



*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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When the space between homes is used as a driveway, this scenario appears to continue to be a source of irritation between neighbours. It need not be so. In fact a recent decision in Ontario attracted the sage observations of the Court:

You are and will likely remain neighbors for some time. As neighbors, it is my sincerest wish that there is a prospect of some reconciliation between you. We all want to live in a community where we feel we can count on our neighbors for help and friendliness; not indifference or hostility.<sup>1</sup>

In this month's issue, we consider the circumstances in which a prescriptive easement may be awarded. The facts were relatively clear and easy to establish. Likewise, the law was agreed to between the parties. Why did this case still proceed before the Court and require the time and expense of a hearing in order to obtain a judicial determination?

As with many neighbour disputes, the determination to press on is often remarkable to others not involved in the litigation. As we explore the decision in this issue, we will also attempt to understand why the stakes seemed to be so high.

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## Neighbours, a Disputed Driveway, and a Claim to an Easement

**Key Words:** *easement, prescription, driveway, use, survey*

The Court described the case before it in a succinct statement:

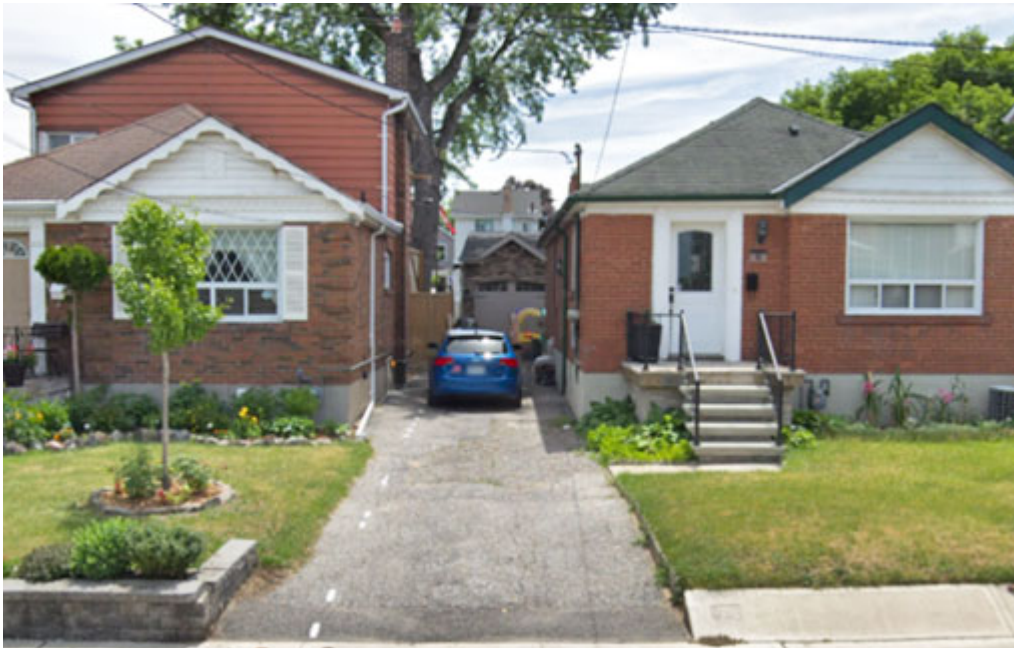
There is little disagreement about most matters in this case. I find that the essential elements have been established.

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<sup>1</sup> *Nunes v. Fernandes*, 2019 ONSC 4815 (CanLII), <http://canlii.ca/t/j2110>

Specifically, with respect to the last element, I find that if the easement is not granted, Nunes/Faria will not be able to enjoy their portion of the driveway and their home as it has been for some time. Without it, Nunes/Faria will not be able to use for parking the driveway next to their home which has been the established use for the driveway, going back decades. While they could park within their property boundaries, the overall dimensions of the driveway would make it practically impossible for someone to enter or exit the parked vehicle if they are not permitted to open their doors or step onto the Fernandes' property. For large-width vehicles like Mr. Nunes' work van, it would be in fact impossible. In addition, to go into the rear of the property towards the garage, given the angles and dimensions, would be very difficult and potentially unsafe to property, if Nunes/Faria could not access the space just outside the present wooden fence. Thus, the easement is necessary for the full use and enjoyment of Nunes/Faria's home at 31 Mahoney. The Fernandes have not really argued otherwise.<sup>2</sup>

An image of the location was captured in Google Streetview and can be seen below in Figure 1.



**Figure 1:** The painted line on the driveway appeared to mark the property line.<sup>3</sup>

The legal requirement for establishing an easement in this dispute was stated by the Court as being able to demonstrate continuous, uninterrupted, open and peaceful use of the land, without objection by the owner (without permission) for any 20-year period prior to conversion to Land Titles or LTCQ. Since conversion occurred on July 23, 2001, the relevant period of time

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<sup>2</sup> Ibid., at paras. 5 and 6

<sup>3</sup> From: Google® Maps. All rights reserved. The Applicant's (Nunes) home is on the right and the Respondent's (Fernandez) home is on the left.

for consideration would begin in July, 1981. However, both parties purchased their properties after 2001, so relevant evidence about this time period would need to come from others and not the present disputing neighbours themselves.

The Court explained the argument that remained central to the dispute:

The main argument made by the Fernandes is that Nunes/Faria have not met their burden of proof on a key matter. It is submitted that the evidence does not establish a right but only a permissive use of the property. In particular, the Fernandes rely on the evidence of Mr. Michael Christianson [predecessor in title to Fernandes] when he described how he and the Pennells [predecessors in title to Nunes/Faria] interacted over the driveway.

Mr. Christianson lived at 33 Mahoney from 1993 to 2001. The Fernandes submit that Mr. Christianson testified that he gave the Pennells permission to use the disputed property for the purpose of parking their vehicles and for entry and exit from them. It is submitted that when Mr. Christianson required the use of the disputed property, the Pennells would remove their vehicles when asked. Relying on this, the Fernandes argue that Nunes/Faria have failed to prove the Pennells' use of the property was continuous, uninterrupted, and without permission from 1993- 2001.

I have carefully reviewed Mr. Christianson's evidence. I find that his evidence is not what the Respondents contend it is. Put another way, their position overreaches what I find that he testified to. His evidence was that the Pennells would always park in the driveway and get in and out, peacefully using his property to do so. From time to time, Mr. Christianson would ask the Pennells to move their vehicles, so he could use the driveway to access the gutters or roof of his home. He would tell the Pennells when he finished so that the Pennells could return their vehicles. Mr. Christianson agreed that the Pennells "accommodated" him in this. When I analyze his evidence closely and in the context of the evidence as a whole, I find that Mr. Christianson never gave permission to the Pennells to cross or use the disputed property. It was open and notorious that they used it for their own purposes. Mr. Christianson had full knowledge that it was his property. I find that such infrequent and minor use by Mr. Christianson for accessing parts of his home for repair or maintenance is not an interruption of the Pennells' use. I further find that, it was Mr. Christianson who sought permission of the Pennells...<sup>4</sup>

Following this analysis, the Court found and declared Nunes/Faria to be entitled to a prescriptive easement for the ingress and egress of vehicles and pedestrians over the disputed property on 33 Mahoney. The Court also directed the Land Registrar to amend the title to both

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<sup>4</sup> *Nunes v. Fernandes*, at paras. 13 to 15

properties to reflect that it is subject to the Right-of-Way over the driveway.<sup>5</sup> If there was any doubt as to what this result would mean, the Court clarified further:

I wish to be clear, the easement that attaches to both properties and can be registered on title is to allow the owners of 31 Mahoney to drive through the property of 33 Mahoney that is immediately adjacent to the driveway and to have ingress/egress any motor vehicles parked on their portion of the driveway. This includes the portion of the property adjacent to the wooden fence. It is for no other purpose. In particular, they are not permitted to park on the property of 33 Mahoney or place any other property or item on that property unless they have the clear consent of the owners of 33 Mahoney.

The Fernandes will not be permitted to build the fence that they wish.<sup>6</sup>

Spaces between homes will often require neighbours to co-operate; both have much to gain by doing so. The alternative is to litigate disputes and create more work for Courts, lawyers and land surveyors. As the Court noted at the outset in this Issue, even after the rendering of its decision, the parties remain neighbours. Prior issues of *The Boundary Point* have referred to the dictum of Lord Hoffman in *Alan Wibberley Building Ltd v Insley* when his Lordship wrote, “Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras’s army.”<sup>7</sup>

A subsequent paper from a writer at the University of South Queensland attempts to address the problem further when explaining,

This paper will examine the options available both legislatively and professionally as a means to resolve boundary disputes between adjacent land owners’ where agreement is desirable and where land title re-adjustment between adjoining owners is required to maintain the cadastre.

Cadastral surveying defines the boundary of a land parcel through survey, adjudication, monumentation and subsequent description of the boundary.<sup>8</sup>

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<sup>5</sup> Implementing this order on the title to affected property will typically require a plan of survey to be prepared so that the Part that is to be subject to an easement can be identified and described.

<sup>6</sup> *Ibid.*, at paras. 21 and 22

<sup>7</sup> *Alan Wibberley Building Ltd v Insley*, [1999] 2 EGLR 89, [1999] EG 66, [1999] 24 EG 160, (1999) 78 P & CR 327, [1999] 1 WLR 894, [1999] WLR 894, [1999] UKHL 15, [1999] NPC 54, (1999) 78 P & CR D19, [1999] 2 All ER 897, at: <http://www.bailii.org/uk/cases/UKHL/1999/15.html>

<sup>8</sup> Simmons, Shane (2011) *Boundary disputes - a clash of wills or a Shakespearean tragedy?* Spatial Science Queensland. pp. 28-34. Available at: [http://eprints.usq.edu.au/20342/2/Simmons\\_SSQ\\_Nov2011\\_PV.pdf](http://eprints.usq.edu.au/20342/2/Simmons_SSQ_Nov2011_PV.pdf)

The problem remains: just because surveyors might wish to reach the truth and locate the legally correct position of a boundary, does not mean that their clients are also equally motivated. For further insights we will need to turn to the social sciences.

*Editor:* Izaak de Rijcke

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

Chapter 5, *Boundaries of Easements*, includes a discussion about easements and rights of way and the preparation of survey plans that are necessary to define the location and extent of same.

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### **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.<sup>9</sup> 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.

### ***Sixth Annual Boundary Law Conference***

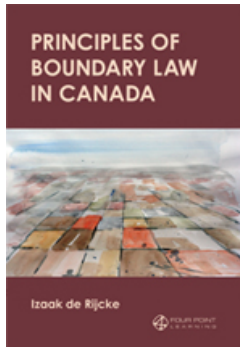
This conference theme is: ***Easements: An Update and Refresher***.<sup>10</sup> This series of eight weekly lunch and learn sessions explored recent trends and developments in both policy and the law regarding easements. The webinar [version](#) of the conference includes access to the annotated readings, slide decks, and, of course, recorded presentations.

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<sup>9</sup> 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.

<sup>10</sup> This conference qualifies for 12 *Formal Activity* AOLS CPD hours.

## *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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