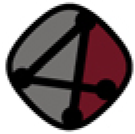

The Boundary Point

Volume 2, Issue 1, January 2014

CASE COMMENTARIES ON PROPERTY TITLE AND BOUNDARY LAW

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

In this issue we consider the effect of having an honest, but incorrect, belief in a boundary location. If the mistake is acted upon and results in an encroachment, does it matter if the belief was arrived at "honestly"? Under these circumstances can carelessness be excused if the honest belief is especially earnest – even zealous? What is the duty on a property owner to get an up to date survey plan so as to be sure to get the boundary location "right"? Two recent cases which wrestle with these questions are considered below.

Mistaken but Honest Belief about a Boundary

Key Words: *mistake, encroachment, improvement, belief, diligence, boundary, survey plan*

The April, 2013 issue 4 of *The Boundary Point*[1] considered the effect of an encroaching deck built under a mistaken belief that the land on which the structure was built belonged to the homeowner. The resulting litigation in *Langley v. Yang*[2] left the neighbour with a forced "private expropriation"; readers will recall the "balance of convenience" test in determining whether or not to allow Yangs' encroachment to continue. It was allowed to continue, but in large part as a direct result of concluding that there was no inconvenience to the Langleys – they could not easily access the encroached area due to a line of boulders.

Since *Langley*, we now have the benefit of two further decisions: one in British Columbia, the other is Alberta. Both of these decisions will be discussed below; collectively, they indicate an interesting trend when it comes to boundaries.

[1] http://4pointlearning.ca/4PL/TheBoundaryPoint_vol1(4).pdf

[2] *Langley v. Yang,* 2012 BCSC 1520 (CanLII), http://canlii.ca/t/ft8dx

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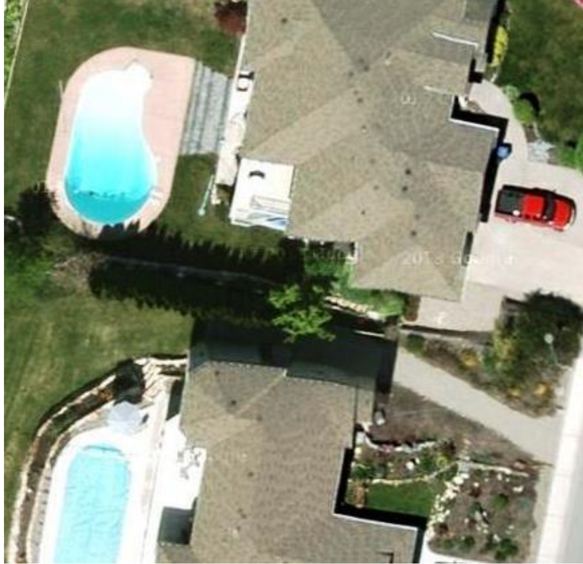

…it just seemed so right[3]

In *Oyelese v. Sorensen*[4], the parties were neighbours in Kelowna. The Sorensen swimming pool was discovered to have been partly built onto the backyard of the Oyelese property. Neither parties were owners at the time the encroachments were built or installed about 12 years ago. Interestingly, this was a proceeding in which the Oyeleses wanted a court declaration that the encroachment existed and that Sorensen be directed to remove the swimming pool at their expense. Sorensens wanted an order from the court directing a conveyance of the land encroached upon from the Oyeleses or, in the alternative, a court ordered easement allowing the encroachment to continue.

Like *Yangley*, the court began by identifying the relevant legislation and how that would be applied:

> The applicable statutory provision is s. 36(2) of the *Property Law Act*, R.S.B.C. 1996, c. 377 (the "Act"):
>
> > 36(2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application
> >
> > a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,
> >
> > b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or
> >
> > c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

[3] All images were sourced from *GoogleMaps®* in October, 2013. All rights reserved.

[4] *Oyelese v. Sorensen*, 2013 BCSC 940 (CanLII), http://canlii.ca/t/fxq74

> The first issue that arises is whether s. 36(2) of the *Act* is engaged. If so, the court must then consider the relevant factors toward deciding where the balance of convenience lies, which party is entitled to a remedy, and what remedy is appropriate[5].

The need for a "fence" that surrounded the encroaching area was the first criterion to be satisfied. The court stated,

> Section 36(2) of the *Act* is only engaged when the encroachment consists of a "building" or relates to a "fence" that has been "improperly located so as to enclose adjoining land". It is common ground that the encroachments here include the fence, a swimming pool, and landscaping around one end of the pool, and that they do not meet the definition of a "building".
>
> It is clear in this case that the chain link fence essentially cuts off an area of land from the Oyeleses' property. It extends from the correct property line between the two lots on Raven Drive, or near it, and continues for the length of the Oyelese lot to the property boundary of their neighbour to the west, creating a wedge of land as the encroaching area. The encroaching chain link fence does not itself truly "surround" the encroaching area, however. On that western boundary, the neighbour has his own chain link fence on his side of the property that borders the encroachment area. Mr. Sorensen also has a wooden fence from the end of that neighbour's fence which continues north along the back of his yard.
>
> The Oyeleses argue that the encroaching fence must define or "enclose" the encroaching area in that the fence must be wholly located within that area. They say that the fence on the neighbour's lot to the west has nothing to do with the Oyeleses' lot, and thus it cannot be considered as part of the encroaching fence by which the area is "enclosed". Further, Mr. Sorensen's own wooden fence at the back does not extend to the encroachment area. Therefore, they say that the definition under s. 36(2) of the *Act* cannot be met.
>
> The *Act* is, in accordance with s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, to be construed as "remedial" and is to be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> …
>
> In *Vineberg v. Rerick*, [1995] B.C.J. No. 2506 (S.C.), the lots were demarked by a fence, a hedge and trees. It was argued that since the fence had gaps and was no longer standing, no jurisdiction for relief under the Act existed. Mr. Justice Leggatt rejected that argument:
>
>> [17] To interpret s. 32 in such a manner as to remove the Court's jurisdiction in this case is to defeat the purpose of the section. While the fence is no longer standing, it "had been improperly located" within the meaning of s. 32.

[5] *Ibid.*, at paras. 15 and 16

> Moreover, although the fence never did fully surround the area in question, I find that it did "enclose" the land for the purposes of the Act. To say otherwise would impose too strict a criteria on what has been construed as a section created to provide equitable relief[6].

The court heard much evidence about the amount of "due diligence" that was conducted by both parties at the time of purchase. This issue is more than just a passing interest; in Vineberg, a key factor was stated to be the parties' *comprehension of the property lines*[7].

> I consider that, to a large extent, both the Oyeleses and Mr. Sorensen are equally innocent in this unfortunate situation. Both bought their properties thinking that the encroachments were part of Mr. Sorensen's property. The fault seems to lie with the original location of the chain link fence and the Dions'[8] reliance on that fence to demarcate the property line, together with a lack of independent verification of the property line when the Dion pool was installed. In this regard, Mr. Sorensen relies on the following comments of the court in *Vineberg*:
>
> > [22] …Furthermore, while it may be advisable for individuals to conduct a survey on property they intend to purchase, I do not find that the petitioner was negligent in not determining the proper boundary before he purchased the property. When he purchased the property, he had no specific reason to have a survey completed and, at the time, the property line seemed clearly marked.
>
> Whether the Dions were negligent or not remains to be seen, although the remarks of the court in *Langley*, at para. 11, are apposite: "no reasonable person ... would have embarked upon an expensive landscaping project without establishing the boundary by means of a proper survey". Whether they were negligent stands to be determined, of course, in relation to their dealings with Mr. Sorensen.
>
> Overall, however, I consider that Mr. Sorensen is, to some extent, the author of his own misfortune, since he specifically sought and obtained clarification concerning the location of the structures in the backyard, including the pool, and had the opportunity to see that the Survey Certificate was not an official document. The "homemade" Survey Certificate might have raised red flags for his consideration before proceeding to close the transaction.

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[6] *Ibid.*, at paras. 17 to 22

[7] In *Vineberg*, this was stated (at paragraph 20), as follows:

> The comprehension of the property lines: Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are three degrees of knowledge: honest belief, negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.

[8] The Dions were prior owners.

> In essence, he knew or should have known that he was relying solely on the statements of the Dions concerning the location of the pool, rather than those of a land surveyor[9].

Ultimately, the court ruled in favour of Oyeleses. In making the following determinations, the court stated that it had heard no evidence that the pool could not be relocated. This was an expensive outcome indeed. An up to date survey would have been a fraction of the cost.

> Accordingly, the Oyeleses are entitled to a declaration that the swimming pool, associated structures, fence and hedge encroach on their property at 282 Raven Drive, Kelowna, British Columbia. There will be an order that Mr. Sorensen remove the swimming pool and associated deck area only as it is located in the encroachment area. He will be required to restore the land now occupied by the encroaching end of the swimming pool and deck to a level state. No submissions were made on how long would be needed to accomplish that removal and filling in of the pool area, but I consider that 75 days should be sufficient[10].

Readers are invited to refer to the full text of this case. There is considerable comment made by the court about the efficiency of "updating" an old survey by attaching a copy to a sworn declaration or accepting a survey plan with the swimming pool location added later in freehand.

This "do-it-yourself" approach to the communicating of survey information was also considered in the subsequent decision in *Deguire v. Burnett*[11]. Mr. Deguire was owner of Lot 27 and Mr. Burnett owned neighbouring Lot 28 in a subdivision in in Lac Ste. Anne County, Alberta. The Deguire home and well encroach onto Burnett's Lot 28 by almost 6 m and 15 m, respectively. As the court noted, "when he made these improvements, he believed that they were located entirely on his own land – that is, within the boundaries of Lot 27"[12].

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[9] *Ibid.*, at paras. 46 to 48

[10] *Ibid.*, at para. 87

[11] *Deguire v. Burnett*, 2013 ABQB 488 (CanLII), http://canlii.ca/t/g0bfw

[12] *Ibid.*, at para. 4

…there seemed to have been plenty of room

The relevant statute in Alberta uses language which is very different from British Columbia's *Property Law Act*. Section 69(1) of Alberta's *Law of Property Act* provides:

> When a person at any time has made lasting improvements on land under the belief that the land was the person's own, the person or the person's assigns
>
> a) are entitled to a lien on the land to the extent of the amount by which the value of the land is enhanced by the improvements, or
>
> b) are entitled to or may be required to retain the land if the Court is of the opinion or requires that this should be done having regard to what is just under all circumstances of the case.

This is considerably simpler than the language found in the British Columbia statute[13]. Courts have interpreted it to reach a result not dissimilar:

> In *Mund v Medicine Hat (City)* 1988 ABCA 168 (CanLII), (1988), 86 AR 392 (CA) at para. 12, Harradence JA, having considered the requirement under the predecessor to Section 69(1) that the applicant be "under the belief that the land was his own", said:
>
>> That belief need not be reasonable, so long as it is honestly held. In that regard, the reasonableness of the belief will be relevant as to whether the belief was in fact honestly held: see *Welz v. Bady*, [1949] 1 D.L.R. 281 (Man. C.A.) and *Maly v. Ukrainian Catholic Episcopal Corporation of Western Canada* (1976) 70 D.L.R. (3d) 691. To summarize, the Plaintiff must establish that he had an honest belief that he owned the land upon which the lasting improvements were made.

[13] The Alberta section is similar to legislative provisions found in Manitoba and Ontario.

> This would appear to be the clearest possible statement of our Court of Appeal that
>
> 1) the requisite belief may be unreasonable, but it must be *bona fide*, in the sense of being honestly held, and
>
> 2) the unreasonableness of the belief is relevant to its honesty.
>
> While I am bound by *Mund*, it is worth adding that this statement is, on the language of Section 69(1), clearly correct. The Legislature has required that, to obtain a remedy under Section 69(1), Mr. Deguire must show that he was "under the belief that the land was [his] own". Had the Legislature intended to afford Mr. Burnett a defence of unreasonableness, it would have been an easy matter for the Legislature to have imposed upon Mr. Deguire the burden of showing that he was "under the reasonable belief that the land was [his] own." Mr. Burnett is therefore not asking me to strictly construe Section 69(1); he is asking me to add something to Section 69(1) that is not there.
>
> At the same time, *Mund*'s direction that the reasonableness of the belief may be considered in evaluating a belief's honesty makes sense. The more reasonable the stated belief about the location of improvements, the more likely it was honestly maintained. Conversely, an unreasonable belief about the improvement's location is less likely to have been honestly maintained[14].

The decision in *Deguire v. Burnett* is very insightful as to whether the belief must be honest or even reasonable and culminates in the following conclusion as to the state of the law with respect to not getting a survey plan:

> I should add, in view of the parties having touched upon the decision of my colleague Sanderman J's decision in *Jones v Semen*, 1999 ABQB 473 (CanLII), 1999 ABQB 473, that I do not see that decision as inconsistent with *Mund*. While Sanderman J's statement (at para. 24) that the applicants were "foolish not to have the land properly surveyed" suggests unreasonable conduct on their part, he went on to describe why "[o]ne can understand in these circumstances [that the applicants] did not feel compelled to survey the land" and that "[o]ne cannot ascribe any *mala fides* to them", and finally that they made an "honest mistake". I take this as a finding by Sanderman J of a reasonable basis for the applicants' belief that they were making improvements to their own land, which further supported a finding that the belief was honestly held. This is the very analysis that *Mund* expressly contemplates[15].

[14] *Ibid.*, at paras. 26 to 29

[15] *Ibid.*, at para. 37

Both parties in this proceeding had brought a motion for summary judgment.[16] In the end, neither side was successful; this simply meant that the proceeding will go on to a full trial. In reaching this conclusion, the court made key findings about the duty of a landowner to at least *try* and ascertain the location of one's boundaries:

> Mr. Burnett, however, deposes that all the survey posts were visible to him when he walked around the property. This contradicts Mr. Deguire's evidence on a key element of his explanation for why he situated the house as he did, and raises the suggestion that, contrary to his evidence, he knew or was willfully blind to the location of the stakes, or that he was at best reckless in failing to look for what might be seen[17].

These two cases in 2013, much like *Langley v. Yang* decided in 2012, underscore the potential consequences of not getting a survey. One does not immediately think of a potential boundary relocation to rectify the results of constructing buildings or improvements which are later found to encroach. That a boundary should be adjusted at all is not a conclusion which courts reach easily. There is a reluctance to reward carelessness and there is a balancing of convenience and equities between the parties. Both *Oyelese* and *Deguire* were cases that were expensive to litigate; it is unlikely that the remedy sought from the courts will be readily pursued in similar cases in the future – unless (and readers have no information on this) the litigation was actually pursued or defended by title insurance companies in the name of either one or both parties.

Editor: Izaak de Rijcke

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[18] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

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[16] "summary judgment" is a procedure used to reach a determination of issues without the need for a full trial.

[17] *Supra*, note 9 at para. 47

[18] 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.

First Annual Boundary Law Conference – Online Version

This online version of the conference *Parcel Title and Parcel Boundary: Where Lawyers and Surveyors Meet*[19] held November 2013 includes the presentations, papers and slide decks from most of the presenters. The purpose of the conference was to review – in a shared lawyer / land surveyor context – recent developments in boundary law as emerging from courts.

The Professional Land Surveyor in Canada as Expert Witness

Developed with the support of ACLS and GeoEd, this online, self-paced course[20] explores all aspects surrounding the role of the professional land surveyor in Canada in assisting – as an expert witness – the decision maker in a legal proceeding. From retainer to report writing to court room, this course is a must if planning to assist in a legal proceeding as expert witness. Plans are presently in place to offer a live "mock hearing" at a location in Ontario in late April, 2014. Live streaming video to that event will be available only to registrants in this course.

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[19] This conference qualifies for 12 *Formal Activity* AOLS CPD hours.

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