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 enforceability of an agreement to create an easement over land. The decision was the result of an appeal from an earlier determination made by a court in Ontario, in which a valid agreement for easement was found to exist. One of the key grounds for appeal was the argument that the contract was merely an "agreement to agree" and that, without the certainty of the terms being settled (including a specifically surveyed location for the easement), the "agreement" was not a contract at all. In *Nordlund Family Retreat Inc. v. Plominski*, the appeal was dismissed; the final survey was not necessary to a finding that there was finality to the agreement.

Agreement to Agree as a Source of Easement Rights

Key Words*: easement, equity, planning, property, contract*

If the law of easements is not complex enough, consider the decision which is discussed in this issue as it relates to the formation of an easement – this time by way of a contract, the enforceability of which had come to be disputed. Although the decision from the Court of Appeal for Ontario (ONCA) in *Nordlund Family Retreat Inc. v. Plominski*[1], is lengthy and a factually detailed case, there do emerge a number of principles which guide a determination of the existence of an easement, as well as the role played by equity. For purposes of understanding these principles, a short summary of the facts will help in appreciating how this case came before the courts initially. Notably, there was no change made by the Court of Appeal to the factual matrix as found by the court below. On a motion for summary judgment, the judge considered an application without a trial. Procedurally, this is now available in many jurisdictions as a means of increasing the efficiency of the quirks, without the expense of a full trial. The court below gave the following summary as a means of "setting the stage":

[1] *Nordlund Family Retreat Inc. v. Plominski*, 2014 ONCA 444 (CanLII), http://canlii.ca/t/g79c8

The properties which are the subject matter of these claims are located on the south side of Basswood Lake. Basswood Lake is located about 100 kilometres east of Sault Ste. Marie, Ontario. The lake is popular for the fishing and boating opportunities it provides. Much of the land surrounding the lake is owned by the Ministry of Natural Resources (the "Crown" or the "Province"). There are a number of cottages located on the lake but the provincial and municipal governments have now limited the number of lots available for development in order to ensure that the wilderness quality of the lake and the surrounding area is preserved.

Some of the properties located on the lake are accessed by driveways and bush roads which are connected to a municipal or provincial road. Many of the properties do not border on municipal or provincial roadways however, and the owners of these properties must arrange to access their properties by way of easements through provincial lands or through lands which are privately owned. Those property owners who are not able to arrange for easements or who do not wish to incur the cost of constructing a road to their properties must access their properties by boat. Naturally, a property which can be accessed by way of a road is considerably more valuable and desirable than a property which is boat access only.

This dispute arises out of an alleged agreement by the parties and their predecessors, whereby the plaintiff claims that the defendant is obligated to provide an easement over its lands to the lands owned by the plaintiff[2].

The topography, and general terrain relative to Basswood Lake, appears in Figure 1 below.

Figure 1: View of terrain and linking roadways between Basswood Lake Road and Basswood Lake[3]

[2] *Nordlund v. Plominski*, 2012 ONSC 5661 (CanLII), http://canlii.ca/t/g352w at paras. 4 to 6

[3] From Bing® Maps. All rights reserved.

In 2004, Mr. Nordlund (described by ONCA as a retired lawyer and US resident), bought land on Basswood Lake as a vacation retreat for his family. The property was one of the "boat access" properties, although it was significant in size. It stretched for about 1 mile along the shore of Basswood Lake. In an effort to secure access to the Nordlund property over land, he entered into negotiations with his neighbour for an easement. The effect of those negotiations, and the resulting agreements and later amendments are summarized by the ONCA as follows:

> In September 2004, Mr. Nordlund entered into an agreement (the "2004 Agreement") with his neighbour Brian Hooey who then owned part of Lot 10 that abutted the Nordlund Property. Under the 2004 Agreement, Mr. Hooey agreed to grant an easement over Lot 10 to the present and future owners of Lots 8 and 9 to permit road access to their property. The 2004 Agreement contemplated a survey and construction of a road at the expense of the owners of Lots 8 and 9, the drafting of an official agreement after completion of the survey and payment of $15,000 upon completion of the official agreement.
>
> The 2004 Agreement provided that the exact route of road access would be determined by the survey and that the easement would be sufficiently wide to accommodate the bringing in of power lines.
>
> Barbara Plominski was the Nordlunds' housekeeper. On or about November 1, 2005, her husband, the appellant Ben Plominski, together with two other individuals (Zenon Zator and his wife Krystyna Dominska), purchased Mr. Hooey's interest in Lot 10. At the time of the purchase, Mr. Plominski, Mr. Zator, and Ms. Dominska signed two documents - an agreement with Mr. Nordlund, and an "Acknowledgement re: Title" addressed to the municipality - in which they agreed to assume Mr. Hooey's obligations under the 2004 Agreement.
>
> Mr. Plominski discovered that the property that he and his co-owners had purchased from Mr. Hooey was landlocked. They had been refused continuing access over part of a road they had been using to reach their property from Basswood Lake Road. Ultimately, in February 2007 they purchased a narrow strip of land on the adjoining Lot 11. The Hooey lands and the part of Lot 11 that were purchased by Mr. Plominski and his co-owners are referred to as the
>
> "Plominski Property." They paid a contractor to construct a new road and to make improvements to an existing road, thus providing direct road access to the Plominski Property from Basswood Lake Road.
>
> It was apparent that the easement necessary for construction of a road to the Nordlund Property had to extend not only over Lot 10 (which was contemplated by the 2004 Agreement), but also over the part of Lot 11 purchased by Mr. Plominski and his co-owners.
>
> When the Plominski Property was originally purchased the intention was for Mr. Plominski and his co-owners to build neighbouring cottages on severed lots. Their application for

> severance was turned down, and in 2007 Mr. Plominski purchased his co-owners' interests in the property. Eventually Mr. Nordlund offered to attempt to sever a lakefront lot from the Nordlund Property for transfer to Mr. Plominski[4].

Thereafter, and as the results of a preliminary survey had become clear, Mr. Nordlund and Mr. Plominski captured their understanding in a further written document as noted:

> In August 2007, after the necessary work had been completed to provide road access to the Plominski Property, and after Mr. Plominski had bought out his co-owners, he and Mr. Nordlund signed a document that the motion judge referred to as the "Easement Summary." The Easement Summary states, among other things:
>
> - The easement for a road to Lots 9 and 8 will start at Basswood Lake Rd. and run through Lots 11 and 10;
> - The road to Lots 9 and 8 must connect from the existing road located on Lot 10 going east;
> - The easement will be 32 feet wide to accommodate necessary turns in the road to avoid rocks and trees but the road itself will be no more than 16 feet wide;
> - The cost of the survey and road construction from the split on the hill going east will be borne by owners of Lots 9 and 8;
> - Maintenance of the common road including fallen tree removal (Basswood Lake Rd. to the split on the hill) will be borne evenly by the owners of Lots 8, 9 and 10 regardless of occupation and/or usage of the lots. Each lot is responsible for paying 1/3 of the maintenance costs;
> - The owners of Lot 10 will not be liable for any injury or property damage which the owners of Lots 8 and 9 and/or their guests may suffer when using the aforesaid easement;
> - The easement is for the present and future owners of Lots 9 and 8;
> - Maintenance of the road from the split on the hill going east will be the sole responsibility of the owners of Lots 8 and 9 until a severance of 250 to 300 feet from the westernmost boundary of Lot 9 is approved and thereafter the costs from the split on the hill to the new west boundary of Lot 9 will be shared in the same manner as the costs to the split on the hill; and
> - Upon signing and delivery of a valid easement agreement from Ben Plominski as the sole owner of Lot 10 and part of Lot 11, Mr. Nordlund will pay Ben Plominski US$45,000.][5].

[4] *Nordlund Family Retreat Inc. v. Plominski*, 2014 ONCA 444 (CanLII), http://canlii.ca/t/g79c8 at paras. 5 to 10

As a sketch that placed the Nordlund Property in context, and relative to Basswood Lake, Nordlund's counsel included a diagram in the factum filed with the court, and is produced in Figure 2 below.

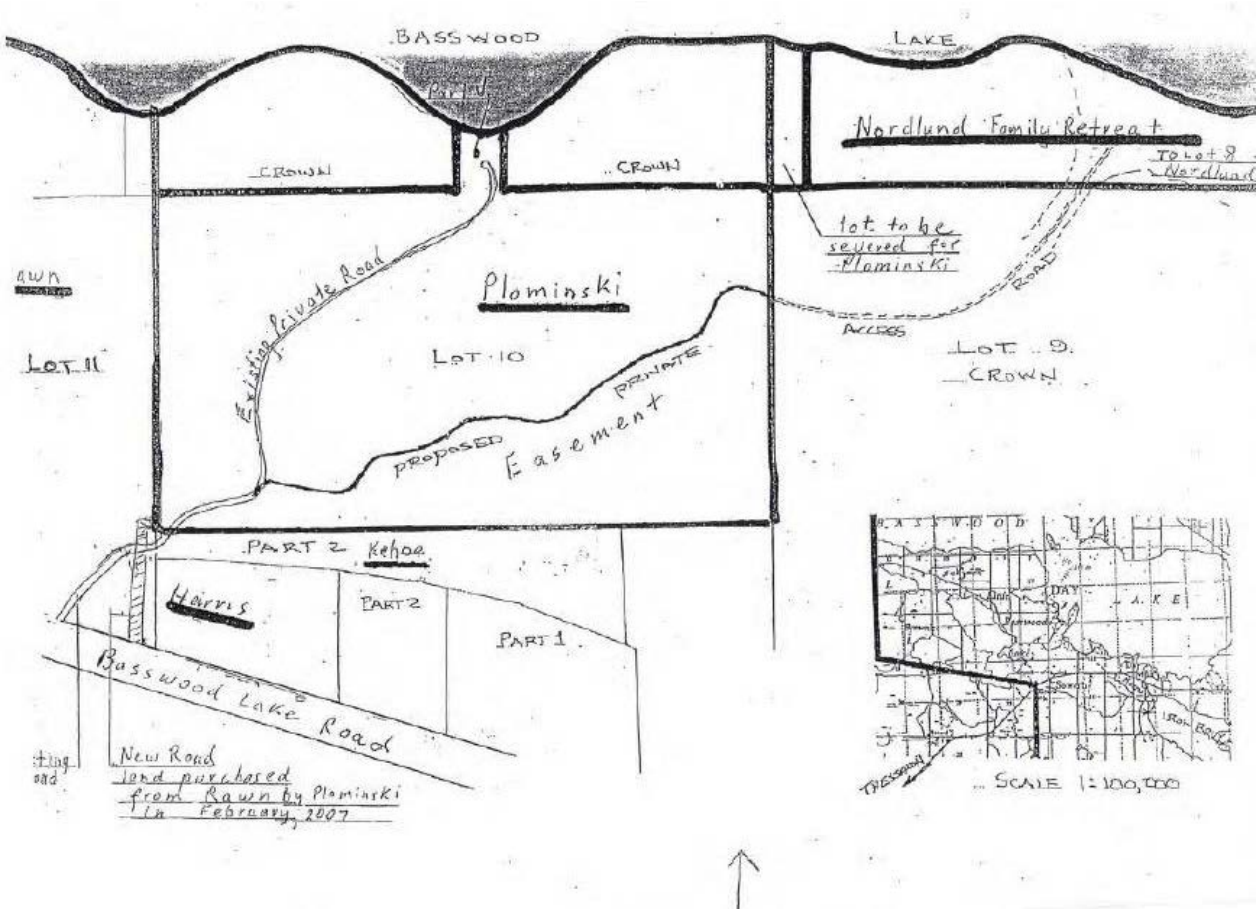

Figure 2: Sketch from Nordlund factum as filed in court[6]

For an easement to be legally established as a registrable interest in land, it not only needs to be described by reference to a survey, it also needs to have local planning approval. Over time, this became an impediment as the availability became more difficult with increased restrictions on development around the perimeter of Basswood Lake. In November, 2009, Nordlund started this court proceeding for an order seeking to enforce the 2004 agreement. The 2004 agreement required Plominski to seek a consent and, among other things, to transfer an easement in favour of Nordlund over a portion of the Plominski land. Nordlund's surveyor was not only tasked to pursue the consent application; he was also retained to produce a survey plan. A copy of the plan showing the proposed easement as a 40 feet wide swath appears in Figure 3 below.

[5] *Ibid.*, at para. 11

[6] Permission to reproduce given by Mr. Fred Skeggs, with thanks.

Of particular interest is the observation made by the court in respect of the depiction of the proposed easement as a 40 feet wide, meandering route.

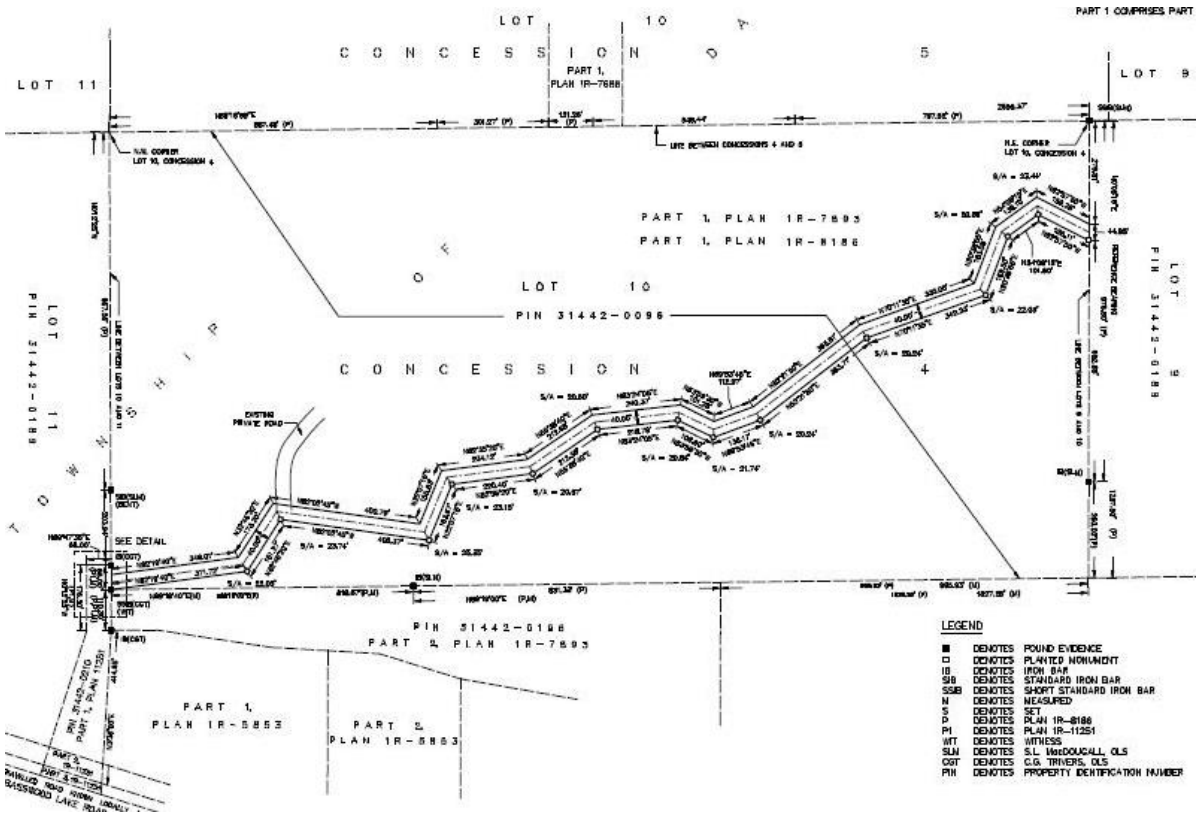

Figure 3: Survey of proposed easement over Plominski property[7]

An interesting argument advanced by Plominski was that the "agreement" was no agreement at all – it was stated as not having the intention of creating legal relations and suffered from too much vagueness as well as uncertainty or lack of essential terms. To this, the court below had stated:

> Although Plominski takes the position that the granting of an easement was conditional on him and his wife receiving a lot, and that he was entitled to withhold the granting of an easement until a lot or monies in lieu thereof was provided to him , this position is in conflict with the wording of the Easement Summary. The third last paragraph is the only paragraph in the Summary which refers to the severance and reads as follows:
>
> > - Maintenance of the road from the split on the hill going east will be the sole responsibility of the owners of Lot 8 and 9 until a severance of 250 to 350 feet from the westernmost boundary of Lot 9 is approved and thereafter the costs

[7] Permission to reproduce given by Mr. Colin Trivers, OLS, with thanks.

from the split on the hill to the new west boundary of Lot 9 will be shared in the same manner as the costs to the split on the hill.

This paragraph provides that maintenance on the easement road will be the responsibility of Nordlund ***until*** the severance is approved (emphasis added). The word "until" indicates that the parties contemplated that easement rights would be granted prior to the approval of the severance.

In my view, the two Summaries of Understanding represent two independent and separate agreements. I note that the Severance Summary is signed by both Donald Nordlund and his wife Jane and by Ben Plominski and his wife Barbara. The Easement Summary is only signed by Ben Plominski and Donald Nordlund. I have already noted that the only reference to the severance in the Easement Summary is a reference which relates to maintenance obligations after an easement is granted, and there is no suggestion that it comprises part of the consideration by Nordlund for the Easement.

In conclusion, I find that Nordlund is entitled to an easement over Lots 10 and 11 on the terms set out in the Easement Summary, and that Nordlund is entitled to this easement notwithstanding the fact that the application process for a severance of a lot on Lot 9 has not been completed. I also find that the parties agreed that in the event the application to sever a lot on Lot 9 was ultimately denied, Nordlund was still entitled to an easement on the terms set out in the Easement Summary[8].

This argument was raised again on appeal and, in disposing of this argument, the Ontario Court of Appeal stated:

The appellant submits that the Easement Summary was not a binding agreement because:

i. By its terms, it is apparent that the parties did not intend the Easement Summary to have binding legal consequences;

ii. The Easement Summary lacks the essential terms required for an enforceable or registrable easement; and

iii. The parties' conduct and communications after signing the document suggest that they were continuing to negotiate the material terms and therefore that they had not arrived at a binding agreement.

The appellant relies on the fact that the Easement Summary stated that it was not to serve as a legal agreement but rather as a summary of an understanding. The motion judge rejected this assertion. He interpreted this language to mean that the parties contemplated the need to enter into a final agreement that could be registered against title after Ministry

[8] *Nordlund v. Plominski*, 2012 ONSC 5661 (CanLII), http://canlii.ca/t/g352w at paras. 84 to 87

approval was obtained and a survey showing the exact location of the easement was completed.

In *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* 1991 CanLII 2734 (ON CA), (1991), 53 O.A.C. 314, Robins J.A. described the issue that confronts a court when deciding whether there is a binding agreement or simply an agreement to agree that lacks essential terms. He stated at paras. 20 and 21:

> The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
>
> However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract…The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself…[9]

This was also dealt with by the court below in the following words – and endorsed by the ONCA.

> In interpreting a document, it must be assumed that the words in the document are intended by the parties to have a meaning. In determining whether the parties intended to enter into a binding agreement it is necessary to determine what the parties meant by the term "legal agreement".
>
> The term must be interpreted contextually, by looking at the context in which the word has been placed in the document and the context and the circumstances in which the document was drafted.

[9] *Nordlund Family Retreat Inc. v. Plominski*, 2014 ONCA 444 (CanLII), http://canlii.ca/t/g79c8 at paras. 50 to 52

> In this case, the parties had not yet obtained a survey which could be registered against the subject lands; neither had they obtained formal approval from the Ministry for an easement. Without a survey, and without formal approval, the parties were unable to enter into a final agreement which could be registered against the property.
>
> The final paragraph of the Summary states that Mr. Nordlund was not obligated to pay for the easement until a "valid" easement agreement had been signed and delivered from Ben Plominski. The Summary therefore contemplates that a more formal agreement would be entered into after certain steps were taken and completed. Presumably, this agreement would be an agreement which could be registered and which would provide the parties with the security to move forward with the clearing of the land and construction of the roadway.
>
> In my view, the Easement Summary was intended to be a preliminary agreement between the parties wherein they agreed that they would undertake certain steps, and assuming these steps were successfully completed they would then draft a final agreement which was capable of being registered against the property. Notwithstanding the fact that the Easement Summary was intended to be a preliminary agreement, there is no reason to believe that it was not intended to be a binding and enforceable agreement[10].

Nordlund stands for the proposition that although parties may negotiate a process and an understanding going forward about the acquisition of a legal interest in land such as an easement, neither that process - nor even the *results* of that process - need to be so specific as to have a final plan of survey prepared in advance. In fact, in *Nordlund*, the parties seemed to anticipate some flexibility or modification in the location of the easement on the ground as might be dictated by topography as well as by other obstructions. Ultimately, even the width of the easement as a passable thoroughfare through forest and rough terrain had to be adjusted and further negotiated – if not in order to save trees (hydro lines for the Nordlund property from the municipal road had to be installed underground), then at the behest of conditions imposed by a planning authority from which consent was sought. Moreover, both courts attached significant weight to the fact that the parties had not only expended considerable money in advancing the implementation of the agreed-upon understanding; they took proactive steps in making significant payments towards such steps along the way. In that regard, the enforceability of an understanding that had already been significantly acted upon gave rise to an equitable remedy known as specific performance.

Property rights can come into existence as a result of the operation of equity in contract law and are no less "rights in land" than what may have been traditionally understood. For lawyers

[10] *Nordlund v. Plominski*, 2012 ONSC 5661 (CanLII), http://canlii.ca/t/g352w at paras. 60 to 64

and surveyors, understanding the nature of these rights, as well as their location on the ground, remains as challenging as ever.

Editor: Izaak de Rijcke

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