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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Easements usually involve the sharing of some use of a portion of land so that the owner of the land may not do what the owner might otherwise legally do in their enjoyment of the land: the title is burdened by the legal rights of another owner who benefits from the easement. Inevitably, this means that the owner of the land and the owner of the easement will interact. Usually, as neighbours, there needs to be some "give and take." When the practical reasons for an easement being granted in the first place are ignored or no longer respected, the owner of that easement may seek help from the courts in order to ensure that the easement rights can continue to be enjoyed.

In this month's issue we consider again a decision[1] from British Columbia in which the owner of an easement to drive over the strip of land was being compromised to the point of making it dangerous, if not at times impossible, to do so. As in the decision in last month's issue of *The Boundary Point*, a land surveyor did not need to testify in court. However, a survey plan depicting the presence and location of improvements built into the easement strip was considered by the Court. In addition to citing case law from BC, the Court referred to many cases and authorities from across Canada, making this decision a relevant consideration in all common law Provinces.

Easements and Interference with Enjoyment: When Does It Become Substantial?

Key Words: *easement, nuisance, interference, encroachment, injunction.*

Readers might think that the law is settled in respect of this topic: interference or obstruction of an easement may occur, provided it is not a substantial conflict with the easement owner's enjoyment. The facts in *Horning v. Schroeder-Collen* were not complicated.

The plaintiff, owned 114 Arlayne Road, Kaleden, British Columbia ("Lot 7") since 2005 as their personal residence. The defendants owned 122 Arlayne Road ("Lot 10") since 2010. The only

[1] *Horning v. Schroeder-Collen*, 2025 BCSC 1233 (CanLII), https://canlii.ca/t/kd2s5

way to access Lot 7 is by way of the "Easement Lands" which cross over several properties, including Lot 10. The image[2] below illustrates the relative position of the 2 properties with Lot 7 at the end of a "dead end."

The view from Arlayne Road in 2012 across the easement strip towards Lot 7 also appears below from the same source:

The easement originated in deeds in the late 1970s which included language as follows:

> The Lot 9 Easement provides that the:

[2] From Google maps® All rights reserved.

> . . . the Grantor [Lot 9] DOTH HEREBY GRANT AND CONVEY unto the Grantee, his heirs and assigns, the owner or owners for the time being of the dominant tenement described as Lots Seven (7) and Eight(8) . . . and their agents, servants, workmen and all other persons having need to use the said Right-of-Way, a free and uninterrupted Right-of-Way for persons, animals and vehicles to use, enter, pass and repass over and upon that certain parcel or tract of land more particular described as:
>
> [the Easement Plan]
>
> The Lot 9 Easement further provides that:
>
> NOTWITHSTANDING anything to the contrary hereinbefore contained, the GRANTOR AND THE GRANTEE further covenant and agree:
>
> . . .
>
> 2. The Grantor and Grantee will keep the Right-of-Way clear of all standing vehicles.[3]

Over time, there was constructed a retaining wall and an "irrigation box" which projected into the easement. These were considered to be permanent structures. However, the amount of these encroachments was not considered by the court to be significant. In contrast, the more recent parking of a large mobile home and cars were considered to be significant by the court, despite their temporary presence. The court explained the difference as follows:

> …a distinction can be made between obstructions that are temporary in character and those which are permanent in character. The latter are very likely to be actionable, but are not automatically so. That distinction is significant in this case given that the evidence of interference caused by the Retaining Wall and Irrigation Box was very limited, despite their permanent character, whereas the evidence of interference from the standing vehicles in the Easement Lands was more significant, despite their temporary character.[4]

In its analysis, the court considered a number of authorities from British Columbia and concluded,

> Read together, I conclude these appeal authorities, which are binding on me, confirm it is not an error to consider the purpose and historical use of an easement when determining whether an encroachment is actionable or not, including where the encroachment is permanent. The starting point in the analysis is the terms of the easement which confers certain rights and imposes certain obligations that run with the lands upon which it is registered and it is my role as the trial judge to then make the necessary findings of fact as to the extent of any interference. I note, as additional support for this approach, that the Ontario Court of Appeal expressly rejected an automatic presumption of substantial

[3] *Supra*, footnote 1, at paras 8 and 9

[4] *Ibid.*, at para 34

interference where a structure is permanent in *Weidelich v. de Koning*, 2014 ONCA 736 at paras. 19-22.[5]

Lawyers and surveyors alike are reminded that not all "interferences" are identical. What will be actionable or not is increasingly dependent on the specific facts which are a source of irritation. In *Horning*, the court found that, in respect of the presence of standing vehicles in the Lot 9 portion of Easement Lands, injunctive relief was appropriate. The injunction sought in respect of the retaining wall and Irrigation Box was dismissed. The plaintiffs' claim for costs was dismissed.

Editor: Izaak de Rijcke

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

The decision in *Horning v. Schroeder-Collen* adds to the discussion in the Chapter, *Boundaries of Easements at page 160* and *ff*.

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. 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*

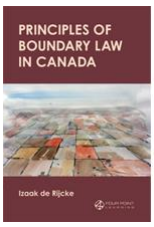
Survey Law 1 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This course will be taught online Wednesday evenings during this fall by Izaak de Rijcke, starting September 3rd. For more information, consult the syllabus. Please go to Four Point Learning to register.

Principles of Boundary Law in Canada

In the context of (1) the complex and ever-evolving nature of boundary law, (2) the challenges of doing legal research in this area, and (3) the constant interplay between land surveying practice (as a regulated profession with norms codified in statutes) and common law principles,

[5] *Ibid.*, at para 44

land surveyors need a current reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable.



See *Principles of Boundary Law in Canada* for a list of chapter headings, preface and endorsements. You can mail payment to: ***Four Point Learning*** (address in the footer of the first page of this issue of *The Boundary Point*) with your shipping address **or** purchase online. (*NB: A PayPal account is not needed.*)

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