



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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When overlapping rights as a result of an easement lead to disputes, owners may forget that the strict language in an easement document may not be the only source for defining the nature of those rights. Easements continue as a fertile area for litigation; if expectations are unmet, or one is seen to “overreach” or encroach, confrontations can be quick to escalate. But rather than just look only at the language in the easement document, courts will also consider the physical attributes of the property, the easement’s purpose in order to consider ancillary rights that exist and are necessary to the use and enjoyment of an easement. Such was the case in *Armstrong v District of North Saanich*.

Ancillary Rights and Easements: What is Necessary for Use and Enjoyment?

Key Words: *easements; ancillary rights; encroachment; rectification*

Easements continue as a fertile area for litigation; neighbours have overlapping rights and interaction is inevitable. Most often this does not pose a problem, but if expectations are unmet, or one is seen to “overreach” or encroach, confrontations can be quick to escalate.

Such was the case in *Armstrong v District of North Saanich*.¹ Physical access to the waterfront necessitated the construction of stairs over an easement that crossed the servient owner’s land. The staircase was substantial. The court gave, as an overview, the following:

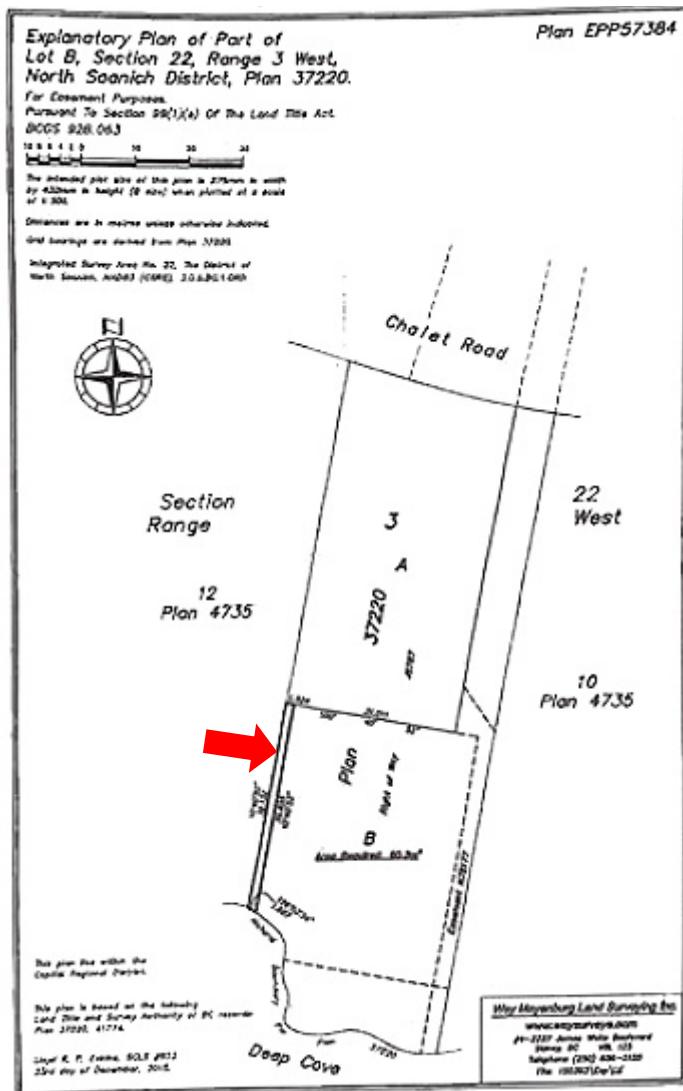
There are two separate but related petitions before the Court, both of which concern stairs built on an easement that facilitates access to the waterfront of Saanich inlet in the District of North Saanich. The stairs were built without a permit, but the District of Saanich subsequently issued a permit confirming that they met all environmental and regulatory requirements and were therefore in compliance with the applicable regulations.

¹ *Armstrong v District of North Saanich*, 2024 BCSC 1844 (CanLII), <https://canlii.ca/t/k76fh>

James Grier and Mary Jean Alger are the beneficial owners of the easement and arranged for construction of the stairs. They seek a declaration that the easement included the right to build the stairs.

The easement is located on the property of their neighbours, Robert Armstrong and Margaret Latham, who are opposed to the stairs. Mr. Armstrong and Ms. Latham have brought a petition for judicial review, seeking to set aside the decision of the District of Saanich to process and issue permits for the stairs. They are also asking the Court for an order that the stairs be removed.²

There was an “Explanatory Plan”³ attached to the decision and it is reproduced below.



The court continued in explaining the facts:

...The easement plan registered in the land title office describes the 11416 Chalet Road property (belonging to the Grier petitioners) as “Lot A”, and the 11410 Chalet Road property (belonging to the Armstrong respondents) as “Lot B”. Lot A is the dominant tenement and Lot B is the servient tenement in relation to the easement.

Lot B is waterfront property that borders on the beach in an area referred to as Deep Cove. Lot A is directly north of lot B and is not waterfront, but the existing easement grants the owners and occupiers of Lot A the right to travel over an identified strip of Lot B that extends from the southern property line of Lot A to the end of the southern property line of Lot B where crown land begins and where the beach is located.

The previous owner of Lot B was a woman named Wanda Hull, who was a friend of the Grier petitioners. She allowed them to access the beach by means of a different path and staircase on her property that were outside the area of the easement.

² *Ibid.*, at paras 1-3

³ *Ibid.*, at para 22 All rights reserved.

Dr. Grier's affidavit sets out the fact that the purpose of the easement was so that after Ms. Hull no longer owned lot B, Ms. Alger and Dr. Grier would continue to be able to access the beach, albeit in a different location than their previous access. Ms. Hull's lawyers drafted the terms of the easement and she charged Ms. Alger and Dr. Grier \$1.00 for the easement.

The relevant portions of the easement itself read as follows:

Whereas:

...

C. The Parties have agreed that the Grantor shall grant to the Grantee an easement for access over that part of Lot B shown on Reference Plan EPP57384 a copy of which is attached hereto...

Grant of Easement for Access:

The Grantor hereby grants in perpetuity to Grantee, and to the owners and occupiers from time to time of the Lot A, and their servants, agents and invitees, the right at all times to enter on and travel over that part of Lot B, section 22 Range 3 West, North Saanich District, Plan 37220 marked on Reference Plan EPP57384 attached hereto, for the benefit of Lot A, Section 22, Range 3 West, North Saanich District, Plan 37220, for the purpose of access to and from Lot A, on foot.[emphasis added]⁴

The red arrow on the plan points to the easement from Lot A over Lot B to Deep Cove. The plan also states that it is based on information from the Land Titles and Survey Authority of BC (LTSA) which, in turn, has a mapping application⁵ from which the location can be seen:



⁴ *Ibid.*, at paras 17-21

⁵ From: <https://parcelmapbc.ltsa.ca/pmsspub/> All rights reserved. The red arrow points to the easement.

The court explained the legal framework when faced with this kind of problem:

Easements are to be interpreted as contractual documents. The Court must determine the intent of the parties by reading the contract as a whole and giving the words used their ordinary and grammatical meaning. Surrounding circumstances will be considered, but should not “overwhelm” the words of the agreement. The wording of the instrument governs issues of interpretation unless there is an ambiguity, or the surrounding circumstances demonstrate that the parties could not have intended a particular use or interpretation (*Tessaro v. Langlois*, 2019 BCCA 95 at para. 19; *Robb v. Walker*, 2015 BCCA 117 at para. 31; and *Fallowfield v. Bourgault*, 2003 CanLii 4266 (ONCA) at para. 10).

Evidence of the surrounding circumstances is generally limited to objective background facts that were either known by the parties, or reasonably ought to have been known by the parties at or before the easement or contract was entered into. (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at para 58 and *Murphy v. Huber Estate*, 2021 BCSC 1334 at paras. 11-14, *aff’d* 2022 BCCA 353).

Easements do not give the dominant tenant exclusive or unrestricted use of a piece of land. The grant of an easement gives rise to “two sets of rights that co-exist over the easement property.” The property owner may assert his or her remaining rights over the easement to the extent that they do not derogate from or interfere with the rights granted under the easement. What actions by the holder of an easement constitute substantial interference with a property owner’s residual rights depends on the circumstances (*Lotzkar v. The Owners, Strata Plan BCS2715*, 2012 BCSC 1500 at paras. 35-40, 44).

Ancillary rights that are not expressly set out in an easement may arise. The grant of an easement is *prima facie* also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment (*Kasch v. Goyan*, 1993 CanLii 2291 (B.C.C.A.) at paras. 9-10 and *Fallowfield* at para. 11).

Whether an easement gives rise to an ancillary right that is reasonably necessary depends on a consideration of all the relevant circumstances. (*Kasch v. Goyan*, at para. 11). The right must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable (*Fallowfield*, at paras. 11 & 23).

The issue of ancillary rights can be approached in two stages. The first task is to interpret the wording of the grant in the context that existed at the time it was granted. The next question is “whether there are any ancillary rights, not included in the wording of the granted easement, that are reasonably necessary for the respondents to be able to exercise their use of the easement (*Fallowfield*, at para. 19).⁶

After explaining this legal framework, the court turned to a careful consideration of the circumstances on the ground near the shore and how, due to a steep drop in the topography, the easement, as granted, could not be realistically enjoyed if a staircase was not permitted to

⁶ *Armstrong v District of North Saanich*, at para 32-37 [Emphasis added]

be installed and remain. An image⁷ of the waterfront appears below and underscores the challenges of this terrain for a pedestrian:



The court continued with its analysis, leading to the conclusion that the continued existence of the stairs is an ancillary right that attaches to the easement and is reasonably necessary to its exercise and enjoyment. It explained:

What was the purpose of the easement and how should it be interpreted?

I am satisfied that the clear purpose of the easement was to provide a land corridor from Lot A to the beach and the waterfront below Lot B. I base that finding on the wording of the easement, the surrounding circumstances, and the location of the easement as depicted on the diagram.

The wording of the easement grants “access over that part of Lot B” identified in the diagram “for the purpose of access to and from Lot A on foot.” As the diagram depicts, the easement is a narrow strip of land extending to the waterfront below Lot B. The only place to travel “over” Lot B to get to is the waterfront and beach area below Lot B. Similarly, the only location that could be accessed by traveling over the easement “to and from Lot A” is the waterfront area. No other purpose makes sense.

The Armstrong respondents argue that the easement says nothing about beach access, and its purpose is to provide access “to and from Lot A” not the beach. In my view, that narrow argument ignores the fact that the beach area is the only place to go when travelling “to and from Lot A.” This would have been obvious to the grantor and grantee at the time of the easement.

⁷ From <https://www.google.com/maps> All rights reserved.

The surrounding circumstances are equally clear as to the purpose of the easement. Ms. Hull and the Grier petitioners were good friends. She had been allowing them to pass over other portions of her property to access the waterfront. There would be no reason to grant the easement, other than to ensure that access to the waterfront from Lot A over Lot B would become a permanent arrangement even after Ms. Hull no longer controlled the property and was no longer in a position to grant permission.

The Armstrong respondents argue that if beach access had been the intention of the grantor of the easement, then one might expect that to arise more clearly from the terms of the easement as it did in Huber Estate. In that case the easement included a 38 foot wide section of the grantor's property adjacent to the lake. However, in Huber Estate, the beach area directly adjacent to the high-water mark of the lake was private property. In this case, the beach area below Lot B is not private property, so there would have been no necessity to include a similarly wide portion of Lot B in the easement in order for the easement owners to enjoy the beach.

My conclusion that the purpose of the easement was to allow access to the beach and waterfront area does not mean there was a right to build stairs on the easement. There is clearly no express right to build any structure within the easement. If the right to build stairs was authorized at all, it can only be as an ancillary right.

Is the staircase necessary for the use and enjoyment of the easement?

Based on all of the available evidence, I am satisfied that the right to put up wooden stairs is necessary for the use and enjoyment of the easement to fulfill its purpose of providing access to and from the beach area in Deep Cove.

The basis on which I arrive at that conclusion is a factual conclusion that the steepness of the slope where the easement is located renders it unsafe to pass over the easement on foot without stairs, inviting potential injury, and making it practically impossible to access the waterfront as intended.

The steepness of the slope is evident from a number of sources. The affidavit of Mr. Armstrong acknowledges that the topography of his property is that it slopes down toward Saanich inlet "with a steep slope along the coastline."

There are also two engineer's reports and an arborist's report that address the steepness of the property. An engineer's report obtained by Mr. Armstrong shows that the elevation change from the coastline to the north portion of his property was 18 metres (29 metres if you include the driveway to Chalet road). Another engineer's report (obtained by the Grier petitioners to support their permit application) states that the upper portion of the easement has a slope of 7 degrees but the lower portion has "a steep slope of over 20 degrees." The arborist's report states that the slope above the natural boundary near the shoreline "steepens to between 31% and near-vertical."

I have reviewed all of the photos that are available of the stairs and the slope that they pass over. While in places the slope is relatively gentle, it is apparent than in other places it is very steep. The easement is also very narrow, such that the option of "zig-zagging" down

the easement area does not exist. I would describe the land underneath the stairs as very rough, with uneven ground, vegetation, rocks and dirt. I have no hesitation concluding it would be a safety risk to pass over the easement area in its raw state, particularly though not exclusively in the wet conditions that are so common in British Columbia.

In essence, I accept the evidence that in its unimproved state, the land within the easement area could not be safely used by anyone on foot. The stairs are not merely “convenient.” They are necessary to travel over the easement area safely to go to and from the waterfront and Lot A. This is not a case like *Englehart v. Holt*, 2014 BCSC 1969 at para. 134-135, where no evidence was tendered to demonstrate necessity.

While it is true, as the Armstrong respondents point out, that the entire easement area is not steep, the stairs in question are built in three distinct sections and cover only those steep areas that would be otherwise difficult or impossible to travel over. Based on the photos in evidence, the small logs that provide additional traction are not in the same location as the stairs, and cover areas of the path that can be travelled over on foot without the aid of stairs. The fact that parts of the path can be travelled in an unimproved state, or with the aid of small logs, does not detract from the necessity of stairs in other areas.⁸

Readers will appreciate that a simple reading of a grant of easement document may not set out all of the rights of a dominant tenement owner. So too, land surveyors may need to consider the spatial extent of ancillary rights. In other words, an “encroachment” onto or into a defined easement area may deserve special consideration. Interestingly, the court made no reference to the appellate decision in *Weidelich v. de Koning*.⁹ *Weidelich* was a corollary of *Armstrong* in that it considered an encroachment by the *servient* tenement owner into the easement, and was the subject of review in [The Boundary Point 2\(11\)](#).

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

Easements are discussed in *Chapter 5: Boundaries of Easements*.

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

⁸ *Armstrong v District of North Saanich*, at para 38-50

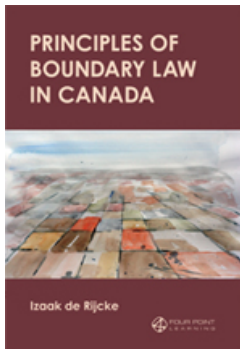
⁹ *Weidelich v. de Koning*, 2014 ONCA 736 (CanLII), <https://canlii.ca/t/gf30c>

hours.¹⁰ 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 2*

Survey Law 2 builds on *Survey Law 1* with a special emphasis on evaluation of evidence and special circumstances encountered in problematic and natural boundaries. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting January 8, 2025. For more information, consult the [syllabus](#). Please go to Four Point Learning to [register](#).

Principles of Boundary Law in Canada



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 need 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.)



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¹⁰ 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.