



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.

In this month's issue we examine a recent decision of the Ontario Superior Court concerning the status of a thoroughfare as a public highway or an access road. The issue in [*Blanchard v. Tripp*](#),¹ involved access to a remote property in an unorganized Township along a road that did not follow a surveyed road allowance. The decision concluded with a finding that the thoroughfare in question was not a public road or access road and further dismissed the plaintiff's claim. The plaintiffs in this and similar cases generally seek one specific outcome – a guaranteed (unobstructed) public vehicular access to their property. What is interesting is the number of possible approaches that can be taken to reach that desired outcome. In this case the lack of a formal survey where the road crossed crown land and the absence of coincidence of location with a surveyed road allowance contributed to the court's finding against the public nature of the road.

Common Law and Statute: Many Paths to a Finding of a Public Road

Key Words: *access road, common road, colonization road, statute labour*

Access to a property may be necessary for the use and enjoyment of that property, but the convenience of that access is not something that is necessarily relevant. Properties may need to be accessed by water, by foot or over a private road at the discretion of a neighbour. For the prospective purchaser, certainty in knowing that access to the property is available in a means that will suit their needs is a key consideration. Access roads, common roads, colonization roads, public highways are some of the terms one may encounter in cases where there is an effort to affirm a parcel's vehicular access over otherwise private land. On the question of public roads, there are also questions of statute labour, dedication and acceptance. There are a number of paths one can take to answer the question of a road's status and the historic appearance of a road on surveys can be a key component in a court's analysis. While this

¹ *Blanchard v. Tripp*, 2018 ONSC 3076 (CanLII), <http://canlii.ca/t/hs22x>; see also: *Blanchard et. al. v Tripp et. al.*, 2017 ONSC 1260 (CanLII), <http://canlii.ca/t/h08vv>

Ontario decision speaks of the history and analysis germane in this province, the relevance of the decision for elsewhere in Canada can be readily appreciated by noting the application of common law tests in the determination of a public highway in other jurisdictions. Surveyors will may face difficult questions when encountering thoroughfares of uncertain status during the course of their work.

Roads or highways² owned and maintained by a public authority having jurisdiction over same create a vast public overland transportation network linking individual properties and providing vehicular access throughout the province. But access to properties via public roads is not a given. In many parts of the province, private roads form the mechanism for access through either rights-of-way, easements, or other arrangements. Roads of different classifications may be created through various mechanisms under a number of different statutes in addition to the provisions of the *Municipal Act*. The *Road Access Act*,³ for example, sets out the conditions for the finding of a common road or an access road – the former being an access road upon which public money has been spent. In this action the plaintiffs had sought a declaration that Trussler Road was a public highway, a common road or an access road. The latter two classifications were dealt with and dismissed in the earlier decision by Justice Gordon and the question of whether the road was a public highway was the focus of the most recent decision by Justice Wilcox. The court provided the following summary to orient the reader:

The subject lands are in Laurier Township, in the District of Parry Sound, Ontario. The Township was surveyed in or about 1878 into lots of approximately 100 acres in the typical fashion. The concessions run east and west and number from 1 at the south end to 14 at the north end of the Township. The lots on each concession number from 1 at the west edge of the Township. Road allowances running east-west were laid out between the concessions at every second concession. Side roads running north-south were laid out after every fifth lot.

In Lot 11, Concession 14 is what I will refer to for convenience as “the junction”. Various routes come together here. Historically, it was approached from the south and west by Glen Roberts Road. Highway 11 runs north and south through it. When Highway 11 was four laned in or about the 1980’s, the approach from Glen Roberts Road was severed. Local access to the junction then changed to Beachy Drive approaching from the south. Also historically, the railroad approached it from the south on a straight line through Lot 11, Concession 13. That changed decades ago when the railroad was rerouted to an easterly path up through Lot 12, Concession 13, curving back into the top of Lot 11, Concession 13 as it approached the junction. There was also a railroad spur in the vicinity of the junction.

² The terms may be used interchangeably.

³ *Road Access Act*, R.S.O. 1990 c. R.24

Trout Creek follows a north-south course to the east of the junction close to the boundary between Lots 11 and 12. It is not to be confused with the municipality of Trout Creek, just to the north of Laurier Township.

What is referred to as Trussler Road ran easterly from the junction into Lot 12, Concession 14 and then angled south and east across Lots 13, 14 and 15, Concession 13, and into unpatented crown lands in Concession 12.

A spur or stub road branches south from Trussler Road into Lot 12, Concession 13. Neither it nor Trussler Road follow a surveyed road allowance at any point. Rather, they are over privately owned lands or crown lands.

Calling these “roads” without further explanation might leave the wrong impression. Although Trussler Road was made passable by automobile traffic at times and in places by landowners along it, it was more of a wagon track. There was less information provided about the stub road, but it appears to have had less use and attention by way of maintenance than Trussler Road.

Laurier Township was settled commencing in the late 1800’s. Thomas Trussler owned several lots to the east of the junction. His son, Charles Trussler, had additional land holdings in the area. Charles appears to have spent his entire life in the area until his death in the 1980’s and to have had some prominence among the local citizenry. He played a central role in the submissions made in this case. Roads in the area tended to be referred to by the name of the individuals whose properties they served. So, the road in question was referred to locally as Trussler Road although not officially named that.

It is important to note that Laurier remains an unorganized township, with no municipal government.⁴

At issue in this case was the status of Trussler Road and the spur road that came off it as being available as a vehicular access route for the Plaintiffs. Alternatively, access would be by foot along the CN lands, which is the mechanism that had been used by the plaintiffs to view the property prior to purchase. Also notable was the offer to purchase signed by the plaintiff having included the following: *“This offer is conditional upon the buyer determining and obtaining at his own expense written permission from the land owners to use the private roadway to give access to the said property within 30 days of acceptance.”*⁵ An aerial view of the properties can be seen in Figure 1 below in which Trussler Road and the spur road are not marked per se, but the curving CN line is clearly visible and roads in question passing over the meandering Trout Creek and cutting through the surrounding woodland can also be seen to the east of Highway 11.

⁴ *Blanchard v. Tripp*, 2018 ONSC 3076 (CanLII), <http://canlii.ca/t/hs22x> at paras 15-22

⁵ *Blanchard et. al. v Tripp et. al.*, 2017 ONSC 1260 (CanLII), <http://canlii.ca/t/h08vv> at para 25



Figure 1: Aerial view of CN line and surrounding road.⁶

The earlier decision in the matter had summarized the dispute (the language of Justice Gordon was repeated by Justice Wilcox):

Vehicular access to the properties owned by the Tripps and Ms. Lavalle is via a driveway or roadway commonly referred to as Trussler Road. Trussler Road runs easterly from the end of Beachey Drive across railway tracks and over the properties owned by Tripps at the south east corner of Lot 11, Concession 14 and the south west corner of Lot 12 Concession 14. It continues easterly over a bridge crossing Trout Creek and over the property owned by Ms. Lavalle. Not far from where Trussler Road enters Ms. Lavalle's property it branches in two directions: (1) Towards the northeast providing access to the Tripps' property; and (2) South towards the CNR Railway. It continues south and easterly over Ms. Lavalle's property following the contour of the CNR Railways lands before veering eastward into property owned by Iris Stevens.

The contest in this case centers not so much on Trussler Road but on a further roadway running a short distance off Trussler Road across Ms. Lavalle's property to the CNR Railway and then across the CNR Railway to the property owned by the Blanchards. In this decision I will refer to it as the spur road. Mr. and Mrs. Blanchard are of the view that this spur road, in conjunction with Trussler Road, leads to their property and provides their means of vehicular access.⁷

A street level view of the junction between Beachley Drive and Trussler Road appears below in Figure 2.

⁶ From: Google Maps®, All rights reserved.

⁷ *Blanchard et. al. v Tripp et. al.*, 2017 ONSC 1260 (CanLII), <http://canlii.ca/t/h08vv> at paras 8-9



Figure 2: Road level view at end of Beachey Drive towards Trussler Road⁸

Whether the road was public or private had significant implications. If the road was public, it could not be obstructed, it provided access to properties along the sides of it and was available for public use. Public roads are owned and maintained by the authority having jurisdiction, but as Laurier was an unorganized township, this responsibility would be taken on by the province. However the province had not been identified as a party added to the action.

The decision, which was a question framed for adjudication as summary judgment, came after a previous decision on summary judgment in the same action that had focused on the status of the road under the *Road Access Act*. A brief summary of the ambit of the *Road Access Act* was provided by Justice Gordon:

Section 1 of the Act provides the definition of “access road” and “common road”.

A “road” is defined as land used or intended for use for the passage of motor vehicles.

An “access road” is a road located on land not owned by a municipality and not dedicated and accepted as, or otherwise deemed at law to be, a public highway, that serves as a motor vehicle access route to one or more parcels of land.

A “common road” is an access road on which public money has been expended for its repair or maintenance.

In *Blais et al v. Belanger*, 2007 ONCA 310, the Ontario Court of Appeal, in confirming that persons who use an access road are not entitled to use the land for their own purposes except to enter or leave their property in a motor vehicle, held that: (1) Those who use an access road on the land of another do not have the right to repair or maintain the road. (2) The Act does not place any obligation on a landowner to maintain an access road across his

⁸ Google Streetview® All rights reserved.

or her property. (3) As a natural consequence of (1) and (2), an access road may, through deterioration over time, cease to be a road.⁹

Justice Gordon's conclusion that the road was neither an access road nor a common road was based on a lack of evidence to support such a conclusion:

The Plaintiffs have offered little objective or independent evidence pertaining to the existence of the spur road when they acquired the property or when it was blocked by the Defendants.

They have been unable to produce any evidence of use of the spur road since 1977. The area surrounding the spur road is rural bush and woodlands and it would be fair to assume some considerable growth of underbrush on the spur road in the more than 30 years since its last use. This is corroborated by the evidence of the Plaintiffs that they had to remove brush in order to efficiently enter and exit their vehicle while on the spur road. It strikes me as improbable that in the absence of motor vehicle traffic for more than 30 years, the brush would have grown only at the sides of the spur road. In addition, the photographs of the remnants of the brushing lead me to believe that in addition to brush, there were small trees and bushes taken down that would in all likelihood have prevented a vehicle from travelling the spur road. The reasonable inference from the evidence is that brush and small trees had grown in on the spur road that had to be cleared to allow a motor vehicle to traverse it or to park on it.

The real estate agent has provided a statement that he changed the listing information for the property from "public access" to "no road access" because he had been harassed by one of the Defendants. However, it is clear that his consideration of the issue was restricted to the status of Trussler Road as opposed to the spur road and that he either did not consider or was not aware that Trussler Road does not directly abut the CNR Railway property.

Furthermore, had there existed road access when he showed the property to the Plaintiffs, surely they would have accessed the property via that road when viewing the property. That they did not leads me to infer that the spur road did not serve as a motor vehicle access route at that time.

Whether or not there was in the past a roadway serving the Plaintiffs' property, the overwhelming preponderance of evidence is that there was no such roadway serving the Plaintiffs' property when they acquired it. Assuming there had once been a roadway of some sort, its complete lack of use and neglect of maintenance for over thirty years led to it no longer serving as a motor vehicle access route when the Plaintiffs acquired their property. Given that the Plaintiffs had no right to maintain the roadway that may once have

⁹ *Blanchard et. al. v Tripp et. al.*, 2017 ONSC 1260 (CanLII), <http://canlii.ca/t/h08v> at paras 15-19

The plaintiffs in this dispute contended that the road in question had been a colonization road and relied upon a 1878 map of the area and various other pieces of indirect evidence to support this assertion. Justice Wilcox summarized the evidence, which was found insufficient to support the claim, as follows:

Exhibit 4, the 1878 map of Laurier Township, shows what appears to be a road angling up from the south west to “the junction” in Lot 11, Concession 14. It is labelled “trunk road”.

Exhibit 1 is a copy of the 1878 map. On it, the plaintiff has highlighted in yellow a broken line angling south west from Lot 10, Concession 14. He submits that it is the colonization road which went through the area. Having looked closely at the map, it appears in fact to be the margin of swamp lands, as such broken lines appear along these in various places on the map.

Exhibit 5, the 1933 map, has a prominent line marked “Ferguson Highway” which generally follows the same route as the above-mentioned “trunk road”, although with smoother curves. Plaintiffs’ counsel noted a double line from the junction also running south west but west of the Ferguson Highway, until it links up again with Ferguson Highway. I disagree that it is the previously noted highlighted line which, as I said above, I think in fact is a swamp margin. The double line is also further west than that. However, I agree with counsel that it appears to be what is known as Glen Robert’s Road.

On the 1933 map, a road crosses Ferguson Highway and the railroad at the junction and continues generally eastward. According to the legend on the 1933 map, it is a “car road” west of Ferguson Highway and continuing easterly from there through the junction and across Lots 11 and 12, Concession 14. In Lot 12, Concession 14, it forks. The right hand fork angles south east through Lots 12 through 15, Concession 13 and Lots 16 through 19, Concession 12. The right hand fork, the legend indicates, is a wagon road. This appears to be Trussler Road.

A 1938 survey done by the Department of Highways of Ontario in Laurier Township (see Affidavit of Donna Blanchard sworn January 14, 2017, Tab 24) shows the area of “the junction”. In particular, it shows a road angling in from the south west, which it identifies as a “colonization road”. Plaintiffs’ counsel suggested that the “colonization road” is what is now known as Glen Roberts Road because they fall on the same place on the maps. That would appear to be so. I note that the colonization road does not continue eastward towards Trussler Road, but appears to turn northward along what the plan labels “the Kings Highway”.

Another Ontario Department of Highways land plan from 1963 (see Affidavit of Donna Blanchard sworn January 14, 2017, Tab 25) also identifies as “colonization road” a road running from the south west to “the junction”.

Plaintiffs' counsel produced an aerial photograph of the area (see Affidavit of Donna Blanchard sworn January 14, 2017, Tab 10). He assumed that it was from 1960, because of the numeric code on it. The significance of it, he submitted, was that it showed Glen Roberts Road approaching the junction from the south, crossing Highway 11 and the railroad and continuing east on Trussler Road, across Trout Creek and through the lands beyond, establishing continuity between Glen Roberts Road and Trussler Road.

Plaintiffs' counsel referred again to the 1933 map showing a "car road" going east from the junction and becoming a wagon road which ran to the south east, suggesting an inference could be drawn from that. He submitted that the colonization road which he says is Glen Roberts Road included the car road shown in the 1933 map extending from the junction into Lot 13, Concession 14.

Exhibit 6 is a Wikipedia print out filed by plaintiffs' counsel to help explain the history of the roads in the area. There was some discussion of the evidentiary value of the information from this source. It was admitted, subject to a consideration of its weight, for historical background.

Briefly, it indicates that colonization roads were built in the 1800's, including north towards Georgian Bay. The Muskoka Road was one of these, running north from Washago, reaching Sundridge by 1887, where it connected to a road to South River. By 1916 the road between South River and Powassan was completed, connecting to one from Powassan to North Bay, and was passible by automobiles. Laurier Township is between South River and Powassan.

It also indicates that Highway 11 was planned from the 1920's as a trunk road from Toronto to North Bay and from there to Cochrane. It linked several existing colonization roads, including Muskoka Road which was partially reconstructed. Highway 11 was named the Ferguson Highway.

I take judicial notice that Highway 11 was four laned, including through the Laurier Township area, starting in or about the late 1980's, which helps to locate some of the maps and aerial photos in time. That four laning is apparent on the Ministry of Natural Resources' 2016 map of the junction area, filed as Exhibit 7.

This history has some consistencies with the 1878, 1933 and other maps filed, features of which have been noted previously. The 1878 map shows a road from the south running to the junction and north from there. The 1933 map shows the Ferguson Highway following generally the same route. This implies that, if these identify the route of the colonization road, that road did not go east from the junction onto Trussler Road, but continued north toward Trout Creek and places beyond.

The plaintiffs' counsel noted that Exhibit 3, the land grant to James Corkery in 1894 of part of Lot 11, Concession 14, reserved the colonization road allowance. He submitted that this supported the argument that the colonization road went through that lot and eastward as

Trussler Road. However, I note that the metes and bounds description of James Corkery's lands describes lands to the west of the railroad. The excepted allowance for the "Government Colonization Road" went along the easterly limit of Corkery's lands. That is to say, the colonization road allowance was immediately to the west of the railroad. That is where the 1878 map shows the trunk road from the south west going off the north edge of the map and where the 1933 map shows the Ferguson Highway. So, the patent to James Corkery contradicts the plaintiffs' counsel's position as to the location of the colonization road. The patent indicates that the colonization road's route did not follow Trussler Road.

I note also that the land records that the plaintiffs provided for properties along the Trussler road do not refer to the presence of a colonization road. The patent of Lots 11 and 12, Concession 12 to Alonzo Brott does reserve the railroad right of way, by contrast. At most, there are the typical general reservations for any public roads or colonization roads, among other reservations to the crown.

In summary, using the enhanced powers available to me on a motion for summary judgment, I do not find that Trussler Road was part of a colonization road.

The court noted that though a statutory mechanism was available whereby roads on private land could be put into public ownership, there was no evidence of such in this case.

The road commissioners had the power to open road allowances where they had been laid down in the original surveys or roads in lieu, and direct the performance of statute labour thereon.

Where there were such roads in lieu over ungranted lands of the crown (In this regard, I note that Trussler Road appears on maps to have crossed several ungranted lots to the east of the lands of the parties in the present case) the commissioners were required to cause a plan thereof, so far as they affected the crown lands, to be made by an Ontario lands surveyor. The plan was to be filed with the Department of Lands and Forests.

In cases where deviations from road allowances passed over patented lands, there were provisions for financially compensating the land owners and requiring a transfer to the Province of title to the lands taken.

Records were to be kept by the secretary-treasurer in a prescribed form of statute labour book for the township of those liable to perform statute labour, and of the labour performed.

The corresponding provision of the [Public Transportation and Highway Improvement Act](#), R.S.O. 1990, is [section 90](#) which states:

- 90 (1) The Minister may arrange with,
- a) the Government of Canada;

- b) the local roads board elected under the [Local Roads Boards Act](#);
- c) the roads commissioners elected under the [Statute Labour Act](#); or
- d) a person who is the owner of land,

for the construction or maintenance of a road in territory without municipal organization, and the Minister may direct payment out of money appropriated therefor by the Legislature of an amount equal to such proportion of the cost of the work as he or she considers requisite.

If statute labour was performed on Trussler Road:

- There should be records identifying it as a road on which statute labour was to be performed. That is, that it was part of the statute labour system in the township.
- There should be of the road where it crossed crown lands.
- There should be land records showing the transfer of title to the road lands from the private land owners to the province.

No such records were entered in evidence. In Stuart Taggart's affidavit of July 19, 2013, he deposes that:

- he was the secretary-treasurer of the Township of Laurier's local roads board, and
- there are no written records of time, money or man hours being spent on Trussler Road as statute labour.

Plaintiffs' counsel frankly admitted that there is not much evidence on point, and that what there is is in fragments which he was trying to tie together.

In support, he referred to various records. First, there were entries in Charles Trussler's personal diary from 1932 and from 1964 to 1969. Defence counsel objected to the admission of these into evidence, suggesting that there should be better evidence available in the form of provincial government records regarding statute labour. Plaintiffs' counsel suggested that these were admissible as historical records, and perhaps on a necessity and reliability analysis, to help with references in other records to place names, thereby locating along the road where work was done. I was not persuaded of the admissibility of the diary entries.¹¹

Similarly, there was insufficient evidence to support the claim that there had been an implied dedication and acceptance of the road for public use. The plaintiffs in this action took a number of paths in their efforts to obtain the desired outcome of vehicular access to the property,

¹¹ Ibid at paras 77-86

though in the end they were ultimately unsuccessful. The decisions are useful references for lawyers and land surveyors alike who encounter questions of road status.

Guest Editor: Megan Mills

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

Chapter 6 provides a thorough discussion of the boundaries of public roads as well as the establishment of roads through the common law mechanism of dedication and acceptance at subsection 6.3 and through statute at subsection 6.5. For an in depth look at questions of roads in Ontario, see also the materials from the Fourth Annual Boundary Law Conference: [Boundaries of Public Highways: New Developments and Practices](#) organized by Four Point Learning in 2016.

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, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

Fifth Annual Boundary Law Conference – Online Version

For the convenience of those unable to attend due to distance or a scheduling conflict, this online [version](#) of the conference *Waterfront Properties in Ontario: Best Practices for Resolving Title & Boundary Issues*¹³ held in April 2018, includes the presentations, papers and slide decks from presenters. This full day event responded to the uncertainties resulting from recent legal treatments of water boundaries in a manner to ultimately benefit professionals, property owners and the public.

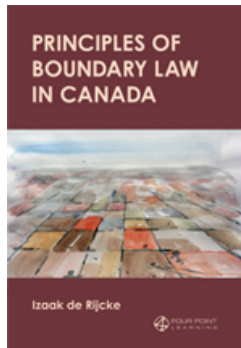
¹² Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd’s [Registered Provider Guide](#) for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

¹³ The conference qualifies for 12 *Formal Activity* AOLS CPD hours.

Electronic Survey Plan Registration for Ontario Land Surveyors

The Digital Plans Submission Task Force highly recommends this training [course](#)¹⁴ developed for Ontario Land Surveyors interested in electronically submitting survey plans to ServiceOntario through Teraview® for deposit or registration.

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, 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. 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.)



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¹⁴ This course qualifies for 5 Formal Activity AOLS CPD hours.