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 discuss an unusual decision which addressed the discovery of an encroachment by a condominium corporation onto adjoining property. The problem came to light when a survey identified an access driveway used by strata plan unit owners was in fact partially located on neighbouring land. While we know that this is not supposed to happen, the fact that it can and does should be reason to pause and reflect on the appropriateness of seldom getting an up to date survey when purchasing a residential condominium unit.

Common Element Encroachments into Private Property

Key Words: *encroachments, condominium, mistake, easement, prescription*

Mistaken improvements leading to encroaching structures have often been reported as being subject to certain statutory solutions. In exchange for aligning the ownership, its extent and title to accommodating the as-built encroachment, fair market value is dictated as payment for the loss of the encroached portion of land. While seemingly straightforward, this framework for allowing a court-ordered private expropriation needs to satisfy a number of tests. The specific elements of these tests and how they are applied will in fact vary from province to province but, generally speaking, all jurisdictions require the trespass to have been the result of an honest mistake. Therein lays the challenge for land managers and surveyors alike.

As up-to-date plans of survey are increasingly not procured as part of property transactions, the risks can include a latent trespass which may be discovered at a later time. This was the undercurrent for the events which led to the recent decision in *The Owners, Strata Plan VR 10 v. EE Management Corp.*[1]

As one considers the commentary below (or also when reading the full decision), we may remember that up-to-date plans of survey for a condominium unit purchase and the larger

[1] *The Owners, Strata Plan VR 10 v. EE Management Corp.*, 2015 BCSC 473 (CanLII), http://canlii.ca/t/ggwl4

common elements owned by the condominium corporation are rarely obtained. The general thinking which has prompted this practice may well be justified: unit boundaries are fixed by the physical structure and boundaries of common elements are surveyed when the condominium was first registered. *The Owners, Strata Plan VR 10 v. EE Management Corp.* may prompt a rethink in conjunction with common elements, much like the recent Ontario Court of Appeal decision in *Orr*[2] did for the boundaries of existing condominium units.

Figure 1[3]

The court offered an introductory summary to the case:

> This lawsuit between the owners of two adjacent properties is anchored in an unfortunate dispute over a driveway (the "Driveway"). The Driveway has historically been used by the plaintiff. A small triangular portion of the Driveway encroaches onto the defendants' lands. The plaintiff claims an equitable easement over the portion of the lands on which the Driveway encroaches. In the alternative, the plaintiff seeks an order vesting title in the plaintiff, or in the further alternative, a statutory easement. …
>
> The Edgewater Lands is a fractional interest property. Accordingly, residents of the Edgewater Estates purchase a fractional interest in the Edgewater Lands. Each fractional ownership interest is assigned to a particular residential unit of the Edgewater Estates. Each registered owner in the Edgewater Estates has an undivided interest in the Edgewater Lands.
>
> The defendant, EE Management Corp. ("EE Management") is a corporate entity which manages the Edgewater Lands and serves as property manager for the Edgewater Estates. EE Management's shareholders are the owners of the fractionalized interests in the Edgewater Lands. EE Management's interest in the Edgewater Lands is limited to its right of

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

[3] From: *The Owners, Strata Plan VR 10 v. EE Management Corp.*, 2015 BCSC 473 (CanLII), http://canlii.ca/t/ggwl4 at Appendix A.

> reverter registered against most of the fractional interests. The right of reverter in relation to some of those fractional interests has been converted into a mortgage.[4]

For ease of assisting the understanding of the reader, the court included a partial copy of the Strata Plan registered in 1969 as an appendix to the reported case. It is reproduced above at Figure 1.

The description by the court continues with the findings of fact and the legal principles that applied to those facts. Early on we read,

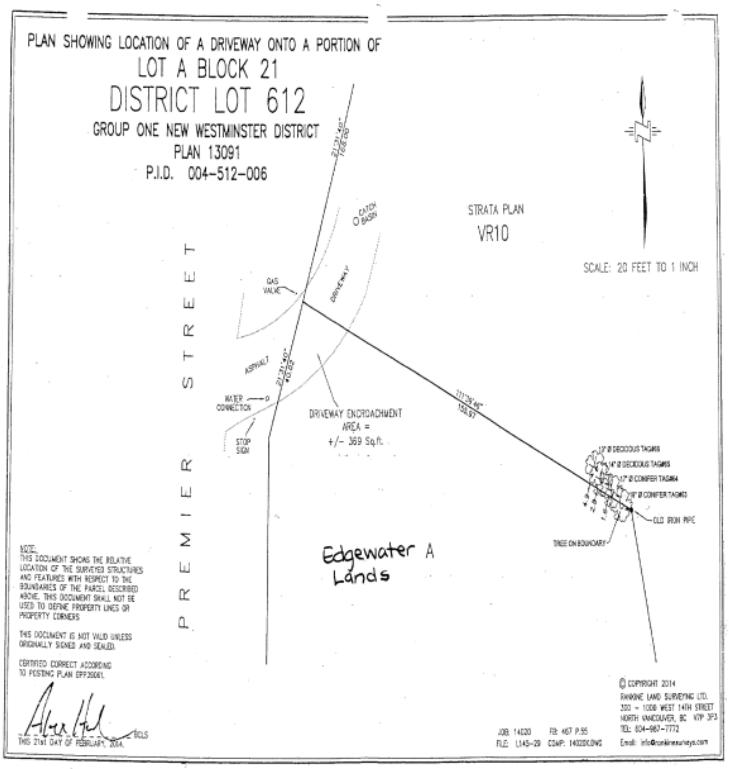
> Edgewater Estates was built first, then VR 5, VR 10, and finally VR 126.
>
> On the evidence, I cannot reliably make any findings as to the state of knowledge of the developers regarding the property lines on or around the Driveway when the Driveway was constructed in the 1970's. Nor am I able to make any determinations as to why the Driveway was constructed with the subject encroachment. The explanation for this state of affairs "is lost in the mists of time": *Dykes v. Nagel*, at para. 49.[5]

In some respect, some readers might suggest that a driveway is not actually a "physical structure" that constitutes a form of permanent encroachment. At issue, however, was a driveway and, for purposes of its relocation, significant engineering, environmental assessment, and other challenges existed to identify the cost of a solution. The court elaborated on some of these challenges as follows:

> The plaintiff also delivered a slope stability report prepared by Horizon Engineering In., which Mr. Bruce Higgins had received in January 2014. Mr. Higgins is a long-time resident of Lynnmour Village and a member of VR 10's strata council.
>
> EE Management eventually retained a survey company to determine the property line between the Edgewater Lands and the VR 10 Lands. On or about February 27, 2014, the surveyor, Mr. Heath, provided EE Management with his findings. His report indicated that approximately 369 square feet of the asphalt Driveway was encroaching on the Edgewater Lands (the "Driveway Encroachment").
>
> The Driveway Encroachment is triangular, and is located near the north-west corner of the Edgewater Lands. For ease of reference, Appendix "B" is an excerpt of Mr. Heath's report, depicting the Driveway Encroachment.
>
> The defendants assert that the plaintiff, through its representative, Mr. Higgins, knew or ought to have known that the Driveway Encroachment was not the plaintiff's property.

[4] *Ibid.,* at paras. 1 & 2, 9 & 10

[5] *Ibid*., para. 18 & 19



I found Mr. Higgins to be a forthright and responsive witness. In cross-examination, Mr. Higgins candidly acknowledged that he had the Documents in his possession for some time prior to early 2014. However, it is important to note that none of the Documents are surveys, and the two sketches which were prepared in relation to water main replacement are not drawn to scale. The third document, which appears to have been available on Geoweb at the District's public website, is also not a survey. It is an aerial photograph showing the various complexes. There is no evidence as to who marked it up, or for what reason. I accept Mr. Higgins' evidence that when he reviewed the Documents he did not make any observations about the property lines on the Driveway as he had focussed his attention on issues associated with the balcony sizes.

In the end, I find that prior to early 2014, Mr. Higgins honestly believed that there was no trespass and that there were no issues with the property lines on the Driveway. Moreover, on the totality of the evidence, I am not persuaded that he should have reasonably been alerted to any such issues. There were no red flags or any matters which reasonably would have precipitated him examining any of the Documents for the purpose of ascertaining the property lines on the Driveway.

In short, I find on balance that neither the plaintiff nor the defendants knew of the Driveway Encroachment trespass until early 2014. This conclusion accords with the probabilities of the case.[6]

The sketch referenced as Appendix "B" is also reproduced above.

This litigation had started long before the final determination as reported in this decision. Interim restraining orders in the form of an injunction had been issued by the court as a result of an attempt by EE Management to close off access altogether for the driveway use by the strata plan unit owners. Other strata plan developments were built further away from the main

[6] *The Owners, Strata Plan VR 10 v. EE Management Corp.*, 2015 BCSC 473 (CanLII), http://canlii.ca/t/ggwl4, para. 33-39

access point to the street over the driveway and these too included many unit owners who relied on the continuing access to the public road network over the encroaching driveway. As a result, other corporations were added to the initial claim; these added parties essentially adopted the same position as did the plaintiffs.

The issues which the court identified as needing to be analyzed are summarized as follows:

a) Is the plaintiff entitled to a declaration of an equitable easement over the Driveway Encroachment?

b) Is the plaintiff entitled to relief under s. 36 of the Property Law Act and, if so, should the court vest title in the land encroached upon or should the court grant a statutory easement?

c) If yes, what compensation should the plaintiff make to the defendants?

d) Does the Driveway Encroachment constitute a trespass?

e) If yes, what damages should the defendants recover in relation to that trespass?[7]

A view of the driveway access point can be seen in the image[8] below:

[7] *The Owners, Strata Plan VR 10 v. EE Management Corp.*, 2015 BCSC 473 (CanLII), http://canlii.ca/t/ggwl4, at para. 64

[8] From Google® Streetview.® All rights reserved.

With respect to the plaintiff's entitlement to an equitable easement, the court explained that of course this was in the nature of proprietary estoppel and, rather than being a true estoppel, operated as a sword in order to create property rights in a claimant. As noted,

> The courts will give effect to proprietary estoppel in circumstances where the conduct of the parties is predicated on certain assumption about their respective rights, such that it would be unjust or unfair to allow a party to resile from that assumption. In *Dykes*, Harris J. (as he then was) noted that "where there has been an implied promise by conduct and acquiescence, coupled with detriment, it may be inequitable to allow a party to assert rights inconsistent with that implied promise": *Dykes*, at para. 59.[9]

Earlier decisions in British Columbia which had considered the availability as well as the test to be met for a declaration entitling a plaintiff to an easement arising from proprietary estoppel were summarized and, were identified as constituting a "broad, flexible and less literal judicial approach to proprietary estoppel which moves beyond the strict evaluation of the "probanda" as articulated in an earlier decision from 2008 which cited the English decision in *Wilmot v. Barber*."[10] Instead, the court stated:

> At the outset, I note that the five elements of "probanda" famously cited by Fry J. in *Willmott v. Barber* (1880) 15 Ch. D. 96, including in particular the making of a "mistake" by a party as to his or her legal rights, have now been overtaken by a broader and less literal approach to proprietary estoppel. *Halsbury's* (4th ed., vol. 16) explains this approach as follows:
>
> > The more recent cases raise the question whether it is essential to find all the five tests literally applicable and satisfied in any particular case. The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it. The belief on which the person seeking protection from equity relies need not relate to an existing right nor to a particular property. It may be easier to establish acquiescence where the right in question is equitable only. Where, on the hypothesis that liability has been established, the question is whether equitable relief should be withheld in the case of a continuing legal wrong, the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief. The modern approach is a

[9] *Ibid*., at para. 70

[10] *Erickson v. Jones*, 2008 BCCA 379 (CanLII), the Court of Appeal summarized the principles of proprietary estoppel., at para. 53

> broad one and the tendency is to reject any classification of equitable estoppel into exclusive and defined categories. [para. 1072; emphasis added][11]

This was further clarified and summarized by the court as the modern test or approach:

> The foregoing characterization of the broader approach was cited with approval by Mr. Justice Chiasson in *Erickson* at para. 56 and in several subsequent decisions of the Court of Appeal, including the recent decision of *Sabey v. Rommel*. In *Sabey*, the Court clarified the essential formulation of the test for proprietary estoppel as follows:
>
> > Although the test for proprietary estoppel has been framed in many different ways in the case law, it always bears the same essential qualities. In my view, they can be summarized as follows:
> >
> > 1. Is an equity established? An equity will be established where:
> >
> > a) There was an assurance or representation, attributable to the owner, that the claimant has or will have some right to the property, and
> >
> > b) The claimant relied on this assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance.
> >
> > 2. If an equity is established, the court must determine the extent of the equity and the remedy appropriate to satisfy the equity.[12]

Ultimately, the court concluded that the plaintiff was unable to satisfy the test and dismissed this claim. Instead, the statutory remedy under the *Property Law Act* began with a statement of the statutory language:

> The relevant section of the *PLA,* s. 36, reads as follows:
>
> **Encroachment on adjoining land**
>
> 36(1) For the purposes of this section, "owner" includes a person with an interest in, or right to possession of land.
>
> (2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application
>
> > a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,

[11] *Tretheway-Edge Dyking District v. Coniagas Ranches Ltd.*, 2003 BCCA 197 (CanLII), para. 64

[12] *The Owners, Strata Plan VR 10 v. EE Management Corp.*, 2015 BCSC 473 (CanLII), para. 73, sub. 30

b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or

c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

Section 36 confers statutory authority upon the court to resolve encroachment disputes on equitable grounds: *Taylor v. Hoskin*, at para. 2. The granting of a remedy pursuant to s. 36 is discretionary and the determination whether to grant or refuse relief turns on the facts and equities of each individual case: *Gainer v. Widsten*, at para. 8.

On considering an application under s. 36, the court must first be satisfied that the requisite criteria mandated by statute are met. That is to say, the characterization of the nature of the encroachment is regarded as a threshold question. The applicant must establish there is an encroachment onto neighbouring land in the form of a building or that there is something having the equivalent effect of a fence which delineates the property: *Epp v. Gartside*, at para. 22.

A "fence" is not defined in the PLA. In accordance with s. 8 of the *Interpretation Act*, the *PLA* is to be construed as "remedial" and is to be given a "fair, large, and liberal construction and interpretation as best ensures the attainment of its objects": *Oyelese v. Sorensen*, at para. 20. [citations omitted][13]

This however was not the end of the test. Explaining further, the court pointed out that section 36(2) simply establishes a threshold and, once attained, there would need to be a further balance of convenience test which has been the subject of other decisions commented on in *The Boundary Point*.[14]

Ultimately, the court held that knowledge of the parties with respect to the existence or nonexistence of the encroachment was only one of several factors to consider; it was not determinative. Likewise, the nature of the encroachment itself was evaluated in terms of cost of removal and other similar considerations. This was found to be a factor favoring the plaintiff. Likewise, the size and effect of the encroachment was seen as amounting to only 369 square feet and, not a significant burden to the defendant. Ultimately, a parcel matching this size and being positioned over the driveway encroachment was ordered to be vested in the plaintiff. The negative affect on the defendants of not retaining that relatively small parcel of land which constituted the encroachment would be minor in relation to the plaintiff's loss of access over the driveway. The amount of compensation to which the defendant was entitled was suggested

[13] *The Owners, Strata Plan VR 10 v. EE Management Corp.*, 2015 BCSC 473 (CanLII) para. 90-93

[14] See, for example, one decision, *Langley v. Yang* in *Mistaken but Honest Belief about a Boundary*, TBP Vol. 2(1)

by plaintiff counsel somewhat arbitrarily as $10,000.00, but the Judge ruled that the parties needed to agree on an amount or come back to court.[15] The defendants were also awarded $6,000 for their claim in trespass.

The cost of litigation would be expected to exceed the relatively minor cost amount indicated for the value of 369 square feet. Even though this area formed part of the common property of the owners of Edgewater Estates, it is still instructive to consider the potential for a periodic audit of common elements and condominium properties from the point of view of potential encroachments. In that regard, most provinces include elements of consumer protection legislation for condominium owners in which a physical audit of the buildings and associated infrastructure are mandated on a periodic basis. No province requires such an audit to include an attendance by a licensed land surveyor in order to verify the continuing absence from encroachments by any third party. This practice may well need to be reconsidered and, be a basis for prompting legislative change.

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.[16] 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.

Third Annual Boundary Law Conference

This year's conference theme is: *Enhancing Parcel Title by Re-Thinking Parcel Boundary*. This one day event (November 16, 2015) engages in critical thinking about boundaries and how we conceptualize them. Traditional assumptions about the nature of boundaries are revisited and new mindsets are introduced so as to better align with what the courts do and conclude. A draft agenda is in preparation and *early bird* registration is now open.

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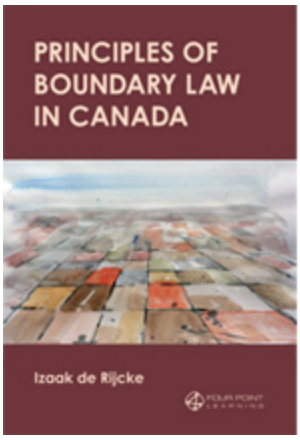
[15] *The Owners, Strata Plan VR 10 v. EE Management Corp.*, 2015 BCSC 473 (CanLII) para. 138

[16] 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.

COMING SOON: Rethinking Land Titles and Boundaries: Integrating Aboriginal Interests with Fee Simple

This presentation attracted considerable interest when delivered at the Yukon Arts Centre in June, 2015. Sponsored by contributions from many local professional and education organizations and First Nations, this event was noted on CBC News, the local papers and has been configured as a recording with further resources.

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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