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.

It is indeed the exception in Canada to have a truly landlocked parcel of land, with no means of access. However, it can and does arise – and with surprising frequency. The reasons may lie in mortgage foreclosure, inattention to detail, or the lack of a survey showing parcel boundaries and a means of access to the parcel from either a contiguous public road or an easement in the nature of a right of way. In *Sauer v. 648657 B.C. Ltd.*,[1] a court considered a number of legal theories that would support a finding of an easement to exist in law despite there being no express grant of such an interest in the past. Using an extensive framework of resources and precedents in British Columbia, and drawing from decisions in Nova Scotia, Ontario and England, the court rejected all theories… but one. The decision in *Sauer* is an intriguing insight to the comparative evaluation of claims to an easement when there is no registration of such a right in the land titles office for the dominant parcel.

Easements and Landlocked Parcels

Key Words: *easement, necessity, common intention, remedy*

It is encouraging when a reported decision begins by stating that there are no material facts in dispute. It means that readers can be assured of a succinct statement of fact rather a detailed outline of the evidence, credibility and an effort to winnow through all of this in order to reach the facts. Such was the opening statement in *Sauer v. 648657 B.C. Ltd.*

The decision begins with a description of a project to acquire 3 separate parcels of land. The goal was a development that would eventually come to be known as “Kelowna Mountain”; it

[1] *Sauer v. 648657 B.C. Ltd.*, 2019 BCSC 43 (CanLII), http://canlii.ca/t/hx0mc

would comprise various tourist and other amenities, include a Welcome Centre, an amphitheatre, suspension bridges, a chairlift, a wine cave, cliff walk, a waterfall and vineyards.[2]

The 3 separate parcels were acquired at different points in time, but the entire project was built over all 3 properties. The court explained the configuration which is also reflected in Figure 1 below.

> The three parcels of land in question are known as:
>
> a) Lot A, covering 160 acres;
>
> b) Lot B, covering 160 acres immediately to the east of Lot A; and
>
> c) Lot C, covering 320 acres immediately to the south of both Lot A and Lot B.
>
> (collectively, the "Lots").
>
> Access to the Lots was via a forest service road. The only practical access to Lots B and C from the forest service road is through Lot A. As is the case for most real estate developments, financing was required for the Project.[3]

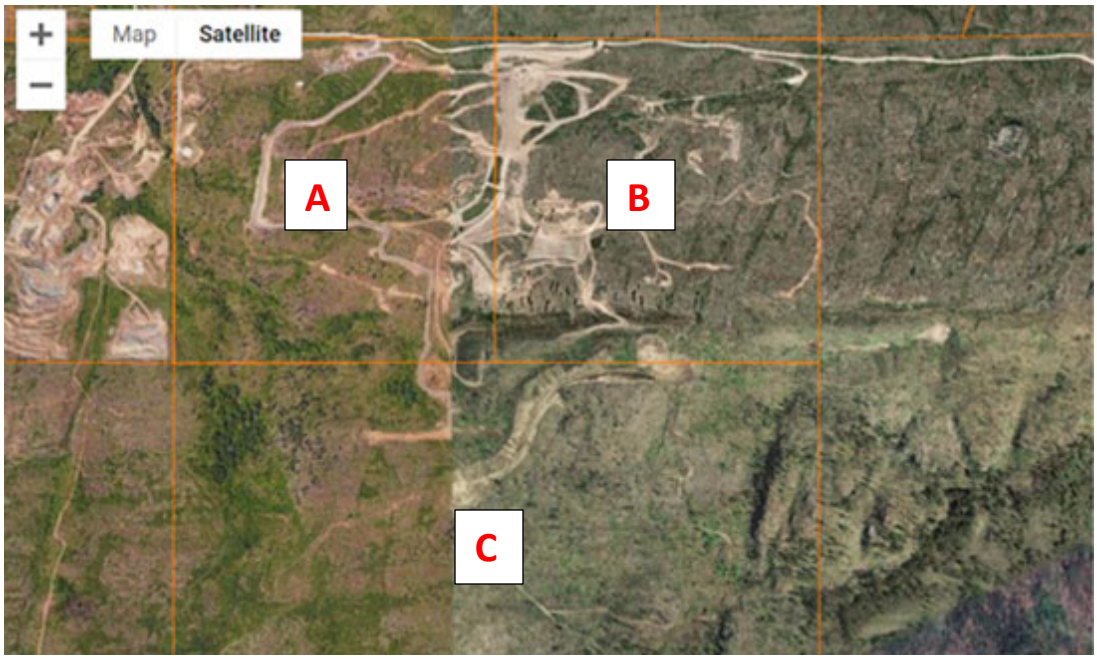

Figure 1: The project spanned 3 parcels, A, B, and C.[4]

[2] *Sauer v. 648657 B.C. Ltd.*, 2019 BCSC 43 (CanLII), at para. 3

[3] *Ibid.*, at paras. 4 to 6

[4] From: British Columbia Data Catalogue at: https://catalogue.data.gov.bc.ca/dataset/7eb82072-8c74-4fce-9934-349b545fdc21 All rights reserved

As noted, the project required financing. Initial mortgages were registered only against the title to Lot A. There was no registered right of way over Lot A that was relevant, but over time the construction of the project encompassed portions of Lots B and C. A physical road was constructed across Lot A in order to reach Lots B and C. However, as the court noted,

> Astonishingly, construction of the Project amenities occurred without apparent regard for the need to obtain building permits or for the boundaries of the Lots. The suspension bridges are anchored on one lot and span another. The Welcome Center and Amphitheatre encroach over lot boundaries, built partially on Lots A and C. The Lot A First Mortgagees, … acquiesced in and indeed encouraged construction of the Project despite the manner in which it was being built.[5]

Over time, further financing was raised and the ownership of all 3 lots was transferred to the project partnership. The partnership registered a blanket easement over all of Lot A in favour of Lots B and C, containing language which read:

> The Grantor for itself and its successors in title, hereby grants unto and for the benefit of the Grantee, its agents, servants, employees, invitees, licensees and its successors in title of the Servient Tenement the full and free right-of-way, right and liberty to pass and repass in common with the Grantor, its servants, employees, agents, invitees and licensees, over and across the Servient Tenement.[6]

Of course priority of registration applied and therefore the first mortgagees of Lot A needed to postpone their interests in favour of the owner of Lot B and C's blanket easement. When asked to do so, the mortgagees of Lot A refused. The mortgage on Lot A fell into default and foreclosure proceedings were started in order to allow the mortgagees to realize on their security.

In order to appreciate the extent of the development over Lots A, B and C, reference can be made to Figure 2. The image illustrates the amphitheatre, the Welcome Centre, suspension bridge and some of the other amenities.

[5] *Ibid.*, at para. 9

[6] *Ibid.*, at para. 16

Figure 2: The Kelowna Mountain project[7]

In the *Sauer* court application, the Petitioners sought, among other things, a declaration of easement over Lot A on the basis of a number of legal grounds. These different claims can be summarized as:[8]

1. Are the petitioners entitled to an easement over Lot A under the principle of proprietary estoppel?
2. Are the petitioners entitled to an easement of necessity over Lot A?
3. Are the petitioners entitled to a remedy under s. 36 of the *Property Law Act*, R.S.B.C. 1996, c. 377, in respect of the encroachments on Lot C? and,
4. Are the petitioners entitled to an implied easement over Lot A based on common intent?

The court considered each claim in turn:

1. Are the petitioners entitled to an easement over Lot A under the principle of proprietary estoppel?

The court explained the nature of proprietary estoppel stating,

[7] From: Google® maps. All rights reserved.

[8] *Sauer v. 648657 B.C. Ltd.*, 2019 BCSC 43 (CanLII), at para. 35

> Proprietary estoppel is a remedy available for the acquisition of an interest in land where its owner knowingly stands by while another person incurs detriment under the belief that he is entitled to an interest in the land. The courts have endorsed a broad, flexible approach to the doctrine.
>
> Proprietary estoppel can do what other estoppels cannot – it can found a cause of action.
>
> The test for proprietary estoppel is whether, on the facts of the particular case, it would be dishonest or unconscionable for a person seeking to enforce a legal right to do so where he has done something beyond mere delay to encourage another to believe that he does not intend to rely on his strict rights and that other person has acted to his prejudice in that belief.
>
> Propriety estoppel, like most equitable remedies, is aimed at doing justice. The elements of the doctrine must, nevertheless, be made out and an equity established. An equity is established where (1) there was an assurance or representation attributable to the owner that the claimant has or will have some right to property; and (2) the claimant relied on the assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance.[9]

The petitioners argued that the Lot A mortgagee knew about – in fact encouraged – the access road being constructed and used in order to reach Lots B and C. However, the court rejected this argument with a somewhat stinging observation that:

> … the petitioners simply failed to engage in sufficient due diligence of the Project before providing the funding they did. They could easily have performed a search of the title to Lot A. Had they done so (and perhaps they did), they would have seen the registration of the Lot A First Mortgage ahead of the Lot A/C Easements. That would or at least should have led them on a train of enquiry regarding the security of the Lot A/C Easements. Whether or not they did so, they are the authors of their own misfortune.[10]

This ground failed.

2. Are the petitioners entitled to an easement of necessity over Lot A?

The underlying principles which give rise to an easement of necessity are established in United Kingdom case law and are referred to as "The rule in *Wheeldon v Burrows*." Simply stated, the rule requires proof of three elements:

1) continuous and apparent use of the grantor's land for the benefit of the grantee's land;

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[9] *Ibid.*, at paras. 54 to 57. References omitted.

[10] *Ibid.*, at para. 61

2) that was necessary for the reasonable enjoyment of the grantee's land; and

3) that was exercised by the grantor at the time of the original derogation of land to the grantee.[11]

In applying the rule, the court recognized the existence of different underlying public policy in varying jurisdictions, thereby leaving inconsistent treatment of the rule. For example, courts in the United Kingdom had described the rule as a means to give effect to the intentions of the parties. In Nova Scotia the rule was interpreted as part of an overall objective to ensure that land was used and not rendered useless. In Ontario, The Court of Appeal rejected the approach taken in Nova Scotia and adopted the statements of the UK courts:

> *Toronto-Dominion Bank v. Wise*, 2016 ONCA 629, rejected the public policy approach from *Hirtle* in favour of the English approach. In so doing, it quoted the following passage from *Nickerson* at para. 34:
>
> > [34] … [T]he law relating to ways of necessity rests not upon a basis of public policy but upon the implication to be drawn from the fact that unless some way is implied, a parcel of land will be inaccessible. From that fact the implication arises that the parties must have intended that some way giving access to the land should have been granted. … Public policy may inhibit the parties from carrying their intention into effect, but I cannot see how public policy can have a bearing upon what their intention was. In my judgment, that must be ascertained in accordance with the ordinary principles of construction, the language used and relevant admissible evidence of surrounding circumstances.[12]

This head of claim was ultimately rejected. The Court concluded that the law in British Columbia is such that the application of the doctrine of implied easement of necessity is limited to the original parties to a grant of subdivided land. Since Lots A, B and C were already subdivided when they were initially purchased by one of the petitioners, an implied easement of necessity is not available. In other words, the subsequent use of an "access road" through Lot A by subsequent purchasers of Lots A and C was simply irrelevant to a determination of this issue.

3. Are the petitioners entitled to a remedy under s. 36 of the **Property Law Act***, R.S.B.C. 1996, c. 377, in respect of the encroachments on Lot C?*

This was an important basis of claim. Section 36 states,

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[11] *Ibid.*, at para. 63, citing *Roop v. Hofmeyr*, 2016 BCCA 310 at para. 39

[12] *Ibid.*, at para. 66. References omitted.

Encroachment on adjoining land

36 (1) For the purposes of this section, "owner" includes a person with an interest in, or right to possession of land.

(2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application

(a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,

(b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or

(c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

The court stated that the purpose of section 36 was to allow a court to resolve disputes over encroachments on equitable grounds. This was understood to include a power to declare a "statutory easement" or to vest title to land on which the encroachment was placed in the name of the trespasser. An "encroachment" can include an access road. In order to succeed in a section 36 claim, the court explained the test:

1. The comprehension of the property lines: Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are three degrees of knowledge: honest belief, negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.

2. The nature of the encroachment: Was the encroachment a lasting improvement? What is the effort and cost involved in moving the improvement? Was is its effect on the properties in question? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more these considerations will be weighed in favour of the petitioner.

3. The size of the encroachment: How does the encroachment effect the properties, in terms of both their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.[13]

The Court noted that while the petitioners had an honest belief that the Access Road was part of Lot C, the evidence demonstrated that they knew it was on Lot A; but they simply assumed

[13] *Ibid.*, at para. 74, citing *Vineberg v. Rerick*, (1995), 59 A.C.W.S. (3d) 787 (B.C.S.C.) at para. 20

that it was available to provide access to Lot C. The petitioners' assumption in this regard was correct – the Access Road does provide access to Lot C. However, that access is subject to the pre-existing rights under the First Mortgage on Lot A. Ultimately the 3-part test could not be satisfied.

4. Are the petitioners entitled to an implied easement over Lot A based on common intent?

This head of claim was noted by the Court as being based on two neighboring landowners having participated in a joint enterprise with the implied intention that both properties would benefit; the law of equity can then intervene to provide a remedy. The benefit must be both an obvious and a necessary inference from the circumstances.[14]

It appeared that this claim was successful. The Court concluded,

> Each of the petitioners and the Lot A First Mortgagees participated and cooperated directly or through their authorized representative in the overall Project undertaking by way of their financing of it. They did so with a view to receiving a handsome return on their investment. When it appeared that their investment was in jeopardy, the Lot A First Mortgagees took steps to safeguard it, first by increasing their investment from $4.5 million to $5.2 million, and then by agreeing to a mortgage extension agreement and later a forbearance agreement. The petitioners' contribution was the provision of mortgage financing after the Project was well underway for the same common purpose.
>
> Throughout, the Lot A First Mortgagees acquiesced in and encouraged the use of the Access Road by those involved in construction of the works on Lot C, including the petitioners, for the common purpose and with the common intent of completing the Project and enabling revenues to be derived from it. If, during the course of the Project, an officious bystander had asked whether Lot C had the benefit of access by way of the Access Road, all involved, including the Lot A First Mortgagees would have emphatically responded: "Of course".
>
> In my view, the shared use of the Access Road from the outset for ingress to and egress from the Project's amenities was such that equity should intervene to grant an implied road access easement over Lot A consistent with the intentions of all of the parties, … as well as the Lot A First Mortgagees and the petitioners (who took security in Lot A and Lot C, respectively).[15]

In the end, the Court awarded the relief sought on the basis of this fourth and final claim.

While this is but an example of how a lack of a registered easement may be "cured" by the obtaining of a court order, the effort and expense in doing so make this a least desirable option.

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[14] *Ibid.*, at para. 77, citing *Barton v. Raine* (1980), 114 D.L.R. (3d) 702 (Ont. C.A.) at 711

[15] *Ibid.*, at paras. 81 to 83

Instead, a consideration of context and the "entire project" at issue in terms of the entirety of land on which it is to be built is a preferred preventative measure.

Editor: Izaak de Rijcke

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

Within *Chapter 5: Boundaries of Easements*, the reader will find a thorough discussion of how easements are formed in a range of circumstances. In particular, proprietary estoppel, easements of necessity, and common intent are discussed in subsection 5:5: *How Easements are Formed.* Further, the remedy set out in section 36 of the British Columbia *Property Law Act,* RSBC 1996, c. 377, is referenced in the book's discussion of adverse possession in *Chapter 4: Adverse Possession and Boundaries*, in particular at subsection 4:6, *Honest but Mistaken Belief Regarding the Boundary and Ownership.*

FYI

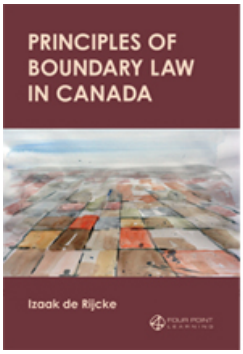
There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[16] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to 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.

Sixth Annual Boundary Law Conference

This year's conference theme is: *Easements: Update and Refresher*. Unlike previous years, this event will be held during April and May as a series of eight weekly *lunch & learn* sessions via our interactive virtual meeting room. Each presentation will focus on a scenario as the context for clarifying recent court decisions. The objective is to support the formation of professionally defensible opinions that parallel what the courts do. A draft agenda is in preparation and early bird registration is now open.

[16] 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.

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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