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.

Can fairness and justice operate to alter a principle of property law? This question was faced by the Nova Scotia Court of Appeal in *Shea v. Bowser Estate*,[1] an appeal from a decision made by a Superior Court judge when asked to relocate the position of an easement that had been first created by express grant.

Can Fairness and Justice Operate to Alter the Location of a Right of Way?

Key Words: *right of way, easement, location, retracement, necessity, convenience*

Shea v. Bowser Estate had a lengthy history. The case had already been dealt with by the Nova Scotia Court of Appeal one time before. In the 2013 decision *Shea v Bowser*,[2] the Court of Appeal had reversed a finding that a conveyance or grant of easement failed to create a legal right of way and remitted the determination of the right of way's *location on the ground* back to the same trial judge. In the original trial decision, the trial judge had disposed of an application for a claim to an easement by dismissing the application in its entirety. It purportedly failed because the judge was unable to ascertain the exact location of the right of way. This is an interesting problem because if the description is so vague or ambiguous as to be impossible to interpret, one might expect that the express grant of a right of way would fail and be void for reasons of uncertainty. Land surveyors in Canada may encounter old descriptions of the boundaries of an easement or a right of way and the location on the ground of the exact strip to be so burdened with an easement may be difficult – even almost impossible – to interpret. More recent regulations and legislation require the description of newly created rights of way to be shown on a plan of survey in order to avoid this very kind of problem.

The first proceeding in *Shea v Bowser*, was heard in 2011. The application judge held that there had been an express grant of a right of way in order to allow for access to certain property

[1] *Shea v. Bowser Estate*, 2016 NSCA 18 (CanLII), http://canlii.ca/t/gnrk1

[2] *Shea v. Bowser*, 2013 NSCA 18 (CanLII), http://canlii.ca/t/fw1kc

referred to as "Lots A and B." In his words, he explained that the effect of an express grant was to rule out the creation of an easement by necessity or implication:

> Both Lots A and B purportedly have express grants of right of way to allow access to them. While I have concluded that the location of these grants of right of way have not been established on a balance of probabilities to pass across the land of the Bowsers, I have specifically refrained from saying where in my opinion such express grant of right of way is located. The only arguable alternative location based on the evidence presented to me is [another right of way altogether], however without having the owners of that/those properties as parties to this proceeding, it would be wholly inappropriate for me to pronounce upon their property rights.
>
> Nevertheless, in the deeds conveying Lots A and B to the Sheas, both contain express grants of right of ways, and thus I cannot conclude that at the time of their granting, a right of way of necessity was acquired by an implied grant of a right of way, presumed to have been made on the basis that the lots were inaccessible except by passing over the adjoining land of the grantor, committing a trespass upon the land of a stranger, or in some other fashion, though inconvenient but not impossible.[3]

On appeal, the court examined this rationale and concluded that certain results flowed from this passage. These results included:

1. The chain of title from Gladys Bowser to the Sheas established that there was an express grant of a right of way.

2. It was not necessary to decide the issue of a right of way by necessity to Lots A and B as there was an express grant of a right of way.

3. He was unable to ascertain from the evidence before him the location of the right of way.

4. Although the application judge says he is not saying where the right of way is located, he does exactly that in saying that the only arguable alternative is

[3] *Shea v. Bowser*, 2011 NSSC 450 (CanLII), 310 NSR (2d) 216, at paras. 84 – 85. See also *Jerome v. Akers*, 2013 NSSC 154 (CanLII) in which the court considered the *Shea v. Bowser* decision in relation to another, unrelated, case. In referring to *Shea v. Bowser*, the court held (at para. 37):

> …it was clear that the right of way was on the Gladys Bowser Road but it was unclear where the Gladys Bowser Road was. Rosinski J. was faced with the problem of *locating the right-of-way. This was a latent ambiguity. As such, more evidence was needed from Gladys Bowser in order for Rosinski J. to come to a conclusive decision as to the location of the right-of-way*. [*Emphasis* added]

> [another right of way altogether] which is located on the [property of a third party].[4]

The appellate court disagreed with the application judge's characterization of central question before him, which was, "The location of the right of way claimed by the Sheas is central to this litigation. ..."[5] Instead, the court restated the central question as whether there was an express grant of a right of way over the lands of Gladys Bowser. This distinction was, as we will see, critical to understanding the proper test to be applied in resolving the uncertainty about a right of way's existence in the first place.

The appellate court held that the application judge,

> …fell into error in speculating that the right of way may have been over some other parcel of land other than that from which the Sheas obtained their title. In his decision, after reviewing the evidence about the origin of the right of way claimed by the Sheas, he says:
>
> > It would appear therefore that the extent of Gladys Bowser's property **could** have included the area surrounding [another right of way altogether] at some time, which does not necessarily mean however that it was part of the deed of property granted to her in 1925. (at ¶23) (My **emphasis**)
>
> In this paragraph he is referencing the [property of a third party] burdened by [another right of way altogether]. The application judge did not find as a fact that Gladys Bowser owned the [property of a third party]. There was little or no evidence before the judge that Gladys Bowser ever owned the [property of a third party] over which [another right of way altogether] is located. However, a finding that she was the owner of that lot was essential to the determination that it was the only "arguable alternative" to the Bowser Lot.[6]

The reasoning led to the obvious statement of law that one cannot grant an easement or right of way over land that one does not own. If the location of two possible alternatives is based on a rejection of the express grant of easement being over the land of a third party, then the only remaining option is that the right of way was over the land that Bowser owned.

The appellate court identified the specific flaw in the application judge's approach:

> The application judge allowed his concern about the location of the right of way to influence his interpretation of the express grants of right of way and the lands which they burden. His speculation that the right of way could have been over the [property of a third party], is just that, speculation. Proceeding as he did, the application judge's findings were,

[4] *Shea v. Bowser*, 2013 NSCA 18 (CanLII), at para. 18

[5] *Shea v. Bowser*, 2011 NSSC 450 (CanLII), 310 NSR (2d) 216, at para. 28

[6] *Shea v. Bowser*, 2013 NSCA 18 (CanLII), at paras. 21 and 22

> respectfully, unfounded or resulted from a misunderstanding of the task before him. Having said this, I want to emphasize that this application was far from a model of how counsel should conduct a proceeding. Deeds in the chain of title were missing, an abstract of title was not provided, and the application judge was given very little guidance from counsel as to how he was to determine the issues. It looks very much like the parties "threw" everything at the application judge and left him to deal with it.[7]

Of course this was unfortunate and represents strong words about the need for proper preparation of an application. Having determined that the right of way legally exists, the court turned to answering the question, "Where is it?" In answering this question, appellate courts rarely perform the work of courts below from which an appeal had been taken. The appellate court concluded,

> …the location of the right of way is still in issue. As the application judge found that the express grant of right of way did not burden the Bowser Lot he did not need to go further and determine the location of that right of way. I realize that he looked at that issue and was unable to do so. However, had he reached the proper conclusion as to the land burdened by the right of way, there may have been other means of determining the location of the right of way. … As a result, I would remit that aspect of the claim back to the Supreme Court for determination of the location of the right of way over the Bowser Lot to Lots A and B.[8]

Seventeen months later, the matter was back again before the same applications judge. This time, when he considered the question, "Where is the right of way located?" he had the benefit of a survey and the evidence of the surveyor's testimony regarding aerial photographs. In that respect, the location of the right of way over the Bowser property was traced as having been relocated in position – and with a benefit to the Sheas. The judge explained what had happened and how it would impact his determination of where the right of way was to be located:

> Although without the express permission of the Sheas, but to their benefit since it allowed them renewed access by car to the Old Main Road, Mr. and Mrs. Bowser permitted Dougie Walker [and Darrell Kent] to build a road in a slightly different location than the original, on the southern portion of the property and intersecting the Old Main Road as shown in the 2003 aerial photograph.
>
> It is not in the interests of justice to now cause to be rebuilt, in its original location closer to the house, the southern portion of the right of way granted across the Bowsers' property to the Sheas.

[7] *Ibid.*, at para. 28

[8] *Ibid.*, at para. 29

> As I understand it, the road shown in the 2003 aerial photograph remains representative of the road at present. That being the case it would be very much of any questionable benefit to anyone, even the Sheas, to rebuild in its original location the southern portion of the right of way granted. Notably, the present location of the road/right of way actually provides easier, closer access to the properties of the Sheas.
>
> I therefore declare that the right of way, expressly granted to the Sheas in the 1971 deeds, to allow them access to Lots A and B, is located where the present roadway is located on the Bowser property [subject to it being diverted if necessary to avoid encroaching on the adjacent property ….] running from the Ostrea Lake Road to what has been referred to as the "Old Main Road".
>
> Should the Sheas wish to more precisely delineate that roadway for purposes of registering their right of way, it will be their responsibility to have it surveyed, and to pay any consequent costs associated therewith.[9]

The location of the right of way was declared to be where it was being presently used after it had been relocated - different in location from where the right of way was first placed. However, the rationale adopted by the application judge was clear: *It is not in the interests of justice to now cause to be rebuilt, in its original location closer to the house, the southern portion of the right of way granted across the Bowsers' property to the Sheas*. What did this mean?

The Sheas appealed again. The Nova Scotia Court of Appeal allowed this appeal too. In a decision released this spring, the court noted the core question arising from the application judge's declaration as follows:

> The contentious aspect of his declaration is that he did not place the ROW in its original location as he found it to exist. Instead, he declared the ROW be located in a different location on the Bowser property because, in his view, it was not in the interests of justice to leave it in its original location.[10]

The Court of Appeal noted that the right of way was created by express grant. In contrast to easements created by other means, there was no discretion to alter its location, based on what might have been seen as a response to injustice. In answer to the question, "*Did the application judge have the authority to relocate a ROW created by express grant to a different location from the one originally granted?"* the court gave a short answer – no. Placed in context, the court explained,

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[9] Shea v. Bowser, 2014 NSSC 211 (CanLII), at paras. 31 - 35

[10] *Shea v. Bowser Estate*, 2016 NSCA 18 (CanLII), at para. 1

> The application judge did not identify any legal principles which could support his authority to relocate a ROW.
>
> It will be clear from the applicable common law rules I will set out that absent abandonment, extinguishment, or mutual agreement by the parties to relocate, an express grant of ROW cannot simply be declared to exist elsewhere from its intended location. To do so flies in the face of clearly established principles.
>
> The task of the application judge was to determine the location of the deeded ROW, not to create a new one. Although relocating the ROW may seem fair and practical, these considerations do not determine the outcome.[11]

The statement of law from the appellate court on the nature of parties' rights to relocate an existing right of way created by express grant was clear and unequivocal:

> A right of way is a limited and exceptional right. Generally speaking, a right of way, including its location, is defined by the grant of that right of way and by the circumstances surrounding it. Once the location of the right of way has been decided, neither the dominant owner nor the servient owner may unilaterally change its location. There might be some limited exceptions to this general rule; however, none apply to this case.
>
> Factors such as overgrowth, increased cost and effort to open a new way, and the existence of the alternate way are not a basis upon which the common law allows a court to move the location of a right of way "in the interests of justice."
>
> A dominant owner has ancillary rights which allow for the reopening of a right of way, even in circumstances where it has been rendered impassable. In this case, the remedy available to the dominant owner through the common law is to repair or reconstruct the road over the current right of way.
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> A right of way acquired through express grant may be altered through abandonment or agreement. Absent these circumstances, which do not exist in this case, or applicable legislation, courts cannot themselves alter the location of a right of way, nor will they allow either party to unilaterally do so. This is so even if a failure to relocate leads to unequitable consequences for one or both of the parties.
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> Property law has its own particular, and at times rigid, set of rules. Courts uphold these rules even though that might result in overturning what may otherwise be a fair result and of benefit to both parties.[12]

[11] *Ibid.*, at paras. 13 - 15

[12] *Ibid.*, at paras. 23 - 27

The application judge had available the evidence from a land surveyor as to where the original deed placed the right of way and could also retrace the boundaries of the way. This included historical aerial photography and ultimately allowed for the placement of the right of way in the same location as where it was first located. The passage of decades in time, the conduct of the parties subsequent to the grant and disuse in preference to a more convenient location were all cited as reasons for placing the right of way elsewhere. Nonetheless, the Nova Scotia Court of Appeal concluded that the application judge did not have the authority or jurisdiction to relocate the ROW and declared it to be where described in the original 1971 conveyance.

Readers may wonder how this decision can be reconciled with a decision from the Court of Appeal in Ontario in which the described location of a right of way shown on a plan of survey was altered. In *MacIsaac v Salo*,[13] the survey used to describe the right of way in an express grant placed the right of way through a rock obstruction. In *MacIsaac*, the application judge had, like the Court of Appeal in *Shea v Bowser Estate*, refused to allow a relocation of the thoroughfare, as surveyed, to a position as travelled. However, *MacIsaac* was an application under the *Land Titles Act* for an order to rectify the parcel register. The relevant section states,

> Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.[14]

This appears to be the exact authority and discretion that the appellate court in *Shea v Bowser Estate* was alluding to. In Nova Scotia, a comparable provision to section 160 in Ontario's *Land Titles Act* may be found in section 35 (1) of the *Land Registration Act*[15] that states:

> A person who objects to and is aggrieved by a registration in a parcel register may commence a proceeding before the court requesting a declaration as to the rights of the parties, an order for correction of the registration and a determination of entitlement to compensation, if any.

The criteria and factors which a court may consider in determining whether it is just and equitable to confirm the registration objected to on such an application include:

a) the nature of the ownership and the use of the parcel by the parties;

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[13] *MacIsaac v Salo*, 2013 ONCA 98 (CanLII), 114 OR (3d) 226

[14] *Land Titles Act*, R.S.O. 1990, c. L.5, s. 160

[15] *Land Registration Act*, 2001, c. 6

b) the circumstances of the registration;

c) the special characteristics of the parcel and their significance to the parties;

d) the willingness of any of the parties to receive compensation in lieu of an interest in the parcel;

e) the ease with which the amount of compensation for a loss may be determined; and

f) any other circumstances that, in the opinion of the court, are relevant to its determination.[16]

We are left with the impression that rights of way are a complex area of property law. Despite the certainty of the overarching principles and the clarity that is available, equitable principles may still be invoked in order to achieve justice. The fact that equity may introduce an element of uncertainty arises because legislation allows for discretion and equity to operate in the face of injustice.

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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.[17] 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

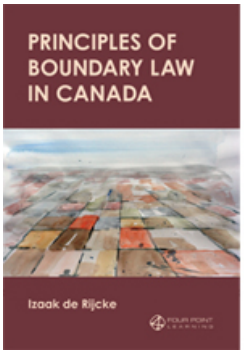
This year's conference theme is: *Boundaries of Public Highways: New Developments and Practices.* This one day event (November 14, 2016) engages in critical thinking about the boundaries of public roads and how we may or may not think of them as different from other boundaries. What are the reasons for highway boundaries having an elevated status? Do they

[16] *Ibid.*, section 35(6)

[17] 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.

even have an “elevated” status? If so, what is the rationale? are the latest developments for the survey of road boundaries? A draft agenda is in preparation and *early bird* registration is now open.[18]

NOW HERE: *Principles of Boundary Law in Canada*



See Principles of Boundary Law in Canada for a list of chapter headings and purchasing options.

Boundaries are a feature that applies to every parcel of land in Canada. Providing secure and predictable results in recording title and identifying the extent of title are elements that operate hand in hand in order to give certainty to the immense value tied up in real estate in Canada. In the context of (1) the complex and ever-evolving nature of boundary law, (2) the challenges of doing legal research in this area, and (3) the constant interplay between land surveying practice (as a regulated profession with norms codified in statutes) and common law principles, land surveyors need a current reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable. Moreover, the education and training needs of new members to the cadastral surveying profession are best served by a reference work that not only provides comprehensive coverage of the material but is organized and indexed in a manner that supports the formation of professional opinions.

The manuscript is now in the hands of our printers and printing of the book has started. Prepaid orders will be filled first and new orders will follow. Thank you for your support and patience.

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