The Boundary Point
Volume 12, Issue 5, May 2024
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.

Readers may recall the December 2022 issue of this publication[1] in which the Ontario Superior Court decision in *Reddick v. Robinson*[2] was discussed. The case involved a dispute over the interpretation of an easement created for the benefit of subdivided lots of a lakefront property to allow for access to the shore of Lake Ontario – the nature of access and the extent to which the strip of land could be used by the dominant owners. The applications judge had dismissed the application, finding that a more permissive use of the shore area would be allowed – namely sitting and picnicking. The applicants in the original decision appealed on the basis that the application judge had erred in interpreting the easement. That appeal, *Reddick v Robinson,*[3] was successful in its outcome for the appellant and the majority of the panel found a restrictive meaning to "shores of Lake Ontario" and the use of the easement lands. What is interesting about the appeal decision is the split within the panel of judges, with a majority of 2 allowing the appeal and thereby setting aside the judgment of the court below but with a comprehensive dissenting opinion that would have dismissing the appeal.

A Reversal of a Decision Interpreting an Easement for Access to the Shore of Lake Ontario

Key Words: *shore land, easement, access, interpretation, intention*

The beautiful shores of Lake Ontario in Prince Edward County provide for an idlyllic spot for relaxation and recreation. Unfortunately, ongoing neighbourly disputes can sometimes create a disruptive atmosphere that results in anything but peaceful. As described in the previous issue

[1] Interpreting an Easement for Access to the Shore of Lake Ontario: Discerning Rights and Limitations, TBP 10(12)

[2] *Reddick v. Robinson*, 2022 ONSC 6124 (CanLII), https://canlii.ca/t/jsr2l

[3] *Reddick v. Robinson*, 2024 ONCA 116 (CanLII), https://canlii.ca/t/k2t61

of this publication, the lands in issue in this matter were a series of lots that had been subdivided from a six acre piece on the lake and a strip of land that connected the appellants' property to the shores of Lake Ontario. At the time of subdivision, Moore and Minaker owed properties situated between the six acre parcel and the lake. These properties were separated from the six acre parcel by a private road and Moore and Minaker worked with a planner to create a 20 ft by 300 ft strip between their respective properties to connect what is now the appellant's property and the shores of the Lake. The strip of land is zoned as a "Special Open Space Zone." Figure 1 below depicts the configuration of the properties and shows the easement strip, title to which is held by the appellants subject to an easement in favour of the respondents.

Figure 1. *Configuration of properties*

That easement reads:

"[F]or the purposes of pedestrian access only in order to use and enjoy the shores of Lake Ontario, such use and enjoyment shall not include camping or the use or operation of motorized vehicles."

Figure 2 provides an aerial view of the properties and the lake from 2018.

Figure 2. *2018 SCOOP imagery*

The appellants took a restrictive view of the easement language and adopted the position that the respondents were limited to pedestrian access only in using the strip for ingress and egress to the shores of Lake Ontario and sought a declaration confirming same and defining the "shores of Lake Ontario" as only that land lying between the high and low water marks. The respondents argued that use of the strip also included such activities as sitting and picnicking. The application was dismissed by the courts below.

> With respect to the definition of "shores", the application judge rejected the appellants' limited definition because 1) it would "severely [limit] the concept of 'use and enjoyment'" and render the prohibitions against "camping or the use or operation of motorised vehicles" in the easement "effectively redundant"; and 2) the term "shore land", as defined in s. 4.1.1 of the *County of Prince Edward Official Plan* (2006) (the "Official Plan") suggested a broader definition that would allow for "both passive and active recreational activities":
>
> > 4.1.1. The shore land and associated water bodies of Prince Edward County are a landscape feature of significant aesthetic, ecological and cultural value. They are also a major tourist attraction as they provide the resource base for both passive and active recreational activities.[4]

The applications judge held that the respondents were not limited to only using the strip as a path to access the shore and in doing so, relied on evidence of Moore and a letter of the late Mr. Minaker speaking to their intentions in creating the strip.

[4] *Ibid*., at para 6

The issues on appeal were identified as follows:

1) What is the standard of review?
2) Did the application judge err in his interpretation of "shores of Lake Ontario"?
3) Did the application judge err in his interpretation of the scope of the easement?
4) If the appellants succeed, should we remit the application to the Superior Court for reconsideration, or does the record permit us to substitute our decision?[5]

In the majority opinion it was noted that interpretation of an easement involves questions of mixed fact and law and as such is owed deference - absent an extricable error of law or a palpable and overriding error on a question of fact. In terms of interpretation of an easement,

> […] the proper approach is to 1) ground the interpretation of the easement in its text, and 2) have regard to the factual matrix, but only as an interpretive aid for ascertaining the objective intentions of the parties. Evidence that speaks to subjective intent is inadmissible: *Sattva*, at para. 59.[6]

While the majority found that as a question of mixed fact and law, the interpretation of the term "shores" attracted deference, they also found that errors in the interpretation of the easement meant a review at the standard of correctness.[7] The appellants took the position that the "shores of Lake Ontario" was limited to *the limestone shore of the lake and not the raised grassy bank above it*.

> Consider the two reasons the application judge gave for rejecting the appellants' proposed interpretation of the word "shores". He first concluded that it would be inconsistent with the easement's prohibition against camping and the use of motorized vehicles. He accepted the respondents' submission that it is impossible to camp or use motorized vehicles in the area between the high and low water marks (which is limestone and largely inaccessible as it lies beneath a steep bank):
>
> > I agree that to restrict the definition of "shores of Lake Ontario" in the manner suggested by the applicants severely limits the concept of "use and enjoyment" and makes the restriction against camping or use of motorized vehicles effectively redundant.
>
> Second, relying on Mr. Moore's testimony that the Official Plan influenced the wording of the easement when it was created, he concluded that such a definition was inconsistent with the broader definition of "shores" found in the Official Plan. He found the Official Plan to be part of the context that helped illuminate the meaning of "shores of Lake Ontario".

[5] *Ibid.*, at para 11
[6] *Ibid.*, at para 15
[7] *Ibid.*, at paras 16-17

> […] I agree with the appellants that for the application judge to have arrived at his conclusion that the prohibitions were "effectively redundant", he must have either 1) failed to consider the photographs, or 2) inferred that, for the prohibitions to have meaning, it had to be possible to camp or drive a motorized vehicle on the shore regardless of where the water meets land and irrespective of weather or water conditions.
>
> To accept the appellants' interpretation would not render the prohibitions "effectively redundant". Based on the photographs and description of the limestone shore, depending of course on the water-level, it is clear that one could camp and also drive a motorized vehicle on the shores. Thus, to prohibit these activities, the easement needed to expressly so provide, as it does.
>
> […] The only evidence that spoke to the role the Official Plan played in the creation of the easement came from Mr. Moore, who testified about his subjective intent at the time. As mentioned, this is an inadmissible consideration when interpreting an agreement such as an easement: *Hanley Park*, at paras. 51-54. The application judge fell into error by relying on this evidence.
>
> The application judge also overstated the significance of, and thereby gave undue weight to, the Official Plan, which is merely a "framework of goals, objectives and policies [of a municipality] to shape and discipline specific operative planning decisions". Official plans are meant only to establish the "broad principles that [govern] the municipality's land use planning generally": *Niagara River Coalition v. Niagara-on-the-Lake (Town)*, 2010 ONCA 173, 261 O.A.C. 76 at para. 42, citing *Toronto (City) v. Goldlist Properties Inc.* (2003), 2003 CanLII 50084 (ON CA), 67 O.R. (3d) 441 (C.A.), at para. 49.
>
> […] [T]he appellants' interpretation is aligned with the language used in the easement itself, which makes clear that the strip of land is for "pedestrian access only" in order to "use and enjoy the shores of Lake Ontario". There is no ambiguity here. The easement is addressing two separate things: 1) access to the shores via the strip of land, and 2) the use and enjoyment of the shores. The pedestrian access route is separate and distinct from the use of the "shores of Lake Ontario". The easement gives the respondents the right to "use and enjoy" the latter but not the former.
>
> In the end, the application judge erred in his approach to defining the "shores of Lake Ontario" by not having regard to the plain language used in the easement and by relying on inadmissible evidence about subjective intent. On this basis alone, appellate intervention is warranted.[8]

The dissenting judgment took a different view of the interpretation of "shore" - disagreeing that the applications judge overlooked material evidence on how the shore could be used.

> […] As the application judge observed, the limestone area is only accessible when the water level is low, which depends on weather and water conditions. The limestone area is, as the

[8] Ibid at paras 22-31

> respondents submit, largely inaccessible as it lies beneath a steep bank. I agree with the respondents' submission that, to suggest that the intention was to prohibit camping and motorized vehicles solely on what is essentially the exposed bed of the lake when water levels are low, defies common sense, particularly when that area is "largely inaccessible". As such, I do not agree that the application judge erred in concluding that the restriction against camping or use of motorized vehicles was inconsistent with "the shores of Lake Ontario" having the meaning advocated by the appellants.[9]

The dissent did not view the references to the Official Plan as contributing significantly to the application judge's interpretation of the easement and found instead this to be relevant context of the surrounding circumstances of the subdivision. The dissent also noted the absence of a settled definition for the term "shore of a lake" that would apply in this case as the precedents cited in the majority opinion involved different contexts – such as water boundaries in private versus public ownership, rights over beaches, etc.

The second key question before the appellate court concerned the scope of the easement and the application judge's consideration and reliance on evidence that reflected the subjective intention behind the easement's creation.

> Reading the application judge's reasons as a whole, the only logical conclusion is that this determination – like the application judge's definition of "shores" – rests on the subjective intent of Mr. Moore and the Minakers. As discussed earlier, subjective intent evidence is not admissible when interpreting an easement. Only objective evidence that speaks to the factual matrix can be considered. The application judge's disposition appears to be tainted by his reliance on subjective intent evidence and his failure to consider objective evidence.
>
> The most relevant objective evidence that informed the factual matrix came from the appellants, who filed on the application a copy of the County's Notice of Decision (the "Notice") approving the rezoning application, and the municipality's Planning Staff Report (the "Report"), which tracks the language in the Notice.
>
> The Notice states:
>
> > The effect of the above applications was to create three residential building lots each with either direct or legal access to Lake Ontario (Athol Bay), and to add additional land to each of the applicant's waterfront lots.
>
> The nature of the access is referenced at two different points in the Report. At para. 1 it reads that "through a series of rights-of-way and lot additions each proposed lot (severed and retained) will have legal access to Lake Ontario (Athol Bay) over the second holding jointly owned by the applicants", and at the end of para. 2 it substantially reproduces the above excerpt from the Notice.

[9] *Ibid.*, at para 59

> The Notice and the Report are instructive in two main respects. First, they tell us that the rezoning application was aimed specifically at providing the lot owners with access to Lake Ontario. To the extent that the amended zoning allows use as a private park, it simply does so "in order to prohibit the construction of any buildings or structures (including a boat launching facility) on this narrow shared water access portion of the property" (emphasis added). Contrary to the respondents' assertions, the rezoning application thus plainly contemplated that the strip of land would provide unobstructed access to Lake Ontario rather than be jointly used as a park.
>
> In any event, the permitted uses under the amended zoning are not determinative of the easement's scope. Zoning does not in and of itself establish interests or rights in land: *2022177 Ontario Inc. v. Toronto Hanna Properties Ltd.* (2005), 2005 CanLII 39320 (ON CA), 203 O.A.C. 220, at para. 35. Rather, the rezoning application must be considered as a whole to glean objective evidence of intent – in this case, unobstructed access to Lake Ontario – which in turn becomes part of the factual matrix: *Freeborne Developments Ltd. v. Corman Park (Rural Municipality)*, 2021 SKCA 48, at paras. 42-45.
>
> Second, the Notice and the Report indicate that two types of access to Lake Ontario were contemplated: direct access (for the appellants, who are titleholders) and legal access (for all landowners, including the respondents). Again, this is objective evidence that sheds light on the surrounding circumstances at the time the easement was created, including the parties' intentions. It should have informed the application judge's consideration of the factual matrix, but it seems that it did not.
>
> Without the subjective intent evidence of Mr. Moore – and after considering only the language used in the easement and the objective evidence highlighted by the appellants – the inevitable conclusion is that the easement restricts the respondents to "pedestrian access only" for the purpose of ingress to and egress from the "shores of Lake Ontario".[10]

The dissenting justice disagreed with the position that the evidence of the original subdivider, that had been relied upon by the applications judge was inadmissible. Rather, she found that much of the evidence of the original subdivider was properly considered as relevant and necessary as part of the factual matrix or the objective circumstances around which the easement was created.

> […] He was examined by counsel as a witness on the application. He had two roles: first, as someone who was involved in the creation of the easement, and secondly, as the appellants' lawyer on the purchase of their property. His evidence about the circumstances leading to the creation of the easement provided the necessary factual context – it was evidence about the surrounding circumstances that was properly and necessarily considered. This included the evidence about the subdivision of the land he owned jointly with the Minakers into three lots, including the enhancement in the value of those lots by the creation of Lot 11 by

[10] *Ibid.*, at paras 33-40

> subdividing a narrow strip of land from his own and the Minakers' lakefront properties. While Mr. Moore's evidence was not the "subjective intention" evidence of a party, I accept that some of his evidence, including his opinions about the conduct of the appellants and the dispute that had arisen, were not relevant to the interpretation issue.
>
> While it would have been helpful if the application judge had expressly indicated which parts of Mr. Moore's evidence he had considered, and which parts were not relevant to his interpretation of the easement, I am not persuaded that the application judge relied on "inadmissible subjective intention evidence" of Mr. Moore.[11]
>
> […] What did inform the application judge's decision however is the uncontradicted evidence about the surrounding circumstances: the subdivision of the Moore and Minaker vacant lands into three lots, and the creation of Lot 11. What the application judge took from Mr. Moore's evidence was that the intent was to provide an equal opportunity for the owners of all three lots and their successors to enjoy the shores of Lake Ontario – which is consistent with how the lots were marketed and sold, and how the easements (including the other easements which affect the subject properties but are not at issue in the litigation) were created and how Part 11 was zoned.
>
> Mr. Moore's evidence was not the evidence of a party; rather it was evidence about the circumstances that led to the creation of the easement from a person who was involved in its creation. To ignore all of his evidence would result in an interpretation of the easement without the necessary context. Paraphrasing *Herold Estate*, at para. 42, when interpreting an easement, the question is not the abstract meaning of its words, but what the creator of the easement is objectively taken to have intended by the words chosen in light of the circumstances – the factual matrix – in which the words were used.

The dissent would have therefore dismissed the appeal, finding that the respondents were not restricted a limited use of the easement for access and a limited interpretation of "shore" as the rocky area between the actual waters and the "water's edge" as marked on the Reference Plan. However, the majority found that the meaning of the "shores of Lake Ontario" in the easement was the land lying between the high and low water marks and further that the respondent's use of the easement was restricted solely to pedestrian access for the purpose of ingress and egress from the shore areas.

It is of course, the majority decision allowing the appeal that stands. One hopes that the parties can come to an amicable resolution and to the continued use of lands and that the impact of the panel's split (which may be interesting for the reader) does not fuel ongoing animosity between the parties involved.

Editors: Megan E. Mills and Izaak de Rijcke

[11] *Ibid.*, at paras 72-73

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

A discussion of waterfront boundaries can be found in *Chapter 8: Natural Boundaries* and the formation of and issues related to easements are among the topics 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 hours.[12] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

Seminar at ANLS AGM

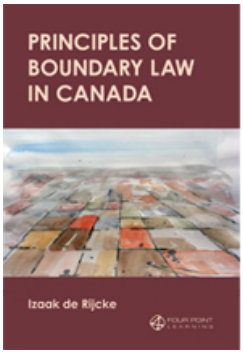
One of the CPD seminars presented at the AGM of the Association of Newfoundland Land Surveyors on May 31st, 2024, is on the topic *of Maintaining Public Confidence and Trust in the Work of Surveyors*. Izaak de Rijcke will tackle the question: "How do we practise our profession in a manner that makes every survey and project be seen by clients and the public as the work of competent, trusted, unbiased and impartial practitioners?" In person in St. John's.

Eastern Regional Group of AOLS "Education Day" – tomorrow!

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. Four Point Learning is co-hosting the event with a speaker presentation and videographer for later access through GeoEd. Cost for the day is $185.00. Please email the Chair of ERG, Simon Kasprzak, to reserve a space**.**

[12] 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.

Principles of Boundary Law in Canada



Boundaries are a feature that applies to every parcel of land in Canada. Providing secure and predictable results in recording title and identifying the extent of title are elements that operate hand in hand in order to give certainty to the immense value tied up in real estate 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 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. Furthermore, the education and training needs of new members to the cadastral surveying profession are served by this reference work that not only provides comprehensive coverage of the material but is organized and indexed in a manner that supports the formation of professional opinions. 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.*)

ISSN: 2291-1588