The Boundary Point

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CASE COMMENTARIES ON PROPERTY TITLE AND BOUNDARY LAW

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Easements continue as a topic that causes confusion, mixed expectations and litigation. While the basic elements that we have all learned about (see for example, the 4 requirements in *Re: Ellenborough Park*[1]) remain foundational, we still encounter circumstances that give pause – and deserve closer scrutiny. In *Reddick v. Robinson*[2] we see a clause contained in a deed made the subject of needed interpretation when neighbours could not agree on the meaning. At issue was not only the use that could be made of the easement strip, but also what activities could be enjoyed when reaching the destination: the shore of Lake Ontario.

Interpreting an Easement for Access to the Shore of Lake Ontario: Discerning Rights and Limitations

Key Words: *shore land, easement, access, interpretation*

Prince Edward County in Ontario is a beautiful place – even more so in summer with long white sand beaches and parks. In 2008 an application was submitted to the local planning authority to divide a six acre parcel into 3 – 2 acre parcels and also attached to each was an easement which would allow for access to Lake Ontario. The court described the scheme:

> The parties to this application are the owners of three neighbouring properties in Prince Edward County. The properties were originally a vacant lot referred to as "the six-acre parcel" which had been owned by Christopher Moore, Marilyn Minaker and the late Paul Minaker. Mr. Moore and the Minakers subdivided that parcel into the three two-acre properties in issue.
>
> The properties are situated close to Athol Bay on Lake Ontario. By the time of the subdivision, the Minakers and Mr. Moore also each owned properties situated between the

[1] *Re: Ellenborough Park*, [1955] EWCA Civ 4, http://www.bailii.org/ew/cases/EWCA/Civ/1955/4.html

[2] *Reddick v. Robinson,* 2022 ONSC 6124 (CanLII), https://canlii.ca/t/jsr2l

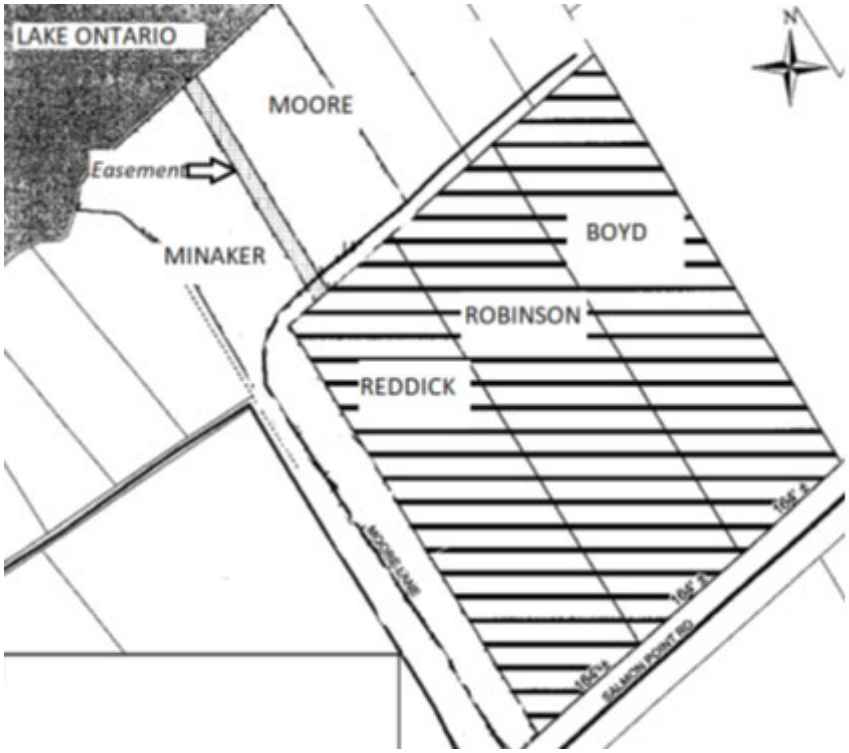
six-acre parcel and the lake. A private road called Moore Lane effectively separated those properties and the six-acre parcel.

Working in conjunction with a planner from Prince Edward County, the Minakers and Mr. Moore devised a scheme that would sub-divide the six-acre parcel into the three two-acre properties now owned by the applicants (the "Reddick Property") and the respondents (the "Robinson Property" and the "Boyd Property" respectively).

As part of the scheme, a 20 feet by approximately 300 feet strip of land was created between the Minaker and Moore properties, connecting what is now the Reddick Property to the shore of Lake Ontario. Legal title to that strip was subsequently conveyed along with the sub-divided lot that is now the Reddick Property. However, an L-shaped easement was also created, running from the west boundary of the Boyd Property along the northern boundary of the Robinson and Reddick properties and then north along the 300 feet by 20 feet strip of land. The easements, in favour of what are now the Robinson and Boyd Properties, are worded as being:

> … for the purposes of pedestrian access only in order to use and enjoy the shores of Lake Ontario, such use and enjoyment shall not include camping or the use or operation of motorized vehicles.

The diagram below depicts the configuration of the respective properties and shows the strip of land, which the Reddicks own, subject to the easements in favour of their neighbours:



Mr. Moore and the Minakers wanted - to use Mr. Moore's words - to be protected "from having something occur in between our properties … that we didn't want to see". As a result, in addition to the provisions in the easements prohibiting camping or the use or operation of motorised vehicles, the scheme also included having the 20-foot strip of land re-zoned as "open space private park", which would prevent the erection of structures of any sort.[3]

[3] *Ibid.*, at paras 1 to 6

In order to compare the layout in the diagram appearing in the reported case with what appears on the ground, a screen capture of 2018 orthophoto imagery was obtained and appears in Figure 1[4] below.

The easement, 20' wide, led from Moore Lane to Lake Ontario, but at the lake, there was little beach; it dropped down a bank.

Figure 1:2018 SCOOP imagery

The court identified the key questions to be decided and what both sides were adopting as their respective positions in these terms:

> The dispute now before the court concerns the nature and extent of the respondents' rights under the easements. Specifically:
>
> a) what is meant by the description "shores of Lake Ontario"; and
>
> b) what is the scope and nature of the easement in favour of the respondents over the applicants' land?
>
> The Reddicks say that the respondents are restricted to using the strip of land for the purposes of accessing the shore of Lake Ontario. The respondents argue that their use of the land is not restricted to ingress and egress, but also includes other uses consistent with the use of an open space private park, such as bringing lawn chairs, picnicking, sitting, and enjoying the view of the water.

[4] From: https://maps.thecounty.ca/Html5Viewer/index.html?configBase=https://maps.thecounty.ca/Geocortex/Essentials/Public/REST/sites/PECPublicViewer/viewers/HTML5_Viewer/virtualdirectory/Resources/Config/Default

> The respondents have, in fact, from time to time, set up chairs and tables and entertained people on the strip of land. The Reddicks, for their part, have installed some decking on and have placed a couple of Muskoka chairs on the strip of land. The respondents have not objected to this (although in oral submissions, counsel for the respondents asserted that the placement of decking on the strip of land is a violation of the open space private park land zoning), but claim to be entitled to similar use. Otherwise, they say, they are deprived of a substantial part of the use and enjoyment of the property.
>
> *The resolution of the dispute turns on what is meant by the words contained in the easement including to what extent, if any, the interpretation of the words used should be informed by the intention of the Minakers and Mr. Moore when they implemented their subdivision scheme, or by the effect of the zoning of the strip of land as "open space private park"* [*Emphasis* added].[5]

Mr. Moore, also a solicitor who acted on the real estate purchase for the respondent Reddicks, was pointed to as having explained to them at the time of their purchase, what the easement meant. Interesting, although he was called to testify as a witness, in seeking to determine what the language in the grant of easement meant, the court looked to the intentions of Mr. Moore and the Minakers *at the time the subdivision scheme was first conceived*. Citing appellate decisions, the court explained further:

> As a matter of law, the language of easements is to be construed broadly:
>
> > … the authorised mode or capacity of user … is as general as the physical capacity of the *locus in quo* at the time of the grant will admit, unless in any particular case … some limitation of user can be gathered from the surrounding circumstances" (Gaunt & Morgan, eds., *Gale on Easements*, 17th ed. (London, UK: Sweet & Maxwell, 2002) at 329).
>
> The approach to be taken by a court asked to interpret an easement is concisely stated by Willcock J.A. in *Robb v. Walker* (2015), 69 B.C.L.R. (5th) 249, [2015] 8 W.W.R. 1, 383 D.L.R. (4th) 554, 53 R.P.R. (5th) 1, 2015 BCCA 117 (CanLII), at paras. 31-32 (cited with approval in *Herold Estate v Canada (Attorney General)*, 2021 ONCA 579 at para. 45):
>
> > [31] When interpreting an easement, the court must have regard to the plain and ordinary meaning of the words in the grant to determine what the intention of the parties was at the time the agreement was entered into. Surrounding circumstances, that is, objective evidence of the background facts at the time of the execution of the contract, are to be considered in interpreting the terms of a contract: *Sattva* [*Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633, 2014 SCC 53] at para. 58.

[5] *Ibid.*, at paras 7 to 10

> [32] The wording of the instrument creating the right of way should govern interpretation unless (1) there is an ambiguity in the wording, or (2) the surrounding circumstances demonstrate that both parties could not have intended a particular use of the easement that is authorized by the wording of the document: *Granfield v. Cowichan Valley (Regional District)* (1996), 16 B.C.L.R. (3d) 382 (C.A.).

The Reddicks bought their property on 14 September 2016. Christopher Moore, who is also a solicitor, acted for them on their purchase. John Reddick's evidence is that the applicants were advised by Mr. Moore that the respondents would be able to walk through the right of way that their property was subject to, in order to get to the water. However, Mr. Reddick states that the applicants would not have purchased their property if it had been suggested to them that their neighbours could use any part of their land for any reason other than access to the water.[6]

The question seemed to turn more into an inquiry of whether the easement was to get to the shore of Lake Ontario, or was it to reach the shore in order to be able to access the water of Lake Ontario. The distinction might be subtle, but the court turned to *Black's Law Dictionary* for a definition of what was meant by the phrase, "shore lands":

"Shores of Lake Ontario"

The 5th edition of *Black's Law Dictionary* defines "shore lands" as:

> … those lands lying between the lines of high and low water mark. Lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water.

Relying on this definition, the applicants argue that the term "shores of Lake Ontario" means the area between the high water mark and low water mark of the Lake. In other words, if the surface of the Lake comes up to the high water mark, there would be no land which the respondents would be allowed to use or to "tarry" over. When the water is lower, the applicants concede that the respondents would be able to use the limestone shelf which would then be exposed. And at any time, the respondents are at liberty to use the right of way to, for example, carry a canoe down to the Lake and launch it from the water's edge.

The respondents argue that such a limited definition would essentially limit their use and enjoyment of the easement to stepping onto the "shore" when weather conditions and water levels make it feasible to do so. They would not be able to sit and stay on the grassy cliff area adjacent to the Lake. Furthermore, the applicants' restricted definition would render the specific prohibitions against camping and the use of motorised vehicles meaningless:

> It makes no sense that there would be a prohibition on camping because it is impossible to camp on the water line. It is also impossible to drive a motorized

[6] *Ibid.*, at paras 11 to 13

> vehicle on the rocks. However, a motorized vehicle could certainly be driven on … [the strip of land].

The respondents also point to the use of the term "shore land" in the *County of Prince Edward Official Plan* (2006) which, Mr. Moore says, influenced the wording of the easement when it was created:

> 4.1.1. The shore land and associated water bodies of Prince Edward County are a landscape feature of significant aesthetic, ecological and cultural value. They are also a major tourist attraction as they provide the resource base for both passive and active recreational activities.

I agree that to restrict the definition of "shores of Lake Ontario" in the manner suggested by the applicants severely limits the concept of "use and enjoyment" and makes the restriction against camping or use of motorised vehicles effectively redundant. It also seems to be more limited than the definition of "shore land" implied by the *Official Plan*. Rather, the search for a plain and ordinary meaning of the words used necessarily requires consideration of the circumstances surrounding the creation of the easement, considered in the context of the circumstances that existed when the easement was created: *Raimondi v. Ontario Heritage Trust*, 2018 ONCA 750, at para. 11.[7]

The interesting aspect of zoning an easement strip as "open space / private park" is how it may seek to apply a limitation on use, much like a registered restrictive covenant. However, these are not the same. This same conclusion was reached by the court in reviewing the evidence of Mr. Moore in more detail:

> *Scope and Nature of the Easement*
>
> According to the respondents, those surrounding circumstances include the intention of Mr. Moore and the Minakers in creating the strip of land and the easements in favour of the respondents, as well as the zoning of the property as open space private park land.
>
> Mr. Moore was summoned as a witness on this application and questioned by counsel. He explained that the creation of the strip of land was to enable:
>
> > … [the] three property owners to be able to bring a lawn chair down, you know, bring a cooler down, spend, you know, the day or the evening there, be able to go into the water, out of the water, take a canoe down. But very passive, was the thought process. And that was the discussion and understanding as to what this would do.
>
> Mr. Moore went on to say that "'to use and enjoy the shores of Lake Ontario' … would by implication require you to sit on that land" and continued:

[7] *Ibid.*, at paras 14 to 18

> Come, spend your time, do what you got to do, have some fun, go swimming, you know, take pictures, have a beer and then don't stay overnight and don't camp and don't bring your car. So, I looked at it very simplistically in that respect because that's what we were creating so that other people that had lands designated as shore lands could actually have the same experience as me on my land.

The applicants point to what was said by the late Mr. Minaker in a January 2008 letter, when applying to have the strip of land rezoned. He wrote:

> ... all three properties would have right-of-way access over the 20' x 296' portion of land to Lake Ontario… [emphasis added]

The letter continued that the 20' x 296' strip:

> ... would be zoned "open space" in order to ensure that no development whatsoever would take place on that portion of the property".

The applicants argue that Mr. Minaker's letter repeatedly emphasised the idea of waterfront access, while being completely silent about facilitating use of the easement property itself for recreational purposes. His letter contemplated that the lots being created "will be more appealing for the acquisition and construction of single-family homes, given the added value gained through the addition of the waterfront access". The letter concluded by stating that "providing such waterfront access to residential building lots is consistent with treatment of similar properties ... ".

When, on 14 April 2008, the application was approved, the Notice of a Decision for the Provisional Consent (the "Decision") stated:

> The purpose and effect of the applications was to sever and rezone the [Moore/Minakers'] two (2) vacant parcels of land as follows:
>
> …
>
> Through a series of rights-of-way (Consent File Nos. B28- & B29-08) and lot additions (see below) each lot (severed and retained) will have legal access to Lake Ontario (Athol Bay) over the second holding jointly owned by the [Moore/Minakers].

The applicants argue that the Decision confirms that the severed lots would be getting legal access to the Lake as opposed to legal access to, or use of, a private park area.

I agree that the Decision does not expressly convey an understanding of what the benefits conferred by "legal access" mean. However, to the extent that the Decision and the zoning of the property is relevant to understanding the meaning of the easements, I read the Decision as being based on an understanding that each of what are now the three subdivided lots owned by the parties to this application would have legal access to Lake Ontario over the strip of land previously owned by Mr. Moore and the Minakers.

> It is important to recognise that while the rezoning application and the resulting Decision can be part of the surrounding circumstances which inform the meaning of the words used in the easement, the zoning of the land does not in and of itself establish interests or rights in land: *2022177 Ontario Inc. v. Toronto Hanna Properties Ltd.*, 2005 CanLII 39320 (ON CA), at para. 35; *Metropolitan Toronto Condominium Corporation 626 v. Bloor/Avenue Road Investment Inc.*, 2009 CanLII 44718 (ON SC), at para. 50.[8]

The entire Reasons for Decision in *Reddick v. Robinson* are short and very readable. In the end, the court dismissed the application, and in holding for the respondents, concluded,

> The application of some common sense and neighbourliness would serve the parties well. The zoning of the strip of land appears to have been predicated on an understanding that the owners of the dominant tenements (currently the respondents) and the owners of the servient tenement (currently the applicants) would all have legal access to the shores of Lake Ontario over the strip of land. That, in my view, was the intent of the easements. In other words, appreciating that the Reddicks are the legal owners of the strip of land (because someone has to be), the applicants' and respondents' rights to the use and enjoyment of the land are the same. It follows, too, that the exercise by one party of their right to use and enjoyment of the strip of land should not unreasonably impair any other party's exercise of their right of use and enjoyment. They should all govern themselves accordingly.[9]

That some common sense and neighbourliness would serve the parties well is a thread that runs through so many reported cases involving neighbour boundary and easement disputes. On the other hand, parties could also be better served if the language used in setting out respective rights and limitations in the first place are as clear as possible.

Editor: Izaak de Rijcke

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

A discussion of easements in general can be found in *Chapter 5: Boundaries of Easements.* See especially pages 166 to 177.

[8] *Ibid.*, at paras 19 to 28

[9] *Ibid.*, at para 34

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