



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.

Beach access for back lot owners and the rights of waterfront owners to exclude neighbours and the general public from beach areas has been a contentious topic in Ontario in recent years. It touches on title and boundary issues related to waterfront properties and may involve rights that are tied to the land or find their basis in an agreement between owners – that is to say a contractual right of access. Lawyers and land surveyors alike should be aware that there is not a “one size fits all” rule regarding beach access when advising clients who are keen to purchase waterfront property and assume they will have a private beach or who are purchasing back lot properties and assume that they have a right of access to the water. Situations are highly fact dependant and nuanced and assumptions of access or even a long tradition of access may stem

from a contractual right rather than a granted, implied or prescriptive easement that runs with the land. The recently released decision of the Ontario Court of Appeal in *Law v. Cedar Ridge Waterfront Park Corporation*, 2018 ONCA 204 explores these themes and is discussed below.

This month’s issue centers on the theme of beach access. For a further discussion of beach access as well as other title and boundary issues for waterfront properties, [register](#) for the Fifth Annual Boundary Law Conference – *Waterfront Properties in Ontario: Best Practices for Resolving Title & Boundary Issues* happening on April 23, 2018.

Scott Fairley, counsel for the Appellant in *Law v. Cedar Ridge Waterfront Park Corporation* case discussed in this issue, will be among the presenters.

Access to the Waterfront: Contractual Rights May Not Benefit Future Owners

Key Words: *implied easement, beach access, contractual rights, waterfront*

Lakefront recreational properties in Ontario carry a premium for their highly coveted access to water for swimming and boating. Where a lakeside lot is subdivided into multiple cottage lots, it often makes sense to subdivide lands so that there is a strip of lakefront lots and a second tier of back lots separated by a road; such a configuration allows the subdivider to maximize the number of lots without creating awkwardly long and narrow lots that stretch from the waterfront to a main road. By creating a further access point to a shared beach, the subdivider can also increase the appeal to future back lot owners by granting access to the water, not merely a view thereof. But the mechanism by which such access is granted may vary and may or may not create an interest that runs with the back lot properties in perpetuity – buyers should beware!

The recently released decision in *Law v. Cedar Ridge Waterfront Park Corporation*,¹ involved parcels of land in a waterfront development known as Cedar Ridge in Simcoe County. The appellant (respondent in the original application) had acquired certain parcels of land in the development through power of sale. The Cedar Ridge development was initially comprised of waterfront and non-waterfront lots on a ridge (the "Ridge Lots"). The respondents collectively owned three Ridge Lots, but these lots did not have deeded water access. The development had originally contemplated common use facilities, including a waterfront park which would serve as a site for a beach club, tennis courts, golf course and yacht club. Access to these amenities would be granted to lot owners holding a membership and remaining in good standing within the non-share capital corporation – the Cedar Ridge Recreational Club ("CRRC") which was to become owner and operator of the lands upon which the common use facilities would be constructed.

The original developer fell into financial difficulties and the common use lands were mortgaged and certain parcels lost to power of sale proceedings. Several parcels, including those at issue in this proceeding, were purchased by the appellant, Cedar Ridge Waterfront Park Corporation while others remained in the ownership of the original developer.² The ridge lot owners (Applicants) sought a declaration that they had an implied easement over the lands owned by Cedar Ridge - such an easement had previously been granted over other parts that had remained in the ownership of the original developer. This claim raised many questions. What was the effect of club membership? Did this create an implied easement in favour of the ridge lot owners that ensured their interest was maintained when the ownership of the lakefront lots was transferred to a new party? Was this an easement that ran with the land or merely a contractual agreement with the previous owners?

¹ *Law v. Cedar Ridge Waterfront Park Corporation*, 2018 ONCA 204, <http://canlii.ca/t/hqpcb>

² Supplementary Factum of the Respondent (Appellant) in *Law v. Cedar Ridge Waterfront Park Corporation*, 2018 ONCA 204 Court File C64145, paras 1-5

The unreported endorsement of Justice Conway held in favour of the Applicants, finding that there had been a common intention to create an implied easement by which the property owners could access the water. This had been evidenced by the marketing materials and real estate listings for the development and the inclusion of membership in the Cedar Ridge Recreational Club (CRRC) as a requirement that had been included in the purchase price of the property.

The Applicants are owners of Ridge Lot Properties in the community. Those properties do not front onto the water, as do the waterfront lot properties. However, in the marketing materials and real estate listings, as well as in representations, to the OSC, Blairhampton made it abundantly clear that the owners of the Ridge Lots would have access to the waterfront on Georgian Bay. This was to happen through the vehicle of a non-profit Corporation, CRRC, to which these common lands would be transferred. The owners of the lots were required to become members of CRRC and this was included in their property purchase price. In other words, through this mechanism, the Ridge Lot owners were assured access to the water. These common lands were also supposed to be developed as a waterfront park.

This never came to be, due the actions of Mr. Blair. He mortgaged the common lands, defaulted on them, and eventually the Respondent acquired them from the mortgagee (Credit Union) under Power of Sale. In that way, Mr. Blair frustrated the very vehicle that he had put in place to secure access for the Ridge Lot Owners to the water.

The Applicants seek an implied easement on the basis of common intention. I am satisfied that there was a common intention of Mr. Blair and the purchasers of the Ridge Lots that they would, through their membership in CRRC, has access to the water. I am also satisfied that Mr. Innes, the principal of the Respondent and Mr. Blair's accountant, knew that the Ridge Lot owners were to have access to the water through those common lands. I reject his submissions that the Applicants were promised only membership in a club and that his knowledge was only that they had the right to become members of CRRC. In my view, that misses the point – that membership in the CRRC was the means by which they were to have access to the water, which is the basis on which they acquired their properties. The requirements for an equitable, implied easement are met: See Anger and Honsberger, *Law of Real Property, 3rd Edition* para 17:20 and Paul Perell, J., "The Creation of Easements", [2005] 30 *Advocates Quarterly* 487 and 491. Given Mr. Innes knowledge, this equitable remedy may also be granted against him.

I see no issue of laches, given the knowledge Mr. Innes had at the time he acquired the property. I also reject the Respondent's argument that all the Applicants acquired was a promise which was not fulfilled. This is the very basis on which this equitable relief is being granted – Mr. Blair's promise to provide waterfront access through CRRC, the frustration of that promise through the mortgages, default and failure to enable CRRC to fulfil its objects, one of which was access to the water.

I therefore grant a declaration that the Applicants have an implied easement over parts 2 – 6 to enable them to access the water. I only grant this relief to the Applicants who are before this Court. The parties may address the size and location of the access route and return to me for further orders should that be required.³

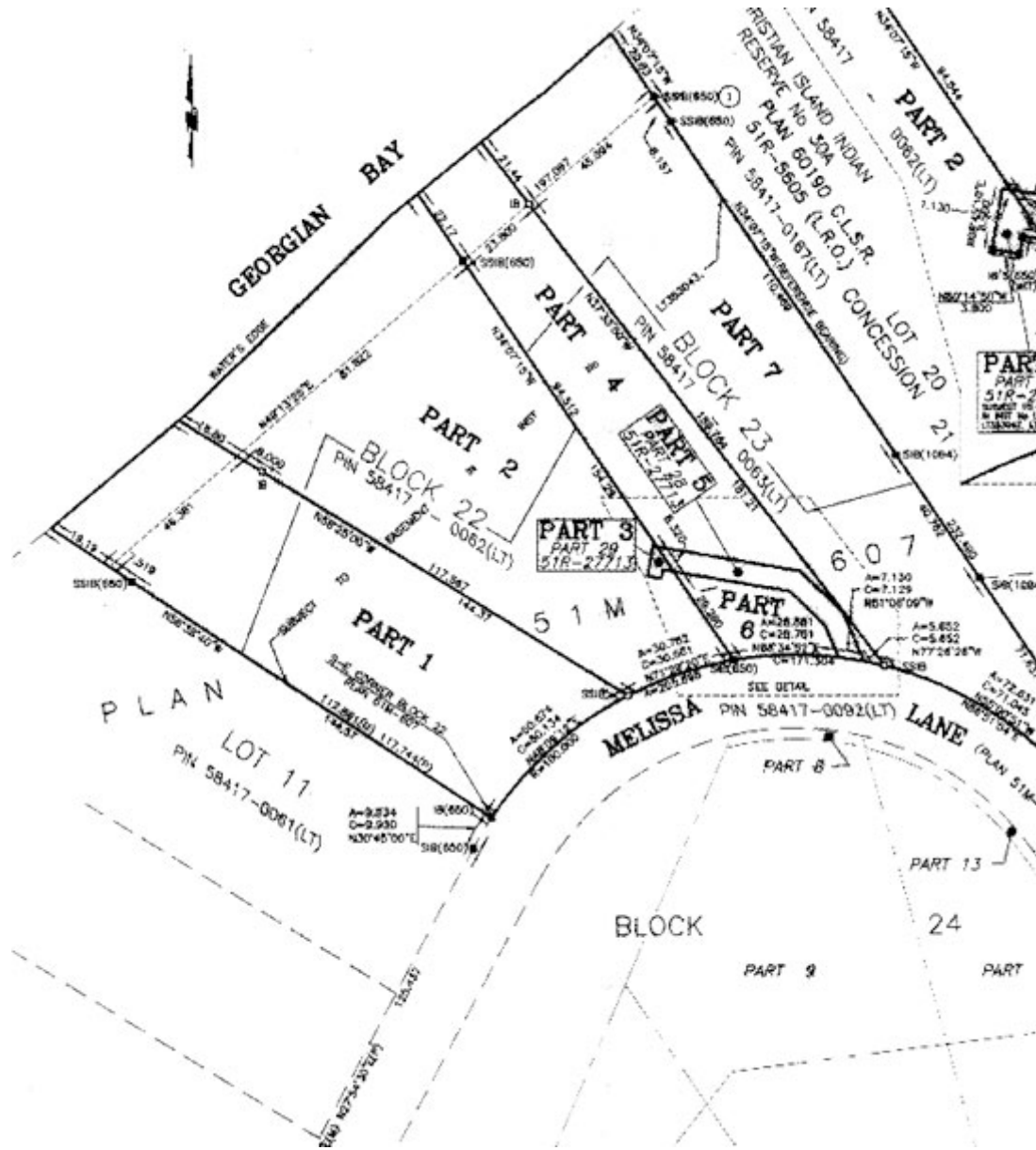


Figure 1: Copy of portion of Plan of Survey⁴

³ Unreported endorsement of Justice Conway dated July 4, 2017, *Law et al. v. Cedar Ridge Waterfront Park Corporation* Application under Rule 14.05(3)(e) of the *Rules of Civil Procedure*, in Ontario Superior Court File NO.CCV-17-11777-00CL.

⁴ From: Plan 51R-38009, courtesy of Dearden and Stanton Ltd. All rights reserved.



Figure 2: The terrain shows undeveloped “back lots” with no amenities for the CRRC.⁵

The decision of the Ontario Court of Appeal, is brief and overturns the decision of the motion judge, with further clarification of the nature of the rights of access. More specifically, the critical components of the fact scenario that point to the conclusion that the rights in question were contractual in nature, rather than running with the land, were explained:

We are satisfied that this appeal must succeed. In her reasons, the motion judge said the following:

I am satisfied there was a common intention of Mr. Blair [the owner] and the purchasers of the Ridge Lots that they would, through their membership in CRRC, have access to the water.

She also said:

Membership in the CRRC was the means by which they were to have access to the water which the basis on which they acquired their properties.

⁵ From: GoogleMaps® All rights reserved.

We accept those observations as well-founded on the record. With respect, however, they fail to come to grips with the nature of the right of access. Was it contractual or was it by way of a right in the land purchased? In our view, the documents reviewed and signed at closing establish that the right was contractual. The respondent's right to access to the waterfront was one of a bundle of rights and obligations created by way of a contract between the club ("CRRC") and lot purchasers like the respondent.⁶

Critical in reaching this conclusion were several factors noted by the Court of Appeal, including the nature of the membership in the club – it clearly needed to be assigned to the subsequent owner, but was not. Further, maintaining one's membership in good standing (although through the ongoing payment of fees), would be required. It was only the membership in the club that permitted access to the waterfront through a contractual relationship rather than by an interest that was tied to the land. Finally, the usual indicators one would expect to see with an easement (i.e. description of the easement lands and the associated use rights) were not set out in the title documents. The court explained as follows:

In coming to our conclusion that the right of access is contractual, and not the basis upon which an easement could be found, we make the following observations:

- The property owner was required to assign to any subsequent purchaser membership in the club and, hence, the right to access to the waterfront sale. This requirement is inconsistent with the existence of an easement over the land;
- The property owner had to be a member in good standing of the club to exercise the rights of membership, including access to the waterfront; and
- Nowhere in the relevant documentation are there any of the normal *indicia* of an easement such as a metes and bounds description of the purported easement, or of a description of the nature of the uses to which the easement was subject.

In our view, the above observations are equally determinative of the argument that there was an easement by *estoppel*. As the rights are clearly contractual, they cannot be converted into rights that run with the land through the mechanism of an easement by *estoppel*.⁷

Rights of access may be derived from many sources – common law, title documents or a formal contractual arrangement or even a casual permission granted out of good neighbourliness. These latter two categories are contractual rights that involve individual neighbours; they are not property rights, and they do not run with the land and do not bind subsequent owners.

⁶ *Law v. Cedar Ridge Waterfront Park Corporation*, 2018 ONCA 204 at paras 1-3

⁷ *Ibid.* paras. 4-5

Neighbours may rescind permissions and contractual arrangements may cease. A prospective purchaser of a cottage property may assume that beach access is a right granted in perpetuity. It remains important for professional advisors to confirm and explain the true nature and limitations of whatever access may or may not legally exist.

Guest Editor: Megan Mills

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

Chapter 8 in *Principles of Boundary Law in Canada* deals with Natural Boundaries and the division of accretions is addressed at page 352 and thereafter. The example found in *Krull v. MacDonald and Irwin* and discussed in this issue of *The Boundary Point* advances the insights needed for practical solutions in this difficult area of real estate law and cadastral surveying.

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.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 – April 23, 2018

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 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

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.

panel discussion that will revisit the pre-conference [exercise](#)⁹ 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)¹⁰ are now available.¹¹

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.¹²

Coming in June — Electronic Survey Plan Registration Course

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



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⁹ 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.**

¹⁰ Online reservation at the [Hilton Mississauga/Meadowvale](#) is available at the special [group rate](#).

¹¹ This conference qualifies for 12 *Formal Activity* AOLS CPD hours.

¹² This course qualifies for 36 *Formal Activity* AOLS CPD hours.