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.

Efforts to ensure that a fence is located on the property line – or even on one's own property – have been generally applauded as good practice and is in the interest of keeping good neighbourly relations. In point of fact, such precautions may be too simplistic if the placement of the fence might impact the enjoyment and use of other amenities that are necessary for the reasonable enjoyment of a neighbour's land.

This is especially true in urban settings where homes have been built to zero, or very small, side yard clearances. The practical and realistic method by which homeowners can access backyards can, for example, be restricted - or even made impossible – by the placement of a fence that serves as a barrier. Such was the case in *Carpenter v. Doull-MacDonald,*[1] an Ontario trial decision released late last year. We are given an insight to the dispute and will also read about the financial consequences of litigation between neighbours that became acrimonious – just because a fence was built entirely on one's own property.

When a Fence on One's Own Property Gets Challenged

Key Words: *fences, easement, prescription*

The proverb that "Good fences make good neighbours,"[2] may not always ring true. In *Carpenter v. Doull-MacDonald,* two neighbours found themselves in a dispute over a fence located entirely on the Respondent's property; the Applicant claimed that it encroached on a prescriptive easement that benefitted her property. Cases of this kind can be vexatious for neighbouring owners because**,** despite good intentions, taking precautions to ensure a fence is on one's own land, and using good quality fencing material, the relationship between neighbours can break down, as it did in this dispute.

[1] *Carpenter v. Doull-MacDonald,* 2017 ONSC 7560 (CanLII), http://canlii.ca/t/hpf59

[2] Frost, Robert, *North of Boston, First ed.,* London, David Nutt, 1914, containing the poem, "The Mending Wall."

The facts themselves were not complicated. In Figure 1 the relative position of the two properties at 11 and 15 Ferncroft Drive in Toronto is illustrated on an extract from the City of Toronto GIS map with an aerial photography overlay.

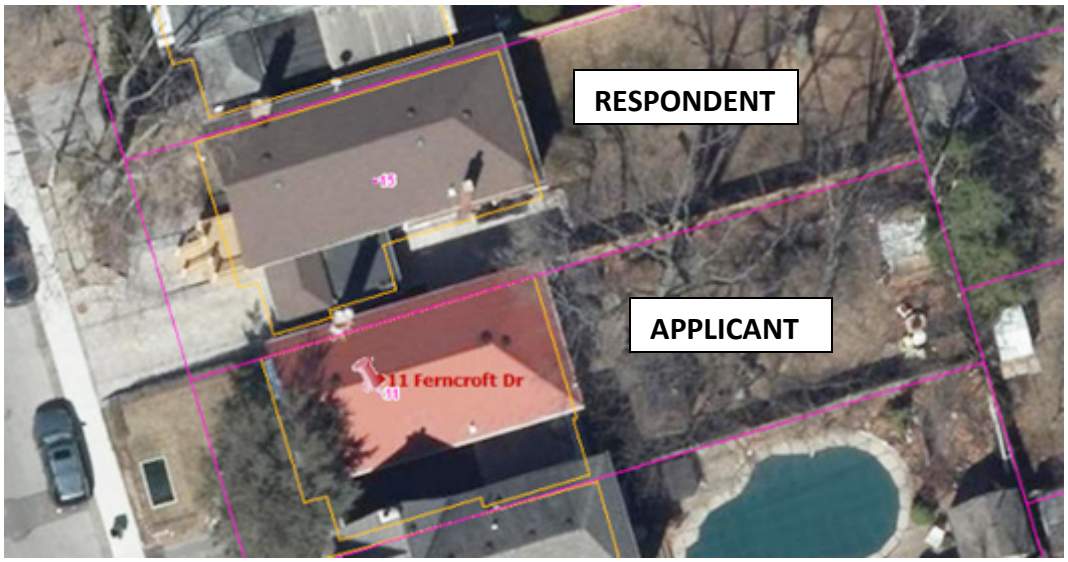


Figure 1: Properties at 11 and 15 Ferncroft Drive with homes in close proximity[3]

The court described the origin of both homes and the relationship of the structures on the lots that were built by a developer with no easement over neighbouring land to access the backyard of each respective property included in, or granted by, separate deed:

> The lots on the east side of Ferncroft Drive, including 11 and 15 Ferncroft Drive, were all developed by a builder in the 1940s. The lots and house are all about the same size, and they are all laid out in a similar fashion. On each property, on the south side of the house, there is a passageway that provides access to the backyard. The passageway adjoins a narrow strip of land that belongs to the adjoining property, but the small strip does not provide access to the backyard of the adjoining property.
>
> The registered deeds to the properties and the surveys of them do not refer to any easements. Each property in the row of properties gains access to its own backyard by a passageway on the south side of the house, which adjoins a small strip of the neighbour's land.
>
> Thus, between 11 and 15 Ferncroft Drive, there is a passageway to the backyard of 15 Ferncroft Drive. The passageway and the adjoining strip of land is 11.8 feet (3.16 metres) in width. The property line between the properties runs through the passageway and the adjoining lands dividing the distance between the houses such that there is 1.0 feet from the north wall of 11 Ferncroft Drive to the property line with 15 Ferncroft Drive.

[3] From: http://map.toronto.ca/maps/map.jsp?app=TorontoMaps_v2 All rights reserved.

> The similarly configured passageway to the backyard of 11 Ferncroft Drive is on the south side of the house between 9 and 11 Ferncroft Drive.[4]

The court decision also included a transcript of oral evidence from the previous owner of 15 Ferncroft Drive, who had installed a wood picket fence with a gate in the space between 11 and 15 Ferncroft Drive. It was removed in the late 2000s but there was nothing in writing and no formal agreement registered on title regarding use of the space between the 2 homes. The owner of 11 Ferncroft Drive would be able to pass through the gate between the two homes to clean out eaves troughs and clean windows when need. The image in Figure 2 shows the former fence between the two homes in 2009.

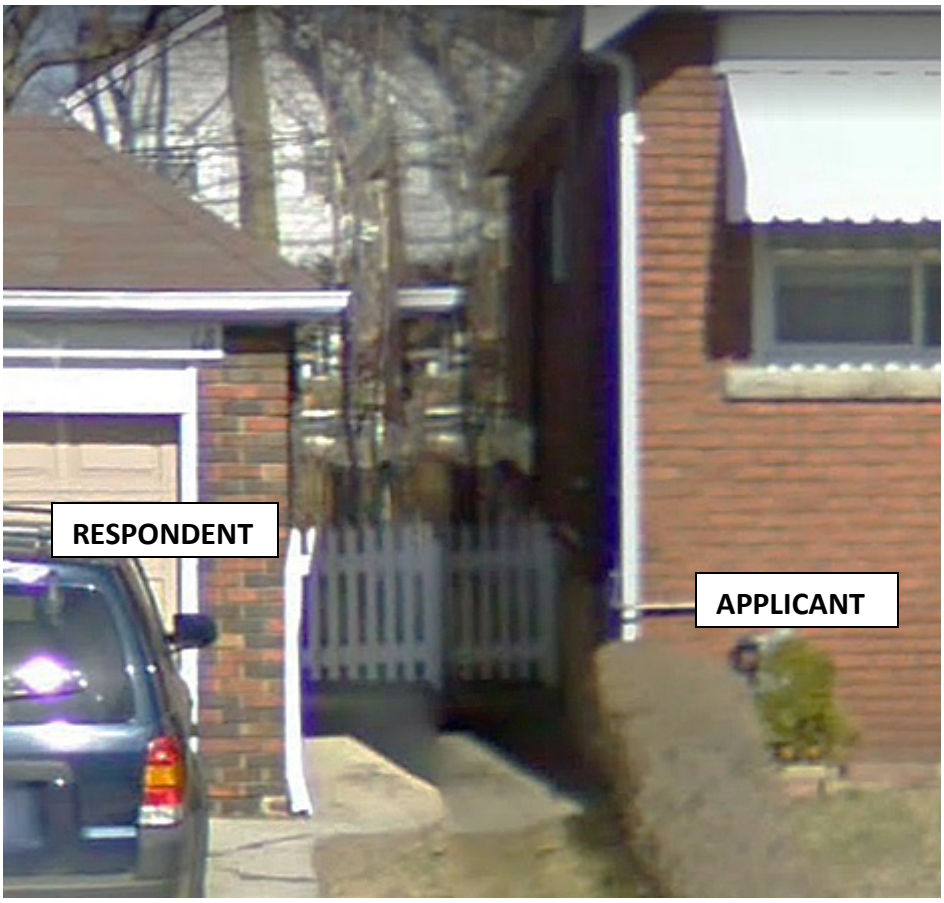


Figure 2: April, 2009 Streetview image from Google Streetview® All rights reserved.

Matters came to a head when the Respondent re-installed the gate between the two homes. Again, the court described its findings based on the evidence:

> In September 2015, Ms. Doull-MacDonald re-installed the gate that at one time had been affixed to the walls of both 11 Ferncroft Drive and 15 Ferncroft Drive and which had been

[4] *Carpenter v. Doull-MacDonald,* at paras. 6 to 9

> removed by Ms. Carpenter in 2015. Ms. Doull-MacDonald had obtained permission to re-install the fence from Ms. Carpenter's husband and son, but this permission apparently did not come to the attention of Ms. Carpenter, who stridently complained about what she regarded as a trespass to her property. Ms. Carpenter detached the fence post affixed to her home.
>
> For present purposes of a claim for a prescriptive easement nothing turns on the events associated with the removal of the gate. The events, however, explain why there is animosity and intransigence between the parties over and above the norms of litigants but consistent with the norms of neighbours who are not neighbourly.
>
> In May 2016, Ms. Doull-MacDonald wrote Ms. Carpenter to advise that she planned to build a wooden fence between the properties. Ms. Carpenter's lawyer responded that the Ms. Carpenter had the right to use the passageway, but he said that she would co-operate to ensure that any fence met both parties' needs.
>
> Ms. Doull-MacDonald, however, did not engage in further correspondence, and she had a wood fence constructed approximately 13 feet into the gap between the properties. The fence is inside Ms. Doull-MacDonald's property line. She retained a surveyor to stake the property before the construction of the fence, and the fence was constructed in accordance with relevant codes and by-laws. She located the fence 14 inches from 11 Ferncroft Drive. The by-laws require a distance of 12 inches.[5]

The Applicant, Ms. Carpenter at 11 Ferncroft Drive commenced a legal proceeding and sought an order from the court for:

a) a declaration that Ms. Carpenter holds a permanent easement over the passageway between 11 and 15 Ferncroft Drive;

b) an order rectifying the land registry to accurately reflect the easement;

c) an order requiring Ms. Doull-MacDonald to remove the fence currently encroaching on the easement; and

d) an order declaring that Ms. Doull-MacDonald and any successors in title, are not entitled to erect fencing on the passageway or otherwise restrict Ms. Carpenter's access.

The decision in *Carpenter v. Doull-MacDonald* includes an excellent summary of the Ontario law of easements claimed by prescription. It concludes with the observations that,

> The theory behind a claim for an easement based on prescription under a limitations statute or under the doctrine of lost grant is that the evidence establishes that the owner of the servient tenement has with knowledge consented or acquiesced to the establishment

[5] *Carpenter v. Doull-MacDonald,* at paras. 18 to 21

of an incorporeal ownership interest in land by the owner of the dominant tenement as opposed to licensing the use of the land without conferring an ownership interest in it.[29] Use by permission or licence is insufficient for establishing a prescriptive easement.[30] The theory was explained in *Sturges v. Bridgman* by Thesiger, LJ. as follows:

> Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses.

For the claim to an easement to succeed, the claimant's use must be "open," which means that the use is not secret or clandestine and an ordinary owner of the land, diligent in the protection of his or her interests, would have a reasonable opportunity of becoming aware of the use of the land. For the claim to an easement to succeed, there must be evidence that the owner of the servient tenement knew or ought to have known what was happening on his or her land. Where the use by the owner of the dominant tenement is notorious and the owner of the servient tenement makes no objection, then his or her acquiescence to the use as a right of the dominant tenement owner can more readily be inferred. If during the 20-year period, the dominant tenement owner acknowledges that his or her use is with permission then this prevents the acquisition of a prescriptive right.

If during the 20-year period of alleged adverse use, the owner of the servient tenement erects a fence or barrier and the owner of the servient tenement acquiesces for a year or more, any claim for a prescriptive right for that period is defeated.

The onus of proof of the requisite use is on the claimant, the owner of the dominant tenement. The evidence required to establish title by prescription will vary with the nature of the user. For a right-of-way, the requirement for its continuous, uninterrupted use will be satisfied if clear and unambiguous evidence shows that the use was of such a nature, and took place at such intervals, as to indicate to the ordinarily diligent owner of the servient tenement that a right is being claimed.

The threshold for meeting the criteria for establishing a prescriptive easement under the Limitations Act or by lost modern grant is high, and courts are hesitant to recognize an easement by prescription because doing so would permit a landowner's neighbourly accommodation of sufferance to ripen into a legal burden on his or her lands without compensations. Use permitted by neighbourliness and enjoyed on that basis is insufficient to establish an easement by prescription.[6]

[6] *Ibid.*, at paras. 47 to 51. [citations omitted]

Note the references to neighbourliness and accommodation: the application was dismissed and costs were awarded against the applicant in the sum of $40,000.00. Ultimately, the claim to an ownership interest in the nature of an easement failed and the fence was not ordered to be removed. However, what had existed as a friendly accommodation between the two predecessors in title (the court called it, "…just benefiting from the neighborliness between the families of two war vets.") was gone as between the present neighbours. Sadly, enforcement of property rights does not always allow for a process by which neighbourliness can be re-established.

Editor: Izaak de Rijcke

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

Prescriptive interests in land are addressed in *Chapter 5: Boundaries of Easements* and the treatment of such claims in a land titles environment is discussed extensively. We are excited to announce that ***Principles of Boundary Law in Canada*** in now in its second printing!

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.[7] 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 — Pre-conference Exercise

This year's conference theme: *Waterfront Properties in Ontario: Best Practices for Resolving Title & Boundary Issues*, responds to the uncertainties resulting from recent legal treatments of water boundaries in a manner that will ultimately benefit professionals, property owners and

[7] 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.

the public. The realization that a "more correct" approach is one that requires *multiple approaches* to be considered at the *same time* in response to *multiple issues* that may all be present at the *same time*, has informed the selection of topics. The day will conclude with a panel discussion that will revisit the pre-conference exercise[8] with the benefit of the various cutting-edge insights shared during the day. A background paper and a draft agenda for this 1-day event (April 23, 2018)[9] are now available.[10]

Introduction to Canadian Common Law — April to June 2018

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 16, 30, May 14, 28 and June 11, 2018. 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.[11]

Coming in June — Electronic Survey Plan Registration

This training course will be developed for surveyors interested in electronically submitting survey plans to ServiceOntario through Teraview® for deposit or registration.

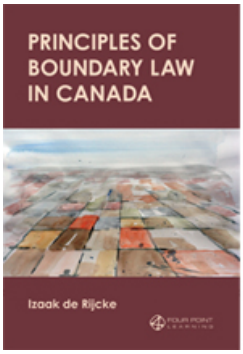
[8] This simple exercise in raising awareness of the multiple issues that can be present at the same time and in different configurations has been prepared as an introduction to some of the topics of this year's conference. Going through this pre-conference activity is an opportunity for surveyors and lawyers alike to explore solving a puzzle and to appreciate how even a relatively simple configuration could contain factors which do not at first materialize. **Please note that registrants will also have the opportunity to post responses, comments or questions to The Mic is Open forum on the conference site.**

[9] Online reservation at the Hilton Mississauga/Meadowvale is available at the special group rate.

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

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

Principles of Boundary Law in Canada



Boundaries are a feature that applies to every parcel of land in Canada. 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 would benefit from a current reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable. Furthermore, the education and training needs of new members to the cadastral surveying profession are served by this 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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