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.

Construction and redevelopment in commercial areas of urban centres are a regular part of life. Minimizing the inconvenience and negative impact of construction activity on surrounding properties is a constant challenge. While a developer may have some rights to access found in a right-of-way, what level of construction activity – parking, staging, locating temporary trailers, materials and equipment – might be permitted and when does activity cross the line and become an infringement of the terms of the right-of-way? This was one of the central questions in the recent Ontario decision in *Figaro Dominion v. The Incumbent*.[1] Had the developer's activities, which were to a certain extent permitted under both a right-of-way and a licence from the servient owner (also named as a respondent), substantially interfered with the Applicants' (or rather the Applicants' tenants) rights under the right-of-way? Here, the Applicants sought and received an injunction against the Developer respondent to restrict parking and otherwise blocking passage of the right-of-way. The decision is an interesting discussion of the law on what constitutes a substantial interference of a right-of-way that is actionable by the owner of the dominant tenement.

Substantial Interference with Use of a Right-of-Way: When is Construction Inconvenience Too Much?

Key Words: *right-of-way, easement, reasonable use, interference, access, injury*

The facts of this case are quite simple. The Applicants are commercial landlords of a series of adjacent properties fronting on Kingston Road in eastern Toronto. The Respondents (Nova Ridge Development Partners) own the adjacent properties and are in the process of constructing a 12-storey condominium building. All of the properties benefit from a right-of-way on property that is owned by the Respondent Church. The court explained,

> On September 17, 2021, the Church entered into a "Tie Back Construction and Crane Swing Agreement" (the "Agreement") with the Developer, which licensed the Developer to use the

[1] *Figaro Dominion v. The Incumbent*, 2025 ONSC 891, https://canlii.ca/t/kbssg

> Laneway as a "*construction staging area*" to store materials, supplies, and equipment; to install a site trailer; erect site fencing; and, to park. The Developer paid the Church $67,000.
>
> The Applicants say that the Developer's actual use of the Laneway infringes the ROW. The Church agrees.
>
> The Applicants have joined the Church as a necessary party and contend that the Church should have taken greater steps against the Developer. They, however, do not seek any relief against the Church.[2]

The central questions on the application were whether the Developer's activities, infringed the right-of-way, have the Applicants demonstrated injury and should an injunction be granted?

For greater context, an aerial image of the site can be seen in Figure 1. Here, demolition of the pre-existing commercial properties on the land owned by the Applicants appears to have occurred although construction of the condo tower has not yet commenced. There are a variety of commercial tenants that occupy the properties owned by the Applicant, including a restaurant, a daycare and a convenience store. These tenants rely on the right-of-way for parking and access during business hours. The daycare also uses the right-of-way for clients to drop off and pick up their children.

Figure 1. Aerial view of commercial properties, the undeveloped property of the respondents as wells as the parking and laneway lands that form the right-of-way. Google Maps. All rights Reserved.

Figure 2 below is a street level view of the right-of-way and parking area behind the subject property taken from the side street in 2019, *prior to any construction activity*. Visible in the image is some signage indicating plans for future development.

[2] *Ibid*. at paras 5-7

Figure 2. View of right-of-way from side street, 2019 prior to commencement of construction activity. Google Maps Streetview. All rights reserved.

A survey depicting the right-of-way and the parties' properties was included within the reported decision and is reproduced below as Figure 3. Yellow highlighting is used to indicate the extent of the right-of-way. The Applicant's properties are located to the bottom left of the survey and the Respondent Developer's properties are on the bottom right.

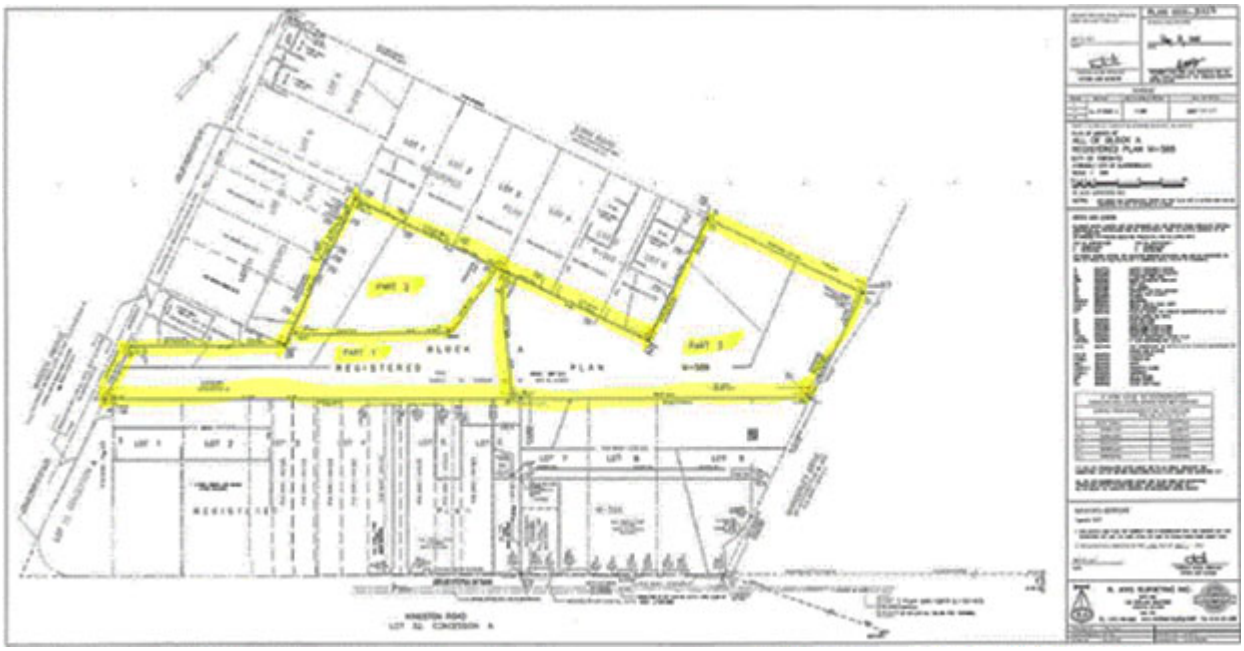

Figure 3. Plan appearing in reported decision. Area of right-of-way is highlighted in yellow.

Finally, Figure 4 below is a street level view of the property from August of 2024 along the main street, Kingston Road, showing the progression of construction. The crane is still visible on site. Materials and road closure signs are seen temporarily blocking access to the side street, but are part of a municipal road maintenance project rather than for the subject condominium construction. A street view directly into the right-of-way from the side street *during the construction period* is not available.

Figure 4. Image of crane and progressing construction as well as municipal roadwork on August 2024. Google Maps Street view. All Rights Reserved.

The court summarized the law on the threshold conduct for a finding of an infringement of the right-of-way with reference to *Weidelich v. de Koning* and other case law. The inquiry is a fact based one and situation dependant that may allow for temporary or even permanent structures on the affected lands provided that unimpeded use of the right-of-way remains.

> The test for determining whether conduct infringes a right-of-way is the "substantial interference" test, which test requires the consideration of "whether practically and substantially the right-of-way could be exercised as conveniently as before" the interference: *Weidelich v. de Koning*, 2014 ONCA 736, 122 O.R. (3d) 545, at para. 10.
>
> This requires consideration of the reasonable use that the dominant owner benefitted from prior to the alleged obstruction and if the right-of-way can be substantially and practically exercised as conveniently as before. This is a fact-driven inquiry and focusses on the interpretation of the instrument creating the easement according to the intention of the parties based on the words they used in the context of the circumstances that existed when the easement was created: *Weidelich*, at paras. 15 and 33; *Wilson v. McQuade*, 2022 ONSC 847, 2022 ONSC 0847, at paras. 28, 36 and 46; *Fallowfield v. Bourgault*, 2003 CanLII 4266 (ON CA), 68 O.R. (3d) 417 (C.A.); *Markowsky v. Verhey*, 2020 ONCA 471, at paras 26-28.
>
> The easement does not exist in the abstract. It is granted for a purpose: *Khazai v. Disante*, 2020 ONSC 2152 at para. 21.

> A party "is not precluded from placing chattels or erecting a fence or gate on an easement, as long as what is done does not substantially interfere with the other party's use of the easement that was granted": *Fallowfield*, at para. 33. A party is not even precluded from building permanent structures on an easement as long as this does not substantially interfere with the use of the easement: *Weidlich* at paras 20-26. Notably, this would apply to the servient tenement who owns the property on which the easement exists. This law would not mean that a party who benefits from the easement (and who does not own the land) can build structures on the easement that do not comply with the purpose of the ROW, absent agreement from the servient tenement.
>
> If the obstruction is fleeting and remedied promptly upon request, it will not likely result in damages. However, parties enjoying a right-of-way over a laneway should not obstruct it without the permission of the other, except for the brief obstruction that is inevitable when a party is using the laneway to access their property: *Khazai v. Disante*, at para. 40.[3]

Within this broad context, the first step is to look at the language of the grant of the right-of-way in order to understand its purpose and scope. In this particular scenario, the language of the original 1949 grant was altered slightly when the land covering the easement was placed in *Land Titles*, with the addition of the word "workmen." A further application by the Church to the Land Registrar correcting same was intended.

> The original wording of the ROW, granted on September 21, 1949, was as follows:
>
> > Together with a right of way in common with all others entitled thereto including the Grantee, his executors and assigns, and his servants, his agents, tenants and occupants of the said lands and premises in, over, along and upon Block "A" as shown on said Plan, M.588 and for the purpose of parking motor vehicles thereon by anyone doing business with the grantee.
>
> It is uncontradicted that the ROW was misdescribed when the easement was put into the Land Title System such that it was recorded as follows:
>
> > T/W A ROW IN COMMON WITH ALL OTHERS ENTITLED THERETO IN FAVOUR OF THE GRANTEE, THEIR SUCCESSORS AND ASSIGNS THEIR SERVANTS, WORKMEN, AGENTS, THE TENANTS AND OCCUPANTS OF THE SAID PROPERTY & ALL OTHERS DOING BUSINESS WITH HIM OVER, ALONG & UPON BLK "A" PL M588; T/W A RIGHT IN COMMON WITH ALL OTHERS ENTITLED THERETO TO THE USE OF SAID BLK "A" FOR THE PURPOSE OF PARKING MOTOR VEHICLES[4]

In terms of past use, the Respondent Church gave evidence that historically the right-of-way had been used as parking for tenants of the lots entitled to use it under easement. Given the broad language of the grant, the court concluded that the right-of-way "permits the Applicants and the Respondents and their tenants, agents, servants and occupants, and those with whom they do business to drive over the ROW and also park on it. This would logically include their

[3] *Ibid.* at paras. 10-14
[4] *Ibid.* at paras. 17-18

employees, customers and suppliers."[5] Noting the sizable width, which would allow passage even if a large truck were parked within the space, and the fact that it served commercial businesses, the court further agreed that receipt of deliveries was also included as well as the parking directly behind the tenant businesses. Though these benefits were described as "ancillary" to the right-of-way in that they would be reasonably necessary to enjoy the right-of-way of a commercial property, the court did not extend these rights to the Developer's workmen or construction workers, noting their exclusion from the original language of the grant and the intention of the Church to apply to amend the language in the easement as registered to remove the mistakenly added group. The court found that the term "agents" at the time of the grant did not include construction workmen engaged in the kind of significant work being done for the condominium construction. However, minimal explanation was given for this finding, other than there was no evidence of such usage at the time.

The Applicants highlighted a long list of the actions which they stated demonstrate that the developer's use of the lands had caused substantial interference with their use of the right-of-way, by significantly reducing the usable parts of the right-of-way or blocking it entirely:

- Using the Laneway for a construction staging area, construction access, a site office, and the storage and delivery of materials and construction equipment including a large crane.
- Erecting a fence along 1/3 of the right-of-way substantially narrowing it.
- Reducing the usable are of the right-of-way from 13 meters at its narrowest to approximately 4.25 meters at its narrowest as a result of the staging area and fence.
- Allowing construction workers to park in spots behind the tenants' businesses
- Allowing the Developer's delivery trucks to obstruct the Laneway by lining up to load and unload materials at the construction site on the east end of the Laneway.[6]

Various affidavit, photographic and video evidence was presented to support these claims. Limited evidence was provided by the Respondent Developer to refute these claims, leaving much of the Applicants' evidence uncontradicted. In response to the Developer's argument that blockage was caused by other vehicles and the activities were permitted by the easement, the court noted the following:

> The fact that there may be isolated instances when unidentified parties have improperly used the ROW does not mean that the Developer's activities have not also blocked the ROW and impeded parking and thoroughfare.
>
> Furthermore, even if other vehicles unrelated to the Developer have caused problems at times, it is unlikely that such vehicles would have caused problems in the absence of the significant reduction in the width of the ROW which is because of the Developer. Recall it has

[5] *Ibid.* at para. 24
[6] *Ibid*. at para. 30

been reduced from 13 meters (42 feet) at the previous narrowest point to approximately 4.25 meters at the current narrowest point. Therefore, the Developer's narrowing of the ROW is still the cause of the problems caused by other vehicles. That is, if the ROW was 13 meters (or 42 feet) wide and a car or truck improperly parked, it was unlikely that it would have obstructed the ROW. The reason it does so now is because the ROW has already been so significantly reduced in width by the Developer.

Further, as noted, the grant must be construed in light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect to the intention of the parties. There is no evidence that at the time of the grant anyone was storing construction materials or constructing fences that narrowed the Laneway, using the Laneway for extensive parking for construction workers, or that there were any of the kinds of items placed in the middle of it, or that there was any usage by another party that had a right to the easement similar to what the Developer has engaged in.

I also reject the Developer's argument that the easement grant includes a right to park on its behalf and that that right extends to its workers. As I have found, "workmen" is a mistranscription in the easement. The original grant does not include "workmen". There is also no evidence that at the time of the grant, "workmen" were using the ROW to park. Therefore, the Developer's workmen are not permitted to park within the ROW according to the terms of the grant at all.

If the Developer was permitted to do what they are now doing based upon the wording of the grant of the easement, they would not have needed to enter into the Agreement with the Church.[7]

The Court went on to reference numerous examples demonstrating that even if the developer's activities were expressly permitted by the right-of-way, their use may not infringe on the rights of others to enjoy their rights under the right-of-way or to exclude the owner of the servient tenement.

Furthermore, even if the Developer's activities were permitted by the ROW, the law is clear that the grantee of a right-of-way may not exercise his right in such a manner as to dominate the right-of-way to the exclusion of the owner of the servient tenement, and others having a like right-of-way: *Soares v. Café Regional Bar & Grill Inc.*, 2013 ONSC 7939, at paras 54-57; *Richardson v. H.G. Meyers Co.*, [1974] OJ No 274 (H.C.J.), at para. 16; *Bridgman v. Loblaws Groceterias Co. Ltd*. (1929), 35 O.W.N. 353, aff'd 36 O.W.N. 214 (Div. Ct.), at paras. 6, 9, 11-12; and *Anthony et al v. F. W. Woolworth Co. Ltd.* 1962 CanLII 212 (ON SC), [1962] O.R. 1005-1012 at para. 4.

The case *Woolworth* is particularly relevant. The plaintiffs sought an injunction and damages for unreasonable obstruction of a right of way. All the litigants were commercial users of their properties. The defendant permitted the lane to be stopped or blocked for unreasonable periods of time by motor vehicles, trucks and transports loading and unloading

[7] *Ibid*. at paras. 50-53

merchandise to the premises. The court held that while the defendant had the right to have trucks come over the right of way and load and unload them, it could not allow their trucks to so use the lane in a manner that others who had the right to pass over it were deprived of their rights. He found that allowing the use in this manner for an unreasonable length of time which blocked the right of way was a real and substantial interference with the rights of the plaintiff and their tenants: paras 2, 6.

This is because even where a right-of-way permits users to load and unload parked cars to receive deliveries to a premises, that right will be subject to the rights of others to use the roadway, and trucks cannot remain for unreasonable lengths of time: *Woolworth*, at paras. 2 and 6.

See also *Bridgeman* where the court held that the defendant's use of the lane, not only as a way but by occupying it with trucks who unloaded materials for varying periods of time that ranged from five minutes to an hour or more constituted substantial interference with an easement. The court stated:

> A right of way is not a right to tarry; and though the doctrine of de minimus would, no doubt, prevent the general principle that interference with a right, however small, creates a cause of action, from being pushed to an absurd extremity, a right of way does not imply a right to occupy and obstruct a servient tenement for such periods as are indicated by the evidence in this case…: para 11.[8]

The Court also distinguished the facts in *Weidelich* as in that case, even though a permanent encroachment had been constructed on the easement lands, the right-of-way was still accessible and passable as before, which was not the case in the present matter. Other distinguishing factors in *Weidelich*, was that it was the servient owner who had constructed the addition and that the properties were not commercial. The right of the Developer to build and place items on the easement land was only through the agreement with the servient landowner, the Church and that agreement required that the activities did not impede passage or interfere with others' rights to use the right-of-way.[9]

Upon concluding that the Developer's activities constituted a substantial interference with the Applicant's use of the right-of-way such that it could not be exercised as practically and conveniently as before, the court then turned its attention to determining whether any "injury" had been demonstrated. The discussion began with the following statement of the law:

> An encroachment or interference on a private right-of-way is actionable only where the encroachment causes injury: *Weidelich*, at para. 10, per Doherty J.A., quoting *Gale on Easements*, 19th ed. (London: Sweet & Maxwell, 2012), the leading English text on the topic:

[8] *Ibid.* at paras. 57-60
[9] *Ibid.* at paras. 64-65

> …it has been said that for the obstruction of a private way the dominant owner cannot complain unless he can prove injury; unlike the case of trespass, which gives a right of action though no damage be proved.[10]

That the Applicants had not lead evidence that they had lost money or had tenants terminate their leases was not detrimental to a finding that an injury had occurred. It was noted that injury in this context need not be that the party suffers monetary damages and multiple cases were cited to this effect.

> In *Woolworth,* the court found that the neighboring property owner who also enjoyed rights under the ROW had substantially interfered with the plaintiffs' right of way by blocking a laneway while loading and unloading trucks.
>
> In *Soares*, the court adopted the reasoning in *Woolworth* enjoining neighboring commercial property owners from parking vehicles on a laneway to load and unload goods, interfering with the plaintiff's right of way: at paras. 56-57 and 61.
>
> In *Wilson*, the court held that the installation of a wood fence and an unlocked metal gate prevented the applicant from accessing her cottage as practically and conveniently as before: at paras. 47, 50-52, and 56.
>
> In *Nolet v. Granger*, 2024 ONSC 3134, found that an unlocked gate across a lane substantially interfered in the plaintiff's right-of-way: at paras. 37-38.[11]

Noting that ongoing complaints had been received from the tenants and the Applicant's obligation as landlord to address such complaints, the court found that the Applicant had demonstrated sufficient injury consistent with the above noted cases where injunctive relief had been awarded.

The Applicant had sought a permanent injunction for the removal of the construction office and all material and equipment stored in the Laneway as well as enjoining the developer from encroaching onto and obstructing the right-of-way in general and the parking areas used by the Applicant and its commercial tenants in particular. The Respondents argued that a permanent injunction that would effectively stop of significantly delay its construction would not be appropriate, particularly given that items have been in place since 2021 and issues were not raised by the Applicant until 2024. Another important factor was that the Developer did have rights to the right-of-way, only as described above, in exercising those rights, he cannot substantially interfere with the rights of the others with an interest in the right-of-way.

> I agree in the circumstances the delay, as well as the closeness of the completion, militates against any permanent injunction requiring the Developer to remove these items. This would impact the Developer's ability to complete the project on schedule and it is unclear how materials could be delivered if they were. I agree that after waiting almost three years to

[10] *Ibid.* at para. 67
[11] *Ibid*. at paras. 70-73

> bring the Application, it would be manifestly unfair for the construction of the condominium to be impeded in this way when it is so close to completion.[12]

Furthermore, the Applicants have not established that the presence of these, on their own, are the problem. Their argument is that it is the combination of these as well as the parking and the way that the Developer is using the space, outside the staging area, that creates the substantial interference. It is an admitted fact that even with these items in the ROW, as well as the fenced off area, there would still be sufficient space for the Applicant, their tenants and customers to pass through, but for some of the other activities of the Developer.

> […] the Developer has a ROW over the Laneway as well. A permanent injunction enjoining the Developer from encroaching onto the ROW or from using it for parking would mean that the Developer could not use it at all which would violate its rights in respect of the ROW.[13]

The court further clarified that there was a requirement to leave a passage of 4.25 metres in width through which cars can pass. In the result, the court aimed to strike a balance with Agreement to allow the Developers' use of the lands for staging, the Developers' rights to the right-of-way and the rights enjoyed by the other Applicants (and tenants of their units). The court ordered a permanent injunction restraining any of the Developer's workers from parking directly behind the Applicants' units (because the right-of-way did not extend to workmen) and further ensuring access for the Applicant by requiring that any delivery trucks or parked cars associated with the Developer be moved within 5 minutes. The result in allowing the continued presence of equipment and the construction office on the right-of-way lands pursuant to the Agreement is not dissimilar to the decision in *Weidelich* in the sense that while some obstruction was being permitted (here based on the Agreement and for the duration of the construction project), that obstruction could not interfere with the ability of others to exercise their rights over the right-of-way.

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

The subject matters considered in *Figaro Dominion* are discussed in Chapter 5, *Boundaries of Easements*, and see the discussion of *Wiedelich v. de Koning* at page 160 and *ff*.

[12] *Ibid*. at para. 83
[13] *Ibid*. at paras. 83-85

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.[14] 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 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 3rd. For more information, consult the syllabus. Please go to Four Point Learning to register.

SaGES Conference

The British Columbia Institute of Technology (BCIT) is hosting the 29th biennial conference of the Surveying and Geomatics Educators Society (SaGES) set to take place between June 15 and 19, 2025 in Vancouver. Approximately 50 papers and presentations are scheduled to be delivered from geomatics educators across North America.

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[14] 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.