The Boundary Point
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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 problem arising from an owner's use of land, which is subject to a right of way, but the use amounts to an encroaching structure. Generally speaking, rights of way exist to permit a right of use by the owner of a right to pass over, or otherwise enjoy some form of non-exclusive feature of ownership. But for the right of way's existence, the use would be a trespass. What happens when the owner of the underlying title builds a structure which encroaches into the right of way space? This occurred in *Weidelich v. de Koning*[1]. In determining the relative rights of the parties, the fact of a structure crossing over the boundary of the right of way was not a basis for making that structure unlawful. Instead, readers will find the analysis used by the court helpful in understanding that boundaries of rights of way may have different qualities from the boundaries of a fee simple parcel.

Encroaching into a Right of Way: When does it become Actionable?

Key Words*: easement, right of way, encroachment, laneway*

Easements and rights of way[2] play an essential role in real estate law in Canada. These are legal means by which passing over another person's land to reach one's own parcel may occur, without it being deemed to be a trespass. In many instances, the rights of the dominant owner

[1] *Weidelich v. de Koning,* 2014 ONCA 736 (CanLII), http://canlii.ca/t/gf30c

[2] In this issue, the expressions "right of way" and "easement" are used interchangeably. Although an easement is, in essence, a right over another's land, any right claimed as an easement must satisfy the common law definition as found in *Re Ellenborough Park*, [1956] Ch 131. As a convenient reminder, in that English decision, the court laid out the essential characteristics of an easement as follows:

- There must be a dominant and a servient tenement;
- The easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit;
- The dominant and servient owners must be different persons;
- The right claimed must be capable of forming the subject-matter of a grant.

Courts in Canada have broadly adopted these characteristics as necessary elements for an easement to legally exist.

are so great as to make the usefulness of the burdened land virtually sterilized for the servient owner. On the other hand, the servient owner does still enjoy title and, when overlapping rights apply in respect of the same parcel of land, courts may be called on to balance or clarify the nature of the respective interests in that one parcel. In *Weidelich v. de Koning* an addition had been built by the owner of the servient tenement (de Koning) into a right of way that provided vehicular access to the rear of several row house properties. Many readers would quickly conclude that this is straightforward: if the structure crosses the right of way boundary, it encroaches and if the encroachment projects into the space of the right of way, then it is unlawful. But as *Weidelich* shows, this is not necessarily so.

The facts in Weidelich are relatively straight forward. The area of concern appears as a cross-hatched portion on a partial copy of a topographic survey plan which had been appended as a schedule to the Court of Appeal decision. Figure 1 below is a reproduction of the schedule from the decision.

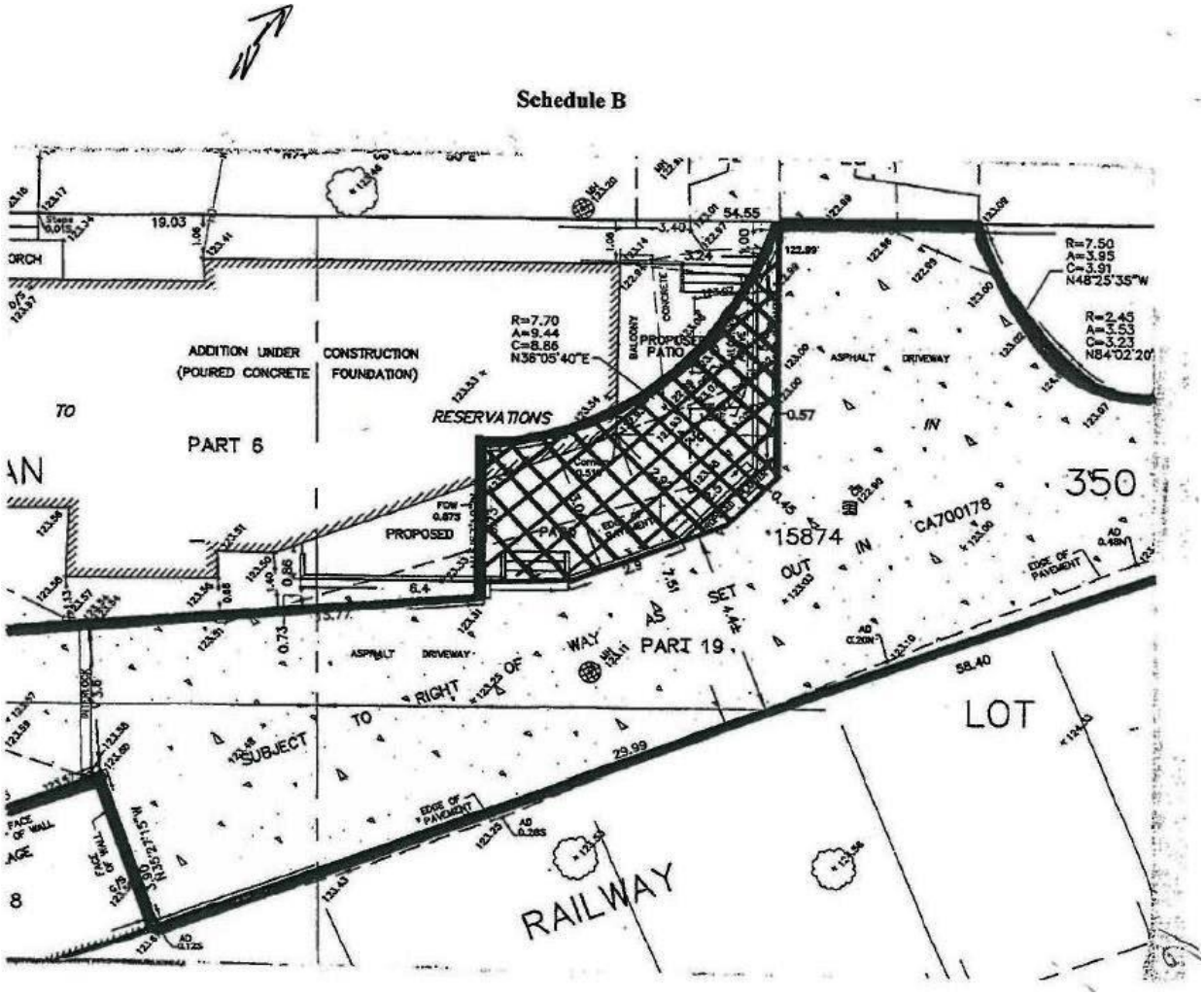

Figure 1: Schedule attached to decision in *Weidelich v. de Koning*, 2014 ONCA 736, at page 14.

Viewed from the air, Cottingham Street appears to the north and the railway appears to the southeast in the image at Figure 2.

Figure 2: The area of concern is pointed out. From Bing® maps. All rights reserved.

The court described the overall configuration as follows:

> Each of the six properties backs onto a private laneway. Six garages (one for each home) stand on the south side of the laneway. Entrance to the laneway runs south from Cottingham Street directly to the east of the respondents' home. The laneway traverses lands owned by each of the six homeowners, and those lands are subject to a right-of-way described in each property's title documents. For example, the respondents' deed provides that their ownership is:
>
> > SUBJECT to a right-of-way in favour of the owners and occupants from time to time of [the other five properties] … over, along and upon … Part 19 … for the purpose of vehicular ingress and egress.
> >
> > The part of the laneway that passes over the respondents' property, identified as Part 19 in the deed, is 3.6 metres at its narrowest point. The laneway

> continues west onto the appellants' properties where its narrowest point is 3.5 metres[3].

Ordinarily, references to the "width" of a right of way would be understood as the lateral space available across the right of way for purposes of driving a vehicle. However, that "width" behind the row houses was less than what remained available as a "width" next to the respondents' home after the addition had been constructed. The court summarized this fact as follows, and by referring to the lower application judgment[4] from which the appeal had been taken:

> The Addition encroaches upon Part 19. However, the right-of-way remains at least 4.4 metres wide wherever the Addition encroaches on it. Schedule B of the application judge's reasons depicts the right-of-way and the encroachment (the cross-hatched section). I have appended a copy of that Schedule to these reasons.
>
> …
>
> The application judge found, at para. 11:
>
> > *[T]he Encroachments caused by the Addition do not create a real or substantial interference with the use of the laneway for vehicular access: it remains as accessible and passable now as it was before the construction, subject to the obvious result that the portion of Part 19 on which the Addition has been constructed can no longer be driven over.* Despite that limitation, however, it is still possible for vehicles (including delivery trucks) to traverse across the remainder of Part 19 unimpeded for purposes of accessing the remainder of the laneway[5]. [emphasis added]

In dismissing the application below, the judge had used a "substantial interference test" in arriving at this conclusion:

> The question thus becomes whether the construction of the Addition and the Encroachments into a portion of Part 19 amounted to a substantial interference with the right-of-way enjoyed by the applicants. Bearing in mind that the purpose of the right-of-way was to permit the applicants to have the vehicular ingress and egress to the remainder of the laneway, in my view the evidence establishes that they continue to have reasonable access. The portion of Part 19 that is occupied by the Encroachments does not prevent them from using the right-of-way for the purpose for which it was intended. It may well be that they will need to make the turn behind No. 61 a bit more slowly or with more caution, but in my view that does not amount to an impairment of the right of access to and over Part 19 to which they are entitled. Rather, such right of access continues unimpeded.

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[3] *Weidelich v. de Koning*, 2014 ONCA 736, at paras. 2 and 3

[4] *Weidelich v. de Koning*, 2013 ONSC 7486

[5] *Supra*, note 3, at paras. 5 and 7

> It follows that, in my view, the construction of the Addition and the creation of the Encroachments do not amount to a violation of the property rights of the applicants[6].

On appeal, the appellants tried to move away from the substantial interference test and focus on an objective "bright line": the addition either crosses the right of way boundary or it does not. This effort was described in the appellate reasons as follows:

> The appellants do not challenge the finding that the respondents' Addition does not affect the appellants' ability to drive to and from their garages along the laneway. Counsel contends, however, that the encroachment is actionable even if it does not interfere with the appellants' ability to use the right-of-way for the purpose identified in the deed. Counsel submits that the appellants have a right to use the right-of-way's entire width for the purpose of vehicular ingress and egress. He maintains that the erection of a permanent structure on any part of the right-of-way necessarily compromises the right granted because the appellants cannot pass over that part of the right-of-way. In counsel's submission, the encroachment's practical effect on the appellants' ability to use the right-of-way for its granted purpose is irrelevant[7].

However, as attractive as this approach may be to land surveyors, it was not adopted by the court. Instead, the court went out of its way to point out that this dispute was not about the correct location of the boundaries of a right of way. Citing the recent decision in *MacIsaac v. Salo*[8], the court pointed out:

> … this case is not about defining the boundaries of the right-of-way. They are clearly delineated in the deed and are not in dispute. Nor is there any dispute that the respondents' Addition encroaches over the boundary line onto the right-of-way. The sole issue here is whether that encroachment is actionable. Nothing in Spencer assists in that determination.
>
> The appellants have not persuaded me that encroachment by a permanent structure is actionable absent actual, substantial interference with the granted right. On the trial judge's factual findings, the appellants cannot meet that burden[9].

What does this mean? Do the boundaries of a right of way that may be described in a deed or reference plan mean nothing? Perhaps not, but a more important question to ask today is: what will determine the spatial extent of property rights that contemplate a *use* as opposed to

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[6] *Supra*, note 4, at paras. 26 and 27

[7] *Supra*, note 3, at para. 8

[8] Referred to in the decision as: *Spencer v. Sallow*, 2013 ONCA 98, 114 O.R. (3d) 226, leave to appeal refused, [2013] S.C.C.A. No. 174

[9] *Supra*, note 3, at paras. 29 and 30

outright *title*? In Figure 3, the appearance of the right of way driveway, viewed from Cottingham Street can be seen before any construction of an addition had been started.

Figure 3: Google® Streetview® imagery from Cottingham Street, dated August, 2011. All rights reserved.

A comparison with the image at Figure 1 leaves one wondering about how much measured width between boundaries is actually necessary in order to allow for the use to be enjoyed. This was not a test which the court was prepared to apply. Instead, the court turned to a consideration of "substantial interference" by weighing the nature of the overlapping (and potentially *competing*) rights:

> The requirement that the dominant owner prove substantial interference to maintain a claim reflects the nature of the dominant owner's right. He or she does not own the right-of-way or the land upon which the right-of-way runs, but only enjoys the reasonable use of that property for its granted purpose. The dominant owner may only sustain a claim predicated on substantial interference with that reasonable use. The distinction is between the rights of ownership and the right of reasonable use for an identified purpose[10].

The court also rejected an examination of the underlying intention of the servient owner in building an encroachment into the right of way. Referring specifically to a recent case[11] which held otherwise, the court concluded:

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[10] *Supra*, note 3, at para. 12

[11] *Albiston v. Liu*, [2013] O.J. No. 3685 (S.C.). *Albiston* is a decision of Small Claims Court. It is also reported in CanLII as: *Albiston v Liu*, 2013 CanLII 49799 (ONSCSM), http://canlii.ca/t/g01zm At paras. 51 to 53, the court stated:

> In [*Albiston*], the trial judge held a trivial interference by a permanent structure may not be substantial if the defendant inherited the encroaching structure, but a trivial interference by a permanent structure is substantial if the defendant deliberately built on the right-of-way. This decision stands alone in relying on the deliberateness of the defendant's conduct, rather than on the degree of actual interference, to define substantial interference. I think *Albiston* was wrongly decided[12].

In conclusion, the test for determining whether or not an encroachment into a right of way by the owner of the servient tenement is actionable is to look at the *nature of the interference on the use*. Neither the fact of merely "crossing the line", nor the presence of a deliberate intention to build into the right of way, will serve as indicators of whether a claim will succeed. Instead, a broader consideration of all the circumstances, and leaving matters to be determined on a case by case basis, is the appropriate framework from which to approach this analysis.

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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.[13] 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.

> Given these divergent approaches, the question then becomes whether substantial interference is a matter of a permanent structure and thus derogation from the grant regardless of use, as urged by the plaintiffs, or one of use, regardless of permanence or derogation by the obstruction or structure, as urged by the defendants.
>
> Do the encroachments in this case, being a permanent structure, derogate from or abridge or substantially interfere with the full enjoyment of the ROW by the plaintiffs?
>
> While the uses by the plaintiffs may not have changed, there is no question, that there is a legal abridgment of the spatial make-up of the ROW as defined in *Devaney v Boyce*. With the encroachments, the ROW is no longer as wide as described in the original grant. There is indeed a diminution of the ROW and derogation from the grant. The defendants knew of the extent of that grant as witnessed by their approaching the plaintiffs prior to construction to perhaps eliminate the ROW altogether. Thus, they were obligated to ensure that it was not derogated from in any way, shape or form, when they were constructing their new house.

[12] *Supra*, note 3, at para. 20

[13] 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.

Second Annual Boundary Law Conference

This year's conference theme is: *Linking Parcel Title and Parcel Boundary: Improving Title Certainty*[14]. This one day event (November 17, 2014) reviews recent developments in boundary law as emerging from courts. The format consists of a series of speakers focusing on topics of interest to both lawyers and surveyors. Best practices and discussions of what these two related professions can and cannot do in bringing certainty and predictability in the location of parcel boundaries on the ground may lead to surprising results. Please note that a pre-conference meet and greet will be held on Sunday evening (November 16, from 7-9pm) to foster socializing and networking.

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Developed with the support of ACLS and GeoEd, this online, self-paced course[15] 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.

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

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