



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.

We occasionally hear about the activity of laypersons in rural or forested areas attempting to locate their property line in an unskilful manner. Sometimes the exercise is successful; the lay person may be adept at locating their own boundaries in the correct location. However, all too often the result of guess-work and dead reckoning is a disaster. In this issue we consider a decision in British Columbia in which a mistake in locating the property line resulted in a trespass and the harvesting of trees which grew on a neighbour's land.

The decision in *Humphrey v. Engel*¹ is not so interesting as an example of trespass; it was the position taken by the defendant in turning his duty to stay on his own property into a reverse obligation owed by his neighbour to defend the neighbour's property lines from incursion by others. The argument was remarkable; the court disagreed and rejected it entirely.

Is there a Duty to “Defend” One’s Property Lines from Incursion by Neighbours?

Key Words: *trespass, unlicensed practice, mistake, logging*

In August, 2011, logging took place in the Slocan Valley of the Kootenay District, in British Columbia. Timber was harvested. The logger's neighbour had concerns that some of the trees were located on her land. A land surveyor was called in to establish the boundary and four trees, valued by the court at \$1,200.00, were found to have been wrongly taken.

These simple facts gave rise to the proceeding in *Humphrey v. Engel* and resulted in an award of more than \$28,500.00 for damages against the logger. How did this claim for the wrongful taking of four trees result in an award more than 20 times higher than the value of the trees? This is an interesting question – but even more intriguing because the calculation included the costs attributable to a survey. In this dispute there was conflicting evidence of what had been said between the parties before the logging started. Mr. Engel claimed that he spoke to Ms. Humphrey on a walk and mentioned to her that he wanted to cut trees down near the power

¹ *Humphrey v. Engel*, 2016 BCSC 464 (CanLII), <http://canlii.ca/t/gnr6l>

line, and that she said to cut whatever he thought was safe. In contrast, Ms. Humphrey could only recall a conversation in which she said Mr. Engel told her he was logging his property to get money to pay his taxes. She said there was no mention that he was clearing dangerous trees from around a power line and no mention of the property line. The court considered her evidence to be the more reliable, but noted that, even at its highest, Mr. Engel's version would not amount to a permission to trespass.

At common law, a trespass is actionable, without having to prove special damages. This means that the court can award monetary damages without a plaintiff having to prove the value of the harm caused by the trespass. The only defence is one of consent. In this proceeding there was no consent given by the plaintiff, but the defendant embarked on a novel argument instead. The submission made by the defendant was that,

...the defendant had an honest but mistaken belief that the trees were on his property. The basis of this assertion is that the previous owner of the property ... said that he had conducted a survey himself and that the property line was east of the line [the surveyor] established. The defendant, in turn, told the plaintiffs that the property line was where the previous owner had told him it was. He submits that the plaintiffs are at fault in failing to "defend" the property line in the 13 years from 1998 - 2011, and had a "duty" to satisfy themselves as to the location of the property line when they bought the property ... Apart from the factual inconsistency of this submission with the notion of "permission" to cross the property line, it is an attempt to shift the responsibility for ascertaining the property line to the [plaintiff].²

This statement was followed by the court determining that,

...there is no legal duty to "defend" ones property lines against incursion by neighbours. The duty is on the defendant to ensure that he does not trespass.³

In finding liability, the court then turned to a consideration of damages. A claim for the "loss of amenities," included the reduced sense of privacy which resulted from the removal of trees along the property line. The court noted that,

The point of living on a tract of land in the Slocan Valley, was, for the plaintiffs, the opportunity to enjoy nature in an undisturbed state, and the privacy that such a property afforded.⁴

² *Ibid.*, at paras. 13 and 14

³ *Ibid.*, at para. 14

⁴ *Ibid.*, at para. 20

This can be seen in the imagery depicting the rugged terrain and forested areas of the Slocan Valley in Figure 1 below.



Figure 1: The Slocan Valley is a rugged and forested area.⁵

The cost of the survey was by far the largest expense, but the court was satisfied that the work undertaken was in fact necessary:

Although, on first impression, it seems like more work may have been done than necessary, I am satisfied with [the surveyor's] explanation, and accept that less would not have given the court reliable information. I am satisfied that the survey was a necessary and proper expenditure to establish the case.⁶

A summary of the expenses incurred by the plaintiff was indicated as:

(a) damages for the commercial value of the trees:	\$1,200.00
(b) damages for loss of amenities:	\$5,000.00
(c) costs of survey	\$22,124.97
(d) cost of photos	<u>\$245.22</u>
	\$28,570.19

While this might seem extraordinary, the troubling aspect of this case seems to lie in the novel argument made by the defendant that the plaintiff was at fault in failing to “defend” the boundary, and had a “duty” to satisfy herself as to the location of the property line when she

⁵ From Google® Maps. All rights reserved

⁶ *Ibid*

bought the property. The court rightly rejected this defence, but it leads one to pause and reflect about the social values which underlie an argument that property owners have a duty to defend their property lines. Surely a duty to defend our boundaries conflicts with neighbourliness as a Canadian value. The cautionary lesson in what this might mean is not the importance of surveys in Canadian society and property law. Yes, having a survey in hand before starting to log may have avoided the trespass, but our worth in supporting Canadian values may lie in contributing to the enhancement of relationships between neighbours – fostering trust. This begins with an appreciation of our legal system as one of the most important pillars of our society.

A legal system is a framework of understanding between society as a whole and individual members as well as among members themselves. The framework is either very precise in prescribing what is accepted or prohibited or it can be generalized – described in a principled fashion. Land surveyors are familiar with this distinction: the hierarchy of evidence can be thought of as an overarching principle and also as a rule. Most of the time it does not matter because the generality of a principle gives flexibility and allows for broad adaptation to a variety of circumstances.

In contrast, rules typically have an all-or-nothing character: incorporating an exception would in fact alter the rule. Principles can have many exceptions, but this does not diminish their validity in the legal system. Unlike rules, principles do not prescribe, but they point in a certain direction. It is even possible for competing principles to point in different directions. As a result, we embark on a course of inquiry to find the principle which is most authoritative or carries most weight.⁷

On the one hand, rules provide certainty: when you follow a rule, you know that you will be compliant⁸ and this is especially important when the consequence of non-compliance is severe. On the other hand, attempting to regulate choice and behaviour by primarily using principles requires a degree of trust – both on the part of individuals who are expected to act honourably and integrity towards each other as well as between individuals and government in how each will operate with respect, and as little interference with the affairs of the other as possible. Does this mean that trust towards neighbours and government eliminates the need for rules and a defined set of consequences which our legal system will impose if we choose to not comply with certain conduct?

⁷ Dworkin, R., *Taking Rights Seriously*, 1977, Duckworth, London

⁸ Korobkin, R.B., “Behavioral analysis and legal form: Rules vs. principles revisited,” 2000, *Oregon Law Review*, 79(1):23 –60

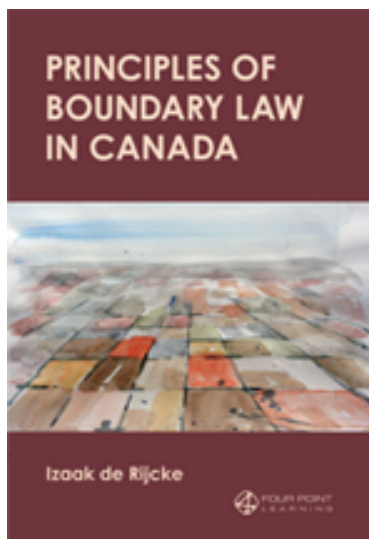
For example, does property law require vigilance in defending one’s boundaries? This is a question of trust (or mistrust), and, as already noted, a court in Canada has already answered the question: “There is no legal duty to ‘defend’ ones property lines against incursion by neighbors.”⁹ But is this a principle or a rule? Given the absence of a duty to actively “defend,” this statement speaks to the existence of trust and may therefore be classified as a principle.

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.¹⁰ 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.

COMING SOON: *Principles of Boundary Law in Canada*



In this [book](#), there is described and developed a concept of the nature of boundaries which will assist in explaining and communicating to clients what we do as land surveyors: the nature of a legal boundary is a containment of rights which the law recognizes and which serve as a cornerstone of prosperity in our society. In today’s complex world, the need for a benchmark work is met in this comprehensive book on boundary principles. Boundaries, and how lawyers, the courts, and we think about them, are complex – and becoming increasingly so – because of the constant progress of the common law prompted by decisions and evolving ideas. This book addresses this phenomenon directly and does not shirk away from tackling some of the most novel ideas which we must understand in our daily work. As a

reference work, this book promises to be an indexed, organized and well referenced guide in reaching a deeper understanding of boundary principles in Canada. We know that all

⁹ *Humphrey v. Engel*, 2016 BCSC 464 (CanLII), at para. 14

¹⁰ 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.

jurisdictions in Canada have their unique rules and procedures as determined by history and legislation. These differences are explained, as well as an explanation of the starting point, from which all common law jurisdictions began.

The targeted publication date of Summer, 2016 is within reach. The manuscript has been edited and is now being reviewed by key representatives of the intended audiences. The opportunity to serve and contribute to the field of cadastral surveying in Canada is both exciting and humbling. It has been a colossal effort. Thank you for your support and patience.



This publication is not intended as legal advice and may not be used as a substitute for getting proper legal advice. It is intended as a service to land professionals in Canada to inform them of issues or aspects of property title and boundary law. Your use and access of this issue of *The Boundary Point* is governed by, and subject to, the [Terms of Access and Use Agreement](#). By using this issue, you accept and agree to these terms.

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.

© 8333718 Canada Inc., c.o.b. as Four Point Learning, 2016. All rights reserved.

ISSN: 2291-1588