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 number of reported cases in which a claim to extinguishment of an easement based on abandonment is small. Late last year such a case was reported – and the applicants were successful. The decision in *Kansun v. Diamantakos*,[1] is a helpful insight to the circumstances to be considered by a court and the application of a remedy in the *Conveyancing and Law of Property Act*[2] to grant this kind of relief.

Extinguishment of an Easement Based on Abandonment

Key Words: *easement, abandonment, intention, use*

A detailed description of circumstances giving rise to this dispute can be found in the reported decision in *Kansun v. Diamantakos*:

[1] *Kansun v. Diamantakos*, 2020 ONSC 7193 (CanLII), https://canlii.ca/t/jbssc

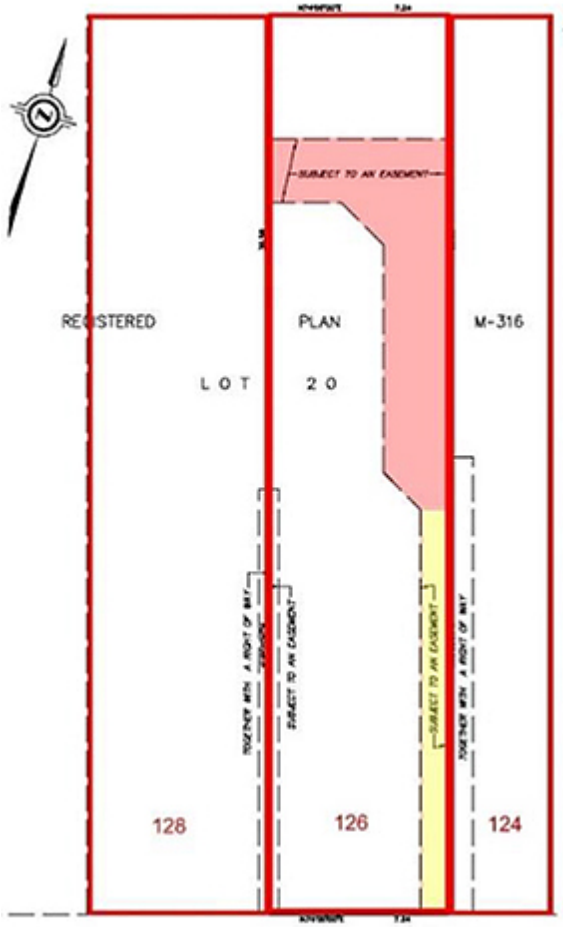
[2] The outcome in *Kansun* was based, in part, on a finding that abandonment had occurred before the lands were converted to *Land Titles* from *Registry*. As to the effect of Land Titles legislation on this issue in Canada, consider also the decision in *Gray v. Doyle*, 1998 CanLII 5131 (BC CA), https://canlii.ca/t/1dxxr in which the court stated,

> [20] In finding that the easement had already been abandoned by previous owners of Lot A before Doyle took title and that, once abandoned, the easement could not be revived, the Chambers judge relied heavily on the authority of *Swan v. Sinclair* [1924], 1 Ch. 254 (C.D.), an English decision which takes no account of the effect on the common law of the *Land Title Act* in B.C.
>
> [21] I agree with Doyle that the Chambers judge erred in that approach. She failed to have regard to the effect of the *Land Title Act* on the question raised by s.35(2)(c).
>
> [22] The easement in this case was a registered charge against the title to the Gray lands in favour of Lot A when title to Lot A was registered in the name of Doyle in 1984. Under the *Land Title Act* Doyle was entitled to the benefit of the easement. That title was not subject to unregistered agreements of which Doyle had no knowledge. Although the non use of the easement by previous owners was a factor to be considered, it was not determinative of the question before the judge.

The sketch below depicts 124, 126, and 128 Maplewood Avenue, which are detached single-family homes. 126 Maplewood is situated in close proximity and between 128 and 124 Maplewood Avenue. The frontage of these properties is on Maplewood Avenue, which is to the south. Each of the lots are narrow with frontages of approximately 25 feet.

For 126 Maplewood, the sketch below depicts three easements; namely: (a) a L-shaped easement in the backyard of the property (the "Backyard Easement"); (b) a rectangular easement running between 124 and 126 Maplewood from the street and connecting to the Backyard Easement (the "Laneway Easement"); and (c) an easement running between 126 and 128 Maplewood (the "Walkway" Easement).

From the legal description, set out above, for 126 Maplewood, it is to be noted that the Laneway Easement forms a "side entrance and driveway for 128 Maplewood, 126 Maplewood, and 124 Maplewood." The Laneway Easement begins at Maplewood Avenue and has a width of approximately 7 feet. It has a length of approximately 35 feet as it runs to join the north-south leg of the L-shaped, Backyard Easement.



From the legal description, set out above, it is to be noted that the Backyard Easement is "to be used as an entrance and driveway" just for 128 Maplewood. The Backyard easement is approximately 7-9 feet in width and is approximately 35 feet in length after it joins with the Laneway Easement. The east-west leg of the L-shaped Backyard Easement runs through the backyard of 126 Maplewood across its width of approximately 25 feet. And the Backyard Easement terminates at the property line between 126 and 128 Maplewood.

It is to be noted that the Walkway Easement is approximately 3 to 4 feet in width and it runs between 128 Maplewood and 126 Maplewood. The Walkway Easement provides an external access route or path to the backyard of the property and an alternative to

> walking through the inside of the house. The Walkway Easement is not wide enough for an automobile.[3]

The court considered evidence of use dating back to the early 1950s. At one point a fence had existed between the two properties at 126 and 128, but that all came to an end when late in 2019, during nighttime, the owner at 128 was described to have:

a) removed a portion of the fence;
b) they cut down trees at the boundary of the properties; and
c) they moved the garbage bins located on the Laneway Easement that had been used by the owners of both 124 and 126 Maplewood; and
d) they parked a vehicle in the backyard of 128 Maplewood gaining access via the Laneway and Backyard Easements.

> The police were called but would not get involved in this neighbours dispute. The intrusion by [the Respondents] was at best a foolish and legally useless effort to provide evidence that the family had not abandoned the Easements.[4]

This litigation ensued. The court offered a very clear statement of the legal principles to be considered in such circumstances. The summary below appears without citations:

> Section 61 of the *Conveyancing and Law of Property Act*, authorizes the court to modify and discharge restrictive covenants including easements. Section 61 states:
>
> > *Restrictive covenants, modification or discharge of*
> >
> > 61 (1) Where there is annexed to land a condition or covenant that the land or a specified part of it is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land, any such condition or covenant may be modified or discharged by order of the Superior Court of Justice.
>
> An easement is an incorporeal hereditament, being an inheritable, non-possessory ownership interest in land. It is a right of usage over a property, which is described as the servient tenement that is annexed to a parcel of land, which is described as the dominant tenement. It is important to keep in mind that an easement is a non-possessory ownership interest in land.
>
> Owning an easement permits the owner of the dominant tenement to require the owner of the servient tenement to suffer some use on that land. Easements may be positive or negative. A positive easement grants to the owner of the dominant tenement the right

[3] *Ibid.*, at paras. 22 to 26. The diagram was referred to by the court and included in the reported decision.

[4] *Ibid.*, at paras. 52 and 53

to use the land of the servient tenement in a particular way that would, in the absence of the easement, be a nuisance or trespass.

An easement being a non-possessory interest in land, adverse possession is not sufficient to extinguish a right to an easement. The *Limitations Act* does not apply to extinguish the right and title to an easement. The theory is that one cannot adversely possess a non-possessory interest in land.

While an easement cannot be lost by adverse possession, an easement may be extinguished by: (a) operation of a statute; (b) operation of law; or (c) expressed or implied release, the onus of proof being on the party asserting the release. Whether there is an implied release is a question of fact in all the circumstances of the case. An abandonment is a matter as between the servient tenement and the dominant tenement.

At common law, an easement will be extinguished by operation of law where: (a) the same person comes to own the dominant and servient lands in fee simple (This is known as merger.); (b) the period for which the easement was created comes to an end; (c) the purpose for which the easement was created has come to an end; or (d) the right to the easement is abused.

Whether the owner of the dominant tenement intends an abandonment is not a subjective question; it is a question of fact to be ascertained from all the circumstances of the particular case. Abandonment depends on the intention of the person alleged to be abandoning, and to establish abandonment of an easement, the conduct of the dominant owner must have been such as to make it clear that he or she had at the relevant time a firm intention that neither he or she nor any successor in title of his or her should thereafter make use of the easement.

Where there has been an express grant of a right of way, it is extremely difficult to show abandonment because a right of way is not lost by mere non-user. Unless the easement is granted for a term of years, the rights conferred by an easement are valuable rights and it is not lightly to be inferred that the owner released his or her rights for no consideration or advantage. The non-use of the right of way must be coupled with the grantee's intention to abandon the right of way, which taken together imply release by abandonment.

Where the owner of the dominant tenement does not use the easement and also does not object nor make any effort to remove obstructions or to stop the servient owner from interfering with the easement, abandonment may be inferred. In other words, if there is evidence of non-user and also evidence of acquiescence, abandonment may be inferred; however, on its own, non-use is insufficient to constitute an implied release. Non-use by itself is insufficient because non-use may arise because the dominant owner from time to time may have no need for the easement, or he or she may have a more convenient means of use than the easement. Thus, lack of use, even for prolonged periods of time, does not necessarily prove that the owner of the easement intended to abandon it.

The intent to abandon means that the person entitled to the easement has knowingly, and with full appreciation of his rights, determined to abandon it. Intention to abandon an easement will be found where the person entitled to it has demonstrated a fixed intention never at any time hereafter to assert the right himself or to attempt to transmit it to anyone else.

Based on my findings of fact, I conclude that in the immediate case, the Backyard Easement and the Laneway Easement have been abandoned and that it should be discharged.

The legal test for the abandonment requires the court to engage in findings of fact perhaps more readily made by a psychologist. The fundamental question in the immediate case is: Given that they knew that they had legal rights to use the Backyard Easement and the Laneway Easement, did the Diamantakos family intend to abandon their property interest?

As a psychologist knows, humans at a very early age develop a concept of “mine”. Anyone who is a parent also knows this psychological fact to be true. A child psychologist and an exasperated parent will tell you that there is a developmental stage for toddlers around 18 months known in the scientific literature as the “mine-stage,” and parents and psychologists will tell you that the word “mine” makes an early appearance when a child begins to talk. This emotional attachment to owning things probably explains the psychology that prompted the childish behaviour of Penelope Diamantakos and her husband John Koutsougeras on the evening of December 13, 2019, but their behaviour obscures the real issue about whether the Diamantakos family had already abandoned the Backyard Easement and the Laneway Easement many years before.

As my findings of fact above reveal, the Diamantakos’ thinking back in 1975 - as evidenced by their conduct - demonstrates that that they made a logical and intentional decision to abandon the Backyard Easement and the Laneway Easement as a driveway. The Diamantakos family knew that 128 Maplewood was the dominant tenement, and they intentionally decided to abandon the Easements.

Apart from the admitted fact that the two Easements were rarely used as a driveway, the intent to abandon was evidenced, among other things, by the circumstances that there were common sense reasons that the Diamantakos family would abandon the Easements. Given the awkwardness and inconvenience of traversing the middle of the backyard of one’s neighbour along a driveway of approximately 100 feet in length, which circumstances likely would be worse during Canadian winters, to reach a dilapidated garage, it was logical and clever of the Diamantakoses to build a parking pad and replace the garage with a shed and to complete the fence, which along with the trees, would provide privacy to their own backyard. Building a parking pad likely added to the value of 128 Maplewood.

The parking pad was not a matter of a more convenient route to a parking garage because there was no longer a garage on 128 Maplewood and a major purpose, if not the purpose for the Easements had come to an end. The Backyard Easement and the Laneway Easement

> were not available for parking, and they never were used for pedestrian access, and, in any event, the Walkway Easement provided pedestrian access to the backyard of 128 Maplewood.
>
> The circumstances and the behaviour of the Diamantakoses demonstrate that the Diamantakos family intended never again to use the Backyard and Laneway Easements as a driveway. I am satisfied by the evidence in the immediate case that an intent to abandon has been demonstrated long before the lands were transferred into the Land Titles Act system, and, therefore, it follows that the Backyard Easement and the Laneway Easement should be discharged and removed from the title of the servient tenement.[5]

This decision is helpful in confirming the importance of intention as a continuing component of the common law test.[6] Likewise, the decision underscores how important it is to identify the point in time when abandonment occurred. It can be expected that an easement abandoned long ago may be the subject of an attempt to "bring back to life," in a more recent time, the abandoned rights if it suits the purpose of the owner of the dominant tenement. As the decision in *Kansun v. Diamantakos* confirms, this could be a dangerous course of conduct.

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 *Kansun v. Diamantakos* underscores, claiming that an easement is abandoned is not impossible, but may not always be easily available.

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

[5] *Ibid.*, at paras. 62 to 78

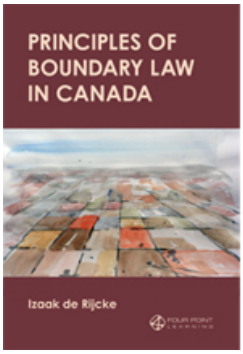
[6] An application based on Ontario's *Conveyancing and Law of Property Act* appears to not rule out similar relief at common law. The jurisprudence appears largely in 19th Century English case law in which intention was considered as key to a determination of the outcome. For example, some conduct, such as bricking up a door for thirty years did not, in itself, establish an intention to abandon an easement: *Cook v. Bath* (1868), L.R. 6 Eq 177 at 179. However, in other circumstances an easement to take water to a mill was extinquished because the mill was demolished: *Liggins v. Ingle* (1831) 7 Bing. 682.

hours.[7] 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 SPRING: Seventh Annual Boundary Law Conference

This year's conference theme is: *Complex Cadastral Problems for the Surveyor as Expert Witness*. The perspective of "surveyor as expert witness" will be used as an overall theme to address complex cadastral surveying scenarios using jurisprudence, legislation and legal principles in a changing environment. Like last year's conference, this event will be held as a series of eight weekly *lunch & learn* sessions via our interactive virtual meeting room. Stay tune for the draft agenda next month.

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 page of this issue of *The Boundary Point*) with your shipping address **or** purchase online. (*NB: A PayPal account is not needed to pay by credit card.*)

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[7] 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.