The Boundary Point

Volume 12, Issue 9, September 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.

Fence encroachment disputes are certainly nothing new to Canadian courts. Fences are often built to delineate property boundaries and the question of encroachment and fence placement is relatively easily addressed through the work of a surveyor to identify the boundary location on the ground. But when an easement or right of way is present, things become slightly more complex as was the case in the decision discussed in this month's issue.

Earlier this year the Supreme Court of British Columbia released *Thompson v. Hay*[1] with further supplementary reasons released just this past month.[2] The dispute centered around the defendant's placement of a fence over an adjacent (and encroaching upon) right of way that crossed the defendant's property and provided access to the plaintiff's land. The plaintiff had removed a portion of the fence as a self help remedy, an act which the defendant characterised as a trespass and a nuisance. Both parties sought injunctions against the other and the matter proceeded as a summary trial. The court found in favour of the plaintiff, in particular that the placement of the fence had caused a substantial interference with the use of the right of way. In the initial reasons, the court had left it to the parties to settle the wording of the injunction order, and setting out the area of the right of way that would be protected from any future obstruction. However, with no agreement on the width that would be impacted by the restriction, the matter returned to the court for a final decision, which was delivered in the supplementary reasons.

Fences that Obstruct and "Self Help" Remedies: Are there Consequences?

Key Words*: easement, right of way, obstruction, fence, abatement, expert evidence*

[1] *Thompson v. Hay*, 2024 BCSC 583 (CanLII), https://canlii.ca/t/k407x

[2] *Thompson v. Hay*, 2024 BCSC 1524 (CanLII), https://canlii.ca/t/k6ds4

The decision begins aptly, if quaintly, by quoting the saying, "good fences make good neighbours" and further noting that the matter before the court concerned a "bad fence" that was straining the relationship between those neighbours.

The properties involved were large rural acreages in a mountainous area. The roadway giving access, and at issue, was about 2 kilometres long beginning at the defendant's property, running through a neighbouring property, and ending at the defendant's property. The road is steep in parts with the grade varying between 5 and 15 per cent. The easement agreement granting the right of way contained the following clauses:

a) granting Mr. Thompson "a free and uninterrupted right, liberty, easement and right-of-way", "to pass and re-pass by pedestrian or vehicular means, over and upon the right-of-way, and to repair, maintain and upgrade the right-of-way" through the lands in the easement area (Clause 1);

b) confirming that Mr. Thompson, and his contractors, servants, agents, invitees, etc., "shall have the full and free right and liberty to have ingress and egress to pass and to repass on the Easement Area either on foot or by means of vehicles … and to remove such trees, grade, gravel, otherwise improve the road surface, and to construct such ditches, and culverts and related improvements as shall be reasonably necessary to utilize and enjoy the benefit hereby granted" (Clause 2);

c) confirming that any work done by Mr. Thompson or his contractors to repair and improve the road or construct ditches and culverts is to be done at his expense and in a good and workmanlike manner. This provision is subject to a sharing provision should Mr. Hay use the easement for access to his own property (Clauses 3 and 5);

d) allowing Mr. Thompson to use aggregate materials on or near the easement area "for the purposes of maintaining and upkeeping the easement and right of way" (Clause 3); and

e) confirming the Hansens' (now Mr. Hay's) covenant that "he shall not make, place, erect, or maintain on the Easement Area any building, structure, foundation or obstruction which would interfere with the rights hereby granted" (Clause 5).[3]

In May of 2021, the defendant constructed a fence around 8 acres of his property for the purpose of limiting the entry of cattle and ATVs from his yard. No notice was given to the plaintiff or the other neighbour. The contentious section of the fence was located alongside the road, in particular a section of 345 metres that was located within the easement area. The plaintiff was concerned that the placement of the fence along the edge of the road shoulder

[3] *Supra* note 1 at para. 13

and within the roadway itself restricted snow ploughing and spring maintenance efforts (grading and pothole repairs).[4]

After unproductive discussions with the defendant, and a demand letter calling for the removal of the fence the plaintiff commenced an application shortly after the fence's initial construction. As winter approached and further information was received, the plaintiff took further action:

> Mr. Thompson proceeded to dismantle the subject fence section following the receipt of a November 8, 2021 report from Ron Kellam, a professional engineer who had been retained by Mr. Thompson's counsel. I will review this report in more detail later, but for the moment I will say that Mr. Kellam found that the fence interfered with the safe operation of the driveway, impeded proper maintenance of the road, impeded snow removal and associated drainage, and could impede the use of fire and other emergency vehicles. He concluded:
>
> > With the onset of winter conditions, I recommend that the fence be removed immediately and relocated to the lower edge of the easement or at the toe of the slope where the road section has been filled.
> >
> > [Underlining in original omitted.]
>
> Mr. Thompson said the following about the removal of the fence:
>
> > On November 22, 2021, I hired contractors to remove the Fence. I instructed the contractors to use their best efforts to avoid causing any damage to Hay's Fence posts or gate. The contractors removed the Fence poles, stacked them, and placed the poles within the Easement Area at the side of the Roadway. The contractors filled the holes from the Fence posts with gravel to avoid creating a tripping hazard for animals.[5]

The plaintiff further set out his position as follows:

> The plaintiff emphasizes that the easement unambiguously prohibits the defendant from placing "any building, structure, foundation or obstruction" in the easement area. The easement terms clearly prohibit the construction of a permanent fence in the easement area.
>
> The terms of the easement also grant the plaintiff an express right to both full access for ingress and egress, and to repair, maintain and upgrade the easement area fully and without obstruction. These broad rights encompass the entire easement area, not just the area of the roadway.
>
> The plaintiff says the construction of the fence created an actionable interference with his easement rights because:

[4] S*upra*, note 1 at paras 14-17
[5] *Supra*, note 1 at paras 20-21

a) the fence reduced the useable width of both the roadway and the effective width of the easement;

b) the fence would have prevented the plaintiff's method of removing snow by ploughing it off the roadway and over the bank;

c) the inability to plough snow over the bank would mean ploughing would create windrows of snow. This, in turn, would cause water to channel on the road surface and lead to icy conditions in thaw/freeze cycles, potholes and other damage;

d) the fence would interfere with grading by preventing a grader operator from "pulling" gravel or other road material from the shoulders to the road surface in order to create a crown; and

e) any advantage gained by having a fence on the road that delineated the edge of the road surface would be outweighed by the risks created by the presence of a fence in that location.

> The law permits an aggrieved party to abate a nuisance, provided the method used is the least detrimental of the available abatement options. Here, the plaintiff says he acted reasonably by giving notice of the nuisance and requesting removal of the fence, attempting to resolve the issue amicably, acting only after receiving an expert's report from a professional engineer that indicated urgent abatement was needed to remove a hazard, and removing the fence in a manner that preserved all but five fence posts and providing replacement barbed wire.[6]

The defendant took the position that the crux of the case was whether the fence constituted a "substantial interference" with the plaintiff's easement rights, noting that the fence was not located on the travelled portion of the road and presenting opinion evidence that the fence did not interfere with the plaintiff's use.[7]

The court found that the fence encroached onto the easement area and noted the following in terms of the defendant's reasons for construction of and placement of the fence:

> I accept the legitimacy of the defendant's concerns regarding off-road vehicle trespassers and wandering cattle, and the property damage and potential safety concerns associated with those matters, which were his reasons for building the fence, but I also agree with the plaintiff that these have little to do with the legal issues in this case. Importantly, none of those reasons required that the fence be built in a location that might infringe on the plaintiff's easement rights.

[6] *Supra*, note 1 at paras 97-100
[7] *Supra*, note 1 at paras 107-108

> On that subject, I do not accept the defendant's evidence that this was the only suitable location for the fence. I reject that assertion because: (1) he provides no basis in terms of experience or expertise to make that statement; (2) he says his contractor also told him it could not be located elsewhere, but that statement is hearsay and the contractor is unnamed and thus unattributed; (3) in the defendant's examination for discovery, he said he did not really consider any other location but, notably, he also said his contractor told him he *could* build the fence on a slope; and (4) there is a quote of about $3,000 from Mr. Daviduke (who does fence construction work) for the building of a similar fence down the slope, thus indicating there was no significant impediment to building a fence there.[8]

The legal principles relating to breaches of easement rights were largely agreed to by the parties and summarized by the court as follows:

> In *TimberWest*, the Court determined that the appropriate approach is to first determine the nature and extent of the rights granted by the easement agreement, and to then determine whether those rights have been substantially interfered with by the actions of the landowner.
>
> As to the first step – the nature and extent of the rights granted – the proper approach is set out in *Tessaro v. Langlois*, 2019 BCCA 95:
>
> > [18] Easements are to be interpreted as contractual documents. Contractual interpretation involves questions of mixed fact and law because the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 3 at para. 50; *Robb v. Walker*, 2015 BCCA 117 at paras. 30–31.
> >
> > [19] This court summarized these legal principles in *Grant v. Lowres*, 2018 BCCA 311:
> >
> > [20] Contractual interpretation generally involves discerning "the intent of the parties and the scope of their understanding" by "read[ing] the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47.
> >
> > …
> >
> > [21] This court adapted those insights to the particular context of easements in *Robb v. Walker* [2015 BCCA 117]:
> >
> > [31] When interpreting an easement, the court must have regard to the plain and ordinary meaning of the words in the grant to determine what the intention of the parties was at the time the agreement was entered into. Surrounding circumstances, that is, objective evidence of the background facts at the time of the execution of the contract, are to be considered in interpreting the terms of a contract: *Sattva* at para. 58.

[8] *Supra*, note 1 at paras 142-143.

> [32] The wording of the instrument creating the right of way should govern interpretation unless (1) there is an ambiguity in the wording, or (2) the surrounding circumstances demonstrate that both parties could not have intended a particular use of the easement that is authorized by the wording of the document: *Granfield v. Cowichan Valley (Regional District)* (1996), 1996 CanLII 356 (BC CA), 16 B.C.L.R. (3d) 382 (C.A.).

The second step – substantial interference – was described in *Smith v. Balen*, 2018 BCSC 918, as follows:

> [85] The test as to whether there has been an actionable disturbance on an easement is whether the way could be practically and substantially exercised as conveniently after as before the interference; to be actionable, the interference must be substantial: *Grenier v. Elliott*, 2007 BCSC 598 at para. 35; see also *Fallowfield v. Bourgault* (2003), 2003 CanLII 4266 (ON CA), 68 O.R. (3d) 417 at paras. 11 and 33 (Ont. C.A.).[9]

With the application of these principles the court found in favour of the plaintiff, with the reasoning explained as follows:

> I am satisfied that the fence constructed by the defendant was a "structure" within the meaning of that prohibition. A fence may be a "structure". Here, the subject fence was something built from component parts and installed both into and onto the land, and obviously intended to be permanent; hence it is a "structure": *R. v. Fajtl*, 53 C.R. (3d) 396, 1986 CanLII 1247 (B.C.C.A.), leave to appeal to SCC ref'd, 20287 (24 March 1987); and *R. v. Thibault*, 51 N.S.R. (2d) 91, 1982 CanLII 3780 (C.A.).
>
> The next question is whether the fence interfered with the plaintiff's easement rights. As noted earlier, the test as to whether there has been an actionable interference on an easement is whether the right of way could be practically and substantially exercised as conveniently after as before the interference. It is on this point that the case turns.
>
> I am satisfied that the fence was located in a manner such that the plaintiff could not practically and substantially exercise his easement rights as conveniently as he could before the fence was built. In particular, I am satisfied that:
>
> a) the intrusion of the fence into the roadway reduced its effective and usable width. As noted earlier, the survey shows this intrusion to be substantial;
>
> b) the most intrusive of the fenceposts created a "shy zone", which further reduced the usable width of the roadway;
>
> c) the presence of the fence would interfere with the plaintiff's snow ploughing insofar as snow could no longer be ploughed over the bank. Without the ability to eliminate the presence of at least some of the snow in that way, it is likely snow

[9] *Supra*, note 1 at paras 145-147

would accumulate at the side of the road in a manner that would further diminish the usable width of the roadway in winter;

d) snow accumulating on the side of the road would increase the likelihood that water would channel on the road surface rather than drain to the side. This would increase the likelihood of ice on the road in freeze/thaw conditions and increase the likelihood of potholes and other damage; and

e) the fence would substantially interfere with road grading by preventing a grader from "pulling" material from the road shoulder into the road itself.

In coming to those conclusions, I have relied on the survey, the photographs and drone footage, and the opinions of Mr. Kellam and Dr. Morrall. I found their opinions to be sensible and well-reasoned.[10]

On the issue of abatement, and in light of the plaintiff taking a self help remedy in removing the fence, the court also found in favour of the plaintiff:

The question of the plaintiff's right to abatement raises the issue of notice. The plaintiff says notice was given, effectively at least, and the defendant says that no effective notice was given.

I begin with some general principles from Allen M. Linden et al, *Canadian Tort Law*, 12th ed. (Toronto: LexisNexis, 2022) at 608–609 [*Linden on Torts*]:

> Abatement, a "self-help" remedy, is available to an individual suffering nuisance where speed is required to end the offending conduct. It is permitted in situations of emergency only and has been discouraged by the courts for obvious reasons. Clearly, where one has been denied an injunction one cannot subsequently resort to abatement in spite of the court's ruling.
>
> Abatement is not confined to cases where the offending condition (encroaching tree branches or roots, for example) can be removed from the land of the party aggrieved, but also justifies entry upon the land of another for this purpose. The person carrying out the abatement must take reasonable care not to inflict unnecessary damage while doing so, and the least detrimental of possible alternative methods of abating must be adopted.
>
> It has been suggested that an abatement cannot be justified unless a mandatory injunction would have issued on the basis that "otherwise one might obtain an end by self-redress which would have been denied to him if he had taken recourse to the judicial process". Thus, the privilege will not lie where the damage caused by abating is wholly disproportionate to the harm threatened.
>
> …

[10] *Supra*, note 1 at paras 159-162.

> Notice to the offender is not necessarily required prior to invoking the remedy, although it is certainly advisable. Notice of abatement will not be necessary where there is no need to enter onto someone else's land, where there is an emergency, and (probably) where the land belongs to the original creator of the nuisance.
>
> …
>
> Only persons who would be successful in a cause of action are entitled to abate.
>
> [Footnotes omitted.]
>
> The present matter is not a case where there was no notice of any kind. The plaintiff made his objections known to the defendant very shortly after fence construction started. He asked the defendant to relocate the fence off the roadway. Attempts to discuss the matter with the defendant were unsuccessful. Counsel for the plaintiff sent a demand letter, and then an action was commenced.
>
> On November 22, 2021, counsel for the plaintiff notified defence counsel that the plaintiff would be removing the fence. This was, however, the same day that the removal work began.
>
> The authorities on the need for notice do not provide the clearest of guidance. It is clear that notice is not necessary where there is an emergency. The authorities also say notice is not needed in some other cases, as where the owner of the land was the original wrongdoer by placing the nuisance there (*Linden on Torts*, at 609; Gregory S. Pun et al, *The Law of Nuisance in Canada*, 2nd ed. (Toronto: LexisNexis, 2015), §6.19) [*Pun on Nuisance*], and where entry onto another's land is not required in order to abate the nuisance: *Phoenix v. Quagliotti*, 11 W.L.R. 659, 1909 CarswellBC 36 (S.C.).
>
> I accept that the plaintiff had good reason to move urgently given the imminent onset of winter that would have prevented the removal of the fence without damaging the fencing materials and possibly damaging the road. Also, there would shortly be a need to plough snow to maintain access to the Mazar and Thompson properties, with the fence complicating that process. I accept as well that the plaintiff had received expert advice that the fence should be removed immediately. Still, whether the situation was an emergency is a difficult one.
>
> […], given the entirety of the circumstances, including the plaintiff's (and the Mazars') significant health issues that gave rise to valid heightened concerns about access, together with the fact that a civil engineer recommended the plaintiff remove the fence immediately, I conclude the situation was one of such urgency that the limited notice given was sufficient.[11]

The injunction sought by the plaintiff was considered, however, as unnecessarily wide by the court and it was left to the parties to settle the wording of the injunction order with leave to

[11] Supra, note 1 paras 176-184

address the matter if they could not agree. As the supplementary reasons released this past month show, the parties could not come to a common agreement as to the width of the injunction area. The court essentially split the difference of the areas sought by the parties.[12]

Editors: Megan E. Mills and Izaak de Rijcke

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

A discussion of 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.[13] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

Webinar from ANLS AGM

One of the presentations at the AGM of the Association of Newfoundland Land Surveyors on May 31, 2024 was on the topic *of Maintaining Public Confidence and Trust in the Work of Surveyors*. Izaak de Rijcke recorded his presentation as a CPD webinar.[14]

Eastern Regional Group of AOLS "Education Day" Webinar

The theme of the Eastern Regional Group (ERG) of AOLS "Education Day" held on April 30, 2024 was *Water Boundaries in a Changing Climate Context*. Four Point Learning co-hosted the event which is now available as a CPD webinar.[15]

---

[12] *Supra*, note 2

[13] 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.

[14] This webinar qualifies for 1.5 *Formal Activity* AOLS CPD hours.

[15] This webinar qualifies for 8 *Formal Activity* AOLS CPD hours.

Course: *Survey Law 1*

Survey Law 1 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting September 4th. For more information, consult the syllabus. Please go to Four Point Learning to register.
Registration closes September 10th.

If you wish to contribute a case comment, email us at TBP@4pointlearning.ca.

If you wish to unsubscribe, please email us your request. To receive your own issues of *The Boundary Point*, complete a sign-up form at the Four Point Learning site.

ISSN: 2291-1588