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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The last several issues of *The Boundary Point* have dealt with decisions in which an encroachment was discovered to exist over a property line. These decisions demonstrate that the construction of a building or other permanent improvement over the boundary is generally permitted to remain upon payment of compensation but only after a finding has been made that the owner had an "honest belief" that the land built upon was the owner's land. But what if the rightful owners raise a defence of negligence in the formation of that belief – and therefore is not "honest"?

Cases from Canadian courts based on a statutory remedy found in some version of a *Law of Property Act*, seem to be increasing and – it has nothing to do with adverse possession. Yet, it can be as destabilizing and disruptive to security of tenure as adverse possession might be. In this issue we consider another such case from the Court of Appeal of Manitoba.

"Honest Belief" and the Test for a Court-ordered Easement to Accommodate an Encroachment

Key Words: *honest belief, mistake, encroachment*

As noted, the last several issues of *The Boundary Point* have dealt with decisions in which an encroachment was discovered to exist over a property line. The frequency of these kinds of disputes appear to be increasing. A court-ordered easement or a transfer of title operates much like a private encroachment. When can a trespasser expect a court based solution – even when a land survey had been involved?

The answer does not appear to be straight forward. Although most Canadian common law provinces have enacted legislation to give a court jurisdiction to order a remedy when an innocent mistake has occurred, not all legislation uses the same test and not all statutes give a

court the same remedy. It is, therefore, encouraging when an appellate decision appears that compares the different test that may apply and reviews the last decades of case law.

In *634 Broadway Ave Ltd. v. Par-Ket/Vending Inc.*,[1] the Court of Appeal of Manitoba considered a structure built by Par-Ket/Vending Inc. on land owned by 634 Broadway Ave Ltd. The structure itself was the above-ground portion of a retaining wall at the base of each fire escape staircase, which encroached up to four inches, and the underground footings of the retaining wall, which encroached approximately six inches onto Par-Ket's property. The entire area of the encroachment was between about 10 and 14 square feet.

The Court gave a synopsis of the facts:

> Par-Ket relies on evidence that it repeatedly raised concerns with 634 that the renovation work being completed by 634's contractors would encroach on its property. Par-Ket would not consent to the encroachment and was assured there would be no encroachment.
>
> Par-Ket submits that the test to grant an easement requires 634 to prove, as a threshold issue, that it had an "honest belief", at the time of the renovation work that it was building on its own land. Instead, Par-Ket submits 634 was negligent in forming its belief that led to the encroachment. Accordingly, Par-Ket asks this Court to allow the appeal and order that 634 be required to remove the encroachments from its property or alternatively, 634 be required to pay a higher compensation.
>
> 634 submits that it held an honest belief that the renovation work would not encroach on Par-Ket's property based on construction plans. In addition, it had entered into a lease agreement with Par-Ket to permit some of the construction equipment and workers to access the work area using Par-Ket's property.[2]

The Court below "allowed the easement for the life of the building and ordered that 634 pay Par-Ket the yearly sum of $1,000, due and payable on January 15 of each year, indexed at 1.5% until such time as the encroachments are removed. The application judge also granted Par-Ket compensation of $7,000 payable in respect of the encroachment that existed since 2015. 634 was also ordered to pay costs to Par-Ket in the amount of $2,000."[3]

Par-Ket appealed. The two issues of relevance to readers were:

1. The application judge erred in law by failing to identify and apply the correct legal test; and,
2. The application judge misapprehended the evidence that demonstrated 634 was negligent regarding the property lines between the two properties.

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[1] *634 Broadway Ave Ltd v. Par-Ket/Vending Inc.*, 2024 MBCA 24 (CanLII), https://canlii.ca/t/k3jcg

[2] *Ibid.*, at paras 3 to 5

[3] *Ibid.*, at para 7

On the first issue, Par-Ket argued that:

> …the application judge failed to apply the test articulated in *Howarth v. Farguson*, 2014 MBQB 103 [*Howarth* QB], aff'd in part, 2015 MBCA 21 [*Howarth* CA]. Specifically, Par-Ket submits that, to grant an easement, the Court must find, as a threshold issue, that 634 had an "honest belief" that it was constructing the renovation work on its own property and was not negligent in forming such belief.

Of note is the wording found in section 28 of the *Law of Property Act*,[4] which states,

> **Encroachments on adjoining land**
>
> 28 Where, upon the survey of a parcel of land being made, it is found that a building thereon encroaches upon adjoining land, the Court of King's Bench may, in its discretion,
>
> a) declare that the owner of the building has an easement upon the land so encroached upon during the life of the building upon making such compensation therefor as the court may determine; or
>
> b) vest title to the land so encroached upon in the owner of the building upon payment of the value thereof as determined by the court; or
>
> c) order the owner of the building to remove the encroachment.

The submissions made by Par-Ket were summarized as,

> Par-Ket relies on *Howarth* QB as authority for the proposition that, in order to obtain relief under s 28 of the *Act*, the party seeking the easement "must have held an honest belief that when they built the addition, they were doing so on their own property" (at para 13). In *Howarth* QB, Menzies J pointed out that the purpose of s 28 of the *Act* is to grant the court the ability to adjudicate an equitable resolution to boundary disputes where an encroachment is found to exist. At para 10, he quotes *Welz v. Bady*, 1948 CanLII 240 at 379 (MBCA):
>
> . . .
>
> The principle of the Act is one of equity and justice. The owner shall not be able to take advantage of another's mistake, enuring to the owner's benefit, without compensation by the owner to the mistaken party to extent of the benefit which the owner receives in the enhanced value of his property. Or in the alternative, if the other party takes over the property, the owner shall be put in as favourable a position, as nearly as possible, as if the mistake had not occurred; that is, he should receive the value before the improvements and generally he should receive payment for use in the meantime by the mistaken party.
>
> . . .

[4] *Law of Property Act*, CCSM c L90

Justice Menzies also referenced the Supreme Court of British Columbia decision of *Vineberg v. Rerick*, 1995 CanLII 3363 at 20 (BCSC) [*Vineberg*], in which the Court outlined its task in adjudicating the balance of convenience and the factors to take into account. Justice Menzies set out the three factors (the *Vineberg* factors) as follows (*Howarth* QB at para 12, citing *Vineberg* at 20):

. . .

1) The comprehension of the property lines: Were the parties [cognizant] of the correct property line before the encroachment became an issue? There are three degrees of knowledge: honest belief, negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.

2) The nature of the encroachment: Was the encroachment a lasting improvement? What is the effort and cost involved in moving the improvement? What is the effect on the properties in question? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more these considerations will be weighed in favour of the petitioner.

3) The size of the encroachment: How does the encroachment affect the properties, in terms of both their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.

Justice Menzies concluded (*Howarth* QB at para 13):

> In order to obtain relief by way of an encroachment, the respondents must have held an honest belief that when they built the addition, they were doing so on their own property. See: ***Chandler v. Gibson*** (1901) 2 O. L. R. 442 (C. A.); ***Parent v. Latimer*** (1910) 17 O. W. N. 210 (D. C.), affirmed (1910) 2 O. W. N. 1159, 19 O. W. R. 461 (C. A.); ***Hrynyk v. Kaprowy***, (1960) W. W. R. 433 (Man. Q. B.); ***Robertson v. Saunders*** (1977), 1977 CanLII 1767 (MB KB), 75 D. L. R. (3d) 507 Man. Q. B.).[5]

The Court explained that section 28 of the *Act* must also be considered in conjunction with section 27, which deals with lasting improvements mistakenly made on another's land. Section 27 states,

> **Relief of persons making improvements under mistake of title**
>
> 27 Where a person makes lasting improvements on land under the belief that the land is his own, he is or his assigns are entitled to a lien upon the land to the extent of the amount by which the value of the land is enhanced by the improvements, or is or are entitled, or may be required, to retain the land if the Court of King's Bench is of opinion or requires that that should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land if retained, as the court may direct.

[5] *634 Broadway Ave Ltd v. Par-Ket/Vending Inc.*, *supra*, fnote 1, at paras 11 to 13

The Court then made comparisons to similar legislation elsewhere in Canada:

> Ontario, Alberta, Saskatchewan and Nova Scotia all have provisions almost identical to the wording of s 27 of the *Act* (see *Conveyancing and Law of Property Act*, RSO 1990, c C 34, s 37(1); *Law of Property Act*, RSA 2000, c L-7, s 69(2) [*Law of Property Act*]; the *Improvements under Mistake of Title Act*, RSS 1978, c I-1, s 2; Land Registration Act, SNS 2001, c 6, s 76(2) [*Land Registration Act*]).
>
> Alberta and Nova Scotia also have provisions equivalent to s 28 of the *Act* (see *Law of Property Act*, s 69(3); *Land Registration Act*, s 76(3)), whereas Ontario and Saskatchewan lack such provisions.
>
> In British Columbia, s 36(2) of the *Property Law Act*, RSBC 1996, c 377 [the *BC Act*], is almost identical to s 28 of the *Act*. British Columbia does not, however, have a provision similar to s 27 of the *Act*.[6]

Using case authorities in British Columbia, and earlier decisions in Manitoba, the Court sought to explain, if not reconcile, the different authorities. It began by explaining,

> Both *Hrynyk v. Kaprowy*, 1960 CanLII 544 (MBQB) [*Hrynyk*] and *Re Robertson and Saunders*, 1977 CanLII 1767 (MBQB) [*Robertson*], referred to in *Howarth* QB, are older Manitoba decisions that considered encroachments and the application of both ss 27-28 of the *Act*.
>
> *Hrynyk* dealt with two encroachments that the plaintiffs alleged were caused by the defendants wrongfully, carelessly and negligently constructing a building on the plaintiffs' lands. The plaintiffs requested an order that the defendants remove those portions of the buildings and a stairway that encroached on the plaintiffs' land and claimed damages. The defendants submitted that the encroachments were made inadvertently and under the belief that the impugned buildings were being erected on lands owned wholly by them. The Court had to consider whether relief could be granted pursuant to ss 28-29 of the *Act* (now ss 27-28, respectively).[7]

The notion that there must be an honest belief that the land built upon does not appear to be a basis for rejecting the remedy available to a court, if in fact a court-ordered transfer of title or easement is *the most just result*. As explained further:

> Therefore, *Hrynyk* is not authority for the proposition that, in order to obtain relief under s 28, the party seeking relief must have held an honest belief that the encroachment was built on their own property. In *Hrynyk*, the Court granted relief by exercising its discretion pursuant to s 29 (now s 28 of the *Act*) even though the Court found that the defendants knew they were not constructing the improvements on their land.

[6] *Ibid.*, at paras 15 to 17

[7] *Ibid.*, at paras 19 and 20

Robertson also involved a dispute between neighbors regarding buildings that were not constructed on land that they owned. In 1971, the Robertsons wished to erect a permanent fence on the boundary line of their property to keep out stray cattle and sought the assistance of government surveyors to locate the boundary line. During the course of the survey, it was discovered that the land occupied and developed by the Robertsons was not their property, but was on property registered in the name of the respondent Saunders. Mr. Saunders was also unaware of the location of the boundaries on the property that he had purchased. He moved into a house on the property he thought he owned and continued to occupy and improve it. The property he occupied was actually owned by the respondent Ross. The Court considered its jurisdiction under ss 27-28 of the *Act* based on the particular facts of the case. The Court concluded as follows (*Robertson* at 510-11):

> . . .
>
> In my opinion, s. 28 does not apply in a situation of this kind. This section applies to a building on one portion of land that encroaches upon another portion of land: "Where . . . a building *thereon* encroaches upon *adjoining land* . . ." (emphasis added). This section, in my opinion, is intended to permit the Court to adjust encroachments that might be called boundary disputes where a building is partly on one piece of land and partly on another. It does not apply to improvements made entirely within a parcel of land.
>
> . . .
>
> Since s 28 of the *Act* did not apply, the Court in *Robertson* went on to consider whether s 27 permitted the Court to provide relief. The Court reviewed a number of authorities and concluded that it had jurisdiction to grant relief. The Court stated (*Robertson* at 515):
>
> . . .
>
> These authorities lead me to conclude that the Court has jurisdiction to confirm a lien or order land to be conveyed to an occupant. To succeed an applicant, (1) must have made lasting improvements, and (2) have had the *bona fide* and reasonable belief that the land was his own. If he made the improvements in those circumstances, he would have done so (to use the heading preceding s. 27) "under mistake of title". Be that as it may, the section does not, in my opinion, distinguish between mistakes of title or identity, and no categorization is necessary. If the conditions of the section are met, the Court may grant relief.
>
> . . .

The Court in *Robertson* applied s 27 of the *Act* and concluded that the circumstances of the case dictated that the most just solution was to require the Robertson's to retain the land upon which they had made the improvements. There was also an order directing compensation for the land required to be retained and the easement to permit access to the public road.

> Again, *Robertson* does not stand for the proposition that, in order to obtain relief pursuant to s 28, the party seeking the easement must have held an honest belief that they were building on their own property.
>
> All of this to say that, in my opinion, the correct interpretation of s 28 of the *Act* and the law of Manitoba does not require, as a threshold issue, that 634 must prove that it held an honest belief that the renovation work being completed was being done on its property. In my view, s 28 is a permissive section that provides the discretion to a Court of King's Bench judge to fashion an appropriate remedy based on the circumstances of each case.[8]

On the question of "honest belief" as part of a "threshold" component to the test to be met, the Court concluded it was not necessary – but was instead one of several factors to consider. It explained further:

> As this Court pointed out in *Howarth* CA, the language of s 28 of the *Act* confers on a judge broad discretion to remedy boundary disputes based on the facts and equities of the individual case. In my view, this Court has endorsed the Court of Appeal for British Columbia's approach and interpretation of the similar section in the *BC Act*. This is clear from the reading of paras 4-5 of Mainella JA's decision in *Howarth* CA.
>
> More broadly, in my view, the law in Manitoba and other provinces, including British Columbia, supports a broad, equitable approach to the application of s 28 of the *Act*. The *Vineberg* factors are applicable as guidance in assessing the equities, which involves a consideration of the degree of knowledge and comprehension of the property lines, the nature of the encroachment, the size of the encroachment and its impact on the neighbouring property owner's land. Where there is evidence of an honest belief in the comprehension of the property lines, that factor may generally favour granting the relief sought. On the other hand, where there is evidence the property owner exercised fraud, knew full-well where the property line was located and built across the property line onto neighbouring property, such evidence would weigh in favour of not granting relief under s 28. In cases where there is evidence of negligence, the court must weigh the facts and equities in the individual case to determine whether it should exercise its discretion. As pointed out in the British Columbia authorities, this is not an application of a one-size-fits-all "test" (*Taylor* at para 51). The factors are not independent hurdles that must be met.
>
> An application made pursuant to s 28 of the *Act* requires the Court of King's Bench judge to review the *Vineberg* factors to guide their assessment of the facts and the equities of each individual case, so that they can determine how to exercise the discretion conferred to them.
>
> In this *case*, the application judge's brief reasons must be considered in light of the submissions and the live issues at the hearing. A review of the entire transcript of the proceedings demonstrates that counsel advanced submissions regarding the interpretation of s 28 of the *Act* and made significant reference to the factors reviewed in *Howarth* CA. I am

[8] *Ibid.*, at paras 25 to 30

> not persuaded that the application judge failed to weigh the relevant factors identified, including whether there was an honest error that caused the encroachment, the permanent nature of the encroachment, the size of the encroachment and the minimal impact the encroachment had on Par-Ket's property. The application judge specifically found that the encroachment was not done deliberately. He found that there may have been some carelessness that should have been addressed, but he concluded that it did not amount to negligence and did not disentitle 634 to the easement.
>
> It is important to emphasize that the honest belief component of the test is not a threshold factor; rather, it was just one factor for the application judge to consider when he exercised his discretion to grant the easement. The decision required the application judge to balance all of the factors and, while his decision was not comprehensive and as clear as it could have been, a review of the entire transcript of the proceedings satisfies me that he knew the factors and applied them to the facts of this case. I am not satisfied that he failed to apply the correct legal test such that it amounts to an error of law. His decision is entitled to significant deference.[9]

On the second issue, Par-Ket argued that the application judge misapprehended the evidence that clearly demonstrated 634 was negligent regarding the property lines between the two properties. Par-Ket submitted that the lower court's conclusion that 634 was "not negligent", but was "perhaps somewhat careless" is not supported by the record. This is a difficult ground to succeed on in an appeal and the Court noted,

> Similar to *Howarth* CA, this is not a case where the applicant deliberately disregarded the property lines and knew that the resulting encroachment would cause damage to the neighbouring property owners. Quite the contrary, there was evidence that 634 believed the retaining wall would be built up to the property line, but would not encroach. By February 2015, 634 discovered that the footings of the retaining wall, necessary for the purpose of supporting the fire escape, were encroaching slightly on Par-Ket's property. Once the encroachment was discovered, it was investigated to determine the cost of removing the encroachment and narrowing the fire escape, which potentially may have made the fire escape non-compliant with relevant building code requirements.
>
> Simply put, I am not satisfied that the application judge misapprehended the evidence or made any palpable and overriding errors in his factual findings or in the inferences he drew. His findings are entitled to deference.[10]

In last month's issue of *The Boundary Point*, we observed,

> Did any decision report arguments being raised that "security of tenure" should be respected and that title should not be ordered conveyed from one neighbour to the other? No. The

[9] *Ibid.*, at paras 38 to 42

[10] *Ibid.*, at paras 44 and 45

issue was not mentioned once. It leaves one to ponder why "security of tenure" is raised to demonize adverse possession; yet a statutory "private expropriation" prevails.

This observation can be repeated in this issue in respect of the Manitoba appellate decision in *634 Broadway Ave Ltd. v. Par-Ket/Vending Inc*. The other important take-away is the Court's affirmation of the significant amount of discretion given to a court by this type of legislation.

Editor: Izaak de Rijcke

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

The subject matter considered in *634 Broadway Ave Ltd. v. Par-Ket/Vending Inc.*, is discussed in section 6: *Honest but Mistaken Belief Regarding the Boundary and Ownership*, in Chapter 4: Adverse Possession and Boundaries.

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 hours.[11] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

The Future of Survey Law Presentation

The slides from the presentation at the AOLS AGM on February 29, 2024 are now available.

Water Boundaries in a Changing Climate Context – Education Day by ERG

The Eastern Regional Group (ERG) of AOLS is hosting an "Education Day" at the Donald Gordon Hotel and Conference Centre in Kingston, ON, on April 30, 2024. Accommodations are available for out of town guests. The theme for the event is ***Water Boundaries in a Changing Climate Context***. Attendance for the day qualifies for 8 formal activity AOLS CPD hours. Four Point

[11] 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.

Learning is co-hosting the event with a speaker presentation and videographer for later access through GeoEd. Cost for the day is $185.00 and space is limited. Please email the Chair of ERG, simon@aksurveying.com to reserve a space.

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