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 use of legislation to allow for public protection of amenities such as shoreline revetments, walking trails, or land conservation interests can and do employ a number of well-established devices such as conservation easements or restrictive covenants. However, what happens when such measures do not include a survey-based land description? If the interest to be maintained is spatially less than an entire parcel, how does the land owner (or for that matter, anyone else) know where it is located?

This problem came before the Supreme Court of British Columbia in relation to a registered statutory right of way that "contemplated the possibility of the construction of a boardwalk over the subject lands." The problem was that a plan defining the location on the ground of the boardwalk was never submitted. The result was a setting aside of the legal burden for a landowner to maintain, as unobstructed space, a portion of a trail and cycleway that was intended to eventually form part of an extended Wild Pacific Trail. In this issue of *The Boundary Point* we consider the decision in *Skene v Ucluelet (District)*,[1] and examine some of its broader implications.

Statutory Easements, Covenants and the Need for Certainty of Location

Key Words: *restrictive covenants, description, statutory easement, certainty*

In *Skene v. Ucluelet (District)*, a court considered an application under s. 35 of the *Property Law Act*,[2] for an order cancelling a statutory right of way registered against waterfront property in Ucluelet, BC. Considered to be a "comprehensive code," section 35 creates a remedy for

[1] *Skene v Ucluelet (District)*, 2019 BCSC 2051 (CanLII), http://canlii.ca/t/j3pmp

[2] *Property Law Act*, R.S.B.C. 1996, c. 377

removing impediments from title by bringing an application to the Supreme Court. However, availability of the remedy is discretionary. Section 35(2) states,

> The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
>
> b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
>
> c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
>
> d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
>
> e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

The location of the site appears in Figure 1 below.

Figure 1: Approximate location of site at waterfront near Ucluelet[3]

A depiction of the parcel fabric and the contextual location of the site can be viewed in Figure 2 in which the parcel fabric is laid over aerial photography and topography.

[3] From: https://www.google.com/maps/ Copyright Google 2019 – All rights reserved.

Figure 2: Parcel fabric from LTSA application[4]

The problem originated in 1997 when a former owner registered a statutory right of way in favour of Canada and the municipal District:

> The Property is one of several parcels that were once the subject of a proposed single resort development known as the Reef Point Adventure Station, conceived by Seabridge Construction Limited … Seabridge planned to develop the Reef Point Adventure Station on the lands it owned at that time (the "Proposed Development Lands").
>
> Seabridge granted the District and Her Majesty the Queen in right of Canada a covenant registered against Lot 43, plan VIP 64738, as charge number EL10358 (the "Natural Boundary Covenant"). The Natural Boundary Covenant contemplated the possibility of the construction of a boardwalk over the subject lands.[5]

In 1998 a Development Permit was applied for and approved for issuance to Seabridge by the District Council. The Permit included the following conditions:

> 10. That the cycle path and boardwalk/path plan be completed in keeping with the plan attached to this report.
>
> 11. A statutory right-of-way shall be registered on the land under the proposed boardwalk/path ensuring the unrestricted use of the entire boardwalk/path for public use and absolving the district from maintenance costs and upkeep.

[4] From: https://parcelmapbc.ltsa.ca/ Copyright 2019 Land Title and Survey Authority of British Columbia - All rights reserved.

[5] *Skene v Ucluelet (District)*, at paras. 3 to 6

> 12. In accordance with the original Preliminary Layout design dated September 1996, the applicant shall construct a 2.0 meter paved cycle path. It is understood that the existing Peninsula Road paved surface from Reef Point Road to the area of He-Tin-Kis shall be reduced to 3.5 meters to meet this criterion. The applicant shall ensure that all existing water and sewer apparatus remain accessible to the District of Ucluelet, Public Works Department with regards to the proposed boardwalk/path and cycle path. [emphasis added]
>
> The District's copy of the 1998 Permit is unsigned and no boardwalk/path plan is attached. There is no evidence the referenced "boardwalk/path plan" was ever prepared or attached to the 1998 Permit.[6]

In 1997, Seabridge had subdivided some of its lands. A "Statutory Right of Way" (SROW) was also entered into and registered against the title of Seabridge's lands. The subdivision created a number of parcels; the Petitioners are successors in title to one of the parcels. The events took a turn for the worse when Seabridge defaulted in corporate filings and was eventually dissolved. The court noted the absence of any actual plan showing boundaries:

> … the 1998 Permit did not include a development plan showing the boundaries of the proposed boardwalk. Further, by 2000 Seabridge had run into financial difficulties and abandoned its plans to develop the Reef Point Adventure Station. No boardwalk was ever built on the Property. On December 5, 2005, Seabridge was dissolved for failing to file its annual report.
>
> The abandonment of the proposed Reef Point Adventure Station single resort development resulted in the Owner's Lands being sold off to multiple purchasers. Subsequently, much of the Owner's Lands were individually developed in a "patchwork fashion", some as recreational properties and a few as small commercial resorts. They are not collectively integrated in ownership, management, or use. Some of the lots remain fully undeveloped.
>
> Around July 2015, the Petitioners sought to obtain a copy of the statutory right of way plan associated with the SROW; however, no statutory right of way plan was ever deposited with the Land Title Office and no statutory right of way plan is attached or linked to the SROW.[7]

The District took steps in 2015 to proceed with a survey of the SROW and complete a plan for the boardwalk that had never been prepared or attached to the original Development Permit. By 2018 the survey had been completed, deposited on title and appeared to be an attempt to bolster what had been lacking in 1998. The 2018 SROW was, however, not the same as before. The court described the new document and detailed the differences:

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[6] *Ibid.*, at paras. 10 and 11
[7] *Ibid.*, at paras. 18 to 20

> On or about September 28, 2018, a statutory right of way plan was deposited with the Land Title and Survey Authority and assigned registration number EPP 68571 (the "2018 Statutory Right of Way Plan"). The 2018 Statutory Right of Way Plan informs several statutory rights of way that were registered subsequent to the SROW on several properties to which the SROW also applies (the "New Statutory Rights of Way").
>
> The New Statutory Rights of Way are similar in form and content to each other. The New Statutory Rights of Way each include an agreement between the respective owners, all successors in title to Seabridge's Owner's, Lands and the District (the "New Agreements"). However, the recitals included in the New Agreements are very different from the recitals in the SROW Agreement. Whereas the SROW Agreement recitals referred to a boardwalk having already been constructed by Seabridge, the New Agreements recitals contemplate the future construction and reconstruction, by the District, of a ground level oceanfront pathway.
>
> The grants contained in the New Agreements confer the same rights as those conferred in the original SROW; however, unlike the SROW Agreement, there are no references in the New Agreements to a "Recreational Village", a management agreement, or a statutory building scheme. Nor do the New Agreements contain the positive obligations imposed on the property owners in the SROW Agreement, including the obligation to indemnify the District and to maintain the contemplated boardwalk.[8]

The basis for the application was succinctly summarised by the court:

> The Petitioners rely on two grounds in their petition and argue there are three reasons the SROW should be cancelled. First, relying on s. 35(2)(e) of the *PLA*, they argue the SROW is invalid due to a lack of certainty. Second, also relying on s. 35(2)(e), they argue the SROW is invalid and unenforceable because it contains positive obligations that go to the heart of the SROW. Finally, relying on s. 35(2)(a), the petitioners argue there have been material changes in the character of the Property, the neighbourhood, and the circumstances involving the development of the Property and its surroundings that render the SROW obsolete. In particular, the Petitioners argue the SROW was predicated on the development of a single resort. They argue the fact that the area now consists of multiple lots which are not owned, operated, or managed collectively constitutes a material change in the character of the Property, the neighbourhood, and its surroundings.[9]

The Court's analysis ultimately gave the Petitioners the relief sought. In doing so, the importance of certainty in allowing a parcel owner to determine with precision the extent of the burden on title was explained:

[8] *Ibid.*, at paras. 27 to 29
[9] *Ibid.*, at para. 35

> In *585582 B.C. Ltd.*, Tysoe J.A. considered whether a covenant was invalid due to uncertainty. In that case, Tysoe J.A. observed that while the covenant in issue prohibited the public rental of the unit unless it was done in accordance with a rental pool management agreement, the rental pool management agreement was not attached to the covenant or incorporated by reference and did not even exist at the time of the creation of the covenant. Tysoe J.A. found the covenant invalid on the basis of uncertainty, and in so finding made the following comments at para. 27:
>
> > There is no certainty with respect to the terms of the Rental Pool Management Agreement and, as a result, there is a lack of certainty in the covenant itself. By looking at the covenant registered against a unit, a successor in title to the unit cannot determine the terms by which the unit may be rented to the public.[10]

The court continued,

> The SROW was predicated on a fact that never materialized: the construction of a boardwalk by Seabridge in the Owner's Lands. The SROW was to be over land chosen by the then titleholder, Seabridge. Seabridge agreed to provide the District with certain rights over a part of the Property once Seabridge had determined the boundaries. But Seabridge never did. In my view, there was no crystallization of any interest in land the SROW could have conveyed to the District because the boundaries of that interest were never determined.
>
> I acknowledge that in *Tessaro* a blanket easement was registered in contemplation of the parties later registering a defined easement. However, the circumstances of that easement are distinguishable from the SROW. In *Tessaro*, the transferor had agreed to grant the transferee an easement over the whole of the servient tenement with the intention that the transferee would have the right to construct the driveway "on any part of the servient tenement in the transferee's sole discretion". In contrast, under the SROW the precise boundaries of the Boardwalk, and the corresponding easement, were within the sole discretion of Seabridge, as the transferor.[11]

Readers may recall the decision in *Cole v Paterson*,[12] reviewed in an earlier issue of *The Boundary Point* last year and entitled, *Clarity of Boundaries and Terms as Essential Elements of Restrictive Covenants*. In *Cole* (which was cited in the *Skene* decision), a restrictive covenant was also struck down because the "plan" attached to the document showed a cross-hatched area drawn with a wide felt tipped pen: the boundaries could not be ascertained with any degree of precision.

The need for a precise description (preferably based on ground survey) appears to be a necessity in British Columbia for statutory easements that operate much like restrictive

[10] *Ibid.*, at para. 42
[11] *Ibid.*, at paras. 53 and 54
[12] *Cole v Paterson*, 2019 BCSC 45 (CanLII), http://canlii.ca/t/hx0md

covenants. This writer is not aware of any jurisdiction in Canada that has dispensed with the need for a survey or description that will define the spatial extent and location of land to which such covenant will apply. It cannot depend on a plan of survey "to be prepared" at a later date and it cannot be satisfied by an artistic rendering that communicates a concept. Cost saving measures to avoid the expense of a survey may therefore lead to ultimate failure of what is intended as a public benefit for the broader community.

Editor: Izaak de Rijcke

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

Restrictive covenants are addressed in subsection 7 within Chapter 5: *Boundaries of Easements*, which covers the criteria required for a restrictive covenant at common law as well as some of the legislative changes that have taken place in an effort to clarify the law and streamline the process of title registration. As discussed in this issue, the power of courts to resolve uncertainty through a court order – or delete the restriction from title – are remedies that remain available in almost all Canadian common law jurisdictions.

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 few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added.

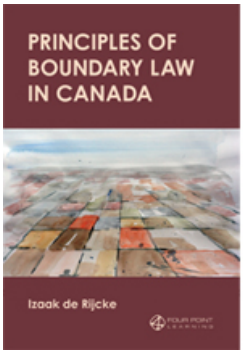
Course: Survey Law 2

Survey Law 2 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This university-level course will be taught online Wednesday evenings by Izaak de Rijcke, starting

[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 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.

January 8, 2020. For more information, see the syllabus. Please note that registration and enrolment is via CBEPS: https://cbeps-cceag.ca/resources/survey-law-2-online-course/.

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.*)

If you wish to contribute a case comment, email us at TBP@4pointlearning.ca.

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