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.

Most urban areas in Canada enjoy the benefit of current air photo coverage at least every couple of years. The product is essential for planners, environmental management and is seen as an important component in attracting new business to communities. As the collection of aerial photography grows, the historic value of this archive becomes an important resource. Sometimes it is used in legal proceedings in order to prove that a certain activity or use was (or was not) taking place on land in the past. When used in this manner, it becomes "evidence" and is subjected to the kind of scrutiny faced by all evidence.

In this issue we consider an appeal from a trial decision that allowed a claim based in adverse possession. The appellants sought to introduce further evidence in the nature of aerial photography and a report from a photogrammetrist on appeal. The court disallowed the request noting, among other things, that aerial photography has inherent limitations, especially when better evidence was already before the court. The decision in *Beffort v. Zuchelkovski*,[1] and the dismissal of an appeal,[2] serve as useful insights to the role of aerial photography in legal proceedings.

Aerial Photography as Evidence of Use

Key Words: *evidence, proof, photography, use, adverse possession*

As far as claims to land are concerned, litigation and trial over a 10 foot swath of land at the rear of a neighbour's property may not seem like a cost-effective way to resolve a dispute. Yet, this is what the plaintiffs in *Beffort v. Zuchelkovski* pursued in an attempt to perfect a claim based in adverse possession in Ontario. The facts were relatively straightforward but, before offering a summation, the court made reference to the poem, *Mending Wall*, by Robert Frost, and the words describing an exchange between Frost and his neighbour:

[1] *Beffort v. Zuchelkovski*, 2016 ONSC 583 (CanLII), http://canlii.ca/t/gn394

[2] *Beffort v. Zuchelkowski*, 2017 ONCA 774 (CanLII), http://canlii.ca/t/h6m89

> In "Mending Wall", poet Robert Frost and his neighbour are engaged in their annual spring ritual of repairing the stacked stone wall that divides their properties. Frost asks the neighbour why they do it every year. He asks why they need the wall. There is nothing on either property that needs containing except pine trees on the neighbour's and apple trees on the writer's, neither of which will wander. The neighbour merely answers "Good fences make good neighbours." For every reason Frost puts forward for not having the wall, the neighbour repeats "Good fences make good neighbours." Frost, convinced that his neighbour will never change, resigns himself to mending the wall.
>
> This case shows us that, sometimes, the neighbour is correct. Good fences do make good neighbours – provided they are placed on the property line.[3]

Shortly after the plaintiffs bought 8 Fraser Avenue in Brampton in 2008, the defendant neighbours told them that they had to move their fence and air conditioner because it was on their land and because they wanted to put up a new fence *on the boundary*. Relocating the fence would move it about 10 feet closer to the plaintiffs' home and leave about 3 feet between their house and the relocated fence. It appears that the boundary location itself was not in dispute.

Figure 1: The 10 foot strip at issue is cross-hatched in red colour.[4]

[3] *Beffort v. Zuchelkovski supra*, footnote 1, at paras. 1 and 2

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

The position of the 10 foot strip is shown as an image in the reported case at Figure 1 above. The configuration was described:

> 84 Mill Street and 8 Fraser form a "T". The Mill Street property is the stem of the "T". The disputed land is located at the top of the stem of the "T" where 84 Mill Street abuts the southern boundary of 8 Fraser in its middle. At the time the Befforts bought 8 Fraser, there was a chain link fence located on 84 Mill Street approximately one meter south of the boundary between the two properties. That chain link fence runs from the east side of 84 Mill Street South to the west side, more or less.[5]

A pictorial view will better illustrate the relative position of the two properties to the neighbouring streets in Figure 2 below.

Figure 2: The intersection of Fraser Avenue and Mill Street South with both properties in view[6]

Evidence from previous owners was heard at trial and the court consider photographs taken in the past as relevant to the determination of the factual foundation of what had occurred. The court also stated the legal test and criteria for adverse possession in Ontario today in respect of properties that had been brought into *Land Titles* as a qualified conversion from their former status under the *Registry Act*. The synopsis deserves repeating:

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

[6] From: https://www.realtor.ca/ ©Canadian Real Estate Association, 2017, All Rights Reserved.

The Law:

The most recent statement of the law of adverse possession is from the Court of Appeal in *McClatchie v. Rideau Lakes (Township),* 2015 ONCA 233 (CanLII), in which Rouleau J.A., on behalf of the Court, says at para 9 to para. 11 that in order to establish adverse possession of land, the claimant must:

1. Establish that throughout the ten year adverse possession period he or she:

    a. Had actual possession of the land,

    b. Had the intention of excluding the true owner from possession, and

    c. Effectively excluded the true owner from possession.

2. The ten year adverse possession period only begins to run from the time at which the claimant can prove all three elements.

3. The acts of possession necessary to establish actual possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous. The claimant must prove all these elements of possession. A failure to prove any one of these elements is fatal to the claim.

The following additional principles also apply:

1. If the claimant acknowledges to the owner, during the adverse possession period, the right of the true owner, then adverse possession fails as the possession is no longer adverse. Acknowledgement stops the clock running. S. 13 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 says written and signed acknowledgment resets the clock. Acknowledgement may be oral: see *Teis v. Ancaster* (1997), 35 O.R. (2d) 216 at pg. 221 (C.A.).

2. Where the property, part of which is said to be adversely possessed, is brought into Land Titles, the ten year adverse possession period is the ten years immediately preceding the conversion of the property to Land Titles: see *Skrba v. Crisafi et al.,* 2014 ONSC 6780 (CanLII).

3. Enclosure by a fence, while not conclusive, is the strongest evidence of open, notorious, peaceful, adverse, exclusive, actual and continuous possession of land, the intent to use the land as an owner, and the intent to exclude the owner from use: see *Beaudoin v. Aubin* (1981), 1981 CanLII 1758 (ON SC), 33 O.R. (2d) 604 (H.C.J.) at p. 4, *Bacher v. Wang*, [2000] O.J. No. 3146, at para. 23, *Raso v. Lonergan*, 1996 CarswellOnt 3005 (Gen. Div.).

4. A mutual mistaken belief of the owner and claimant that the disputed land belongs to the claimant, while not conclusive, may imply the intention to exclude the

> owner: See *Bacher, supra* at para 26, *Raso, supra*, at para. 3, *Beaudoin, supra*, at page 617, *Carrozzi v. Guo*, 2002 CanLii 42513 (Ont. S.C.) at para. 35 to 39, and *Mueller v. Lee*, 2007 CanLii 23914 (Ont. S.C.) at para26.
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> 5. The test of inconsistent use does not apply in cases of mutual mistake as to ownership of the disputed lands: see *Wood v. Gateway of Uxbridge Properties Inc*. (1990), 75 O.R. (3d) 769 (Gen. Div.), and *Teis, supra* at page 224.
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> 6. In cases of mutual mistake, it is easier to establish adverse possession. If the owner thinks the property is the claimant's, the owner cannot intend to possess it, and therefore is out of possession of it and is not exercising control over it. It negates the argument that the claimant had permission to use the land: see *Mueller, supra*, at para 26-27.[7]

In order for the plaintiffs to succeed, it was necessary to establish adverse possession on the above noted criteria for 10 years prior to conversion to LTCQ. During a portion of this time period title to the defendants' property was held by previous owners who testified at trial and declared that there was no chain link fence in place during their ownership. This testimony was contradicted by other evidence and, in making a finding of credibility, the trial judge held that he preferred the other evidence. He concluded, as fact, that there was a chain link fence in the position alleged by the plaintiffs for the requisite 10 year period.[8]

> I find that [the plaintiffs], have possessed the disputed lands on 84 Mill Street South, Brampton for [the 10 year period]. I find that the possession, because of the presence of the chain link fence, was open, notorious, peaceful, adverse, exclusive, actual and continuous possession of the disputed land. The owners of 8 Fraser Avenue's intent to use the disputed land as an owner, and to exclude the owner from use is also uninterrupted for that period. I find that the owners of both 8 Fraser Avenue and 84 Mill Street had the same opinion: that each owned the land up to their side chain link fence, and not on the other side of it. This was a common error on the part of all owners.[9]

The defendants appealed. As part of the appeal proceeding, a request was made to introduce fresh evidence on appeal. This request was denied and, in oral reasons given on the same day as the hearing of the appeal, the court stated,

> This appeal involves a disputed strip of land between the abutting properties of the appellants and the respondents. The trial judge gave careful and detailed reasons for judgment explaining why he accepted the evidence pled by the respondents, that for the relevant 10-year period prior to the land being governed by land titles, their predecessors

[7] *Ibid.*, at para. 13

[8] *Ibid.*, at para. 41

[9] *Ibid.*, at para. 57

in title had adversely possessed the disputed strip. He gave judgment finding the respondents had established title by adverse possession. There is no issue as to the applicable legal test and the appeal turns solely on disputed issues of fact.

The appellants' case rested almost entirely on the evidence of the Kepkas who had owned the respondents' lands for a 10-month period between 1988 and 1989. The evidence of all other predecessors entitled to both the appellants' and the respondents' lands was that during the relevant 10-year period (which began to run on September 21, 1988), a chain link fence divided the strip of land from that of the appellants' and incorporated into the lands of the respondents. That evidence was supported by photographs taken during the relevant period showing that there was a chain linked fence. Only the Kepkas disputed that fact and testified that the property line was defined by a board fence that they erected. The trial judge carefully explained why he found that the recollection of the Kepkas was unreliable.

The trial judge's findings of fact attract deference in this court. He was entitled to find on the evidence that while the Kepkas had erected a board fence on part of the property, the chain link fence was present and defined the rear boundary of the property during the entire time they owned it. The trial judge did not err in finding that a statutory declaration relied upon by the appellants simply reflected the mutual mistake of all parties at the time that the chain link fence was the boundary.

We see no error, much less one that rises to the level of a palpable and overriding error that would justify this court in interfering with the trial judge's decision.

The appellants also moved to introduce fresh evidence, namely an opinion from the president of a photogrammetric mapping company based on aerial photographs of the properties taken in the period 1988 to 1989. In our view, this evidence does not meet the test for admissibility.

First, the motion to adduce fresh evidence was filed on the eve of the appeal and the appellants have failed to provide an adequate explanation for either the late filing or for why the evidence could not have been made available earlier through the exercise of due diligence.

Second, we are not persuaded that the evidence is sufficiently reliable or credible to overcome the direct evidence of the various witnesses and the contemporary photographs taken on the ground indicating the presence of the chain link fence in the relevant period.

Accordingly, both the motion to adduce fresh evidence and the appeal are dismissed.[10]

[10] *Beffort v. Zuchelkowski*, 2017 ONCA 774, at paras. 1 to 8. [*emphasis* added]

If there is one thing that is easily confused by geomatics professionals, it is the difference between evidence and fact. With backgrounds in STEM subjects, it is not surprising that scientific proof is understood to involve hypothesis testing, data evaluation and statistical analysis and, in the end, a hypothesis is either established as untenable - or it becomes more robust. A certain scientific "truth" has been established.

In contrast, *legal* proof takes a somewhat different approach, relying on the law of evidence, rules of exclusion and seeking to find credible pieces of evidence and testimony in order to reach conclusions of fact. There is rarely anything scientific about the process. Generally speaking the first trier of fact who can observe, listen to, and assess witnesses' testimony under oath are afforded deference when, on an appeal, the argument is made that a court reached an incorrect conclusion of fact, or one that cannot be supported by the evidence.

This case is not the first instance in which courts have expressed some doubt about the reliability of aerial photography. Please refer to earlier issues of *The Boundary Point* in which courts have released decisions and the reliability of such evidence has at times been questioned.[11]

Editor: Izaak de Rijcke

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

There is not a separate chapter in *Principles of Boundary Law in Canada* that specifically explains the role of fact-finders in using evidence to order to arrive at facts. Nonetheless, the discussion centred around the "hierarchy of evidence" at Chapter 3 and pages 74 and following are relevant to these issues. Likewise, *Chapter 4: Adverse Possession and Boundaries* also includes extensive discussion about the application of specific tests for adverse possession in differing jurisdictions in Canada. The decision in *Beffort v. Zuchelkowski* is an illustration of one further example in Ontario.

[11] See, for example, *Reiner v. Truxa,* 2013 ONSC 6009, in *TBP* 2(2) and *Cooper v. Dawe*, 2015 CanLII 7869, in *The Boundary Point* 3(6)

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.[12] 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.

Fifth Annual Boundary Law Conference — Postponed

Izaak de Rijcke, the *Conference Moderator*, came to the realization that the goals of this year's conference *Waterfront Properties in Ontario: Best Practices for Reducing Ownership Conflict* – *to provide clarity to a conflicted topic* and *to establish a broad consensus on emerging best practices to reduce conflicts among stakeholders, mitigate the risk for professionals, and minimize uncertainty for members of the public* – will require progressing beyond just defining the issues and positions from the different professional perspectives. A road map – a *common ground* framework – is needed to problem-solve waterfront ownership, access and boundary issues. This intervening step promises to make the conference an even higher-value CPD event.

If not already registered, you are encouraged to pre-enrol at no cost in order to get notification of the date and venue for the revised conference: *Waterfront Properties in Ontario: Best Practices to Resolving Title and Boundary Issues*.

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.

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[12] 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.