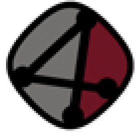

The Boundary Point

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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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Conflict and court proceedings in urban settings over relatively small strips of land are expensive and time consuming. Whatever the result after a court hearing, there is rarely a resolution of the underlying conflict between neighbours who must continue to live in close proximity after the verdict. Such was the situation in the case we discuss in this month's issue *Wiley v. Plank*,[1] in which the applicants sought to prevent a proposed renovation to the respondent's house by claiming ownership to a strip of land through adverse possession. The judge did not mince words in the court ruling and a costs endorsement when it came to the expression of annoyance at both parties in failing to "yield to the obvious."

While the decision does not provide anything new in terms of the development of the law of prescriptive easement claims, it does raise questions about the suitability of pursuing neighbourly disputes primarily through litigation. There is a role for lawyers to encourage settlement, but is there one for land surveyors as well? Is there any duty to de-escalate disputes and avoid having parties resort to the valuable resources of our courts? At the very least, this month's case emphasizes the potential value for surveyors and lawyers to be well versed in methods of conflict de-escalation in dealing with clients who may "dig in their heels" when there is a conflict with the neighbour.

Unneighbourly Disputes: What Duties Exist to De-escalate Boundary Conflicts?

Key Words: *prescriptive easement, reasonable necessity, professional ethics, settlement, conflict resolution*

In urban settings, where space may be at a premium, we often see conflict and court proceedings over very small strips of land. These proceedings are expensive, time consuming

[1] *Wiley v. Plank,* 2022 ONSC 4056 (CanLII), https://canlii.ca/t/jqd1l

and their resolution rarely solves the underlying conflict between neighbours who must continue to live in close proximity after the verdict. Such was the situation in the case we discuss in this month's issue *Wiley v Plank*,[2] in which the applicants sought to prevent a proposed renovation to the respondent's house by claiming ownership to a strip of land through adverse possession. The strip of land formed part of the driveway running between the two homes in Toronto, the applicant and their predecessors in title had used the land as part of their driveway for decades. Based on the nature of the use, an adverse possession claim (which would involve exclusive use of, and obtaining title to, the land) could not be made out, and late in the proceeding the applicant claimed a prescriptive easement interest instead. The respondent would not agree. Following a discussion of the concept of reasonable necessity for prescriptive easements and based on the evidence, the prescriptive easement claim was successful. That said, in the costs decision[3], the judge did not mince words when it came to expressing annoyance at both parties in failing "yield to the obvious".

The facts of this particular dispute were fairly simple. At its core, the issue was a question of whether the applicants had a claim to a portion of their neighbour's property based on a prescriptive easement. However, the underlying dispute was much larger and concerned an effort by the applicants to thwart a proposed renovation by the respondent. Beginning with the core issue before the courts, the facts were described by the court:

> The applicants live to the north of the respondent's house on the west side of the street. Looking at the houses from the street, the applicants' northern house is to the right of the respondent's house.
>
> The respondent's house consists of four rental units. She does not live there.
>
> The applicants' driveway is between the two houses. The applicants' driveway is not a mutual drive. The respondent's house has its own driveway to the south of her house.
>
> Looking at the pictures, there appears to be a single driveway that is eleven feet wide running between the houses. But actually, the applicants' driveway, at its narrowest, is not quite seven feet wide measured from their house to the boundary line between the properties. The remaining strip of driveway is about four feet wide running from the boundary line south to the respondent's house. The strip is paved like the applicants' driveway and is unobstructed. A car driving up the applicants' driveway would not see any reason to stick close to the right so as to stay within the northernmost seven feet on the applicants' land rather than using the full available eleven feet of driveway.
>
> The evidence of two prior owners and numerous neighbours is perfectly clear. The driveway was openly and continuously used as the driveway for the applicants' house throughout the relevant period. The applicants' predecessors used to back their cars into the driveway. That

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[2] *Ibid*

[3] *Wiley v. Plank*, 2022 ONSC 4462 (CanLII), https://canlii.ca/t/jr5mg

means that the driver's door opened on the north side of the driveway. To leave room to open the driver's door, the full width of the driveway was used for parking. That is, the cars were parked at least partly on the respondent's side of the boundary.[4]

An image of the two properties can be seen below in Figure 1, there are two large urban homes with a narrow driveway between them.

Figure 1: Street view of respondent property (to the left) and applicant property (to the right) with narrow driveway between.
© Google Maps Streetview. All rights reserved.

While there is a garage at the end of the end of the driveway, this was never used for cars. There was ample evidence from the applicants and their predecessors in title that the driveway was used for parking cars throughout the relevant period (in this case the period is 20 years leading up to 2003 when the property was brought into *Land Titles, ie*: from 1983-2003). For a finding of a prescriptive easement the applicants must show open and continuous used of the strip of land for 20 years prior to the lands being registered under the *Land Titles Act* and that that easement sought was reasonably necessary for the better enjoyment of the applicants' land.[5]

The respondent's evidence was that she only visited the property occasionally. She did not offer any evidence from tenants of the property during the relevant period to refute that of the applicants and their predecessors in title.

[4] *Supra,* note 1 at paras 9-13

[5] *Supra,* note 1 at para 7

The court also considered arguments regarding the principle of reasonable necessity in the context of a prescriptive easement claim – concluding that the burden is on the applicant to demonstrate reasonable necessity and also finding that in this case, that burden had been discharged. The court explained,

> In *Hunsinger v. Carter*, 2018 ONCA 656 (CanLII), the Court of Appeal found that reasonable necessity was made out on the following basis:
>
> > [16] The uncontradicted evidence was that large trucks have accessed the back of the appellant's property regularly over the entire time the appellant and his family have operated their business. ***The motion judge inferred that the trucks did not need to drive over the portion of the strip at the front half of the driveway but could stick to the appellant's side of the driveway until they got to the back half. Although this may be possible, it is clearly not as convenient as having access to the full driveway.*** One need only consider a large truck backing into the driveway, not straight backwards as before over the whole driveway, but now having to stick to the appellant's side at the front, then making a turn onto the entire strip at the back end. [Emphasis added.]
>
> By contrast, in *Vivekanandan v. Terzian*, 2020 ONCA 110 (CanLII) the Court of Appeal rejected a claim for an easement over a strip of driveway:
>
> > [16] In my view, the predecessors in title's evidence of historic use of the disputed driveway area falls short of establishing that it was continuous or permanent. Rather, it was tied to specific time-limited activities that by their nature are sporadic – children grow out of car seats and not every car trip involves grocery shopping or bringing things into the house. Moreover, it was clear that this use did not always require occupation of the disputed driveway area. ***While the predecessors in title always used their own part of the driveway, they did not always park over the disputed driveway area or park alongside the disputed driveway area and use it to exit their vehicles. As the photographs of the disputed driveway area reveal, the driveway was wide enough that the predecessors in title could park their cars on their own driveway without occupying the disputed driveway area.*** [Emphasis added.]
>
> Mr. Bussin submits with much logical force that the Court of Appeal's decision in *English v. Perras*, 2018 ONCA 649 (CanLII) provides an important gloss for considering which of the foregoing two cases best applies to the facts before me.
>
> In *English*, the Court of Appeal found that the only reason that the applicants needed to use the respondent's side of the driveway was due to the existence of a retaining wall on the applicants' own side. But the applicants adduced no evidence as to why that retaining wall was there. It was not clear whether it was actually retaining anything or if it might have been just decorative for example. The application judge assumed that the retaining wall was necessary. The Court of Appeal held that the judge had made an error in mis-applying the burden of proof:

> [52] Respectfully, the application judge engaged in impermissible speculation to reach her conclusion on this issue. In doing so, she reversed the onus of proof, requiring the Perrases to establish that the easement was not necessary, and that the wall could be taken down. While the onus may shift on the issue of acquiescence and permission, in the manner described in *Castles and Condos*, it does not shift on this issue. ***It was up to Mr. English and Ms. Perry to establish that the easement was reasonably necessary to the enjoyment of 371. The history of the retaining wall was important.*** [Emphasis added.][6]

Based on the continuous use of the driveway, the need for access to parked vehicles, a concession from the respondent regarding the safety of driving down the driveway without using the disputed strip, and a lack of evidence from the respondent, the court found the applicants successful and granted the claim to a prescriptive easement.

One should note though that the initial claim of the applicants was for title to the disputed strip based on adverse possession or, an *exclusive* use of the strip through a prescriptive easement (the judge noting that no such claim had been previously granted[7]) Only very late in the proceedings did the applicants modify the relief sought to include a claim by prescriptive easement. These claims were seen as aggressive tactics on part of the applicants and not viewed favourably by the judge when it came to the costs decision.

In the costs decision, Justice Myers went on at some lengths to discuss a feeling that the parties had used aggressive tactics in claiming title when it was clear it could not succeed. There was also a more generally discussion of how the parties had misdirected their dispute into this particular proceeding, and that it did not resolve the underlying issues:

> The outcome of the application and the obvious settlement was staring them all in the face. The applicants' rights were defined by the use of the strip of land by the applicants and their predecessors in title for nearly half a century – no more and no less.
>
> The dispute arose because the respondent wants to renovate her house. Instead of talking to each other about their respective concerns and interests in respect of the renovation, they lawyered-up and misdirected their dispute into this proceeding.
>
> The applicants overreached and so did the respondent. The settlement exchanges make clear that neither was in a mood for negotiating to get to the actual use of the strip that they both should have known and understood. They just went down the road of fighting this fight, dragging into court their neighbours and former neighbours, for no real purpose.

[6] *Supra,* note 1 at paras 27-30

[7] *Supra,* note 3 at para 6

> I do not view either side as successful. Neither got what they said they wanted. Both got the answer that was obvious and known to them had they looked at matters through an objective lens.[8]

In awarding no costs to either party to the dispute Justice Myers also went on to put the proceeding in the broader context of the dispute between the two neighbours over the proposed renovation and to comment on the manner in which court proceedings do so little to get at the true heart of conflicts between neighbours:

> In my view, neither side achieved anything of value in this proceeding. I resolved an artificial dispute that was a proxy for a different dispute relating to the respondent's renovation. It was possibly a muscle-flexing exercise; perhaps with a view to setting the tone for the next round of negotiations.
>
> Neighbours' fights rarely end in court. Even if one side succeeds, the court proceeding is merely a battle in a larger war that continues until armistice is declared and peace is achieved. That cannot happen as long as each party insists on having his or her own way instead of finding a neighbourly way to communicate, actually listen, and compromise to try to accommodate both sides' needs and wants.
>
> The applicants may have delayed the respondent's zoning hearings by a few months. It was an expensive adjournment. Otherwise the parties are right where they were the day before the application was commenced. The applicants use the full driveway for all purposes and the respondent wants to renovate in a manner that seems to have caused some concerns for the applicants.
>
> In my view, both sides should absorb their own costs. It is not fair nor reasonable to require the respondent to pay the applicants for responding to their overreaching claims. Neither should the applicants pay the respondent for responding in kind. All are a bit wiser and a somewhat poorer and they still need to speak to each other about the real issues. With any luck they will find a way to avoid a lifetime of anger and anxiety whenever they see each other in the years and decades to come. Court proceedings cannot help with that either.[9]

This reflection on the ongoing relationship between neighbours and the lack of finality that a court decision really brings to the relationship leads to a few further issues for professionals that might be called upon to assist in resolving such disputes. First, surveyors will often find themselves in the midst of tense emotions and conflict between neighbours and will need to ensure that they have the skills to deal with people in such situations. Further, it also raises the question of whether there might be any duty on the part of a land surveyor to aid in resolving such conflicts outside the courts. Certainly, for the lawyer there is a professional duty to pursue

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[8] *Supra,* note 3 at paras 10-13

[9] *Supra,* note 3 at paras 16-19

settlement (see below) but for the land surveyor, the governing statutes are somewhat more vague.

Surveyors are governed by the *Code of Ethics* and *Standards of Practice* that, while specific to the jurisdictions in which they practice, carry common themes of integrity, maintaining public trust and conducting a survey in a non- biased manner in their various provincial iterations. In Ontario, the *Code of Ethics* is enshrined in the *General Regulation* under the *Surveyors Act*[10] and requires members to "conduct his or her professional and private affairs in such a manner as to maintain public trust and confidence in the profession;"[11] and the *Standards of Practice*, appearing in the same regulation require that "every licensed member shall conduct every survey in an impartial manner."[12] These requirements of impartiality and maintaining public trust place a clear duty on the surveyor who may be retained by one party - in what really is a neighbour dispute – to de-escalate the dispute.

A surveyor's conclusion on boundary location should obviously be the same regardless of which party to the dispute has retained them. This is self-evident and elementary. But how often do we find ourselves being asked by a client to do produce a survey as a tool to "beat up" the neighbour? What if the client has already used municipal by-law enforcement in an attempt to exert change of a neighbour's behaviour? Clearly, the surveyor does not advocate on behalf of their client or dismiss relevant evidence of boundary location that may be lead to an unfavourable conclusion on boundary location for their client. But the risk of being enlisted in a client's agenda to bully a neighbour and be "weaponized" against the neighbour is real.

In a court setting, surveyors acting as expert witnesses who may stray into the area of advocacy on behalf of one of the parties to a dispute may find their evidence discounted by the court. The duty to be unbiased is a clear one, but is there a related further duty on the land surveyor to proactively encourage settlement between neighbours? Maybe, or maybe not.

The task of finding a resolution without engaging the courts may be better left to the lawyers involved – even in spite of their own professional duty to act as resolute advocates on behalf of their clients. Rules of professional conduct applicable to lawyers may seem a bit at odds on this objective. The nature of the lawyer's role as advocate can be found within the relevant governing rules of professional conduct in each jurisdiction. For example, in Ontario, section 5.1-1 of the *Rules of Professional Conduct* shows a balance between the duty towards a client and the duty towards the court or tribunal. It reads as follows:

[10] General, RRO 1990, Reg 1026, at sections 33 and 34, https://canlii.ca/t/55496

[11] *Ibid.* at section 33(2)(a)

[12] *Ibid.* at section 34(2)(l)

> When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

On the other hand, the rules also require the encouragement of settlement where appropriate. In Ontario the relevant section, 3.2-4 also speaks to discouraging useless legal proceedings.

> A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

The court in *Wiley* certainly did not mince words or hold back from voicing displeasure that the parties had not made reasonable offers to settle the dispute. Both parties sought more than was rightfully theirs, neither "succeeded" in the end and as such no costs were awarded.

In a perfect world, most property disputes could and would be resolved before reaching the courts. If there is a question as to spatial extent of rights, these may be answered by employing the services of a surveyor, or engaging lawyers to explain respective rights and hopefully arrive at a mutually agreeable solution that both sides can live with. Such a path forward avoids lengthy and expensive court processes that may bring finality to a legal question, but do not resolve underlying conflicts between neighbours, only leaving them (as Myers J. put it), "a little older and poorer." Such conflict resolution may seem outside the land surveyor's purview, but the skills to deal with and deescalate difficult conflict situations can form a critical tool in the surveyor's tool box. The time may be here to consider this as an important resource for surveyors in Canada.

Editors: Megan E. Mills and Izaak de Rijcke

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

Chapter 5:5 discusses the formation of easements by prescription. Adverse possession claims, though dismissed here, are discussed at length in Chapter 4. One can find a lengthy discussion of the land surveyor's professional ethics in Appendix 3.

FYI

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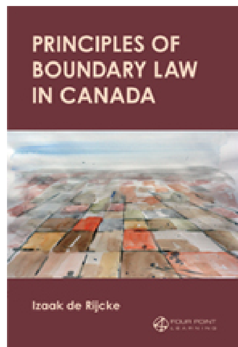
hours.[13] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

Principles of Boundary Law in Canada

Principles of Boundary Law in Canada is now in its THIRD printing! We took delivery of the latest inventory last month to meet demand for teaching and courses in Survey Law.



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. 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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[13] 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.