The Boundary Point
Volume 4, Issue 2, February 2016
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.

Seldom do easement cases reach the appellate courts; when they do it is often an opportunity to receive clarity and further guidance on this area of property law. Easements remain everywhere, yet their significance in conveyancing, title insurance, surveys and title registration remains poorly understood by the public – and may even be challenging for land professionals. In 2015, the Court of Appeal for Ontario dealt with three significant decisions[1] involving easement disputes. The results confirm what has always been known, but they also illustrate how a claim to an easement may interact with other property rights in novel and unexpected ways. For land surveyors across Canada, these decisions may signal a renewed interest in plans of survey as a means of "seeing" what is being openly used on the ground, rather than just assuming that what appears registered on title represents the whole story.

"Expired" Easements Still Openly Used

Key Words: *easements, notice of claim, extinguishment, prescription*

Just as the January 2016 issue of *The Boundary Point* was going to press, the Ontario Court of Appeal released its decisions in *Gold v. Chronos*[2] (herein *"Gold"*) and *Hoggarth v. MGM Farms and Fingers Limited*[3] (herein "*Hoggarth*"). *Gold* involved an application for an order that a certain easement had not been extinguished and ordering a neighbour to cease or stop the blocking of a right-of-way. The trial judge said yes.[4] *Hoggarth* involved an application for an

[1] The three cases from 2015 reviewed in this issue (namely: *Gold v. Chronas*, *Condos and Castles v. Janeve Corporation* and *Hoggarth v. MGM Farms and Fingers Limited*), follow closely after the decision in *Weidelich v. de Koning*, 2014 ONCA 736 (CanLII), http://canlii.ca/t/gf30c in late 2014. *Weidlich* dismissed an appeal from the trial decision which had been reviewed in *The Boundary Point*, Volume 2(11)

[2] *Gold v. Chronas*, 2015 ONCA 900 (CanLII), http://canlii.ca/t/gmm6f

[3] *Hoggarth v. MGM Farms and Fingers Limited*, 2015 ONCA 908 (CanLII), http://canlii.ca/t/gmnkq

[4] The trial decision below was reported at: *Gold v. Chronas*, 2014 ONSC 6763 (CanLII), http://www.canlii.org/en/on/onsc/doc/2014/2014onsc6763/2014onsc6763.html It had also been the subject of review in the earlier issue of *The Boundary Point*, Volume 3(5)

order that certain easement-like rights arising out of a note on a plan of subdivision in 1950 still applied and remained valid. The trial judge also said yes.[5]

In both *Hoggarth* and *Gold*, the Court of Appeal dismissed the appeals, thereby confirming the validity and persistence of the easement as a legal encumbrance on the servient owner in the specific circumstances of each case. In contrast, in *Condos and Castles v. Janeve Corporation*[6] the trial judge found no easement to have been established, but on appeal, this determination was reversed. The court looked closely at the evidence and determined that it did support a factual finding of an easement by prescription.

Notice, equity and *Torrens* title registration

Last year's issue of *The Boundary Point* which reviewed *Gold* also discussed the decision of Justice Perell in *Condos and Castles v. Janeve Corporation.*[7] That outcome was also appealed to the Court of Appeal for Ontario last year but, differing from the decision in *Gold*, the court allowed the appeal in the *Condos and Castles* decision.[8] This issue of *The Boundary Point* will review and update what happened to both lower level decisions when they were appealed – one was upheld; the other was reversed.

To some extent, readers might argue that this issue – and specifically the issues before the court in these three cases are specific to Ontario and have little relevance elsewhere. This view is of only limited validity. The challenge for any land titles system – whether originating as a purist form of *Torrens* title, or being the result of conversion and upgrades from a historic registry of deeds system, is the challenge posed by the equitable doctrine of "notice". In other words, in an effort to design a land registration system which is certain, predictable, and accurate, users of a land registration system need to have a level of assurance that the information contained in the system is not only legally correct but *complete*,[9] and reliable – even if other information found on the ground conflicts with the information.[10] It is in fact

---

[5] *Hoggarth v Mgm Farms and Fingers Limited*, 2015 ONSC 2494 (CanLII), http://canlii.ca/t/gh8j9

[6] *Condos and Castles Realty Inc. v. Janeve Corp.*, 2015 ONCA 466 (CanLII), http://canlii.ca/t/gjnf5 (herein "*Condos and Castles*")

[7] *Condos and Castles Realty Inc. v. Janeve Corp.*, 2014 ONSC 6640 (CanLII), http://canlii.ca/t/gf9nq

[8] *Condos and Castles Realty Inc. v. Janeve Corp.*, *supra*, footnote 6

[9] This is part of the "Mirror Principle" which forms an important part of any *Torrens* title registration system. Note that Ontario's land registration system records only major easements. In British Columbia, the system seeks to record all easements affecting the title to a parcel.

[10] If we reflect on what "completeness" might mean as a combined part of the "Curtain Principle" and the "Mirror Principle", we are immediately faced with the fact that there are many things which can legally affect an owner's use and enjoyment of property, but are not necessarily defects of title. It is the reason for conveyancing lawyers conducting "off title" searches. Therefore, "completeness" is not to be confused with "contradictory" and giving rise to a conflict.

actual knowledge of circumstances which can be observed and documented to be taking place on the ground which is the most difficult issue to reconcile with information in the land registration system … or a lack of information on that point. Most laypersons would likely have a gut sense of "unfairness" insofar as a land registration system unable to accommodate an activity on the ground as being lawful or somehow legitimated by reason of continued and open use, acquiescence, and necessity.[11]

These are all "equitable" considerations and therefore stack up against the policy objectives of certainty and predictability in a land title registration system. In fact these stack up in such a powerful manner that they even make legislative amendments which seek to eliminate such equitable doctrines daunting if not impossible. The importance of survey plans lies in the fact that information shown on a plan of survey and the surveyor's ability to document historic use and other activity which is not consistent with registered ownership, may clothe a viewer of the survey with *actual knowledge*. Having been placed on "notice", the viewer may no longer be able to look at a parcel register and claim "certainty" while ignoring what is now known.

Condos and Castles Realty Inc. v. Janeve Corp.

In *Condos and Castles* the appellant had originally asked for a declaration that it had a right-of-way over a private "laneway"[12] behind some buildings on King Street West in Toronto. In the hearing at first instance, the judge concluded that the predecessors in title of *Condos and Castles* had not acquired a prescriptive easement over the laneway (actually a private right-of-way). Although there was more than 20 years of use of the private right-of-way, it was by *licence* and not *as of right*. The Court of Appeal concluded that there was no evidence to support a factual finding that the use made by predecessors in title was by permission and therefore by way of a *licence* and not *as of right* and therefore allowed the appeal: an easement was declared to exist.

Briefly, and drawing on some of the diagrams illustrating the factual circumstances at issue in the earlier issue of *The Boundary Point*, the same sketch used by the court hearing the

[11] These are not activities which cannot "become" interests in a *Land Titles* context by reason of adverse possession of prescription, but are uses which must be recognized as legally permitted because of necessity. For example, resort to some other theory by which the legal mechanism through which the right arose must have occurred but a record of it has since been lost.

[12] As we noted in *The Boundary Point*, Volume 3(5),

> Lanes and easements are not synonymous but are often used interchangeably, even in court decisions. Generally speaking, a lane refers to a narrow strip of land which can physically accommodate pedestrians or vehicles as a thoroughfare. In contrast, an easement is a specific reference to the property rights which may be held over another's land to make the passage over such land "legal". Not all easements are lanes and public lanes are not easements. In this issue we use the terms interchangeably because this is often encountered in reported cases.

application was replicated by the Court of Appeal in describing the physical layout of the relevant properties on the ground. It appears again below as Figure 1.

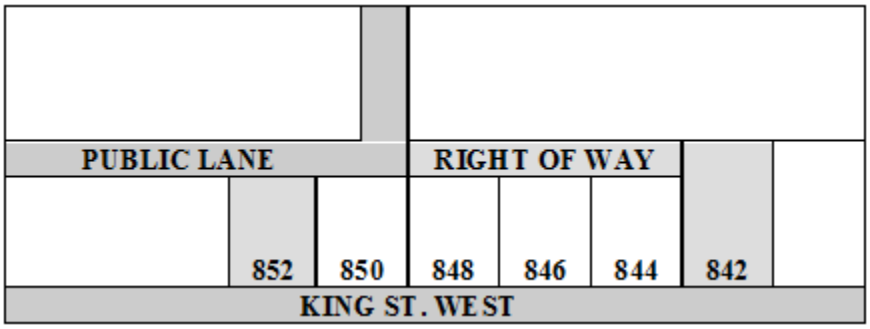

Figure 1: A rough sketch of the properties on King St. West[13]

The court gave the following short description:

> The appellant owns 842 King Street West, which abuts the right-of-way leading to the public lane depicted in the sketch. The respondent owns the four properties known municipally as 844-850 King Street West, as well as the right-of-way directly behind them. The issue is whether the appellant's predecessors in title to 842 King Street West acquired from the respondent's predecessor in title a prescriptive easement over the depicted right-of-way.[14]

The Court of Appeal noted that the legal burden was on *Condos and Castles* as claimant to a prescriptive right, to "demonstrate a continuous, uninterrupted, open, and peaceful use of the land, without objection by the owner" as had been previously held in an earlier decision, *394 Lakeshore Oakville Holdings Inc. v. Misek.*[15] The Court of Appeal also confirmed the quotation from an earlier decision in *Henderson v. Volk*[16] and quoted same, but went on to caution that these words needed to be understood in context. In particular, *Henderson v. Volk* was in respect of a prescriptive claim to an easement for walking purposes arising out of a pedestrian use of property between two homes. *Henderson v. Volk* went on to explain that an easement for pedestrian purposes is distinguishable from an easement for vehicular purposes. This was identified by the Court of Appeal in *Condos and Castles* as being particularly noteworthy given the nature of how conspicuous vehicular traffic was, compared to the inconspicuous nature of pedestrian traffic. Accordingly, the Court of Appeal held that as the burden of proof initially fell

---

[13] *Condos and Castles Realty Inc. v. Janeve Corp.*, *supra*, footnote 3, at para 21, and *Condos and Castles Realty Inc. v. Janeve Corp.*, *supra*, footnote 4, para. 3

[14] *Condos and Castles Realty Inc. v. Janeve Corp.*, *supra*, footnote 4, para. 4

[15] *394 Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 6007 (CanLII), http://canlii.ca/t/2d5z8, 98 R.P.R. (4th) 21

[16] *Henderson v. Volk*, 1982 CanLII 1744 (ON CA), 35 O.R. (2d) 379, [1982] O.J. No. 3138 (C.A.)

to the claimant in C*ondos and Castles*, it eventually shifted as the evidence was led in the application and ultimately, the burden shifted entirely once the record was clear. Thereafter, it fell to the appellant to lead evidence to rebut the inference by proving the use was not by permission. Failure to then call such evidence was fatal to the appellant's case.

Interestingly, the Court of Appeal in C*ondos and Castles* reviewed the evidence of the appellant's predecessors in title in detail; how best to characterize the nature of the use in terms of its legal character was the challenge. The court stated,

> A fine line may well exist between acquiescence and permission in many cases. However, in this case, all the evidence points to acquiescence. There is no evidence of permission. … The relationship between acquiescence and permission, and the shifting evidentiary burden, was well laid out by the Nova Scotia Court of Appeal in *Mason v. Partridge*.[17] … [There], the court held that in deciding whether Partridge had granted Mason permission to use an old logging road to cross over Partridge's land, the trial judge erred in law by failing to differentiate between acquiescence and permission.[18]

Citing other provisions in that decision, the Court of Appeal noted that the trial judge in *Partridge v Mason* called acquiescence the "foundation of prescription" and stated that "passive toleration is all that is required for acquiescence."[19] Another Nova Scotia trial decision has since applied the *ratio* in *Partridge v Mason*.[20] In allowing the appeal, the court in *Condos and Castles* engaged in a revisit of the evidence to make corrections to the application judges' findings of fact – surprising, because this is something which appellate courts are usually loathe to do.[21]

Gold v. Chronas

In *Gold,* the circumstances were more complex than in *Condos and Castles* - but not because the facts were particularly difficult to understand. In contrast with *Condos and Castles*, which dealt with a claim to an easement by prescription before conversion to Land Titles, *Gold* addressed the question of whether a "registered" easement or right-of-way persisted in law,

---

[17] *Mason v. Partridge*, 2005 NSCA 144, 261 D.L.R. (4th) 315

[18] *Condos and Castles Realty Inc. v. Janeve Corp.*, *supra*, footnote 4, paras. 19 and 20 [references omitted]

[19] *Condos and Castles Realty Inc. v. Janeve Corp., supra,* footnote 4, at para. 20

[20] See: *MacNeil v. MacNeil,* 2014 NSSC 171 (CanLII), http://canlii.ca/t/g71lb, 344 N.S.R. (2d) 350 at para. 26, where the court noted, "Acquiescence is not implied permission; instead acquiescence is acceptance of actions known to the property owner." Further, at para. 27, "…the burden of proving acquiescence falls to the claimant seeking prescriptive rights. Upon proof the true owner acquiesced to the use of his property, *the burden shifts to the owner to establish some positive act of permission*." [*emphasis added*]

[21] Appellate courts usually give the trier of fact below significant deference due to not wanting to "re-try" the case.

despite a lack of compliance with statutory requirements which provided that such failure would cause the legal interest to expire.

The easement in *Gold* was created by express grant in the form of a deed, but the easement had last been used or referred to in a description in 1960. The deeds in a chain of title under the *Registry Act* from 1960 onwards no longer referred to the right-of-way. In 2003, all of the properties in this locale were converted from *Registry* to *Land Titles* through administrative conversion and came to be known as "*Land Titles Conversion Qualified*" or *LTCQ*. A key issue in *Gold* was the effect of Part III of the *Registry Act* in regards to easements which had not been referred to for more than 40 years in a chain of title. Did the failure to mention the easement extinguish the associated rights at law and allow the appellant to block the easement and lawfully deny its use? Figure 2 shows the use that was in issue.

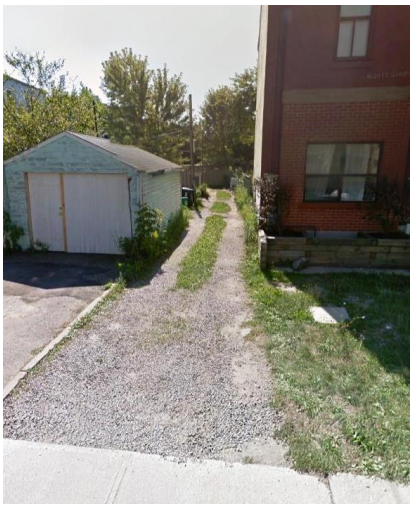

Figure 2: The private lane served as vehicular access from Cunningham Avenue to the rear of the applicants' properties on the left.[22]

The servient owner's home is on the right and the land included the gravelled right-of-way strip on the left leading to the properties of the respondents in the appeal.

Part III of the *Registry Act* is still part of the law in Ontario and, especially after *Gold*, may have significance for properties which still enjoy a *LTCQ* kind of title. These have been grandfathered in as part of the rights which were vested on the date of conversion to *LTCQ* and accordingly, the Court of Appeal's determination in *Gold* would be highly relevant to a determination of the correct principles to be used in determining whether or not a claim to an easement which had purportedly expired under *Registry*, might still have legal status under *LTCQ*. Section 113(5) of the *Registry Ac*t deserves repeating (in its entirety), because it indicates the exception which was at issue in this appeal:

> 113(1) A claim that is still in existence on the last day of the notice period expires at the end of that day unless a notice of claim has been registered.
>
> (2) A person having a claim or a person acting on that person's behalf, may register a notice of claim with respect to the land affected by the claim,
>
> (a) at any time within the notice period for the claim; or

[22] GoogleStreetView® All rights reserved.

(b) at any time after the expiration of the notice period but before the registration of any conflicting claim of a purchaser in good faith for valuable consideration of the land.

(3) A notice of claim may be renewed from time to time by the registration of a notice of claim in accordance with subsection (2).

(4) Subject to subsection (7), when a notice of claim has been registered, the claim affects the land for the notice period of the notice of claim.

(5) This Part does not apply to,

(a) a claim,

(i) of the Crown reserved by letters patent,

(ii) of the Crown in unpatented land or in land for which letters patent have been issued, but which has reverted to the Crown by forfeiture or cancellation of letters patent, or in land that has otherwise reverted to the Crown,

(iii) of the Crown or a municipality in a public highway or lane,

(iv) of a person to an unregistered right of way, easement or other right that the person is openly enjoying and using;

(b) a claim arising under any *Act*; or

(c) a claim of a corporation authorized to construct or operate a railway, including a street railway or incline railway, in respect of lands acquired by the corporation after the 1st day of July, 1930, and,

(i) owned or used for the purposes of a right of way for railway lines, or

(ii) abutting such right of way.

(6) Subsection (1) does not apply to a claim to a freehold estate in land or an equity of redemption in land by a person continuously shown by the abstract index for the land as being so entitled for more than forty years as long as the person is so shown.

(7) The registration of a notice of claim does not validate or extend a claim that is invalid or that has expired other than as a result of subsection (1).[23] [emphasis added]

The appellants argued that the application judge made a mistake by relying specifically on Section 113(5)(a)(iv) of the *Registry Act* which, according to them, only applied to prescriptive easements which had been acquired through adverse possession rather than under a registered instrument. In essence, they argued that a right-of-way that was once registered but has expired because of the failure to register a Notice of Claim under Part III within 40 years after the right-of-way was last mentioned does not qualify as an "unregistered right-of-way" within

[23] R.S.O. 1990, c. R.20, s. 113, as amended

the meaning of this paragraph. Furthermore, they argued that to hold otherwise would mean that a right-of-way would become "frozen" in existence as of the *LTCQ* conversion date – irrespective of whether it continued to be openly used and enjoyed thereafter or not.

Revisiting the circumstances on the ground involves the image at Figure 2 above, but also an appreciation of why the dominant owners could not enjoy vehicular access from the front of their properties. Figure 3 is a stark illustration of why this was simply impossible.

The right-of-way for the dominant tenement passed over the servient owner's property. It was initially described in a deed in 1948 as being 8.5 feet wide and ran along the entire length of the property of the appellant in the appeal, *Chronos*. Especially noteworthy was the fact that there was no reference to the easement since 1960 in respect of the chain of title for property owned by *Chronos* (which was the servient tenement). Equally noteworthy, was the absence of any explanation in the evidence as to how references in the deeds to the right-of-way disappeared after 1960.

Figure 3: 78 to 86 Brock Avenue. The grade separation and wall prevented vehicular access from the front of the dominant tenements.[24]

In *Gold*, the Court of Appeal undertook its analysis by starting with an examination of the statutory scheme under the *Registry Act*. As a "deeds" based system, evidence of good title would be found in the records as registered under that statute. As a form of deed registration (but with enhanced qualifiers and efficiencies), Part III allowed for a narrowing of the search of title as well as a limitation on the time period during which a chain of title needed to be demonstrated. (*ie*: a title search period ran backwards from the date of dealing to a "root of

[24] GoogleStreetView® All rights reserved.

title" which generally was the latest deed or instrument dealing with the title immediately preceding 40 years before dealing with the title, and any claims registered more than 40 years ago are deemed irrelevant).

But what occurs when evidence of property rights are registered under the *Registry Act* and the registration of these instruments are converted to property interests under the *Land Titles Act* through *LTCQ*? The question was not just academic; it lay at the core of the Court of Appeal's analysis in terms of the effect of administrative conversion to *LTCQ*. In that regard, the court noted,

> *LTCQ* parcels are converted to the Land Titles system without surveys or notice to owners …Thus, *LTCQ* status does not guarantee boundaries: *Land Titles Act*, s. 140(2). Further, *LTCQ* parcels are subject to mature adverse possession claims and prescriptive easements claims ... Under s. 44(1) of the *Land Titles Act*, they are also subject to any existing right of way or easement:
>
> > 44. (1) All registered land, unless the contrary is expressed on the register, is subject to such of the following liabilities, rights and interests as for the time being may be subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed to be encumbrances within the meaning of this Act:
> >
> > …
> >
> > 2. Any right of way, watercourse, and right of water, and other easements.[25]

Using this legislation as the starting point for a framework by which to conduct its analysis, the Court reviewed the application judge's reasoning and noted that the application judge rejected the appellant's argument that Section 113(5)(a)(iv) merely codified the historic exclusion of prescriptive easements from the 40-year search rule. In fact, prescriptive easements are already excluded from the 40-year search rule because the definition of "claim" for the purposes of the 40-year search rule was set out in section 111(1) of Part III of the *Registry Act* and included "only claims based upon or arising out of a registered instrument."

The Court continued its analysis,

> Further, I agree with Mr. Lem[26] and the application judge that once-registered rights of way that are not effectively renewed within the 40-year search period meet the definition of "unregistered". In its plain meaning, the word "unregistered" is not synonymous with "never registered." In my view, on its face, "unregistered" right of way also encompasses a right of way that once was, but no longer is, effectively registered.

---

[25] *Gold v. Chronas*, *supra*, footnote 2, at paras. 32 and 34

[26] This was a reference by the Court to: Lem, Jeffrey W., *1387881 Ontario Inc. v. Ramsay (Annot)* (Dec 2004), 24 R.P.R. (4th) 37-49, a case comment on *1387881 Ontario Inc. v. Ramsay* (2004), 2004 CanLII 66338 (ON SC), 71 O.R. (3d) 735

In relation to this point, the main focus of Part III of the *Registry Act* is on claims "set forth in, based upon or arising out of" registered instruments, their impact in the chain of title, their expiry and how they can be renewed.

Through various amendments, the Legislature has attempted to confine, to the extent possible, the title search period to 40 years and to eliminate any mechanism for renewing a claim, other than by registration of a notice of claim in a prescribed form.

Considered in that context, it makes sense that the word "unregistered" in a provision creating an exception to Part III would encompass claims that were once registered but are no longer validly registered. In my view, the purpose of s. 113(5)(iv) is, at least in part, to preserve, because of particular circumstances relating to the claim, a claim that was once registered, but which is no longer validly registered. The particular circumstances are the fact that the underlying right continues to be openly enjoyed and used.

In *Ramsay*, at para. 46, this court articulated the overall purpose of the *Registry Act* as seeking to promote commercial certainty; to simplify the title search process; and, to this end, to eliminate stale claims.

Through s. 113(5)(iv), the Legislature protects claims that are old, but not stale, in a manner that is consistent with the purposes of the *Registry Act* and that is not unfair to purchasers. Even though not validly renewed, the claims are not stale because they are still being openly enjoyed and used. And protecting such claims does not defeat the purposes of Part III – nor is it unfair to purchasers. This is because the enjoyment and use is open. The claims are there to be seen.

Moreover, assuming the Legislature intended to reverse the result in *Ramsay*, which held that rights of way could be preserved if referred to in registered deeds on the servient tenement, s. 113(5)(iv) is the only mechanism that would protect against the manifest unfairness that could accrue to dominant tenement owners because of the legislated change in the law. Prior to the 2006 Amendments, dominant tenement holders may have relied reasonably on references to rights of way in deeds registered on the servient tenement. Properly interpreted, s. 113(5)(a)(iv) could protect them from losing, unfairly, a right of way they continue to use and enjoy, openly.

In oral argument on appeal, the appellants submitted that the application judge's interpretation of s. 113(5)(a)(iv) creates a title search problem, in that it defeats the 40-year title search rule, and effectively requires a search back to the Crown grant. I reject this argument. The words "openly enjoying and using" do not point to doing a title search; rather, they point to conducting a careful inspection of the property and of all available (or new) surveys.

Fairness suggests that a right of way that was once registered and continues to be openly enjoyed and used should be exempted from the operation of the 40-year rules set out in Part III. This must have been what the Legislature intended – and is what a proper interpretation of s. 113(5)(a)(iv) requires.

> Having regard to these factors, I reject the appellants' argument that s. 113(5)(a)(iv) applies only to prescriptive easements.
>
> I also reject the appellants' argument that the impact of Land Titles conversion has any bearing on the interpretation of s. 113(5)(a)(iv). Section 113(5)(a)(iv) was enacted originally in 1966, prior to the enactment of any section authorizing conversion to *Land Titles*.[27]

We might pause to note that the concept of notice is an equitable doctrine. It has been argued to undermine the integrity of a *Torrens* title registration system.[28] However, if a title

---

[27] *Gold v. Chronas*, *supra*, footnote 2, at paras. 77 to 87

[28] See *Lawrence v. Maple Trust Company*, 2007 ONCA 74 (CanLII), http://canlii.ca/t/1qfh2 at paras. 52 and 53 in which the 5 member panel of the Court of Appeal for Ontario quotes from *United Trust Co. v. Dominion Stores Ltd.*, 1976 CanLII 33 (SCC), [1977] 2 S.C.R. 915, [1976] S.C.J. No. 99, 71 D.L.R. (3d) 72:

> At pp. 950 to 952 of *United Trust*, Spence J., for the majority, explains why United Trust could not rely on the register to take free of Dominion's interest and emphasizes that common law principles are not to be assumed to have been abrogated by the *Act*.
>
> > It is the appellant's argument that the enactment of the Torrens land titles system in the Province of Ontario made applicable in that province the main theory of a Torrens title registration system, to wit, the absolute authority of the register, and that it is the effect of such a principle that actual notice, no matter how clearly proved so long as encumbrances do not appear on the register, does not affect the clear title of the purchaser for value. I am ready to agree that this is a prime principle of the Torrens system and that it has been referred to as such by various text writers which I need not cite in support thereof.
> >
> > The Torrens Registration System was the brainchild of a Mr. Robert Torrens of South Australia and, due to his perseverance, a statute embodying the principles of his land titles system was enacted in South Australia in 1857. Similar statutes based on the same principles and using the same technique were enacted in rapid succession in Queensland in 1861, in Tasmania, Victoria and New South Wales in 1862, in New Zealand in 1870, and in Western Australia in 1874. Use of the system spread to Canada and a like statute was enacted in the Colony of Vancouver Island in 1861, and then in the Province of British Columbia in 1869. The *Land Titles Act* was enacted in Ontario in 1885. At that time, the Legislature in Ontario had before it as models all these previous enactments which I have listed. In every case, those enactments contained an express provision making actual notice ineffective to encumber the registered title.
> >
> > However, in Ontario, only a few years after the enactment of the *Land Titles Act*, the courts have expressed a disinclination to imply such an extinction of the doctrine of actual notice. There is no doubt that such doctrine as to all contractual relations and particularly the law of real property has been firmly based in our law since the beginning of equity. It was the view of those courts, and it is my view, that such a cardinal principle of property law cannot be considered to have been abrogated unless the legislative enactment is in the clearest and most unequivocal of terms. Such a provision, as I have said, does appear in all the other statutes cited by the appellant.
>
> In my view, *United Trust* cannot be read as simply a decision that registered interests in land are subject to the doctrine of actual notice. The notion of "absolute" title – that is, immediate indefeasibility – cannot be reconciled with the result or the reasoning of the majority.

registration system needs to value "integrity" in the sense that it is an accurate reflection of what is openly used on the ground, then accommodation of this factor does not necessarily undermine integrity: it actually enhances the integrity of the title registration system in the sense that it accurately portrays the circumstances that are evident on the ground. These may constitute an "equitable claim" which trumps an idealized, yet imperfect title register.

In arguments heard by the Court of Appeal from the respondents, the suggestion was made that the true intention of Section 113(5)(a)(iv) was to ensure that, in the rare circumstances where a past registered right is not validly renewed for some reason yet the usage still openly continues, no danger exists that an existing right will be lost unfairly through the operation of Part III of the *Registry Act*. The Court agreed. In doing so, it characterized section 113(5)(a)(iv) as an exception, not only to the 40 year expiry period, but also to the 40 year title search period. Where section 113(5)(a)(iv) does apply, a right will not expire after 40 years. An instrument which may not be seen in the *Act* as legally valid because it was registered outside the 40 year title search period will continue to affect the chain of title. The grandfathering concept of *LTCQ* ensures that such interest is carried forward into *Land Titles*.

The Court of Appeal revisited its earlier ruling from 2005 in *1387881 Ontario Inc. v. Ramsay*. The history of Part III and amendments to the legislation were described in *Ramsay* and the court ultimately concluded,

> *Ramsay* was significant because this court held that, following the 1981 Amendments, a registered easement could still be preserved not only by registering on the servient tenement a notice of claim in the prescribed form but also by registering a deed referencing the right of way. This was largely because the definition of notice period referred to a period 40 years after the registration of an instrument or notice of claim. In the light of this conclusion, the court found it unnecessary to address the argument made in that case by the owner of the servient tenement that s. 113(5)(a)(iv) of the *Registry Act* would preserve an easement that was openly enjoyed and used.[29]

Professionals in Ontario involved with real estate work and boundary surveys may recall that the Court of Appeal decision in *Ramsay* prompted amendments[30] to the *Registry Act* in 2006 by making changes to the definitions of "notice of claim" and "notice" in order to read as they do today. Those amendments required a Notice of Claim to be a claim "in the prescribed form"

---

[29] *Gold v. Chronas*, *supra*, footnote 2, at para. 59

[30] The 2006 Amendments changed the wording of s. 113(5)(a)(iv) from:

> This Part does not apply to, … a claim … of a person to an unregistered right of way or other easement or right that a person is openly enjoying and using.

to:

> This Part does not apply to, … a claim … of a person to an unregistered right of way, easement or other right that the person is openly enjoying and using.

and also confined the definition of "notice period" to "an instrument that first creates a claim." In *obiter*, the Court of Appeal observed that,

> The interpretation and application of the 2006 Amendments is not directly at issue on this appeal. Nonetheless, I observe that, on their face, the amended definitions I have referred to appear to be aimed at reversing the holding in Ramsay that a registered right of way could be preserved through the registration on the servient tenement of a deed referring to the right of way. That said, nothing in these reasons should be taken as determining the interpretation or application of the 2006 Amendments.[31]

Ultimately, the Court of Appeal concluded that section 113(5)(a)(iv) of the *Registry Act* could protect a dominant tenement holder's right to use a right-of-way that was once registered on the title to the servient lands but is no longer validly registered – for the same reasons explained by Mr. Lem in the annotation in *Ramsay*. In other words, section 113(5)(a)(iv) does not apply to prescriptive easements because they do not arise out of any registered instrument. If section 113(5)(a)(iv) was intended to apply only to prescriptive rights, it would be redundant for this provision to exist. Accordingly, if the 40 year title search rule and the 40 year expiry rule do not apply to unregistered prescriptive easements there would be no need to have enacted section 113(5)(a)(iv) to preserve them - and therefore *the purpose of the subsection must be to target the preservation of legal easements which had technically expired but remain openly used and enjoyed.*

This may seem like a subtle distinction but the effect is actually quite profound. A right that is being openly used and enjoyed in the context of *LTCQ* title under the *Land Titles Act* will prevail and continue to exist at law even though the *Land Titles Act* and information shown on the parcel register might be silent in regards to its existence. Perhaps we should not be surprised. Harkening back to Section 44 of the *Land Titles Act*, registered land always was subject to easements and rights-of-way that lawfully existed but was not listed in the title register for the affected parcel. For surveyors, the decision in *Gold* affirms the importance and commercial significance of having an up-to-date survey performed when transacting in real estate. As the court noted,

> The words "openly enjoying and using" do not point to doing a title search; rather, they point to conducting a careful inspection of the property and of all available (or new) surveys.
>
> Fairness suggests that a right of way that was once registered and continues to be openly enjoyed and used should be exempted from the operation of the 40-year rules set out in

[31] *Gold v. Chronas*, *supra*, footnote 2, at para. 62

> Part III. This must have been what the Legislature intended – and is what a proper interpretation of s. 113(5)(a)(iv) requires.[32]

In *Gold*, the ultimate result was to dismiss the appeal but this conclusion was arrived at by conducting a review of the evidence, the application judge's analysis, and ultimately finding that the evidence supported a finding that the respondents had openly enjoyed and used the right-of-way from at least the expiry date (2000) to 2003 when the servient tenement was converted to land titles, and from that date to the date of the court application.[33]

This conclusion also agrees with the Court's observation of a practical reality:

> I am satisfied that the record creates an inference, on a balance of probabilities, that all of the respondents and their predecessors in title, dating back to at least 1988, openly enjoyed and used the right-of-way. That is because using the laneway is the only realistic way to access the respondents' homes and associated parking.[34]

The grade separation pictured in Figure 3 above certainly confirms this.

Readers might be troubled by the decisions in both *Condos and Castles* and in *Gold*. However, when properly understood, the Court came to its conclusions based on a careful review of the facts as well as a detailed consideration of the legal principles. Although the reasons in *Condos and Castles* did not use the word "fairness," the reasons in *Gold* did; both decisions align with what seems right.

Hoggarth v. MGM Farms and Fingers Limited

In *Hoggarth v Mgm Farms and Fingers Limited*,[35] the court heard an application to determine the status of certain rights claimed over strips of land which were laid out on a plan of subdivision and provided access to the waterfront of Lake Simcoe. The plan was registered in 1950 and included the following wording on its face:

> Note: lots numbered 1, 11, 23, 33, 41, 51, 59 and 77 are hereby dedicated as area of user, common to each property owner in the subdivision.[36]

The question brought by the applicants to the court was the status of their rights to decades-old "user in common" rights set out on this plan. Over the years, the fee simple in the lots had

---

[32] *Gold v. Chronas, supra*, footnote 2, at paras. 84 and 85

[33] *Gold v. Chronas, supra*, footnote 2, at para. 97

[34] *Gold v. Chronas, supra*, footnote 2, at para. 100

[35] *Hoggarth v Mgm Farms and Fingers Limited*, 2015 ONSC 2494 (CanLII), http://canlii.ca/t/gh8j9. Appeal dismissed, *Hoggarth v. MGM Farms and Fingers Limited*, 2015 ONCA 908 (CanLII), http://canlii.ca/t/gmnkq

[36] *Ibid.,* ONSC, at para. 6

been routinely conveyed - often to owners of one of the abutting lots. The uses made of the subject lands included the launching of boats, as access to various other properties, parking of vehicles, storage for surrounding properties and access to Lake Simcoe for swimming and various recreational purposes. In addition, the Township used portions of the lands for drainage of various other parcels of land, both on and off the plan.

In answering the question, the court described the application as raising two issues and proceeded with its legal analysis by addressing each one in turn. The two issues were:[37]

a) What is the nature of the rights that were given to the Applicants and other owners of the [lands] by virtue of the dedication noted on [the plan]?

b) What, if any, effect do the provisions of the *Land Titles Act* with respect to "Land Titles qualified" designation, and the predecessor provisions of the *Registry Act* on limitations on claims for user have on these rights?

The first issue involved a consideration of the conditions attached to planning approval given in 1949 to the registration of the plan. One condition in particular was seen as granting "user in common" by the Provincial Department of Planning and Development. That authority required,

> …the conditions and amendments to the approval of the final plan for registration of the subject subdivision are as follows:
>
> > … 3. That five percent of the land included in the Plan abutting on Lake Simcoe be designated on the final plan with the words "Area of User Common to Each Property Owner in the Subdivision", in view of the fact that the draft plan does not show an adequate area set aside for bathing purposes[38]

Furthermore, the evidence involved a recognition that the lands had been openly used for the many purposes noted above. This was consistent with what the court ultimately held regarding the notation on the plan. The rights had both a private aspect as well as a *quasi-public* aspect. What is especially interesting was the court's recognition that these "common rights" were not necessarily for the public at large but for the other lot owners on the plan. This may at first appear to contradict the language of section 57 of the *Surveys Act* which states:

> Subject to the *Land Titles Act* or the *Registry Act* as to the amendment or alteration of plans, **every** road allowance, highway, street, lane, walk and **common shown on a plan of subdivision shall be deemed to be a public** road, highway, street, lane, walk and **common**, respectively.[39] [emphasis in original]

[37] *Ibid.,* at para. 18

[38] *Ibid.,* at para. 25

[39] *Surveys Act,* R.S.O. 1990, c.S.30, s. 57

At its face, this section deems every common shown on a plan of subdivision to be a public common. However, citing *Lorne Park (Re)*,[40] the court noted that,

> … at the heart of this issue is not a lengthy debate over the nomenclature of the rights created but rather a determination of the real substance relating to those rights. Not what the rights are called but rather what the rights are.[41]

Concluding that the rights were in the nature of an easement and more, the court answered the first issue by stating,

> The dedication encompasses a bundle of rights. I find that those rights include an easement and much more. Not only do the rights confer passage over the [subject lands] to other lot owners and others who wish to swim in Lake Simcoe, but also those rights contemplate the various uses open and continuous deposed to by the various affiants supporting this application. Again, more than that, the water drainage uses including the construction of swales, ditches and culverts on some of the [subject lands] by the Township or its predecessor benefits all of the lot owners and the public at large. Those drainage works not only serve to drain water from the [subject lands] and abutting lots but also drainage of water from the surrounding lands including drainage of water from the municipal road … into Lake Simcoe. Again, the nature of the rights created must find its source in the intention to dedicate which has been clearly established through the letter of the Department of Planning and Development in 1949 and carried through by [the subdivider] in 1950.
>
> The cases show that there can be creation of quasi-public rights. It cannot be said that the original owners have unequivocally abandoned their rights in favour of the public. This would fly in the face of condition of approval number three and the dedication on the plan. I reject any suggestion by the Respondent owners that they may use their lots for their own purposes without being restricted whatsoever by the rights and interests created by the dedication or notice (howsoever called) originating from [the plan].[42]

Turning to the second issue, the court faced some questions which were similar to what the Court of Appeal for Ontario considered later in *Gold v. Chronas*.[43] In other words, and as the court noted, the respondents argued that rights over the subject lands, if any, had been extinguished by operation of Part III of the *Registry Act*. The court stated the position as follows:

> …the rights created affecting the lands on [the Plan], whether described as an easement or by some other description, … have long since expired by virtue of the *Registry Act* s.113(1). That interest in land and bundle of rights cannot be revived or resurrected by s.113(5)(a)(iv) of the *Registry Act*. More specifically, those rights expired on September 23, 1990 being 40

---

[40] *Lorne Park (Re),* [1913] O.J. No. 26 (Ont.S.C.); appeal dismissed: *Lorne Park (Re),* [1914] O.J. No. 4

[41] *Hoggarth v Mgm Farms and Fingers Limited*, 2015 ONSC 2494 (CanLII) at para. 44

[42] *Ibid.,* at paras. 56 and 57

[43] *Gold v Chronas*, 2015 ONCA 900 (CanLII), http://canlii.ca/t/gmm6f

> years from the registration of [the Plan]. Further, those rights were extinguished long before the lands in question were converted to "Land Titles conversion qualified" on January 21, 2002.[44]

This submission included reference to the fact that no notice of claim had been registered in respect of the Applicants' rights. As a result, it was argued that those rights had been extinguished. Furthermore, the Respondent owners submitted that the Applicants could not make use of section 113(5)(a)(iv).[45] The court,

> … found that s.113(5)(a)(iv) does apply to the facts of our case. The Applicants do have a claim to an easement (on the Respondent owners' preferred analysis) or other rights that they openly use and enjoy. Either by way of easement or other rights, the Applicants have overwhelmingly demonstrated that they have been openly enjoying and using those rights which this court has previously identified.
>
> I find that as of January 20, 2002, the day before conversion to registration into the Land Titles system, the Applicants' rights by dedication or, notice, or quasi-public or public use deriving from the notation on Plan 993 were being enjoyed by the Applicants, were valid, subsisting and definitely in place. These rights were relied upon by the Applicants and other lot owners of Plan 993 and the Township in common for both a quasi-public and public purpose. These rights have not been extinguished by operation of the Registry Act.[46]

Citing section 44(1)(2)[47] of the *Land Titles Act*, the court concluded,

> …the rights and interests of the Applicants and other lot owners, including the Respondent owners are not extinguished by the provisions of the *Registry Act* and continue to have effect under the provisions of the *Land Titles Act*.[48]

---

[44] *Hoggarth v Mgm Farms and Fingers Limited*, 2015 ONSC 2494 (CanLII) at para. 60

[45] Section 113(5)(a)(iv) states,

> **Exceptions**
>
> **(5) This Part does not apply to,**
>
> **(a) a claim, …**
>
> **(iv) of a person to an unregistered right of way, easement or other right that the person is openly enjoying and using;** [emphasis added in quoted part in decision].

[46] *Ibid.,* at paras. 70 and 71

[47] Section 44(1) provides:

> **Liability of registered land to easements and certain other rights**
>
> **44.(1) All registered land,** unless the contrary is expressed on the register, **is subject to such of the following liabilities, rights and interests as for the time being may be subsisting in reference thereto,** and such liabilities, rights and interests shall not be deemed to be encumbrances within the meaning of this Act:
> …
> 2. **Any right of way, watercourse, and right of water, and other easements.** [emphasis added in quoted part in decision].

The decision was appealed.[49] A different panel of judges in the Court of Appeal for Ontario from the panel which heard the appeal in *Gold v Chronos* released its endorsement in *Hoggarth* a mere four days after *Gold*, dismissing the appeal. Most notable was the appellate court's determination that the court below had made no errors in the assessment of the evidence. Of course readers might well wonder, "But what exactly were the rights that were dedicated on the plan in 1950?" The appellants raised this as an issue in the appeal. They argued that the court below had erred in not articulating the nature of these rights. However, on appeal, the court disposed of this issue as follows:

> We do not give effect to the appellants' final argument. The rights of the respondents by reason of the continuous common user of the subject lots originated with a notation on the subdivision plan. That notation referred to the lots as "an area of user common to each property owner in the subdivision." There was no qualification or restriction as to the way in which the lots could be used. We agree with the respondents that it would be wrong to read in a restriction based on an archived letter stating the reasons for the designation.
>
> We note that the order of [the court] states that the subject lots are and remain subject to the rights of the appellants and others who are owners of lots [on the plan] without specifying the rights. While the order may appear very general, this is understandable. The order tracks the relief sought in the application and it does not appear that argument was addressed to the court below respecting the specific types of uses that the respondents were making of the [subject lands]. While in our view the scope of the application addressed only the common user rights of the respondents, we decline in this appeal to make any amendment to the order that would restrict or alter its scope. Nor would we add to the order to recognize rights of the Township that were not directly at issue in the application or the appeal.[50]

Hoggarth is yet another example of the persistence of easement-like rights into a land titles (*LTCQ*) context, despite the wording found in Part III of the *Registry Act* and despite the uncertainty associated with the exact nature and make-up of these rights. Originating in a note on a plan of subdivision 66 years ago, the owners of land in this locale continue to be burdened and benefitted by the property rights engaged.

What do these decisions mean?

These three decisions from the final days of 2015 confirm the extent to which our courts protect easement rights. Despite efforts to eliminate such interests through the operation of Part III of the *Registry Act* and legislative amendment after *Ramsay*, their persistence should be a note for both caution and opportunity for land surveyors. Caution because of what the court has repeatedly affirmed as the importance of a use being "openly used and enjoyed." Plans and

---

[48] *Hoggarth v Mgm Farms and Fingers Limited*, 2015 ONSC 2494 (CanLII) at para. 86

[49] *Hoggarth v. MGM Farms and Fingers Limited*, 2015 ONCA 908 (CanLII)

[50] *Ibid.*, at paras 17 and 18

survey reports must draw attention to this when encountered. Opportunity because the significance of what a surveyor can observe on the ground and report in the returns to a client may come to be seen, going forward into 2016, as having a renewed and indispensable value.

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.[51] 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.

Introduction to Canadian Common Law — April to May

Understanding the workings of the legal system and the legal process is essential for regulated professionals entrusted to make ethical and defensible decisions that have the potential of being reviewed by a court. This short but rigorous course immerses current and aspiring cadastral surveyors in a reasoning process and real-life applications to develop or bolster skills in forming and communicating professionally defensible opinions that strive to parallel what the courts do. The five 2-hour sessions will take place live on Monday evenings: April 4, 18, May 2, 16 and 30, 2016. The sessions can be attended in-person at Guelph or remotely from anywhere in Canada. This learning opportunity qualifies for the full formal CPD hours requirement of a rolling three-year period.[52]

Third Annual Boundary Law Conference — Online Version

For the convenience of those unable to attend due to distance or a scheduling conflict, this online version of the conference *Enhancing Parcel Title by Re-Thinking Parcel Boundary*[53] held in November 2015, includes the presentations, papers and slide decks from presenters. The

[51] 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.

[52] This course qualifies for 36 *Formal Activity* AOLS CPD hours.

[53] This conference qualifies for 12 *Formal Activity* AOLS CPD hours.

purpose of the conference was to revisit traditional assumptions about the nature of boundaries and introduced new mindsets better aligned with what the courts do and conclude.

Administrative Law for Regulated Professionals: A Primer for Members and Statutory Committees — Online Version

The online version is the seminar[54] held October 2015 includes the presentations, papers and slide decks from presenters. The purpose of the seminar was to relate the various acts, principles, structures and processes of Administrative Law to AOLS members' practice as well as to the workings of AOLS council and committees.

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

This presentation, sponsored by First Nations and many local professional and education organizations, attracted considerable interest when delivered at the Yukon Arts Centre in June, 2015. Speaking from the perspective of both a lawyer and a land surveyor, Izaak de Rijcke reviewed recent Canadian cases related to Aboriginal title and reflected on how this "collective right" challenges traditional thinking about property rights and ownership within existing property law regimes.[55] Since this presentation, there have been further developments in Canada's relationship with its First Nations. The final *Report*[56] of the Truth and Reconciliation Commission was released in December and includes specific recommended Calls to Action about how we view aboriginal title. One such Call in the *Report* states:[57]

> **52)** We call upon the Government of Canada, provincial and territorial governments, and the courts to adopt the following legal principles:
>
> i. Aboriginal title claims are accepted once the Aboriginal claimant has established occupation over a particular territory at a particular point in time.
>
> ii. Once Aboriginal title has been established, the burden of proving any limitation on any rights arising from the existence of that title shifts to the party asserting such a limitation.

This presentation was prescient in regards to this Call to Action.

---

[54] This seminar qualifies for 12 *Formal Activity* AOLS CPD hours.

[55] This resource qualifies for 2 *Formal Activity* AOLS CPD hours.

[56] Truth and Reconciliation Commission of Canada, *Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada*, 2015

[57] *Ibid.*, at page 328

If you wish to contribute a case comment, email us at TBP@4pointlearning.ca.

If you wish to unsubscribe, please email us your request. To receive your own issues of *The Boundary Point*, complete a sign-up form at the Four Point Learning site.

ISSN: 2291-1588