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.

Easements and rights of way created by express grant are based on a deliberate act to create property rights for the benefit of the dominant tenement. The nature of these rights and their spatial extent are explicitly stated (although there can remain some ambiguity) within the text. After decades have passed since rights of way were first created, circumstances on the ground may sometimes make it impossible for the rights in the original grant to be exercised in the same way. In some instances, abandonment can be inferred and the easement may be removed from title records. Such a process provides clarity and ensures that the title record accurately reflects what is occurring on the ground today, rather than containing vestiges of rights or encumbrances that have long ago ceased to be practical.

This month, we focus on the principles of easement abandonment through a decision of the Ontario Court of Appeal in *Yekrangian v. Boys*.[1] This decision follows an appeal from a decision reported last year as *Yekrangian v. Brogren*[2] which, at the time, was the subject of Volume 8, Issue 7, of *The Boundary Point.* Readers may recall that, at trial, there was significant reliance on the wording of recent transfers which had included references to the right of way in question. The trial judge had been critical of the survey evidence that had been introduced, giving it minimal weight. The Court of Appeal allowed the appeal (in part) after examining the right of way in the context of each of the two dominant tenements. The Court found that for one dominant tenement the right of way had been abandoned; for the other, there had been a partial abandonment. The trial judge's approach to the survey evidence was not found to be in error, but in the circumstances there was little further that such evidence added. However this does not discount the fact that survey evidence showing changes over time can be critical in approaching claims of easement abandonment.

[1] *Yekrangian v. Boys*, 2021 ONCA 629 (CanLII), https://canlii.ca/t/jj59c

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

Inferring Intention to Abandon an Easement

Key Words*: right of way, easement, intention to abandon*

Rights of way and easements "run with the land" and carry with them a certainty and permanence that outlasts an individual's tenure as owner of a particular parcel. Such rights may be created through an express grant with language appearing in the conveyances of both dominant (together with) and servient (subject to, reserving therefrom) properties. If an easement or right of way is no longer practical, it can be either expressly released by the dominant owner or release may, under certain circumstances, be implied based on non-use and a finding of an intention to abandon.[3] For prospective purchasers, looking at the title record, inclusion of an easement in a conveyance supports the assertion that the easement has not been abandoned. However, circumstances on the ground may be such that, in spite of the language of conveyances, it may be inferred that a right of way or easement is no longer in use by the dominant tenement and has been abandoned.

In *Yekrangian v. Boys* the appellants purchased a residential property with the intention of replacing the existing small bungalow with a much larger dwelling and were prevented from proceeding with their plans due to rights of way registered on title in favour of two properties abutting along the rear boundary. The appellants had believed, based on the advice of their realtor, that the rights of way had been abandoned and sought a declaration stating so and an order deleting these rights from title. The application judge disagreed and the appellants appealed. The appeal decision begins with an overview of the fact scenario which readers may also recall from an earlier issue of *The Boundary Point* which reviewed the trial decision.

> The houses situated on the dominant tenements – 174 and 176 Strachan – are row houses with rear gardens abutting 121 Massey Street, the servient tenement. 174 and 176 Strachan lack direct access to their rear gardens except through the houses themselves. They each benefit from a registered right of way that runs up the driveway of 121 Massey Street at a width of approximately eight feet, then bends, in an "L" shape, to run along the length of their respective rear gardens at a width of approximately eight feet. The appellants' intended construction would completely obstruct both rights of way.
>
> […]
>
> The rights of way were established by the deed for 121 Massey dated September 28, 1905.
>
> The respondents concede that there have been encroachments on both rights of way over the years. A previous renovation not later than 1986 extended the rear of the house at 121 Massey to within approximately one foot of the property line with 174 and 176 Strachan. The house extension runs along the entire length of 121 Massey's boundary with 174 Strachan,

[3] See also *Remicorp Industries Inc. v. Metrolinx*, 2017 ONCA 443 (CanLII), https://canlii.ca/t/h419w at paras 47-50

> and along seven feet of its boundary with 176 Strachan. Previous owners of 174 and 176 Strachan planted trees near the property line with 121 Massey. A previous owner of 176 Strachan constructed a fence along the entirety of the boundary with 121 Massey, and that fence was rebuilt by the respondent [owner of 176]. At various times garden sheds at the rear of 121 Massey were built on the rights of way. Finally, sometime between 2017 and 2018, the owners of 123 Massey, another neighbouring property, built a residence that encroached by one foot eleven inches onto the rights of way.[4]

A street view image[5] of the appellant's property can be seen below in Figure 1 in which the fence blocking the driveway over which the easements in question are located is also visible.

Figure 1: Boarded driveway across an impugned easement.

The relative proximity of the properties can be seen in Figure 2 below with the blue arrow showing the location of the rights of way.

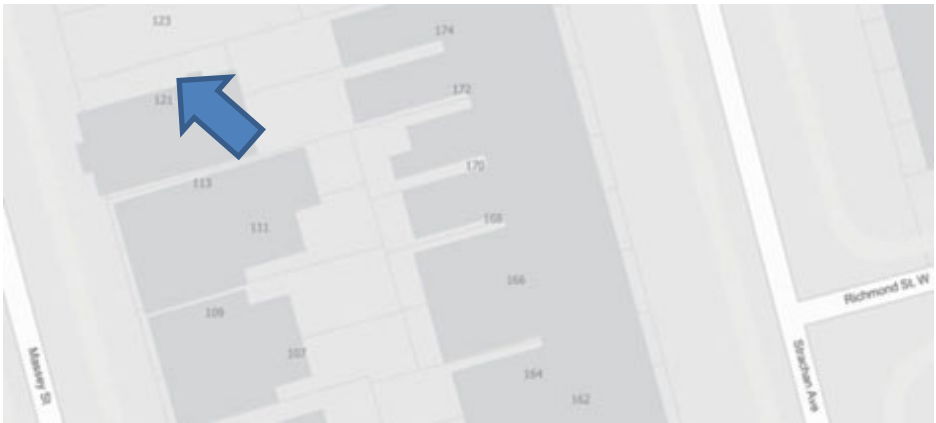

Figure 2: Layout of properties affected by the easement.

[4] *Supra* note 1, at paragraph 3-6

[5] Images from Google Streetview© All rights reserved

The key issue before the application judge was whether the appellants had met the burden of showing that the respondents (or their predecessors in title) had ceased using the rights of way, and whether this non-use indicated an intention to abandon the rights of way. The Appeal Court decision summarized the application judge's conclusions and reasoning as follows:

> The rights of way were noted in the deeds for 174 and 176 Strachan. Although this evidence was not determinative, the application judge found that it was some evidence that there was no intention to abandon the rights of way as of the date of the last purchase and sale of those properties.
>
> In reaching her ultimate conclusion that the rights of way had not been abandoned, the application judge found that the nature of both rights of way is to permit access to the rear of 174 and 176 Strachan for property maintenance like renovations, repairs, and landscaping – rather than to provide day-to-day pedestrian access – and that the totality of the evidence did not establish non-use.
>
> To the contrary, the application judge found that the rights of way remained useable, and had in fact been used to access the rear of 174 and 176 Strachan as recently as 2015. […]
>
> The application judge thus concluded that the evidence supported a "finding of 'use' for a specific purpose": to access the rear gardens of 174 and 176 Strachan for property management. She concluded that the appellants failed to establish that the respondents, or their predecessors in title, had expressly or impliedly abandoned the rights of way.[6]

On appeal, the court looked first at an interpretation of the express grant which had created the rights of long ago in 1905 by way of a deed for 121 Massey. This deed described the rights of way as follows:

> RESERVING therefrom a right of way at all times for all persons entitled thereto and to the grantors and all those claiming under them, over, along and upon the northerly ten feet also the easterly portion of the northerly twenty-seven feet and seven inches of the hereinbefore described parcel being eight feet nine inches wide at the north and five feet eight inches in width at the southerly limit thereof…[7]

Key to understanding and interpreting whether there was non-use is an understanding of the nature of the rights of way described in the grant above. The appellants argued that the trial judge had misinterpreted the purpose of the rights of way, due to a failure to draw the desired inference from one particular factual circumstance known to the parties in 1905 – the existence of sheds at the rear of the dominant tenements. However, the court disagreed:

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[6] *Ibid.,* at paras 9-14

[7] *Ibid.,* at para 21

> The 1905 deed describes the bounds of 121 Massey, in part, by reference to "the westerly face of a row of sheds now standing on the rear premises of dwelling houses fronting toward Strachan Avenue".
>
> The appellants argued before the application judge that she should infer from this detail that the purpose of the rights of way was to enable the occupiers of the dominant tenements to access these sheds on their respective properties. In oral argument before this court, counsel suggested that horses would have been kept in the sheds, in the same way that contemporary homeowners store vehicles in garages, and would similarly have been accessed by the occupiers on a daily or near daily basis. As the sheds – and the horses – no longer exist, the original purpose of the rights of way had lapsed, and non-use followed.
>
> The appellants' argument tying the nature of the rights of way to the sheds is speculative, and the application judge made no error in rejecting it. There is no express statement in any of the title documents explaining the nature of the rights of way. In order to ascertain the nature of the rights of way, the application judge was required to consider the context that would have been known to the original contracting parties at the time they agreed to the creation of the rights of way. As the appellants argue, this context includes the existence of sheds at the rear of 176 and 174 Strachan, and the rights of way were obviously intended to provide access to these sheds and whatever was stored in them. But the application judge made no error in rejecting the argument that this must have been the whole of the purpose of the rights of way, such that once the sheds were gone, the rights of way became obsolete.
>
> Another contextual factor, which the application judge found to be significant, is that there was, and is, no direct access to the rear of 174 and 176 from Strachan Avenue, and the parties would have contemplated that the owners of 174 and 176 Strachan would, from time to time, need periodic access to the rear of their properties for the purpose of performing periodic maintenance or renovation. This interpretation of the deed establishing the right of way was available to the application judge, and she made no error in characterizing the purpose of the rights of way as broader than facilitating access to sheds, and including access for periodic maintenance and renovation.[8]

Upon concluding that the trial judge had not erred in misinterpreting the purpose of the right of way, the Court then summarized the principles for finding an abandonment of an easement with reference to the earlier Court of Appeal decision in *Remicorp Industries Inc. v. Metrolinx*:[9]

> The party asserting abandonment must prove, in the absence of express release, that the party holding the easement demonstrated a fixed intention never to assert the right conferred by the easement, or to transmit it to anyone else: *Remicorp,* at paras. 47, 50.
>
> The holder's intention is to be inferred from all the surrounding circumstances, including any non-use of the easement and any acquiescence to encroachments on the easement. Non-use

[8] *Ibid*., at paras 30-33

[9] *Remicorp Industries Inc. v. Metrolinx,* 2017 ONCA 443

> can constitute some evidence of an intention to abandon, although it is generally insufficient to prove an intention to abandon by itself: *Remicorp* at paras 47, 49, 59.
>
> A court will not lightly infer that an owner has given up the easement, a valuable right in property, for no consideration: *Remicorp*, at para. 47, citing *Gale on Easements*, 20th ed. (London: Thomson Reuters (Professional) UK Limited, 2017), at paras. 12-26. That is particularly the case where the easement appears on title, as it does in this case.
>
> An intention to abandon is found more readily where a permanent structure has been constructed over the right of way, and the holder of the right of way has not objected to it: see, analogously, *Tasker v. Badgerow,* [2007] O.J. No. 2487, at para. 41. The construction of a permanent structure that completely obstructs a right of way communicates that the right of way will be permanently and totally denied to the holder. If the holder does not object, the court may infer that the holder acquiesced, and may infer that the holder intended to abandon it. Where a permanent structure constitutes a partial obstruction only, it will be more difficult to infer that the holder intends never to assert the right conferred by the easement, and it may be possible to conclude that the holder abandoned the use of part of the right of way only.[10]

In reviewing the application judge's treatment of the survey evidence, the Appeal Court found that there had been no error in giving said evidence minimal weight. The court reviewed the application judge's treatment of the survey evidence as follows:

> The surveys were tendered for three purposes. The first was to establish that there were at one time sheds at the rear of the dominant tenements. The second purpose was to provide more direct evidence that the rights of way had been abandoned by the time of the surveys, by the notation on the 1987 survey "apparently never in existence" and on the 1988 survey "not in use." The third purpose was to establish that the frame shed (succeeded by the teal coloured shed) at the rear of 121 Massey completely obstructed the right of way, and rendered it impassible.
>
> The application judge was critical of this evidence, characterizing it as "not properly introduced, unsworn" and gave it "minimal weight, if any."
>
> It is not entirely clear why the application judge characterized the surveys as not properly introduced. It is not uncommon for historical property surveys to be introduced as attachments to affidavits that were not sworn by the authors of the surveys. The older the survey, the less likely that its drafter will be available to give evidence. Regardless, the application judge nevertheless accepted the surveys into evidence and noted their evidential limitations. As explained below, there was no error here.

[10] *Ibid* at paras 35-38

> First, with respect to the use of the 174 Strachan survey to establish the historical presence of sheds at the rear of 174 and 176 Strachan, this fact was not disputed, and the evidence was unnecessary.
>
> Second, the two notations on the surveys attesting to the non-use or non-existence of the rights of way were hearsay. There was no evidence as to the source of these notations, or the basis for the conclusions they expressed. The application judge made no error in refusing to rely on them.
>
> Third, the application judge made no error in finding the surveys did not establish that the wood frame shed rendered the rights of way impassable. The surveys that depicted the wood frame shed did not measure the gap between the shed and the wall of the house at 121 Massey or give a complete rendering of the sheds' dimensions.[11]

Were the obstructions that encroached onto the rights of way, namely the driveway fence, a boundary fence and an addition to the house at 121 Massey, sufficient evidence upon which one could draw a conclusion of abandonment? The Court of Appeal reviewed the application judge's conclusions on each item and held there to be a distinction between the impact of fences and sheds in comparison to the extension of the house:

> The fences and sheds do not obstruct the right of way to the same extent as the extension of the house. They are not structures of any permanence, nor have they prevented the right of way from being used to access the rear of 176 Strachan for occasional maintenance, renovation, and repair. To the extent that the fences constituted an obstruction, they were and are easily removable. Similarly, a garden shed is not typically constructed in a manner that makes it impractical or disproportionately expensive to remove or modify to facilitate the sort of access contemplated by the rights of way. The sheds were either easily removable or the appellants failed to discharge their burden of establishing that they were not. Permitting sheds and fences (and even constructing a fence) did not, in this case, suggest abandonment.[12]

While the placement of the fences and sheds may have made access through the rights of way awkward, these structures did not impede the use and signal abandonment by creating an insurmountable barrier. The permanent extension of the house was a different story and the court described its impact on the two dominant properties separately:

> The addition to the house at 121 Massey – a permanent structure unlike a fence or a garden shed – has, for all practical purposes, completely obstructed the right of way in favour of 174 Strachan for at least 35 years. The structure encroaches so far into the right of way that only a 1-foot-wide, 7-foot-long gap remains between the boundary fence of 174 Strachan and the

[11] *Ibid.,* at paras 46-51

[12] *Ibid.,* at para 63

> wall of the house at 121 Massey. There was no evidence before the application judge that the right of way in favour of 174 Strachan had been, or could be, used for any purpose, other than the evidence of the respondent owner of 174 Strachan who said that he believed lengthy wooden boards could conceivably be run through the gap.[13]
>
> Accordingly, I conclude that the application judge made a palpable and overriding error in not finding that the house extension constitutes a complete obstruction to the use of the right of way by 174 Strachan. It is inconceivable that the extension could have been built without the knowledge and acquiescence of a predecessor in title, who could not have failed to appreciate that it constituted a complete and permanent obstruction.[14]
>
> […]it is an inescapable conclusion that if the predecessors in title to 174 Strachan – by acquiescing to the construction of the extension of 121 Massey – abandoned their right of way, then the predecessors in title to 176 must similarly have abandoned that portion of the right of way on which the house extension sits. As it is not possible for this court to make a finding of the dimensions of the right of way so impacted, I would remit the matter to the Superior Court for a determination of the dimensions of the portion of lands subject to the right of way in favour of 176 Strachan that are occupied by the house extension at 121 Massey, and for an order deleting that portion of the right of way in favour of 176 Strachan from title.[15]

Courts will proceed with caution when faced with questions of the abandonment of rights of way or easements. It is something signalled both by non-use as well as an intention on the part of the dominant owner. As seen above, even significant obstructions to use, may not constitute complete abandonment if the scope of the rights are still available - awkward as such access might be.

In this decision, the application judge was found not to have erred in the treatment of the survey evidence; the evidence either supported a fact that was not in dispute, was of questionable origins or did not provide measurements on key questions. Note however, that no expert witness was called to explain the survey evidence. While not of use in this decision, survey evidence which is complete, thorough and properly introduced and explained may be critical in other decisions on easement and right of way abandonment.

Editors: Izaak de Rijcke and Megan Mills

[13] *Ibid.,* at para 39

[14] *Ibid.,* at para 42

[15] *Ibid.,* at para 66

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

Boundaries of easements, including mechanisms for the creation of easements and rights of way, are discussed at length in Chapter 5.

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.[16] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

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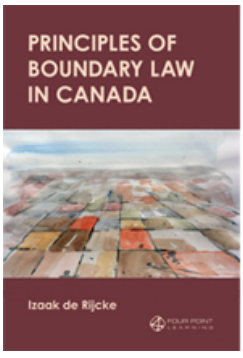
The overall purpose of *Survey Law 2* is to build on the Survey Law 1 course with a special emphasis on evaluation of evidence and special circumstances encountered in problematic and natural boundaries. Understanding the workings of the legal system and the legal process is essential for regulated professionals entrusted to make ethical and defensible opinions that have the potential of being reviewed by a court. This university-level course will be taught online by Izaak de Rijcke starting January 12, 2022. For more information, consult the syllabus. Please note that registration is via AOLS.

Principles of Boundary Law in Canada



In the context of (1) the complex and ever-evolving nature of boundary law, (2) the challenges of doing legal research in this area, and (3) the constant interplay between land surveying practice (as a regulated profession with norms codified in statutes) and common law principles, land surveyors would benefit from a current reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable. See *Principles of Boundary Law in Canada* for a list of chapter headings, preface and endorsements. You can mail payment to: ***Four Point Learning*** (address in the footer of the first

[16] 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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