The Boundary Point
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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

Can an easement be relocated from its position where it was first established in a deed or grant? Generally speaking, this problem is a "non-starter" if the owners of the dominant and servient tenements do not both agree to the relocation. The reasons are obvious: when first created by express grant, owners of the affected properties are presumed to know where the easement will lie and what uses will be permitted. Subsequent alterations may arise out of negotiation and agreement – but if no agreement is reached, courts are reluctant to impose a change to private property affected by the easement.

Relocation of an Easement: Against all Odds

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

It is indeed rare to read about a court-ordered relocation of an easement over private property. Yet it has been encountered in a number of recent cases that deserve a mention in this discussion of an evolving area of property law. In the trial decision in *Remicorp Industries Inc. v. Metrolinx*,[1] an easement was ordered to be relocated from its position over one area of the servient lands to another area. The circumstances were somewhat unusual, but the decision did represent an example of the application of a principle recently adopted in an earlier appellate decision[2] in Ontario. The decision in *Remicorp* was recently overturned at the Ontario Court of Appeal which stressed a cautious approach to granting relocation orders.[3] This issue of *The Boundary Point* is of interest to owners of land that may benefit from, or be burdened by, an easement but the easement is in an inconvenient or unworkable position.

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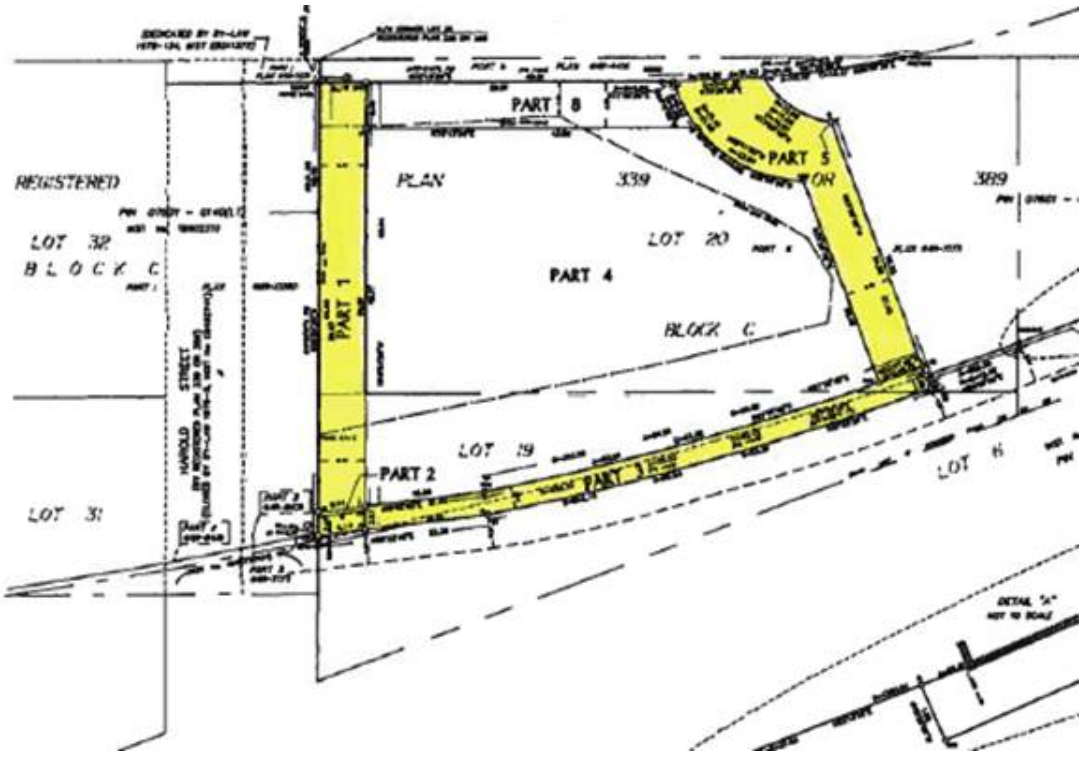
[1] *Remicorp Industries Inc. v Metrolinx*, 2016 ONSC 10 (CanLII), http://canlii.ca/t/gmx3s

[2] *Lywood et al. v. Hunt* (2009), 2009 CanLII 25312 (ON SC), 97 O.R. (3d) 520 (Ont. S.C.), affirmed 2011 ONCA 229 (CanLII))

[3] *Remicorp Industries Inc. v. Metrolinx*, 2017 ONCA 443 (CanLII), http://canlii.ca/t/h419w

The court described the configuration of the easements at issue and included a partial copy of the survey plan:[4]

> The Canadian National Railway Company ("CN") owned the Mimico railway station in the west of Toronto. The station property consisted of a small building surrounded by a parking lot and vegetation (the "Property"). The Property lies west of Royal York Road and borders on Judson Street to the north with railway lands and tracks to the south. On a survey dated November 26, 2002, the Property is divided into nine parts. The significant parts for the purposes of this appeal are Parts 1, 2, 3, and 5, highlighted below.
>
> The easement under dispute in these appeals is shown on Part 5. Part 5 is a curved, uphill, unpaved laneway running from Judson Street to the parking lot providing access to the station and to the uncontested easement. This laneway is described by the parties as the "Access Easement". It is approximately 6.1 to 11 metres wide and about 45 metres long.

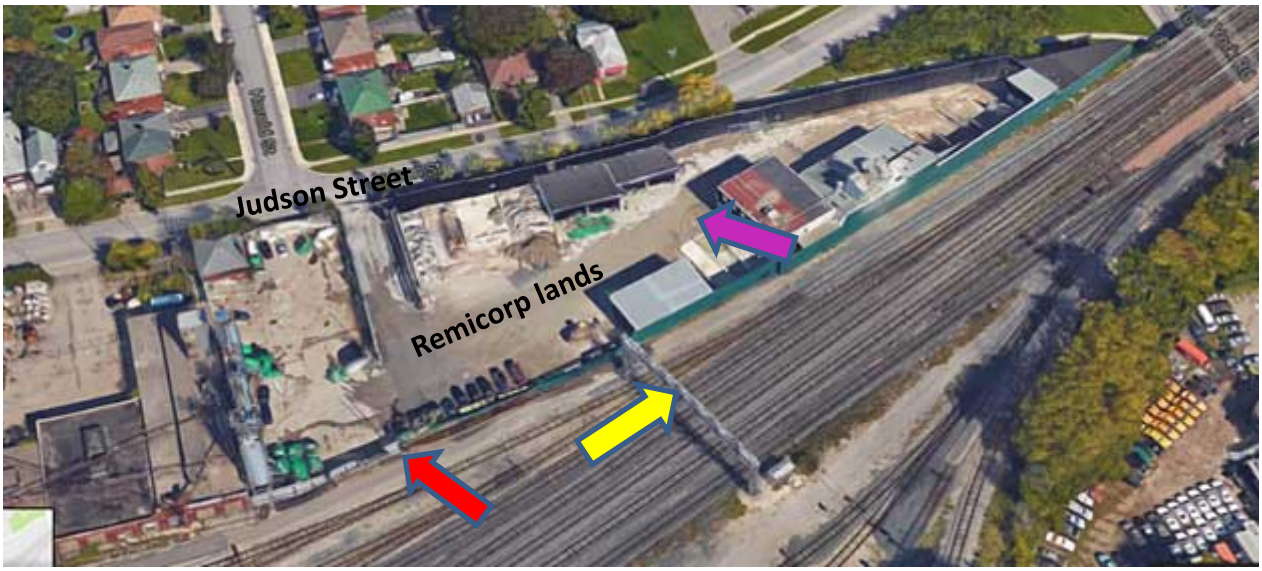


The relocation of the position of an easement on the ground is generally not effective at law unless there has been an express agreement supported by transfers. Absent same, a court order is necessary to confirm a relocation, based on findings that there has been either abandonment or release. In the trial decision in *Remicorp ,* the court had ordered the relocation of an access easement based on the principle in *Lywood v Hunt*:

[4] *Ibid.*, at paras. 5 and 6. From Reference Plan 66R-20057. All rights reserved.

> Metrolinx disputes the submission by Remicorp that it has "abandoned" its original Access Easement. For Remicorp to be successful under the law, it must show express release, implied release or operation of law (*Lywood et al. v. Hunt* (2009), 2009 CanLII 25312 (ON SC), 97 O.R. (3d) 520 (Ont. S.C.), affirmed 2011 ONCA 229 (CanLII)). It was not disputed there has been no express release.[5]

In *Remicorp v Metrolinx*, there were two separate easements. One, called an "access easement," allowed for access to the railway land across the land owned by Remicorp from Judson Street. The second, called a "maintenance easement" was about 10 feet wide and ran parallel to the railway over Remicorp lands. A mitigating factor was the construction of a signal bridge by Metrolinx' predecessor in title, partly on to the maintenance easement. The relative location of these features can be seen in Figure 1 below:



View of Remicorp lands north of railway[6] *showing signal bridge, access easement and maintenance easement*

An earlier aerial photograph, taken before the signal bridge was installed, shows the pallet of materials placed by Metrolinx on the maintenance easement and that was referred to in the decision.[7]

[5] *Remicorp Industries Inc. v Metrolinx*, 2016 ONSC 10 (CanLII) at para. 14

[6] GoogleMaps 3D © Google Inc. 2017. All rights reserved.

[7] See *Remicorp Industries Inc. v Metrolinx*, 2016 ONSC 10 (CanLII) at para. 15(e)

Figure 2: View of Remicorp lands north of railway[8] *showing Metrolinx pallets and rails on the immediate south side of the gate at the western edge of the Maintenance Easement that would also block access.*

The court noted that the trial decision in *Lywood* had observed that easements generally are perpetual, have actual or potentially valuable rights, and ought not to be lightly interfered with, particularly for no consideration. The evidence of pallets and rails blocking use of the access easement undermined the importance and need for any easement by Metrolinx.

Neither party in *Remicorp* was suggesting or proposing that the easement and the rights conferred on it be taken away. Remicorp only sought to move it about 40 metres to the west and become a straight, paved lane, somewhat longer than the curved path currently on title and thereby reflect the current configuration of the property's use.

The applications judge found that the court had jurisdiction to make the order to relocate the access easement, stating,

> …subsection 61(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, the Access Easement is moved to the alternate Access Easement (Part 1 of the plan of survey). Similarly, if there is a distinction, subsection 119(5) of the *Land Titles Act*, R.S.O. 1990, c L.5, applies. I conclude the modification is beneficial to the parties interested and the existing easement is to be discharged while the alternate Access Easement registered on title.

[8] Bing Maps ©2017 Microsoft Inc. All rights reserved.

However, this conclusion was not reached before the court had also considered the installation of the signal bridge as partly encroaching onto the maintenance easement over Remicorp lands as well as the application of *Weideleich v De Koning* to these facts:

> In all of the circumstances, if necessary, I would conclude there is sufficient evidence of an implied release. However, I also conclude the operation of law is the basis upon which Remicorp should succeed. As indicated, counsel for Metrolinx made submissions that the use of the word "exclusive" in the description of the easement being "exclusive, free, uninterrupted and unobstructed" meant its right was primary and absolute even, superior to the entity owning the land. I disagree. Relying on the decision of *Weidelich v. De Koning*, [2014] ONCA 736, Justice Doherty describes easements in the context of actionable encroachment stating (at paragraph 12) the holder of the easement "does not own the right of way but only enjoys the reasonable use of that property for its granted purpose". In my view, the purpose was to pass over for access to the tracks when or if required, not to place or build anything permanent on that land. This description reinforces my conclusion. Metrolinx is entitled to its easement but the facts and circumstances of this case require the easement to be moved to the alternate Access Easement.[9]

Metrolinx appealed on the basis that the applications judge had erred in concluding that the easement had been abandoned and, in particular in ordering that the easement be relocated. The Ontario Court of Appeal turned to principles from historic case law in assessing the limits of the court's discretion to order the remedy of relocation, particularly the requirement that the relocation benefit the parties involved:

> In any event, the applications judge did not apply the correct legal principles in concluding that the Access Easement should be relocated.
>
> Subsection 61(1) of the CLPA does not indicate how a court's discretion is to be exercised. Subsection 119(5) of the LTA requires proof that the modification will be "beneficial to the persons principally interested in the enforcement of the condition or covenant".
>
> In *Re George* (1926), 59 O.L.R. 574 (C.A.), this court considered whether a modification would be "beneficial to the persons principally concerned", a phrase previously contained in the CLPA and which is nearly identical to that found in the LTA. Middleton J.A. stated, at pp. 577-578:
>
> > The provisions of the statute (12 & 13 Geo. V. ch. 53) are not easy to interpret. A Judge is empowered to modify or discharge building restrictions 'on proof to his satisfaction that the modification will be beneficial to the persons principally concerned.' If this means beneficial

[9] *Remicorp Industries Inc. v Metrolinx*, 2016 ONSC 10 (CanLII) para. 21

> to the applicant the provision is senseless, for the relief would not be sought unless the applicant deemed it a benefit. If it means beneficial to the respondents it is again meaningless, for the respondents would undoubtedly release any right they may have if for their benefit. The meaning that has been given to the expression in practice is that the Judge must satisfy himself that the balance of convenience is in favour of granting the application, having regard to the rights and interests of both parties, and I think it may safely be said that the order should not be made unless the benefit to the applicant greatly exceeds any possible detriment to the respondents: *Re Button* (1925), 57 O.L.R. 161.

In *Re Ontario Lime Co. Ltd.* (1926), 59 O.L.R. 646 (C.A.), in discussing the CLPA, this court stated, at p. 651:

> It has been more than once pointed out that under this statute there is no power to make compensation to a landowner who is prejudicially affected, and the jurisdiction is one to be exercised with the greatest caution, and an order should seldom, if ever be made which will in truth operate to the prejudice of the adjacent landowner who has any real rights. The true function of the statute is to enable the Court to get rid of a condition or restriction which is spent and so unsuitable as to be of no value and under circumstances when its assertion would be clearly vexatious.

The applications judge did not apply these principles. Moreover, he ignored the warning given by this court in *Ontario Lime* that the jurisdiction be exercised with caution and that an order be seldom granted if prejudicial to the adjacent landowner. It is also difficult to see how the applications judge could conclude that the modification was beneficial to the interested parties. The relocation deprived Metrolinx of its rights under the Easement Agreement and results in significant traffic flow at the site of the alternative easement on Part 1. With the exception of making certain adjustments such as the removal of structures erected without building permits, the benefits to Remicorp of relocating the Access Easement are not obvious. Indeed, they do not appear to have been considered or identified by the applications judge.[10]

Easements, especially the rights of dominant and servient owners, and the circumstances under which the boundaries and spatial extent of these rights may be altered remain complex areas of law. An order to relocate the position of an easement is but one form of a broader area of law: rectification. In turn, a court's jurisdiction to order a rectification of title can usually be found in the land registration statutes across Canada. However, sight should not be lost of a court's inherent jurisdiction to exercise equity.

[10] *Remicorp Industries Inc. v. Metrolinx*, 2017 ONCA 443, at paras 87-91

Accordingly, the decision in *Metrolinx* should not be seen as only isolated to the facts of the case or even limited to Ontario. Some basis for the decision in *Metrolinx* was found in the earlier decision in *Lywood v Hunt*. That decision refused both an application and counter-application for orders to expunge and create easements respectively. The words of Justice Lauwers in the *Lywood* trial decision deserve repeating:

> I am reluctant to leave matters as they are by simply dismissing the application and the cross-application since I have also found that there has been an undue expansion of the rights-of-way.
>
> I have found that the right-of-way to cross Lot 9 to access the lake has been unduly expanded to include the whole of the lot. There remains an issue as to which "description" of this right prevails – the right-of-way over the whole of Lot 9 (as described in the Hunt transfer), or the right-of-way over the defined path on the east side of Lot 9 (as described in the Littner and Albert transfers). According to Mrs. Lywood, there is no longer a defined path, and this fact does not appear to be in dispute. The continued uncertainty regarding the scope and location of the access right-of-way must be resolved.
>
> I have also found that the right-of-way to pump water from the lake to Lot 21 has been unduly expanded by the use of the pipe to pump water from Lot 21 to the lake. That use must end. In addition the associated wording regarding the use of the pump in the boathouse no longer reflects reality. Furthermore, use of the boathouse for purposes other than pumping water to Lot 21 is an undue expansion of the original right granted.
>
> The parties have added the typical clause requesting "further and other relief". Section 96(3) of the *Courts of Justice Act* gives Superior Court judges the power to rectify as an equitable remedy. This exercise of this power was discussed with counsel and they acknowledged my authority to fashion a remedy.
>
> In *Tobias v. Nolan*, [1987] N.S.J. No. 145, 4 A.C.W.S. (3d) 150 (C.A.), the appellants were seeking rectification of a deed to include the legal descriptions of certain lots. The court stated, at p. 287 A.C.W.S.: "As Mr. Justice MacIntosh pointed out, the remedy of rectification is an equitable remedy by which the courts will modify the terms of a written instrument so as to give effect to the real intention of the parties."
>
> This is a case well suited for some form of rectification. In *Rizzi v. Nikmo*, [1995] B.C.J. No. 1588 (S.C.), at paras. 26-28, the court decided that given the state of the relationship between the parties, it was best to rectify the right-of-way for further clarity. In *Keetch v. Jengle*, [1969] O.J. No. 150 (C.A.), the original deed seemed to grant Keetch a right-of-way over all of Part 12 of the Jengle property (similarly to the case at bar). The owners could not agree on the extent of the right-of-way. The court chose to limit the extent of the right-of-way with very detailed language, adding the following description: "commencing with a fifteen foot [page537] width, more or less, at the westerly boundary of said Part

> Twelve with Part Nine as designated on said plan of survey and extending eastward progressively to a width of twenty feet, more or less, at the easterly limit of said Part Twelve where it bounds said Part Thirteen".
>
> A similar approach should be taken here. In the circumstances, I am prepared to rectify the references to the rights-of-way in the Hunt deed. I believe that the parties are in the best position to determine how this should be done. With respect to the lake access right-of-way, there needs to be a metes and bounds description or a registered reference plan that will comply with the *Registry Act*, but the parties are in the best position to determine the precise location.[11]

Of course the business of rewriting the terms of an easement or right of way can be a slippery slope. The basis for the exercise of a court's equitable jurisdiction is to only rectify an easement if necessary to give effect to the intention of the parties. Accordingly, one basis for appeal in *Lywood v Hunt* was to seek clarification that an easement for a water pipe on one side of the cottage be aligned with a right of way to reach a pump in a boathouse located on the other side of the cottage. The court rejected this request on appeal, stating:

> The appellants' second submission is that if the right-of-way does create both a right of access for recreational purposes and the right to use the pump – with the ancillary right to have a pipeline – the two rights-of-way should be combined so that both are enjoyed over the same side of the property.
>
> The difficulty with this submission is that it flies in the face of the language of the instrument creating the rights-of-way. The right of access for recreational purposes is explicitly along the east side of the appellants' property. The only boathouse is located on the west side of the property and there is evidence that the boathouse has been on the west side since the 1940s. The installed water pipes are on the west side of the property. There is no evidence capable of supporting a finding that there was ever a boathouse on the east side of the property. While we can understand the appellants' desire to have the two rights-of-way along the same side of their property, in our view, we would have to rewrite the instrument granting the rights-of-way to achieve that result and we have no power to do so.[12]

The ultimate decision to not allow for a relocation of the easement turned on an interpretation of how a court's discretion ought to be exercised in an application under section 119(5) of the Land Titles Act. The Court of Appeal continued,

> Subsection 119(5) of the LTA states:

[11] *Lywood v Hunt* (2009), 2009 CanLII 25312 (ON SC), 97 O.R. (3d) 520 (Ont. S.C.), at paras. 53 to 59

[12] *Lywood v. Hunt*, 2011 ONCA 229, at paras. 7 and 8

> The first owner and every transferee and every other person deriving title from the first owner, shall be deemed to be affected with notice of such condition or covenant, but any such condition or covenant may be modified or discharged by order of the court on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant.

According to the applications judge, the Access Easement had been abandoned. He therefore erred in finding that there was a covenant over which the court could exercise its jurisdiction.

In any event, the applications judge did not apply the correct legal principles in concluding that the Access Easement should be relocated.[13]

Needless to say, the appellate decision confirms that a court's jurisdiction is to be exercised with caution and that an order will be seldom granted if prejudicial to the adjacent landowner. On the facts of this case, the benefit to Remicorp was difficult to discern, while the detriment to Metrolinx was clear. The persistence of easement rights, once created by express grant, is a reminder that easements are potent elements of property law – not to be cancelled easily when the affected parties do not agree.

Editor: Izaak de Rijcke

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

Chapter 5: Boundaries of Easements, in *Principles of Boundary Law in Canada* is the longest chapter in the book. As the decision in *Remicorp Industries Inc. v. Metrolinx* underscores, this is a complex topic and one in which the application of principles by a court may see a reversal on appeal. The outcome in *Remicorp* is especially relevant to the subsection, *Emerging Issues* at page 156 and the impact of earlier cases such as *MacIsaac v. Salo* and *Weidelich v. De Koning*.

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

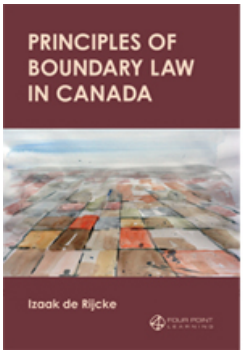
[13] At paras 85 to 87

hours.[14] 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

This year's conference theme: *Waterfront Properties in Ontario: Best Practices for Reducing Ownership Conflict*, responds to the confusion created by a series of seemingly inconsistent decisions concerning waterfront properties over the last decade. Presenters – lawyers, surveyors and government representatives – will explore a common set of recent court cases and provide insight and analysis focused on problem-solving waterfront ownership and boundary issues from their unique professional perspectives. The day will end with a multidisciplinary panel discussion that aims to establish broad consensus on emerging best practices to reduce conflicts among stakeholders, mitigate the risk for professionals, and minimize uncertainty for members of the public in this consistently complex area of boundary law. A draft agenda for this one day event (November 13, 2017) is in preparation and *early bird* registration is now open.[15]

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.

[14] 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.

[15] This conference qualifies for 12 *Formal Activity* AOLS CPD hours.

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** pay online

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