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.

Hardly a month passes by without a decision being reported on *CanLII* from a court somewhere in Canada dealing with an aspect of the law of easements. Generally speaking, these are decisions stemming from disputes where the use of an easement or right of way has been obstructed or the validity of the easement itself has been called into question. In this month's issue of *The Boundary Point*, the decision in *Oostdale Farm and John Oostvogels v. Joseph Lawrence Oostvogels*[1] (referred to as "*Oostdale*"), is considered. Released at the end of May, 2016, after a 2 day trial in February at Antigonish, Nova Scotia, *Oostdale* was divided in success between the parties – two brothers who had come to own different portions of the family farm each experienced success and loss. This decision will be of interest to both real estate lawyers and land surveyors.

Intensification of Use and Disputed Location of Easement Boundaries

Key Words: *easements, use, boundary, uncertainty, hierarchy of evidence*

In *Oostdale*, the facts were relatively straightforward. The parents of the two brothers who became the litigants in this dispute, had operated a dairy farm since the 1960s just outside Antigonish, Nova Scotia on land that was acquired through a purchase agreement with the Nova Scotia Farm Loan Board.[2]

In 1988 the father took title to, and purchased, "six acres" from the Nova Scotia Farm Loan Board on which had been built their home and an outbuilding. The outbuilding was used mainly by the family to service farm machinery. The deed to the six acre parcel included a metes and

[1] *Oostdale Farm and John Oostvogels v. Joseph Lawrence Oostvogels*, 2016 NSSC 146, http://www.courts.ns.ca/Decisions_Of_Courts/documents/2016nssc146.pdf

[2] The reference to a "purchase agreement" in the reported decision is unclear whether title was immediately obtained in the 1960s or if this was a long term purchase agreement in which the title was held by the Farm Loan Board as long as the full purchase price remained unpaid.

bounds description and a right of way, 20 feet wide, through the farm property. The description was repeated in the decision as follows:

> All and singular that certain lot, piece or parcel of land situate, lying and being at Church Street Extension, Town of Antigonish, Nova Scotia, and being shown on Instrument of Subdivision approved by Department of Municipal Affairs, December 11, 1987, said lot being more particularly described as follows:
>
> > Beginning at a point south of the Church Street Extension at a small stream;
> >
> > Thence in an easterly direction along said stream a distance of two hundred and ten (210) feet more or less to a fence;
> >
> > Thence along said fence in a southerly direction a distance of seven hundred and thirty-five (735) feet more or less to a point;
> >
> > Thence along a fence in a westerly direction a distance of one hundred (100) feet more or less to a point;
> >
> > Thence along a fence in a northwesterly direction a distance of four hundred and sixty (460) feet more or less to a point;
> >
> > Thence along a fence in a northerly direction a distance of six hundred and seventy (670) feet more or less to the Point of Beginning;
> >
> > Containing an area of six (6) acres more or less . . .[3]

The description continued with a reference to the right of way:

> . . . Also including a right of way twenty (20) feet in width over the existing driveway, leading from the limits of Church Street Extension to the northern boundary of the above described lot - said lot being a portion of the lands presently owned by Jack Oostvogels and Nova Scotia Land Settlement Board - said agreement being registered as Document BG 256 Registry of Deeds Antigonish.[4]

The father died in 2007 and under the terms of his will the six acre parcel was inherited by his son, Joseph. John, the other son, was owner of the adjacent farm property over which the right of way passed. The general configuration of the properties can be viewed in Figure 1 below, in which the "outbuilding" used to service farm machinery is marked by the arrow. The imagery refers to "Church Street Extension," but that public road actually stops further to the east.

[3] *Oostdale Farm and John Oostvogels v. Joseph Lawrence Oostvogels*, 2016 NSSC 146, at para. 13

[4] *Ibid.*, at para. 24

Figure 1: The "outbuilding" on the six acre parcel is marked by the red arrow and located at the end of the Church Street Extension.[5]

Trouble arose when Joseph's use of the outbuilding began to change. Joseph opened an automobile repair operation, his brother John objected to the use and started the proceeding.

Figure 2: GoogleMaps® depicts the location of "Joe Oostvogels Automotive"[6]

The court recognized that there were only two issues before it and described them as:

[5] Imagery from BingMaps® and ©DigitalGlobe. All rights reserved.

[6] Imagery from GoogleMaps® and ©DigitalGlobe. All rights reserved.

1. What is the location of the boundaries of the land owned by the defendant?

2. Whether the grant of right of way attached to the defendant's land may be used to support a commercial operation in the nature of an automotive repair business.[7]

With respect to the first issue the plaintiff, John, alleged that the description of the easement defined the boundaries of the land; the defendant, Joseph, argued that the boundaries were defined by the fences on the ground. This contest is familiar to land surveyors and in order to resolve the issue, the court began by quoting extensively from the principles set out in *Goulden v. Nova Scotia (Attorney General)*,[8] in determining what to do once a latent ambiguity was found to exist. The parties had agreed that, in fact, there was a "latent ambiguity" in the 1988 deed; the metes and bounds description set out in the deed, which reference fence lines, did not correspond with the locations of the fence lines or the stated size of the lot (six acres). Accordingly, extrinsic evidence could be considered. A portion of the quoted extract from *Goulden* deserves repeating:

> 12 **Boundary determination**. Before embarking on a review of the evidence, it will be of use to set out several of the general legal principles that govern the rather technical field of boundary determination. Various legal principles govern deed interpretation and boundary demarcation when the court is required to resolve boundaries. The general rules of evidence apply to boundary disputes, which are typically heavily concerned with documentary evidence of title. In deed interpretation, the question is not the grantor's subjective intent. Rather, the court is concerned with the meaning of the words used in the deed. That is to say, the question is "what is the expressed intention of the grantor?": *Knock v. Fouillard*, 2007 NSCA 27 (CanLII), at para. 27. If the terms of the conveyance are clear, extrinsic evidence is not admissible: Anne Warner Le Forest, *Anger and Honsberger's Law of Real Property, 3d edn.* (Aurora, Ont: Canada Law Book, 2010) at s.18:30:30.
>
> 13 When the words of a deed are not ambiguous, either in themselves or when applied to the land in question, the intention of the original grantor is to be taken from the words of the description in the deed. No further rules of interpretation are required: *Herbst v. Seaboyer,* (1994) 1994 CanLII 3982 (NS CA), 137 N.S.R. (2d) 5 (C.A.), at para. 15; *McCormick v. MacDonald*, 2009 NSCA 12 (CanLII), at para 73. A latent ambiguity occurs when the words of a document on their face do not admit a different possible meaning, but surrounding circumstances show that two or more different meanings are possible. A party may demonstrate that a latent ambiguity exists, and attempt to resolve it, by adducing extrinsic evidence, including evidence of subjective intention. A patent ambiguity, by contrast, is "apparent from the face of the document": *Taylor v. City Sand and Gravel Ltd.*, 2010 NLCA

[7] *Oostdale Farm and John Oostvogels v. Joseph Lawrence Oostvogels*, 2016 NSSC 146, at para. 10

[8] *Goulden v. Nova Scotia (Attorney General)*, 2013 NSSC 253 (CanLII), [2013] N.S.J. No. 418

> 22 (CanLII), at para. 21; Geoff R. Hall, *Canadian Contractual Interpretation Law, 2d edn.* (Toronto: Lexis Nexis Butterworths, 2012) at s.2.8.5.
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> 14 The rules for ascertaining the intention of a grantor in the event of ambiguity were set out in *McPherson v. Cameron* (1868), 7 N.S.R. 208, [1868] N.S.J. No. 2 (S.C.). Dodd J. said the general rule "is to give most effect to those things about which men are least liable to mistake" (para. 5). In applying this principle, the elements of the description are "marshalled" in the following order: "First, the highest regard had to natural boundaries; Secondly, to lines actually run and corners actually marked at the time of the grant; Thirdly, if the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established; Fourthly, to courses and distances, giving preference to the one or the other according to circumstances" (para. 5).[9]

In applying these principles, the court determined that the plaintiff's claim that the boundaries are defined by the measurements in the metes and bounds description must fail, and determined the first issue – the location of the boundaries – on this basis.

The second issue was based on a claim by the plaintiff that the defendant's use of the right of way for commercial purposes was inconsistent with the right of way's intended purpose; the use was alleged to interfere with the plaintiff's farm operation. The second issue was analyzed by the court on the basis of the test articulated by the Supreme Court of Canada in *Laurie v. Winch*,[10] and quoted in *Oostdale* as:

> … Just as the circumstances existing at the time of the grant may be looked at for the purpose of ascertaining the intention of the parties as to the dominant tenement and as to the location and termini of the way, the circumstances may also be looked at for the purpose of construing the conveyance as to the nature and extent of the rights conveyed.
>
> …
>
> In *Robinson v. Bailey* [[1948] 2 All E.R. 791.], Lord Green M.R. referred to the language of Farwell L.J. in *Todrick's case*, *supra*, and said at p. 795:
>
> > While not in any way dissenting from that statement as a general proposition, I would like to give this word of caution, that it is a principle which must not be allowed to carry the court blindly. Obviously the question of the scope of the right of way expressed in a grant or reservation is prima facie a question of construction of the words used. If those words are susceptible of being cut down by some implication from surrounding circumstances, it being, to construe them properly, necessary to look at the surrounding circumstances, of course they would be cut

[9] *Oostdale Farm and John Oostvogels v. Joseph Lawrence Oostvogels*, 2016 NSSC 146, at para. 12

[10] *Laurie v. Winch*, 1952 CanLII 10 (SCC), [1953] 1 S.C.R. 49

> down. *Todrick's case* is a very good example of the sort of application of the rule which Farwell J. was enunciating.[11]

This was an issue concerned with the **nature** of the use and the rights that were associated with the enjoyment of the way, as opposed to uncertainty about the **spatial extent** of these rights. Further assistance was identified by the court in the decision in *Sunnybrae Springbook Farms Inc. v. Trent Mills (Municipality)*:[12]

> Lauwers J. in *Sunnybrae*, *supra* at para. 94, cited *Laurie* for the following proposition: "The court must look not only to the instrument creating the easement, but at all circumstances present at the time the easement was made in order to determine its extent and nature."
>
> Accordingly, it will be a rare case when resort to the surrounding circumstances will not be necessary in construing the bounds of an easement. This would only be inappropriate where the words of the grant are clear and unambiguous, and expressly and satisfactorily resolve the problem before the court.
>
> The words of the grant in our case do not expressly resolve the problems before the court. The grant does not specify the right of way's purpose, beyond giving a right of access between the Church Street Extension and the defendant's property. It also does not specify the permitted scope or mode of use. An examination of the surrounding circumstances is necessary. There are various factors that may form the analysis.
>
> 1. The past use of the right of the way and its use at the time of grant;
>
> 2. Why the right of way was created;
>
> 3. Physical characteristics of the right of way surrounding servient land;
>
> 4. Characteristics of the dominant tenement;
>
> 5. Relationship of the parties;
>
> 6. Passage of time.
>
> An easement's purpose may not be frozen in time and can evolve where the use of the land changes within the reasonable ambit of the right of way (*Laurie*, *supra*.) However, it is a

[11] *Oostdale Farm and John Oostvogels v. Joseph Lawrence Oostvogels*, 2016 NSSC 146, at para. 29, quoting from *Laurie v. Winch*

[12] *Sunnybrae Springbook Farms Inc. v. Trent Mills (Municipality)*, 2010 ONSC 1123 (CanLII), [2010] O.J. No. 3715, aff'd 2011 ONCA 179 (CanLII), [2011] O.J. No. 965 at para. 93 [*Sunnybrae*], Lauwers J. explained, "Overburdening of a right of way occurs when it is used excessively or significantly beyond the rights and nature conveyed in the grant of easement."

> general principle that the grantee of a private right of way cannot turn it into a public right of way *Granfield v. Cowichan Valley (Regional District)* [1996] B.C.J. No. 261, (BCCA).[13]

In applying these principles to the facts as determined by the court in *Oostdale*, the reasoning was explained thus:

> The evidence establishes that the dominant tenement was deeded to the parents so they could have a retirement home. The right of way was attached to the property to give it a means of access from Church Street Extension. It is an easement of necessity. The dominant tenement and servient tenement were historically used for a farmhouse and a farm. Until the dominant tenement was bequeathed to the defendant and he opened the vehicle repair business, the right of way was only used by those living at home and perhaps the occasional guest.
>
> As stated, the right of way or driveway travels through the farm outbuildings to the residential homes of both parties. The dairy farm currently consists of 120 head of dairy cows. The barns and other out buildings are located on both sides of the driveway, in very close proximity to the driveway. The right of way in this area is used in the farm operation including cattle, farm equipment and workers who regularly occupy the area. Farm equipment consists of tractors, spreaders, forestry equipment, harvesters, wagons, ATVs and farm vehicles. A "very large and extended" milk truck arrives and parks on the driveway adjacent to the barn on a regular basis to load milk. The plaintiff claims that traffic related to the defendant's business interferes with the farm operation and at times poses risks to workers while crossing the yard, as depicted in video security cameras admitted into evidence.[14]

Under these circumstances, the court concluded that:

> While the use of land can change over time, the change of use of this right of way created an unacceptable increase of traffic creating an over burden on the right of way.
>
> The problem lies in the fact that the defendant has changed the right of way from a private one to a public one. This goes beyond what was reasonably contemplated by the parties in 1988.[15]

The plaintiff therefore succeeded on the second issue. While the decision in *Oostdale* may leave both brothers as only partly unsuccessful, real estate lawyers and land surveyors may refer to

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[13] *Oostdale Farm and John Oostvogels v. Joseph Lawrence Oostvogels*, 2016 NSSC 146, at paras. 30 - 33

[14] *Ibid.*, at paras. 34 - 35

[15] *Ibid.*, at paras. 39 - 40

the decision as a further affirmation of well-established principles of law and boundary retracement regarding easements.

Editor: Izaak de Rijcke

Cross-references to *Principles of Boundary Law in Canada*

The decision in *Oostdale* involved an interpretation of the description of an easement found in a deed and the nature of permitted use of an easement. Both of these issues are dealt with in *Principles of Boundary Law in Canada*.

First, the interpretation of a metes and bounds description when an ambiguity is present, was referenced in relation to the work of R.W. Cautley[16] in stating, in the book,[17]

> As a "system of survey" the early means of settlement in Maritime provinces took place by the grant of ownership based on a description that often used local landmarks and features in order to identify the boundaries. Known as "metes and bounds descriptions," this method of describing the boundaries of a parcel of land in narrative form has been used for centuries in carving out a new parcel or in describing an area of land. However, their relative success has been a function of the skill of the draftsperson and the availability of measurements to known features on the ground, in order to reflect the intention of the parties to a document in which the land is described.

Second, we know that the intensification of use over an easement with the passage of time has always been problematic. This is also discussed in *Principles of Boundary Law in Canada* in connection with the decision in *Laurie v. Winch*, discussed in Chapter 5: *Boundaries of Easements,* at p. 157.

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

[16] Cautley, R.W., *Descriptions of Land, A Text-Book for Survey Students*, The MacMillan Company, New York, 1913

[17] see Chapter 2: *How Boundaries are Created*, at pp. 39 - 40

hours.[18] 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.

Fourth Annual Boundary Law Conference

This year's conference theme is: *Boundaries of Public Roads: New Developments and Practices.* This one day event (November 14, 2016) engages in critical thinking about the boundaries of public roads and how we may or may not think of them as different from other boundaries. What are the reasons for highway boundaries having an elevated status? Do they even have an "elevated" status? If so, what is the rationale? What is the latest in best practices for the survey of road boundaries? An agenda is now finalized.[19]

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[18] 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.

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