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 requirement that structural walls, floors and ceilings of the "as built" unit in a condominium, define the unit boundaries. More to the point – the unit is the object of title, so the question of extent of title is answered by reference to the unit boundary. Descriptions of condominium unit boundaries in Ontario are required to conform to the *Condominium Act*[1] and the Regulations. In a decision[2] released in December, 2014, the depiction of the spatial extent of a unit which *differed from the physical space actually used by the owner* as her townhouse was considered in an appeal from a judgment that had found partially in her favour. A third story of the townhouse was not included as part of the unit purchased by the plaintiff in the trial decision below. The appellate result confirms, for condominium property managers, lawyers and land surveyors, the importance of understanding the significance of how unit boundaries are first established and how information about unit boundary location is later retrieved.

Condominium Unit Boundaries and Mistaken Extent of Title

Key Words*: condominium, unit boundary, spatial extent, mistake, property management*

The trial decision in *Orr v. MTCC No. 1056*,[3] was appealed. In a unanimous decision by the appellate court, it described the dispute as one in which the plaintiff had,

> … bought what she believed was a three-storey condominium townhouse unit from Richard Weldon in the Grand Harbour development in Etobicoke, Ontario. The condominium documentation, however, revealed that the unit was only two storeys. The third floor was

[1] The *Condominium Act, 1998*, S.O. 1998, c. 19, s. 8(1)(d) requires that a description must contain diagrams showing the shape and dimensions of each unit and the approximate location of each unit in relation to the other units and the buildings.

[2] *Orr v. Metropolitan Toronto Condominium Corporation No. 1056*, 2014 ONCA 855 (CanLII), http://canlii.ca/t/gfgt3

[3] *Orr v. MTCC No. 1056*, 2012 ONSC 4919 (CanLII), http://canlii.ca/t/fsjcb

illegally built into the common element attic space. This is a set of grouped appeals about where liability falls for the difference in the number of permitted storeys.[4]

Indeed, this captures the issues which were alive at the appellate level: liability for things which had gone wrong in what appeared to be a relatively routine condominium townhouse purchase. Liability for the result and the unmet expectations of the buyer were one thing. Understanding how this happened – and, specifically, the circumstances in which the spatial extent of the legal entity known as a condominium unit were different from the physical space occupied by the townhouse, deserve a closer consideration. A depiction of the townhouse with the former third floor forming part of the living space appears in Figure 1.

Figure 1: The former third floor had formed part of the living space

Members of the real estate bar in Ontario have been keenly aware of the trial decision since it was first released in 2012. Much of the initial response was directed at the importance of scrutinizing the condominium survey plans which described unit boundaries with one's client. The purpose was two-fold: confirm the locational identity of what a client understands as the unit that is being bought and verify the spatial extent of the unit in space. Efforts to raise awareness of this responsibility continue to this day in the form of CPD activities for lawyers and cautionary risk management bulletins.[5]

Multiple appeals were made by the several parties who were not content with the result at trial. One of the appellants was the law firm which had acted on the purchase. Writing for the

[4] *Supra*, footnote 1, at para. 1.

[5] See, for example, Mullin, R., *The Unpredictable Bench/Unpredictable Case Law – Condo* in, "Scary Issues for the Real Estate Practitioner," Ontario Bar Association, on November 3, 2014.

appellate court, Justice P. Lauwers described the arguments made by the appellant lawyers, and their dismissal as follows:

> Gowlings argues that, as a matter of law, title to the third floor was conveyed to Ms. Rainville[6] and was never a condominium common element.
>
> Gowlings does not dispute that the Declaration and the survey sheets describe or show the third storey as part of the common elements, not part of townhouse 113. Nonetheless, Gowlings argues that the "controlling document with respect to title" is not the survey sheet or sheets, but the actual physical features of the unit. This argument is based on s. 4 of the Declaration, which provides:
>
> > Boundaries of Units
> >
> > The monuments controlling the extent of the units are the physical surfaces mentioned in the boundary of the units contained in Schedule "C" attached hereto.
>
> Schedule "C" then sets out the legal boundaries for this unit as follows:
>
> > BOUNDARIES OF RESIDENTIAL UNITS
> >
> > Horizontally (see cross-sections on Part 1, Sheet 3 of the Descriptions)
> >
> > …
> >
> > b) The upper surface and plane of the concrete floor slabs in the basements of Units … 4, 5, 6 and 7 on Level 1.
> >
> > …
> >
> > g) The upper surface and plane of the drywall ceiling in the uppermost story of … Units 2 to 9 inclusive on Level 1.
>
> The ceiling of the third floor in townhouse 113 would fit within this description in these provisions.
>
> Gowlings argues that there is an error on the survey sheets since they show only two storeys and not three. Gowlings asserts that this error occurred because the survey sheets for the unit were prepared by the surveyor when the framing was in place for the two storey unit. Gowlings argues that the surveyor ought to have been called back after the construction was finished to complete the survey for the unit, which would then have included the third storey. The survey sheets ought to be corrected, but they do not control title. According to Gowlings, albeit quite by accident perhaps, by operation of law Ms.

[6] Note that Ms. Orr's name had changed to Ms. Rainville during the course of these proceedings.

> Rainville got what she bargained for as a result of the law firm's work, being title to all three floors of the unit.
>
> I do not agree with this argument for two reasons. First, the argument that the physical features of the unit trump the Declaration and the survey sheets was never put to the trial judge. The evidence necessary to explore that issue properly was not led by the parties. The experts were not examined on the practice that is followed in situations where a unit's physical features diverge from the Declaration and the survey sheets. The argument, in short, smacks of novelty and implausibility. It cannot be resolved on the evidence presented at trial or before this court (*767269 Ontario Ltd. v. Ontario Energy Savings L.P.*, 2008 ONCA 350 (CanLII), at para. 3; *Pirani v. Esmali*, 2014 ONCA 145 (CanLII), 94 E.T.R. (3d) 1, at para. 74). The court's normal practice of refusing to entertain entirely new issues on appeal should apply (*Pirani*, at para. 74; *Kaiman v. Graham*, 2009 ONCA 77 (CanLII), 75 R.P.R. (4th) 157, at para. 18).
>
> Second, it is not clear to me that accepting the validity of this argument would eliminate Gowlings' liability. Instead of delivering Ms. Rainville a unit with clear title, Gowlings would have delivered her into a lawsuit with MTCC 1056 about the enforceability of the Declaration. This is not what a domestic real estate client reasonably expects from her lawyer. Gowlings' failure to discover the basic problem with the size of the unit was negligent, as the trial judge concluded.[7]

The Court of Appeal concluded that these arguments were novel and ought to not be allowed as fresh submissions at an appellate level – but even if allowed, the "basic problem with the size of the unit" was a problem which the lawyer had a duty to uncover. In some respects this conclusion makes eminent good sense. However, at a practical level, there may be serious difficulty in the discharge of this duty by a lawyer in every routine residential transaction.

Generally speaking, for a meaningful review of condominium plans to take place with respect to the location of a unit and the spatial extent of a unit's boundaries, it is necessary to know what is actually on the ground and what the client has identified as the object of expected ownership. In order to understand the location of a unit, the legal designation of unit and level numbers have little to do with ultimate municipal address, let alone floor number or suite number. How these identifiers connect may need to be better understood, both in terms of detail and clarity when first prepared by a surveyor and (equally important), in terms of the

[7] *Supra*, footnote 2 at paras. 84 to 88

ability to "read" the Survey Plan after it has been registered as a part of the condominium description.[8]

In terms of unit boundaries, many of the previous comments also apply with respect to the extent of a unit in three-dimensional space. This becomes important for reasons identified in *Orr*, but also holds significance for residential owners who plan to make alterations in amenity areas, such as the enclosing of patio space or converting a balcony into a three season sunroom. These changes may not be permitted if the space turns out to constitute a part of the common elements.

The meaningful review of condominium plans by a lawyer with a client is therefore predicated on a number of factors. First, it depends on the availability *and affordability* of the information sought. A PIN printout[9] may provide details of all interests which apply in respect of a unit. Details can be obtained by downloading the relevant instruments which appear registered against the title to a unit, but this convenience is not necessarily possible in respect of the detailed condominium plans themselves. If these are only available in paper format and, are difficult to copy or require significant time in order to locate and duplicate, availability and access are less than ideal. In fact timeliness and affordability under such conditions pose a problem for the lawyer. Likewise, condominium plans themselves are not required to be

[8] Note that the description in a declaration and the survey plans registered along with the declaration to establish a condominium corporation are not the same thing. Regulations under the *Condominium Act, 1998*, stipulate how unit boundaries are to be shown on the survey plans:

> (4) The specification of the boundaries of each unit as described in clause 8 (1) (c) of the Act shall be shown on plan views and cross sections but no plan view or cross section is required for more than one unit with identical boundaries to other units.
>
> (5) The plan views and cross sections shall be shown on the sheets of the plans of survey that designate the units or, if it is impractical to do so, on a separate sheet of the plans of survey.
>
> (6) If the plan views and cross sections are shown on a separate sheet of the plans of survey, the sheets of the plans of survey that designate the units shall include a cross-reference to the separate sheet.
>
> (7) Except with respect to units in a vacant land condominium corporation, section or perspective drawings, sufficiently accurate to portray the vertical relationship of all levels, shall be drawn on each sheet of the plans of survey that designates the units or that shows the exclusive use portions.

From: *Description and Registration*, O. Reg. 49/01, s. 5(4) to 5(7), at: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_010049_e.htm#BK4

[9] This information constitutes the parcel register under Ontario's *Land Titles Act*.

attached to a Status Certificate[10] and unless specifically asked for, may not be forthcoming for the lawyer/client review and discussion.

Second, a meaningful review of condominium plans with a client is also predicated on the existence of knowledge of what is being looked at. This is a different matter from what has been discussed above. Borrowing from the discipline of mapmaking, the ability to portray spatial extent on a flat surface and the reading and comprehension of the result have been timeless challenges.[11] So too, a reader's capacity to appreciate what is being portrayed remains as daunting as ever. Lawyers practising real estate conveyancing may not have had training in how to read a survey plan – much less one that includes the depiction of three-dimensional planes, blow-ups of complex details at differing scales, and an overall orientation to development on the ground which more often than not has never been seen by the lawyer from a distance, let alone visited by the lawyer in person.

Condominium managers, in contrast to lawyers, are more likely to be familiar with the spatial extent of units located within a particular project, and how owners are making use of their units relative to the common elements. At trial, the court in *Orr* had not found the condominium corporation or its property managers liable. Ms. Rainville appealed this finding and, in allowing this appeal against the condominium corporation, the court wrote,

> In this appeal, Ms. Rainville argues that Brookfield and MTCC 1056 were negligent in completing the estoppel certificate. The trial judge concluded Brookfield was not liable for negligence on the basis that its employees did not fall below the applicable standard of care and that Ms. Rainville did not rely on the estoppel certificate in deciding to purchase the townhouse. In my view, with respect, the trial judge's reasoning on this issue reveals reversible errors. These are detailed below.

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[10] In Ontario, the status certificate is a statutory document which a condominium corporation must provide to a unit owner or purchaser. Its preparation is usually prepared by the property manager as agent for the condominium corporation. Under the prior *Condominium Act*, these were called "Estoppel Certificates".

[11] See, for example, http://en.wikipedia.org/wiki/Cognitive_map and the explanatory introduction:

> A cognitive map (also: mental map or mental model) is a type of mental representation which serves an individual to acquire, code, store, recall, and decode information about the relative locations and attributes of phenomena in their everyday or metaphorical spatial environment…
>
> Cognitive maps have been studied in various fields, such as psychology, education, archaeology, planning, geography, cartography, architecture, landscape architecture, urban planning, management and history. As a consequence, these mental models are often referred to, variously, as cognitive maps, mental maps, scripts, schemata, and frames of reference.
>
> Cognitive maps serve the construction and accumulation of spatial knowledge, allowing the "mind's eye" to visualize images in order to reduce cognitive load, enhance recall and learning of information. This type of spatial thinking can also be used as a metaphor for non-spatial tasks, where people performing non-spatial tasks involving memory and imaging use spatial knowledge to aid in processing the task. [*references omitted*]

The basis for Ms. Rainville's claim is some important text in the second estoppel certificate, which provided:

> There are no continuing violations of the declaration, by-laws and/or rules of the Corporation, apart from any involving assessment obligations for which the current unit owner is responsible and the status of which is disclosed in paragraph 1 of this certificate.

The Declaration described townhouse 113 as a two-storey unit, and indicated that the third storey was common element space. The survey sheets referenced in the Declaration were consistent with this description. As a result, the existence of the built-out third floor was a violation of the Declaration and the statement in the estoppel certificate to the contrary was incorrect.

Ms. Rainville's claim against Brookfield and MTCC 1056 sounds in negligent misstatement or misrepresentation. The elements of that cause of action are set out in *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC), [1993] 1 S.C.R. 87:

> (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. (Para. 33, p. 110)[12]

After applying these elements in an analysis of liability, the appeals by Ms. Rainville against both the condominium corporation and the property manager were disposed of as follows:

> In my view, effect should be given to this ground of appeal against MTCC 1056. Ms. Rainville successfully made out the elements of liability for negligent misstatement on the part of MTCC 1056 in respect of the second estoppel certificate, and is entitled to damages against MTCC 1056.
>
> I would dismiss Ms. Rainville's appeal against Brookfield. While the trial judge's ultimate holding that Brookfield is not liable was correct, I would reach that conclusion on the basis that Brookfield was MTCC 1056's agent and did not owe Ms. Rainville an independent duty of care. Nor is there evidence that Ms. Rainville relied specifically on Brookfield, as opposed to MTCC 1056.
>
> It follows from this conclusion and the incorrect statement in the estoppel certificate that MTCC 1056 is estopped from demanding that Ms. Rainville close up the third floor and

[12] *Supra*, footnote 2 at paras. 39 to 42

> restore the unit to its two storey configuration at her own expense and that she pay occupancy rent for the third floor. Those elements of the judgment below must be set aside.[13]

The finding of liability under these circumstances against both the lawyer for not conducting a review of the plans with the buyer, and the condominium corporation for issuing a status certificate which contained a false statement regarding compliance with the declaration, speak to a need for a better understanding of how descriptions are to be read. More importantly, a description that is found in a declaration is based on a graphic plan of survey – often very complicated – and its comprehension is now an essential competency for real estate lawyers and condominium corporations and their property managers.

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.[14] 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 — Online Version

For the convenience of professionals who reside in northern Ontario or otherwise were unable to attend in person, this online version of the conference *Linking Parcel Title and Parcel Boundary: Improving Title Certainty*[15] held November 2014 includes the presentations, papers and slide decks from presenters as well as a forum for discussing ethical issues in the delivery of professional services. The purpose of the conference was to explore new paradigms in bringing certainty and predictability in the location of parcel boundaries on the ground. Please mark the date of the *Third Annual Boundary Law Conference* in your calendar: Monday, November 16, 2015.

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[13] *Supra*, footnote 2 at paras. 73 to 75

[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 conference qualifies for 12 *Formal Activity* AOLS CPD credits.

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