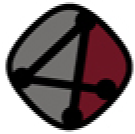

The Boundary Point

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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 issues or aspects of property title and boundary law that are 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 a decision which made use of a surveyor's work in assisting a court, in the location and extent of use of an easement claimed to exist on the ground. It turned out that, the change over time depicted in the aerial photographs, had an impact on how the court weighed this evidence.

Easements by Prescription

Key Words: *prescription, easement, aerial photography, survey plan*

In today's age of increasingly sophisticated tools and complex technology, we can lose sight of the surveyor's role in assisting with the resolution of competing claims. In this issue of *The Boundary Point,* the focus turns to a deeper understanding of that role, in the context of a claim to a prescriptive easement.[1] Furthermore, the method and techniques used by the land surveyor to assist a court in the reaching of a final conclusion will be explored.

In *Cooper v. Dawe*,[2] a recent Supreme Court of Newfoundland and Labrador decision resulted from a consideration of a claim to a prescriptive easement, regarding what was identified as a driveway owned by the defendant. Although a narrow description of the decision is simply one in which the court found that a prescriptive easement had been established, which effectively accommodated pedestrian and vehicular access over a portion of a driveway, this decision touches on other points, which have relevance in the context of land surveying. Consequently, this issue of *The Boundary Point* will be instructive in its consideration of how the court treated evidence from a surveyor and how that evidence was effectively used in reaching a determination that a prescriptive easement was legally recognized. Through the use of aerial

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[1] The expression "prescriptive easement" is essentially a reference to the legal method by which an easement can come into existence. It contrasts, *as a method*, to other techniques of easement creation such as, "implied easement" or "easement by grant". Prescription operates in certain common law jurisdictions and is similar to the requirements of adverse possession – except that exclusivity is not a requirement. All of the usual requirements that are necessary and have been stated in *Re: Ellenborough Park*, [1955] EWCA Civ 4, continue to apply.

[2] *Cooper v. Dawe,* 2015 CanLII 7869 (NL SCTD), http://canlii.ca/t/ggg0s

photographs to establish a historical use and occupation, and a consideration of a surveyor's plan, which had been revised over time, as well as the testimony of lay witnesses who had knowledge of both the historic use and the recent changes made by the plaintiff's tenants, a factual matrix could be established for the court.

The driveway itself can be seen (albeit in a somewhat limited fashion) in Figure 1 below. Dated September, 2013, the scene is one of bucolic calm in a small village on the east coast of Newfoundland. Alterations made by Mr. Cooper's tenants did not occur until the following summer and therefore the image pre-dates any alterations which may appear in later photography.

Figure 1: View looking south from Main Road with Mr. Cooper's home in the distance[3]

In *Cooper v. Dawe*, the plaintiff, Cooper, asked the court for a declaratory order stating that he had an easement over the part of his access that traversed Mr. Dawe's property when passing from the main road to his house, and that the easement extends to pedestrian as well as vehicular access. The Cooper property is west of the Dawe land and south of the property owned by Mr. Fifield. The area in dispute was a portion of the driveway which has been crosshatched on a survey plan that had been entered into evidence. This crosshatched area (along with the surrounding properties) can be seen in Figure 2 below.

The testimony and documentary evidence from a Newfoundland Land Surveyor, as well as lay witness testimony, resulted in the claimant succeeding in obtaining an easement. Two key questions will often arise in disputes of this nature:

1. What is the spatial extent and location of the easement?
2. What are the uses which will be permitted over this stipulated area?

[3] From Google® maps and street view at https://maps.google.ca/ Image dated September 2013. All rights reserved.

These questions are usually necessary when considering claims to an easement by prescription, as the answers (which are typically answered in the document of conveyance by which an easement is created by express grant) can only be found by considering the nature and extent of historic use. As we progress through this issue, the immediate goal is to provide a foundation for how these concepts inform our understanding of how the law is applied in resolving claims to prescriptive easements.

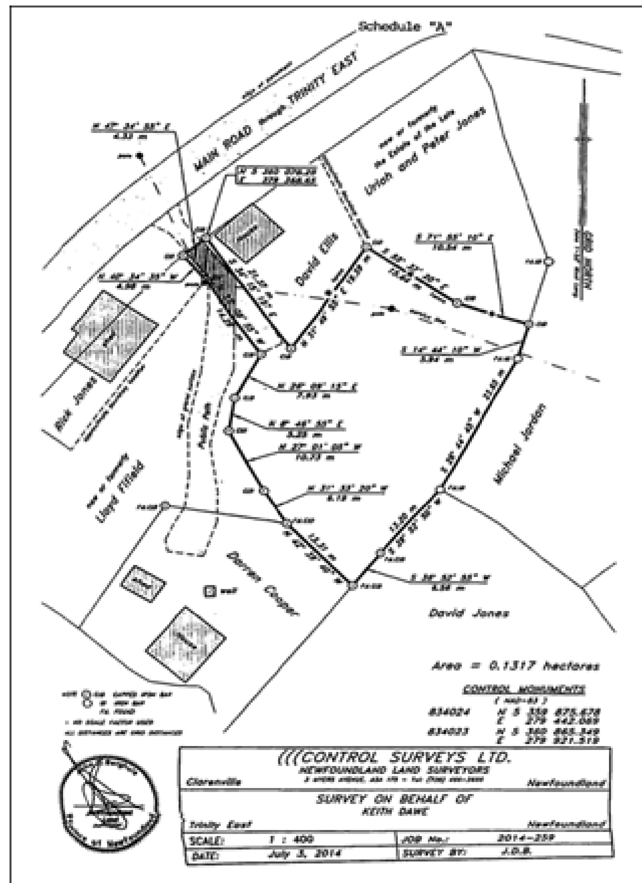

Figure 2: Survey Plan attached to reported decision as Schedule A[4]

The *Cooper* decision thoroughly discusses the law on easements. Like all other decisions at the trial level, this case is not necessarily binding in other provinces. However, the court's articulation of the legal principles which govern the doctrine is quite similar - if not identical - to the principles followed by appellate courts across Canada. Consider the following statement in *Cooper*,

> …prescriptive easements are established by "user as of right", which is practiced *nec vi* ("without violence"), *nec clam* ("not secretly") and *nec precario* ("without permission"). "User as of right" is the antithesis of permitted user in the discussion of prescriptive

[4] *Cooper v. Dawe*, *supra*, footnote 2, at para. 60

> easements. Express permission defeats prescriptive easements. Prescriptive easements will be established if the owner of the servient tenement acquiesces in the use of his property. Acquiescence is silent or passive assent or submission, or submission with apparent consent. It is to be distinguished from avowed or express consent on the one hand, and from opposition or open discontent on the other. It might be appropriately called "quiet satisfaction". The servient owner cannot be said to "acquiesce" in the dominant owner's use if he gives the dominant owner express permission, if the dominant owner used force to obtain or to sustain the use, or if the servient owner did not know that the dominant owner was using his property.[5]

This principle is similar to what was articulated in the Ontario Court of Appeal decision in *Kaminskas v. Storm*,[6] in which the court noted that,

> …for an easement to be created by prescription, the user of the alleged right (for the applicable time period) must be shown to have been (i) continuous and (ii) "as of right"… User "as of right" means that the use has been uninterrupted, open, peaceful and without permission for the relevant period of time. It is often described using the Latin maxim *nec vi, nec clam, nec precario* (i.e., without force, without secrecy and without "*precario*"). "*Precario*" in this sense is taken to mean "[t]hat which depends not on right, but on the will of another person"

These statements highlight the underlying principles at common law, regarding prescriptive easements – as well as the subtle differences between these two jurisdictions.

An easement by prescription can be claimed through three distinct mechanisms. These include prescription at common law, by doctrine of lost modern grant, and by statute. The common law version of prescription is quite rare and has become almost obsolete in today's modern age. That said, the other two doctrines are quite similar. They both require that, "(a) there must be a dominant and servient tenement; (b) an easement must accommodate the dominant tenement; (c) the dominant and servient owners must be different persons; and (d) a right must be capable of forming the subject matter of a grant."[7] One major distinction between the two mechanisms, by which prescription can operate, is that the statutory form requires the claimant to prove continuous use of at least twenty years prior to the time of commencing the action. The lost modern grant doctrine, on the other hand, can be established through a twenty year period of continuous use at any point in time.

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[5] *Cooper v. Dawe*, at paras. 6 and 7

[6] *Kaminskas v. Storm,* 2009 ONCA 318 (CanLII), http://canlii.ca/t/236fw at paras. 28 and 30, citing *Burrows v. Lang*, [1901] 2 Ch. 502 (Ch. Div.), at p. 510, cited in Jonathan Gaunt, Q.C., and Paul Morgan, Q.C., *Gale on Easements, 17th ed.* (London: Sweet & Maxwell, 2002), at para. 4-82

[7] This is the test outlined in *Re: Ellenborough Park*, [1955] EWCA Civ 4

As surveyors know, prescriptive easements are legal creatures best left to a court for final determination; the surveyor can only provide an opinion of spatial extent and indication of the type of use, based on the best available evidence. The role of a surveyor in such a situation, may be to provide expert evidence through an affidavit, wherein he or she will be subject to cross-examination. This is a method typically used by the court as one piece of evidence in determining whether a claim for an easement through prescription will succeed. With that being said, in the case where a surveyor illustrates on a plan of survey a form of trespass and use, which is of a type that may be attributable to an easement, and the client reasonably relies on the plan, the surveyor's opinion is then susceptible to a challenge through the court.

If an easement is found to have been determined incorrectly, the surveyor may face liability. There are various factors which the surveyor and the lawyer will take into account when determining and registering easements, which include, but are not confined to, necessity, use, and the intention of the abutting property owners and their predecessors. To determine these details, the surveyor will perform a field survey, conduct research, and find all deeds which pertain to the properties, as well as property owners' testimony and photographs which can provide details as to usage. In the following paragraphs, the use of aerial photography in establishing historical use will be discussed.

In *Cooper*, the land surveyor used aerial photography to help determine the extent of the use of the driveway in question. In his affidavit, he concluded that the photos established that the driveway had been used from at least 1948, continuously, as a means of access by pedestrians and small motor vehicle traffic. However, after cross-examination, the court noted that this witness retracted most of these statements. In particular, the photographs could not definitively lead him to believe that the historic use had accommodated either pedestrian or vehicular traffic. Ultimately, the conclusions of fact in this case supported the award of an easement not because of the surveyor's evidence based on the aerial photography, but rather through lay witness testimony which established the spatial extent of usage. This is an important lesson: aerial photography, in the context of establishing the nature of usage, is only as reliable as the credibility of the one interpreting this data. Ambivalence in giving evidence under oath on a matter of photo interpretation or some other area of expertise is often dismissed in preference to eye witness testimony. We do not have the benefit of the exhibits themselves, but the type of imagery that has recently become available may be telling.

Figure 3: The Cooper home is shown at the shore with a distant Main Road through Trinity East[8]

While in *Cooper,* the photographic evidence was disregarded, other cases, such as *O'Hanley v Wheatley & Gulf Surveys*,[9] demonstrate how such evidence can be highly probative. *O'Hanley* involved a dispute regarding the location of a boundary line located between the parties' properties. The court referred to the relevance of the photographic evidence as follows:

> In the context of the many pieces of evidence present, the most poignant evidence is the aerial photographs. They have a lot of probative value. They appear to illustrate that: (i) in 1958 and in 1970 the MacKinnon Road did not extend north of the Old North Shore Road; (ii) there was no travelled road or path on the O'Hanley farm; (iii) the farming activity on the O'Hanley farm stopped just short of the east side of that travelled lane; and (iv) the lane or path appears to be located west of a straight line in extension of MacKinnon Road.[10]

This statement serves as a reminder of the weight that can potentially be attached to such evidence. The difference between the evidence adduced in *O'Hanley* and the photographs in *Cooper* is that in *O'Hanley,* the prior photographs clearly showed events and details of occupation and usage as it related to the boundary dispute whereas in *Cooper*, the evidence did not allow the surveyor to determine the extent of usage. Thus, as mentioned earlier, the weight to be attached to this form of evidence is proportional to the clarity of the photographs, as well as the skill and credibility of the witness who interprets the photographs.

Another example of the value of aerial photography in determining historical usage is found in *Sharma v Mallet*. In that case, the claimant obtained an easement over his neighbour's property. Finding in favour of the claimants, the court stated that the plaintiffs have,

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[8] From Bing® Maps at: http://www.bing.com/maps/ All rights reserved.

[9] *O'Hanley v. Wheatley & Gulf Surveys,* 2005 PESCTD 20 (CanLII), http://canlii.ca/t/1k422

[10] *Ibid.*, at para. 39

> …satisfied on a balance of probabilities that the owners and tenants of the Sharma property used the driveway between the two properties to gain access and park their vehicles in the backyard of the Sharma property for many years going back beyond 1972. The 1972 aerial photograph, exhibit 2, clearly shows vehicles parked behind the Sharma property and supports the evidence of Mr. Hunter.[11]

Ultimately, surveyors can play a significant role in determining the weight that is to be attached to aerial photographs. This idea was expressly articulated in the case of, *Macneil v. Chisholm*.

> It is to be noted that Mr. MacKinnon a very experienced surveyor did through the course of examining the aerial photographs used terminology such as "very difficult to see", "very difficult to say", "looks like small building on the road", "looks like", "not sure". The aerial photographs deserve a great deal of consideration and in some respects are conclusive. They are, however, not without their weaknesses.[12]

The decisions noted above imply that the weight of evidence (*i.e.,* aerial photography), can vary depending on certain contextual factors. Sometimes the surveyor can make use of aerial photographs to determine if historic activity exists, in order to opine on a boundary location or on the existence of an easement, but only when the photographs themselves are reliable. Overall, aerial photography has the potential to be highly probative, and in many cases, even conclusive.[13]

Another interesting aspect within the context of *Cooper* is how survey plans may be used – despite certain "disclaimers" which may appear on their face. For example, in *Cooper*, the court used a plan of survey which had a disclaimer noted; it stated, "SAMPLE ONLY not to be used for legal title." Likewise, certain other language such as "sketch" and "provisional" are often used by surveyors in an attempt to avoid liability, or to make the client aware of the lack of finality to the plan. This becomes problematic when the client relies nonetheless on such a plan and a

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[11] *Sharma v. Mallet*, 2004 NSSC 258 (CanLII), at para 26

[12] *MacNeil v. Chisholm*, 1998 CanLII 3182 (NSSC), at page 6

[13] Of course a healthy dose of caution remains. What if the photograph is a "snapshot in time" of a dynamic phenomenon, such as smoke or water? Please consider the comments found in *Ramara (Township) v Mullen*, 2012 ONSC 2220 (CanLII), http://canlii.ca/t/fqzhm at para. 32:

> For that reason I do not place much weight on the photographic evidence presented in this case; although photographs can be more objective evidence than an individual's report, photographs are unlikely to be an adequate means of capturing a by-product that alters by the second, is directed by the wind, and which can have a translucence that an ordinary camera may not fully reveal. As indicated above, the bulk of the photos show the smoke hovering on or above the respondent's property, or apparently passing to the south of the Doyle's property. Yet it takes little imagination to conclude that smoke of the thickness revealed in many of the photos would infiltrate the surrounding area, and in particular the lands that lie to the east of the respondent's property and are exposed to the prevailing winds.

dispute arises. In most situations, such plans cannot assist in determining one's relevant legal position. In *Cooper*, the plan[14] was used as an illustration to assist the court in identifying the relevant parcels of land and the area of dispute. This may be a generally useful application of such plans. In *Wilson v. Johnston*, the court dealt with the question regarding what value can be added to resolving a dispute when the survey plan in evidence has a disclaimer added to it. Consider the following excerpt:

> Counsel for the Plaintiff submits that it is common in claims involving adverse possession or boundary disputes to include either sketches or draft plans of survey (or combinations of the two) as schedules to describe the property in dispute. In support of that proposition, counsel for the Plaintiff has cited a number of cases…
>
> The paragraph in the Amended Statement of Claim with which the Defendants are taking issue does not, in my view, offend the provisions of Rule 25.06(1). The survey and sketch only provide a roadmap for the court and are not evidence supporting either party's position before the court.[15]

Although the court did not expressly prohibit such plans from being used to determine the relative parties' legal positions, there is a strong implication that such plans are only used to provide the court with some clarity regarding the disputed area.

Plans with disclaimers do raise various questions. The greatest of which are whether there can be any authority attached to such plans, and how liable the surveyor will be if the client relies on a faulty plan. These are questions which ultimately rely on the facts of each case. The one thing that can be taken from cases which reach the court on this issue, is that such plans are unlikely to be used to advance one's legal position. Furthermore, plans with disclaimers can provide use to the courts by supplying, as stated in *Wilson*, the courts with a roadmap to assist in realizing the facts as they are on the ground. In *Cooper*, the disclaimer was merely mentioned but it was used as it was in *Wilson*. It is safe to say, however, that disclaimers on plans will most often have the effect of eliminating authoritativeness, which the plan may have otherwise carried.

Editor: Kevin Wahba[16]

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[14] See Figure 2 above.

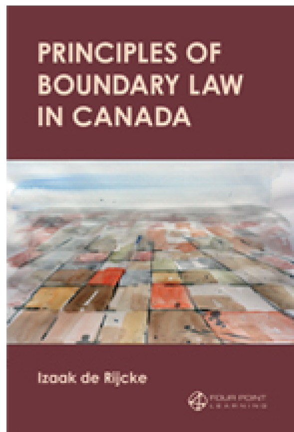
[15] *Wilson v. Johnston,* 2014 ONSC 3006 (CanLII), http://canlii.ca/t/g6v86 at paras 23 and 25.

[16] Kevin Wahba is an articling student working with Izaak de Rijcke from offices in Guelph, Ontario. His contribution to this issue of *The Boundary Poin*t is gratefully acknowledged.

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 credits.[17] These resources are configured to be flexible with your schedule, ranging from only a few hours of CPD credits 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.

COMING SOON: *Principles of Boundary Law in Canada*



This comprehensive treatment of the principles of boundary law lies at the intersection of law and land surveying. Although the textbook has its foundation in the law of real property in Canadian common law jurisdictions, it is intended as a resource which bridges two professions. For real estate lawyers, it connects legal principles to the science of surveying and demonstrates how surveyors' understanding of the parcel on the ground has helped shape efficient systems for property demarcation, conveyancing and land registration. For land surveyors, it provides a structure and outlines best practices to follow in the analysis of boundary retracement problems through the application of legal principles. This textbook is not meant to be used as a "how to" guide for the answering of specific questions about boundary problems. Rather, it is intended to serve as a reference tool to support the formation of professional opinions by clarifying the framework for evaluating boundary and survey evidence.

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