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.

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Restrictive covenants are a type of burden that, when registered on title, impose limits on the use of a parcel of land in order to maintain the value of an adjoining parcel. The tool represents another metaphorical stick in the bundle with the associated "right" being held by a neighbouring parcel (the dominant tenement). In this month's issue, we will be exploring the decision of the Ontario Divisional Court in *Wonderland Power Centre Inc. v. Post and Beam on Wonderland Inc.*[1] in which the court reviewed a decision of the motions judge on the enforceability of a restrictive covenant as registered on title. Because the registered version did not identify the lands to be benefited by the restrictive covenant, the court was required to tackle the question of whether the *Land Titles* parcel register should be rectified to describe the benefited lands, or whether the covenant was invalid from the start. In addressing this question, and eventually coming to the conclusion that the latter approach was appropriate, the court looked at the requirements of restrictive covenants; the integrity of the *Land Titles* register and the reliance placed upon it by prospective purchasers.

Can a Restrictive Covenant that is Void from the start be "Rectified"?

Key Words*: rectification, restrictive covenant, dominant tenement, unregistered covenants* Land Titles *parcel register*

Certainty is a critical component in property conveyancing and prospective buyers rely on the content of the *Land Titles* register on which to base trusted transactions in land. This reliance is based upon the concept of indefeasibility of title which is embodied in the three hallmarks of a land titles regime:

[1] *Wonderland Power Centre Inc. v. Post and Beam on Wonderland Inc.,* 2022 ONSC 2237 (CanLII), https://canlii.ca/t/jnpnt

- The mirror principle, whereby the register is the perfect mirror of the state of title;
- The curtain principle, which holds that the purchaser need not investigate past dealing with the land, or search behind the title as depicted in the register; and
- The insurance principle, whereby the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy.

The extent to which a prospective purchaser relies upon the registered instruments in the Land Titles register was a key question for the panel of the Ontario Divisional Court in *Wonderland Power Centre Inc. v. Post and Beam on Wonderland Inc.* More precisely, the question of concern for the purchasers of a parcel of land was the validity of a restrictive covenant that purported to limit the use of the subject property, but as registered, did not meet the established criteria for a restricted covenant to run with the land. Should the register be rectified to ensure the validity of the covenant? Or could the prospective purchasers have the covenant as registered, declared invalid?

The nature and history of this dispute can be summarized relatively simply: a restrictive covenant was registered on title by a predecessor to the respondent Wonderland Power Centre Inc., when it sold the property to the London Public Library. That covenant prohibited commercial use of the land. Sixteen years later, the Library Board sold the land to the appellant, Post and Beam on Wonderland Inc. Post and Beam leased the property for commercial use and Wonderland brought an application to enforce the restrictive covenant - or to rectify the description of the covenant in the *Land Titles* register. At issue was the wording of the registered restrictive covenant ***which did not identify the lands to be benefited*** (the "dominant tenement"). The motions judge granted the motion to rectify the *Land Titles* register in order to describe the benefited lands and Post and Beam appealed.[2]

The facts as described by the Divisional Court note a complicating factor at the time of registration of the original restrictive covenant, in that there were in fact two versions circulating, one in which the dominant tenement was named and another in which it was not. The requirement that a dominant tenement be identified in order for the restrictive covenant be registered and run with the land is set out in Ontario's *Land Titles Act*, section 119(4), which states that a covenant is not to be registered unless four conditions are met:

a) the covenantor is the owner of the land to be burdened by the covenant;
b) the covenantee is a person other than the covenantor;
c) the covenantee owns the land to be benefitted by the covenant and that land is mentioned in the covenant; and

[2] *Ibid.* at paras 1-2.

d) the covenantor signs the application to assume the burden of the covenant.

The decision describes the history and specific language of the unregistered and registered covenants as follows:

Unregistered Restrictive Covenant

Holdings attempted to register the restrictive covenant before the closing of the transaction. As described more fully below, Holdings submitted an Application to Annex Restrictive Covenant to the Land Registrar on October 11, 2021. The Application described the abutting lands owned by Holdings that were to benefit from the restrictive covenant, as well as the burdened lands being purchased by the Library Board. The restrictive covenant was defined as follows:

> A restrictive covenant is hereby registered against the lands described as Part Lot 36, Concession 2 being Parts 1 &2, PL 33-R-14721, London/Westminster which prohibits the owners, occupiers of the land and any successors and assigns, from carrying on any commercial use on the property for a period of fifty (50) years commencing October 11, 2001.
>
> This restrictive covenant benefits the lands described as Part Lot 36, Con 2. now designated as Pts 3 through 20, PL33R-14721 London/Westminster, being part of PINS 08209-0200 and 08209-0199.

Two parcels of land were to be benefitted by the Restrictive covenant: PIN #08209-0200 and PIN #08209-0199.

> a. PIN #08209-0200 contained Parts 3 through 13 and Part 20 on Reference Plan 33R-14721 and was owned by Holdings.
>
> b. PIN #08209-0199 contained Parts 14 through 19 on Reference Plan 33R-14721and was also owned by Holdings.

The application was receipted, but not registered. Section 78(1) of the Act provides that the time of receipt of every instrument submitted for registration must be noted. But under ss. 78(3)-(4) of the Act, an interest in land is not effective until registered. This interest was never registered, and I refer to this as the Unregistered Restrictive Covenant.

Following the sale, PIN #08209-200 was split into two parts. The Library property, being Parts 1 and 2 on Plan 33R-14721 was created as a new parcel (PIN #08209-244). Ownership of the balance of the property: Parts 3 through 13 and Part 20 on Plan 33R-14721 remained with Holdings and formed part of PIN #08209-0636, and Parts 14 through 19 formed PIN #08209-0417.

Registered Restrictive Covenant

Holdings submitted to the Land Titles Registry a second Application to Annex Restrictive covenants. This document is marked “Registered as ER127568 on October 11, 2001 at 15:07”. I refer to this as the Registered Restrictive Covenant.

> The Registered Restrictive Covenant identifies the burdened land—the lands bought by the Library Board—but does not identify the benefitted land—the lands owned by Holdings/Wonderland. The Registered Restrictive Covenant provides:
>
> > A restrictive covenant is hereby registered against the lands described as Part Lot 36, Concession 2 being Parts 1 &2, PL 33-R-14721, London/Westminster which prohibits the owners, occupiers of the land and any successors and assigns, from carrying on any commercial use on the property for a period of fifty (50) years commencing October 11, 2001.
>
> The second paragraph in the Unregistered Restrictive Covenant, which contained a legal description of the benefitted lands, is not contained in the Registered Restrictive Covenant.[3]

The Library Board constructed and operated a library and then listed the property for sale in 2015. At that time the listing agent contacted Wonderland about potential acquisition of the property. Wonderland declined and in communications noted its intention to keep the restrictive covenant on title. Two years later, the parent company of Post and Beam entered into negotiations with the Library Board and sought a legal opinion on the restrictive covenant. They were informed it was unenforceable and proceeded to purchase the property in August of 2017. Post and Beam then entered into a long term lease to rent the property which was extensively renovated to meet the commercial tenant's needs. Later in 2017, Wonderland sued Post and Beam to enforce the restrictive covenant. The motions judge held the covenant on title was unenforceable - seemingly a win for Post and Beam - however the motions judge went on to grant Wonderland's motion for rectification of the register to make the restrictive covenant enforceable. In other words, the defect was cured. Post and Beam appealed. The court described the key issues on the appeal as follows:

> The key issue is whether the motion judge erred in granting Wonderland's motion to rectify the Registered Restrictive Covenant by adding a clause identifying the benefitted lands.
>
> The second question presented by the appellant, which is whether the motion judge erred in dismissing Post and Beam's motion for summary judgment, flows from the answer to the first. Wonderland concedes that if the motion judge's order rectifying the restrictive covenant is set aside, summary judgment dismissing Wonderland's action to enforce the restrictive covenant must follow as there would be no genuine issue requiring a trial.
>
> The motion judge correctly identified the issue – that rectification is not available against a *bona fide* purchaser for value with notice *[sic].* But she erred in conflating actual notice and constructive notice and in finding that knowledge of a flawed and unenforceable restrictive covenant is to be equated with actual knowledge of a proper and binding restrictive covenant.[4]

[3] *Ibid.* at paras 6-12
[4] *Ibid*., at paras 31-33

In addressing the question of the enforceability of restrictive covenants, the court found that that motions judge's conclusion was correct, and further explaining the importance of the relevant provisions of the *Land Titles Act* with a nod to an historic Supreme Court of Canada decision as follows:

> Registration alone does not give an instrument force. Section 119(6) provides that: "[t]he entry on the register of a condition or covenant as running with or annexed to land does not make it run with the land, if such covenant or condition on account of its nature, or of the manner in which it is expressed, would not otherwise be annexed to or run with the land" (emphasis added).
>
> The requirement that the land "benefitted by the covenant" be "mentioned in the covenant" reflects a long-standing common law requirement that a restrictive covenant define the land that is to be benefitted by the restriction if it is to run with the land. A person dealing with a parcel of land, such as a prospective purchaser, should be able to determine without further investigation the precise nature and extent of the encumbrances to which the land is subject.
>
> The Supreme Court of Canada in *Galbraith v. Madawaska Club Ltd.,* 1961 CanLII 16 (SCC), [1961] S.C.R. 639, at para. 23 held that, to be enforceable, "the deed itself must so define the land to be benefitted as to make it easily ascertainable". The Court held, at para. 24, that a covenant expressed in a deed which does not describe the benefitted lands is personal only and did not run with the land:
>
> > [A] restrictive covenant contained in an agreement which omits all reference to any dominant land, although it sets out the restrictions placed upon the servient land, is unenforceable by the covenantee against a successor in title of the covenantor, since such an agreement expresses no intention that any other lands should be benefited by the covenant. A covenant running with the land cannot be created in this manner and in the absence of any attempted annexation of the benefit to some particular land of the covenantee, the covenant is personal and collateral to the conveyance as being for the benefit of the covenantee alone.
>
> Applying these legal principles, the motion judge held that the Registered Restrictive Covenant was not enforceable because it contained no reference to the existence of dominant lands to be benefitted.[5]

But what is more interesting, is the court's analysis on the question of rectification of the registry and the interplay of notice with the mirror, curtain and insurance principles noted above. The court reviewed the motion judge's decision as follows:

> The motion judge correctly held that the court's powers of rectification under ss. 159 and 160 of the *Land Titles Act* are qualified or limited by reference to the indefeasibility of title that follows from registration, and that a purchaser only obtains the benefit of indefeasible title if he or she is a *bona fide* purchaser for value without notice.

[5] *Ibid.*, at paras 35-37

But the fundamental and the key point in this appeal is that notice must be actual notice of the interest. The motion judge erred in conflating the concepts of actual notice and constructive notice. The motion judge fell into error at para. 92 by conflating a contractual covenant with a restrictive covenant running with the land. She held:

> With full knowledge of the restriction regarding commercial use of the property, Post and Beam proceeded with the purchase in any event. In my view, the knowledge and willingness of Post and Beam to run the risk that the restrictive covenant could or would not be rectified militates in favour of a finding that it would be unjust *not* to rectify the restrictive covenant. [Emphasis in original.]

In finding that Post and Beam had notice of the Unregistered Restrictive Covenant, the motion judge failed to distinguish between knowledge of the existence of a potential interest in land and knowledge of the benefitted lands. Knowledge of the benefitted lands is required, under the common law and s. 119(4)(c), before an interest runs with the land. The motion judge found that Post and Beam knew about the Registered Restrictive Covenant, which did not identify the dominant tenement—it was attached to the agreement of purchase and sale. Further, she found that during the negotiations to purchase the property from the Library Board, Post and Beam received legal advice that a restrictive covenant was on title but that it was unenforceable. She then found at para. 91:

> Prior to closing, therefore, Post and Beam were fully aware that (a) the subject property was located adjacent to a large multi-commercial shopping and business area identified in the advertisement as “Wonderland Power Centre”; (b) the property was just “steps” away from Wonderland Power Centre which consisted of “major retailers” according to the same advertisement; and, (c) Wonderland had applied for and obtained a restrictive covenant which prohibited the owners, occupiers of the land and any successors and assigns of the property to be purchased from the Library Board from carrying on any commercial use on the property for a period of fifty (50) years commencing October 11, 2001.

This is not the same, however, as actual knowledge of the description of the benefitted lands (the dominant tenement), which must be “easily ascertainable” by review of the registered document.

By purchasing the Library Property, Post and Beam acquired fee simple title subject to the encumbrances registered on title. Post and Beam was not a party to the original sale of the Library Property to the Library Board and was not privy to the negotiations between the Library Board and Holdings. Post and Beam relied on the Registered Restrictive Covenant and was unaware of the Unregistered Restrictive Covenant at the time of purchase. There is no suggestion that its purchase of the Library Property was fraudulent. This makes Post and Beam a *bona fide* purchaser for value without notice.

As a *bona fide* purchaser for value without notice, Post and Beam had a right to rely on what was registered on the Library Property's title without further investigation. Consistent with the underlying equitable principles and ss. 159 and160 of the *Land Titles Act*, absent fraud or actual notice, the rights that Post and Beam acquired cannot be defeated by rectification that

arises from a transaction to which it was a stranger. As Epstein J. (as she then was) noted in *Durrani v. Augier*, 2000 CanLII 22410 (ON SC), 190 DLR (4th) 183 (Ont. S.C.), at para. 49, the court has no jurisdiction under s. 160 to interfere with a registered interest:

> It is significant that both sections dealing with the power of the court to rectify the register start with the words "subject to any estates or rights acquired by registration under this Act". These words relate back to the concept of indefeasibility of title and to the fundamental objectives of the land titles system discussed earlier. Their import is as follows. Where a bona fide purchaser for value succeeds in becoming a registered owner, the fact of registration is conclusive. Indefeasibility of title is a consequence or incident of that registration. Accordingly, the court does not have jurisdiction to rectify the register if to do so would interfere with the registered interest of a bona fide purchaser for value in the interest as registered.[6]

The court noted that rectification is available when a party has ***actual notice of an interest in land*** that varies from the interest which appears in the parcel register. Here, there was neither actual notice of benefitted lands, nor was there a finding that Post and Beam knew of the extent of the dominant tenement. The court went on to discuss actual notice in a practical context for prospective purchasers:

> The actual notice required to defeat a registered interest under the *Land Titles Act* therefore requires advertent knowledge, not simply a failure to make inquiries. Post and Beam was alleged to have actual notice that the benefitted lands were some unspecified lands owned by Wonderland. At its highest, this may have raised a suspicion that some portion of undescribed adjacent lands were the intended dominant tenement. This does not equate to actual knowledge.
>
> What Post and Beam did know was that the restrictive covenant was invalid. Post and Beam did not have a duty to inquire into why the instrument was invalid. Post and Beam had actual knowledge of the unenforceable restrictive covenant on the registry – why should it have to look any further? It was entitled to rely on the mirror and curtain principles of the *Land Titles Act*.[7]

The court went on to discuss the importance of the sufficiency of the register for transactions in land:

> The sufficiency of the register is critical to conveyancing in this province. The Law Society of Ontario has provided lawyers with practice guidelines about the electronic registration of title documents: *Practice Guidelines for Electronic Registration of Title Documents,* as approved by Convocation, June 28, 2002. The *Guidelines* make clear at p. 14 that, consistent with the principles of the land titles system, the purchaser's lawyer need not make further inquiries beyond the law statements to determine the accuracy of the statement:

[6] *Ibid.*, at 42-47

[7] *Ibid.*, at paras 53-54

> Lawyers need not look to nor request nor require evidence behind registered compliance with law statements, but rather should rely upon provisions of the *Land Titles Act* as to the sufficiency of title once certified. The entire TERS and Land Titles system is premised on the sufficiency of the register to establish title to real property.
>
> The approach taken by the motion judge, however, conflicts with the mirror and the curtain principles and undermines the sufficiency of the register to establish title. It raises questions: at what point should a prospective purchaser decide not to rely on the Land Titles Registry and inform a vendor that, if it had attempted to create an interest in land, it had failed? Is the burden on a prospective purchaser to advise the vendor and wait, prior to purchase, to see if the vendor does something? Or does the purchaser wait to see if either the vendor or the covenantee act to rectify post-purchase and, if they do, run the risk of rectification? This is exactly the scenario rejected by the Court of Appeal in *Sekretov* when it stated, referring to a purchaser buying lands burdened by a restrictive covenant wherein the covenantee and the benefitted lands were not identified: "[h]e is placed in a most precarious position if he must first breach the covenant and then wait in fear and trembling to see if he is to be sued."[8]

The Divisional Court also held that the motions judge had erred in law and principle in concluding that rectification does not impact the ***indefeasibility of the purchaser's title***. The issue for the court here was not simply ownership of the property but the quality of title. Sure, rectification would not impact Post and Beam's ownership, but it would also constitute an interference with rights acquired as a *bona fide* purchaser for value without notice. The Divisional Court took issue with the motion judge's reliance on the 2013 Ontario Court of Appeal case in *MacIsaac v Salo*, which had also dealt with the question of rectification – but based on a need to correct a description based on an incorrect survey Reference Plan:

> In her consideration of indefeasibility, the motion judge cited the decision of Winkler C.J.O. in *MacIsaac v. Salo*, 2013 ONCA 98, 114 OR (3d) 226. In so doing, she failed to appreciate the important differences between the Court of Appeal's decision in *MacIsaac* and the immediate case. In *MacIsaac*, the Court relied on s. 160 of the *Land Titles Act* to rectify a reference plan deposited with the registrar that did not accurately reflect the location of an access road. The Court emphasized that a reference plan does not independently create an interest in land (unlike a registered instrument) and is only a description of the boundaries of a parcel as they exist on the ground. Winkler C.J.O. explained that the distinction arises because of the exception to indefeasibility created by s. 140(2) of the *Land Titles Act*, which states that the description of registered land is not conclusive as to the boundaries or extent of the land. For these reasons, concerns about the quality and indefeasibility of title did not arise and s. 160 could be used to correct an admittedly inaccurate reference plan: *MacIsaac*, at paras. 36-49, 54-56.

[8] *Ibid.*, at paras 60-61

> By contrast, prospective purchasers evaluating a restrictive covenant registered on title may rely on the Land Titles Registry as stated in s. 78(4) of the *Act*. Prospective purchasers have no equivalent to a survey that can be used to independently evaluate the accuracy of the registered instrument or the existence of any unregistered instruments. Indeed, s. 72(1) of the *Land Titles Act*, which deals with unregistered instruments, provides that:
>
> > No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the records of the office kept for the entry of instruments received or are in course of entry.
>
> The motion judge held that Post and Beam should have known there was a risk the Registered Restrictive Covenant would be rectified. In reaching this conclusion, the motion judge overlooks that Ontario courts have never used s. 160 of the *Land Titles Act* to rectify a restrictive covenant by adding a description of the benefitting land after purchase by a third party where the owners of the benefitted lands were not a party to the later sale transaction, and there was no fraud or actual notice. It was unreasonable for the motion judge to fault Post and Beam for not foreseeing that a court would take the unprecedented action of rectifying an otherwise unenforceable restrictive covenant in these circumstances.[9]

In the result, the motions judge's order for rectification was set aside.

When we speak of the metaphorical "bundle of sticks" in reference to property rights we must be mindful that some of these rights and restrictions have a defined spatial extent that may need to be defined by a land surveyor, while other rights may apply to the entirety of a parcel. While such restrictions may not have spatial boundaries needing definition, they still represent a burden on title and must be defined appropriately within the creating document in order to continue to run with the land and bind subsequent purchasers. How the restrictive covenant without a defined dominant tenement ended up being registered in the first place in this scenario is unclear, but the Divisional Court focused on the integrity and reliability of the *Land Titles* parcel register as essential in providing notice to inform transactions in land. For land surveyors and lawyers involved in developing easements or restrictive covenants for their clients, the importance of ensuring that the lands benefitted and the lands burdened be both correctly defined, is clear.

Editors: Megan E. Mills and Izaak de Rijcke

[9] *Ibid.*, at paras 64-67

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

A discussion of boundaries of restrictive covenants and the decision in *MacIsaac v. Salo* is discussed in *Chapter 5:* ***Boundaries of Easements***.

FYI

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