



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 explore how land use controls to protect wetlands interact with the physical structure of a roadway so as to impact a private landowner's property rights. If nothing else, the decision which is reviewed highlights the complex relationship that exists between property rights and their spatial extent on the one hand, and how these are impacted on the other hand by a statutory and regulatory control framework. The decision in *Regional Municipality of York v. DiBlasi*¹, is especially interesting because it also engages in a consideration of the meaning of "highway" from legal, jurisdictional and functional perspectives. Furthermore, and at a time when flood risk management is gaining increasing importance, this decision highlights the problems faced by land owners when undertaking work on their own property which might impact the presence or flow of water on neighbouring lands.

Constraining Property Rights to Protect the Flow of Water

Key Words: *highways, land use, scope of expertise, wetlands, conservation, expert witness*

Conservation Authorities in Ontario have existed for many decades as creatures of statute; their objects are set out in legislation:

The objects of an authority are to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals².

One such authority is the Lake Simcoe Region Conservation Authority (LSRCA). Pursuant to regulations passed under the *Conservation Authorities Act*, LSRCA had mapped areas within the watershed under its jurisdiction and identified certain "Regulated Areas". The importance of mapping Regulated Areas is to identify areas of hazards and environmental sensitivity and to

¹ *Regional Municipality of York v. DiBlasi*, 2014 ONSC 3259 (CanLII), <http://canlii.ca/t/g70st> As of the time of publication, a motion for leave to appeal has been filed in the Court of Appeal for Ontario, but not yet heard.

² *Conservation Authorities Act*, R.S.O. 1990, c. C.27, s. 20(1)

regulate development in these areas. The mapping is available on line and is accompanied by an appropriate warning or disclaimer which reads:

Please note that in the case of discrepancies between the mapping and the actual features on your property, the text of Ontario Regulation 179/06 prevails and the jurisdiction of the LSRCA may extend beyond the areas shown on the maps. Before undertaking any of the kinds of activities referred to in the Regulation in or near the areas shown on the maps, please seek professional advice and/or contact the LSCRA to determine the actual boundaries of the restricted areas³.

In Figure 1 below⁴, the Regulation Area in *DiBlasi* shows an area on private property which is identified in the court's decision as "Provincially Significant Wetland" (PSW). The "Regulation Area" is in fact the PSW plus a further 120 metres beyond its perimeter. This is denoted in yellow colour.



Figure 1: Regulation Area within Lot 11, Concession 2

The facts in *DiBlasi* were obviously determined and stated by the court, although the evidence was drawn from the testimony of experts who gave different information and not all of it was accepted. The defendant had constructed a berm on his property and the Regional Municipality sought an order from the court, compelling its mandatory removal. Note that the berm was not built within the boundaries of the Regional road; it was alleged to have been constructed within

³ From LSRCA website at: http://www.lsrca.on.ca/maps/disclaimer_pdfs.php

⁴ From LSRCA Map Sheet 10 dated July, 2013, from: http://www.lsrca.on.ca/PDFs/Regulation179-06maps/GenReg_010.pdf and subject to published licence and terms of use. All rights reserved.

the Regulated Area, which needed a permit from LSRCA before starting that work. In the opening summary of the case, the court gave the following synopsis:

The subject property is located on the north side of Bloomington Road and ... is owned by ... Mr. DiBlasi ... The defendants' property consists of approximately 48 acres of land upon which there is a single family detached dwelling, in which Mr. DiBlasi lives. Both Bloomington Road and Leslie Street are municipal roads over which the Region has jurisdiction.

The subject property runs along Bloomington Road for approximately 3,000 feet west of Leslie Street towards Bayview Avenue. Prior to August 2012 there were berms along the south side of the property in front of Bloomington Road; except for approximately 450 feet running west from the driveway into the commercial part of the property. Mr. DiBlasi put up a berm (the "subject berm") along the southerly edge of the said remaining 450 feet, between the berms to the west and to the east, in the area in which there was previously no berm.

The ditch between Bloomington Road and the berm is owned by the Region and is approximately six feet wide...

The defendants' property also contains a provincially significant wetland ("PSW"), which is part of the White Rose – Preston Lake Wetland Complex (the "Wetland"). The Wetland has been designated as a PSW since January 2000. PSWs are areas identified as the most valuable in the province by the Ontario Ministry of Natural Resources (the "MNR") using the Ontario Wetland Evaluation System.

The Wetland, plus an area which extends outwards a distance of one hundred and twenty metres from the boundary of the Wetland ("the setback"), is regulated by the LSRCA under Ontario Regulation 179/06 made under the *Conservation Authorities Act*...⁵

In essence, this location was part of the Oak Ridges Moraine⁶ - an ecologically important geological landform that was part of the PSW in an area that was subject to regulation by the local conservation authority. In addition, the Regional Municipality, as plaintiff, complained that the construction of a berm in 2012 by the plaintiff had caused the backing up of water into a ditch along a portion of the north side of Bloomington Road. LSRCA was only added as an intervenor in this proceeding; it already had a separate action underway in which Mr. DiBlasi

⁵ *Regional Municipality of York v. DiBlasi*, 2014 ONSC 3259, at paras. 5 to 10

⁶ A good description of the Oak Ridges Moraine and its features can be found in the summary at: http://en.wikipedia.org/wiki/Oak_Ridges_Moraine

was being prosecuted by the LSRCA with respect to the construction of the berm without a permit⁷.

The two main areas of contention, as between the parties, are the cause of the flooding in one or both of the ditches, and the course of the surface water and where it flowed prior to construction of the berm⁸.

At trial, both the Region and the defendant called witnesses who were tendered to the court as experts on these issues. In its decision, the court concluded,

It is not clear to this court that the defendants' expert would have been qualified to testify as an expert had a trial been held in this matter. As per *Fogan v. Nowacki*⁹ the evidence of an architectural technologist was rejected on drainage issues because he "was not qualified to speak to technical and engineering issues and could offer no expert opposing evidence...."¹⁰ In the case at bar, the Region's expert, Mr. Hagesteijn, was a qualified engineer with 30 years' experience in storm water management. I accept that his scientific analysis using computer modelling should be preferred over Dr. Coleman's method of reviewing surveys and walking the property. To be clear, I do not take anything away from Dr. Coleman's expertise in land use planning and ecology. The fact remains, however, that such expertise is not the type of expertise needed to make the scientific assessments needed in this case.

Of course the question of an expert witness' role, and what is a recognized area of expertise, has already been the subject of an earlier issue of *The Boundary Point* and continues as a theme in the course, *The Professional Land Surveyor as Expert Witness*¹¹.

A better appreciation of the site can be seen in Figure 2 below¹² which illustrates the same anvil-shaped area that was identified as a PSW in Figure 1 above.

⁷ *Regional Municipality of York v. DiBlasi*, 2014 ONSC 3259, at para. 20(g)

⁸ *Ibid.*, at para. 21

⁹ 2012 CarswellOnt 14549 (OMB), at paras. 16 and 17

¹⁰ *Ibid.*, at para. 17

¹¹ See: <http://4pointlearning.ca/4PL/CPD-ExpertWitness.pdf>

¹² Image was sourced from GoogleMaps® in June, 2014. All rights reserved.



Figure 2: The defendant's property on the north side of Bloomington Road

The question of a berm having been built seemed to be unmistakable. In the words of the court, the following finding of fact established the construction of a berm along the north side of Bloomington Road, and the consequences which flowed from that activity:

According to the LSRCA the berm is blocking the flow of water from the ditch and across the defendants' land into the PSW. They have served Vito DiBlasi with a Notice of Violation dated September 26, 2012, with respect to the unauthorized development, interference or alteration in or on a wetland setback. While this case is not concerned with that prosecution, it would seem odd that the LSRCA would pursue such a prosecution without confidence that the subject berm was actually within the wetland setback. Further, the LSRCA map located at page 57 of the Region's motion record clearly shows the berm within the boundary of the setback.

I find that Mr. DiBlasi's argument that the berm is not within the setback area to be disingenuous in the face of the evidence presented. It appears he does not like to be told what to do when it comes to his property. He applied for permission to construct the berm only after he had already constructed it. In 2007 he submitted a permit for placement of fill only after he received a Notice of Violation from the LSRCA. Mr. DiBlasi appears to like to act first and seek required permission later¹³.

A logical question emerges at this point. If the LSRCA was already prosecuting the defendant under the *Conservation Authorities Act*, why was the Regional Municipality of York bringing this

¹³ *Regional Municipality of York v. DiBlasi*, 2014 ONSC 3259, at paras. 84 and 85

application for an order directing that the defendant remove the berm? The answer lies in the determinations made by the court, in these terms:

There is no doubt that the ponding in the ditches creates inconvenience as the public in York Region have had to pay over \$11,000 to pump out the ditches since the berm was erected. Further, there are public safety issues related to the citizens of York Region and indeed any motorist using that section of Bloomington Road given that ponding could result in the drowning death of a motorist. Finally, there is the issue of the ponding creating a habitat for mosquito larvae and the public safety issues related to the potential spread of West Nile virus.

The defendants argue that the Region has not met the test for public nuisance in that it has not established “special or peculiar damage” which is defined as extraordinary, direct and not fleeting. The defendants rely on the academic paper of Professor Alistair R. Lucas¹⁴ for this proposition. The defendants argue that there is no evidence of damage to the pavement or a mosquito hazard, or any damages special to the Region.

I respectfully disagree. In *Torino Motors (1975) Ltd. v. Kamloops*, (1988), 63 D.L.R. (4th) 168 (BCCA) at para. 4, the court held that “[n]uisance includes the escape of water which inflicts damage, injury and inconvenience on all who come within the ambit of the nuisance.” I infer from this that nuisance may include not just the escape of water, but also the accumulation or ponding of water. I also find that the “all” referred to in this passage would include not just the public, but PSWs, which are areas designated to protect wetlands and the environment with the public interest in mind¹⁵.

These findings follow a determination of what in fact constitutes a highway. Is it the physically travelled road surface, the legally owned corridor of the highway, or is a highway something else? This was an issue which the court clearly wrestled with. Just because there existed a statutory definition of a “highway” did not decide the issue, or answer the question. Instead, the court embarked on an analysis which appeared to involve an inquiry into what was “functionally necessary” as a thoroughfare:

The *Municipal Act*, 2001, S.O. 2001 c. 25, does not define the term “road”. However, it does contain a definition of “highway” at section 1(1):

“highway” means a common and public highway and includes any bridge, trestle, viaduct or other structure forming part of the highway and, except as otherwise provided, includes a portion of a highway; (“voie publique”)

¹⁴ “Public Nuisance: Public Wrongs and Civil Rights of Action” A Symposium on Environment in the Court Room, March 23-24, 2012, University of Calgary

¹⁵ *Regional Municipality of York v. DiBlasi*, 2014 ONSC 3259, at paras. 97 to 99

In W.D. Russell in *Russell on Roads*, at page 51, (2nd Ed., Carswell: Toronto (2008)), states that “the term ‘common and public highway’ in the *Municipal Act, 2001* refers to roads owned by the municipality.”

Section 26 of the *Municipal Act, 2001*, specifies what is considered a “highway”:

The following are highways unless they have been closed:

1. All highways that existed on December 31, 2002.
2. All highways established by by-law of a municipality on or after January 1, 2003.
3. All highways transferred to a municipality under the *Public Transportation and Highway Improvement Act*.
4. All road allowances made by the Crown surveyors that are located in municipalities.
5. All road allowances, highways, streets and lanes shown on a registered plan of subdivision.

The *Municipal Act, 2001* recognizes at section 44(8) that parts of a highway can be “untravelled”:

- 8) No action shall be brought against a municipality for damages caused by,
 - a) the presence, absence or insufficiency of any wall, fence, rail or barrier along or on any highway; or
 - b) any construction, obstruction or erection, or any siting or arrangement of any earth, rock, tree or other material or object adjacent to or **on any untravelled portion of a highway**, whether or not an obstruction is created due to the construction, siting or arrangement. [Emphasis added.]

In the case of *Stager v. Muskoka Lakes (Township)*, 71 O.R. (2d) 126, the court notes “[I]n my view the road includes not only the travelled portion but also the ditches and verges and the full extent of the road allowance”. However, this case interprets the 1980 version of the *Municipal Act*, R.S.O. 1980, c. 302. The case was affirmed at the High Court of Justice, Divisional Court, 1989 CanLII 4176 (ON SC), (1989), 71 O.R. (2d) 126. The definition of “road” adopted in *Stager* was also mentioned in *Saiviarkand Investments Ltd. v. Toronto (City)*, [2009] O.J. No. 6424, at para. 16.

In *R. v. Wassilyn*, 2006 ONCJ 248, the central issue was whether the definition of “street” in the *Toronto Municipal Code*, Chapter 743, includes a sidewalk. The *Toronto Municipal Code* defines “street” as a “highway” as defined in section 1(1) of the *Municipal Act, 2001*. The court ruled that the definition of “highway” included the sidewalk. At paras. 8-11, the

decision was based on a close interpretation of the *Municipal Act, 2001*, itself and jurisprudence:

8 Section 55(1) of the act provides: An upper-tier municipality is not responsible for the construction and maintenance of sidewalks on its highways and the lower-tier municipality in which the highways are located is responsible for the construction and maintenance of the sidewalks and has jurisdiction over that part of the highway, unless the municipalities agree otherwise.

9 Similar references to sidewalks forming a part or parts of highways are also found in sections 42, 60, and 297 of the *Municipal Act*, R.S.O. 1990 c. M.45.

10 The civil jurisprudence while not directly applicable, in my opinion, supports the respondent's position that the sidewalk forms part of the highway. In *Green et al. v. Dixon Road Car Wash Ltd et al.*, 1981 CanLII 1941 (ON SC), (1981), 124 D.L.R. (3d) 503 Justice Craig noted at p. 505:

If “highway” in s. 427(1) does not include “sidewalk” then, aside from cases where snow and ice are involved (s. 427(4)), actions against municipalities for damages with reference to sidewalks would be confined to a common law right of action based on misfeasance; the statutory liability for non-repair would not arise. In my opinion that is clearly not the case; “sidewalk” must be considered as part of a highway as defined in the *Municipal Act*, s. 1, para. 10, and referred to in s. 427(1). For years the cases have all proceeded on that basis and assumption. To mention a few: *Gilmour v. City of Toronto* (1926), 30 O.W.N. 319 at p. 320; *McCracken v. Hamilton*, [1959] O.W.N. 128; affirmed [1960] O.W.N. 74.

11 In the case of *122-124 Avenue Road Holdings Inc. v. Toronto (City)* 1991 CanLII 7146 (ON SC), (1992), 6 O.R. (3d) 661 Cavarzan J. noted at p. 663:

It is undisputed that “highway” in the Municipal Act includes all of the highway, that is to say, the roadway, the sidewalks, and the boulevards.

In *McQueen v. Niagara-on-the-Lake (Town)* (1987), 9 A.C.W.S. (3d) 45, [1987] O.J. No. 2416, at para. 13 the court ruled that a boulevard, which is between a sidewalk and a roadway was part of the “highway”. However, this case interpreted a previous 1980 version of the Act at section 257.

If the reasoning of *Wassilyn* and *McQueen* is applied to the issue at hand, then a “highway” under the Act includes a sidewalk and a boulevard, and must also include the ditch within its parameters. This conclusion is bolstered by section 44(8) of the *Municipal Act, 2001* that recognizes that some parts of a “highway” are untraveled.

Clear Breach of the Municipal By-Law and Flagrant Breach of Regulation 179/06

Given the above I find that there has been a clear breach of by-law R-686-81-40 and CAA regulation 179/05 in that:

- a) The ditch forms part of the road – being Bloomington Road.
- b) It is undisputed that Bloomington Road is a road under the jurisdiction of the Region;
- c) The berm was constructed by the defendant Gaetano DiBlasi;
- d) The berm has caused the flooding in the north ditch;
- e) The berm is an “encumbrance” which has been interpreted to include an item which clogs, impedes, hinders or obstructs;
- f) The berm is located within the PSW setback;
- g) The berm prevents the flow of water overland to the PSW which is a clear breach of Regulation 179/06;
- h) There are no exceptional circumstances which would prevent the granting of the injunction;
- i) The infringements of by-laws in other areas of Bloomington Road which have not been addressed by the Region, as alleged by the defendants, are not a defence to this action; and
- j) The flooding in the north ditch will harm the pavement structure of Bloomington Road even with regular maintenance;

In the event I am wrong with respect to the test for a statutory injunction, an injunction would issue based on the berm being a public nuisance. The same principles apply to the test for a public nuisance as a statutory injunction¹⁶.

Interestingly, the remedy available from the court for the Region of York was based on a multi-layered finding of breaches of legislation, regulations and common law nuisance. If there was any question of what the berm might have looked like, this can be readily seen in Figure 3 as captured on Google StreetView¹⁷:

¹⁶ *Ibid.*, at paras 85 to 96

¹⁷ GoogleStreetView® All rights reserved



Figure 3: GoogleStreetView® image dated September 2012

This image is in rather stark contrast to the image dated a year earlier in Figure 4¹⁸:



Figure 4: GoogleStreetView® image dated August 2011

This decision is not only interesting to read; it gives lawyers and surveyors reason to pause and think about the impact which regulatory controls and protection of the environment have on private property rights: can the spatial extent be easily captured and defined? If not, what are the challenges in developing a comprehensive property rights cadastre that provides reliable information about the nature and spatial extent of these rights and duties?

From the mapping that was available online from LSRCA's website¹⁹, to the determination of flow of surface water, to being able to ascertain where on one's property a berm could be built,

¹⁸ *Ibid*

to determining where construction would need a permit, this was no easy task. For a landowner without any special expertise, these are problems which may give the impression that property rights have been taken away. However, given government policy and the identified public interest in having Regulated Areas established, property owners may well need more sophisticated tools for reaching answers. This proceeding was not just a result of a 2-dimensional assessment of where a Regulated Area might be, but also the 3-dimensional evaluation of surface water ponding, drainage and, what ultimately resulted in the backing up of water in a ditch along a Regional Road.

Editor: Izaak de Rijcke

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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.²⁰ 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.

Second Annual Boundary Law Conference

This year's conference theme is: *Linking Parcel Title and Parcel Boundary: Improving Title Certainty*²¹. 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

¹⁹ The wording of the disclaimer which typically appears on the mapping available from LSRCA – such as Map Sheet 10, dated July, 2013, at: http://www.lsrca.on.ca/PDFs/Regulation179-06maps/GenReg_010.pdf reads:

This product was produced by the Lake Simcoe Region Conservation Authority and some information depicted on this map may have been compiled from various sources. While every effort has been made to accurately depict the information, data/mapping errors may exist. This map was produced for illustrative purposes only.

One may wonder if such a mapping product is in fact *used* for illustrative purposes. In the absence of a survey conducted on the ground, the map may be the best evidence available to the public in terms of locating the boundaries of the Regulated Areas. Could a case be made for widespread availability of 3-dimensional data about land?

²⁰ 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.

²¹ This conference qualifies for 12 *Formal Activity* AOLS CPD hours.

interest to both lawyers and surveyors. 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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²² This course qualifies for 12 *Formal Activity* AOLS CPD credits.