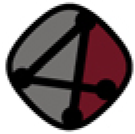

The Boundary Point

Volume 8, Issue 4, April 2020

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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More than just a consideration of legal process, a decision of the Ontario Superior Court released a number of years presented a useful discussion of the subtle but important differences between easements that arise from express grant as opposed to easements which arise through prescription. The parties in this dispute all shared easement rights over the same land, but in a contest that challenged the very existence of an easement itself, the owner of the underlying fee simple title had not been joined in the dispute. The analysis used by the court regarding the mechanism by which an easement over land can become extinguished is especially helpful since the court chose to include a highlighted partial copy of a survey plan in the endorsement setting out the reasons for decision.

Disuse and Abandonment of an Easement: When can it be Extinguished?

Key Words: *easements, abandonment, prescription, laneway*

Easements and rights of way[1] play an essential role in real estate law in Canada. These are means by which passing over another person's land to reach one's own parcel may occur, without it being deemed to be a trespass. In many instances, the rights of the dominant owner

[1] In this issue, the expressions "right of way" and "easement" are used interchangeably. Although an easement is, in essence, a right over another's land, any right claimed as an easement must satisfy the common law definition as found in *Re Ellenborough Park*, [1956] Ch 131. As a convenient reminder, in that English decision, the court laid out the essential characteristics of an easement as follows:

- There must be a dominant and a servient tenement;
- The easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit;
- The dominant and servient owners must be different persons;
- The right claimed must be capable of forming the subject-matter of a grant.

Courts in Canada have broadly adopted these characteristics as necessary elements for an easement to legally exist.

are so great as to make the usefulness of the burdened land virtually sterilized for the servient owner.

Furthermore, the means by which easement rights can be created can be short listed to the following mechanisms:

- express grant
- prescription
- implication
- necessity

This is by no means an exhaustive list and it certainly does no justice to the complexity of each item in terms of the legal test and criteria to be satisfied. However, once an easement comes into legal existence and its open use starts to be enjoyed, the method of its creation is often quickly forgotten. From a legal point of view this may not be of much consequence – unless an assertion is made that an easement is "abandoned". In the face of such a claim, the method by which the easement came into existence becomes a critical question; it is the answer to that question which will define the response required to rebut an "abandonment" claim.

In the Ontario Superior Court of Justice decision in *Currie v. Chatterton,*[2] a deeded right of way provided vehicular access to the rear yard of Currie's property in Toronto at 155 Hannaford Street. This right of way ran along the north side of the Chatterton[3] property at 159 Hannaford Street. The configuration was "L-shaped" and is best illustrated in the diagram included in the endorsement from the court in Figure 1 below:

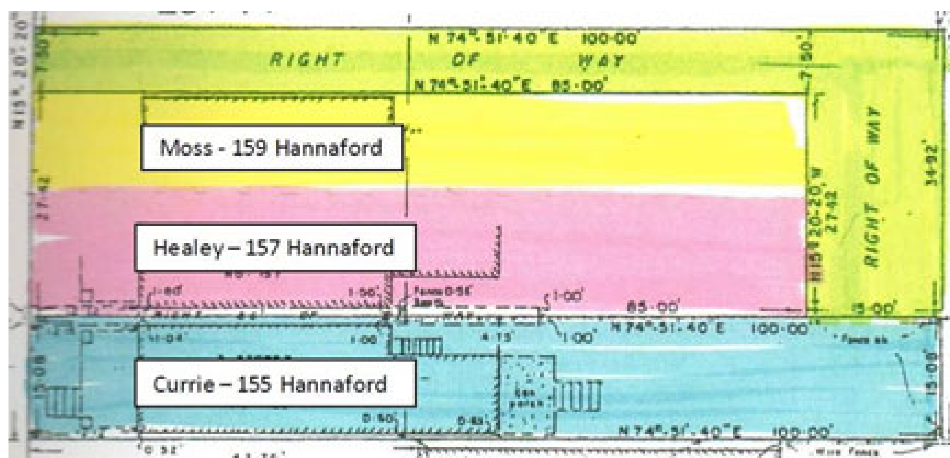

Figure 1: The "L-shaped" right of way serviced 3 separate properties[4]

[2] *Currie v. Chatterton*, 2014 ONSC 4571 (CanLII), http://canlii.ca/t/g8htr

[3] Chatterton was the first named respondent, but Moss was the respondent named in the court's diagram.

[4] *Currie v. Chatterton*, at page 2

The significance of this configuration was that the owner at 155 (the applicant Currie) could not make use of the right of way because the owner of 159 (the respondent) had obstructed passage. The court described the dispute as having arisen under these circumstances:

> The applicants want to use the laneway to access their residence at the rear of their property. Ms. Moss says that the applicants or their predecessors in title have abandoned their rights to use the laneway. She says that she is entitled to park her car beside her house so as to block the laneway and both she and Mr. Healey (or their predecessors) have fenced off the laneway so as to appropriate portions of it into their backyards.[5]

At the street, the right of way is shown as having a width of 7.5 feet; this is not a generous width for the use of motor vehicles. In fact, a good depiction of the "fencing" referred to above, and which also blocked access from the street over the right of way strip, can be seen below.

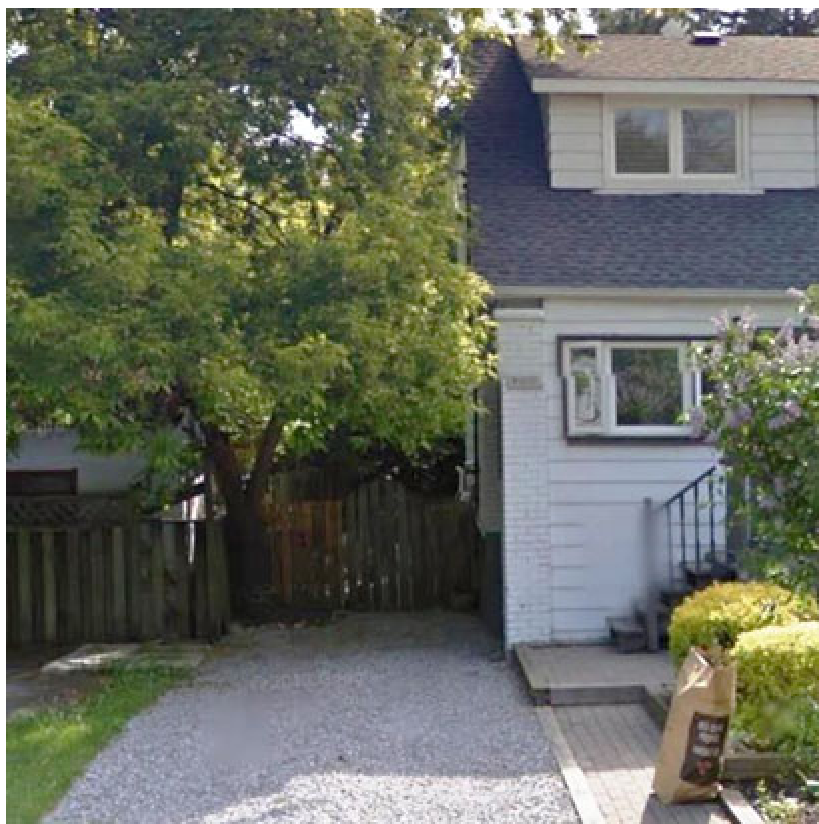

Figure 2: In May 2012 imagery[6], a wooden gate is pictured as having been installed across the right of way and to the north of the home at 159.

[5] *Ibid.*, at para. 4
[6] From GoogleStreetView®. All rights reserved

A candid assessment of what is depicted is nothing short of a driveway use that has become established over the right of way just east of the street. An earlier image of the same site in August 2011 can be seen below.

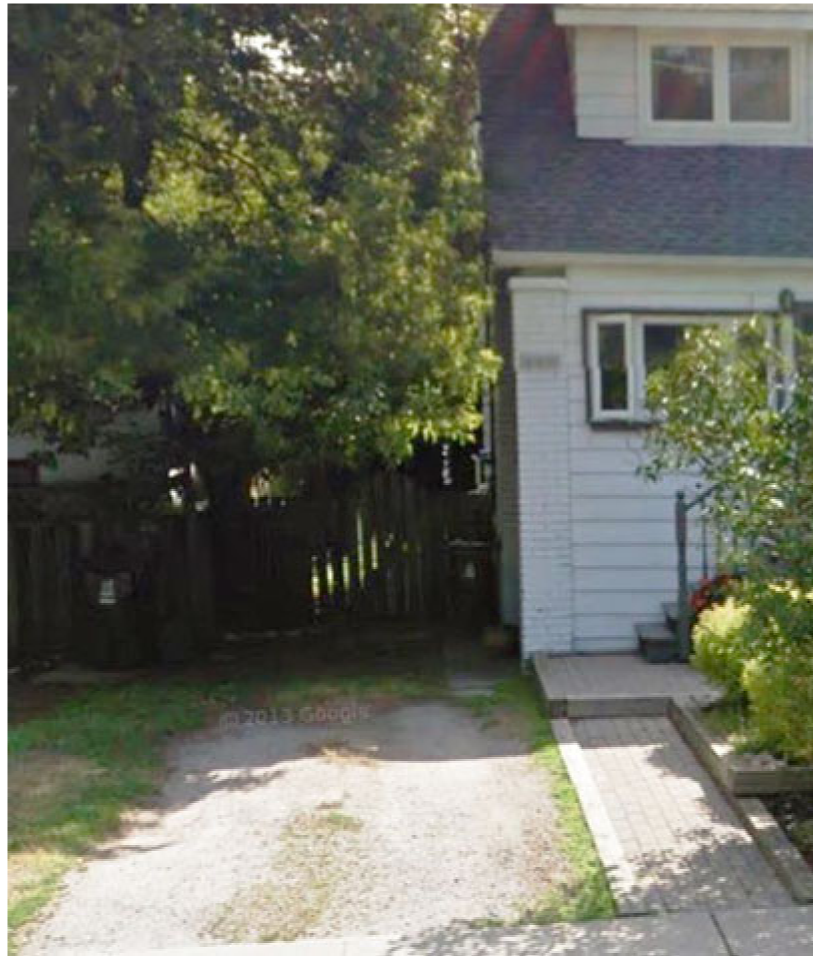

Figure 3: In August 2011 imagery[7], the wooden gate is already present and the driveway usage is readily apparent.

The rights of way were all considered valid by the court; each had arisen by deed and were expressly referred to and described in separate grants. These were all lands that were now registered under the *Land Titles Act*. These were not prescriptive easements. The court summarized the law as follows:

> The law concerning abandonment of a deeded right of way is not controversial. Abandonment is a deliberate act and is not caused merely by disuse. A lack of use of a right-of-way for an extended period of time may be grounds for an inference to support abandonment, but there are cases in which very lengthy periods of lack of use have been

[7] From GoogleStreetView®. All rights reserved

> held not to amount to abandonment. That is, a party can wait and choose to use its right-of-way when it wants to do so. There is also law that prescription does not apply to limit a deeded right-of-way in Ontario.[8]

Of course this raises inferences of adverse possession and begs the question as to whether or not an adverse possessor can ever extinguish an easement interest which sits above a true owner's title. This is expressed by the court when it wrote:

> I fail to see how Ms. Moss has a right to park her car on the laneway or to take a piece of the laneway for her backyard just because the applicants may no longer be entitled to use the laneway. Both the respondent Healey and the owner of the laneway have interests in the laneway. That is, abandonment by the applicants alone still does not give her the rights that she claims to hold. Accordingly, I do not accept that Ms. Moss's claim to possession entitles her to assert the owner's rights against the applicants.[9]

But this was critical: none of the parties had the underlying fee simple title to the right of way lands. All parties shared a non-exclusive right of way interest over the "L-shaped" strip. Title to that strip remained in the estate of the owner who had passed away – but did leave surviving heirs. Nonetheless, the parties in this proceeding did not add the estate as a party. The consequence was the court stating that,

> On that basis alone, I am reluctant to declare any rights in the laneway that may affect the owners' interests.[10]

This left the parties with a clear lack of jurisdiction on the part of the court to make any declaration of rights that would affect the rights of the estate. The following extract from the case is an excellent summary of what persuaded the court in reaching its ultimate disposition:

> Fences were erected between Ms. Moss's house and Mr. Healey's house and between Mr. Healey's house and the applicants' house. Although barely visible, aerial photographs from the 1950s and 1960s appear to show the existence of boundaries of some kind. This suggests that the applicants' predecessors did not use the laneway or acquiesced in the laneway being fenced off for some period of time. However, there is currently a gate in the fence between Ms. Moss's yard and Mr. Healey's yard. The gate would not have let a car through. But a person could get through and, therefore, it is not inconsistent with the existence of the right-of-way. Moreover, neither of the fences currently in place is substantial in its construction. Similarly, the fact that a few insubstantial trees have been allowed to grow does not, of itself, mean that the right-of-way became unusable nor necessarily lead to an inference that the applicants' right-of-way has been abandoned.

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[8] *Currie v. Chatterton*, at para. 8
[9] *Ibid.*, at para. 7
[10] *Ibid.*, at para. 6

> Practically speaking, the predecessors of Ms. Moss and Mr. Healy have arrogated the Chatterton's laneway as their own back yards. But there is no evidence at all of any positive act of abandonment of the right-of-way by the applicants or their predecessors. The fact that the rights-of-ways over the laneway for all three pieces of land have continued to be referenced in all transactions, including Ms. Moss's recent purchase of her house (of which more is written below), seems to me to counter an inference that mere lack of use alone was intended to be an abandonment. Why would the applicants' predecessors have conveyed the right-of-way to the applicants in 2001 if they had intentionally given up their rights to use the laneway?
>
> Moreover, Ms. Moss's predecessors recognized the ongoing existence of the applicants' right-of-way. By letter dated February 12, 2012, in response to the applicants' assertion of their rights, counsel for Ms. Moss's predecessors confirmed to the applicants' counsel that they do not own the right-of-way or the trees on it. Counsel for Ms. Moss's predecessors advised that they had instructed their clients not to park on the right-of-way.[11]

The problem then really boils down to this: it seems like one owner of the right to use the right of way (Moss) has enclosed (even if by way of a gate to exclude motor vehicles) the right of way strip – but other owners (*eg*: Currie), who have the same rights in respect of the same strip, have not been particularly vigilant in exercising their rights of user. However, that fell short of a positive act on the part of Currie that could be pointed to so as constitute evidence of abandonment.

Relying on an earlier decision in *455645 Ontario Ltd. v. Rousseau*[12], the court listed the principles which were to guide a court in answering whether an easement had been abandoned or not:

1. Abandonment is a question of fact;
2. Non-user is essential to abandonment, at least in these circumstances. Non-user, and nothing more, is not sufficient to permit a conclusion of abandonment;
3. Adverse possession for a period in excess of that provided in *The Limitations Act*, R.S.O. 1970, c. 246 is not sufficient to bar a right to an easement. As well, such possession if found, does not change the onus on the issue of abandonment;
4. In some circumstances evidence of non-user may lead to a finding of acquiescence on the part of the holder of title to a right of way or easement;

[11] *Ibid.*, at paras. 11 and 12

[12] *455645 Ontario Ltd. v. Rousseau*, (1981), 19 R.P.R. 1 (Ont. S.C.). This decision is not available through open source law reports.

5. All of the evidence bearing upon the issues of non-user, acquiescence and abandonment must be considered. It is an error in principle to fail to consider all the evidence by expedient resort to earlier decisions, the effect of which is non-user is in itself not sufficient to permit a conclusion that an easement right has been abandoned by the possessor of that right;

6. The onus of establishing abandonment is on the defendant in this case. In more general terms, the onus is cast upon the party asserting abandonment. In this case, where there is no dispute as to the evidence, the matter of onus assumes very much less practical significance than is the case where there is a conflict in the evidence, and hence the facts are open to dispute on that account. On the issue of abandonment, if evidence of abandonment, when considered and compared with that opposed to it, has a more convincing force, and a greater probability of truth, then the onus has been discharged. On the other hand, if the trier of fact is unable to say that the evidence on either side of the issue of abandonment preponderates, then the finding on that issue must be against the defendant;

7. If there is evidence of non-user and evidence, albeit circumstantial, of acquiescence, the trier of fact may infer abandonment.

There is a quality of persistence to easements in the nature of a right of way. The requirement that clear evidence be produced to establish the fact of abandonment speaks to the underlying importance of easements for the better enjoyment of real property. If it was worthwhile to create an easement by express deed, then the test for abandonment is understandably high.

The overall disposition of this application by the court was captured in these words:

> In all, assessing all of the evidence before me on the standard set out in *Rousseau, supra*, I would not find as a fact that the applicants or their predecessors abandoned their right-of-way over the laneway. The few fairly small trees and the fences are equivocal. They support a finding of non-use at least by a wide vehicle. But people are allowed to hold their deeded rights-of-way and not use them until they want to do so. Absent something more, under the case law I would not find abandonment from mere non-use based on a couple of grainy aerial photos. As I noted above, the continued reference to the right-of way in the deeds of the applicants and their predecessors is some indication that they continued to rely on their right-of-way. Ms. Moss's predecessor recognized the applicants' rights i.e. they did not assert that the applicants had abandoned. The precise timing of when Ms. Moss learned the details of her right-of-way is not relevant as it is not probative of whether the applicants or their predecessors intended to abandon their right-of-way. The fact that she parks on the laneway after acknowledging to her counsel her understanding that it was not a parking spot is once again colour that may go to the equities rather than to the merits of the issue of abandonment.

> It follows that if I could get to the merits, I would not find that the applicants or their predecessors abandoned their right-of-way based on the very limited evidence before me. But I do not think that I have the necessary parties before me to make that determination. A determination that there is no abandonment means that the true owner remains subject to the right-of-way. That is, it affects the owner's interests. I can only surmise that neither the applicants nor the respondents served the owners because they have made common cause that neither wants the true owners asserting an interest in the laneway (and asking for money) now or because of some issue in the other litigation that I am told exists. As noted above, Ms. Moss seeks to advance an argument as if she is the true owner. I am not satisfied that Ms. Moss has standing to raise the issue of abandonment to answer the applicants' assertion of their deeded rights. I note only in the alternative that if I am found to be wrong on standing, I do not think that Ms. Moss has proven the fact of abandonment by the applicants or their predecessors. Based on the title documents, I am prepared to enforce the applicants' deeded right-of-way as against Mr. Healey and Ms. Moss *in personam* and enjoin them from blocking the applicants' use of the laneway to access their premises.[13]

This is a most interesting result. Because the true owner of the underlying title to the "L-shaped" strip was not joined, no court order could affect that owner's rights. However, in granting a remedy that was akin to a personal injunction against Moss and Healey, Currie did succeed in getting the obstructions over the easement removed in order to allow access to the backyard of 155 Hannaford. The decision in *Currie* is an interesting articulation of principles around easement abandonment. Such principles were relied upon subsequently in *Aragon (Wellesley) Developments (Ontario) Corp. v. Piller Investments Ltd.*[14] a decision which explored abandonment of an easement against the complicating backdrop of a landlord and tenant scenario and was itself the focus of *The Boundary Point* Issue 6(9).

Editor: Izaak de Rijcke

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.

[13] *Ibid.*, at paras. 14 and 15

[14] *Aragon (Wellesley) Development (Ontario) Corp. v. Piller Investments Ltd.*, 2018 ONSC 4607 (CanLII), http://canlii.ca/t/htc3s

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ISSN: 2291-1588