



*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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The use of space between homes to access a garage or other amenity in the back yard from the street or front yard – whether by vehicle or on foot – seems to be a chronic issue that keeps appearing in the courts. Sometimes the problem stems from an uncertainty in the title record; other times the problem stems from neighbours behaving badly. This is an issue that is not confined to any one jurisdiction in Canada and generally the legal response has been to consider a framework that evaluates property rights using the law of easements as perhaps the most common starting point. Where there is a written agreement of sorts, significant weight is given to the intentions of the parties.

In late 2019 the problem appeared again in a reported decision from the Ontario Superior Court of Justice. In *Le Marchant v. Grunwald*,<sup>1</sup> neighbours in the 1970s had attempted to create mutual overlapping easements over their properties in order to allow for vehicular access from the street to the back yards. Due to certain defects in the easement creating documents, the applicants argued that the rights were void and should be deleted as an interest from the parcels' titles. However, the driveway was being physically used and enjoyed... until the applicants brought this proceeding and sought a court order declaring that the use was not permitted and must cease.

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## Repairing Easements and Rectification of Descriptions

**Key Words:** *descriptions, easement, certainty, right of way, rectification*

In *Le Marchant v. Grunwald*, a court considered an application for a declaration that a purported easement or right of way was void. The Respondent, Grunwald, brought her own

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<sup>1</sup> *Le Marchant v. Grunwald*, 2019 ONSC 7513 (CanLII), <http://canlii.ca/t/j497g>

counter-application for rectification and an order under sections 159 and 160 of the *Land Titles Act* by which any defect in the right of way would be corrected.

The Reasons for Decision from the Court included a partial copy of a survey plan that was out-dated,<sup>2</sup> but showed the general configuration of the properties and the purported easements. A copy appears below in Figure 1.

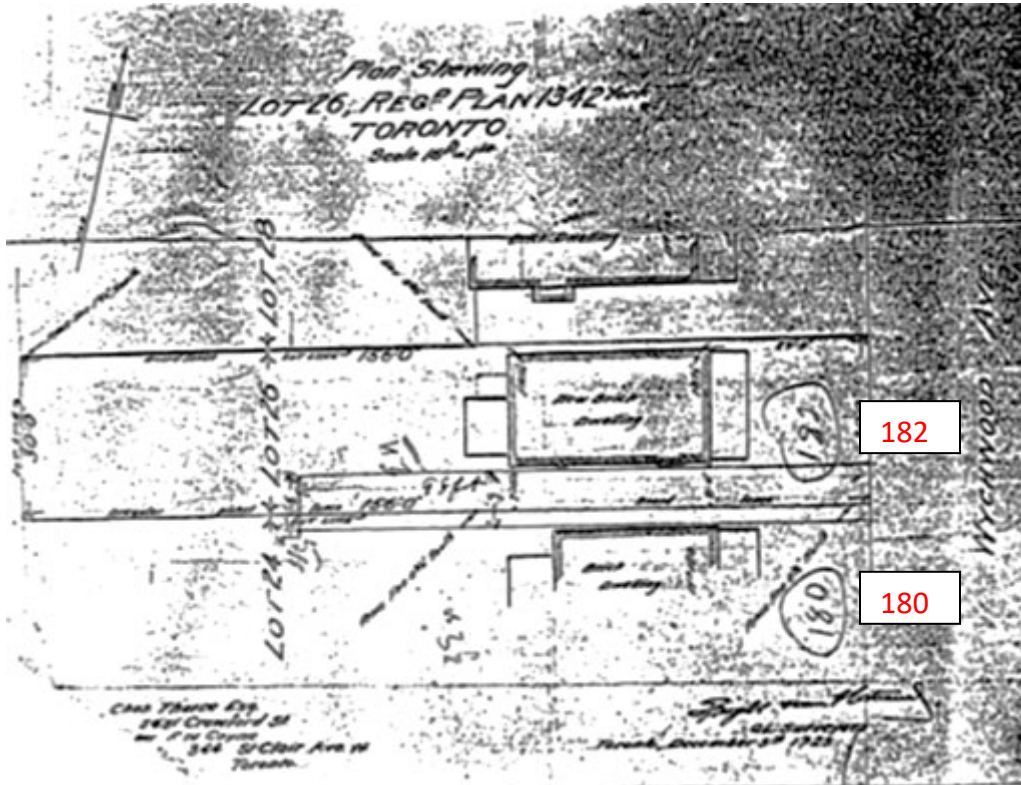


Figure 1: Plan of survey showing two properties at Nos 180 and 182<sup>3</sup>

The Court explained the configuration of “mutual” driveway easements:

The top of the sketch is toward the north and lot 26 is 182 Wychwood Avenue, the property now owned by the Le Marchants and lot 24 is 180 Wychwood, the property owned by Ms. Grunwald. Wychwood Avenue is to the east (the right side of the sketch). The right-of-way is between the two properties, and it is depicted as commencing on the west side of Wychwood Avenue.<sup>4</sup>

<sup>2</sup> The year of the survey was not stated, but it appears to date from the 1920s, with hand-drawn alterations of unmentioned origin.

<sup>3</sup> *Ibid.*, at para. 4. All rights reserved.

<sup>4</sup> *Ibid.*, at para.5.

A more recent view from street level in Figure 2 below reveals the circumstances on the ground before the decision was released by the Court.



Figure 2: Street view looking west<sup>5</sup>

A signed agreement that purported to create the mutual driveway in 1976 is reproduced in the Reasons for Decision and readers are encouraged to review same carefully. The Court did so too. The application was framed as an attack on the legality of what had been created in 1976 and was registered on title. The Court summarised the six issues that arose from a consideration of the two Applications:

- a) Is the Right-of-Way Agreement void because of the absence of a formal enurement clause?
- b) Should the Right-of-Way Agreement and the Grant of the right-of-way be rectified to correct the references to the commencement being from the “easterly” limit of Wychwood Avenue?
- c) Should the parcel registers for 182 Wychwood and 180 Wychwood be rectified pursuant to sections 159 and 160 of the *Land Titles Act*?

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<sup>5</sup> From *Google® Streetview*. All rights reserved.

- d) Does the Right-of-Way Agreement entitle the owner of 180 Wychwood to use the right-of-way for vehicular ingress and egress to and from Wychwood Avenue to and from the rear of 180 Wychwood?
- e) Should the Le Marchants be enjoined from interfering with the use of the right of the way by storing materials or vehicles and erecting structures on the right-of-way?
- f) Should Ms. Grunwald be enjoined from interfering with the use of the right-of-way and be ordered to remove her garden that encroaches on the right-of-way?

Each was considered in turn and eventually led to a finding that there was a common intention to create mutual easements in the 1970s and an order rectifying any deficiency in the descriptions for their location in order to correct certain technicalities that led to a misdescription. In doing so, the Court considered both equitable and statutory grounds to order rectification. This is important because it is seldom that the two grounds appear at the same time in one proceeding. The Court explained and applied the equitable jurisdiction to order rectification as follows:

The court's equitable jurisdiction to grant rectification is concerned with mistakes in recording the parties' intent or purpose in their writing. Rectification is designed to ensure that the parties' documents express the parties' purpose at the time the document was finalized.

To obtain an order rectifying a document, usually a contract, the applicant must prove: (1) a common intention held by the parties before the making of the document alleged to be incorrect; (2) the common intention remained unchanged at the date that the document was finalized; and (3) the document, by mistake, does not conform to the parties' prior common intention.

In *Wasauksing First Nation v. Wasausink Lands Inc.*, at paragraph 77 the Court of Appeal stated:

[A]n applicant seeking rectification of a written agreement must demonstrate, on "convincing proof", that the parties had a common intention, antecedent to the formal document in question and evidenced by some outward expression of accord, that continued unchanged until the time that the formal document was executed by the parties and that the formal document mistakenly did not conform to the prior common intention.

In determining whether a common intention existed, a court adopts an objective approach and considers what a reasonable observer would have believed the parties intended, taking

into consideration the evidence of all the parties as well as the surrounding documentary evidence.<sup>6</sup>

The Court explained and applied statutory jurisdiction to order rectification under the *Land Titles Act* as follows:

The *Land Titles Act*, sections 159 and 160 provide:

159. Subject to any estates or rights acquired by registration under this Act, where a court of competent jurisdiction has decided that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence of the decision the court is of opinion that a rectification of the register is required, the court may make an order directing the register to be rectified in such manner as is considered just.

160. Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

Under sections 159 and 160 of the *Land Titles Act*, the court may order rectification where the court decides that a person is entitled to an interest in registered land and the court is of the opinion that a rectification of the register is required. The case at bar is an appropriate case to order the parcel register to be rectified to correct what is an obvious mistake made in Instrument CY 625415.

I disagree with the Le Marchants' argument that sections 159 and 160 of the *Land Titles Act* are not available in the circumstances of the immediate case.

When Instrument CY 625415 was registered, 182 Wychwood and 180 Wychwood were properties registered under the Registry Act. As part of the Province of Ontario's project to convert lands under the Registry Act into the land titles system, the province transferred the lands and classified both properties as "Land Titles Conversion Qualified" ("LTCQ") and the lands came to be governed exclusively by the *Land Titles Act*. The Le Marchants, however argue that sections 159 and 160 of the *Land Titles Act*, which make rectification available, do not apply to lands classified as LTCQ.

There is, however, no basis and no merit to this argument. There is nothing in the *Land Titles Act* that makes a distinction between properties registered as LTCQ and properties registered as Land

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<sup>6</sup> *Le Marchant v. Grunwald*, 2019 ONSC 7513 (CanLII), at paras. 34 to 37 (references omitted)

Titles Absolute for the purposes of sections 159 and 160 of the *Act*. Therefore, I order that the parcel registers to be amended.<sup>7</sup>

The Reasons for Decision in *Le Marchant v. Grunwald* are therefore not only coherent and compelling, but further explain how a framework of analysis to reach a conclusion begins with a search for the intention of the parties. This mandate has repeatedly appeared as a guiding light in contract interpretation, but also in resolving descriptions of land that may be ambiguous.<sup>8</sup> A full reading of the Reasons is highly encouraged.

*Editor:* Izaak de Rijcke

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

Intention is a criterion for consideration in the retracement of boundaries, but when uncertainty is increased due to technical errors or mistakes in a document or a metes and bounds description, rectification is often available as an equitable remedy. As a remedy, this remains available in almost all Canadian common law jurisdictions – even when the jurisdiction espouses certainty that can only be enjoyed in a *Torrens* system of title registration.

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## 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.<sup>9</sup> 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.

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<sup>7</sup> *Ibid.*, at paras. 42 to 46

<sup>8</sup> For further reading and useful resources, please see: *Hooey v. Tripp*, 2 DLR 136, 1912 CanLII 579 (ON SCDC), <http://canlii.ca/t/gw5d8>, *Leblanc v. Terre Noire Surveys*, 2014 NSSC 165 (CanLII), <http://canlii.ca/t/g6r99>, *Robichaud v. Ellis*, 300 NSR (2d) 350, 950 APR 350, 2011 NSSC 86 (CanLII), <http://canlii.ca/t/2fzcg>, *Oostdale Farm and John Oostvogels v. Joseph Lawrence Oostvogels*, [2016] NSJ No 214 (QL), 2016 NSSC 146 (CanLII), <http://canlii.ca/t/grwh0>, and *Barthel v. Scotten*, 1895 CanLII 9 (SCC), 24 SCR 367, <http://canlii.ca/t/1ttb0>

<sup>9</sup> 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.

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Understanding the workings of the legal system and the legal process is essential for regulated professionals entrusted to make ethical and defensible decisions that have the potential of being reviewed by a court. ICCL immerses current and aspiring cadastral surveyors in a reasoning process and real-life applications to develop or bolster skills in forming and communicating professionally defensible opinions that strive to parallel what the courts do. As such, ICCL provides a solid foundation for the study of the substantive topics in *Survey Law 1* and 2. Plans are underway to make this course available in the spring of 2020.

## *Coming this Fall: Seventh Annual Boundary Law Conference*

This year's conference theme will be: ***Boundaries on Artificially Controlled Bodies of Water***.<sup>10</sup> Like last year's online conference, this learning opportunity will be delivered as a series of 8 weekly lunch and learn sessions. The first session will be late October, 2020 so stay tuned!



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<sup>10</sup> This conference may qualify for 12 *Formal Activity* AOLS CPD hours; an application is pending once the online conference program is final.