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.

Just as there are overlapping interests in land – mortgages, easements, and other encumbrances – that interplay with a title holder's rights, so too there are overlapping legal mechanisms that impact how parties may interact with one another. The common law reflects legal norms that govern the relationship between parties, while legislation imposed by governments codifies legal norms and sets a standard for interactions based on public policy. Both common law and legislation apply broadly and publicly, but within a particular jurisdiction. Contracts are agreements between individual parties that govern specific transactions (such as a sale of a property) or ongoing relationships (a lease arrangement). Contracts operate within a broader legal framework of the common law and legislation and can – in certain instances – allow parties to contract "out of" the common law rules and legislative scheme.

In a decision released last month, *Union Gas Limited v. Norwich (Township),*[1] the Ontario Court of Appeal dealt with the question of how provisions of an agreement between a utility provider and a municipality interplay with an existing statutory scheme. The specific dispute concerned who bears the cost of a gas pipeline's relocation. That the land on which such a relocation was to take place was privately owned and the land owner was not a party to the litigation highlights the fact that a given parcel of land will involve a range of layered interests held by different parties. We also consider the decision of interest to land surveyors in Ontario because of their status under the *Drainage Act*.

Contracts, Legislation and Overlapping Interests in Land

Key Words: *contract, easement, utilities, drainage*

The dispute at the heart of the decision of the Ontario Court of Appeal in *Union Gas Limited v. Norwich (Township)* concerned a cost-sharing agreement for the relocation of a gas pipeline between a utility and a rural municipality. The relocation that prompted the dispute occurred

[1] *Union Gas Limited v. Norwich (Township)*, 2018 ONCA 11 (CanLII), http://canlii.ca/t/hpmsk

following certain drainage works occurring on private land under the *Drainage Act*, R.S.O. 1990, c. D.17 (the "*Act*"). The *Act* sets out a cost sharing scheme for parties where a utility relocation is undertaken. The franchise agreement existing between Union Gas and the Township set out a different scheme for cost sharing under similar circumstances. In setting the stage for examining the interplay of these two schemes, the court set out the fact scenario as follows:

> Under s. 4 of the Act a landowner may petition a municipality to undertake drainage works. Where the municipality's council decides to proceed with the construction of drainage works, it appoints an engineer under s. 8 to plan the works, including to assess their cost. The engineer is required to submit a report to the municipality. If the council proceeds based on the report, it passes a by-law adopting the report and authorizing the drainage works.
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> The engineer's report is required to assess landowners and utilities for benefit, outlet liability, injury liability and special benefits (ss. 21 to 24). Section 26 allows all of the increase in the cost of drainage works due to the presence of public utilities to be assessed by the engineer against those utilities. The section provides as follows:
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> > In addition to all other sums lawfully assessed against the property of a public utility or road authority under this Act, and despite the fact that the public utility or road authority is not otherwise assessable under this Act, the public utility or road authority shall be assessed for and shall pay all the increase of cost of such drainage works caused by the existence of the works of the public utility or road authority.
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> Section 48(1) provides for a right of appeal by a landowner or public utility from an engineer's report, to the Agriculture, Food and Rural Affairs Appeal Tribunal.
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> In April 2012, a landowner petitioned Norwich regarding two improvements to the Otter Creek Municipal Drain. Norwich's council appointed an engineer. The engineer prepared one report for both projects, and assessed Union $1,180 under s. 26 of the Act for costs relating to boring steel pipes across the gas main. This assessment was not disputed.
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> The report also identified a conflict between a Union gas pipeline and the proposed drainage work that would require the gas pipeline to be moved. The report stated that if any utilities required relocation "the extra costs incurred shall be borne by the utility involved in accordance with the provisions of section 26 of the [Act]." In February 2014, the Norwich council adopted a by-law approving the engineer's report.
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> Union did not appeal the engineer's report. Instead, with respect to the gas pipeline that required relocation, it issued an invoice to Norwich seeking a 35% contribution, relying on a cost-sharing mechanism in the Franchise Agreement.
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> The Franchise Agreement is based on a model franchise agreement, whose terms were approved by the OEB in accordance with the *Municipal Franchise Act*, R.S.O. 1990, c. M.55. The Franchise Agreement allows Union to operate its gas infrastructure within Norwich's territorial boundaries.
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> Section 12 of the Franchise Agreement permits Norwich to request Union to relocate any part of the gas system where such relocation is necessary to alter or improve any highway or municipal work, and provides for cost-sharing. The applicable paragraphs are as follows:

> (a) If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, [Norwich] deems that it is necessary to take up, remove or change the location of any part of the gas system, [Union] shall, upon notice to do so, remove and/or relocate within a reasonable period of time such part of the gas system to a location approved by the Engineer/Road Superintendent…
>
> (d) The total relocation costs as calculated above [described in detail in paragraph (c)] shall be paid 35% by [Norwich] and 65% by [Union] except [an exception follows that does not apply here.]

Section 13 of the Franchise Agreement provides:

> The Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, except by-laws which have the effect of amending this Agreement.

Norwich did not pay Union's invoice. The work proceeded, and Union brought an application to the Superior Court to determine the rights of the parties.[2]

The application judge approached the issue as a question of whether the relocation costs fell within the scope of the *Act* or the franchise agreement, characterizing the *Act* as a comprehensive code relating to drainage works and concluding that the costs question was covered by s 26 of the *Act* and ordered that Union Gas pay the full cost of the relocation. The decision of the applications judge was summarized by the Court of Appeal as follows:

> The application judge concluded that the Franchise Agreement did not "oust or override" the provisions of the Act. He referred to *Seidel v. Telus Communications Inc.*, 2011 SCC 15 (CanLII), [2011] 1 S.C.R. 531, at para. 91, citing *Brand v. National Life Assurance Co. of Canada* (1918), 1918 CanLII 540 (MB QB), 44 D.L.R. 412 (Man. K.B.), at para.15, as authority that "no mere contract *inter partes* can take away that which the law has conferred."
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> The application judge stated that the cost-sharing provisions of the Franchise Agreement did not apply to all costs associated with drains. "Municipal works" is not defined in the Franchise Agreement. Moreover, the Gas Franchise Handbook, to which the Franchise Agreement refers, states that the cost-sharing mechanism will apply "in most circumstances", suggesting it will not always apply. He noted that the Franchise Agreement provides that it is subject to "the provisions of all regulating statutes", which includes the Act.[3]

The Township appealed and was successful. In finding that the judge had erred in both analysis and result, the Court of Appeal first addressed the application judge's conclusion that the *Act* overrides the Franchise agreement provisions. In doing so the Court noted that there was an incorrect interpretation of *Seidel*:

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[2] *Ibid.*, at paras 7-16

[3] *Ibid.*, at paras 19-20

> The foundation of this conclusion is the application judge's interpretation of *Seidel* as standing for a general principle that "no mere contract *inter partes* can take away that which the law has conferred". There is no such general principle, and the application judge was not correct in his interpretation of what was said, or quoted from, in *Seidel.*
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> In*Seidel* the court considered whether a provision in a cell phone service agreement requiring arbitration of claims was enforceable when B.C. consumer protection legislation expressly prohibited contracting out of its terms. In the course of the minority judgment, and before turning to the modern approach to arbitration, LeBel and Deschamps JJ. described the courts' traditional hostility towards arbitration, as contrary to public policy, because it was seen to challenge the jurisdiction of the courts. It was in this context that they quoted a passage from the 1918 decision in *Brand* which stated in part:
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> > The true ground for holding that the jurisdiction of the courts cannot be ousted by an agreement between parties is that the courts derive their jurisdiction either from the statute or common law, and no mere contract *inter partes* can take away that which the law has conferred.
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> The traditional view that parties could not, by contracting for arbitration, "oust" the jurisdiction of the courts, has been overtaken by modern authorities, including *Seidel* itself, recognizing that arbitration clauses will be enforced absent legislative language to the contrary (at para. 42).
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> The application judge took a part of the quotation noted above out of context as authority that parties cannot contract out of statutory provisions. As discussed below, the law is to the contrary.[4]

Statutes providing baseline rights that would, under certain circumstances, allow parties to contract out of such rights would be contrary to public policy. But courts are to be extremely cautious about interfering with the rights of parties to enter into contract on public policy grounds.

A somewhat similar problem had been considered in respect of a high pressure gas pipeline in the recent decision in British Columbia in *FortisBC Energy Inc. v. Surrey (City)*.[5] There, the court considered the competing contractual rights under a Trunk Line Agreement with the statutory rights under the *Pipeline Act* and Regulations. Ultimately, the court ruled that the legislation did not change or supersede the contractual rights and obligations - although *FortisBC* was not cited in *Union Gas Limited v. Norwich.*

In approaching the particular question at hand relating to contracting out of the provisions of the *Drainage Act*, the Court of Appeal in *Union Gas Limited v. Norwich* noted:

> […] whether the Act prohibits contracting out of s. 26, can be addressed in short course. The application judge characterized the Act as a "complete and comprehensive code with regard to who does what and who pays for what", in support of his conclusion that the

[4] *Ibid.,* at paras 23-26

[5] *FortisBC Energy Inc. v. Surrey (City)*, 2013 BCSC 2382 (CanLII), http://canlii.ca/t/g2gq0

> provisions of the Act override the parties' agreement. The issue here however is whether the Act expressly, or by necessary implication, would prohibit a utility and a municipality from arriving at their own agreement respecting the sharing of costs, where the construction of the drainage works requires the relocation of a pipeline. I see nothing in the legislative scheme that would preclude such a cost-sharing agreement in circumstances where the utility is required by the municipality to alter its pipeline to accommodate drainage works. Enforcement of the parties' contractual cost-sharing agreement would not undermine the detailed procedures set out in the Act, for the proposal, planning and approval of drainage works, and the sharing of the municipality's own costs. Indeed, as the application judge noted, referring to a 1986 OEB report, the cost-sharing mechanism in s. 12 was developed by the OEB as a disincentive to municipalities to require gas pipeline relocation.
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> And there is nothing in the legislative scheme to suggest that the ability to contract for the allocation of relocation costs between a municipality and a utility is contrary to public policy. In approving this specific Franchise Agreement, the OEB explicitly found that the agreement was "in the public interest" in a Decision and Order dated September 16, 2004. The Act is not a public policy statute, a point that was acknowledged in argument by the respondent.[6]

The next step in the analysis focused on whether the Franchise Agreement applied to the current dispute. While the language of the cost sharing provisions spoke to situations where relocation was required to accommodate "municipal works," it did not speak specifically to drainage works; however the Court of Appeal held drainage works undertaken by the municipality – in this case as a result of a petition by a property owner – did fit within the term "municipal works."

> […] Municipal drainage works are approved, constructed, repaired and maintained by a municipality (see ss. 4, 5, 8, 58 and 74 of the Act). Section 5(g) of the Franchise Agreement specifically refers to gas systems affecting a "municipal drain", and accordingly contemplates that drainage works are part of the municipal works covered by the agreement. There is nothing in the Franchise Agreement that would exclude drainage works from "municipal works", or that would remove from its cost-sharing provisions the drainage works undertaken by Norwich in this case.
>
> The Franchise Agreement describes the cost-sharing mechanism in clear language and it unambiguously applies when a municipality requests relocation of a gas system to accommodate *any* municipal works. Section 13 does not assist Norwich in its argument that the Act, and not the Franchise Agreement, would apply to this dispute. That section provides that the Franchise Agreement is subject to the provisions of all "regulating statutes" and municipal by-laws of "general application," but specifically excludes "by-laws which have the effect of amending [the] Agreement." The appellant says, without relying on any authority, that the Act is a regulating statute to which the Franchise Agreement is subject, and therefore overrides the provisions of the agreement. I disagree. I would interpret "regulating statute" in the context of this agreement, as referring to health and safety, environmental and other like statutes that would regulate the construction of and

[6] *Union Gas Limited v. Norwich,* at paras 30-31

> work on a gas system by the utility within the regional municipality. Section 13 does not exempt the parties from the cost-allocation provisions to which they have agreed. As for by-laws, the intention is clear (and the respondent acknowledges) that any by-law (including the one passed in this case approving the engineer's report), would be unenforceable if it sought to impose an assessment of costs other than that to which the parties agreed. As such, the Franchise Agreement would override Norwich's by-law approving the engineer's report to the extent it purported to assess Union for the entire cost of relocating its pipeline.[7]

In the end the Court of Appeal held that the cost sharing mechanism of the Franchise Agreement ***prevailed over any assessment made under the* Act *and the utility was required to pay a portion of the relocation costs***. The decision not only addresses the interplay between statute and contract, but for those with a specific interest in land law it serves as a reminder of the interplay of different interests and uses in the land held by different parties for different purposes: the owner seeking to improve the state of the land (likely for agricultural purposes), the township taking on the drainage project to ensure it is done in a way that does not interfere with neighbouring properties, and the utility maintaining an interest in the placement of a pipeline but accommodating surrounding public works projects while maintaining safety. The overlapping of interests resulting from the intersection of utility corridors, easements and statutory rights is a topic of continuing evolution and deserves careful treatment.

Guest Editor: Megan Mills

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

Overlapping interests in land are addressed in *Chapter 1: Boundaries in History and Law*, easements are specifically are dealt with in *Chapter 5: Boundaries of Easements.* For further discussion on the interplay of common law and statutes, see *Appendix I: The Canadian Context of Common Law for Land Surveyors.*

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

[7] Ibid. at paras. 33-34

hours.[8] 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 — New Date and Venue

We now have a date and location for the postponed conference: April 23, 2018 at the Hilton Mississauga/Meadowvale. As many will appreciate, this topic is a daunting challenge to configure and organize in a manner that will ultimately benefit professionals, property owners and the public. The adjournment has permitted time to re-focus the theme to "*Waterfront Properties in Ontario: Best Practices to Resolving Title and Boundary Issues*". The revised agenda will be revealed soon, but for now, please mark your calendar: APRIL 23, 2018. Thank you for your patience.

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[8] 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.