



*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.

Boundaries along the waterfront remain fraught as a subject that continues to suffer from a lack of clarity. In this month's issue of *The Boundary Point*, we explore a claim arising out of the placement of a wharf in front of a riparian owner's property. Although there was an easement in the form of a footpath across the upland property allowing for access to the wharf, members of the public would park their vehicles alongside the public road in order to access the footpath and the wharf. Further, the wharf itself encroached over the boundary of its permitted site within the bay. This gave rise to a claim for damages for interference with riparian rights as well as a challenge to the legality of the easement itself.

Although we may prefer to read decisions from the courts that are neatly confined to only one or two boundary issues, the events that actually bring boundary disputes before the courts are more complex and frequently involve several overlapping issues. In *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*,<sup>1</sup> this certainly was the case. Understanding the nature of riparian rights and the extent to which these rights may be affected as a result of a grant of easement should not be confined to an academic question for students in Boundary law. However, *Arbutus* elevates the hypothetical scenario into a real life problem. This issue of *The Boundary Point* will be of interest to land surveyors who may find the latest cases from courts in Canada involving water boundaries, riparian rights and easements to be relevant to their practice.

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## Riparian Rights, an Easement Encroachment and Rectification

**Key Words:** *encroachment, riparian rights, easement, rectification*

The plaintiff in *Arbutus* sued Crown Canada and British Columbia for damages arising from wrongful interference with the plaintiff's riparian rights. The damage was alleged to have been the result of constructing a public dock into Horton Bay on Mayes Island in British Columbia. The location of the wharf can be seen in the imagery in Figure 1 below.

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<sup>1</sup> *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2016 BCSC 2083 (CanLII), <http://canlii.ca/t/gvm9w>



*Figure 1: The dock projecting out into Horton Bay<sup>2</sup>*

Members of the public parked vehicles on the side of Horton Bay Road and proceed to walk over the plaintiff's land along an easement created by a deed in 1960. The specific language used in the deed was:

“BETWEEN Francis Winterton Pratt Of Mayne Island, Province of British Columbia

hereinafter called the “Grantor”

AND

Her Majesty the Queen in the Right of the Province of British Columbia

hereinafter called the “Grantee”

WITNESSETH that in consideration of the sum of \$50.00 now paid by the Grantee to the Grantor (the receipt whereof is hereby acknowledged) the Grantor doth hereby grant and

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<sup>2</sup> From: Google Maps © Google Inc., 2016. All rights reserved.

convey unto the Grantee, the owner in fee of those lands and premises described as Lot 431, Cowichan District, her heirs and assigns and her and their agents, servants and workmen a free and uninterrupted right-of-way in perpetuity but subject to the proviso hereinafter contained, through, along and over that certain parcel of land described as:

Commencing at a point South 63 15' 30" East, a distance of 263.1 feet more or less from the most southerly corner of Lot 2, Section 2, Mayne Island, Plan 6166, then North 22 02' West 87 feet more or less to High Water Mark of Horton Bay and South 22 02' East 7 feet more or less from the said commencement point and having a width of ten feet on either side of the above described centreline, containing 0.043 acre more or less for the purpose of constructing a footpath and other works incidental to the operation of wharfage facilities appurtenant to the lands owned by the Grantee hereinbefore described.

Provided, and it is hereby expressly agreed, that if and whenever the operation of the said wharfage facilities is discontinued, the said right-of-way and all rights incidental thereto and hereby granted shall cease and determine.

The Grantee for herself, her heirs and assigns covenants with the Grantor his heirs and assigns that the Grantee will at her own expense keep the right-of-way in proper repair and condition."

The registered easement contains an explanatory plan, attached as page 5 and entitled "Explanatory plan of R/W required for access to federal government landing is S.E. ¼ Section 2 Mayne Island". The plan shows the location of the right of way leading from Horton Bay Road to the water lot.<sup>3</sup>

This document is reproduced in its entirety in order to allow readers to consider the purpose of the easement in this case: "...*constructing a footpath and other works incidental to the operation of wharfage facilities appurtenant to the lands owned by the Grantee...*" A survey plan was also attached to the grant of easement in 1960. Over the years that followed, various improvements were made to the footpath and dock.

The dock itself was located on a water lot that extended from the shore into the Horton Bay. Figure 2 below illustrates the relative position of the dock, the upland property fabric and the public road alongside which members of the public parked their cars.

The claim asserted in *Arbutus* was based on the upland property having a riparian title. The court found that it had such title, but then embarked on a consideration of what the associated riparian rights actually included. This analysis of the law was based on the quoted statements in the decision:

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<sup>3</sup> *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2016 BCSC 2083, at paras. 40 and 41



Figure 2: The water lot on which the wharf was located at the end of the footpath.<sup>4</sup>

Riparian rights have been discussed in the case law in B.C. In *North Saanich (District) v. Murray*, [1975] B.C.J. No. 1126 (C.A.), the issue before the Court was whether a riparian owner had the right to construct wharves or other structures upon the foreshore. In finding the riparian owner did not have the right to construct wharves or other structures on the foreshore, the Court of Appeal adopted the following statements as accurately stating the law on riparian rights in British Columbia:

[11] In so far as the issues that arise in this case are concerned, I think that the general statements contained in 39 *Hals.*, 3rd ed., p. 514 et seq., accurately state the law of British Columbia:

<sup>4</sup> From: Capital Regional District: <https://maps.crd.bc.ca/Html5Viewer/?viewer=public> 2016. All rights reserved

675. General right of access by riparian owners. A riparian owner, that is to say, an owner of land abutting on water, is entitled *ex jure naturae* to access and regress to and from that water ...

677. Nature of right of access. A riparian owner's right of access to the water on which his land abuts is a private and not a public right and any interference with it is actionable without proof of special damage; it does not depend on ownership of the bed of the river or other water in question and it is wholly distinct from the public right of navigation.

678. Exercise of right of access. In the exercise of his right of access a riparian owner must not interfere with any public right of navigation which exists in the water on which his land abuts or put down anything which disturbs the foreshore. If, however, there is an erection on the foreshore, such as a pier or causeway, the riparian owner, and those whom he permits to go on his land, may use it as a means of access [emphasis in original].

680. Incidental rights. The riparian owner's right of access includes (1) the right to land, or pass over the shore or bed at all states of the water for that purpose, even when the shore or bed is not vested in him; and (2) the right to moor vessels adjacent to his land for such period as is necessary to load or unload them and, in the case of tidal waters, if they cannot be loaded or unloaded in one tide, the right to keep them there until the operation is completed. A riparian owner must not, however, moor a vessel in such a way as to interfere with another riparian owner's right of access or so as to interfere with any public right of navigation.<sup>5</sup>

The argument advanced by Arbutus that its riparian rights were being interfered with was summarized by the court as follows:

As noted earlier, the plaintiff asserts that the registered easement does not on its face provide any notice of the waiver of riparian rights because the specific words are not used. The plaintiff asserts its riparian rights allow unimpeded access to deep water across every point on the Property's foreshore. The plaintiff argues that without specific reference to the riparian rights in the registered easement, the wharf facilities cannot remain on the Property because it blocks the Property's access to deep water at the point it intersects the land. The plaintiff says even if it were found that the registered easement impacted its riparian rights, the ramp to the wharf and the pathway are not entirely within the area covered by the registered easement.

An easement sets out a proprietary right that runs with land, burdening the servient tenement and benefiting the dominant tenement. When a purchaser acquires land

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<sup>5</sup> At para. 68

burdened by an easement, he or she has no inherent right to demand the easement be cancelled or modified.

A registered easement is a reflection of a contractual agreement, and easements are interpreted in accordance with the principles of contractual interpretation. However, easements are unique in that they are intended to be relied upon by subsequent purchasers and others who were not parties to the original transaction. As a result, rules unique to the construction of easements have developed.<sup>6</sup>

However, in rejecting these submissions, the court reasoned:

In my opinion, the plain language of the easement in this case provides notice to subsequent owners of the impairment of their riparian rights. The grant to the Province included “her heirs and assigns and her and their agents, servants and workmen”. The grant was for a right of way in perpetuity over the Property subject to the provisos in the document. The purpose of the easement is set out as the construction of a footpath and other works incidental to the operation of wharfage facilities appurtenant to the lands owned the Grantee hereinbefore described.

The registered easement provides for a right of way in perpetuity, provided that, if and whenever, the operation of wharfage facilities is discontinued the right of way and all the rights incidental thereto and hereby granted shall cease and determine. The Province is responsible for keeping the right-of-way in proper repair and condition.

It is apparent from the plain language of the grant that it provides for a right of way between Horton Bay Road and the wharfage facilities located in water lot 431. The explanatory plan attached clearly states that the right of way depicted is “required for access to the federal government landing”. [emphasis in original]<sup>7</sup>

Ultimately, the court held that any impairment of riparian rights attached to the plaintiff’s land that fronts the right-of-way, the footpath and the Horton Bay wharf was authorized - so long as the operation of the Horton Bay harbour public wharf continued.

Other issues were argued by the plaintiff. For example, the question of parking of vehicles on the adjoining roadway was challenged in that it was not enumerated in the easement as a permitted use in the list of allowable activities. The court quickly disposed of this argument in stating,

Canada and the CRD assert that an incidental and/or ancillary right to park vehicles on the side of Horton Bay Road, within a reasonable distance from Horton Bay harbour, is

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<sup>6</sup> *Ibid.*, at paras. 70 to 72

<sup>7</sup> *Ibid.*, at paras. 75 to 77

reasonably necessary to the comfortable exercise and enjoyment of the rights granted in the registered easement.

There is no dispute that vehicular access is necessary for the reasonable use and operation of the wharf, which is situated several kilometers outside the village and the nearest store, and is not connected by public transportation. Users of the wharf testified of the need and practice of parking vehicles on the side of Horton Bay Road in order to reasonably use the facility...<sup>8</sup>

Another argument, advanced by the plaintiff in response to the defendants' request for rectification of the easement if in fact rectification was needed to cure a defect. This was an interesting part of the decision because the whole topic of rectification, as a remedy in equity, has been argued as anathema to the rigour and predictability of a *Torrens* title system.<sup>9</sup> This issue arose because the plaintiff argued that the easement was in fact a contractual agreement entered into in 1960 between the original owner and Canada for the operation of the wharf as a public facility and/or permitting reasonable parking along Horton Bay Road. It did not bind successive owners, such as the plaintiff, who did not expressly waive their riparian rights.

A small portion of the path and the wharf structures were shown on a survey to lie outside the area defined in the registered easement. Canada requested that the registered easement be rectified so as to include the entire pathway and upland portions of the wharf structures within the described easement. Rectification is also available as a statutory remedy and the court noted:

In this case, the plaintiff argues that the *Torrens* system embodied in the *Land Title Act* and, in particular s. 29, bars rectification. Section 29 provides that a person is not affected by unregistered interests in land or unregistered charges, even if the person has actual or constructive notice, except in the case of fraud. This provision applies to unregistered charges. In this matter, the charge is registered against the title. The plaintiff has provided no case authority for the proposition that s. 29 of the *Land Title Act* bars the rectification of a registered instrument, whereas I have been provided with cases in which courts have granted rectification of a registered instrument.<sup>10</sup>

The remedy was ordered and the court concluded:

As noted earlier, the plaintiff did not raise any concerns about the Horton Bay harbour public wharf until after its consent was requested to change the tenure of the water lot. The plaintiff did not raise any concerns about the location of the footpath or the wharf

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<sup>8</sup> *Ibid.*, at paras. 90 and 91

<sup>9</sup> For example, see: *Fort Garry Care Centre Ltd. v. Hospitality Corporation of Manitoba Inc.*, 1997 CanLII 3523 (MBCA), <http://canlii.ca/t/1flkf>; and *MacIsaac v Salo*, 2013 ONCA 98 (CanLII), <http://canlii.ca/t/fw4zf>

<sup>10</sup> *Ibid.*, at para. 118

structures until after a recent survey. In my opinion, the facts of this case are similar to the *White* case in that [the plaintiff] purchased the Property under the mistaken belief that the footpath and wharf structures were included in the easement.<sup>11</sup>

The *White* case is a reference to *Banville v. White*.<sup>12</sup> The ratio in *White* was described by the court as:

Court of Appeal discussed the doctrine of rectification in the context of a registered easement and whether it was available against a subsequent purchaser. The issue was whether a turnaround that fell outside the area covered by a right of way was intended to be covered by the registered easement. The right of way had been created by the original owners when the lands were subdivided into Lots 1 and 2. The two lots were adjacent to one another and shared a private driveway that ended in a turnaround that was located on Lot 1, now owned by the plaintiffs. The defendants sought rectification, for the first time on appeal, if it was found that the turnaround did not fall within the easement. The dissent noted that the plaintiffs had constructive notice of the existence of the turnaround and in the circumstances would have ordered rectification of the easement to include the turnaround so as to reflect the agreement when the easement was granted.<sup>13</sup>

In reaching its conclusion that the easement was valid and that no riparian rights were interfered with, the court also added further reasons “in the alternative” and stated that, even if the easement did not allow the uses claimed by the defendants, it would order rectification – which took the following form:

I am also of the view that if I have reached the wrong conclusion regarding whether the riparian rights and parking are included in the registered easement, the registered easement should be rectified as sought by the Province, with some modifications as follows:

WITNESSETH that in consideration of the sum of \$50.00 now paid by the Grantee to the Grantor (the receipt whereof is hereby acknowledged) the Grantor doth hereby grant and convey unto the Grantee, the owner in fee of those lands and premises described as Lot 431, Cowichan District, her heirs and assigns and her and their agents, servants and workmen, visitors, invitees and members of the public a free and uninterrupted right-of-way for ingress and egress to the wharfage facility and for the maintenance, operation, construction or replacement of the wharfage facility appurtenant to the lands owned by the Grantee hereinbefore described in perpetuity but subject to the proviso hereinafter contained, through, along and over that certain parcel of land described as:

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<sup>11</sup> *Ibid.*, at para. 126

<sup>12</sup> *Banville v. White*, 2002 BCCA 239 (CanLII), <http://canlii.ca/t/4xw3>

<sup>13</sup> *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2016 BCSC 2083, at para. 115



Commencing at a point South 63 15' 30" East, a distance of 263.1 feet more or less from the most southerly corner of Lot 2, Section 2, Mayne Island, Plan 6166, then North 22 02' West 87 feet more or less to High Water Mark of Horton Bay and South 22 02' East 7 feet more or less from the said commencement point and having a width of ten feet on either side of the above described centreline, containing 0.043 acre more or less for the purpose of ingress and egress from Horton Bay Road to constructing a footpath and other works incidental to the operation of wharfage facilities appurtenant to the lands owned by the Grantee hereinbefore described

The description of the area also has to be rectified to include all of the area on which the footpath and wharfage structures are situated. As noted earlier, the area to be included in the easement is approximately 0.010 acre or 440 square feet.<sup>14</sup>

Nonetheless, since the trespass had occurred over many years, albeit minor, the court awarded nominal damages to the plaintiff in the sum of \$7500, but awarded costs of the litigation in favour of the defendants. The \$7500 amount was attributable solely to the encroachment of the footpath and wharf structure over the easement boundary as surveyed.

*Editor:* Izaak de Rijcke

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

The decision in *Arbutus* is ostensibly about riparian rights and the extent to which a public wharf, accessible by way of a footpath over a registered easement, is or is not operative as a waiver of those riparian rights. However, the subtext is all about easements and the availability of rectification as a remedy in the context of a *Torrens Land Titles* context.

*Arbutus* elaborates on (and explains) the relationship between the riparian right of access to water and how a grant of an easement by the riparian owner to allow for use of a path to access a dock – to the placement of the dock itself – may or may not abrogate riparian rights. This topic is discussed in *Chapter 8 – Natural Boundaries* (especially at page 291), but the clear result in *Arbutus* lay in the court's finding that the grant of easement operated as a waiver of the upland owner's rights in that case. A different interpretation of the effect of the grant of easement under different circumstances may lead to a different outcome.

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<sup>14</sup> *Ibid.*, at paras. 133 and 134

*Arbutus* is also helpful in giving a further example of how equity and rectification can operate in the context of a *Land Titles* system. This is discussed in *Chapter 7 – Boundaries and Land Registration Systems* (especially at page 283 and the application of this topic in BC).

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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.<sup>15</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.

### Introduction to Canadian Common Law – April to May 2017

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 10, 24, May 1, 15 and 29, 2017. The sessions can be attended in-person at Guelph or remotely from anywhere in Canada. Given the course work required beyond mere attendance at the sessions, this learning opportunity qualifies for the full Formal Activity hours CPD requirement of a rolling three-year period.<sup>16</sup>

### Fourth 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 *Boundaries of Public Highways: New Developments and Practices*<sup>17</sup> held in November, 2016, includes the presentations, papers and slide decks from presenters. The 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

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<sup>15</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.

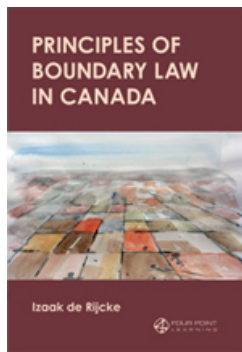
<sup>16</sup> This course qualifies for 36 *Formal Activity* AOLS CPD hours.

<sup>17</sup> The conference qualifies for 12 *Formal Activity* AOLS CPD hours.

conclude. Please mark your calendar for the Fifth Annual Boundary Law Conference: **November 13, 2017.**

### *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.

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 of this issue of *The Boundary Point*) with your shipping address or [purchase](#) online. (NB: A PayPal account is not needed to pay by credit card.)



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