The Boundary Point
Volume 5, Issue 4, April 2017
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 an easement be acquired over private property by a public authority? This question was addressed in a decision that was released in the final weeks of 2016. Generally speaking, we think of a dominant owner as having a right that runs with the title to that owner's land, and which is capable of being enjoyed by the dominant owner. But when the dominant owner is a department of government, how does the right of way over private property become established? This question was squarely answered in *Harbour Authority & Ano. v. Simpson Aqua*,[1] an appellate court decision that reversed a decision of the trial court in *Harbour Authority & ano. v. Simpson Aqua*.[2]

This issue of *The Boundary Point* is of interest to public authorities owning land for a public purpose but who may risk a mistaken right to an interest over private property that cannot be acquired through public user alone.

Public Authority's Failed Claim to an Easement over Private Property

Key Words: *easement, user, prescription, dominant tenement, public use, lost modern grant*

The litigation arising from this dispute is an interesting commentary on the need to properly characterize the nature of the legal right claimed. It also serves as a further step in contrasting the law of private easements with the law of public rights of way. The decision at the trial level offered a good synopsis of how this litigation came to a head:

> DFO, a Federal Government department and Public Works Canada, another Federal Government department, have maintained and improved the Harbour facilities since approximately 1904.
>
> …

[1] *Harbour Authority & Ano. v. Simpson Aqua*, 2016 PECA 20 (CanLII), http://canlii.ca/t/gwj9t

[2] *Harbour Authority & ano. v. Simpson Aqua*, 2015 PESC 31 (CanLII), http://canlii.ca/t/glg7h

> The Applicants claim a prescriptive easement over the Servient Lot. The claim states that the right of way (easement) to access the slipway and wharf on the Dominant Lot exists because the Applicants and others have used the easement for a period of more than 20 years. In this decision, the terms right of way and easement are used interchangeably.
>
> The Respondent claims there is no such prescriptive right of way or easement over the Servient Lot and wants to place barriers on its property to prevent the use of its property by the fishers.
>
> The properties in question, the Dominant Lot and the Servient Lot, were identified by Mary Lynn McCourt, witness for the Applicants, in her capacity as a Geomatics Supervisor for the Province of Prince Edward Island. The Court viewed maps and what I will described as aerial photos or mapping of the properties in question.[3]

The very reference to "servient" and "dominant" properties in the early paragraphs of the trial judge's decision was an alert to the direction his decision would ultimately go: an analysis that focussed on the claim to an easement over private property. Moreover, the stated interchangeability of "right of way" with "easement" in this context would ultimately lead to a reversal of the decision on appeal.

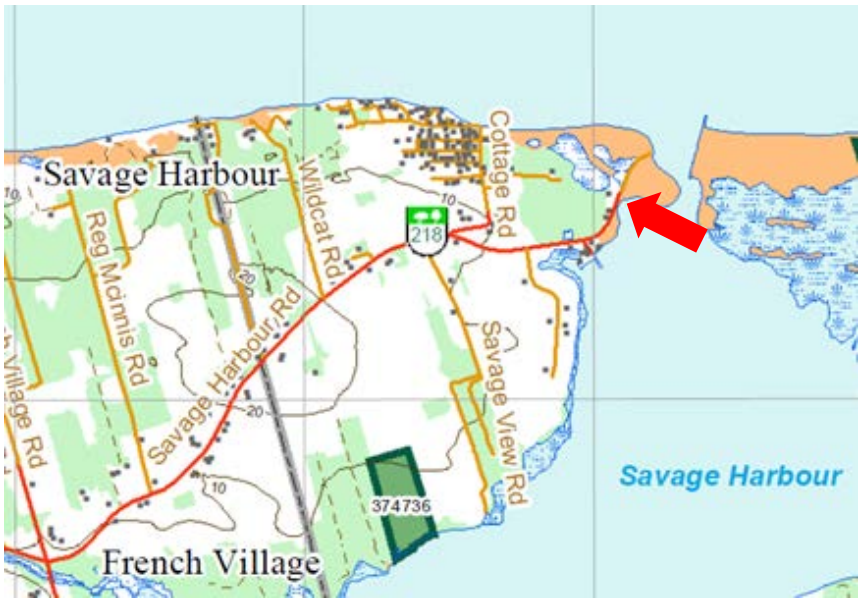

Figure 1: The location of the DFO owned dock in Savage Harbour.[4]

The location of the dispute can be seen in an image of Savage Harbour on the north shore of Prince Edward Island in Figure 1 to the left. The harbour at the heart of this dispute was used predominantly by fishers of oysters, mussels and crabs for more than 100 years. To access the slip from Savage Harbour Road (Highway 218), fishers needed to cross land owned by Simpson Aqua Ventures Ltd.

[3] *Harbour Authority & ano. v. Simpson Aqua*, 2015 PESC 31 (CanLII), at paras. 11 to 15

[4] From: *Prince Edward Island Public Land Atlas*, available at: http://www.gov.pe.ca/photos/original/gis_pubatlas27.pdf

Figure 2: Access to the slipway on DFO land crosses Simpson Aqua land[5]

There was no registered right of way or other legally recognized interest over the land of Simpson Aqua that could be referenced as a basis for a legal right to pass over this land.[6] The court described the general route to be followed for reaching the slipway in order to launch a boat in the following passage. It is also pictured in Figure 2:

> A summary of the fishers' and boat haulers' evidence suggests that for more than 20 years the fishers and the boat haulers: 1) exited the Savage Harbour Road, 2) headed [sou]theast towards the wharf, 3) turned left onto the Dominant Lot, 4) turned left again and travelled in a northwesterly direction over a portion of the Dominant Lot and then, 5) drove onto the Servient Lot until the boat and trailer were in line with the slipway so as to back the trailer and the boat down the slipway into the water for the purpose of launching the boat.
>
> The evidence of the Applicants further suggests that in order to haul a fishing boat out of the water, the same process is followed as is set out above, with the exception that when the truck and trailer has pulled the boat out of the water, they travel northwesterly across the Dominant Lot and the Servient Lot and leave the area by crossing the Servient Lot back onto the Savage Harbour Road.[7]

The trial judge considered the use made of the Simpson Aqua property for over 20 years and summarized the arguments made in favour of Simpson Aqua's position as,

> [In one affidavit the witness stated] he would be unable to describe the path which the fishers and boat haulers used as having a certain width or distance or location over and across the Servient Lot.

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[5] From: PEI Land Online, https://www.princeedwardisland.ca/en/information/agriculture-and-fisheries/landonline-geographic-information All rights reserved.

[6] Regular readers of this publication will recall the discussion of *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2016 BCSC 2083 (CanLII), http://canlii.ca/t/gvm9w in *The Boundary Point* 5(2); the distinguishing feature in that case was that easement rights had been registered against title to the servient property.

[7] *Harbour Authority & ano. v. Simpson Aqua*, 2015 PESC 31 (CanLII), at paras. 25 and 26

Simpson's position is the fishers and boat haulers should not be permitted to cross any portion of the Servient Lot to launch their boats down the slipway and into Savage Harbour and or haul the boats out of Savage Harbour, up the slipway and off the property.

Simpson further argues permission was granted by his predecessors in title and the permission vitiates or negates the right of way or easement. A further argument is the right of way will substantially interfere with Simpson's ability to build and operate his business.

Simpson's counsel also points out that at one point the Dominant Lot and the Servient Lot were possessed or owned by the same organization, namely, National Sea Products Ltd., and prior to that Carl Joseph Coffin. His position is that unity of possession prevents the prescriptive right of way or easement from coming into existence.

Essentially, from the Court's perspective the Respondent Simpson is asking the Court to prevent the Applicants from using the very easement or right of way he himself has been using for the last 19 years.

The issue before the Court is whether or not the Applicants have acquired a prescriptive easement over the Respondent's servient lot, a right which would prevent the Respondent from restricting the Applicants' ingress and egress from Savage Harbour.[8]

Figure 3: View of the slipway from Savage Harbour Road looking southeast.[9]

Placed into context, the area used for ingress and ingress by fishers to reach the slipway can be seen in Figure 3. The trial court ultimately found in favour of DFO, as owner of the "dominant land" as having established an easement over the "servient land" of Simpson Aqua. This result was reached by the court in considering the law of easements in PEI and began by asking the question, "What is a Prescriptive Easement?" It answered this question (even though there is no basis for prescription to operate in PEI[10]) as follows:

[8] *Ibid.*, at paras. 42 to 47

[9] Google Streetview image from August, 2009. ©Google Inc., All rights reserved.

[10] The authority for the operation of prescription as giving rise to an easement is specifically absent. As stated in *Hicks v. Knox,* 2012 PESC 5, and also repeated below, at para. 7:

A prescriptive easement is the legal method by which an easement can come into existence. The subject of a prescriptive easement or right of way would have been raised in the consciousness of a young law student in first year Property Law class. It was discussed in the nightmare-causing chapter entitled Incorporeal Hereditaments. One explanation of a prescriptive easement as set out by *Anger and Honsberger Law of Real Property (2nd ed.)*, is as follows:

> A claim to an easement that has not been acquired by grant, express or implied, must be .... upon prescription, that is to say, a title acquired by possession had during the time and in the manner fixed by law (Vol. 2, p. 935)

Further, the policy behind the establishment of the prescriptive easement was to have the law...

> ... do all it can to quiet titles and preserve the security of property. (P. 935)

In reviewing the very early case law on the issue, *Anger and Honsberger* set out:

> The Court will be slow to draw an inference of fact which would defeat a right that has been exercised during a long period... and will presume everything that is reasonably possible to presume in favour of such a right.

At para. 6 of a recent decision known as *Cooper v. Dawe*, 2015 CanLii 7869 (NLSCTD), Handrigan, J., describes the creation of prescriptive easements as follows:

> [6] Prescriptive easements are established by "user as of right", which is practiced *nec vi* ("without violence"), *nec clam* ("not secretly") and *nec precario* ("without permission"). "User as of right" is the antithesis of permitted user in the discussion of prescriptive easements. Express permission defeats prescriptive easements. Prescriptive easements will be established if the owner of the servient tenement acquiesces in the use of his property.

Further, at para. 7, Handrigan, J., states:

> [7] Acquiescence is silent or passive assent or submission, or submission with apparent consent. It is to be distinguished from avowed or express consent on the one hand, and from opposition or open discontent on the other. ...

If a claimant can prove through his evidence he has used the Servient Lot, for instance, as in this case, by travelling across the property, for a period of at least 20 years, the Courts may

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In this jurisdiction, the starting point for a discussion of the law related to prescription by easement begins with the case of *Brewer v. Larkin*, 13 Nfld. & P.E.I.R. 401 (P.E.I. Supreme Court, Appeal Division) *in banco*. MacDonald J., writing for the court, states there is no *Prescription Act* in force in Prince Edward Island and since the *Statute of Limitations* does not specifically provide for prescription, then the only manner in which a plaintiff can acquire a prescriptive title is based upon the doctrine of the lost modern grant.

then conveniently presume that there has been an express grant of the easement or right of way made at an earlier time.

That there was no actual grant document provided as proof before the Court, does not affect the outcome because the Court also makes the presumption the document or grant had been lost.

Unlike adverse possession, more commonly known as squatter's rights, a prescriptive easement involves the use of and not the possession of the property in question. Claimants must only establish its use and not possession. There are three ways to acquire a prescriptive easement; at common law, by statute, or through the doctrine of the lost modern grant. As both parties noted in their *facta*, in the case of *Brewer v. Larkin*, 1997 Carswell PEI 61, the Appeal Division held:

> As there is no *Prescription Act* in force in this Province and as our Statute of Limitations does not specifically provide for prescription, the only manner in which the plaintiff can acquire a prescriptive title is based upon the doctrine of the "lost modern grant" (MacDonald, JJ. at para. 10.)

There remains no statutory basis on Prince Edward Island which provides for prescriptive easements.[11]

Instead, the court found an easement to have been established by the "doctrine of the lost modern grant," and concluded,

> … based on the reasons set out above, I will allow the Application of the Applicants. While the entity known as the Harbour Authority of Savage Harbour has not been in existence for the requisite period of at least 20 years, the fishers and boat haulers it represents and DFO have established, on the balance of probabilities, through their factual matrix, their right to the relief requested.
>
> The four essential characteristics of an easement have been established in the evidence:
>
> 1) There is a dominant (DFO property) lot and a servient (Simpson property) lot;
>
> 2) The easement used by the fishers and boat haulers and DFO benefits the dominant lot;
>
> 3) The dominant and servient owners are different persons; and,
>
> 4) The right, the easement, is capable of forming the subject matter of a grant.
>
> An order shall issue declaring the parcel of land identified as Provincial Parcel Number 482976, the Servient Lot, is subject to an easement in favour of and providing access to and

[11] *Harbour Authority & ano. v. Simpson Aqua*, 2015 PESC 31 (CanLII), at paras. 48 to 55

> from the boat slipway located on the parcel of land identified as Provincial Parcel Number 656652, the Dominant Lot. The easement shall be granted to the Applicant Attorney General of Canada.
>
> As well, the evidence supports the finding the Applicant DFO, through their continuous management, supervision, maintenance and use of the Dominant Lot and the fishers and boat haulers who have crossed over the Servient Lot have enjoyed more than 20 years of uninterrupted use of the property commencing in 1981 when DFO purchased the dominant lot. The access was open, continuous, and uninterrupted.
>
> No exact measurement was described for the width of the easement, however, given the evidence provided by the boat hauler, Mr. Walsh, as to the width of the boat, truck and trailer, the easement shall be no more than 20 feet in width. The parties are ordered to cooperate to establish the easement over the property of Simpson, and if they are unable to agree on the boundaries of the easement, the parties may come back to the Court for direction. The legal description for the easement shall be included in the order which is submitted to the Court for signature.[12]

Simpson Aqua appealed.

In allowing the appeal, the court accepted arguments by Simpson Aqua that the fishers who used the DFO-owned slipway were not owners of the dominant tenement; their use of Simpson Aqua's property to access the slipway was not pursuant to any property interest held by them in the DFO property. Likewise, DFO did nothing to encourage the fishers to use the Simpson Aqua property:

> DFO did not use the Simpson property itself, and it did not direct, permit or participate in the fishers' use of the Simpson property. In my opinion, no easement was proven on the application. The character of the fishers' user of the servient tenement is not in contemplation of the [lawful] DFO user.[13]

This was further explained:

> The party seeking an easement by prescription over the land of another has the burden of proving the user asserted to make out its claim. There being no evidence of DFO direct user and no evidence of any DFO direction or permission for the fishers' user, the only remaining avenue to an easement in favour of Canada would be for the law to view the user of the Simpson property by the fishers as user by DFO.[14]

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[12] *Ibid.*, at paras. 78 to 82. Note the court-ordered requirement for the parties to agree on the location and boundaries of the easement. If you were the surveyor for the parties, how would you locate its boundaries?

[13] *Harbour Authority & Ano. v. Simpson Aqua*, 2016 PECA 20, at para. 9

[14] *Ibid.*, at para. 20

Of course there was no evidence of this. The court reasoned further and in reaching its conclusion that the doctrine of lost modern grant ought not to be expanded to allow for the creation of a public right of access to be attached to the DFO property, stated the following:

> On both the application and on the appeal, appellant's counsel submitted that the applicant Canada having provided no evidence of direct user it could not "*tag on*" to user by fishers who, in his words "*had no colour of right*" in the DFO property. Counsel differentiated DFO's right to manage and control its own property, which he properly noted is beyond question, from any DFO right to control or manage or travel over the servient lot, which as he accurately observed DFO neither had, nor sought to exercise. DFO gave no direction or permission to the fishers to use the Simpson property. As to the Harbour Authority, it only had that which it received from DFO, which did not include rights over the Simpson property.
>
> In my opinion, the application seeks to stretch the law of prescriptive easements beyond its proper interpretation, application, and intended purpose. It skips over the requirement for the user of the servient tenement to be by persons and of a nature that is ascribable to the owner of the dominant tenement. In my opinion, the user by persons other than the fee simple owner of the dominant tenement that is in contemplation of the law user by the owner is user by persons who have a legal interest in the dominant tenement, or by persons who claim a legal right and who exercise such user under the direction or with the permission or participation of the owner of the dominant tenement so as to assert a right of the owner. Here, no easement is present. First, DFO did not itself use the Simpson property, and it is not shown that DFO directed, permitted or otherwise participated in fishers' user. Second, DFO's purpose of maintaining the slip being to provide a service to fishers and the public without discrimination in prosecution of the fishery, the field of users "fishers" is amorphous. Fishers have no possessory interest in the dominant tenement; all fishers and all members of the public without discrimination could use the marine slip property.
>
> As well, there is no demonstrated connection between the fishers' user of the servient tenement and DFO the owner of the dominant tenement. DFO joined the proceeding to provide the facility of fee simple owner. During the prescriptive period, DFO did not assert any right as owner of the dominant tenement to use the servient tenement, either by itself or by the fishers. The evidence does not disclose that DFO even knew that fishers travelled over the servient tenement over the 20-year period in question. There is no demonstrated nexus or connection between the fishers' user of the Simpson property and any assertion of a right by or on behalf of the dominant tenement owner DFO.
>
> Fishers could not by themselves obtain any more than a personal license over Simpson property; a license does not run with the land; the fishers could not acquire a legal right for themselves. The fishers chose on their own to have their boat haulers cross the Simpson property for their own convenience. They did not assert the right of DFO the owner of the

> dominant tenement to use the way in question. As well, while the evidence of a boat hauler showed that such use was a great convenience and thereby valuable for the fishers' use and enjoyment of the dominant tenement, the applicants did not claim an easement of necessity. The evidence also permits an inference that boat haulers who enter the slip area from the provincial road, could leave the marine slip by that same route or through DFO's undeveloped legal right-of-way located at the east side of the Simpson property, in any event without crossing over the Simpson property.
>
> I understand DFO's aspiration and theory of case in supporting the Harbour Authority's application. DFO's purpose in owning and maintaining the slip is to provide marine slip service to commercial fishers and to the public in prosecution of the fishery. As DFO's invitees, fishers may be viewed as persons who had an implied license from DFO to use the dominant tenement. In their use thereof, and for its better enjoyment, they crossed over the servient tenement. DFO joined the application as fee simple owner to provide a competent grantee for the easement. DFO supports the fishers' effort to obtain the easement because it is "*supportive of decisions that ensure public access, and facilitate the operation, maintenance and management of a public commercial fishery at Savage Harbour*." Upon obtaining an easement, DFO would assign all benefits of the easement to the fishers. As noted, while early editions of *Gale on Easements* theorized that any user under a claim of right in respect of the servient tenement will be in contemplation of the law user by the possessor of the dominant tenement, the most recent edition of *Gale on Easements* downgrades that view to a footnote and states that the correctness of Mr. Gale's nineteenth century proposition must today be considered doubtful. I have already stated my reasons for preferring a qualified view of user based on established legal principles that fit together to form a coherent doctrine of lost modern grant that involves the owner of the dominant tenement. From a policy perspective, I do not see why the centuries old common law doctrine of lost modern grant should now be relaxed and expanded to more easily attach to private property a legal right of public access.[15]

One might well conclude that the court has left a conundrum for DFO: it owns property and seeks to facilitate public and commercial use of a slipway in order to facilitate the harvesting of fish, but there is no legal access over private property to reach the slipway. The result, in this decision, represents an application of legal principles to a factual matrix that did not produce a desired solution for DFO. Nonetheless, the court's decision is a timely reminder that simple use by just anyone is not sufficient to create an easement at common law; it must be a user by a person or persons who have an actual connection and property interest in the dominant tenement. We are left to wonder whether access to the slipway and the user over private property by members of the public could have been characterized as a "public right," thereby giving rise to a claim of common law dedication and acceptance. We may never know. What is

[15] *Ibid.*, at paras. 28 to 32

certain is that courts reject claims made by persons without a legal interest in, or connection with, the dominant tenement.[16]

Editor: Izaak de Rijcke

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

Although prescription may not be possible under the law of Prince Edward Island, the establishment of an easement under the doctrine of lost modern grant certainly does. However, the elements necessary for a claim to succeed (and thereby create the further challenge of establishing its location and boundaries on the ground) are rigorous and prevent such a claim to be established by just anyone.

In *Chapter 5 – Boundaries of Easements*, the topic of easements being established under the doctrine of lost modern grant is discussed. The decision in *Simpson Aqua* adds clarity to the subject matter discussed in the book at page 142 by confirming the nature of the law – and its rigorous requirements when a claim over private property is asserted. The book was released after the trial decision was released, but before its reversal on appeal. The trial decision is referred to in a footnote at page 145.

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.

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[16] In support of this proposition, the court cited *Rymer v. McIlroy*, [1897] 1 Ch. 528; *Pugh v. Savage*, [1970] 2 W.L.R. 634 (Eng.C.A.), per Lord Justice Cross; *Kilgour v. Gaddes*, [1904-7] All E.R. Rep 679; 394 *Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 6007 (CanLII), at 65; *Willman v. Ducks Unlimited (Canada)*, 2004 MBCA 153 (CanLII), at 38-40; *Thomas v. Cottam*, 2006 NSCA 134 (CanLII), at 28; *Kimbrell v. Goulden*, 2006 NSCA 102 (CanLII), at paras.37-40; and *MacDonald v. Malley*, 1998 CanLII 9797 (NB QB), 1998 CanLII 9797 (NBQB), at pp.9-10

[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.

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*[18] 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 conclude.

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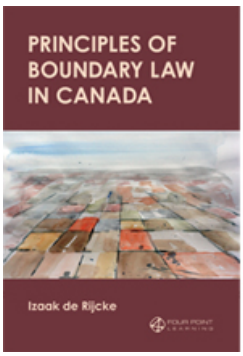
Principles of Boundary Law in Canada



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[18] The conference qualifies for 12 *Formal Activity* AOLS CPD hours.

[19] This course qualifies for 36 *Formal Activity* AOLS CPD hours.

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ISSN: 2291-1588