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.

Municipalities have been increasingly motivated to impose restrictions on use and to define other obligations through a restrictive covenant that covers the same land as the easement. This is sometimes done in the same document creating the easement – or by the use of separate instruments.

In *Kelowna (City) v. 1004364 BC Ltd.*,[1] we consider a decision resulting from an attack on the validity of an easement which included restrictive covenants in the same document. Since restrictive covenants cannot be expressed as positive obligations, the court was asked to strike down the entire instrument by which the easement was created.

Challenging an Easement which Included Positive Restrictive Covenants

Key Words*: easement; right of way; restrictive covenant; extinction; language of grant*

Although *Kelowna (City) v. 1004364 BC Ltd.*[2] was decided in April, 2023, a further ruling on costs was released last month.[3] Shortly after the proceeding was started in 2021, the City of Kelowna had brought an application for an injunction to restrain the defendant from blocking public access over a boardwalk constructed along the waterfront of Okanagan Lake until the court had made a determination in this proceeding.[4] That injunction application was partially successful – but it was revisited in *City of Kelowna v. 1004364 BC Ltd*.[5]

[1] *Kelowna (City) v. 1004364 BC Ltd.*, 2023 BCSC 554 (CanLII), https://canlii.ca/t/jwlqm Herein, "*Kelowna v. 100*"

[2] *Ibid.*

[3] See *Kelowna (City) v. 1004364 BC Ltd.*, 2023 BCSC 1580 (CanLII), https://canlii.ca/t/k03gm

[4] *City of Kelowna v. 1004364 BC Ltd.*, 2021 BCSC 2097 (CanLII), https://canlii.ca/t/jjzrp

[5] *City of Kelowna v. 1004364 BC Ltd.*, 2021 BCSC 2529 (CanLII), https://canlii.ca/t/jlk97

Kelowna v. 100 is a fascinating case in how the struggle to strike down an easement that had been registered before 100 became owner of the servient lands and the intervening pandemic all militated to leave the easement vulnerable to being struck down. During the pandemic, outdoor dining patios were not being used, but as the public started to use the boardwalk again, the patio was found to interfere or encroach upon the easement which contained the boardwalk (in part).

An illustration of the site's configuration appears below from BC's LTSA mapping application:[6]

The boardwalk also appears in an aerial image[7] in part from GoogleEarth®:

[6] From: Parcel Map LTSA BC under Open Licence: https://www2.gov.bc.ca/gov/content?id=A519A56BC2BF44E4A008B33FCF527F61 All rights reserved.

[7] From https://www.google.com/maps All rights reserved.

As the court explained,

> On July 31, 2000, the Form C was registered as a charge against the title of the Lands, under No. KP68923 (the "Instrument"). On the same day, the surveyed Plan of Statutory Right of Way KAP67233 (the "Right of Way"), which formed Schedule B to the Instrument, was filed in the Land Title Office, along with the Plan of Consolidation KAP67232, which consolidated the Crown Grant of filled foreshore with Lot 3 to create the Lands.
>
> The key clauses (1.1, 2.1, 2.2 and 2.3) of the Instrument are as follows:
>
> > NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the sum of the One Dollar ($1.00) of lawful money of Canada, now paid by the Grantee to the Grantor (the receipt and sufficiency of which is hereby acknowledged by the Grantor), and in consideration, the Grantor doth hereby;
> >
> > 1.1 Grant, convey, confirm and transfer, in perpetuity, unto the Grantee, in common with the Grantor, the full, free and uninterrupted ingress or egress at all times hereinafter as the Grantee considers necessary to, though [*sic*], over and under that portion of the lands of the Grantor comprising 280 m^2 shown outlined in dark black on the Plan of statutory Right-of-Way deposited in the Kamloops Title Office under Plan KAP 67233, a reduced copy of which is attached as Scheduled "B" hereto (hereinafter called the Perpetual Right-of-Way) and, in common with the Grantor, for:
> >
> > a) the Grantee;
> > b) its officers, invitees, licensees, employees, servants, agents; and
> > c) to the extent permitted by the Grantee, every member of the public during daylight hours only.
> > d) At their will and pleasure, to enter, go, pass and repass upon and along the Perpetual Right-of-Way.
> >
> > . . .
> >
> > 2.1 THE GRANTOR HEREBY COVENANTS TO AND AGRESS [*sic*] WITH THE GRANTEE that the Grantor will not, nor permit any other person to erect, place, install or maintain any building, structure, mobile home, concrete driveway or patio, pipe, wire or other condition, over and under any portion of the Perpetual Right-of-Way so that in any way [*sic*] interferes with or damages or prevents access to the Perpetual Right-of-Way.
> >
> > 2.2 The Grantor shall at all times maintain and keep the Perpetual Right-of-Way in a state of good repair and kept free of refuse, reasonable wear and tear excepted, and shall replace the Perpetual Right-of-Way or portions thereof from time to time when necessary at the cost of the Grantor.

2.3 The Grantor agrees to maintain, at the sole cost of grantor, a 3.0 m wide public boardwalk within the Perpetual Right-of-Way. The Grantee acknowledges that the Grantor has prior to execution of this agreement, constructed a boardwalk partially over the perpetual right-of-way (approximately 1.5 m wide) with the remainder of the boardwalk located partially over the adjacent foreshore of Okanagan Lake. In the event that the width of the boardwalk accessible to the public is reduced to less than 3.0 m wide, the Grantor agrees to expand the boardwalk surface within the Perpetual Right-of-Way, at the Grantor's cost, to a minimum of 3.0 m wide.

The Instrument provides in cl. 3.1(a) that the grantor may temporarily interrupt the use and enjoyment of the Right of Way, so long as the temporary interruption does not materially or unreasonably impair the use of the Right of Way, except where the City has given its prior written consent to the grantor for constructing or renewing or enlarging sidewalks and walkways or for constructing, renewing or enlarging landscape areas through the Right of Way.

The Instrument provides in cl. 3.1(d) that, despite cl. 2.1, the grantor has the right to erect, maintain, repair and replace signage and security gates as the grantor requires to ensure that no members of the general public have access to the Right of Way from sundown to sunrise each day.

Clause 4.2 of the Instrument provides that the covenants contained therein are covenants running with the land.

Clause 4.5 of the Instrument provides that it shall enure to the benefit of and be binding on the parties' respective heirs, administrators, executors, successors and assigns.[8]

When the matter was argued in court, it appears that both sides agreed that clauses 2.2 and 2.3 contained positive covenants that do not run with the land. Accordingly, they do not bind the Hotel (the defendant, 100). However, the defendant Hotel argued that even after the removal of clauses 2.2 and 2.3, there remained a *positive covenant at the heart of the Instrument*, namely an obligation for the Hotel to maintain a boardwalk in the area defined in clause 1.1 (the "ROW Area"). The Hotel submitted the following in support of its argument:

a) The negotiation of the Instrument discussed the boardwalk extensively. During the negotiations, the City and R93 agreed to move the ROW Area to ensure it matched the area of the boardwalk.

b) The Instrument makes no sense if the boardwalk does not exist, because the parties did not mean for the public to have to clamber over the rocks that lie beneath it. There is no point in the Right of Way without the boardwalk.

c) Clause 2.1 makes no sense if the entire Instrument is not about a boardwalk rather than a defined area. R93 would have immediately been in contravention of cl. 2.1 if the

[8] *Kelowna (City) v. 1004364 BC Ltd.*, at paras. 21 to 26

> Instrument was truly about movement through an area, because cl. 2.1 prohibits the construction or maintenance of any improvement in the ROW Area.[9]

In contrast, Kelowna argued that, after the removal of clauses 2.2 and 2.3, *at the heart of the Instrument remained a statutory right of way, which runs with the land and binds the Owner*. The court explained the significance of a "statutory right of way" in these terms:

> A statutory right of way is a modified easement created pursuant to s. 218 of the *LTA*. The relevant portions of s. 218 read as follows:
>
> > **218** (1) A person may and is deemed always to have been able to create, by grant or otherwise in favour of
> >
> > a) the Crown or a Crown corporation or agency,
> >
> > b) a municipality, a regional district, the South Coast British Columbia Transportation Authority, a local trust committee under the *Islands Trust Act* or a local improvement district,
> >
> > . . .
> >
> > an easement, without a dominant tenement, to be known as a "statutory right of way" for any purpose necessary for the operation and maintenance of the grantee's undertaking, including a right to flood.
> >
> > (2) To the extent necessary to give effect to subsection (1), the rule requiring an easement to have a dominant and servient tenement is abrogated.
> >
> > . . .
> >
> > (3) Registration of an instrument granting or otherwise creating a statutory right of way
> >
> > a) constitutes a charge on the land in favour of the grantee, and
> >
> > b) confers on the grantee the right to use the land charged in accordance with the terms of the instrument, and the terms, conditions and covenants expressed in the instrument are binding on and take effect to the benefit of the grantor and grantee and their successors in title, unless a contrary intention appears.
>
> Statutory rights of way operate similarly to easements, with the most important difference being that an easement right of way must attach to the owner of a neighbouring property known as the dominant tenement. Instead of a dominant tenement, a statutory right of way provides a right over the servient tenement property to specified types of public entities.[10]

[9] From para. 42 in *Kelowna (City) v. 1004364 BC Ltd.*, *supra*, at footnote 1

[10] *Ibid.*, at paras. 45-46

In other words, a statutory easement is an exception to the common law test set out in *Re Ellenborough Park*[11] requiring that a dominant tenement exist for an easement to be valid. The court continued its analysis and explained the law:

> A positive covenant requires the covenantor to undertake a positive act or spend money. Unlike easements, statutory rights of way and restrictive covenants, positive covenants do not run with the land. This means that positive covenants registered on title bind only the original parties and not any successors in title.
>
> In *Parkinson v. Reid*, 1966 CanLII 4 (SCC), [1966] S.C.R. 162 at 167 [*Parkinson*], the Supreme Court of Canada cited the following passage from *Gale on Easements* with approval:
>
> > The rule in *Tulk v. Moxhay* does not extend to affirmative covenants requiring the expenditure of money or the doing of some act. Such covenants do not run with the land either at law or in equity. The doctrine only applies to covenants which are negative in substance though they may be positive in form.
>
> The Court of Appeal recently affirmed that the rule that positive covenants do not run with the land is still the law in British Columbia, and declined to recognize certain exceptions to that rule: *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2019 BCCA 144 [*Jameson House*] at paras. 3, 81–83.
>
> If an instrument contains positive covenants along with easements, statutory rights of way or restrictive covenants, then the positive covenants cease to have legal effect upon the transfer of title. Any valid easements, statutory rights of way or restrictive covenants will remain effective, as was the outcome in both *Jameson House* at paras. 96–97 and *Nordin v. Faridi* (1996), 17 B.C.L.R. (3d) 366, 1996 CanLII 3321 (C.A.) at para. 52.
>
> Where the court finds that an instrument contains only positive covenants, or that there is a positive covenant at the heart of the instrument, then the court may declare the entire instrument ineffective or remove it entirely from title. The Owner relies on two cases in which this was the outcome.[12]

The treatment of positive covenants had come up before in the British Columbia Court of Appeal. The court considered the decision in *Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd.*,[13] which dealt with a covenant between two neighbouring properties. "The covenant had three terms, the first requiring the covenantor to not use the property for any purpose other than the operation of a golf course and residence, the second requiring maintenance of the golf course, and the third requiring discounted golf rates for customers of

[11] *Re Ellenborough Park,* EWCA Civ 4, 3 All ER 667, Ch 131, 3 WLR 892

[12] *Supra*, footnote 1, at paras. 47 to 51. Some citations omitted.

[13] *Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5 (Herein "*Aquadel*")

the covenantee. The covenantor sought the removal of the entire covenant on the basis that it contained only positive covenants rather than restrictive ones."[14] The court explained:

> The Court of Appeal ruled that the entire instrument should be removed as it contained only positive covenants. The Court wrote at para. 4: "Properly construed the Agreement is a positive one, requiring the petitioner to maintain a portion of its lands as a golf course." The Court later elaborated:
>
> > [15] In my respectful view, although the learned judge stated the law correctly, he erred in applying it to the facts of this case, and in particular erred in the construction of the Agreement. The judge read the Agreement as containing three separate and severable covenants: (1) not to use the land for any purpose other than as a golf course; (2) to maintain the golf course to an acceptable standard; and (3) to give certain persons a preferential rate for use of the golf course. The judge said that although the second and third covenants imposed positive obligations on the covenantor, the first part of the Agreement was severable and was negative in substance.
> >
> > [16] With respect, I disagree on both counts. Although the first part of the Agreement uses negative language ("he will not use the Whitlam land for any purpose other than as a golf course"), the covenant is positive in substance. It requires Whitlam to use the property only as a golf course, with related facilities, and as the location for two residences.
> >
> > . . .
> >
> > [18] It was, moreover, an error to read the first paragraph in isolation from the next two paragraphs. The covenants to maintain a golf course on Whitlam's land, to keep it in repair, and to give preferential rates to certain golfers, are consistent with, and only with, Whitlam's obligation to use the land as a golf course. If the first paragraph were interpreted to mean that Whitlam did not have to use the lands as a golf course, and could allow it to return to wilderness, the remaining paragraphs of the Agreement would be meaningless and unenforceable. Whitlam could hardly maintain the golf course in a proper and acceptable manner and give preferential rates to certain golfers for its use if he failed to use the land as a golf course at all.
>
> The Owner argues that the present case has a "striking similarity" to *Aquadel*, and that the Court should interpret the Instrument here in a similar fashion. Referring to cls. 1.1, 2.1, 2.2 and 2.3 of the Instrument as Covenants One, Two, Three and Four, the Owner writes as follows in its closing submissions:
>
> > 118. Covenants One and Two when read in isolation may appear to be negative in nature. They are not. Reading the document as a whole, it becomes clear that the entire agreement is about access over a constructed boardwalk. This Is not and was

[14] *Ibid.*, at para. 70

> not intended to be a right to cross the ground beneath the boardwalk. That is a rock slope that does not meet up with the boardwalk to the north (akin to the staircase in *Parkinson*). If it is a right to cross the ground beneath the boardwalk, then the boardwalk is a "structure" that is being maintained that "would interfere with access to the Perpetual Right-of-Way" in violation of Covenants One and Two. It does not make sense that the very boardwalk that must be maintained under Covenants Three and Four violates Covenants One and Two. Reading the agreement as a whole, Covenants One and Two are meant to prevent obstruction of the boardwalk, which is precisely what the City is arguing. The gist of the City's complain is that the locked gate blocks the public from using the boardwalk. The City is complaining about the gate on the boardwalk being locked.

In my view there are several flaws with the Owner's propositions.

First, what the Owner refers to as Covenant One in the above passage is not a covenant at all, but rather a statutory right of way. A restrictive covenant is a private agreement, usually in a deed or lease, that restricts the use of occupancy of real property, for instance by specifying lot sizes, building lines, architectural styles, and the uses to which property may be put: *Black's Law Dictionary*. In comparison, an easement grants a specific right to use the servient tenement to the dominant tenement holder, or to a specified public entity in the case of a statutory right of way. While an easement or statutory right of way will restrict the servient tenement holder's use of their property to the extent that they must allow the right to be exercised, they are under no express obligations with respect to their property.

The Supreme Court of Canada wrote as follows in *Parkinson* at 167: "An obligation on the owner of the servient tenement to perform work on it would be inconsistent with the nature of an easement which as regards the servient owner is always negative, the obligation on him being either to suffer or not to do something." By definition, an easement or statutory right of way is a right granted to a third party that cannot impose positive covenants. It may impose restrictions on the use of the servient tenement by necessary implication, but it cannot impose positive obligations.

Clause 1.1 cannot be characterized as a covenant, only a statutory right of way. By its plain words, it grants a right of way to the City and the public. It does not expressly impose any active obligations to do or not do anything with respect to the Lands as a restrictive covenant would, and it cannot do so by implication.

This is a critical difference from the first covenant in *Aquadel*, which the Owner says is analogous to cl. 1.1. The *Aquadel* covenant is without question a covenant: it restricts the types of uses to which the land may be put. It is not fair to say that this clause is strikingly similar to the cl. 1.1 easement, which operates differently by its plain wording and by its nature as a legal interest.

Second, the Owner does not account for the construction of the Instrument as a whole in its statement that "[i]t does not make sense that the very boardwalk that must be maintained under Covenants Three and Four violates Covenants One and Two."

Underlying the Owner's statement is the key interpretive question raised by the Owner's arguments: is the Right of Way over the boardwalk or is it over the land on which the boardwalk is constructed with acknowledgement of and accommodation for the existence of a boardwalk? The Owner argues that it is the former and that imposes a positive obligation to maintain the boardwalk. The Owner says the result is that the Instrument does not run with the land.

The parties agree and I have already determined that cls. 2.2 and 2.3 are positive covenants that do not bind the Owner.

I do not agree with the Owner's statement that cls. 1.1 and 2.1 prohibit the construction of any structure in the ROW Area.

Clause 1.1 does not prohibit the Owner from building or having anything in the ROW Area. It gives the City and the public the right to move across the ROW Area, which is defined in the map attached as Schedule "B" to the Instrument. The boardwalk does not interfere with this right, but rather enhances it.

The same can be said of clause 2.1. In argument, the Hotel stressed that cl. 2.1 binds the Owner to not allow anyone to erect, place, install or maintain any structure on the ROW Area. This interpretation ignores the final words of cl. 2.1, which continue: "that in any way interferes with or damages or prevents access to the Perpetual Right-of-Way". This restates the common-law principle already implicit in clause 1.1: the Hotel is not prohibited from building anything at all, but rather from building anything that would interfere with the right of way. The boardwalk does not interfere with the right of way.

It is my conclusion that the Right of Way is over the land, not the boardwalk and as a result I do not find that cls. 1.1 and 2.1 and cls. 2.2 and 2.3 contradict one another. The Owner stressed in argument that the boardwalk featured prominently in the negotiation of the Instrument and that the ROW Area was selected to match the location of the boardwalk. The Owner said that these factors mean that the Court should interpret the Right of Way as lying over the boardwalk rather than the ROW Area. In my opinion, cls. 1.1 and 2.1 of the Instrument are clear that the Right of Way is over the ROW Area, not the boardwalk structure.

The Owner says that the Instrument "makes no sense" without the boardwalk as the absence of the boardwalk would leave "the public to have to clamber over the rocks that lie beneath it". The City was and still is working to establish a connected path network along the shores of Okanagan Lake and other areas within the city. Obviously, the Instrument was created with the existence of the boardwalk in mind. However, without the boardwalk, the Instrument would still provide the public with the right to access and transit the ROW Area. That right would be very different over undeveloped land, but it would exist nonetheless. The

> City's level of success in accomplishing its goal does not colour the interpretation of the Instrument.
>
> This part of the Owner's argument seemed to suggest that the Right of Way had to run either over the land or over the boardwalk. However, these options are not mutually exclusive. Clause 1.1 provides the right to move to, through, over and under the ROW Area, which would allow movement on both a boardwalk and the bare land.[15]

At this point, readers might wonder what the difference was between the location of the boardwalk and the location of the easement. They were not the same. The Hotel used this fact to further argue that the easement therefore failed. The court disagreed, concluding,

> The Right of Way lies over the ROW Area, not over the structure of the boardwalk. I made this finding as a matter of interpretation in light of the surrounding circumstances known to the parties at the time of the negotiation of the Instrument. The parties knew of and accounted for the boardwalk when drafting the agreement. It was natural for the City to wish for the ROW Area to align with the area of the boardwalk given its presence so that the public could use it. However, the Instrument expressly defines the Right of Way to correspond with the ROW Area rather than the boardwalk. It accounts for the existence of the boardwalk outside of cl. 1.1, which grants the Right of Way. While cl. 2.2 implicitly and cl. 2.3 expressly refer to the existence of the boardwalk, they do not invalidate or otherwise impact the right of way granted in cl.1.1. With the City's concession that these clauses do not bind the Owner as a subsequent owner, there is no obligation on the Owner to maintain the boardwalk.
>
> While the boardwalk may help the City achieve its goal of creating an interconnected path network, that does not lead to the conclusion that the Right of Way must lie over the boardwalk contrary to its express language. While its presence enhances the access, the Instrument does not require that presence.
>
> The validity of the Instrument is at issue in this proceeding, not its effectiveness in accomplishing the City's goal of an integrated path network. There is a difference between these two issues. The Right of Way is effective over the ROW Area rather than the boardwalk regardless of how much the existence of boardwalk helps the City achieve its goals.
>
> There is no positive covenant or obligation for the Owner to maintain the boardwalk within the area of the statutory right of way. An easement or statutory right of way cannot impose positive obligations. It is settled law that the servient tenement holder has no obligation to maintain a right of way.

[15] *Ibid.*, at paras. 71 to 86

> The Owner's claim for a declaration that the Instrument is invalid and unenforceable and for an order that its registration be cancelled is dismissed.[16]

The law applied in *Kelowna v. 100*, including the finding of a statutory easement, applies in most common law jurisdictions in Canada, but with some attention required to specific legislation. Readers are recommended to consider the entire decision, as well as the more recent comments from the court found in the costs judgment.[17]

As land surveyors we may have concerns when the boundaries of an easement or right of way do not align with the spatial extent of the physical means by which the easement can be enjoyed. In this case the physical means was the boardwalk, but it could potentially be any physical means, such as a pathway, portage, or staircase. *Kelowna v.* 100 is a helpful resource to consider when preparing a survey for an easement that is meant to align with a purpose-built access structure – such as a boardwalk.

Editors: Izaak de Rijcke

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

Easements and rights of way are discussed in *Chapter 5: Boundaries of Easements,* and easements by express grant in particular are discussed at section *5.5: How Easements are Formed.*

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[16] *Ibid.*, at paras. 106 to 110

[17] *Kelowna (City) v. 1004364 BC Ltd.*, 2023 BCSC 1580 (CanLII), https://canlii.ca/t/k03gm