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.

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It remains surprising how shared use areas between neighbours become a source of friction and dispute. Mutual rights of way for a shared driveway between properties were a common practice by builders of homes in older neighbourhoods in Canadian cities. A separate garage in each neighbour's backyard could be accessed by vehicle from the street without sacrificing valuable lot width for new developments.

This is the scenario which gave rise to the recent decision considered in this month's issue. Two neighbouring homes with a shared driveway and one owner embarks on a home addition or improvement. Every little encroachment and every inch of space suddenly takes on greater significance as there may (or may not be) an interference with the use of a right of way that is "substantial" in the eyes of the law.

The Mutual Driveway Easement: Efficient Land Use or a Source of Friction?

Key Words: *easement, driveway, encroachment, shared use, change in use*

As noted, mutual and overlapping rights of way for a shared driveway between homes built in older neighbourhoods was a common practice in many urban centres across Canada. The overlapping rights of way allowed for a shared use of one driveway for vehicular access into the two respective backyards, but it also allowed for a greater density and, as a result a closer proximity, of the homes built next to each other.

To this day, the planning goals of many city's by-laws and Official Plans include the management of "the car" and in particular, to achieve this goal by minimizing the impact on a streetscape of multiple driveways entering onto a street.[1]

[1] For example, the City of Richmond, British Columbia speaks of a goal to "Reduce the visual impact of the car on the appearance of the streetscape and residential livability by: Concealing parking from the street (e.g. locate

While the exact mechanism by which a shared driveway can be created today[2] may different from the techniques of a century ago, the fact remains that many such mutual driveway easements exist and the as-built infrastructure remains.

In *Figure 1* below, we see a home undergoing renovation in 2014 and which attracted the litigation in *Matuszek v. Aishford*.[3] To the left (or south) is a driveway that squeezes between the renovated home and the home on the neighbouring property.

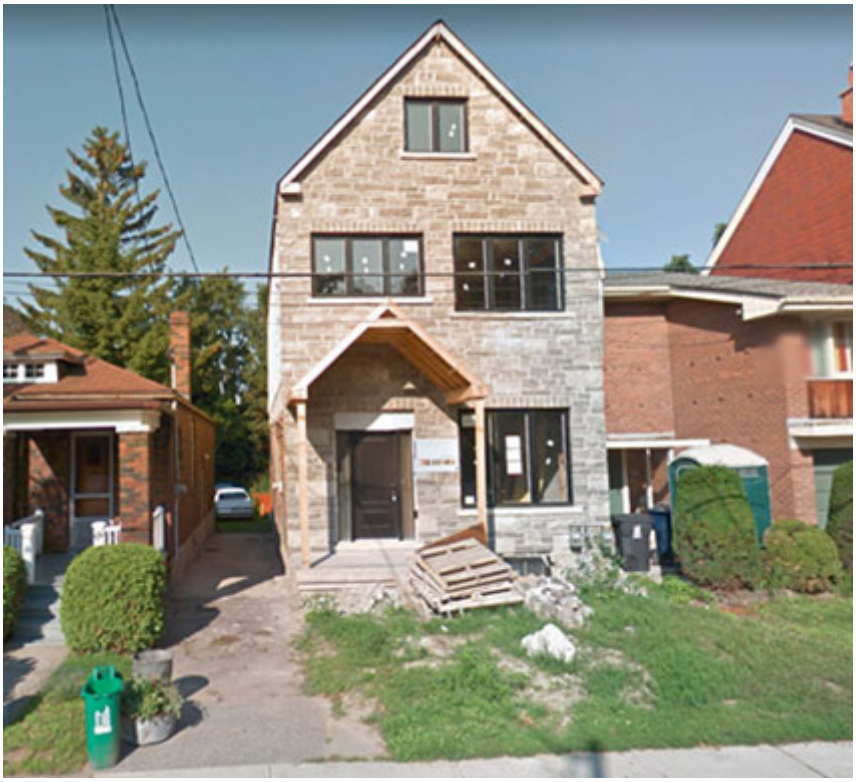

Figure 1: Home at No. 24 undergoing renovation and driveway to left[4]

The court summarized the facts in a few short paragraphs:

> The Applicant, Annette Matsuzek, and the Respondent, Christopher Aishford, own neighbouring properties on Kennedy Road in Toronto. Mr. Aishford's property, 24 Kennedy

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carports and surface parking behind dwellings, and…Limiting the size and number of driveways (e.g. through the use of shared driveways, lanes, maximum driveway widths)" at *Richmond Official Community Plan, CITY CENTRE AREA, McLENNAN SOUTH SUB-AREA PLAN*, Bylaw 7100 Schedule 2.10D, at pp. 9-10. Many other cities have similar planning goals.

[2] It is expected that today's land planning tools are more sophisticated and make use of private driveways as part of internal condominium traffic flow and maintenance, and not mutual cross-over easements.

[3] *Matuszek v. Aishford*, 2019 ONSC 1028 (CanLII), http://canlii.ca/t/hxk3b

[4] Google ® Streetview image attributed to August, 2014. All rights reserved.

> Avenue, is immediately to the north of Ms. Matuszek's property at 22 Kennedy Avenue. Between their properties is a mutual driveway, for which each is granted an easement over the other's property.
>
> Beginning in 2015, Mr. Aishford renovated the house on his property, including installing cement parging and brickwork on the house. The parties' relationship became acrimonious. The Applicant's position was that the Respondent's renovations resulted in various encroachments on the right of way. Specifically, Ms. Matuszek claimed that a stair walkout at the rear of Mr. Aishford's house, air vents on the south wall, and a hydro conduit and protective metal sleeve also on the south wall all encroached on the right of way.
>
> Ms. Matuszek parked her vehicle, a 1985 Thunderbird (the "Thunderbird"), on the mutual driveway for a period of time, claiming that she could not drive it between the houses to the back of the properties where it had previously been parked. Mr. Aishford claimed that the Thunderbird blocked his access to the mutual driveway and prevented him from moving his garbage and recycling bins from the rear to the front of his house. Once the Thunderbird was moved, Mr. Aishford placed two large landscaping rocks on the mutual driveway in order to prevent Ms. Matuszek from parking on the mutual driveway again.
>
> After receiving correspondence from Ms. Matuszek's counsel, Mr. Aishford moved the stair walkout and the air vents. The landscaping rocks were removed from the mutual driveway after the commencement of this proceeding.[5]

Against this background, the neighbour to the south sought court ordered relief to have a hydro conduit and a U-guard along the south side of the Respondent's home removed because they were encroachments into the right of way. In other words, it was alleged that they caused substantial interference to the Applicant's use of the right of way.

In evaluating the claim, the court considered the origin of the right of way and noted that the deed to the Applicant's property (the "Deed") provides for "a mutual driveway 6 feet and 9 inches wide by 75 feet deep for the joint use of the owners and occupants from time to time of the lands adjoining the same on the north and on the south," and concluded that the right of way was a total of 81 inches or 205 centimetres wide. The court noted further that,

> …the Deed further states that "the projection of eaves, chimney breasts, window sills or down pipes of the houses immediately adjacent to the right of way shall not be considered an encroachment on the said right of way."[6]

[5] *Matuszek v. Aishford*, *supra*, at paras. 1 to 4

[6] *Ibid*., at para. 8

Both the hydro conduit and "U guard" were dismissed as intrusions that interfered with the use of the mutual driveway. Referring first to the *Ontario Electrical Safety Code* which required rigid PVC conduit to be protected where exposed to mechanical injury, the court noted further,

> …while the Deed does not specifically refer to hydro conduits, cables, or protective guards, they nonetheless fall within the category of fixtures necessary to provide services to the home and thus do not constitute an encroachment. The hydro conduit and cables are necessary to provide electricity to Mr. Aishford's house, and the U-guard was installed for safety reasons. Although there is no U-guard, Ms. Matuszek's house also has a hydro conduit and cables on the side of her house facing the mutual driveway.[7]

What followed was an interesting description of how the spatial extent of 6 feet and 9 inches as a width for the mutual driveway was argued to be no longer available… but ultimately rejected. No surveyor was called to provide measurement or other evidence. Instead, the court described the parties' own measurement activities:

> Ms. Matuszek measures the alleged encroachments and adds them together to conclude that the space available for the right of way must necessarily have been reduced. Ms. Matuszek adds the width of: the parging of 0.9 inches (2.28 cm), the U-guard of 3.5 inches (8.89 cm), and an encroachment shown on the 2005 survey of 1.57 inches (4 cm). According to this calculation, the total available space would be reduced by a total of 5.97 inches (15.17 cm). The remaining space available for the right of way would thus be 75.03 inches (190.57 cm). By Ms. Matuszek's calculations, the Thunderbird measures six feet wide. This would leave only a total of 3.03 inches (7.70 cm) or 1.51 inches (3.85 cm) on each side for the vehicle to pass through the right of way.
>
> This leaves a discrepancy of approximately six inches between Mr. Aishford's measurements and Ms. Matuszek's calculation. Mr. Aishford's measurements and photograph demonstrate, rather conclusively, that a width of 82 inches remained after the installation of the U-guard. It is unclear from the photographs whether Ms. Matsuzek's measurements of the brick and parging are from the same location as the U-guard. In addition, where the U-guard is installed, the wall is recessed and it is unclear to me whether Ms. Matuszek's calculations take this recession into account.[8]

Turning to the question of whether or not substantial interference had been established, the decision in *Weidelich v. De Koning*,[9] was applied.

> An encroachment on a private right of way is actionable only where the encroachment substantially interferes with the dominant owner's ability to use the right of way for a

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

[8] *Ibid.*, at paras. 13 and 14

[9] *Weidelich v. De Koning*, 2014 ONCA 736 (CanLII), http://canlii.ca/t/gf30c

> purpose identified in the grant. The requirement that the dominant owner prove substantial interference reflects the fact that they do not own the right of way or land upon which it runs, but only enjoy the reasonable use of that property for its granted purpose.[10]

The court then turned to the penultimate question: *Could the Applicant still drive her Thunderbird motor vehicle between the two homes or not?*

Figure 2 below depicts a Streetview image capture attributed to September, 2018.

Figure 2: The width between the two homes was measured and submitted in evidence to the court.[11]

The court concluded,

> As noted above, the Thunderbird is 72 inches (183 cm) wide. The right of way is 81 inches (205 cm) wide, leaving nine inches (22.86 cm) of clearance, or 4.5 inches (11.43 cm) on each side. The available space was only ever that wide. Ms. Matuszek admitted that even before Mr. Aishford's renovations, the Thunderbird had to be driven slowly and cautiously over the

[10] *Ibid.*, at paras 10 and 12

[11] Google ® Streetview image. All rights reserved.

> mutual driveway to park it at the back of the properties. This suggests that the granted purpose of the right of way did not include its use as a mutual driveway for a vehicle of that size. In addition, Ms. Matuszek was able to move her other vehicle, a Volkswagen Beetle, down the mutual driveway after the installation of the U-guard. Since the reasonable use of the right of way for its granted purpose, as a mutual driveway, remains possible, there is no substantial interference.[12]

The Application was dismissed.

While the outcome may not have been surprising under all of the circumstances, what if the deed had not included language that stated, "the projection of eaves, chimney breasts, window sills or down pipes of the houses immediately adjacent to the right of way shall not be considered an encroachment on the said right of way?" Is 4.5 inches clearance on either side of a car enough or, is this irrelevant? There only was so much space between the 2 homes after they had been built. While the homes cannot be moved to be further apart, a choice does exist as to make of automobile that may be either easier or just impossible to drive over the shared driveway.

Editor: Izaak de Rijcke

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

Easements are covered in *Chapter 5: Boundaries of Easements* which covers the criteria for determining what constitutes "substantial interference" including a discussion of the 2014 decision of the Ontario Court of Appeal in *Weidlich v de Koning* in subsection 5:6 beginning at page 160. *Chapter 6: Boundaries of Public Roads* also considers the concept of "substantial interference" following the decision in *Weidelich v de Koning* at subsection 6:9.

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.[13] These resources are configured to be flexible with your schedule, range from only a

[12] *Matuszek v. Aishford*, *supra*, at para. 1 to 4

[13] 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

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[14] theme is: *Easements: Update and Refresher*. Unlike previous years, this event being held during April and May as a series of eight weekly *lunch & learn* sessions via our interactive virtual meeting room ***is presently under way***. 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. As live sessions are recorded, you can still enrol in this terrific learning opportunity and catch up on past sessions.

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