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.

We are often reminded of the elements necessary for a valid easement to exist; these originate in the *Re Ellenborough Park*[1] decision and failure in all elements to prevail results in the easement no longer being enforceable. However, is the test for an easement no longer existing just as clear? We are, for example, reminded that an easement created by express grant can only cease to exist through a merger in title of the dominant and servient tenements, or a release and re-conveyance. In other words, a challenge to an easement based on abandonment is difficult to succeed and is usually left for an attack on an easement created through prescription. In *Yekrangian v. Brogren*,[2] an owner challenged an easement on the basis that it had been abandoned. Interestingly, the evidence placed before the court in support of a claim that it had been abandoned included several plans of survey – but without any affidavit or other evidence from the surveyors who had produced these plans in the past. What is necessary to succeed in a claim that an easement has been abandoned? How is survey evidence useful or necessary in such a claim?

Abandonment and Easements Created by Express Grant: Challenges Remain

Key Words: *easements, abandonment, express grant, survey evidence*

In *Yekrangian v. Brogren*,[3] an owner challenged an easement on the basis that it had been abandoned. Generally speaking, an attack on an easement based on abandonment is difficult to succeed. The circumstances giving rise to the problem in *Yekrangian* were relatively clear. In fact the Applicants' property, located on Massey Street in Toronto appears in *Google Streetview*® with a board fence across a driveway on the north side of the property in Figure 1 below.

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[1] *Re Ellenborough Park*, [1956] 1 Ch 131, https://www.iclr.co.uk/document/1950000067/casereport_26822/html

[2] *Yekrangian v. Brogren*, 2020 ONSC 2320 (CanLII), http://canlii.ca/t/j7r8w

[3] *Ibid.*

Figure 1: Boarded driveway across impugned easement[4]

The right of way (ROW) was described in early title documents and explained by the court:

> The September 28, 1905 deed of property for 121 Massey, Street, Toronto, ON (**"121 Massey"**) includes a ROW. The ROW was described as being across 121 Massey from its westerly property line to its easterly property line to sheds on the rear premises of the 174 and 176 Strachan Avenue. These sheds are no longer in existence.
>
> The ROW on the title documents for 174 and 176 Strachan Avenue establish that they are the dominant tenements, with 121 Massey being the subservient tenant.[5]

The applicants had sought to obtain a minor variance in order to renovate their dwelling and extend it to the property line, and the respondents had opposed the application before the Committee of Adjustments based on the fact that such a change would prevent them from accessing the ROW. The applicants sought a declaration that the ROW had been abandoned, which the respondents opposed in this matter.

The ROW is a narrow eight foot strip along the north of the applicant's property. A gate was installed which opens to allow pedestrian and vehicular traffic through. A further layout of the relative position of the servient tenement (121 Massey St.) and the dominant tenements (172 and 174 Strachan Ave.) appears in Figure 2 below.

[4] From: *Google Streetview*® All rights reserved.

[5] *Yekrangian v. Brogren,* at para. 2-3

Figure 2: Layout of properties affected by the easement[6]

Fencing along the boundary between the Strachan Avenue and Massey Street Properties prevent direct access to the ROW.

The parties agreed on a series of points of law that, together, formed a framework of understanding and a test for finding whether an easement had been abandoned. These were summarized by the court as follows **[emphasis in the original]**:

- The applicable principles are set out by the court in *2108133 Ontario Inc. v. Kabcan Foods Ltd.* 2009 CanLii 9739.
- Abandonment is a question of fact. (*455645 Ontario Ltd. v. Rousseau* (1981), 19 R.P.R. 1 (Ont. H.C.) at para. 25).
- The burden of proof is on the Applicants. (*Liscombe v. Maughan* (1929), 1928 CanLII 450 (ON CA), 62 O.L.R. 328 (S.C.App.Div.) at para. 28; 455645 *Ontario Ltd. v. Rousseau*, supra, at para. 31; *Peters v. Palmer* (2000), 34 R.P.R. (3d) 143 (Ont. S.C.J.) at para.21).
- The only way in which a ROW can be extinguished by the act of the parties interested is by release, actual or presumed. (*Liscombe v. Maughan*, supra, at para. 28).
- In the absence of an actual release, non-user is essential to abandonment. (*455645 Ontario Ltd. v. Rousseau*, supra, at para. 27; *Peters v. Palmer*, supra para. 22).
- Non-user is not sufficient to permit a conclusion of abandonment. (*455645 Ontario Ltd. v. Rousseau*, supra, at para. 27).
- There must be some intention to abandon this property right. (*Closs v. Ferguson* (1923), 24 O.W.N. 199 (Div. Ct.); *Peters v. Palmer*, supra, at para. 21). **The intention to abandon**

[6] From: City of Toronto Community Maps and ESRI Canada Inc. All rights reserved. Available at: https://www.arcgis.com/apps/View/index.html?appid=241e54e64fbe465b9bbc8408f974ef90

means that the person entitled to the ROW has knowingly, and with full appreciation of his rights, determined to abandon it. (*Liscombe v. Maughan*, supra; *Peters v. Palmer*, supra).

- In some circumstances, evidence of non-user may lead to a finding of acquiescence on the part of the holder of title to the ROW. (*455645 Ontario Ltd. v. Rousseau*, supra, at para. 29). Non-user will not have the effect of establishing abandonment unless a release can be implied from such non-user and the surrounding circumstances. (*Liscombe v. Maughan*).
- Including the express ROW in a registered conveyance is evidence that abandonment was not intended by the owner of the dominant tenement or not presumed by the owner of the servient tenement. (*Liscombe v. Maughan*, supra at para. 32).
- In the absence of an actual or express release, non-user is essential to abandonment.[7]

Had non-user been established by the evidence? Had there been abandonment by the dominant tenement? The court concluded in both instances that the answers were "no." On the question of non-use the applicants made reference to a number of sheds located on the property in early days and tried to read in a purpose for the ROW as a means of accessing these sheds. The court explained,

> The Applicants make reference to a number of sheds described in the Deed of September 28, 1905, which were located on the rear of 176 Strachan Avenue. They submit that these sheds were referred to as a means of plotting the ROW. It is agreed that these sheds were not there by 1986 when [the prior owner] started living at 121 Massey.
>
> The Applicants' submit however, that while the purpose of the ROW is not explicitly stated in the Deed, it does state that the ROW extends from Massey Street to the west edge of the Strachan properties. In a prior description of the 121 Massey property, there is a description of a "row of sheds" along the west edge of the Strachan properties. It is the submission of the Applicants that there is a reasonable presumption that the purpose of the ROW was to access the row of sheds at the rear of the Strachan properties. As the sheds no longer exist, it is submitted that by operation of law, the ROW is extinguished as its purpose is gone. It is the submission of the Applicants that because the purpose of the easement no longer exists, such is evidence of an express intention to abandon it. I do not accept this argument as it is not based on evidence, but only on assumptions. Further, it is not consistent with the evidence of the Respondents on how the ROW is used.[8]

Survey evidence was also submitted by the Applicants:

> The evidence of the Applicants on this Application includes the following "surveys":

[7] *Yekrangian v. Brogren* at para 15

[8] *Ibid.*, at paras 17-18

i. An unsworn attached survey of 176 Strachan, dated July 20, 1987, stated to have been completed by Blain Martin Surveying Limited (the **"176 Strachan Survey"**). The 176 Strachan Survey does not show the Strachan property sheds.

ii. An unsworn attached survey of 174 Strachan, dated June 22, 1988, stated to have been completed by Tom Czerwinksi Surveying Ltd. (the **"174 Strachan Survey"**). The 174 Strachan Survey, also, does not show the Strachan property sheds.

iii. An unsworn and undated survey of 121 Massey (the **"Undated 121 Massey Survey"**) which the Applicants submit must have been prepared before the 174 Strachan Survey because it shows a 'Metal Clad Shed' at the rear of 174 Strachan, which is not shown in the 174 Strachan Survey. This metal clad shed shown in the Undated 121 Massey Survey may be one of the 'sheds' referred to in the First Deed from 1905. The Undated 121 Massey Survey shows the brick dwelling on 121 Massey.

The authors of these surveys did not give evidence and further, no evidence on who prepared or the purpose the 174 Strachan Survey or the 176 Strachan Survey was filed. The Applicants argue that without evidence to the contrary, there is a reasonable presumption that both surveys were prepared, either for a predecessor in title of the respective properties, or a person with an interest in the property (i.e. a lender or a prospective purchaser). As a predecessor in title of each property would have had to consent to the surveyor accessing their property in order to conduct the survey, and thus, would have known that the survey was being completed.

The Applicants further rely on the notation referring to the ROW in the survey of 176 Strachan "APPARENTLY NEVER IN EXISTENCE". There is no evidence on the origin or reason for this notation.

Further relying on these surveys, the Applicants also submit that the wood shed which appears to be shown on the 176 Strachan Avenue Survey of July 20, 1987, and the undated 121 Massey Survey also appears to have been on the ROW. The Applicants submit that there does appear to have been enough space to permit access to 176 Strachan Avenue. There is no evidence on whether this wood shed did completely block access to the ROW. This shed was not there when the Applicants purchased 121 Massey Street.[9]

Note the quotation marks used around the term "surveys." These were unsworn and unaccompanied by affidavits and the court noted that as such could be given "very minimal weight, if any."[10]

Evidence that the right of way had been used by a contractor in transporting materials – though be it awkwardly over fencing – into the Strachan properties and further evidence that the ROW, though obstructed, had not been "unused" was key to the courts' findings on the

[9] *Ibid.,* at paras 19-22

[10] *Ibid.*, at para 24

above questions. The court discussed balancing evidence for a finding of abandonment as follows **[emphasis in original]**:

> I agree that as held in the case of *Hayden et al, v. Warden et al.*, 1984 CarswellOnt 593, **permitting obstructions to remain on a right-of-way is not proof of abandonment if the obstruction is not preventing it from being used in the manner desired.** The direct evidence of its intended use confirms that the evidence in this application does not support abandonment or an intention to abandon.
>
> The parties agree that the intention to abandon can be **proven** by actual or express release or an implied intention can be established by acquiescence and the surrounding circumstances. To establish an intention to abandon, the person who benefitted from the ROW must have a full appreciation of his or her rights. [The previous owner]'s evidence that the ROW was not used for the purpose for which it was intended for the period of 1986 to 2010. It is not enough to establish abandonment of the ROW as there is no evidence of who was allegedly refused access by [the previous owner] or that they had the appreciation after rights, or that it was their right to abandon the ROW. I find that [the previous owner's] evidence does not support non-use or an intention to abandon the ROW.
>
> To the contrary, the evidence shows that the Respondents have used the ROW within the past ten years to access their properties and that there is no proper evidence of abandonment by the Respondents. I find that the evidence of any past encroachments on the ROW does not support a finding that they completely obstructed its use, (as evidenced by [the contractor]'s use for the renovations).[11]

The inclusion of the ROW in the deed, although agreed by all that this was not a conclusive factor against a finding of abandonment, did support that there had not been an intention to abandon the right of way. The court relied upon this and the direct evidence of the contractor who had used the ROW to transport building materials over the fences when he had constructed decks for previous owners.

As noted above, no weight was given to the survey evidence. One might speculate that, had the survey evidence been properly introduced and supported by affidavit evidence by the surveyor or an expert witness, to proffering an explanation for the notation "APPARENTLY NEVER IN EXISTENCE" there may have been a different balance in the evidence and outcome. Findings of abandonment rely on a balance between intentions on paper (*ie*: in the form of releases, in the details of a conveyance or depictions on a survey) and practices on the ground (*ie*: use or non-use by the parties). Though it was not the case here, surveyor's evidence can be an important factor in determining the balance.

Editors: Izaak de Rijcke and Megan Mills

[11] *Ibid.*, at paras 41-43

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

For a discussion of easements and their loss through abandonment, please see *Chapter 5: Boundaries of Easements, Restrictive Covenants and Lesser Interests in Land*.

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