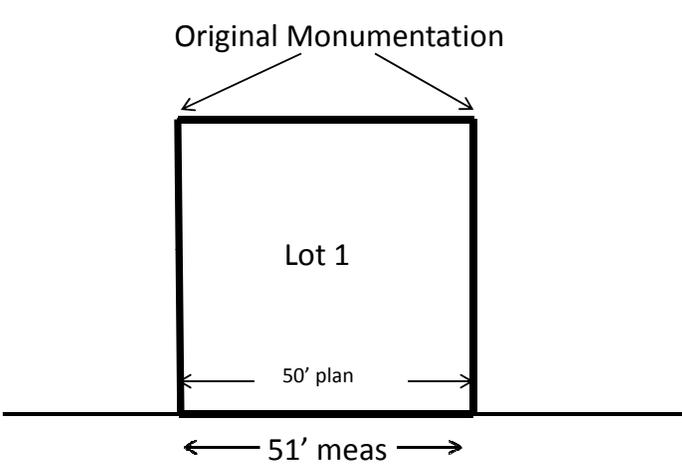
# Natural Boundaries (cont'd)

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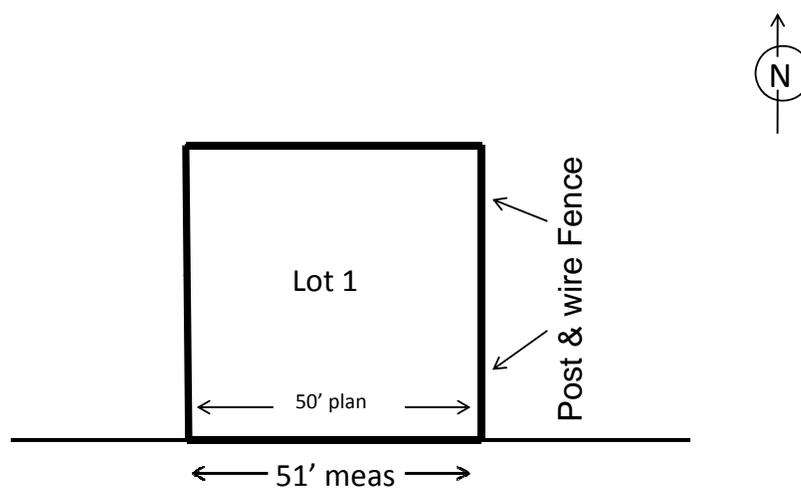
# Original Monumentation

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# Fences or Possession

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## Extent of Title

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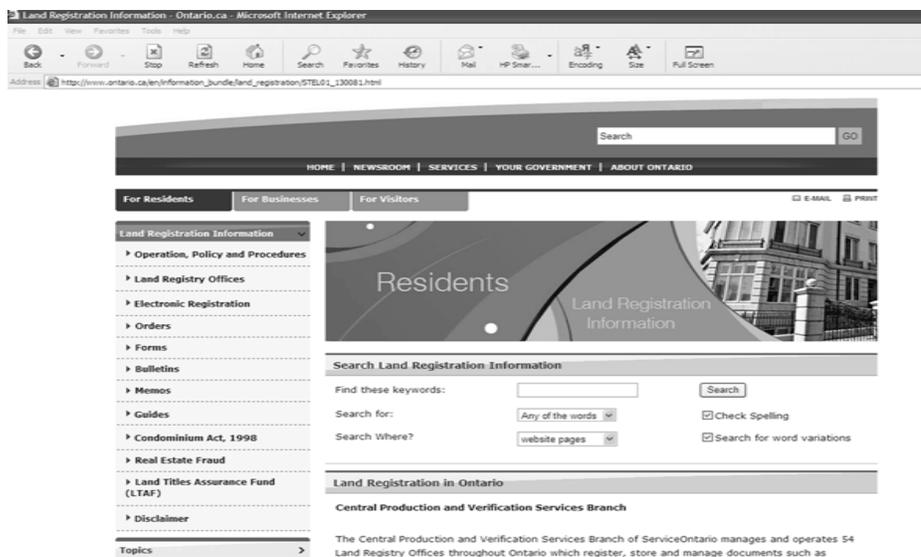
► Subsection 140(2) of the *Land Titles Act*:

- *“The description of registered land is not conclusive as to the boundaries or extent of the land.”*

## Further Information

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- ▶ [www.serviceontario.ca/landregistration](http://www.serviceontario.ca/landregistration)



# Plan 53R-10717

