The Boundary Point
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Case Commentaries on Property Title and Boundary Law

In this issue we review a decision from the Prince Edward Island Court of Appeal[1]. *Bassett v. M-5 Enterprises Inc.* involved a question posed to the court for an answer: did a fence along the edge of a laneway constitute "…other blocking of the subject lands" within the meaning of minutes of settlement? What seemed like a simple question about the interpretation of language to define property rights turned into a split decision. Splits of 2:1, or 3:4 are not uncommon and, in some circles, are regarded as the best type of outcome for gaining insight into possible new directions in the law[2]. In some sense it has little to do with who "won"; rather, it is all about the juxtaposition of well-argued positions resulting in articulated perspectives which provide balance. As a result, this issue of *The Boundary Point* is not only a consideration of different approaches to take in the interpretation of language meant to define property rights, it is also an opportunity to consider the legal process and how the principles of property law may and sometimes do change as a direct result of this process.

Interpreting Rights in Land: Can Ambiguities be Resolved by Looking Beyond the Language?

Key Words: *interpretation, contract, ambiguity, parole evidence, factual matrix, dissent*

As noted above, the lack of unanimity among judges who have sat on a panel hearing an appeal is often an opportunity to reflect on well-argued positions resulting in articulated perspectives which provide balance. In terms of whether this makes the law unpredictable, or whether this is just an isolated instance, consider the frequency with which decisions from the Supreme Court

[1] *Bassett v. M-5 Enterprises Inc.*, 2014 PECA 11 (CanLII), http://canlii.ca/t/g7l7j

[2] There is interesting research that has emerged on the extent of "split decisions" in the Supreme Court of Canada. Statistics released by the court and referred to below, attracted the following blog posting:

> What could have made these statistics even more enticing would be a break down on who sits in dissent most often and why. Are there thematic connections? Well, of course there are: a justice dissenting on a specific issue would not be expected to change his or her mind if the same or even similar issue arises. However, change does occur, as we know when reviewing the decade of cases from the 1990s on the *mens rea* requirements for criminal negligence. This change or shift in the court's decision-making is appropriate and welcome: we want our courts to be reflective of societal fundamental values and this ability for change in legal principles permits this. We also want our jurists to be open to this change, in a principled way, of course. So, analyzing SCC decisions is a way to track change and to better understand the court's position or change in position on any given issue.

From: http://www.ideablawg.ca/blog/2014/3/18/making-a-split-decision-in-the-supreme-court-of-canada.html

of Canada are *not* unanimous. Statistics released from that court earlier this year reveal a significant number of "split" decisions in the last 10 years. The court has graphed this statistic in Figure 1 and what does not emerge is any clear trend as to increasing or decreasing numbers in the last decade. This suggests that the lack of unanimity is just part of the legal process as well as the "living and dynamic" nature of the common law.

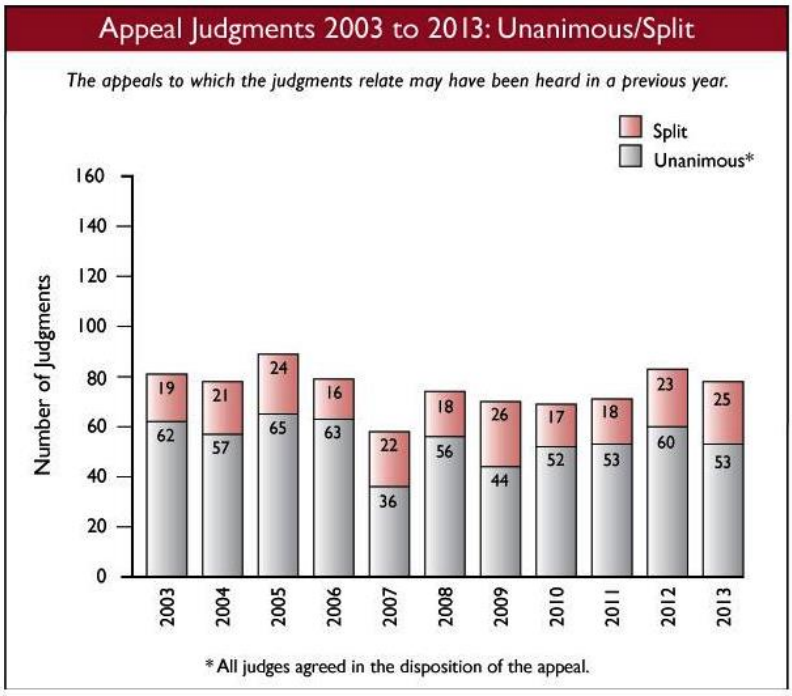

Figure 1: Appeal Judgments in the Supreme Court of Canada 2003 to 2013: Unanimous/Split[3]

In *Bassett*, the majority decision summarized the problem thus:

> The question in issue is the one posed by Mitton in his Notice of Application (the "2013 Application"). The question is whether the fence erected by Bassett in November, 2012, on or near the boundary between Barrett's Lane and Mitton's adjacent property violates the June 27, 2006 Memorandum of Settlement between the parties (the "Agreement"), and more particularly paragraph 4 thereof.
>
> Paragraph 4 of the Agreement states:
>
> > The Applicant [Bassett] and the Respondent [Mitton] shall ensure that there shall be no parking or other blocking of the subject lands [Barrett's Lane].
>
> The "subject lands" are described in the Agreement, paragraph 1 as "the entirety of land commonly known as Barrett's Lane."[4]

[3] From: http://www.scc-csc.gc.ca/case-dossier/stat/cat4-eng.aspx

The factual summary was referred to by the majority as having been accurately described by the dissenting judge, and agreed to by the majority. Rights of way and easements are often created to serve as a means of getting from point A to Point B. As such, the right to access or "jump in" to the easement somewhere along its length between A and B may have never been contemplated and not a part of what parties originally agreed to. Further details of the problem on the ground are summarized in *Bassett* in the following extract and in the Figure 2 diagram below:

> This appeal involves the interpretation of a Memorandum of Settlement signed by the parties in 2006. The appellant Bassett owns commercial and residential property at 310 Grafton Street, Charlottetown, Prince Edward Island. Dr. Gregory Mitton is the President of the respondent, M-5 Enterprises Inc. I will refer to the respondent M-5 Enterprises Inc. and its predecessor in title as "Mitton" throughout.
>
> Mitton owns property and runs a dental surgery at 342 Grafton Street. Barrett's Lane lies between 310 and 342 Grafton Street. Barrett's Lane runs roughly north/south and consists of two parcels. The west parcel is 12 feet by 160 feet, and the east parcel (hereinafter referred to as "Parcel A") is 10 feet by 71.5 feet. The west parcel runs the full length of Barrett's Lane. Parcel A runs only in the northerly 71.5 feet contiguous to the west parcel. Thus, the width of Barrett's Lane at Grafton Street, its northern most point, is 22 feet. Seventy-one point five feet to the south it narrows to 10 feet and it continues a further 88.5 feet. Barrett's Lane and the properties of the parties are shown on a building location certificate by Gulf Surveys Ltd., revised December 9th, 2004, which is referred to in the Memorandum of Settlement and is attached hereto [*Editor's note*: the survey appears partially reproduced at Figure 2 below].
>
> In 2004 Mitton constructed a fence on the western boundary of Parcel A the effect of which was to prevent Bassett's access to Parcel A. The newly constructed fence extended the full length of Barrett's Lane as shown on the Gulf Surveys Plan. Bassett commenced an action in 2005 against Mitton which was settled by virtue of a Memorandum of Settlement dated June 27, 2006 (the 2006 contract). As a result of this contract, Mitton removed the fence on the western boundary of Parcel A such that access at Grafton Street was restored to 22 feet in width. Within a few months however, Mitton also removed the fence that separated 342 Grafton Street from the southernmost 88.5 feet of Barrett's Lane. He then directed his patients to exit his property to Grafton Street by way of Barrett's Lane. They would thus exit Mitton's property on to Barrett's Lane where it was 10 feet wide, proceed in a northerly direction and through Barrett's Lane where it became 22 feet wide and then to Grafton Street. Bassett responded by making an application to quiet the title on the land.
>
> Bassett was initially unsuccessful in his quieting of titles application. The trial judge found that Parcel A was owned by Mitton and that the west parcel (160 feet in length) was a

[4] *Bassett v. M-5 Enterprises Inc.*, at paras. 4 to 6

> public right-of-way 2011 PESC 9 (CanLII), (2011 PESC 09). In July 2012 however, the Court of Appeal overturned the trial judge's decision and granted Bassett title to Barrett's Lane including Parcel A "*subject to the rights and obligations of the parties as agreed in the 2006 contract*" 2012 PECA 13 (CanLII), (2012 PECA 13, at para.86).
>
> In November 2012 Bassett erected a fence running north-south and close to or on the boundary of Barrett's Lane and Mitton's property. The effect of this fence was to prevent Mitton from gaining access to Barrett's Lane from his property[5].

Barrett's Lane and the relative position of Parcel "A" appear on a plan of survey that was referred to in the decision. A partial copy is reproduced in Figure 2.

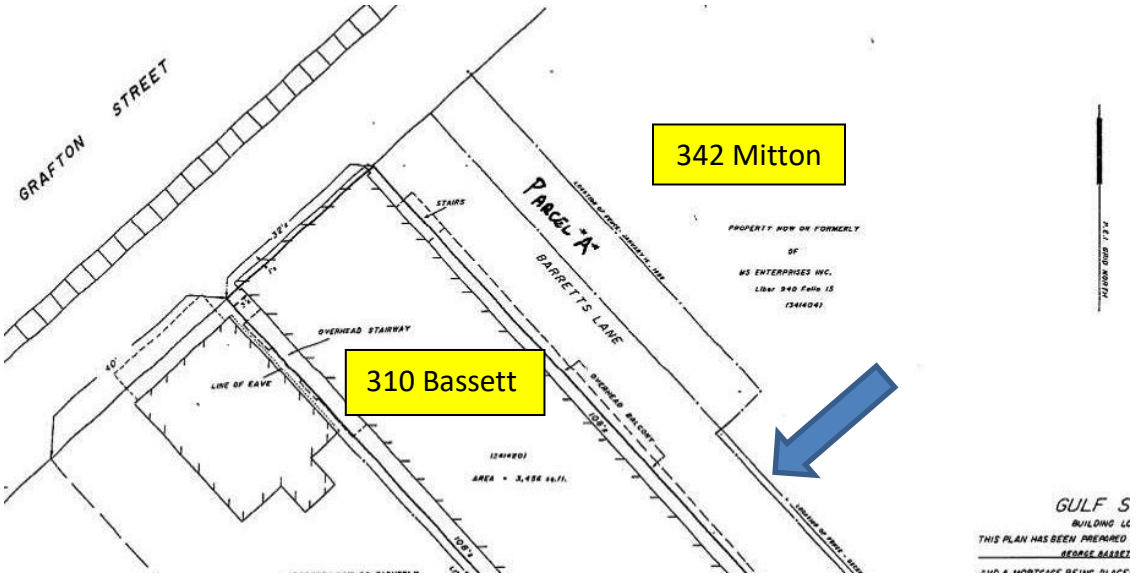

Figure 2: Partial copy of the plan of survey - updated in 2004 to show location of fence (at arrow)

What was it about the fence that prompted this dispute? Did it extend into the Parcel "A" portion of Barrett's Lane or otherwise encroach? Was the fence a kind of boundary structure? No, neither; the fence prevented lateral entry into the laneway from its flank. A view of the site from Grafton Street is helpful in showing the circumstances on the ground. In Figure 3 this view is obstructed by the utility pole but, nonetheless, a general appreciation of the relative location of the two properties on either side of Barrett's Lane can be seen.

The contrasting positions taken before the court by the two litigants are set out in the decision:

> Bassett says the trial judge fell into error as he failed to take into account the context and the factual matrix of the 2006 contract. Had he done so, he would have seen that the 2006 contract granted Bassett rights of unimpeded use of Barrett's Lane and that Mitton's rights

[5] *Ibid.*, at paras. 46 to 50

were limited to the ability to have access to Barrett's Lane from Grafton Street so he could use Parcel A for such things as garbage drop and pick-up, fire safety and fuel deliveries. Bassett urges the court to interpret the words "*the whole of Barrett's Lane*" to mean the width of Barrett's Lane at its northern most 71.5 feet, that is that portion of Barrett's Lane where the west parcel and Parcel A are contiguous.

Mitton's position is that the words in the contract are clear and unambiguous. The trial judge looked at and referred to both context of the words within the contract as well as the factual matrix. The factual matrix must not overwhelm the words chosen by the parties to settle their differences and the Court would be taking from Mitton that for which he bargained should they agree with Bassett's interpretation. The trial judge correctly concluded that the fence erected by Bassett was a breach of the 2006 contract[6].

Figure 4: Barrett's Lane viewed south from Grafton Street in September, 2013[7]

The minority portion of the decision in Bassett then embarked on an analysis of the law and stated the following principles which would apply. In fact many readers will recognize the principles as expressions of the basic rules of contract interpretation which surveyors use in attempting to interpret the language found in deeds, descriptions of land and other evidence of boundaries:

[6] *Ibid.*, at paras. 52 and 53

[7] GoogleStreetView® image dated September, 2013. All rights reserved.

The genius of the common law is that it is constantly evolving. In 1969 the Supreme Court of Canada applied the parole evidence rule and refused to admit the defendant's oral evidence where it directly contradicted the written contract *(Hawrish v. Bank of Montreal*, [1969] 2 D.L.R. (3d) 600 (SCC)). Over the years the courts developed many exceptions to the parole evidence rule to the point that it became a rather narrow rule. For example, parole evidence is admitted to establish a collateral contract, where there is an ambiguity in the contract, to establish a condition precedent, and to show fraud or misrepresentation amongst other reasons.

The Supreme Court of Canada while reaffirming the parole evidence rule also gave its blessing to the courts considering the surrounding circumstances prevalent at the time of the contract. Iacobucci J. writing for the courts in *Eli Lilly and Company v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129, stated at paras.54-55:

> ... The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, **possibly read in light of the surrounding circumstances which were prevalent at the time**. Evidence of one party's subjective intention has no independent place in this determination.
>
> Indeed it is unnecessary to consider any extrinsic evidence at all when the document is **clear and unambiguous** on its face. ... [emphasis added]

In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 (CanLII), [2010] 1 S.C.R. 69 (SCC), Cromwell J. for the majority wrote at para.64:

> The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. ...

Reading the words of the contract in light of its purposes as a commercial context, implies that the factual matrix is admissible to help explain the words used in the contract.

In my view these three Supreme Court of Canada cases stand for the proposition that the intention of the parties must be gleaned from the words chosen in context of the contract as a whole (*Tercon*) and in light of the surrounding circumstances (*Eli Lilly*). This is often referred to as the factual matrix. However, in doing so, evidence of the parties' subjective intention is not admissible evidence (*Eli Lilly*) nor is parole evidence which directly contradicts the written word in the contract where those words are clear and unambiguous (*Hawrish v. Bank of Montreal*)[8].

[8] *Bassett v. M-5 Enterprises Inc.*, at paras. 55 to 59

This analysis would be a narrow use (admissibility) of subjective intention, but at the same time would embrace the full "factual matrix" of what exists on the ground in relation to the words chosen in the document. In that regard, the following context was also provided as further history to the earlier dispute:

> Bassett bought his property in the mid-1970s after having leased it since the sixties. He ran several businesses on the property over the years. During his tenure, there had always been a fence on the southern most part (88.5 feet in length) separating Mitton's property from the west parcel of Barrett's Lane (that parcel 10 feet in width). That fence, moving in a northerly direction, turned east 10 feet and then north to the boundary of Grafton Street (61 feet - Parcel A). Often Bassett's tenants would park there which impeded the ability of other vehicles to drive on Barrett's Lane.
>
> In 1998 Mitton bought 342 Grafton Street where he set up his dental surgery and some other businesses. Shortly afterwards, Mitton had a visit from the Fire Marshall's office. They advised him that it was his responsibility to keep Parcel A clear of snow and vehicles so the fire department could access a fire hydrant on the property. He also proposed to have his oil, propane and garbage pick-up on Parcel A. He advises he became tired of policing Parcel A so as to keep it clear of parked motor vehicles. His solution, in late 2004, was to construct a fence which had the effect of cutting Parcel A off from the balance of Barrett's Lane. He also received a quit claim deed to the property from Maritime Electric. Mitton, by erecting his fence and obtaining a quit claim deed, was claiming ownership of Parcel A. As to the balance of Barrett's Lane (the west parcel), the evidence before the trial judge was that Mitton said: "*...it was a public right-of-way so I should have access to it - or anybody, not just me, you or anybody here should have access to it, because if they want to drive in there, they should be able to drive in there.*"[9].

An earlier image of Barrett's Lane taken in 2009 appears in Figure 5. The oil storage tank and disputed parking area over Parcel "A" can be seen in the image.

[9] Ibid., at paras. 68 and 69

Figure 5: Barrett's Lane viewed looking south from Grafton Street in August, 2009[10]

What this does is give the context in which the minutes of settlement were drafted and which were now before the court for interpretation. The minority decision concluded:

> I am fortified in my conclusions by the fact that if the intent was to limit Mitton's access to Parcel A only and then only for the purposes of oil, propane, garbage and fire services, it would have been so very, very easy for them to have said so. If ingress/egress was intended to be from Grafton Street only, it would have required only an addition of three words namely "*to Grafton Street*" to clause five. Surely such experienced businessmen and lawyers could have accomplished that task if, in fact, that was the intention of the parties. Had the parties intended the 2006 contract to deal only with Parcel A or to limit Mitton to Parcel A, they would have clearly and succinctly stated this in the contract. Furthermore, they would not have used words such as "*over the entirety of land, commonly known as Barrett's Lane being a roadway*" and "*over the whole of Barrett's Lane*."
>
> The question put before the trial judge was: did the fence constructed by Bassett block Barrett's Lane? The answer is: the fence blocked Mitton's access to Barrett's Lane contrary to the 2006 contract[11].

The majority took a different approach. After pointing to the evidence that was available to the application judge - based on what was available from the original trial, numerous defects were found. Nonetheless there was sympathy extended to the court below:

[10] GoogleStreetView® image dated August, 2009. All rights reserved.

[11] *Bassett v. M-5 Enterprises Inc.*, at paras. 85 and 88

> The question posed in the 2013 Application demonstrates that paragraph 4 of the Agreement is ambiguous. The context of the Agreement as a whole informs a view, but does not resolve the ambiguity. Imprecise drafting employed in the Agreement regarding both the facts and the law increase the challenge of contractual interpretation. Based on the mixed terminology used in the Agreement, I can understand why the applications judge concluded that Mitton obtained what he called "*non-specific rights of ingress and egress over Barrett's Lane*."
>
> Paragraph four must be considered in its place within the Agreement as a whole. I will consider the other provisions[12].

To consider Paragraph four in its place within the Agreement, the majority reviewed all the other paragraphs and ultimately described the relationship between factual matrix and subjective intention thus:

> The subjective intent of a party to an agreement is of course of no concern, as subjective intent it is not eligible for consideration as part of the factual matrix. However, conflicting statements about the content of discussion between the parties could form part of the factual matrix, and could be an important component.
>
> In my assessment, resolution of this conflict at the applications stage would have been helpful; however, I should not resolve the conflict now based on the evidence before this Court. The conflicting evidence was by affidavit, the statements in issue are self-serving, and the evidence was not developed or tested at the applications stage. There was no cross-examination on the affidavits; the deponents' references to what counsel said are hearsay; and no corroborating evidence on the statements attributed to their counsel was proffered or called for.
>
> I am satisfied this Court can render a proper decision without choosing between the conflicting evidence. I proceed based on the advice in Hall: *Canadian Contractual Interpretation Law*, at page 31. Within the application of the principles of contractual interpretation, given the paramount importance of the words of the Agreement, being the language agreed upon by the parties to govern their legal obligations, as in all cases of conflicts, the words will always prevail over the context. The factual matrix can be used to clarify the intentions of the parties expressed in the Agreement, but not to contradict that intention, create an ambiguity that does not otherwise exist, or have the effect of making a new agreement. The proper approach is to keep the primary focus on the words used in the Agreement, with the factual matrix somewhat in the background. On that basis, paragraph 4 can be interpreted effectively without resolving the mentioned conflict in the affidavit evidence of the parties.

[12] *Ibid.*, at paras. 13 and 14

> In summary, the factual matrix informs me that when the Agreement was made: the boundary fence from the jog along to the south end of Barrett's Lane was in existence substantially as it had been continuously for decades; neither Mitton nor his predecessors ever had ingress and egress through or across the boundary between Mitton's property and Barrett's Lane; Barrett's Lane was physically a closed-in laneway with ingress and egress only at Grafton Street, and was used as a service lane and for tenant parking, and never used as a thoroughfare; Bassett had used Barrett's Lane as a laneway for the tenants of his properties, and Bassett's tenants both entered and exited in their vehicles at Grafton Street.
>
> In my opinion, the intention of the parties stated in paragraph four of the Agreement is that they were both obligated to ensure there would be no parking or other blocking of Barrett's Lane. "Parking" refers to vehicles, and "other blocking" also refers to vehicles and to like kinds of blocking. The parties agreed in paragraph two that Mitton must remove the portion of his fence he erected in 2004 which had severed Parcel "A" from Barrett's Lane. Paragraphs four and five should be read together to cover the expressed contemplation of the parties that they would keep Barrett's Lane clear of parked vehicles that would block their ability to exercise their respective interests. Those interests were namely, Bassett's for tenant passage and parking, and Mitton's to service his utilities.
>
> In my opinion, a fence along the boundary between Barrett's Lane and the back of the Mitton property does not violate paragraph four of the Agreement. A boundary fence does not block Barrett's Lane, as it existed in 2006 when the Agreement was executed. It does not change the character of Barrett's Lane as it existed at the time of the Agreement. A boundary fence is vertical, and takes up virtually no surface area of Barrett's Lane. The boundary fence erected by Bassett that precipitated Mitton's 2013 Application is no different in character than the boundary fence that was there for decades and which Mitton replaced in 2004.
>
> The parties designed the Agreement to remedy particular mischief, and to recognize existing interests which the parties had expressed leading up to the Agreement. It settled a court proceeding. The parties made the Agreement regarding their interests in a closed-in laneway. The boundary fence does not inhibit Mitton from the agreed "open egress and ingress" over Barrett's Lane, the character of which at the time of the Agreement was only to and from Grafton Street[13].

The fence was allowed to remain. This is a decision which makes for worthwhile reading because it identifies, in its split, a competing approach to the resolution of subjective intention and the weight to be attached to same. To suggest that subjective intent ought not to contradict a factual matrix, and that the focus should be on the words themselves, places

[13] *Ibid.*, at paras. 34 to 40

intention at a rather low level of importance. The dissenting judgment remains helpful nonetheless. This is especially so when one appreciates the fact that the court did really inquire into the understanding of the parties as to what "Barrett's Lane" actually was. Was it a private right of way? Was it a public Lane? Whatever it is that the parties understood, ingress and egress from Grafton Street remained intact and available to both sides, although access to the strip by Mitton from Mitton's side was essentially blocked. For professionals working in the field of real estate law and property boundaries, this is one further example of the dynamic nature of the common law and how rights in land are both relative and dependant on the original document which creates those rights.

Editor: Izaak de Rijcke

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We thank all who attended this year's conference: *Linking Parcel Title and Parcel Boundary: Improving Title Certainty*. [15] This full day event explored new paradigms in bringing certainty and predictability in the location of parcel boundaries on the ground. For the convenience of professionals who reside in northern Ontario or otherwise were unable to attend in person, the online version of the conference will includes the presentations, papers and slide decks from presenters as well as a forum for discussing ethical issues in the delivery of professional services.

[14] 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.

[15] The online version of the conference qualifies for 12 *Formal Activity* AOLS CPD credits.

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[16] This course qualifies for 12 *Formal Activity* AOLS CPD credits.