



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.

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Time at the beach will soon be upon all of us again. A case in Nova Scotia about the enforceability of an easement giving access by the public to a beach on the ocean is therefore timely. Understanding how property rights can be enforced can tell us much about how these rights have meaning – even “legitimacy.” In *Halifax Regional Municipality v. Rhino*,¹ a court considered an application for an injunction to prevent the blocking or obstruction of an easement. One of the defences raised by the Respondent (and the only one reported to have been pursued in argument), was that the natural boundary had eroded inland, thereby eliminating the easement strip and extinguishing its existence.

In considering all of the evidence, the court ultimately rejected this argument, but leaves us with reasons which explore how such circumstance may be approached in other settings.

Can an Easement for Public Access to a Beach Fail due to Erosion from the Ocean?

Key Words: *public access, easement, beach, erosion*

The Halifax Regional Municipality purchased property about 10 years ago on the ocean. The house that formerly stood on the property was demolished in order to create a small parking lot for the public. From the parking lot, pedestrians could then walk down a pathway to Silver Sands Beach.

The facts appear straightforward and, as the court explained,

The applicant obtained title to two parcels of land at Cow Bay by Warranty Deed on September 25, 2003. The vendor was Silver Sands Realty Limited; the deed to the applicant was signed by representatives of the vendor...

¹ *Halifax Regional Municipality v. Rhino*, 2022 NSSC 152 (CanLII), <https://canlii.ca/t/jpllp>

The two parcels of land purchased by the applicant were Lot 2, at 1287 Cow Bay Road (now a parking lot), and Lot 3, which is Silver Sands Beach.

On paper, Lot 2 (the parking lot) is bounded to the south by the ocean. However, there is a steep cliff which makes direct access to the ocean from that parking lot practically impossible. Therefore, in practical terms, in order to travel from Lot 2 to Lot 3 one is required to cross over other lands. At the time of the applicant's purchase of Lots 2 and 3, those "other lands" were owned by Silver Sands Realty Limited.

The 2003 deed to the applicant for Lots 2 and 3 made specific provision for an easement over those pieces of land between Lot 2 and Lot 3, thereby allowing passage for the public from the parking lot to the beach.

The applicant submits that their purchase of these two parcels of land was for the benefit of the public, *i.e.*, for use as a public park/beach, with an associated parking area. This will be addressed in more detail later in this decision.

In the original deed, this easement was actually in two parts. The first is in relation to a "Parcel B" property (shown on survey plan dated June 25, 2003, and containing 35,375 acres [*sic*] more or less). This is the easement that is in dispute before me within the present application. The deed indicates that the applicant's easement extends over this entire Parcel B property:

TOGETHER with a right-of-way to Halifax Regional Municipality, its successors and assigns for persons and vehicles over Parcel B. attached

In that same deed the easement also continued over another piece of land, lying adjacent to the Parcel B property and the beach property:

TOGETHER with a right-of-way to Halifax Regional Municipality, its successors and assigns for persons and vehicles with respect to a Gravel Road to be used for Emergency Maintenance use only; said Gravel Road extending from the western boundary of Lot 2 to the northern boundary of Lot 3 and being geographically shown on the above referred to Plan No. 14-1092-0.

That particular easement is not the subject of the present dispute. That second burdened property is now deeded to third parties (the Atkinsons) who are not involved in the present proceeding. I am advised that the applicant is in separate discussions with the Atkinsons about issues involving the easement over their property.

Since the time of the 2003 conveyances, there has been a specific identifiable pathway through Parcel B which leads from the parking lot to the beach. This is the pathway which the public have consistently used over the years.

The Parcel B property was transferred from Silver Sands Realty Limited to the respondent in 2012. Since then, the respondent has erected various structures presumably to contain access by the public exclusively to this pathway and to maximize privacy for himself and his

home. This includes an iron fence along the pathway, additional fencing at the entry to the pathway from Lot 2, and a masonry wall and fence between Lot 2 and Parcel B.

The respondent has also piled various debris, rocks, materials along the pathway in order to narrow it. Although the right-of-way specifically includes vehicle passage, the materials deposited by the respondent have prevented a vehicle from passing.

Things have only escalated since then. In 2020, the respondent decided to entirely block access to the right-of-way to the public and to the applicant. The gate at the head of the pathway (at the parking lot) was locked; access cannot be gained otherwise.

A sign has been erected near that locked gate, replicating Halifax Regional Municipality (“HRM”) signage, including the logo and phone number; it announces that the public right-of-way is “under construction” and that the beach is closed. The applicant advises that it did not erect this sign. The respondent made no mention of this sign in his affidavit, but the only inference I can draw is that he erected it (or caused it to be erected). Furthermore, I infer that he used HRM logos and phone numbers to imply that the path was closed with their authority.²

The configuration of properties and the ocean can be seen in Figure 1 below.



Figure 1: Silver Sands Beach and parking area south of Cow Bay Road³

In Figure 2, the same location is illustrated, but with an air photo overlay. Readers will find especially interesting the depiction of a natural boundary in this GIS application, relative to where the shore, and other ocean front features appear.

² *Ibid.*, paras. 2 to 14

³ From: Halifax Regional Municipality Open Data Portal at: <https://www.halifax.ca/home/maps/explorehrm> with imagery from: <https://www.arcgis.com/apps/webappviewer/index.html?id=425cf408196648db994be8f53206f75c> All rights reserved.



Figure 2: Pedestrian path from parking area to the beach appears in the middle of this image.⁴

In considering the defence raised in response to the injunction application brought by the Halifax RM, the court explained its analysis:

The respondent raised a number of arguments in his Notice of Contest. Most of those arguments were abandoned by the time of the hearing. However, I will summarily address some of them. I do this out of an abundance of caution, but also, to note that the applicant had to spend quite a bit of needless time and effort responding to some/all of these issues.

...

At the time of the hearing, only one argument was put forward by the respondent in his defense to the application. It is contained in paragraph 7 of his Notice of Contest. It is an argument in relation to the “high-water mark” of Parcel B and Silver Sands Beach (Lot 3). It was expressed in the respondent’s brief as “there is no contiguous boundary above the OHWM between Silver Sands Beach and the right-of-way”.

It is the respondent’s contention that the high water mark of the beach has moved, due to erosion, since the original grant in 2003. In fact, the respondent suggests that at high tide, the water now effectively reaches the point where the right-of-way crosses between Parcel B and the Atkinson property. He has provided photographs which appear to show that such is the case. In fact, it is the respondent’s belief that some day the entirety of the beach (Lot 3) will be washed away by the ocean.

The respondent notes that it is a generally accepted principle in property law that waterfront property ends at the high water mark. He further points out that this right-of-way was meant to establish a passage between Lot 2 (the parking lot) and Lot 3 (the beach). As matters currently stand, in his submission, there is no longer any connection between those two properties at the high water mark; access to the beach must be gained through another

⁴ *Ibid.* Readers will also take note of the depiction of property lines in this GIS product – especially the “High Water Mark” feature referred to in the decision.

property. It is the respondent's position that the right-of-way is therefore not only affected, but extinguished.

In response, the applicant notes that the original right-of-way made no explicit mention of "direct access" to the beach; it is simply an easement across the entire Parcel B property. Furthermore, that the transaction, from the beginning, involved a grant of easement across the other property (the now-Atkinson property).

Further, the applicant disputes the location of the high water mark put forward by the respondent. The applicant points out that the beach still remains completely accessible from Parcel B.

Richard Harvey, an employee of HRM, testified by affidavit that he visited the beach on February 15, 2022, and took photographs, which he attached. In those photographs, it can be clearly seen that there is still quite a bit of beach property left at the end of the path. The evidence does not indicate if the photographs were taken at high tide or low tide.

In my view, whether the applicant or the respondent is correct about the present location of the high-water mark is not material in the context of the dispute before me. I say this because, even if the respondent is correct, and even if the seawater reaches the end of the pathway at high tide, I remain entirely unconvinced that such extinguishes the easement.

I have been provided with no authority, either by way of statute or caselaw, that would support the notion that an expressly granted right-of-way could be entirely extinguished in these particular circumstances. I know of no such authority. The respondent did provide the case of *Kerrigan v. Harrison* (1921) 1921 CanLII 6 (SCC), 62 S.C.R. 374; however, in my view, that case is entirely distinguishable on its facts.

The present case involves an express grant of easement over all of Parcel B. Nothing I have heard in this application alters that fact. Generally speaking, an express easement requires an express release to be recorded in order to extinguish it (*MacNeil v. Anban Holdings*, 2005 NSSC 6). To be clear, I am not precluding the possibility that there could perhaps be other methods, or factual scenarios, that could extinguish an express easement. However, I have no evidence or authority that would show that the present scenario should result in an extinguishment.

Although this easement was granted over the entirety of Parcel B, the existing pathway is at the extreme outer edge of Parcel B and partly along the coastline. It seems to be the least intrusive option for the owner of Parcel B.

I accept that significant erosion has occurred in this area, particularly in relation to the beach itself. However, that does not change the fact that an easement exists over Parcel B. Inasmuch as the purpose of this easement was to allow passage between Lots 2 and 3, that purpose also still exists. The question of additional passage over the Atkinson property (if needed) does not affect the Parcel B easement in my view, and in any event, was also provided for in the original grant.

It is clear to me that the respondent finds this easement to be inconvenient and irritating. He has made many unilateral efforts to rid himself of it; even going so far (and boldly) as to block it altogether. It is also abundantly clear that he should not have done so, and that he had no authority in law to do so.⁵

This case is very fact-specific. The easement at issue was described in the original deed as being situated over the whole of the servient lands – and not necessarily confined to the strip actually used for pedestrian access to the beach from the parking lot. Accordingly, while there may have been erosion (and even continuing inland so as to cover the strip), the location on the ground of the public’s exercise of the legal right to pass down to the beach could arguably shift further inland as well. This is an interesting case for its consideration of the evidence.

Editors: Izaak de Rijcke and Megan E. Mills

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

This interesting decision lies at the intersection of *Chapter 5: Easements of Boundaries* and *Chapter 8: Natural Boundaries*.

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.⁶ These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year’s quota.

Course: Survey Law 1

Survey Law 1 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This

⁵*Halifax Regional Municipality v. Rhyno*, 2022 NSSC 152 (CanLII), at paras. 17 and 24 to 35

⁶ 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.

course will be taught online Wednesday evenings by Izaak de Rijcke, starting September 7th. For more information, consult the [syllabus](#). Please note that registration is through [AOLS](#).

Education Day at the AOLS AGM

In March, 2022, the AOLS had its Education Day at its virtual AGM. One of the sessions, ***Geomorphology at the Waterfront: The Law Struggles to Keep Up*** built on some of the issues introduced in Four Point Learning's 7th Annual Boundary Law Conference: [Complex Cadastral Problems: Searching for Solutions](#) in the spring of 2021. This CPD session at the AGM was presented by Dr. Colin Rennie of the Department of Civil Engineering at University of Ottawa, and Izaak de Rijcke, a lawyer in Guelph. This presentation and associated resources remain available on the GeoEd site. An article summarising their presentation is also scheduled to appear in the next issue of the *Ontario Professional Surveyor* magazine.

CPD at the National Surveyors Conference for PSC

At the National Surveyors Conference in Ottawa, held in early May, 2022, Izaak de Rijcke presented a new CPD seminar for Professional Surveyors Canada on the topic, ***Survey Law Issues in Recent Court Cases: Indigenous title, Shared natural boundary factors and Revisiting co-ordinates***. This presentation will be available again for members of PSC on the 4PL site in the near future.



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