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.

In Ontario, "Orphan Alleyways" are mysterious strips of land which can take many different forms. In some instances, research will show that these strips are in fact "laid out" as a public lane on a registered plan of subdivision. In other instances, they exist as forgotten private easements used to access land which otherwise would be landlocked – but there is no recent record of the easement having been referred to in a deed. In fact other situations can exist in which there is an "assumed-to-exist" easement, but when considered in a court application, the assumption is not proven. Such was the case in *185 King Developments Inc. v. Tewson*.[1]

Also called "orphan laneways" and sometimes found in other provinces, they all share one feature in common: ownership and title seem to have been neglected or forgotten many decades ago, but there remains a physical entity or space on the ground. They also suffer from a lack of a consistent municipal response. Some municipalities appear eager to take title and jurisdiction while others have adopted a standing policy of just not wanting the responsibility that comes with ownership.

"Orphan Alleyways" in Ontario: Genealogical Research

Key Words*: easement, research, orphan alleyway, lane*

"Orphan Alleyways" are sometimes referred to as "orphan laneways" and can pose difficulties for both lawyers and land surveyors acting for owners of land that was subdivided many, many, decades ago. While not the only reported case addressing one such claimed alleyway, *185 King Developments Inc. v. Tewson*,[2] is a recent case involving property in downtown Toronto that

[1] *185 King Developments Inc. v. Tewson*, 2022 ONSC 6776 (CanLII), https://canlii.ca/t/jt9w2

[2] *Ibid.*

serves as a good example of how to approach the settlement of outstanding claims through a court proceeding.

The court gave a summary of the history of the strip of land:

> In 1824 Mr. Boulton bought a large block of land at the southwest corner of King Street East and George Street. Over time, he subdivided and sold lots identified respectively as 181, 183, and 185 King Street East.
>
> In 1833, John Boulton sold his first lot at 185 King Street East. The lot is located on the southwest corner of King Street East and George Street. It fronts on both King Street East (to the north) and George Street (to the east).
>
> When he created and sold the first lot, Mr. Boulton kept for himself the narrow strip of laneway at the south end of the lot. In doing so, he kept access for himself from George Street to his other lots to the west at 183 and 181 King Street East.
>
> But, because Mr. Boulton continued to own the laneway and the neighbouring lots, he did not need to create an easement or right-of-way over the laneway. It remained his land so he could use it as he pleased to access his remaining lots to the west. The new owner of 185 King Street East then had no deeded right to own or to use the laneway behind his land. It was kept by Mr. Boulton.
>
> Mr. Boulton sold 183 King Street East in 1846. When he sold that lot, the lot description included the southern strip of laneway across 183 King Street East. Mr. Boulton did not keep this piece of the laneway like he kept the laneway behind 185 King Street East.
>
> Instead, to protect his access to his remaining lot at 181 King Street East, when Mr. Boulton sold 183 King Street (including the laneway at the rear) he kept for himself a right to use the laneway over 183 to access 181 King Street East.
>
> In 1850, Mr. Boulton sold his last lot at 183 King Street East. There is no mention of a right of way or easement in the deed.
>
> In summary, from 1824 to 1833 Mr. Boulton owned the whole block. From 1933 to 1946, Mr. Boulton could use the laneway at the south end of 185 King Street East to access the rest of his block. In 1846, when he sold 183 King Street East, Mr. Boulton could access his remaining lot at 181 King Street East from George Street by using his laneway behind 185 and then using his registered easement over 183.
>
> After Mr. Boulton sold 181 King Street East, he no longer needed to access any of the three lots. But he still owned the small strip of laneway running behind 185 King Street from George Street to the boundary line with 183 King Street East. And registered title to that strip of laneway is still in Mr. Boulton's name to this day.
>
> Title documents evidencing subsequent dealings with all three sold lots refer in various ways to rights-of-way over the Boulton laneway. The wording varies. But later deeds for each of the three lots recognize dominant rights to an easement over the Boulton laneway.

There is no evidence of the creation of any easement by Mr. Boulton. There is no evidence of any agreement of the owner of the servient tenement to grant easements over the land in favour of the three others who claimed dominant rights. If any of the subsequent owners used the laneway, perhaps they simply had Mr. Boulton's permission to cross his land. Or perhaps they had easements orally or by prescription.

The respondents who oppose the application do not claim that they have acquired any rights over the Boulton laneway due to the existence of the alleged rights of way in the deeds of neighbours. Rather, they say that the rights of way preclude the applicant from having acquired adverse possession because, among other things, neighbours must have used the land under their rights of way.[3]

An illustration of the strip of land appears in Figure 1[4].

Figure 1 - Disputed strip at back of 181, 183 and 185 King St., East, Toronto, from George Street

A further depiction of the strip is available from Google Streetview® and appears in Figure 2[5].

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

[4] From: https://map.toronto.ca/maps/map.jsp?app=TorontoMaps_v2 All rights reserved.

[5] From: https://www.google.com/maps/ Image capture: September 2021. All rights reserved.

Figure 2: View of disputed strip from George Street

The summary provided by the court leaves no details on how the strip of land was treated upon administrative conversion from *Registry* to *LTCQ*; we can only conclude that it was left as a *Registry non-convert* with the Abstract Index showing Mr. Boulton as the last grantee in a deed.[6]

However, the court did acknowledge that all of the respondents named in the application are, in the main, the great-great-great-grandchildren of Mr. Boulton. The court continued:

> …the applicant hired a genealogist to identify and locate them so they could be given notice of this proceeding. However, some of the respondents seem to have misunderstood the purpose of the notice they received. They oppose the application as if they, as a group, have some residual right to share the property (or its monetary value). They do not have any such rights.
>
> The respondents were properly given notice to ensure that anyone with rights of ownership in the property had the opportunity to come forward and assert his or her claim. There is no evidence from any of the respondents that any of them has any right whatsoever to the land. While Mr. Boulton's will is known, none of the wills of his children, grandchildren, great-grandchildren, or great-great-grandchildren are in evidence. None of the respondents has proven that he or she has any legal interest in the land.
>
> Assuming that no one actually knew about the forgotten piece of laneway, it might have devolved through residuary devises in the various wills. But no one knows the identity of any residuary beneficiaries of Mr. Bourton's children, let alone his grandchild, great-

[6] Importantly, this is entirely different from showing Mr. Boulton's name as owner in the Parcel Register for this strip of land.

> grandchildren etc. Gifts could have been made to charity or to relatives by marriage, or to anyone.
>
> While it is not impossible that one or more respondents might have a claim to the land, the claim has to be proven. The land does not just belong to them as a group or individually because they trace roots to an owner 200 years ago.[7]

All of the respondents were self-represented and Toronto was not named as a respondent party. There was no basis for the municipality having an interest in the strip of land, despite it being referred to as a "lane" or "alley". The strip was simply not a public lane or a public alley.

However, when the court considered the objections from the lay respondents, it dismissed them all, concluding in a description of the outcome that, "This is not a close call. There is more than ample evidence to prove each element of the Mitzes' claim of possessory title and that their title arose long before the land was registered under the *Land Titles Act*."[8]

In a subsequent ruling on costs,[9] the court considered the liability and amount payable to the applicant for costs. After a short synopsis of the case which stated,

> The unusual fact about the case is that paper title to the subject piece of land remains in the name of the person who bought it in 1824. The original owner subdivided and sold off the rest of the block. But he never formally conveyed away the narrow laneway.
>
> The applicant proved that Mr. Mitz, his father, and their respective holding companies, had exclusively occupied the land for about 75 years. They exercised complete dominion over the land by using it to park their cars on a daily basis. They excluded neighbours and all others from the land with their cars and with a chain across the laneway for more than ten years prior to the title to the land being registered provisionally under the *Land Titles Act*.
>
> The applicant quite properly retained a genealogist to try to find the heirs of the original titled owner. The respondents are largely his great-great-great grandchildren. Unfortunately, they laboured under several misapprehensions about the civil litigation process.[10]

the Endorsement turned to the matter of costs. The applicant had incurred over $112,000.00 but was seeking just over $25,000.00 from the self-represented parties. As noted by the court,

> Like all civil litigation, this case was about money. The opposing respondents wanted the developer to pay them for great-great-great grandfather's laneway.[11]

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[7] *185 King Developments Inc. v. Tewson*, at paras. 3 to 6

[8] *Ibid.*, at para. 42

[9] *185 King Developments Inc. v. Tewson*, 2022 ONSC 6776 (CanLII), https://canlii.ca/t/jt9w2

[10] *Ibid.*, at paras 4 to 6

[11] *Ibid.*, at para 18

Moreover, their conduct was described further:

> As descendants of the original owner of the land, the respondents formed an expectation that they were entitled to compensation, i.e. money, from the developer. Matters of money do have a way to translate in peoples' heads into assertions of loftier principles. The opposing respondents' great-great-great grandfather was a prominent person in Canadian history. But our law knows of no general entitlement of descendants to compensation apart from individuals proving that they have an ownership interest in their progenitor's property. Absent a provable claim to title for individuals, there was no familial issue at play. But the opposing respondents decided that they had "rights that needed protection". So, their claim for money morphed into an assertion of family honour.
>
> The opposing respondents felt a heavy responsibility to make a "large corporation" building a "high rise development" pay them money. They chose to see a refusal as an affront. So they opposed this claim knowing that doing so would cause the applicant to spend money answering their opposition.[12]

Both decisions in 185 are short and easy to read. The question of research extending beyond title records and delving into genealogical history is not commonly encountered by lawyers or land surveyors. Most will leave it to a specialist with prior experience in this field.

For examples of other recent decisions and materials available in Toronto, please consider *Laneway (Bathurst & Richmond) Inc. v. City of Toronto*,[13] and the map of public laneways published by Toronto at: https://www.toronto.ca/wp-content/uploads/2021/08/8f40-CityPlanning-Map2PublicLanewaysFullExtent-scaled.jpg.

Editor: Izaak de Rijcke

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

A discussion of laneways and their status in terms of public or private can be found in easements in general can be found in *Chapter 6: Boundaries of Public Roads.* See especially pages 236 to 241.

[12] *Ibid.*, at paras 20 and 21

[13] *Laneway (Bathurst & Richmond) Inc. v. City of Toronto*, 2021 ONSC 1287 (CanLII), https://canlii.ca/t/jdfg4

FYI

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[14] 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.