



*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.

This past summer ushered in a new era for gaming and the use of geo-location on hand-held devices. The popularity of the Pokémon Go application is evident in the large number of people reported to be “going outside” for the first time to play a game, rather than on a computer based at home or at work. This issue of *The Boundary Point* reviews an emerging development that is already before the courts in North America: trespass over boundary lines as a result of playing a game in the real world that does not acknowledge or include any element of property rights regarding “where” the game might take a player. Players also threaten privacy rights that are held by owners of property. Decisions will soon be made by courts regarding the certification of class proceedings and, ultimately, the meaning of a legal boundary in an augmented reality world.

---

## Absence of Boundaries in Augmented Reality Triggers Trespass Claims in the Real World

**Key Words:** *augmented reality, trespass, virtual boundary, survey fabric*

Since its launch earlier this summer, the Pokémon Go<sup>1</sup> smartphone app has been an instant hit, attracting millions of players obsessed with hunting down digital creatures.<sup>2</sup> The game uses cameras and GPS to construct an augmented reality based on real world surroundings. Players (or “trainers” as they are referred to in the game) must then travel through real physical space in order to collect virtual creatures they see on their smartphones as an image superimposed onto the real world surroundings. The players then train these creatures to battle at “gyms” that are located at landmarks. It is a merging of the digital and physical worlds and has caught the interest of millions world-wide. The game items to be collected are placed not only in easily accessible public spaces - a park or street corner - but also on driveways, back-yards, in cemeteries, and police station parking lots. In foisting this augmented reality onto a digital

---

<sup>1</sup> Pokémon Go<sup>®</sup> is claimed by Niantic, Inc. All rights reserved.

<sup>2</sup> The game reported earned creators \$200 million in the first month. See: <http://www.gamespot.com/articles/pokemon-go-made-200-million-in-first-month-report/1100-6442444/>

version of the real world and sending participants in the augmented reality out into the physical world, there has been a profound oversight by game creators in either ignoring or overlooking the challenges created by the intersection of the augmented reality of the game and the reality on the ground.<sup>3</sup>

Generally speaking, interactions within the virtual world by those who choose to participate by playing a game are governed by End User Licence Agreements (EULAs) - contracts that are used by the creators of the virtual world. In order to enter the virtual world, members must first agree to the EULA, usually by clicking to accept a terms of use document before being given access to the game. EULAs govern communities that may be composed of millions of people and, it has been suggested, may set out some specific conduct norms. But these EULAs have their limitations, they do not create enforceable rights between members of the community or between members of the community and the public at large in the way that common law creates societal norms:

In the real world, many of the background, default rules that keep communities running smoothly are provided by the common law. For example, personal and dignitary interests are protected by the law of torts, while private property interests are protected by property law. Such common law rules bind everyone to respect basic property rights and the bodily and dignitary integrity of fellow citizens.

Virtual worlds need these basic societal safeguards too. [...] Tort and property rules automatically bind everyone in a community cheaply and without need for mutual consent. Contracts simply cannot do that. So virtual world EULAs have quickly run into trouble.<sup>4</sup>

However, what Pokémon Go has done is to bring a fourth party into the interaction - the property owner of the land on which a Pokémon gym or creature has been placed in the augmented reality. There is no contract between either the property owner and the game provider or the property owner and the players.<sup>5</sup>

In the physical world, boundaries have been introduced through the common law as a spatial component confirming the area over which an owner may exert and enforce control. Boundaries are not simply lines on a plan but, rather, are the nexus at which owners' rights of

---

<sup>3</sup> It is likely safe to assume that land surveyors were not consulted in the development of the game.

<sup>4</sup> J.A.T. Fairfield, "Anti-social Contracts: the Contractual Governance of Virtual Worlds" (2008) 53 McGill Law Journal 427 at 436.

<sup>5</sup> But that said, it has also perhaps simplified the criticisms of EULAs described in the excerpt above, by bringing at least a portion of the interactions back into the physical world where societal norms – as set out in the common law and statutes relating to trespass and nuisance – will apply. At least for the interaction between the players and the property owners. It is not clear how the game provider fits into the situation, this is a question that the courts will face through the class action suits already under way.

ownership and control about other owners' similar rights at a physical point. In contrast, in the virtual world, there are no comparable boundaries for property rights; players drawn in by the game become oblivious to the property rights that have a spatial extent in the real world.

Game creators, by setting players loose in the real world, are inviting trespass and other issues. Shortly after it was released, the game raised issues of trespass and nuisance for property owners and has already prompted class action law suit in the United States and in Alberta.<sup>6</sup> The main plaintiffs in the Alberta lawsuit, "have been inundated by players at their home in the otherwise sleepy hamlet of Torrington, Alta., since the game was introduced." It has been reported that the plaintiff's property has been designated a Pokémon Gym, and Niantic has so far ignored the property owner's request to remove it from the game.<sup>7</sup> The statement of claim alleges:

Pokestops and Pokemon Gyms were established by Niantic with the callous disregard of property owners, and without prior consultation with property owners. As a result, the Class generally, and the Plaintiff specifically, have been inundated with hordes of trespassing players intruding and invading their privacy.<sup>8</sup>

In the United States, a New Jersey man, apparently inundated with hundreds of requests from players to access his backyard, has commenced a class action law suit against the creators.<sup>9</sup> The statement of claim in the action against Niantic Inc. in the US includes the following allegations:

The intentional, unauthorized placement of Pokéstops and Pokémon gyms on or near the property of Plaintiff and other members of the proposed class constitutes a continuing invasion of the class members' use and enjoyment of their land, committed by Niantic on an ongoing basis for Defendants profit. On the basis of the foregoing acts and practices, Defendant Niantic, is liable for nuisance and all Defendants have been unjustly enriched.

...

Indeed, Defendants have shown a flagrant disregard for the foreseeable consequences of populating the real world with virtual Pokémon without seeking the permission of property owners. Niantic placed at least three Pokéstops within the United States Holocaust Memorial Museum in Washington, D.C.

...

---

<sup>6</sup> <http://www.cbc.ca/news/canada/calgary/pokemon-go-lawsuit-class-action-torrington-alberta-schaeffer-1.3715263>

<sup>7</sup> *ibid*

<sup>8</sup> *ibid*

<sup>9</sup> <http://www.sfgate.com/entertainment/the-wrap/article/Pokemon-GO-Sparks-Class-Action-Lawsuit-Over-9006016.php>

Niantic blithely acknowledges its placement of Pokéstops on private property, advising users on the Pokémon Go website: “If you can’t get to the Pokéstop because it’s on private property, there will be more just around the corner, so don’t worry!”<sup>10</sup>

The above class action suits in Canada and the United States originate from property owners, and are directed towards the game creators. However, in the physical world, it is the players who, in some circumstances, are failing to heed the rather flippant warning concerning private property and are committing the acts of trespass. But is there a trespass of sorts occurring when the game creators place a digital item on the digital version of the real world property?

In the physical world, trespass is based both on the common law tort and is also codified by statute in some jurisdictions.<sup>11</sup> At common law, trespass occurs when a person has entered upon another person’s land without permission or enters with permission and then engaged in conduct beyond the scope of that permission.<sup>12</sup> There is a common law defence in that entering onto another person’s land for the purpose of recovering one’s own goods is not a trespass to land, provided that the other person caused the goods to be on the land, and the person entering the land “limits entry to what is reasonable and necessary to reclaim the goods.” Is there room to stretch this defence to accommodate overly zealous Pokémon trainers collecting creatures? Can players’ retrieval of such digital “goods” through entry into a physical space be considered a reclaiming of their own goods? It seems that a positive reply to these questions would be absurd but if individuals are becoming so deeply ingrained into the augmented reality as to become oblivious to the physical reality and the societal and legal norms associated with property and other rights in the physical world, we are entering an era of intense confusion.

Is the mere placement of the virtual object, the Pokémon gyms, onto the virtual version of an individual’s (real) property in itself a trespass? It has been held that a landowner’s property rights include the airspace above the land, to a reasonable height, but what about a virtual version of the property? By placing a creature or gym on the digital version property without the real world property owner’s permission and without any form of EULA in place are the game creators engaged in a form of digital trespass? What rights, if any, are there in the digital version of the property owner’s real property? Such would be a new area for the courts which do date have dealt with a handful of questions concerning conduct within a virtual world. Digitized images of real world locations have become a commonplace tool in recent years through interfaces such as Google Maps® (and Bing®). Such images are captured from adjacent

---

<sup>10</sup> [http://online.wsj.com/public/resources/documents/2016\\_0802\\_pokemon\\_lawsuit.pdf](http://online.wsj.com/public/resources/documents/2016_0802_pokemon_lawsuit.pdf)

<sup>11</sup> For example, see: *Trespass to Property Act*, R.S.O. 1990, c. T.21

<sup>12</sup> Halsbury’s laws of Canada- Negligence and other Torts (2016) Reissue II. Intentional Torts 3. Specific Torts (8) Trespass HTO-19. Linden, Feldthusen, Belanger-Hardy (Contributors)

public space or satellite and unaltered save for a blurring of identifying features of individuals and car licence plates that were captured inadvertently along with the location image. This raised discussion of privacy at the time. But by taking these digital images, adding a virtual creature and inducing people to attend at the physical location in order to “capture” the creature brings the privacy and trespass issues for the property owner back into the real world.

In addition to trespass, privacy, has been one of the issues raised<sup>13</sup> but, unlike common law property rights, common law rights associated with privacy are much less clear. In the 2012 decision in *Jones v. Tsige*,<sup>14</sup> the Ontario Court of Appeal took a significant step to recognize intrusion upon seclusion as an actionable wrong.

I would essentially adopt as the elements of the action for intrusion upon seclusion the *Restatement (Second) of Torts* (2010) formulation which, for the sake of convenience, I repeat here:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

The key features of this cause of action are, first, that the defendant’s conduct must be intentional, within which I would [page262] include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff’s private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

...

These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one’s financial or health records, sexual practises and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.

---

<sup>13</sup> It appears to be raised in the Alberta law suit noted above.

<sup>14</sup> *Jones v. Tsige*, 2012 ONCA 32 (CanLII)

Finally, claims for the protection of privacy may give rise to competing claims. Foremost are claims for the protection of freedom of expression and freedom of the press. As we are not confronted with such a competing claim here, I need not consider the issue in detail. Suffice it to say, no right to privacy can be absolute and many claims for the protection of privacy will have to be reconciled with, and even yield to, such competing claims. A useful analogy may be found in the Supreme Court of Canada's elaboration of the common law of defamation in *Grant v. Torstar* where the court held, at para. 65, that "[w]hen proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know."<sup>15</sup>

What can then be said about the potential impacts on property law and privacy law that may result from Pokémon Go? The popularity of the game and its adoption by many individuals is a classic example of disruptive technology. But what may happen next – especially in regards to society's awareness of, and respect for, boundaries? It appears that several threats – and opportunities – appear on the horizon.

First, the litigation and class proceedings will run their course. In theory, every owner of private property is a potential member of a plaintiff class since every owner of property has the protection at law against trespass over a boundary. The risk to developers of the game arising from this threat may be enough to reduce its placement of virtual characters to be collected to public spaces or other similar measures. However, the risk will need to be equal to or greater than the potential profits to be made by owners of the application. At this time, the potential profits are staggering.

Second, there may be a gradual acceptance in society of trespass and intrusions to the privacy of property owners as inevitable. In some respects, this form of resignation to the inevitable is similar to the impact of copying and digitizing of musical and literary works without the permission of the creator/owner of these works. Social change ushers in a new legal framework – usually in the form of legislation. Revisions to copyright law and reform of the *Copyright Act* continue in Canada and in all of the common law world.

Third, the place and role of boundaries in property law may need to be adjusted. Regardless of how good the quality of "free" mapping may be, the missing element is the entire boundary fabric layer. An interesting strategy for developers of the Pokémon Go application would be to integrate a legal boundary fabric into the augmented reality experience, thereby giving players the ability to avoid causing a trespass and risking the threat of a claim arising from intrusion of privacy. If cost in developing such a virtual boundary fabric is less of a factor, the impetus to do so may signal a new reality for land surveyors and owners of the Pokémon Go application alike.

---

<sup>15</sup> *Ibid.*, at paras. 70 to 73

Disruption of established orders is not new. We will benefit from monitoring closely the evolution of this development – especially in terms of the legal arguments that emerge and in seeing which class proceedings get certified and which do not.

Editor: Izaak de Rijcke<sup>16</sup>

---

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

The expressions, “augmented reality” and “virtual reality” do not appear in the Index of *Principles of Boundary Law in Canada*. However, this issue of *The Boundary Point* raises two specific topics to bear in mind for readers of the book: the nature of boundaries and the use of mathematical co-ordinates to determine the location of a legal boundary. A basic proposition introduced in the book is that there cannot be a legal boundary to be surveyed if there is no spatial differentiation of rights in land [see Chapter 1: *Boundaries in History and Law*, at p. 28]. The mere running of a line with no further official act to elevate the line into a boundary is echoed in the AR world of *Pokémon Go*: no line has ever been run and property rights do not exist until such time as the AR is superimposed onto the real world of boundaries, property law and a legal response to trespass.

AR is also an avatar for a mathematical framework or model of reality. In that respect, the issues identified in the book [see: Chapter 10: *Boundaries and Co-ordinates*, at p. 442, and the reference to, “...the integration between a mathematical co-ordinate database for legal parcel corners and boundaries and a principle based algorithm for resolving the many disconnects that will appear between ‘place’ as defined by the co-ordinate value, and the ‘hard’ feature on the ground.”]. The progression and eventual resolution of class proceedings out of the *Pokémon Go* application will shed new insights into how the law will reconcile a mathematical model of “place” based on GPS co-ordinates with the fact of property rights and boundaries being very much a part of our real world. We will be monitoring this closely for the purpose of ascertaining new paradigms that will reconcile co-ordinate values in AR with the true location of boundaries.

---

<sup>16</sup> Large portions of this e-newsletter has been written by Megan Mills, lawyer at Izaak de Rijcke Law Office.

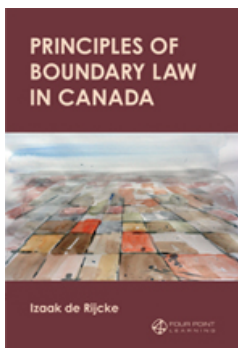
## FYI

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.<sup>17</sup> 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 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.<sup>18</sup>

### NOW HERE: *Principles of Boundary Law in Canada*



A boundary is an attribute of every parcel of land in Canada – a parcel cannot exist without boundaries. 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.

---

<sup>17</sup> 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.

<sup>18</sup> This conference qualifies for 12 *Formal Activity* AOLS CPD credits.



See [Principles of Boundary Law in Canada](#) for a list of chapter headings, preface and endorsements. You can mail payment to: **Four Point Learning** (address in the footer of the first page) with your shipping address or [purchase](#) online. (NB: A PayPal account is not needed to pay by credit card.)

**NEW FEATURE: Cross-referencing *The Boundary Point* to *Principles of Boundary Law in Canada***

This month's issue is the first example of cross-referencing this e-newsletter to the contents of the book: *Principles of Boundary Law in Canada*. The "Cross-references to *Principles of Boundary Law in Canada*" feature will be included in all future issues and, over time, will also be part of an update and annotation of back issues to increase their relevance and usefulness as a resource for land surveyors and real estate lawyers across Canada.

---



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](mailto: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