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## Surprise: Land Titles doesn't guarantee lot dimensions!

A decision of the Ontario Court of Appeal in February may have settled the thorny question of whether or not courts have the authority to correct erroneous descriptions of properties in the land registration system.

The origin of the dispute dates back to 1985, when Veikko Kivikangas subdivided a parcel of waterfront land he owned in the Sudbury area into three lots.

Kivikangas instructed his surveyor to prepare a reference plan of survey showing the registered right of way to be in the same location as an existing gravel road which ran from the main highway across the first parcel, then the second, and into the third.

On the ground, the path takes a detour around a large rock outcrop. Unfortunately, the surveyor prepared and registered the reference plan showing the gravel drive going directly through the outcrop rather than around it.

Effectively, it was impossible to access the two inner lots using the registered right of way. For many years, the owners of the three lots peacefully used the actual roadway on the assumption that it was located as described on the reference plan.

In 2005, Kimberly Maclsaac, one of the current owners, became aware that the registered road went through the rock rather than around it. The other neighbours discovered the discrepancy two years later.

Peggy and Gordon Salo had spent considerable funds improving the roadway with ditches, culverts and concrete. After their neighbours allegedly began to use the roadway with commercial trucks and construction equipment, the Salos barricaded the road and a series of altercations took place. With the road blocked, the owners of the two inner lots, Maclsaac and Kristina and Karsten Johansen, had no way to access their properties except over (or through) the rock outcrop.

Eventually, Maclsaac and the Johansens sued the Salos claiming rectification of the land registry because of the surveyor's error.

In January 2012, Justice Dan Cornell decided that the court did not have the power to rectify the reference plan and title abstract, and that Maclsaac and the Johansens were stuck with a roadway they couldn't use.

The real estate bar was, to say the least, unhappy with the decision. Toronto real estate lawyer Craig Carter said at the time that the court decision is "a fundamental attack on the system of title recording in Ontario" since erroneous land descriptions could not be rectified.

The case came before the Ontario Court of Appeal last September, and the court's decision was released in February 2013.

In a highly unusual decision, Chief Justice Warren Winkler, writing for a three-judge panel, rejected the arguments of the plaintiff, the defendant and the Canadian Bar Association, acting as intervener.

The court based its opinion on the Land Titles Act, which says that the title system only guarantees the quality of title and not the quantity. As a result, the court said that it had the authority to rectify the location of the easement by relocating it around the rock outcropping.

The Court of Appeal decision highlights the risks of relying on the descriptions of property parcels in Land Titles since there is no guarantee of boundaries. Registered owners clearly own something, but what they own is not guaranteed unless the size or extent of title is determined by established and accepted legal descriptions, by survey of the property, by court order or by other means. Only then will the land titles system effectively guarantee the size and extent of the land as well.

The appeal court's decision affects a purchaser's ability to rely on the land titles system since boundaries are subject to rectification whenever a court believes justice requires it. This exposes land owners to unpredictable loss of the extent and quality of their ownership unless an actual boundary has been settled.

The courts can settle the actual boundary by determining the parties' intention and, once the actual boundary is determined, the courts can rectify the boundary but require a legal basis to do so.

An application has been filed for leave to appeal to the Supreme Court of Canada.

*[[MacIsaac v Salo, 2013 ONCA 98 \(CanLII\)](#)]*

[ This article is excerpted from a longer review of topics in real estate law presented by Bob Aaron at the Law Society of Upper Canada's 2013 Sole and Small Firm Conference in Toronto, Ontario on May 23, 2013.]

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