



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 affect your work.

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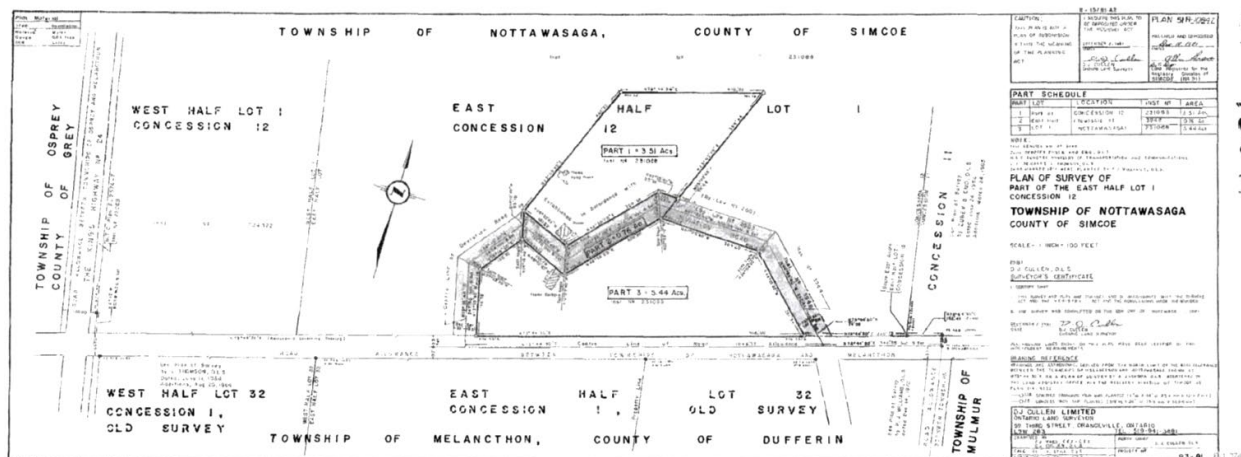
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Roads are everywhere. Yet not every thoroughfare is a public highway. Fallen into disuse and even blocked off, some tracks may seem like unlikely candidates for public highway status. But even the most obscure tract of land, having been used by the public in the past, can still have the status of municipally owned land. In Ontario we consider a decision¹ which illustrates an important exception to title registered under the *Land Titles Act*: “any public highway”² prevails as an exception to the title of land under the *Act*.

A “Deviation Road” is Declared to be a Public Highway

Key Words: *dedication and acceptance, highway, exceptions to registered title, road on survey plan, by-law*

Appended to this decision was a Reference Plan of Survey which the court had shaded to illustrate the “Deviation Road” at issue. It appeared as,



¹ *Township of Clearview et al. v. Wargon et al.*, 2026 ONSC 2252 (CanLII), <https://canlii.ca/t/kkjm4>

² *Land Titles Act*, R.S.O. 1990, c. L.5, s. 44(1) 8

The court described the land sought to be declared in the ownership of the municipality as follows:

The land is a deviation from part of the original road allowance. It is referred to as the “Deviation Road.” I will call it that for convenience, without any predetermination that it is legally a “highway.” The Deviation Road terminates on its west and east ends at the “Melancthon-Nottawasaga Townline Road,” the original road allowance/boundary road, a public highway. The Deviation Road includes a bridge over the Noisy River. Because a boundary road is under the joint jurisdiction of the two townships that share it, the applicants have named Melancthon as a respondent in this proceeding. Melancthon did not respond to the application.

The Deviation Road is part of the East Half of Lot 1, Concession 12, Clearview (Nottawasaga). It spans land now owned by Mr. Bailey in the Township of Clearview, municipally known as 825941 Melancthon-Nottawasaga Townline Road. In 1981, Reference Plan (“R-Plan”) 51R-10847 was prepared. I have attached a copy. The reference plan shows part of the Deviation Road as Part 2, an area of .76 acres. The R-Plan also shows the remainder of the Deviation Road, but not as “Parts” on the R-Plan. For visualization purposes, I have highlighted the Deviation Road in its entirety. On the R-Plan, the surveyor has called the entirety of it the “Deviation Road”, and in doing so noted: “Centre Line of Deviation Road established in accordance with By-Law 260 Inst. No. 3948.” I am satisfied that what I have highlighted on the R-Plan is the land in issue.

The land in contention is contained today as part of the lands registered in the Land Titles Office #51, as PIN 58224-0008 (LT) and PIN 58224-0009 (LT).³

The depiction of this area on the county GIS map⁴ illustrates the location:



³ *Ibid.*, at paras 6 to 8

⁴ Simcoe County GIS – All rights reserved

It is obvious that the topography would have presented a challenge for settlers seeking to travel along the surveyed road allowance. The court described in detail the relevant legislation to reflect such circumstances and how deviation roads, built outside the Crown surveyed road allowances, nonetheless gained public highway status:

“What is a “public highway”?

There is a bare bones description of what constitutes a highway in s. 26 of the *Municipal Act, 2001*, S.O. 2001, c.25. If, after January 1, 2003, it is alleged that a road was previously a “highway”, then its history must be investigated. This is because s. 26, clause 1, of the current *Municipal Act* grandfathered all “highways” that existed on December 31, 2002, into the new legislation, unless they have been closed. A “highway” also includes all road allowances made by the Crown Surveyors located in municipalities, unless they have been closed: see *Municipal Act, 2001*, s. 26, clause 4.

The *Highway Act* of 1810, Statutes of Upper Canada, 50 Geo. III, c. 1, was the patriarch of Ontario’s present road legislation, followed by the *Municipal Institutions Act* of 1849, 1849 12 Vic., c. 81 (the “Baldwin Act”). The consolidated *Municipal Institutions Act* of 1858, S.U.C. 1858, c. 99, restated the definition of a highway as:

300 – What Constitute Highways

All allowances for roads made by the Crown Surveyors in any Town, Township or place already laid out, or hereafter laid out; and also all roads laid out by virtue of any Act of the Parliament of Upper Canada, or any roads whereon the public money has been expended for opening the same, or whereupon the Statute Labour hath been usually performed, or any roads passing through the Indian Lands, shall be deemed common and public highways, unless where such roads have been already altered, or may hereafter be altered according to Law.

This definition was in effect in 1878. However, public highways were not confined solely to those that fell within that definition. As the applicants point out, highways could be created by the common law principles of dedication and acceptance.

The first legislative recognition of roads and streets being created by “dedication by the owner” and “acceptance by the municipality on behalf of the public” appeared in s. 432 of the *Municipal Act* of 1913, S.O. 1913, 3-4 Geo. V, c. 43 (“*Municipal Act* of 1913”), which provided:

432 Except in so far as they have been stopped up according to law all allowances for roads made by the Crown surveyors, all highways laid out or established under the authority of any statute, all roads on which public money has been expended for opening them, or on which statute labour has been usually performed, all roads passing through Indian lands, *all roads dedicated by the owner of the land to public use, and all alterations and deviations of* and all bridges over *any such allowance for road, highway or road, shall be common and public highways.*
[emphasis added]

Despite the late statutory recognition in 1913, the common law also applied in 1878 and following. As stated in *Russell on Roads*, C.R.W. Biggar wrote in *The Municipal Manual 1900*:

A third class of highways has, since the passing of 50 Geo. III, c. 1 [the *Highway Act* of 1810] become so important as to require detailed consideration. It embraces all such public roads, streets, lanes, etc., as have been dedicated by private owners, and accepted as highways by or on behalf of the public.

Whether the private owner of lands has, or has not dedicated a trespass road to the public for highway purposes, must in every case be a question of fact. His intention to do so may be evidenced:

(1) By his executing a deed or other written document in which the land is described as a highway.

...

Russell on Roads indicates that owners “dedicating” their land and the municipality “accepting” it to create a road has been recognized in the common law since the early 1800s. The reference quoted is from *Meredith & Wilkinson: Canadian Municipal Manual* as follows:

The law as to the dedication of highways is well and compendiously stated in *O’Neil v. Harper* (1913) 1913 CanLII 538 (ON SCAD), [1913 CarswellOnt 820, 13 D.L.R. 649, 28 O.L.R. 635, [1913] O.J. No. 91 (Ont. S.C.)] where it is laid down, though not for the first time, that land dedicated for the purpose of passage becomes a public highway when accepted for that purpose by the public; there must be the intention to dedicate. Acceptance may be inferred from public user, and no formal act of adoption is necessary. Open and unobstructed user by the public for a substantial time is, as a rule, evidence from which both dedication and acceptance may be inferred, but an intention to dedicate can only be inferred against a person who is absolute owner in fee simple and sui juris, all of which propositions are supported by citation of the authorities.

Since the first Baldwin Act in 1849, there have been various legislative provisions (up until December 31, 2002 when s. 26 of the *Municipal Act, 2001* was passed) that acknowledged that both the common law formula and the statute law formula led to municipal ownership of roads. This applied even in the case where the municipality did not receive an actual deed to the land in question. For example, s. 433 of the *Municipal Act* of 1913 provided that:

433 Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act.

When a municipality acquires title to a road by deed from the owner for road purposes, it does not mean that it has assumed the road.

Formal acceptance by the municipality could be by passage of a by-law accepting ownership. However, in *Rorabeck et al. v. Township of Sidney et al.* (1977), 1977 CanLII 1138 (ON HCJ), 16 O.R. (2d) 296 (H.C.) at p. 303, Labrosse J. wrote that it is well settled that acceptance by a

municipality can be established without being dependent upon a by-law or resolution of the municipality.

Indirect acceptance by the municipality can be established by showing that the municipality assumed the road by performing work and incurring expenditures in connection with it..."⁵

The municipality's application was opposed by the respondent who gave evidence and made submissions of law on why the Deviation Road was not, or no longer was, a public highway. These submissions included the lack of registration of a former township by-law on title, as was required under the legislation that applied when the by-law was passed. He also conducted a search of title and found no evidence of a deed or transfer of the disputed strip to the municipality. The expiry of any interest which the municipality may have had by the operation of Part III of the *Registry Act* was also argued.

These submissions were discussed in detail by the court which made findings of fact based on all the evidence.

"There is no issue that the Deviation Road was a route that clearly detoured around part of the original road allowance, which was a boundary road between Nottawasaga and Melancthon. As such, it had the attributes of a replacement boundary. It was also connected to roads in the Township of Mulmar. I infer that a complete boundary road was a necessity in the past to connect residents of Nottawasaga and Melancthon in that area to one another and to the Township of Mulmur in the southeast and to the King's Highway to the immediate west. There is no issue that there was a mill on Mr. Pound's property fronting on the Deviation Road, built around 1864. There was a bridge on the Deviation Road close to the mill, making travel possible over the Noisy River. All of this explains why Mr. Pound donated the land to the municipality for a road, particularly with the mill on his property. It is difficult to see how the residents in the area could have travelled in a reasonable fashion without it or how the mill could have functioned.

A surveyor suggested to Mr. Wargon that he make further inquiry about the Deviation Road when, in 1964, he purchased other land in the area, before his 1966 tax purchase. There was obviously awareness of the Deviation Road at the time. In 1981, the presence of the Deviation Road was plotted on Reference Plan 51R-10847. Today the Deviation Road in some places is just two parallel ruts with a hump of grass in the centre. In other places, it is in better repair.

From this history of the Deviation Road, I infer that a road had been constructed and used by the public. I find that Nottawasaga assumed the Deviation Road in the 1878 to 1884 period. It is a highway, unless prevented or defeated by other statutory provisions or events."⁶

And,

⁵ *Ibid.*, at paras 28 to 37

⁶ *Ibid.*, at paras 57 to 59. Mr. Wargon bought the property from the municipality by way of a tax sale deed for unpaid property taxes.

“Mr. Wargon deposed that he was under the impression when he purchased the property that he was purchasing what he calls “the path.” He does not say that anyone told him that at the time. He did not produce a copy of his solicitor’s reporting letter on the purchase transaction.

Mr. Wargon deposed that he did not visit the property until October 1965. However, in 1964 he became the owner of the West Quarter of Lot 1, Concession 11 in Nottawasaga, which is the land immediately adjacent to the east of the subject property. He constructed a cabin on it. At the time that he purchased Lot 1, Concession 11, he had it surveyed to establish the southwest corner of the property (which is the southeast corner of Lot 1, Concession 12). That corner is shown on the survey as 220 feet from the Deviation Road. In a reporting letter of June 24, 1964, with the survey, the surveyor advised Mr. Wargon: “We will have to obtain more information on the deviation road into Mulmur....” Clearly, Mr. Wargon was aware of the presence of the Deviation Road at the time of his 1966 tax purchase.

Mr. Wargon admits that he saw the path running through the lands and connecting to public roads on both the west and east ends of the subject property. It was narrow and deeply rutted in some areas, but was maintained better in others.

Mr. Wargon says that in the 1960s vehicles would occasionally drive over the path. Most were local residents, but other members of the public used it infrequently. He did not prevent it.

In 1967 Mr. Wargon converted the existing mill into a house. The house and garage were on opposite sides of the path. Mr. Wargon says that he would not have converted the mill and built the garage if he had believed that the path was a public road. However, he placed two mailboxes on the path, across from the barn and set his garbage out there for municipal pick up. This assumes a public road. People do not put their garbage in the middle of their private property for municipal pick up. People in rural areas do not put mailboxes in the middle of their property for mail delivery.

Mr. Wargon deposed that in the 1970s, Melancthon performed occasional maintenance on the road. Once each summer they graded it. Every year, when rainfall caused a culvert to be washed out, Mr. Wargon would call Melancthon to repair it. The evidence establishes that Clearview contributed to the cost.

In the 1970s Mr. Wargon went to the registry office and reviewed documents. He deposed that his review confirmed that he owned the path. He did not say what his review entailed or what expertise he had in reviewing title.

Mr. Wargon deposed that in the 1980s Simcoe County began performing occasional maintenance on the bridge by sweeping it, clearing debris from the grates, and checking its condition. Mr. Wargon said he regularly maintained the bridge by clearing off debris and occasionally replacing wooden guard rails. In October 1994 Melancthon wrote to him and thanked him for doing so, writing: “This is indeed a public service.”

In the 1980s the traffic on the path increased. Mr. Wargon put up “Private Property” and “No Trespassing” signs at both ends of the path. In the 1990s, Mr. Wargon asked Clearview to close the path by blockading the public road. Clearview refused. The use of the path

continued and increased in the 2000s. The Clearview Road Superintendent told Mr. Wargon that Clearview believed it owned the path.

Mr. Wargon deposed that he ploughed the path in the winter during his 56 years as owner. In June 1994, the Clerk of Melancthon wrote to Clearview that Melancthon had made arrangements with Mr. Wargon to snow plough the town line deviation between the Townships of Clearview and Melancthon from the point where Melancthon turns it's plough to 10 metres past the easterly boundary of Mr. Wargon's home property, but otherwise Melancthon maintains the road year-round.

In 2005, Mr. Wargon asked the Township of Melancthon to close the Deviation Road by blockading the public road immediately east of the path. At an intersection one kilometre west of the west end of the path Melancthon erected signs stating, "Narrow Bridge No Trucks" and "No Exit." On December 12, 2005 when Melancthon purported to close the Deviation Road, the resolution that it passed provided:

We agree to the closure of the road as proposed by Allan Wargon re: Melancthon-Mulmur Townline Line west through Concession 1 OS, East Part Lot 32 to Melancthon-Clearview Townships. This relieves the Township of any snowplowing and maintenance and liability obligations on this road from the westerly side of the County Bridge East to the Melancthon-Mulmur Townlines.

The Township of Melancthon did not comply with any of the road closing requirements in the *Municipal Act, 2001*, S.O. 2001, c. M. 25, as amended, which, at the time, in s. 34 stipulated highway closing procedures by municipalities. No notice was given. The consent of Clearview was not obtained. No by-law was passed. No certified copy of the by-law was registered on title.

In 2012, the County of Simcoe reconstructed the bridge on the Deviation Road at a cost to taxpayers of \$220,000. On August 24, 2012, Mr. Wargon sent a letter to the County entitled: "Re: the bridge over the Noisy River on the Melancthon-Nottawasaga Townline." He wrote: "This bridge, which is being rebuilt, is located on a deviation of the Melancthon-Nottawasaga Town Line that runs through our property, indeed, the bridge is roughly in the center of our farm property." He also wrote that if the road was to be paved, it needed to be paved up the slope and around the curve to where it met relatively level ground, roughly to just past where his mailboxes were located.

Christian Meile, the Director of Transportation Construction and Maintenance for the County of Simcoe deposed that when the County bridge reconstruction work was being carried out, neither Melancthon Township nor Mr. and Mrs. Wargon complained that County workers were trespassing on private property or that the County was spending public funds for the reconstruction of a bridge located on private property. However, the Wargons did complain on several occasions about the people using the road who end up trespassing on their property.

In 2019, Melancthon closed the eastern end of the path by adding large concrete blocks as a barrier. On July 22, 2019, Mr. Wargon erected a gate near the western end of the path and

placed rubble near the eastern end of the path. In August 2019, Clearwater’s counsel wrote a letter claiming that Nottawasaga was the owner of the path.

The evidence establishes to my satisfaction that Mr. Wargon knew when he purchased the subject property that the Deviation Road was a public way. In the 1980s, when Lavendar Falls on the Wargons’ adjoining property (part of Lot 1, Concession 11) was publicized in the press, people began using the Deviation Road to travel to see the Falls. They trampled over the Wargons’ fields and wreaked havoc. This was Mr. Wargon’s real complaint – too much traffic.”⁷

As noted at the outset, this decision is a reminder of how land ownership may not be as clear as what may appear from the registered title alone. Land surveyors and real estate lawyers alike will find the court’s analysis and the discussion of historic legislation (and how it remains relevant) instructive.

Editor: Izaak de Rijcke

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

An entire chapter on *Boundaries of Public Roads* can be found at page 221.

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Course: *Survey Law 1*

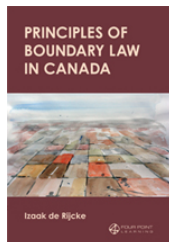
Survey Law 1 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This

⁷ *Ibid.*, at paras 101 to 115

⁸ 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.

course will be taught online Wednesday evenings by Izaak de Rijcke, starting September 9th. For more information, consult the [syllabus](#). Please go to Four Point Learning to [register](#).

Principles of Boundary Law in Canada



This comprehensive treatment of the principles of boundary law lies at the intersection of law and land surveying. Although the textbook has its foundation in the law of real property in Canadian common law jurisdictions, it is intended as a resource which bridges two professions. For real estate lawyers, it connects legal principles to the science of surveying and demonstrates how surveyors' understanding of the parcel on the ground has helped shape efficient systems for property demarcation, conveyancing and land registration.

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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