The Boundary Point
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Case Commentaries on Property Title and Boundary Law

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The proximity of neighbours in cottage country will often mean that vehicular access is shared or needs to pass over each other's' land due to topography, or the original layout for development and subdivision. For the most part, these schemes work well – except when they don't. Easements to pass over private property are the most common device used at law to make travel to a family cottage assured and protected. However, descriptions of rights of way, their width, or even their location may all be less than perfect. What happens if a property owner, burdened by an easement used by neighbours, chooses to block off and then relocate the easement in a different position over the owner's property?

Such a question was the focus of a recent decision in the Ontario Superior Court in *de Jocas v. Moldow Enterprises Inc.*,[1] where, following a disputed relocation of a driveway to access cottage property, litigation ensued.

Unilateral Relocation of an Easement Created by Express Grant

Key Words: *easements, relocation, interference, description, intention*

A detailed description of circumstances giving rise to this dispute can be found in the diagrams replicated in this decision and the summary offered by the court at the outset. As the court described,

> The parties (and one other family) own five neighbouring cottage properties that lie north to south along the western shore of Soyers Lake in Haliburton County. The de Jocas' property is the most northerly property, then the respondents', then the Piesanens', then the Sayewichs' and, finally, the Carsons'. The Sayewichs are not parties to this application.

[1] *de Jocas v. Moldow Enterprises Inc.*, 2020 ONSC 7160 (CanLII), http://canlii.ca/t/jbqf0

> The applicants claim that the respondents have interfered with their reasonable use and enjoyment of registered, deeded easements over a shared laneway.
>
> The shared laneway is referred to as "Brewers Close" or "Brewers Circle". It is a semi-circular gravel laneway that connects at both ends to a 66 foot wide right of way called Between Lakes Trail.
>
> It is uncontested that until it was altered by the respondents in 2015, Brewers Close was the only way for vehicles to access the parties' respective cottage properties.[2]

A diagram was referred to by the court and included in the decision. It is replicated in Figure 1 below.

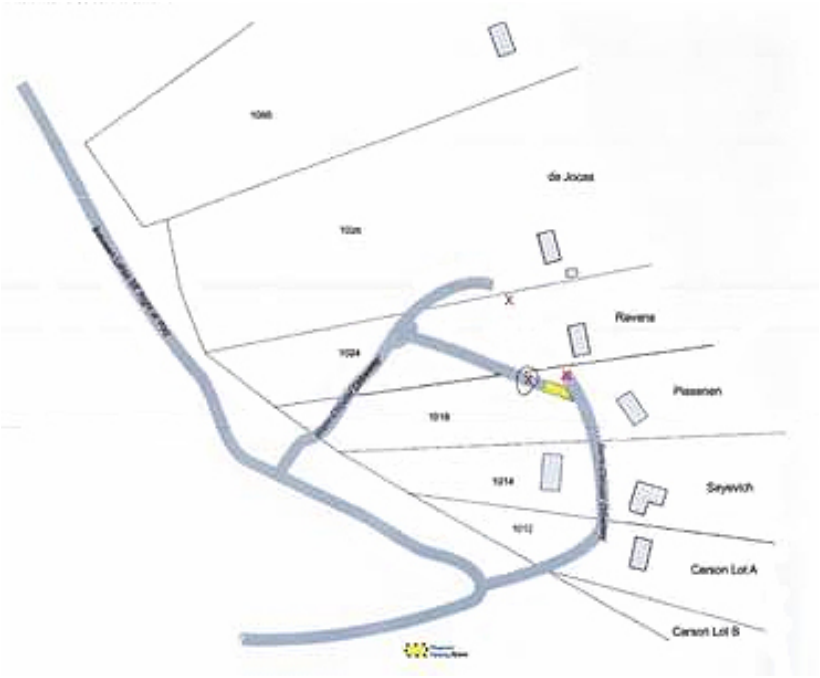

Figure 1: The circular laneway was broken and relocated at points labelled with red "X"s.[3]

The facts of the dispute were not in dispute – the hearing proceeded on the basis of affidavits and transcripts. Referring to the diagram in Figure 1, the court explained,

> This diagram helps explain the current situation. Soyers Lake would be located to the right of the diagram to the east of all of the properties. Between Lakes Trail runs down the left or west side of the properties.
>
> Until 2015, Brewers Close ran as a single loop from Between Lakes Trail, through all five properties, and back out to Between Lakes Trail.

[2] *Ibid.*, at paras. 1 to 4

[3] *Ibid.*, at page 3. All rights reserved.

In 2015 and 2016 the respondents built a new piece to move the laneway away from their cottage to the west. They blocked both ends of the old loop at or near the "Xs" on the diagram. The northeastern piece of Brewers Close that ran through the respondents' land near their cottage is missing from the diagram showing the current situation. In its place, the respondents built a new piece of laneway which is the straight line connecting to two broken pieces of the loop.

The respondents built their new piece of laneway partly on the Piesanens' land where the Piesanens had a parking spot. The Piesanens have now blocked the new piece at or near the spot marked with a circled "X" on the diagram. They blocked the new connection to prevent their neighbours from illegally trespassing on their property.

Today therefore, the de Jocas' and the respondents can only access their properties using the north entrance on Between Lake Trail. The other three owners can only access their properties from the south entrance.

No one can drive a vehicle from one end of the original loop that was Brewers Close to the other.[4]

Figure 2: The circular right of way appeared in evidence from the Haliburton GIS map.[5]

This decision is a helpful illustration of the application of legal principles already stated in earlier decisions such as *Fallowfield*, *Weidelich*, *Murphy* and *Mihaylov*.[6] Before the 5 lots were

[4] *Ibid.*, at paras. 8 to 13

[5] *Ibid.*, at para. 18

created in 1961, the lands were all owned by the original developer. Rather than using a plan of subdivision, the lots were separated by individual deeds with metes and bounds descriptions and including rights of way – both "together with" and "subject to." The resulting configuration appears above in Figure 2.

A closer examination of the wording in the deeds for the rights of way led the court to note that not all deeds had the same wording. This ultimately left the court to conclude,

> …Ostensibly therefore, the respondents have no deeded right to use Brewers Close over the de Jocas' land to the north. The Piesanens have no deeded rights to use Brewers Close over the respondents' land or the de Jocas' land. And the Sayewichs have no deeded right to use the driveway over the Piesanens' land, the respondents' land, or de Jocas' land.[7]

This identification of the problem led the court to state the principle to be used for the interpretation of deeded rights of way by drawing on the ratio in an earlier Court of Appeal for Ontario decision:

> In F*allowfield v. Bourgault*, 2003 CanLII 4266 (ON CA), 68 O.R. (3d) 417 (C.A.), at para. 10, the Court of Appeal described the appropriate approach to interpreting deeded rights of way:
>
> > Where an easement is created by express grant, the nature and extent of the easement are to be determined by the wording of the instrument creating the easement, considered in the context of the circumstances that existed when the easement was created. This principle is set out in *Halsbury's Laws of England, 4th ed., vol. 14* (London: Butterworths, 1980), at p. 26, para. 54:
> >
> > The nature and extent of an easement created by express grant primarily depend upon the wording of the instrument. In construing a grant of an easement regard must be had to the circumstances existing at the time of its execution; for the extent of the easement is ascertainable by the circumstances existing at the time of the grant and known to the parties or within the reasonable contemplation of the parties at the time of the grant, and is limited to those circumstances. [Footnotes omitted][8]

In applying these two principles, the court placed the rights of way in the same location as when the lots were first created in 1961. The court concluded,

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[6] *Fallowfield v. Bourgault*, 2003 CanLII 4266 (ON CA) http://canlii.ca/t/1g3wf, *Mihaylov v. 1165996 Ontario Inc.*, 2017 ONCA 116 http://canlii.ca/t/gxg0s, *Murphy v. Longmore*, 2019 ONSC 2602 http://canlii.ca/t/hzzgt, and *Weidelich v. de Koning*, 2014 ONCA 736 http://canlii.ca/t/gf30c

[7] *Ibid.*, at para. 2

[8] *Ibid.*, at para. 33

> …meaning had to be given to the words in all of the deeds that limit the rights of the other owners over "the said *existing* semi-circular driveway". … The parties' servient obligations to allow use of their lands are limited to the driveway that existed when the root deeds were granted.
>
> The combined evidence of Mr. McMullen and Ms. DeHueck is that from 1961 to 2015, there was no change to the location of Brewers Close. The owners knew where it was and knew it was a shared right of way that provided each of them access to their properties. The same is said by Mr. Piesanen, Mr. Carson, and the non-party Mr. Sayewich who was examined under oath.
>
> The word "existing" in the root deeds in this case has the same effect as the word "present" in *Mihaylov*. The physical attributes of the right of way is given certainty by being fixed in time.[9]

A land surveyor also gave evidence for the court. Referring to this evidence, the court concluded that the location of the rights of way was established from the outset and ascertainable in location to the present day:

> Mr. Geyer, also a surveyor, testified that to surveyors, written metes and bounds descriptions are low on the list of priorities of sources of evidence for a survey. The physical evidence on site is the most important input. He too was able to locate Brewers Close from the deeds and physical inspection.
>
> Case law has recognized that despite the law's normal assumption that the written word brings the most certainty, describing the physical world in writing in deeds is a very imprecise activity. Anyone who tries to read a metes and bounds description understands how difficult that task can be. It takes many words expressed in a most opaque manner to describe what people viewing the physical site can encapsulate in one word - "here". See: *Murphy v. Longmore*, 2019 ONSC 2602 (CanLII) (Div. Ct.).
>
> In my view, there is no vagueness or uncertainty to the definition of the land over which rights were granted. The words used in the root deeds and in the parties' deeds are reasonably ascertainable. On the evidence before the court, which is the only evidence available, the location of Brewers Close was known and did not change from 1961 to 2015. In fact, there is now a survey by a licensed surveyor showing it.
>
> Accordingly, I grant the declaration sought by the de Jocas and Carson applicants. The Peisanens are entitled to a declaration recognizing that they hold easements to use Brewers Close over the properties located south of their property.[10]

[9] *Ibid.*, at paras. 45-47

[10] *Ibid.*, at paras. 50-53

Before concluding this judgment, the court observed the personal cost and toll which this litigation has caused. Using words reminiscent of Lord Hoffmann in *Alan Wibberley Building Ltd v. Insley*,[11] the insights concluded with,

> The costs and distress being suffered by the parties to find a way to move a driveway that they all need are truly astounding. I also heard whispers of other issues – possibly damage to property and other trespasses.
>
> Nothing will end the hostilities, costs, stress, and risk of harm until the parties find a way to settle their disputes.
>
> They all need access to their land. They all know that each of the others needs access too. They all have their own priorities, needs, and wants. Unfortunately, they overlap with the priorities, needs, and wants of the other side.
>
> Even if the parties go to the Supreme Court of Canada, as long as they live beside each other and interact while in heightened states of upset, disputes will continue and new ones will start.
>
> **The only answer that will bring final resolution and peace to these idyllic cottages is for the parties to decrease the volume so they can truly hear the other sides' priorities, needs, and wants and compromise their own sooner rather than later.**[12]

Lawyers and land surveyors know only too well that at the end of a boundary dispute, the parties continue as neighbours – unless one or both choose to move on. If the reason for doing so is the result of having to endure the dispute, the wisdom of the court in these words may need to be taken to heart earlier in the process, rather than letting the dispute run its entire course.

Editor: Izaak de Rijcke

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

Chapter 5: *Boundaries of Easements*, in *Principles of Boundary Law in Canada* is the longest chapter in the book. As the decision in *de Jocas v. Moldow Enterprises Inc.* underscores, this is a

[11] "Boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras's army." In, *Alan Wibberley Building Ltd v. Insley* [1999] UKHL 15, 78 P & CR 327, 78 P & CR D19, [1999] 1 WLR 894, [1999] 2 All ER 897, [1999] 2 EGLR 89, [1999] 24 EG 160, [1999] EG 66, [1999] NPC 54, [1999] UKHL 15, [1999] WLR 894.

[12] *Ibid.*, at paras. 70 to 74 [**emphasis** in original]

complex topic and one in which the application of principles by a court is especially relevant to the subsection, *Emerging Issues* at page 156 and the impact of earlier cases such as *MacIsaac v Salo* and *Weidelich v De Koning*.

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