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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Land title regimes in most Canadian provinces are designed with certainty in mind and certain assurances for owners of title to land parcels, as well as a mechanism for claiming compensation when there has been a loss or damages sustained as a result of an error or omission in relation to a parcel. In this month's issue we explore a decision of the Supreme Court of Nova Scotia which involved a rather complex fact scenario that included elements of an encroachment, change in descriptions, misdescription, foreclosure and confusion over a boundary line. At the heart of *Innes v. Childs*[1], was a somewhat simple question that came down to whether a party had demonstrated a loss for which compensation was available under the *Land Registration Act*. The court answered this question in the negative, with the key to its finding being a long standing fence demarcating a boundary on the ground that had been in place for decades and withstood the multiple changes and errors in the description that had occurred with respect to the descriptions of the property over time. While there may have been a lack of certainty with respect to the boundaries of the two adjoining properties when one looked at the property descriptions, this "confusion" had to be considered in a practical sense, and by examining the situation on the ground.

Confusion on Paper but not on the Ground:

Is there a *loss* compensable under Land Titles legislation?

Key Words: *encroachment, boundary dispute, compensation, prescriptive title, foreclosure, loss*

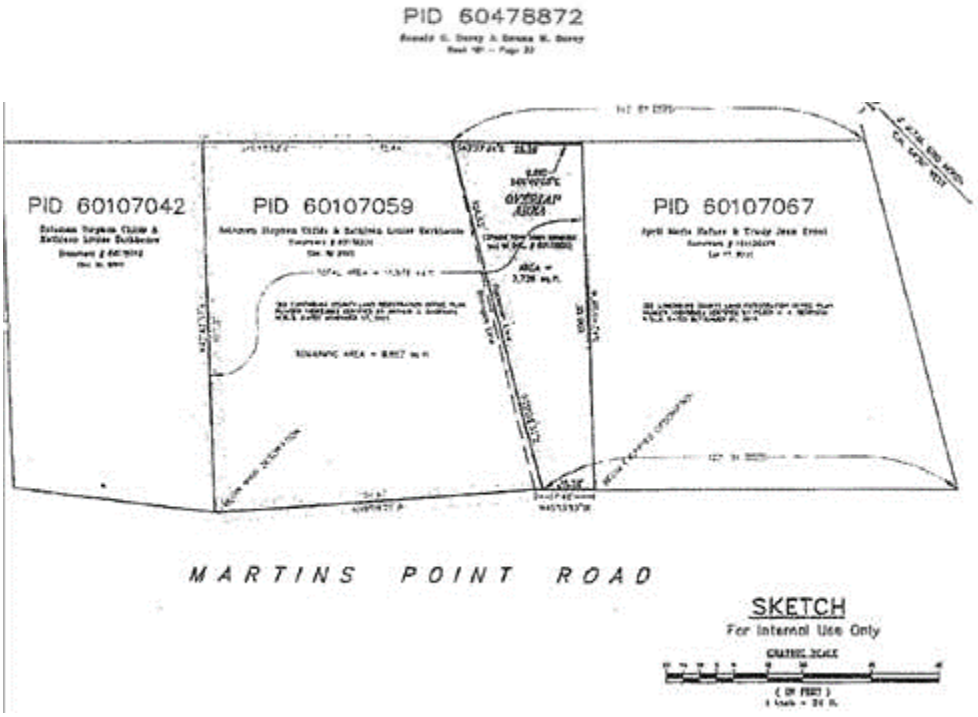
Generally speaking, the description of a property's boundaries will provide a clear indication, free from uncertainty and can be applied to the ground with respect to the spatial extent of adjoining parcels of land. In *Innes v. Childs*, the descriptions, or rather, *misdescriptions*, created some confusion, in spite of what appeared to have been settled by agreement on the ground.

[1] *Innes v. Childs*, 2019 NSSC 73 (CanLII), http://canlii.ca/t/hxqlg

This confusion prompted a claim being brought for compensation under the *Land Registration Act*, but which was ultimately unsuccessful. The fact scenario and history are rather complex, though the question itself of whether or not the parties had sustained a loss was fairly simple. The title history of the properties, owned by members of the same family in rural Nova Scotia, was set out in the decision through a reference to the Applicant's brief (emphasis in original) and included a number of exhibits that are reproduced below as they appeared in the reported decision:

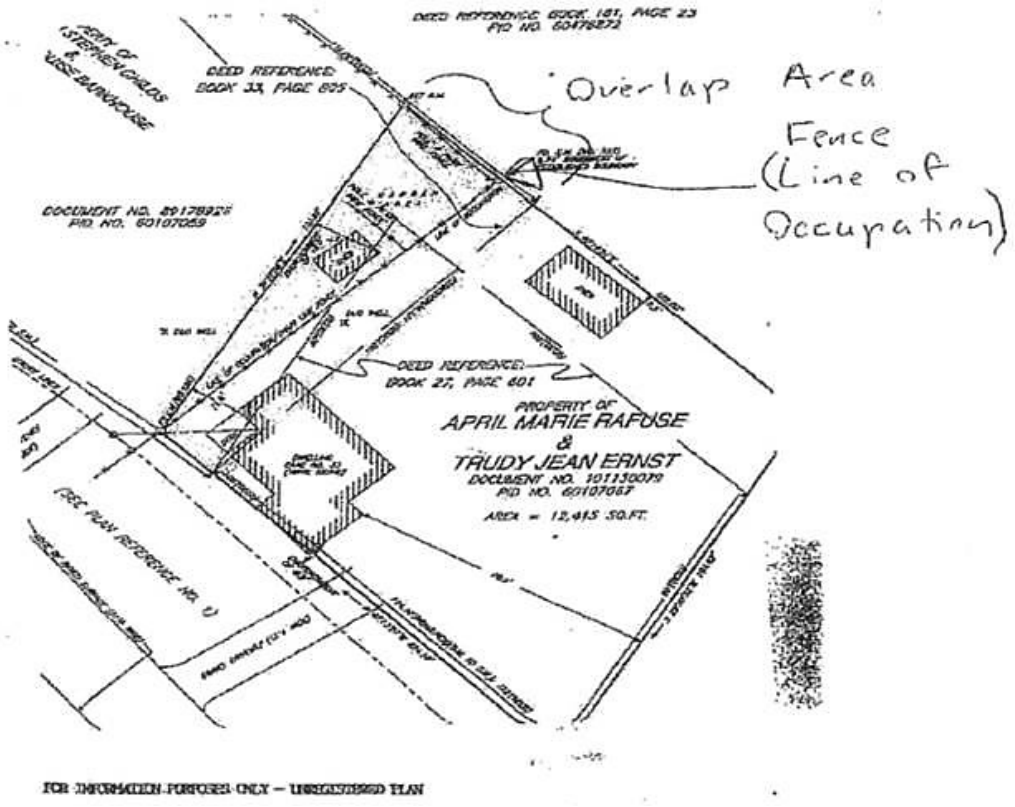
> [13] I am satisfied that the history of the legal descriptions with respect to the two affected properties is summarized in the Applicant's brief as follows:
>
> > 8. The history of the hidden conflict in boundary descriptions is set out in the affidavits on file of Ms. Walker, Mr. Innes, Q.C. and April Rafuse.
> >
> > 9. The property description for what is known as the Childs/Barkhouse property (27 Martins Point Road) was for our purposes as set out in a deed dated October 24, 1970 …
> >
> > 10. The property designation for what is known as the Ernst/Rafuse property was set out in the deed dated November 16, 1979 …
> >
> > 11. The 1979 description for the Ernst/Rafuse lot was intended to bring within the confines of the Ernst/Rafuse lot a house, built long before, that had mistakenly encroached upon the lands described by the 1970 Childs/Barkhouse deed.
> >
> > 12. <u>The description in 1979 Ernst/Rafuse deed overlapped the description in the 1970 Childs/Barkhouse deed</u> …
> >
> > 13. <u>In order to remove this overlap (and apparent conflict between the 1970 and 1979 deeds) a 'savings and excepting" wording was added to the description contained in the 1970 Childs/Barkhouse deed by way of a statutory declaration in 1987</u>...
> >
> > 14. <u>The "savings and excepting" wording in effect removed the overlap area from the 1970 description of the Childs/Barkhouse lot, and left it (the overlap area) within the 1979 Ernst/Rafuse property description</u> ...
> >
> > 15. The previous owner of the Childs/Barkhouse lot was one Bonnie Cleveland. In March 1998 she granted a mortgage to Scotia Mortgage Corporation. The mortgage contained the 1970 description as modified by the 1987 "savings and excepting" words.
> >
> > [<u>Emphasis</u> added]
>
> [14] Notwithstanding the manner in which the legal boundaries were described in the above instruments, the various owners of the Ernst/Rafuse lot, from time to time, did not

make use of the entire overlap area either before or after the corrections noted above. For ease of illustration, this overlap area (which was "saved and excepted" from the Childs/Barkhouse property and should have been included in the description of the Ernst/Rafuse property) has been reproduced below:



[15] The land saved and excepted from what became the Childs/Barkhouse property (also referred to as the "overlap area") and conveyed in the 1979 deed to Herman Rafuse had been designed primarily to correct a mistake "on the ground" whereby a portion of the residence on the Ernst/Rafuse lot had been erected on land (then) encompassed in the description of the Childs/Barkhouse lot as contained in the Jean Hiltz to Marshall Hiltz conveyance of October 24, 1970. However, the only portion of the overlap area that was occupied by the owners of the Ernst/Rafuse property over the years (again, both before and after the 1979 deed) was to be found to the east of a fence that had been put up sometime during the 1960s between the two properties.

[16] This is illustrated more particularly in the reproduction below (again) taken from the affidavit of Catherine Walker, Exhibit "E", p. 130 of 184 (portions of which affidavit will be discussed at greater length further in these reasons). The handwritten notations were appended to the copy noted in the Applicant's brief, and accurately depict the current features of interest:



[17] The history of this fence is set out in the affidavit evidence provided by April Rafuse, sworn July 21, 2017. References to the "Homestead Property" therein are to the Ernst/Rafuse property. As Ms. Rafuse states:

> 2. I was born in 1964. The property located at 33 Martins Point Road was my family Home (hereinafter "the Homestead Property"). I grew up on the Homestead Property. Attached hereto as Exhibit "A" is a property online map identifying the Homestead Property.
>
> 3. The Homestead Property is abutted by the Martins Point Road on the South/South-West; by lands of the respondents Solomon Childs and Kathleen Barkhouse on the West; by lands of Ronald and Donna Dorey on the North; and by lands owned by the Nova Scotia Department of Natural Resources on the East.
>
> 4. The Respondents Solomon Childs and Kathleen Barkhouse have resided on the property located at 23 Martins Point Road for over 30 years (hereinafter "23 Martins Point Road").
>
> 5. There is a lot of land between the 23 Martins Point Road house lot and the Homestead property. This property is known as 27 Martin's Point Road. This lot does not have a residential dwelling on it but does contain some out-buildings. Attached hereto as Exhibit "B" is a property online map identifying this lot. In

2007, The respondents Solomon Childs and Kathleen Barkhouse purchased 27 Martins Point Road (hereinafter the "27 Martins Point Road").

6. My grandmother (my mother's mother) was Jean Hiltz. She acquired all of the land which would include the Homestead Property and 27 Martins Point Road in the early 1950s.

7. My parents resided in the house that stands on the Homestead Property beginning the early 1950s. My brother was born in the house in 1954. My mother used to point out the bedroom where he was born. The house has stood in the same place since it was built.

8. The Homestead Property, in its original form, was deeded to my parents in a deed dated August 23rd, 1962, a copy of which is attached hereto as Exhibit "C".

9. At some point between the early 1950s and 1979, an addition was built onto the house on the Homestead Property.

10. In 1979, further land was added to the Homestead Property. Jean Hiltz and Marshall and Pauline Hiltz, signed a conveyance which transferred the original Homestead Property and a portion of lands owned by them to my parents, expanding the Homestead Property. A copy of this deed is attached hereto as Exhibit "D".

11. The reason this conveyance took place was because up until that point all the land was owned by members of our family, so the lines of occupation were agreed upon within the family. As she grew older, my mother wanted to get all the documentation straightened out.

12. The house and lawn on the Homestead Property encroached onto an area of land, part of which was owned by my grandmother Jean Hiltz, and part of which was owned by her son, Marshall Hiltz. The 1979 conveyance was done to ensure that my parents owned the property on which the house was built.[2]

A street view of the property at 33 appears below as Figure 1, the addition on the white house at number 33 which had originally encroached upon the lands of number 27 is visible as is the chain link fence which presently stands between the two properties.

[2] *Innes v. Childs* at paras 13-17

Figure 1. Streeview® of property at 33 with fence and "overlap" lands visible.

The long history of this fence was critical to the court's finding. According to affidavit evidence, the existing chain link fence had been constructed by family members in the 1970s and had been placed in precisely the same location as a pre-existing wooden fence that had itself stood for some time. The land in the triangular portion of "overlap" adjacent to the fence was noted as being undeveloped at the time the fence was constructed, although converted to a garden in more recent years. Figure 2 shows a street level view of the property at the "overlap" lands.

Figure 2. View of "overlap" lands at 27 with fence and dwelling at 33 visible.

The issues before the court stemmed from confusion that occurred when, in 2007, the Applicant, erred when acting for the mortgagee in a foreclosure on the property at 27 Martins'

Point Road. The error was an omission that occurred when title was migrated, specifically the omission of the "saving and excepting" clause in the legal description, an error that was later repeated in the deed to the present owners of the property at 27. Of note is that the earlier Notice of Foreclosure had in fact contained the proper legal description. Acknowledging his error, the Applicant in this matter had sought an order to register the proper descriptions.

The main question, now before the court was, "Have the Respondents, Childs/Barkhouse, demonstrated a loss for which compensation is payable under the *Act*?[3] In addressing the key question of whether or not the compensation sought by the Respondents was payable under *the Land Registration Act*, the court closely examined the impact of the erroneous description in the migration of title - namely that the mortgagee could only foreclose upon that which was covered by the mortgage, that is to say a parcel where the overlap area was clearly saved and excepted based on prior correct descriptions. SMC could not sell to the Respondents that to which they had not taken title, notwithstanding the repetition of the error in the later deed. Further, as the court referenced in its reasons, the *Act* itself included knowledge based limitations that were explained by the court as follows:

> [63] Second, this argument does not give proper effect to what the *LRA* actually says. Consider, for example, section 4(3):
>
> > 4(3). A person who engages in a transaction with the registered owner of an interest that is subject to an interest that is not registered or recorded at the time of the transaction, other than an overriding interest, <u>in the absence of actual knowledge of the interest that is not registered or recorded</u>
> >
> > a) may assume without inquiry that the transaction is authorized by the owner of any interest that is not registered or recorded;
> >
> > b) may assume without inquiry that the transaction will not prejudice that interest; and
> >
> > c) has no duty to ensure the proper application of any assets paid or delivered to the registered owner of the interest that is the subject of the transaction.
> >
> > [Emphasis added]
>
> [64] As I have explained, the Respondents (Mr. Childs – over 40 years and Ms. Barkhouse over 30 years) have lived adjacent to the Childs/Barkhouse property for a long time. They knew that the *de facto* property line of 27 Martin's Point Road was the fence. Knowing this,

[3] *Innes v. Childs* at para 24

they possessed "actual knowledge" within the meaning of section 4(3) above. They knew the real boundary of the property they were getting when they paid their $9,500 and purchased it from SMC. It was only after they received the actual deed, saw the erroneous description, and got out their measuring tape, that they began to hope for more.

[65] Third, consider section 73(1) of the *LRA,* which provides that certain interests ("overriding interests") including easements or rights of way (that are actually in use) will be enforced over all other interests according to law regardless of whether they have been noted in the parcel register or not. Expanding upon this theme, the legislation then goes on to provide:

> 74.(1) Except as provided by Section 75, no person may obtain an interest in any parcel registered pursuant to this *Act* by adverse possession or prescription unless the required period of adverse possession or prescription was completed before the parcel was first registered.
>
> (2) Any interest in a parcel acquired by adverse possession or prescription before the date the parcel is first registered pursuant to this *Act* is absolutely void against the registered owner of the parcel in which the interest is claimed ten years after the parcel is first registered pursuant to this *Act*, unless
>
> a) an order of the court confirming the interest;
>
> b) a certificate of *lis pendens* certifying that an action has been commenced to confirm the interest;
>
> c) an affidavit confirming that the interest has been claimed pursuant to Section 37 of the *Crown Lands Act*; or
>
> d) the agreement of the registered owner confirming the interest,
>
> has been registered or recorded before that time.
>
> 75(1). The owner of an adjacent parcel may acquire an interest in part of a parcel by adverse possession or prescription after the parcel is first registered pursuant to this *Act*, if that part does not exceed twenty per cent of the area of the parcel in which the interest is acquired.
>
> (1A) An owner of an undivided interest in a parcel may acquire the whole interest in the parcel by adverse possession or prescription after the parcel is first registered pursuant to this *Act*.
>
> (2) For the purpose of this Section, adverse possession and prescription include time both before and after the coming into force of this *Act*.
>
> [Emphasis added]

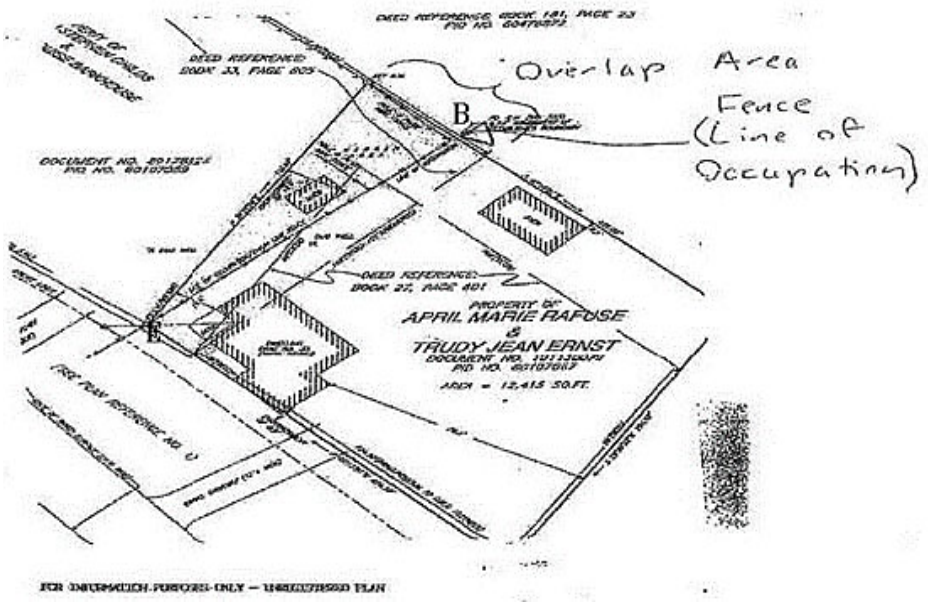
[66] Given the concerns noted by these Respondents, it is somewhat ironic that they did not formalize their position with the court prior to February 2018, when they filed their

> Notice of Claim. As noted, it was the Applicant who commenced this proceeding on June 26, 2017, prior to the lapse of the ten-year limitation mentioned in section 74(2). Even if this had not happened, section 75(1) would likely have operated to allow the Respondents' prescriptive rights to remain extant, in these circumstances.[4]

Earlier in the decision, the court had explored the adverse possession argument and in doing so, the court looked at whether there had been an acquisition of title to the triangular piece of land based on adverse possession and found that such acquisition had occurred, based on the long term occupation and demarcation by the fence line. This finding was reinforced by a further determination that the parties treated the boundary of 27 and 33 as being marked on the ground by the fence:

> [43] I have carefully considered the uncontradicted evidence of Messrs. Venniotte and Ms. Rafuse (a successor in title to Herman Rafuse and current co-owner of number 33 "the Ernst/Rafuse property") as well as the clear and well-documented opinions contained in Ms. Walker's affidavit, as well as the survey plans of both Arthur C. Backman and Berrigan Surveys Limited. All of the criteria for the acquisition of a prescriptive right by the owners of the Childs/Barkhouse property to that portion of the "overlap area" located to the left of the fence have been satisfied. These include openness, exclusivity, notoriety, continuity and having acted as the owner as of right. In particular, I find that the successive owners of the Childs/Barkhouse property and the Ernst/Rafuse property treated the fence (both the current chain link one and its wooden predecessor) located between the properties as correctly marking the boundary between their respective properties. I find this to have been the case since at least 1965, notwithstanding the manner in which these properties were described in the deeds and other instruments executed from time to time over the years. (*Affidavit, April Rafuse, July 21, 2017, paras. 8 to 12*)
>
> [44] For ease of reference I reproduce the relevant features of Exhibit "12" ("the Berrigan survey plan"). To lapse into geometry parlance, the line B→E shown thereon depicts what was at all times the location of the fence since at least 1965, if not earlier. Hence it has been the *de facto* boundary line between the two properties, since (at least) that time. I also find that this plan accurately depicts the location of all of the other features shown thereon, and that the handwriting (appended upon the following copy by the Applicants) accurately highlights the areas to which it purports to draw attention:

[4] *Innes v. Childs* at paras 63-66



> [45] As a consequence, everything to the left of the "fence (line of occupation)" shown in the above diagram satisfies the criteria as having been acquired by adverse possession by the predecessors in title of owners of the Childs/Barkhouse property. This is notwithstanding the fact that it is part of the "saving and excepting" language (the overlap area) which describes the dimensions of what Herman Rafuse and his successors in title to the Ernst/Rafuse property are supposed to own (on paper).[5]

In spite of the apparent confusion that had occurred, the court held that there had been no loss suffered that was compensable under the *Act*:

> [70] … the Respondents have suffered no loss because neither they nor their predecessors in title ever owned more land than what the present (and pre-existing) fenced boundary provides. The error in the land migration carried out by Mr. Innes did not affect the rights of the Respondents Childs/Barkhouse to any of the land to which they were entitled (to the west or left of the fence) which had been acquired by prescriptive right by their predecessors in title over the years, nor did it affect the remainder of the overlap area which remained on the east or right (the Ernst/Rafuse) side of the fence.
>
> [71] Most importantly, by virtue of the Consent Order, the records of the Registrar now reflect all of the land that the Respondents could have ever expected to obtain based upon what they knew, or ought to have known (all along), of the real boundary between the two properties.
>
> [72] The Applicant succinctly observes (brief, para. 62):

[5] *Innes v. Childs* paras. 43-45

62. In summary then Mr. Childs did not own the land to the east [right] of the existing fence between the two properties. The omission of the "savings and excepting" wording in the 2007 did not give him that land; he lost nothing when the words were re-inserted; and hence there was no "loss" to him "due to an error or omission in a parcel register." s. 85(1)(a).

In essence, this is a boundary dispute

[74] Compensation is predicated upon loss. And not just any type of loss. For example, while section 85 of the *LRA* sets up a compensatory scheme within which the Respondents purport to bring themselves, section 86(1) (*inter alia*) provides that a person is not entitled to compensation:

> 86(1) … if the loss was sustained because
>
> …
>
> e) there is a discrepancy between the legal description or Provincial mapping in the parcel register and the actual location, boundaries or extent of the parcel in question;

[75] Therefore, even putting their case at its strongest, this is an insurmountable obstacle for the Respondents.

[76] Consider, in addition, section 21(1) of the *LRA*. It provides that registration in the parcel registry does nothing (and purports to say nothing) about the actual boundaries of the registered interest. This must be considered in tandem with section 22(2) which tells us that provincial mapping cannot be taken as "conclusive as to the location, boundaries or extent of a parcel." Section 86(1)e, as noted above, brings this train of thought to its logical conclusion.

[77] As has been explained (and quite apart from all else), the legal description received by the Respondents, whether with or without the "saving and excepting" clause, would have been divergent from the actual *de facto* boundary on the ground in any event. The placement of the fence, which had been recognized by the owners of civic numbers 27 and 33 since at least 1965 as the true boundary, conformed with neither scenario. Compensation is accordingly being sought on the basis of a boundary discrepancy between the legal description in the deed and the actual location of the proper boundary. The combination of sections 21(1), 85 and 86(1) indicate that no compensation is available to the Respondents under the *LRA* as a result. They have not established that they have suffered a loss which is compensable under the legislation.[6]

[6] *Innes v. Childs* at paras 71-77

This decision relied significantly on the evidence pointing to the situation on the ground - how did the parties understand and treat the boundaries of the adjoining land? A long standing fence was a key indication of this understanding in the face of "confusion" that may have occurred as a result of misdescriptions and errors. How the boundary was treated played a key role in assessing whether or not there had truly been any loss compensable under the *Act*, but in this case of course, none was found. Critical also was the limitation in the legislation's guarantee on the question of boundaries.

Guest Editor: Megan Mills

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

A thorough discussion of land registration systems and how they relate to boundaries including examples from Ontario, Nova Scotia and British Columbia is set out in *Chapter 7: Boundaries and Land Registration Systems*. A discussion of the nuances of claims based in adverse possession can be found in *Chapter 4: Adverse Possession and Boundaries*.

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.[7] 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

We thank all who attended this year's conference: *Easements: Update and Refresher*.[8] This series of eight weekly lunch and learn sessions explored recent trends and developments in

[7] 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.

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

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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