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.

The law of easements has evolved considerably since the famed House of Lords decision in *Re Ellenborough Park* over a half century ago with ample case law aimed at bringing clarity to this sometimes complex area of law. That said, the basic principles distinguishing an easement or right of way, which runs with the land, and capable of being registered on title, from other lesser interests, such as licences, have remained constant. There must be a dominant and servient tenement, the easement must accommodate the dominant tenement, the dominant and servient tenements cannot be owned by the same person and the easement must involve a right capable of forming the subject matter of the grant. These criteria are easily repeated, but not always clearly understood. A recent decision of the Ontario Superior Court[1] provides an example of the importance of these basic principles of easement interests. The applicants were ultimately unsuccessful in their claim for an easement; the court found that the agreements entered into at the time of the conveyance of the property were mere licences – a limited personal agreement between parties for ingress and egress. The case showed the importance of understanding basic principles and, by further extension, becomes a reminder of the need to depict interests appropriately on plans of survey so that costly litigation can be avoided.

Back to Basics: Criteria for Finding an Easement instead of a mere Licence

Key Words: easement, right of way, licence

The applicant and respondent in this dispute are owners of adjacent multi-unit commercial industrial properties; these properties were described in the decision. An image of a survey plan of the properties also appeared in the decision and is replicated below at Figure 1:

[1] *1832732 Ontario Corp. v. Regina Properties Ltd.*, 2018 ONSC 7643 (CanLII), http://canlii.ca/t/hwpvg

31 Taber Rd. and 35 Taber Rd. are adjoining commercially zoned properties in the City of Toronto (in the area that was formerly the City of Etobicoke). A survey of the properties is set out below.

Figure 1. Image of properties as it appeared in the reported decision. All rights reserved.

In the depicted survey, Taber Rd. is at the top (north). Brar Corp.'s property (35 Taber Rd.) property is at the left (west) of the survey, and Regina Properties' property (31 Taber Rd.) property is to the right (east). The driveway onto Brar Corp.'s property is to the far left (west) of that property. The driveway onto Regina Corp.'s property is located beside the east side of Brad Corp's property.

It shall be important to note that a vehicle traveling on Taber Rd. can use the driveway on Brar Corp.'s property (35 Taber Rd.) to enter that property, then travel across the back of the property and exit and return to Taber Rd. via the driveway on Regina Corp.'s property (31 Taber Rd.) Conversely, a vehicle traveling on Taber Rd. can use the driveway on Regina Properties' property (31 Taber Rd.) to enter that property, then travel across the back of Brar Corp.'s property and exit and return to Taber Rd. via the driveway on Brar Corp.'s property (35 Taber Rd.).

The 35 Taber Rd. property is a multi-unit commercial/industrial property. At least three of the tenants operate auto mechanic shops. Due to the nature of the uses being made of the 35 Taber Rd. property, the City of Toronto requires Brar Corp. to apply every five years for a minor variance of the zoning by-law with respect to the uses and parking for those uses on the 35 Taber Rd. property.

As already noted above, there is a driveway on Regina Properties property (31 Taber Rd.). Brar Corp.'s tenants use Regina Corp.'s driveway. Use of the driveway is of particular importance to the tenants operating auto mechanic shops because absent the access and

> egress to and from and on the neighbouring property, it would be very difficult to maneuver and turn around trucks, trailers, and large vehicles for the auto shop garages.[2]

Title to 35 Taber Road had been held by a corporate defendant, Regina Taber Properties. This entity was wound up when the property was sold to the applicants. The former principals of Regina Taber Road Properties are also the principals of the respondent, Regina Properties.

As is evident from the above survey both of the properties had access off of Taber Road that could accommodate a conventional vehicle. Below, figure 2 depicts the driveway of 35 Taber Road with a fence in the location marking the boundary line between 35 and 31. The nature of the businesses operated by the tenants of 35 Taber Rd. which saw frequent traffic from trucks, trailers and large vehicles in the auto shop garages. The rear of the building at 35 Taber Road is shown in Figure 3 below.

Figure 2. Driveway view of 35 Taber Road

[2] At paras 6-10

Figure 3. Side view of west side of 31 Taber Road

Such usage required greater area within which to maneuver safely. At the time of the purchase of the property at 35 Taber Road, the Agreement of Purchase and Sale contained the following provision in Schedule A:

> The Seller represents to the best of his knowledge and belief that:
>
> […]
>
> [2] the driveways serving the property are located wholly within the boundaries of the property, and entrance relating to such driveways have been approved by the appropriate road authority & authorized "Right of Use" with neighbouring property at 31 Taber Rd. The parties agree that these representations shall survive and not merge on completion of this transaction, but apply only to the state of the property existing at completion of this transaction.
>
> […]

A signed statutory declaration was also provided by the president of the Vendor corporation which referred to the "right of use" in the agreement above, limiting same to ingress and egress and explicitly excluding a right of parking.

> 1. I am the President of Regina Taber Properties Inc. (the "Vendor"). I have read and am familiar with the agreement of purchase and sale between Vendor and 1832732 Ontario Corp. (the "Purchaser"), accepted August 23, 2010, as amended, including all appendices

thereto (the “Agreement”). In this connection I have examined in particular the representations, warranties and covenants contained in the Agreement and the terms and conditions contained in the Agreement. The words “right of use” in the agreement means only the right to enter from 31 Taber Rd. & to exit 31 Taber Rd does not permit the right to park on the property municipally known as 31 Taber Rd.

2. I have made or caused to be made such examinations or investigations as are, in my opinion, necessary to furnish this declaration, and I have furnished this declaration with the intent that it may be relied upon by the Purchaser as a basis for the consummation of the subject sale transaction, to the best of my knowledge and belief.

3. The representations, warranties contained in the Agreement are, and shall be as of the date of closing of the subject transaction, true and correct as of the date hereof; all covenants contained in the Agreement have been complied with and no breach the terms and conditions contained in the Agreement has occurred and is continuing as of the date hereof and at the time of closing, to the best of my knowledge and belief.

4. I make this declaration for no improper purpose and make this declaration conscientiously knowing that it has the same effect as a statement made pursuant to the *Canada Evidence Act.*

As noted above, the tenants of 35 Taber Road operated auto mechanic shops; the use was not in compliance with city zoning and as such, the property owner was required to seek minor variances from the municipality every 5 years. In the years following the closing of the transaction, there were no major problems concerning access and egress from the two properties. However, there were some issues related to parking by tenants of 35 Taber on the driveway of 31 Taber, although there were different versions of how frequently this occurred and whether or not it was with the permission of the owners of 31 by agreement, directly with individual tenants. In 2016, when it came time again for the application for a minor variance, City staff suggested that a zoning by-law amendment would be preferable to repeated minor variance applications. An application was made and for the purposes of same a report was prepared by the City’s Development Engineering Department. A number of excerpts from the report were reproduced in the court decision, some of which are included below:

APPLICATION DESCRIPTION

This is in reference to the above application made by MacNaughton Hermsen Britton Clarkson Planning Limited (MHBC), on behalf 1832732 Ontario Corp., for the proposes of Zoning By-Law Amendment to facilitate the continued operation of a multiple occupancy building with reduced parking on the lands generally located southwest of Taber Road and Airway Road. The subject site is located at 35 Taber Road, north of Haas Road, in the former City of Etobicoke (Ward 2). The site is currently zoned “Industrial Class 2” (I.C2) under the Etobicoke Zoning Code and “Employment Industrial Zone” (E) under By-law No. 569-2013. The site is currently occupied by a seven-unit, 956.89 m2 multiple-occupancy building.

[…]

A. REVISIONS AND ADDITIONAL INFORMATION REQUIRED FOR PLANS, STUDIES AND DRAWINGS

The owner is required to amend the Studies and/or Drawings to address the following comments and resubmit for the review and acceptance by the Executive Director of Engineering and Construction Services prior to approval of the zoning by-law amendment.

1. Transportation Services

1.1. According to the submitted site plan, 23 on-site parking spaces are provided on the site. Three of these spaces are located east of the building and encroach into the neighbouring property at 31 Taber Road. These three parking spaces must be deleted from the site plan.

1.2 We require the owner of 35 Taber Road and the owner of the adjacent property at 31 Taber Road to enter into an easement agreement, to be registered on-title, that establishes reciprocal rights of vehicular and pedestrian access in perpetuity between the property at 31 Taber Road (which may require access onto the neighbouring property at 35 TaberRoad for vehicle maneuvering purposes) and the property at 35 Taber Road (which requires access to the neighbouring property at 31 Taber Road for use of their driveway to Taber Road and for vehicle maneuvering purposes). The existing informal arrangement can be easily modified and is thus not acceptable for this rezoning application.

[…]

D. BACKGROUND

[…]

DRIVEWAY ACCESS/SITE CIRCULATION

Existing full-movement driveways are provided to Taber Road from the subject site to the west and to the east of the existing building. No modifications are proposed as part of the subject rezoning application.

The driveway to the site is located entirely on the adjacent property at 31 Taber Road. A statutory declaration dated October 18, 2010, included as an appendix in the planning rationale, appears to include an informal arrangement that permits vehicular access to the site at 35 Taber Road via the driveway on 31 Taber Road, although the passages in the declaration that describe this access appear to have been a typewritten amendment to the declaration. We require an easement agreement establishing reciprocal rights of vehicular and pedestrian access in perpetuity between the properties at 31 Taber Road (which may require access onto the property at 35 Taber Road for vehicle maneuvering purposes) and 35 Taber Road (which requires access to the neighbouring property at 31 Taber Road for use of their driveway to Taber Road and for vehicle maneuvering purposes).

> The submitted draft by-law amendment for Zoning By-law No. 569-2013 shall be revised to delete Clause 3(b) which states: "Vehicle access to the lot is permitted to be shared with the abutting property at 31 Taber Road." It is not appropriate to include such a clause in the zoning by-law amendment.

With this direction from the municipality, the respondent's cooperation was sought in registering the required easements so that the zoning application could proceed. The respondents refused to cooperate in this regard. A proceeding was commenced to obtain a court order for the registration of the required right of way. At about this time, when the court proceeding began, the respondents erected a gated fence between the two properties, although it was unclear as to what extent the fence obstructed access and garbage collection at the tenant sites. A counter application was brought by the respondent for trespass on its driveway and parking lot. The fence is visible in Figure 2 above and Figure 4 below.

Figure 4. Fence and view of 35 Taber Road from neighbouring property at 31

As the reader may have already come to notice from this discussion, there were several corporate entities involved in the ownership and sale of the Taber Road properties, though the controlling minds were the same group of individuals. While the vendor of 35 Taber had been wound up when it was sold to the applicant, the individual behind the corporation was still involved in the corporation owning 31 Taber Road. As such, there was some reference to

standing in the decision and further discussion in which the court concluded that the assurances given to the purchaser were intended to be honored after closing.

The key question though, centred on whether there was an easement established capable of being registered. The owner of 31 had refused to co-operate when asked by the applicant to register such an easement. Was there a valid claim to an easement that the court could enforce as the remedy sought by the applicant, or was the arrangement for use of the driveway for ingress and egress limited to a neighbourly agreement between the parties in the form of a licence? While the city may have required an interest in the nature of an easement in order to grant the zoning amendment, such a municipal planning requirement had no bearing on whether one actually existed and was enforceable by the courts. With a relatively recent conveyance involved, the question was really very straightforward. In answering this question the court returned to the first principles of easements, which it summarized as follows (references omitted):

> There are four major requirements for or characteristics of an easement.
>
> First, there must be a dominant tenement that enjoys the benefit of the easement, and a servient tenement that carries the burden of the easement. The grantee of the easement must have an estate or interest in the dominant tenement at the time of the grant. In Ontario, with an exception for some statutory easements, easements do not exist "in gross", which means that an easement in Ontario must have an identifiable dominant tenement.
>
> Second, the easement must accommodate, that is, better or advantage, the dominant land. It is not enough that an advantage has been conferred to the owner of the dominant property making his or her ownership more valuable or providing a personal benefit to him or her; rather, for there to be an easement, the right conferred must serve and be reasonably necessary for the enjoyment of the dominant tenement. The policy rationale for this requirement is that the burdening of the servient property is justified because another property is benefited. A benefit personal to the landowner of the dominant tenement that does not benefit his or her land cannot constitute an easement. The requirement that the easement must be reasonably necessary for the enjoyment of the dominant tenement serves to emphasize that there must be a connection between the easement and the dominant tenement, as opposed to a personal right. The reasonable necessity requirement is fact specific and is applied in a flexible manner having regard to current social conditions and trends.
>
> Third, the dominant and servient tenements cannot be owned by the same person.
>
> Fourth, the easement must be capable of forming the subject matter of a grant, that is, it must be of a type recognized by the law, be defined with adequately certainty, and be limited in scope.

> Where a vendor grants an easement, he or she is encumbering his or her own lands with an ownership interest for the benefit of the lands of another landowner. Common law required a deed for the creation of an easement by grant, but equity would enforce an agreement to grant an easement if there was valuable consideration or if the owner of the dominant property incurred expenditure or work in furtherance of the agreement. Equity would enforce the agreement between the parties and also against parties taking title to the servient property with notice of the agreement to grant an easement.
>
> Where an easement is created by express grant or by express reservation in a grant, the nature and extent of the easement, including any ancillary rights, are determined by the wording of the instrument creating the easement, considered in the context of the circumstances that existed or were within the reasonable contemplation of the parties when the easement was created.[3]

Applying the test to the circumstances at hand, the court determined that the nature of the agreement was one of a **licence** to a right of way and did not constitute and enforceable **easement**. The court's analysis read as follows:

> I begin the analysis of what right was being granted by Mr. Regina and his corporations to Brar Corp. by noting from Mr. Regina's Statutory Declaration that while the right was to survive and not merge on completion, it applied only to the state of the property existing at completion of this transaction. This is a clear indication that Regina Properties was not granting an interest in land and was not restricting itself from altering the state of the property and of ending the license if the state of the property were to change in the future.
>
> Further indications that Regina Properties was not granting an interest in land may be taken from the circumstance - about which both Regina Properties and Brar Corp. do not dispute - that a grant of a permanent right-of-way (or one of longer duration than 21 years) would be illegal under the subdivision control provisions of the *Planning Act* unless regulatory consent to the conveyance was obtained. In contrast, no regulatory approval is required for a time-limited license, which as noted above does not entail a conveyance of a proprietary interest. In the immediate case, it appears that the parties contracted for a license that did not require regulatory approval.
>
> Had the parties contracted for a permanent right-of-way, then the contract would have been illegal in the absence of regulatory approval. That the City subsequently and currently wishes the parties to agree to a permanent right-of-way is of no moment. The City's intent was not a factor in the parties' negotiations.
>
> Moreover, what the City prefers is that there be a reciprocal grant of rights-of-way; i.e. the City requires that Brar also convey a permanent right-of-way over 35 Taber Rd. However, Reciprocal rights-of-way were never negotiated by the parties.

[3] At paras 45-51.

> In any event, had the parties intended to establish an easement, then, in my opinion, two of the four major requirements for or characteristics of an easement were not satisfied; namely the second requirement that the easement better or advantage the dominant land and the fourth requirement that the subject matter of the grant be defined with adequate certainty and be limited in scope.
>
> In my opinion, the second requirement is not satisfied because it is not enough that an advantage has been conferred to the owner of the dominant property. In the immediate case, a personal benefit; *i.e.*, a limited license was given to Brar Corp. that was not intended to benefit its land or to burden the land of Regina Properties.
>
> As for the fourth element, in the immediate case, there is a significant controversy about what the dimensions would be of the grant of a right-of-way, particularly if the right-of-way was a reciprocal one as required by the City of Toronto.[4]

In light of this conclusion, the court vacated the instrument that had been registered on title by the applicants, and turned its attention to the counter application in trespass related to parking on 31 Taber Road by tenants of 35. This counter application was denied based on formal procedural requirements that were not met by the respondent. Normally the type of remedy sought is available when brought as part of an action. The remedy sought was in the form of an injunction, but such a remedy is only available on an application for certain types of claims; these are laid out in clearly in the *Rules of Civil Procedure*. The action / application distinction is a procedural one and may seem arbitrary at first glance, but clear rules govern the powers of the court. In this case the criteria were not met and further, the court did not exercise its discretion to convert the application into an action. At the end of the proceeding, neither party in this matter was successful and both were required to pay their own costs. Perhaps a clearer understanding of the basic rules would have saved the time and expense of a court proceeding.

Editors: Izaak de Rijcke & Megan Mills

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

Principles of Boundary Law in Canada devotes an entire chapter to easements - Chapter 5: Boundaries of Easements - which addresses basic criteria for finding easements, distinguishing easements from other interests in land. The chapter also explores emerging issues with boundaries of easements.

[4] At paras 58-64

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.[5] 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[6] 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.

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[5] 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.

[6] This conference qualifies for 12 *Formal Activity* AOLS CPD hours.