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 presence of an easement affecting land that is of interest to a prospective buyer can cause problems if not disclosed in the course of forming an agreement of purchase and sale. While some easements may actually provide an important benefit for a home owner – sewers or utility servicing are but two obvious examples - others may be much more restrictive and therefore can have a significant impact on how a property can be enjoyed. This continuum of impact was explored in a recent decision of the Ontario Superior Court in *Joo v. Tran*,[1] where a motion for summary judgment was brought for a failed residential real estate transaction involving a property burdened by a number of easements. Under what circumstances can a potential purchaser refuse to close due to the presence of easements over a property? This question is considered and addressed in the standard language of the Ontario Real Estate Association's Agreement of Purchase and Sale section on Title. The court went through a number of examples in the case discussed below.

We often hear of the importance of the prospective purchaser obtaining an up to date survey prior to purchase. In this this case a survey was attached as a schedule to the agreement of purchase and sale and played an important role in demonstrating what the purchasers knew at the time of entering into the agreement.

The Value of a Survey Attached to an APS

Key Words: *agreement of purchase and sale, easement, requisition, survey, title*

There are many limitations on the use of land which restrict or control how an owner may use one's own property - even when that ownership is title in fee simple. Zoning by laws, building codes, and the common law of nuisance represent but a few of these limitations that have broad application. Other limitations that can impact a specific property can be found in the

[1] *Joo v. Tran, 2020* ONSC 806 (CanLII), http://canlii.ca/t/j56cr

form of easements for services such as drainage, sanitary sewer lines, public utility lines, access, restrictive covenants, etc. These easements and restrictions will, to some extent or another, impact an owner's freedom to use the property in any manner whatsoever.

Accordingly, if there is no (or simply inadequate) disclosure to a buyer when making an offer to buy property, such a buyer may take on certain risks, as there may be many unseen restrictions or encumbrances on the property. This risk is recognized and dealt with in the context of the wording in a standard Agreement of Purchase and Sale, in allowing a buyer a period of time to perform due diligence and research the title. In the routine exchange of correspondence between legal representatives of the buyer and seller through the form of requisitions and responses before the deal is concluded, many issues that are discovered can therefore be cured. To that end, the standard form Agreement of Purchase and Sale used by members of the Ontario Real Estate Association provides for the following in relation to Title:

> **Title:** Provided that the title to the property is good and free from all registered restrictions, charges, liens, and encumbrances, except as otherwise specifically provided in this Agreement, and save and except for
>
> a) any registered restrictions or covenants that run with the land providing that such are complied with;
>
> b) any registered municipal agreements and registered agreements with publicly regulated utilities providing such have been complied with, or security has been posted to ensure compliance and completion, as evidenced by a letter from the relevant municipality or regulated utility;
>
> c) any minor easements for the supply of domestic utility or telephone services to the property or adjacent properties; and
>
> d) any easement for drainage, storm or sanitary sewers, public utility lines, telephone lines, cable television lines or other services which do not materially affect the use of the property…[2]

Certain minor easements that do not materially impact the use of the property and provide services thereto are just expected as part of modern life and one may not cancel an agreement of purchase and sale because of them. That said, other easements that do significantly restrict the use of the property may so seriously curtail a buyer's future use and enjoyment of the property, so as to give the buyer the option of backing out of the deal. This continuum was discussed in *Joo v. Tran*.

The facts were not in dispute and were summarized by the court as follows:

[2] *Joo v. Tran* at para 4

> The Defendants as purchasers, submitted an offer to purchase the Plaintiffs' residential dwelling at 691 St. John's Sideroad West, Aurora, for $2,130,000. They paid a deposit of $100,000 to the broker. Their offer was accepted by the Plaintiffs on the 30th day of April 2017. On May 4, 2017, the Defendants signed an Amendment to the Agreement of Purchase and Sale, which was accepted by the Plaintiffs as vendors on May 10, 2017. Significantly, a building location survey initialed by all parties was attached as Schedule "C" to this Amendment.[3]

The property in question can be seen in the image below.

Figure 1: August 2015 Streetview, from Google Maps. All Rights Reserved.

[3] *Joo v. Tran* at para 3

An aerial view of the property appears below.

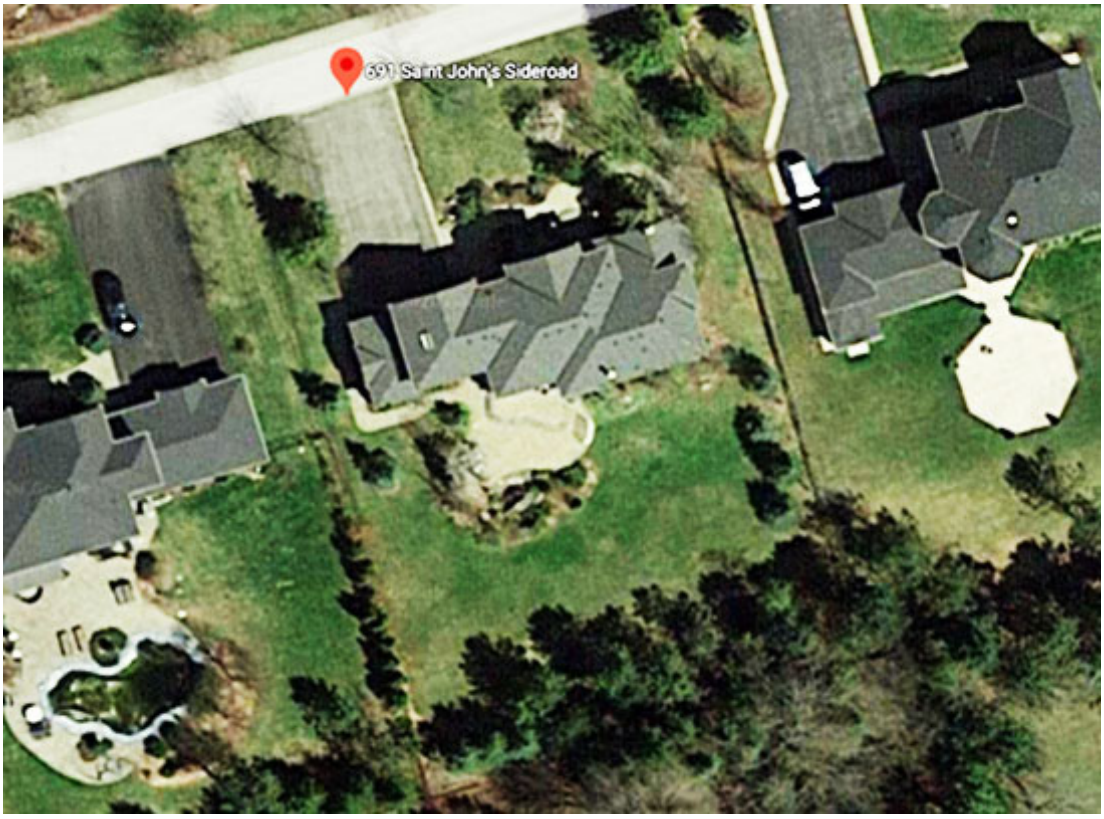

Figure 2: August 2015 aerial view, from Google Maps. All rights reserved.

In the course of the buyers' search of title, it was discovered that there were a number of easements affecting the property in favour of the Town for water mains, sanitary sewers and storm drains, and in favour of Bell Canada, Aurora Hydro Connections and Aurora Cable TV for construction and maintenance of services and facilities. Did these easements fall within those contemplated by the standard form Agreement of Purchase and Sale as minor exceptions for domestic services? Or did they represent a restriction that would allow the buyers to terminate the contract?

What made the facts in this case interesting was that a survey had been attached as a schedule to an earlier amendment to the Agreement of Purchase and Sale. This survey was not dated, but it showed the foundation of the home under construction at the centre of a residential lot and the easements at issue covered over a quarter of the property's area. The court described the information in the survey:

> … [o]n the north limit of the property, shown as Part 7 thereon, easements in favour of the Town of Aurora and Bell Canada are noted. Just below that, on Part 66, an easement in favour of the Town of Aurora, Hydro and Cable TV are noted. On the south limit of the property, there is a further easement three metres in width along the southerly boundary

noted as Part 19. There is no evidence before the court that the structure on the property in any way encroaches upon these easements.[4]

The court's brief and concise analysis explored several examples from earlier decided cases and explained the test for determining materiality:

> Counsel for the Defendants submit that these easements take up approximately 27% of the land mass of this residential dwelling. In furtherance of their argument, the Defendants refer to *Hallinan v. Coughlin,* 2009 CarswellOnt 1687. In that case, the court deal with an easement over the driveway and backyard, enabling adjacent owners to use the easement. Justice Gray noted at para. 9:
>
> > There is no question, in my view, that the easement over the driveway and the backyard constitutes an "encumbrance" as contemplated in paragraph 10 of the Agreement. There is no dispute that the easement was not disclosed in the Agreement of Purchase and Sale.
>
> The court determined that because there was a registered encumbrance that was not removed, the purchaser was entitled to rescind the contract.
>
> In *Savo v. Moursalien,* 2016 CarswellOnt 7932, Justice Charney dealt with a failed real estate transaction where the property was subject to two Trans Canada pipeline easements. It appears only one easement was referred to in the Agreement of Purchase and Sale. Justice Charney noted that the easement covered almost the whole backyard, potentially requiring the homeowner to remove a swimming pool and cabana, if requested by the pipeline authority. His Honour concluded by granting summary judgment in favour of the Defendant purchaser, terminating the transaction and ordering the return of the deposit.
>
> In *Stefanovska v. Kok,* 1990 CanLII 6848, Moldaver J. (as he then was) considered a situation where the property was subject to a storm and sanitary sewer easement. He noted that the easement only affects the westerly border of the lot, occupying approximately 3.5% of the total lot. With respect to this easement, he noted at p.7, "This easement, unlike others such as Hydro, Bell, gas and the like, which the purchasers might expect, was not foreseen by his clients (the purchasers)." In ruling in favour of the vendors, His Honour noted at p.11:
>
> > The true and overriding test to be applied in these cases is whether the impediment to title, in any significant way, affects the use and enjoyment of the property. As earlier indicated, I have found this not to be the case.
> >
> > In *Ridgely v. Nielson,* 2007 CanLII 14624, Her Honour Justice Forestell considered an easement regarding storm and sanitary sewers. She noted that the easement

[4] *Joo v. Tran* at para 12

covered most of the rear garden and 26% of the property. She also noted that a two-storey gazebo encroached on the easement. Her Honour noted at para. 8:

> Therefore, consideration as identified in the case law is relevant to determining materiality:
>
> (i) the location of the easement;
> (ii) the size of the easement;
> (iii) the point of access; and
> (iv) the owners' enjoyment of the property.

On the facts of the case before her, judgment was granted in favour of the purchaser. The Requisition requiring removal of the easement was valid.

In addition to cases submitted, the Defendants relied on commentary from Justice Paul Perell in his text *Real Estate Transactions* (Canada Law Book, 2014). On p.80 he noted:

> Under the standard title of provision, the purchaser is entitled to a title free from all encumbrances "except as specifically provided". This reference allows for the Agreement to specify encumbrances to be assumed or that run with the land. It is important to appreciate that the party's contract about the quality of the purchaser's title *vis,* the parties may agree that the title can have defects or encumbrances, or they may contract that the vendor remove the defects or encumbrances. This means that there is a contextual aspect to what are defects.[5]

In considering the matter at hand within the context of the above noted decisions on materiality, the court noted an affidavit of one of the defendants that had indicated they had advised the sellers they would only close if all of the easements had been removed or discharged. To this, the court noted:

> The affidavit is significant for what it does not say. Although the proposed purchasers were offering to pay over $2,000,000 for this residential property, there is no indication as to how the property would be serviced by the utilities, including hydro, telephone or cable TV, if the easements were removed.[6]

The court held that the easements were of a nature that one would expect in a residential subdivision and granted summary judgement in favour of the plaintiffs, finding the defendants in breach of contract for failing to follow through with their obligations under the agreement of purchase and sale. In doing so the court stated:

> In my view, the four easements are standard utility easements which are carved out as an exception in paragraph 10 of the Agreement of Purchase and Sale. Indeed, they are well

[5] *Joo v. Tran* at paras 15-19
[6] Joo at Tran at para 22

> illustrated on the survey, which was attached as Schedule "C" to the amendment to Agreement of Purchase and Sale. All parties executed and initialed it in May of 2017. It was not until August of 2017, that a paralegal for the purchaser first made reference to this issue. The standard municipal or utility easements run across the front of the land with a smaller easement across the back of the land. There are no encroachments of the structure into these easements, nor does it compromise a purchaser's use of the backyard, unlike *Ridgely.* Although these easement holders can maintain and repair the easement lands, the general public does not have access to or use and enjoyment of these easements. Nor were these utility easements as broad as the easement in *Savo,* which had the potential to require the homeowner to remove a backyard pool and cabana, if necessary.
>
> Although these easements take up a significant percentage of the lot, I am satisfied that this has to be reviewed in context and in view of the actual location of the dwelling, the location of the easements, and the stated purpose of these easements. I adopt the wording of Moldaver J. in *Stefanovska* that these are the types of utility easements that any purchaser might expect in a residential subdivision. I take further comfort in the fact that the easements are well illustrated on the survey, which became part of the Agreement of Purchase and Sale by reason of its attachment to the Amendment executed and initialed by all parties.[7]

Damages were awarded to the plaintiff based on their loss – they had subsequently successfully sold the property to another purchaser but at a lower price. The survey here, though undated and prepared at a time before construction of the dwelling had been completed, was significant in that it did include reference to the easements at issue and allowed the court to see them in context. Arguably this was also true for the defendant purchaser, but sadly, it is not enough that a survey be attached to a property for certainty; purchasers must also take the time to review and read it with some care.

Guest editor: Megan Mills

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

Survey depiction of easements is addressed in Chapter 5: *Boundaries of Easements* which also includes a broad discussion on the formation of easements.

[7] *Joo v. Tran* at paras 23-24

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.[8] 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.

Coming this Fall: Seventh Annual Boundary Law Conference

This year's conference theme will be: ***Boundaries on Artificially Controlled Bodies of Water***.[9] 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!

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

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[8] 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.

[9] This conference may qualify for 12 *Formal Activity* AOLS CPD hours; an application is pending once the online conference program is final.