



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.

Easements seem to be a regular topic of dispute and Canadian courts often provide decisions that incrementally clarify this area of property law. It may well be that, like boundaries, and due to their nature as a non-possessory interest in the land of another, they highlight the unavoidable interaction between owners who share a common space, line or physical place of abrasion.

Tenants have a unique interest in land; where land is leased the tenant has a possessory interest and the landlord retains a reversionary, non-possessory interest. In *Aragon (Wellesley) Development (Ontario) Corp. v. Piller Investments Ltd.*,¹ the Ontario Superior Court of Justice explored the role of the tenant in an adverse possession claim. This decision is particularly interesting because of the several twists involved in the dispute – an adverse possession claim based on occupation by a tenant, questions of inconsistent use where the servient owner held the land solely as an easement for the benefit of the dominant owners, a claim of abandonment and a registered owner who had passed away over a century ago.

An Easement Under Challenge: Tenancy, Abandonment and Adverse Possession

Key Words: *easement, possessory title, abandonment of easements, adverse possession against landlord or tenant, inconsistent use*

The dispute concerned a strip of land in downtown Toronto over which there was an easement benefitting several neighbouring landowners. The easement would have provided necessary access for a residential development proposed by one of the dominant owners but the use by the tenants of another dominant owner interfered with such access. The use had involved the placement of a gate, fence, garbage bins and a deck that served the long term tenants, a grocery store and bookshop. The obstructions had not posed an issue for the other dominant owners until the development was planned.

¹ *Aragon (Wellesley) Development (Ontario) Corp. v. Piller Investments Ltd.*, 2018 ONSC 4607 (CanLII), <http://canlii.ca/t/htc3s>

The decision involved competing applications brought by neighbouring property owners in downtown Toronto. One application was brought by Aragon (Wellesley) Development (Ontario) Corporation (“Aragon”) whose property fronted Wellesley St. East and the second by Piller Investments Limited, owner of land fronting Church St. The applications concerned an L-shaped parcel of land between the western boundary of the Aragon Property and the eastern boundary of the Piller property. The land is noted as “EASEMENT” in the survey sketch appearing at Figure 1 below, which was also included in the reported decision.

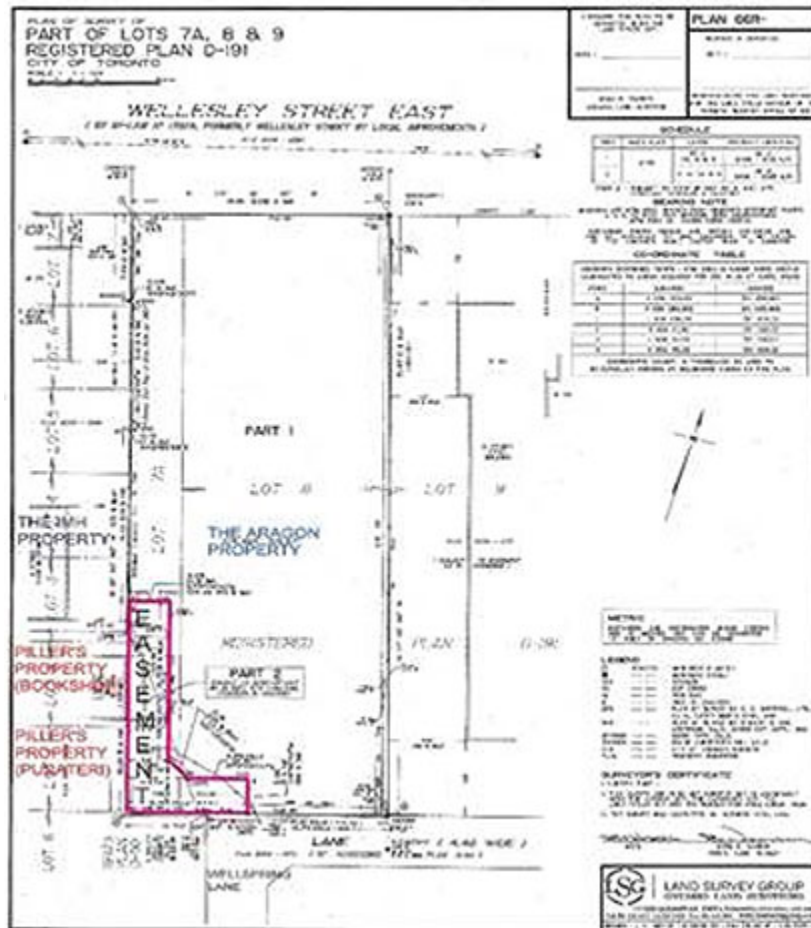


Figure 1: Survey sketch appearing in decision

IMH 77 Wellesley Ltd. owned the property fronting on Church St. to the north of the Piller property. The registered owner of the L-shaped right of way at the heart of the dispute, marked in pink in Figure 1, pursuant to the *Land Titles Act* is Robert Malcolm, who died in 1908. The applications were described succinctly:

For its part, Piller, in its application and as respondent to Aragon’s application, seeks declarations that: (a) Aragon and IMH have abandoned the L-shaped land; i.e., abandoned their respective rights of way; and (b) Piller has obtained a possessory title over the L-

shaped Land owned by Mr. Malcolm and also over a small trapezoid-shaped portion of Aragon's lands, known as the Part 4 Land.

As respondent to Piller's application, Aragon denies that it has abandoned its right of way, and it disputes that Piller has obtained any possessory title by adverse possession.

IMH takes no position on the applications.

The descendants of Mr. Malcolm support Aragon, and they resist Piller's claims to adverse possession over the L-shaped Land.

In the competing applications, there is no doubt that Piller's tenants are encroaching and have encroached on the L-shaped Land for many years before all the subject lands were transferred from the Registry System under the *Registry Act*, to the Land Titles System. There is, however, a vigorously-contested dispute about whether Piller's possession and use of the L-shaped Land is sufficient to have established a possessory title over the L-shaped Land. There is also a vigorously contested dispute about whether Aragon has abandoned its right of way.²

While Aragon's case was relatively easy to prove, in that as registered owner of a right of way of the L shaped land, they could simply rely on the registered title instruments, in contrast Piller had before it the onerous task of proving both that Piller's tenants had acquired possessory title to the land and that Aragon's predecessors had abandoned their interest in the right of way.

Upon reviewing the title history, it was concluded that rights of way over the L shape lands had been granted to the predecessors in title to Aragon, Piller and IMH, and these respective rights of way were subsequently included in successive conveyances of the properties.³

The use of and improvements constructed upon the lands during the relevant periods were described as follows below. Of note was that, for many years, the owners of the Aragon property had no use for the right of way, however the right continued to be included in conveyances over the years.

[...] One building was a two-and-a-half-storey brick residence with a porch and a one-storey sun room. [...] There was direct access to the Aragon property from the Wellesley Street frontage. There was a fenced backyard and outside of the fence was a two-storey brick garage with stairs to the second storey. The door to the garage was on the public lane to the south of the Aragon Property. The Aragon Property had access to Maitland Avenue along Wellspring Lane.

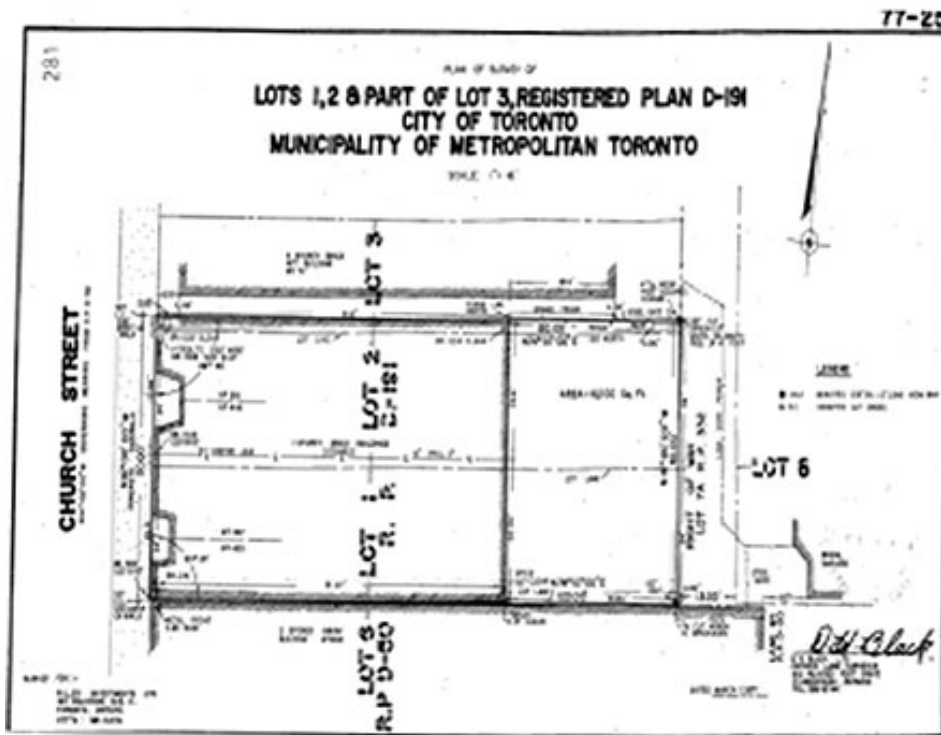
² *Aragon* at paras 11-15

³ Paragraphs 61-94 of the decision detail the title history which also includes numerous references to the individual owners and their place in Toronto history, an interesting read.

Here, it may be noted that the chain of owners of the Aragon lands had no apparent need to use the right of way that they owned but each of them were granted a conveyance that included the right of way. Here, it may be foreshadowed, as discussed in more detail below, that a right of way cannot be lost by adverse possession, and while a right of way may be lost by abandonment, on its own, non-use may be insufficient to prove abandonment.

The chain of owners of the Aragon Property made no change to the two buildings on what is now the Aragon Property and the buildings remained on the Aragon Property until the buildings were demolished by those planning to redevelop the property, events that occurred after all the properties had been transferred from the Registry System to the Land Titles System.

Turning to Piller, when it acquired its property in 1977, there was already in place a wire-metal fence with a gate around portions of the L-shaped Land. The survey, set out below, dated March 7, 1977, by D.H. Black Ltd., Ontario Land Surveyor, shows the wire fence and the steel gate at the rear of the Piller Property. When the gate was closed, the fence enclosed most of the L-shaped Land but not the small portion of Aragon's Property; *i.e.* the Part 4 Land, a small trapezoid-shaped portion of Aragon's lands.⁴



The fence on the Piller property was replaced for security and safety purposes at the request of Piller's tenants operating the grocery store and the tenants had used the enclosed portion for parking, deliveries and waste disposal. In the 1980s a deck and patio had been constructed by

⁴ Paras. 97-100

tenants operating the bookstore that extended into the L-Shaped land. Until 2016, there was no dispute over the use being made by Piller's tenants of the L-Shaped land or any evidence of concern by any of the successive owners of the neighbouring properties. However, as Aragon's plans for development of the property took shape, that changed:

[...] on August 23, 2013, Aragon submitted a development application to the City of Toronto seeking amendments to the City's Official Plan and to the zoning by-laws to permit its condominium project. As was the case with the prior owners' plans to develop what is now the Aragon Property, the L-shaped Land was incorporated into the project as a mean of access. Motor vehicles will access the Aragon Property entering from Wellesley Street. The vehicles will travel south until they reach the L-shaped Land and then the vehicles pass through the L-shaped Land to enter a parking garage with an elevator to the parking level of the building. Vehicles leaving the condominium building will exit onto Wellspring Lane. The Aragon right of way is crucial to Aragon's condominium project.

In the summer of 2016, Aragon advised Piller that the deck patio was outside the boundaries of the Piller Property, encroaching on the Aragon right of way and should be removed.

Piller did not agree and responded by asserting that it had acquired ownership of the L-shaped Land by adverse possession and by the abandonment by Aragon's predecessors and IMH's predecessors of their respective rights of way.

Up until the summer of 2016 and Aragon's demand, Piller had received no complaints about the use its tenants were making of the L-shaped Land and the Part 4 Land.⁵

As noted earlier, Piller's case was rather complex, fact dependent and difficult to prove, involving both a claim of adverse possession to establish and ownership interest in the L-shaped lands and a claim of abandonment on the part of Aragon's predecessor's in title to the easement interest. Adverse possession in this situation involved a tenant; Justice Perell described the law as follows:

When a landowner land leases his or her land, the landowner becomes a landlord and the tenant has the right of exclusive possession of the leased property; the landowner has a reversionary, non-possessory interest. Thus, when a landowner leases his or her land, it is his tenant who has the possession of the land that can be lost or acquired by adverse possession.

The legal circumstance that the landlord has a reversionary interest presents three scenarios about the operation of the law of adverse possession. The first scenario is where the leased premises are occupied by a third-party who is asserting a claim for a possessory title. The second scenario is where the tenant of the leased premises extends his or her

⁵ Paras 118-121

possession and encroaches on the landlord's adjoining lands. The third scenario is where the tenant of the leased premises extends his or her possession of the leased premises onto a third party's adjoining land. (The third scenario is the scenario of interest in the immediate case.)

Dealing with the first scenario, during the term of the lease, having no right of possession, the landowner cannot be disposed, and any claim for adverse possession is a claim against the leasehold and not the freehold. How the doctrine of adverse possession operates when there is a leasehold against which a claim is being made for a possessory title was described by the Ontario Court of Appeal in *Giouroukos v. Cadillac Fairview Corp. Ltd.*, at pp. 178-80, where Justice Robins stated:

So long as the lease continues in effect, possession is vested in the tenant who, as a normal consequence of the landlord-tenant relationship, has control over and the power to exclude others from the leased property. The landlord's interest is non-possessory and remains so until the lease is terminated and possession reverts to him. Until then, the possessory rights of the tenant continue intact, and the possession of a squatter initiated during the term of the lease, while adverse to the tenant, cannot be adverse to the landlord. It follows, that until the landlord's interest becomes possessory, his right of action does not accrue and the statutory period does not run against him. ... 5(11) and (12) of the Act.

Thus, if a landowner leases his or her land, the land is insulated from a claim for adverse possession during the term of the tenancy. Using a variation of the circumstances of the immediate case to illustrate the point, if it was Aragon seeking a possessory title against Piller (which it is not actually seeking to do), then the claim would fail because Piller cannot be disposed of a possession it does not have during the course of the lease. (In the case at bar, it is Piller through its tenants seeking adverse possession, which would add to its land holdings; the third scenario above.)

Turning to the second scenario, it is where the tenant of the leased premises extends his or her possession on to the landlord's adjoining property. [...]

The general principle that emerges from the second scenario is that when the tenant occupies lands owned by the landlord not included in the demise, it is a question of fact whether the occupation is adverse to the landlord or just part of the leasehold.

Turning to the third scenario, the general rule for the third scenario, where the tenant of the leased premises extends his or her possession and encroaches on a third party's adjoining lands, is any encroachments by the tenant on land belonging to third parties will

enure for the landlord's benefit, [...] unless a different intention is shown by the conduct of the landlord or tenant.[...]⁶

In summarising the law as it applies to a finding of an abandonment of an easement interest, Justice Perell noted the following challenges:

Where there has been an express grant of a right of way, it is extremely difficult to show abandonment because a right of way is not lost by mere non-user. The non-use of the abandonment must be coupled with the grantee's intention to abandon the right of way to demonstrate implied release by abandonment. Unless the easement is granted for a term of years, the rights conferred by an easement are valuable rights and it is not lightly to be inferred that the owner released his or her rights for no consideration or advantage.

Where the owner of the dominant tenement does not use the easement and also does not object nor make any effort to remove obstructions or to stop the servient owner from interfering with the easement, abandonment may be inferred. In other words, if there is evidence of non-user and also evidence of acquiescence, abandonment may be inferred; however, on its own, non-use is insufficient to constitute an implied release. Non-use by itself is insufficient because non-use may arise because the dominant owner from time to time may have no need for the easement or he or she may have a more convenient means of use than the easement. Thus, lack of use, even for prolonged periods of time, does not necessarily prove that the owner of the easement intended to abandon it.

The intent to abandon means that the person entitled to the easement has knowingly, and with full appreciation of his rights, determined to abandon it. Intention to abandon an easement will be found where the person entitled to it has demonstrated a fixed intention never at any time hereafter to assert the right himself or to attempt to transmit it to anyone else.

Where the owner of an easement includes the easement in a conveyance of his or her dominant tenement, while not conclusive, the inclusion supports the absence of an intention to abandon. Where the non-user is explicable by reference to the absence of any need of the owner of the dominant land to use the right of way for the time being, this will fortify a conclusion that there has been no abandonment of the right for all time.⁷

Piller faced an exceedingly challenging task in order to succeed in its claim, as summarized by Justice Perell:

Because of the intricate law, described above, that applies to the circumstances of the competing applications, Piller is confronted with the legal equivalent of an ironman triathlon in bad weather. To succeed in its application and to defeat Aragon's application,

⁶ Paras. 144-153, footnotes omitted.

⁷ Paras. 161-164, footnotes omitted.

Piller had to establish that before 2003, when the subject properties were transferred into Land Titles, that: (1) its tenants, who were trespassers, acquired a possessory title over the L-shaped Land; (2) the tenants' possessory title inured to Piller's benefit as the holder of a reversionary, non-possessory ownership interest; and, (3) that Aragon's predecessors abandoned the Aragon right of way, which is a difficult proposition to prove because non-use by itself, even a very lengthy period of non-use, may not demonstrate abandonment.⁸

On the question of abandonment, Piller's claim was unsuccessful, simply put, non-use by predecessors in title did not result in abandonment, particularly because the right had been included in successive conveyances:

Apart from Aragon, there was no evidence from any of the grantee's of Aragon's right of way or any evidence from any person who might have a glimmer of an idea of what those grantee's intentions might have been with respect to the right of way that they purchased and then sold. There was very little evidence upon which to conclude that the right of way had been abandoned. It rather appears that although the successive grantees were not using the right of way, they all regarded it as an important right to be preserved and not to be abandoned. The right of way was sold as a part of each succeeding conveyance.

I do not know when the two brick buildings on the Aragon Property were constructed, but these improvements were likely constructed by Ms. Ellis before she conveyed her property to Toronto Diocesan Board of the Woman's Auxiliary to Missions in 1926. The buildings are noted on the 1927 survey of the property. That survey reveals that Ms. Ellis and her successors had direct access from Wellesley Street and direct access to Wellspring Lane without resort to the L-shaped Land. Those circumstances explain why no use was being made of the right of way, but those circumstances do not lead to me to the inference that Ms. Ellis and her successors in title had the intention to abandon the right of way.

Based on the evidence that I have reviewed above, there is nothing other than explainable non-use and the evidence is insufficient for me to conclude that there was an abandonment of the right of way. I rather conclude that all of the successive owners, some of whom were savvy business persons, did not abandon the easement.⁹

The other requisite prong of Piller's claim - that of adverse possession - was also unsuccessful. In reviewing the law related to the role of tenants in obtaining possessory interests for the land, Justice Perell found that, in the present fact scenario, it was *possible* that Piller's tenants could have obtained a possessory interest for their landlord's benefit. However with a high threshold for acquiring possessory title, the claim here fell short.

⁸ Para. 175

⁹ Paras. 184-186

In my opinion, the facts do not support the case that before the subject lands were transferred into Land Titles, Piller's tenants had acquired a possessory title.

The major problem for Piller is that its tenants were trespassers on the L-shaped Land and the Part 4 Land and there was nothing inadvertent about their conduct. They knew they were trespassing on lands not owned by Piller. However, needy those tenants may have been to use the L-shaped Land, they had no paper title to it, and as Justice Blair noted in *Masidon Investments Ltd. v. Ham, supra*, courts in Ontario have historically lacked enthusiasm for claims for adverse possession made by trespassers.

Courts in Ontario impose a high threshold for adverse possession, and Ontario courts add an inconsistent use requirement to the test for adverse possession. The trespasser's possession must be adverse to exclude the owner from such uses as the owner wants to make of his or her property during the period when the trespasser occupied the property.

In the immediate case of the competing applications, the inconsistent use requirement imposes an extraordinarily high threshold, because it appears that Mr. Malcolm's or Messrs. Bickell's and Wickett's use of the L-shaped Land was just to hold it as servient tenement for the Aragon, Piller, and IMH rights of way.

The original purpose of the grants of right of way was to support sales of lots on Plan D-191, and once that purpose was spent, Mr. Malcolm or Messrs. Bickell and Wickett, it seems, had no personal use for the L-Shaped Land. They simply held the land to be used by others.

There is no evidence Mr. Malcolm or Messrs. Bickell and Wickett retained other lands near Church and Wellesley Streets to be served by the L-Shaped Land. Mr. Malcolm or Messrs. Bickell and Wickett were simply holding the servient lands for the benefit of the dominant landowners, leaving it to the dominant landowners to protect their own rights to use the servient lands.

In the immediate case of the competing applications, there is a sort of confluence of the law of abandonment with the inconsistent use element of the law of adverse possession, and thus in a kind of vicious legal circle for Pillar, it had to prove abandonment of the right of way by Aragon's predecessors in order for Pillar's tenants use of the right of way to be inconsistent with Mr. Malcolm's intended use, which was to hold the property as the servient property.

Regardless of whether that last observation is correct, the fact remains that the acts of Piller's tenants are not adverse to the very limited use intended by Mr. Malcolm or by Messrs. Bickell and Wickett. Further, there were discontinuities in the use being made by the tenants, and while the gated fence and deck were undoubtedly obstructions to the right of way, the problem was easily remedial as soon as one of the dominant landowner's objected, which finally occurred in 2016.

I find, therefore, that the facts of the competing application do not establish a claim for a possessory title by the tenants.¹⁰

The decision is a unique consideration of possessory and non-possessory interests in land and how they may interplay. The fact scenario in which the owner of the L-shaped land, were found to hold the land for a very limited use as an easement for the benefit of the neighbours puts a unique spin on the matter.

In the result, the application brought by the party proposing the development was successful and the longstanding obstructions were ordered removed.

Guest Editor: Megan Mills

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

Chapter 5: Boundaries of Easements contains a through discussion of easement law, in particular subsection 5.5, *How Easements are Formed*, *Chapter 1: Boundaries in History and Law* at subsection 1.3 outlines the nature of tenancies and leases and adverse possession is reviewed at length in Chapter 4.

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.¹¹ 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.

¹⁰ Paras 191-199

¹¹ 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.

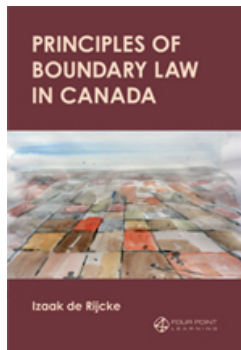
Electronic Survey Plan Registration for Ontario Land Surveyors

The Digital Plans Submission Task Force highly recommends this training [course](#)¹² developed for Ontario Land Surveyors interested in electronically submitting survey plans to ServiceOntario through Teraview® for deposit or registration.

Easement Update

Please mark your calendar - **November 12, 2018** - for a half day course on ***Easements: Making Sense of 12 Cases in the Last Year***. More details to follow in coming issues of *The Boundary Point*.

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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ISSN: 2291-1588

¹² This course qualifies for 5 Formal Activity AOLS CPD hours.