MacIsaac et al. v. Salo et al.
[Indexed as: MacIsaac v. Salo]

Ontario Reports

Court of Appeal for Ontario,

Winkler C.J.O., LaForme J.A. and Cunningham A.C.J.S.C.J. (ad hoc)*

February 19, 2013

114 O.R. (3d) 226 | 2013 ONCA 98

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Case Summary

* Cunningham A.C.J.S.C.J. did not take part in the judgment.

Real property — Registration — Land titles — Rectification — Deposit on title of reference plan not creating interest in land triggering s. 78(4) of Land Titles Act — Remedy of rectification being available where reference plan that was deposited on title incorrectly portrayed right of way — Land Titles Act, R.S.O. 1990, c. L.5, s. 78(4).

After subdividing a parcel of land into three lots, the parties' predecessor in title, K, had a reference plan showing a right of way prepared by the appellant surveyors. The reference plan was registered on title. It incorrectly portrayed the right of way as running in a straight line and failed to include a curved portion of the gravel road that circumvented a large rock outcrop. A dispute arose among the parties. In an action arising out of that dispute, the appellants moved for an order rectifying the location of the right of way, relying on s. 160 of the Land Titles Act. The motion was dismissed. The motion judge held that the interests shown in the title register must prevail and concluded that there was no jurisdiction to rectify title or balance the interests of the parties. The appellants appealed.

Held, the appeal should be allowed.

In contrast to a registered instrument, the deposit on title of a reference plan does not independently create an interest in land triggering s. 78(4) of the Land Titles Act. The remedy of rectification was available.

Cases referred to

719083 Ontario Ltd. v. 2174112 Ontario Inc., [2013] O.J. No. 115, 2013 ONCA 11, affg [2012] O.J. No. 2948, 2012 ONSC 3815, 23 R.P.R. (5th) 159, 217 A.C.W.S. (3d) 713 (S.C.J.); Durrani v. Augier (2000), 50 O.R. (3d) 353, [2000] O.J. No. 2960, 190 D.L.R. (4th) 183, [2000] O.T.C. 607, 36 R.P.R. (3d) 261, 98 A.C.W.S. (3d) 1323 (S.C.J.); Lumme v. Eagle Point, L.L.C., [2011] O.J. No. 1698, 2011 ONCA 291; United Trust Co. v. Dominion Stores Ltd., [1977] 2 S.C.R. 915, [1976] S.C.J. No. 99, 71 D.L.R. (3d) 72, 11 N.R. 97, 1 R.P.R. 1

Statutes referred to

Land Titles Act, R.S.O. 1990, c. L.5, ss. 51(1), 78(4), 140(2), 150(1), (2), 159, 160

Surveyors Act, R.S.O. 1990, c. S.29 [as am.]

Authorities referred to

Lambden, David W., and Izaak de Rijcke, "Boundaries" in The Canadian Institute of Surveying and Mapping, Survey Law in Canada: A Collection of Essays on the Laws Governing the Surveying of Land in Canada (Toronto: Carswell, 1989)

Lamont, Donald H.L., Lamont on Real Estate Conveyancing, looseleaf (2011-Rel. 7), 2nd ed., vol. 2 (Toronto: Carswell, 1991) [page227]

Moore, Marguerite E., and Janet M. Globe, Title Searching & Conveyancing in Ontario, 6th ed. (Markham, Ont.: LexisNexis, 2010)

Petzold, Lorraine, "The Survey and the Real Estate Transaction" (Paper delivered at the Law Society of Upper Canada Continuing Legal Education Seminar, October 1983) (Revised September 1993)

APPEAL from the order of Cornell J., [2012] O.J. No. 202, 2012 ONSC 337, 14 R.P.R. (5th) 320 (S.C.J.) dismissing a motion for a rectification order.

Frank E.P. Bowman and Muriel Moscovich, for appellants S.J. Gossling and D.S. Dorland Limited.

Edward Babin and Tim Hudek, for respondents Peggy Charlene Salo and Gordon Salo.

Richard R.F. Nolin, for respondents Hugh Spencer MacIsaac, Kimberly Ann MacIsaac, Christina Johansen and Karsten Johansen.

Arnie Herschorn and Craig Carter, for intervenor Ontario Bar Association.

The judgment of the court was delivered by
WINKLER C.J.O.: —

A. Overview

[1] This appeal originates from a dispute between three sets of adjoining landowners over a road used to access their waterfront properties on Lake Panache, near Sudbury, Ontario. The

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dispute began when the parties discovered that part of the road lies outside of the boundaries of a right of way shown on a reference plan.

[2] The defendant surveyor, S.J. Gossling, and the defendant surveying company, D.S. Dorland Limited ("appellants" or "appellant surveyors"), brought the motion that gives rise to this appeal. They sought rectification of a reference plan that they prepared and that was deposited on title in the local land registry office in 1986. The appellants admit that the reference plan incorrectly portrays the right of way as running in a straight line and fails to include the curved portion of the gravel road that circumvents a large rock outcrop.

[3] The appellants asked the motion judge for an order rectifying the location of the right of way on the reference plan so that it would correspond with the gravel road as it existed on the ground when the reference plan was prepared. In seeking this relief, the appellants relied on s. 160 of the Land Titles Act, R.S.O. 1990, c. L.5. [page228]

[4] The motion judge dismissed the motion for rectification. He held that the interests shown in the title register must prevail and concluded there was no jurisdiction to rectify title or balance the interests of the parties.

[5] The appellant surveyors appeal from the order dismissing their motion. For the reasons that follow, I would allow the appeal.

B. Facts

[6] The facts of this case are straightforward and generally uncontested.

[7] This dispute involves three adjacent waterfront lots, which originally comprised one parcel of land owned by Veikko Kivikangas. In 1985, Mr. Kivikangas subdivided the original parcel into three lots. He instructed a representative of the appellant surveyors to prepare a reference plan showing a right of way, which was to represent the location of an existing gravel road.

[8] The reference plan was deposited as Plan 53R-10717 ("R-Plan") in the land registry for the District of Sudbury on January 7, 1986. A copy of the R-Plan is attached as Appendix A.

[9] The three lots shown on the R-Plan are landlocked and do not have legal access to a public road. The R-Plan consists of seven parts. The westerly lot is comprised of Parts 1, 4 and 6. The middle lot is comprised of Parts 2, 5 and 7. The easterly lot is Part 3. The right of way is designated as Parts 4 and 5. Part 4 is on the westerly lot and Part 5 is on the middle lot on the R-Plan.

[10] Unbeknownst to Mr. Kivikangas and contrary to his instructions, the appellant surveyors showed Part 4 as two straight lines even though the gravel road dipped to the south at one point to avoid a large rock outcrop. Part 4 fails to show the dip in the road and so the right of way shown as Part 4 runs directly into the rock outcrop.

[11] The current owners of the three lots that were subdivided by Mr. Kivikangas are parties to an underlying action that precipitated this motion.

[12] The plaintiffs in the action are Hugh and Kimberly MacIsaac and Karsten and Christina Johansen (the "plaintiffs"). The MacIsaacs purchased the middle lot on the R-Plan from Mr. Kivikangas in 1990. The Johansens purchased the easterly lot from Mr. Kivikangas in 2000. The

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defendant Peggy Salo purchased the westerly lot in 1992 from Gerald Gauthier and Mona Storie, who had previously purchased it from Mr. Kivikangas.

[13] When Mr. Kivikangas sold the three lots, he advised each purchaser that there was a right of way over the existing gravel road. [page229]

[14] The portion of the right of way shown as Part 4 is located on the lot that is owned by the Salos, while the portion of the right of way shown as Part 5 is located on the lot owned by the MacIsaacs.

[15] The legal description in the transfer to the MacIsaacs describes the acquired parcel as being together with a right of way over Part 4 and subject to a right of way over Part 5 on the R-Plan. The transfer to the Johansens describes the acquired parcel as being together with a right of way over Parts 4 and 5. The legal description in the transfer from Mr. Gauthier and Ms. Storie to Ms. Salo describes the parcel as being "Parts 1, 4 & 6, Plan 53R-50717 . . . SUBJECT to right of way over Part 4, Plan 53R-10717." In short, the plaintiffs obtained the benefit of a right of way over the defendants' parcel while the defendants took their parcel subject to one.

[16] Ms. Salo and her husband Gordon Salo incurred significant expense in making improvements to the gravel road that ran across their property by widening it and adding ditches, culverts and concrete.

[17] Controversy erupted between neighbours after the plaintiffs allegedly intensified their use of the improved road, including using it to transport commercial trucks and construction equipment. The Salos contend that this increased traffic caused significant damage to the improved road on their property.

[18] The MacIsaacs had a survey prepared in 2005. This survey revealed that the portion of the road on the Salo property that circumvents the large rock outcrop is outside the boundaries of Part 4 and within the boundaries of Part 6.

[19] The Johansens and Salos became aware of the discrepancy between the location of the road on the ground and the location of the right of way on the R-Plan in October 2007.

[20] After learning of the discrepancy, the Salos barricaded the section of the road on their lot that is located outside of Part 4 on the R-Plan.

[21] The plaintiffs responded with an action claiming damages from both the Salos and the surveyors. The plaintiffs seek declaratory relief to secure access to their properties by the existing road. They also request an order to rectify the register for land titles in accordance with s. 160 of the Land Titles Act. The Salos counterclaimed against the plaintiffs, and the Salos and the surveyors cross-claimed against each other.

[22] It is uncontested that relocating the road to conform to the boundaries of Part 4 as shown on the R-Plan would require substantial blasting and roadwork. [page230]

C. The Motion Judge's Decision

[23] The motion for rectification was brought by the appellant surveyors at the direction of the motion judge.[1] On the motion, the appellants conceded that they had failed to show the right of way on Part 4 as instructed by Mr. Kivikangas. The appellant, Mr. Gossling, deposed in his

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affidavit:

> [W]e accept that the right-of-way in 1985 curved around the rock and Mr. Kivikangas asked it to be documented as such, and show it as located on the ground, which our survey did not do. We therefore seek rectification of our survey and Part 4 of Reference Plan 53R-10717 to reflect the true intention of Veikko Kivikangas, but which was incorrectly drawn on our survey.

[24] This concession was a departure from the appellants' initial position in response to the plaintiffs' action, which was that they had followed Mr. Kivikangas' instructions.

[25] On the basis of their admitted mistake, the appellants sought an order rectifying the R-Plan so that the area shown as Part 4 corresponds with the roadway as it existed in January 1986.

[26] The motion judge viewed s. 78(4) of the Land Titles Act as the "starting point for the inquiry" (at para. 14). This section states:

> 78(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

[27] The motion judge acknowledged that the court has the power to rectify the land titles register pursuant to ss. 159 and 160 of the Land Titles Act. These provisions state:

> 159. Subject to any estates or rights acquired by registration under this Act, where a court of competent jurisdiction has decided that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence of the decision the court is of opinion that a rectification of the register is required, the court may make an order directing the register to be rectified in such manner as is considered just. [page231]
> 160. Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

[28] The rectification provisions begin with the language: "Subject to any estates or rights acquired by registration". The motion judge held, at para. 16, that this language supports the rationale of the "Torrens land titles system which fundamentally provides that an owner is entitled to rely upon the title abstract as an accurate reflection or mirror of the state of title". He explained that under this system, the parcel register is not designed simply to provide notice, but is deemed to be conclusive of the state of title.

[29] The motion judge observed that "indefeasibility of title is a consequence of, or incident of, registration" (at para. 16). In support of this assertion, he cited Epstein J.'s reasons in Durrani v. Augier (2000), 50 O.R. (3d) 353, [2000] O.J. No. 2960 (S.C.J.). At para. 49 of her reasons,

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Epstein J. held:

> It is significant that both sections [ss. 159 and 160] dealing with the power of the court to rectify the register start with the words "subject to any estates or rights acquired by registration under this Act". These words relate back to the concept of indefeasibility of title and to the fundamental objectives of the land titles system discussed earlier. Their import is as follows. Where a bona fide purchaser for value succeeds in becoming a registered owner, the fact of registration is conclusive. Indefeasibility of title is a consequence or incident of that registration. Accordingly, the court does not have jurisdiction to rectify the register if to do so would interfere with the registered interest of a bona fide purchaser for value in the interest as registered.

[30] The motion judge rejected the surveyors' position that all the parties were innocent since the mistake was between the original owner and the surveyor. He concluded, at para. 19, that the parties were not innocent because any of them could have obtained a location plan survey at the time of purchase and learned of the title problem. He went on to say that even if all parties were innocent, the interests shown in the title register must prevail and, as a result, "there is no jurisdiction to rectify title or balance the interests of various innocent parties". In this regard, he relied on the following passage, from para. 51 of Durrani:

> As far as the court is concerned, when it comes to dealing with competing interests of innocent parties affected by registration, the interests shown in the registrar prevail and there is no jurisdiction to rectify the title even when, as in the matter before me, the result may appear to be inequitable. [page232]

The motion judge found there was "nothing to suggest that Peggy Salo was anything other than a bona fide purchaser for value" (at para. 20).

[31] The motion judge dismissed [at para. 20] the motion for rectification because permitting rectification of a mistake "which did not even involve the parties to this action would seriously undermine the very foundation upon which the Ontario land titles system is based and be contrary to the governing legislation and established legal principles".

D. Issues

[32] The appellants raised two issues on appeal:

(1) Is this an appropriate case for rectification given that this case involves a classic example of a mistake in the documentation of acknowledged common intention?

(2) Does the court have jurisdiction to grant the requested relief on either an equitable basis or pursuant to specific provisions of the Land Titles Act?

[33] The Ontario Bar Association was granted leave to intervene as amicus curiae to address the need and legal basis for the availability of the remedy of rectification in the land titles system. The OBA submitted that where the parties have actual knowledge of an interest in land that varies from the registered interest, the parcel register should be rectified so that a party is not advantaged by an error that does not accurately reflect the interests of the parties.

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[34] The respondents, the Salos, took the position that actual notice is not a proper issue on appeal because it was not mentioned in the notice of motion or argued on the motion. Alternatively, they contended that Ms. Salo did not have actual notice of the location of the gravel road or of a mistake in the registry when she purchased the property. She did not purchase the property from Mr. Kivikangas or communicate with him before the purchase or see the actual road when she viewed the property. She deposed that the first time she and her husband had knowledge of the right of way was when her lawyer disclosed the R-Plan to them prior to closing.

[35] In supplementary submissions, the OBA advised the court that it had been under the mistaken impression in preparing its original factum that Ms. Salo had purchased her property directly from Mr. Kivikangas. The OBA's original position was that rectification would be available if Mr. Kivikangas told Ms. Salo that she was purchasing the lot subject to a right of [page233] way that followed an existing gravel path. However, upon learning that Ms. Salo had not purchased the property from Mr. Kivikangas, the OBA submitted that the evidentiary record may not support a finding that Ms. Salo had actual notice that the location of the right of way conflicted with what was registered on title and hence rectification might not be available.

E. Analysis

[36] It seems to me that the issues as framed by the parties and the intervenor do not speak to the problem at hand. In particular, contrary to the OBA's submissions, the availability of the remedy of rectification does not depend on whether or not Ms. Salo had actual notice of the location on the ground of the gravel road before she purchased the property. This is not a situation where there is an interest in land that varies from a registered interest such that the court must decide which interest prevails. This issue has no bearing on the outcome of the present appeal.

[37] For purposes of analysis and disposition, the issues on this appeal must be reconceptualized.

(a) Rectification provisions in the Land Titles Act and the principle of actual notice

[38] The OBA suggests that the motion judge's reasons indicate that the remedy of rectification as described in ss. 159 and 160 of the Land Titles Act is not available where a bona fide purchaser for value has actual notice of a competing interest in property. I agree to the extent that the motion judge's reasons fail to make it clear that the statutory remedy of rectification is available where a party has actual notice of an interest in land that varies from the interest shown in the register.

[39] The motion judge's reliance on Durrani for the established legal principles is incomplete. To be precise, he did not refer in his reasons to the discussion in Durrani, at para. 52, to the effect that equity continues to have application to claims governed by the Land Titles Act and that the Act has not abrogated the equitable principle of actual notice, citing United Trust Co. v. Dominion Stores Ltd., [1977] 2 S.C.R. 915, [1976] S.C.J. No. 99, at pp. 952-53 S.C.R. At para. 58, Epstein J. held: "It is always a necessary precondition for valid title that the purchaser or mortgagee be a bona fide or good faith purchaser for value without notice." This principle was reiterated by Moore J. in 719083 Ontario Ltd. v. 2174112 Ontario Inc., [2012] O.J. No. 2948,

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2012 ONSC 3815 (S.C.J.), at para. 28, affd [2013] O.J. No. 115, 2013 ONCA 11: "only bona fide purchasers . . . for value [page234] without notice obtain the protection of indefeasibility of title which is the essence of the land titles system".

[40] Moreover, the motion judge's statement that the registration of an interest in land is conclusive of the state of title and that there is no jurisdiction to order rectification of a mistake in the registry fails to recognize that the equitable principle of actual notice remains enshrined in the land titles system.

[41] However, that said, the issue of actual notice is not determinative of the availability of the statutory remedy of rectification in this case.

(b) The appropriate analytical framework

[42] The motion judge viewed s. 78(4) of the Land Titles Act as the legislative starting point for the inquiry into whether he could invoke ss. 159 or 160 to rectify the register. Section 78(4) confirms the effectiveness of registered instruments in the land titles system. As explained in Durrani, indefeasibility of title is an incident of registration under the Land Titles Act and the powers of the court to order rectification are limited by rights acquired through the registration of an instrument in the register by a bona fide purchaser for value without notice.

[43] The motion judge, the parties and the OBA failed to distinguish between a registered instrument in the land titles system, such as a transfer or a charge, and a reference plan that is deposited for record in the land registry office in accordance with s. 150(1) of the Land Titles Act. This subsection states:

> 150(1) A transfer or charge of freehold or leasehold land shall not be registered unless a plan of the land prepared by an Ontario land surveyor, to be known as a reference plan, has been deposited for record in the land registry office.

[44] A reference plan is intended to eliminate the need for a metes and bounds description of property in a registered instrument. Pursuant to s. 150(1) and (2) of the Land Titles Act, reference plans are required to be deposited in the land registry office where a party is seeking to register a transfer or charge of a parcel of land that is not the whole of a registered parcel of land, or the whole of a lot or block on a subdivision plan, or the whole of a part on a previously recorded reference plan of survey. The function of the reference plan is to provide a convenient graphic description of the property being transferred or subject to a charge: see Donald H.L. Lamont, Lamont on Real Estate Conveyancing, looseleaf (2011-Rel. 7), 2nd ed., vol. 2 (Toronto: Carswell, 1991), at p. 28-19.

[45] In contrast to a registered instrument, the deposit on title of a reference plan does not independently create an interest in [page235] land. As this court pointed out in Lumme v. Eagle Point, L.L.C., [2011] O.J. No. 1698, 2011 ONCA 291, at para. 5: "The Reference Plan . . . does not convey any interest in property. It is a reference plan and only that." This court further explained in Lumme, at para. 6: "The Land Titles Act only guarantees the quality of one's title, not the extent of it." This statement is based on s. 140(2) of the Land Titles Act, which states:

> 140(2) The description of registered land is not conclusive as to the boundaries or the extent of the land.

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[46] Section 140(2) of the Land Titles Act is a significant qualification to the language of s. 78(4). The principle of indefeasibility of title does not preclude the correction of a registered instrument containing a misdescription of the boundaries or the extent of land. As the Lumme case illustrates, where an error in the location of boundaries on a reference plan is corrected by the director of titles under the Boundaries Act, then, absent a claim to title by possession or use,[2] title to the affected lands is limited to the land on the reference plan within the corrected boundaries. The same implications follow where the correction to the boundaries on a reference plan is made by order of a court.

[47] The qualification in s. 140(2) to the principle of indefeasibility of title is a reflection of the important distinction between boundaries as described by a reference plan and boundaries as established on the ground by a surveyor through measurement and monumentation. The former executive director of the Association of Ontario Land Surveyors, Lorraine Petzold, shed light on this distinction in an insightful lecture at the Law Society of Upper Canada.[3] The paper states, at p. 2, that land surveyors "in laying out and establishing boundaries for the first time, are primarily involved in the technical task of measuring and monumenting a parcel of land to the specification of the owner". On the subject of misdescription, she adds that "it is important to realize that the word 'boundary' means the original limit of a parcel as it was set out on the ground, not as it was described" (at p. 5). [page236]

[48] Indeed, prospective purchasers of property in the land titles system must understand that the parcel description of a property -- including an incorporated reference plan -- is not definitive of the boundaries or the extent of the land. Only an up-to-date survey can confirm the location of the boundaries of a parcel of land as they exist on the ground: see Marguerite E. Moore, Title Searching & Conveyancing in Ontario, 6th ed. (Markham, Ont.: LexisNexis, 2010), at p. 182.[4]

[49] Returning to the present case, ss. 159 and 160 of the Land Titles Act empower a court to correct errors in the register with the proviso that rectification is "[s]ubject to any estates or rights acquired by registration under this Act". Contrary to the view of the motion judge, this proviso is not engaged on the facts of this case. Here, we are confronted with an acknowledged surveying error in describing the boundaries of a right of way and not with the quality of title conferred by a registered instrument.

[50] I pause to note that the Boundaries Act does not define the term "boundary". Nor is the term defined in other Ontario legislation. David W. Lambden, O.L.S., and Izaak de Rijcke, O.L.S., give the following definition in their essay, "Boundaries" in Survey Law in Canada: A Collection of Essays on the Laws Governing the Surveying of Land in Canada (Toronto: Carswell, 1989), at 4.01:

> A boundary is the line of division between two parcels of land. It is a limiting line; by it is ascertained the extent of parcels in separate ownership or subject to different rights.

These authors observe, at 4.72, that "the limits of easements are boundaries in every sense of the word". I agree with the authors' view that the term is not limited to the boundaries of separately owned parcels, but also applies to the boundaries of an easement, including a right of way.

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[51] The registration of the transfer to Ms. Salo of Parts 1, 4 and 6, Plan 53R-50717, subject to a right of way over Part 4, Plan 53R-10717, did not have the legal effect of granting an indefeasible, unencumbered interest in the portion of the land [page237] that the appellant surveyors mistakenly showed on the R-Plan as being within Part 6 instead of Part 4. The description of the registered land provided by Part 4, which is referenced in the registered transfers to the parties in the action, is not conclusive as to the boundaries or the extent of the land, as confirmed by s. 140(2) of the Land Titles Act.

[52] In this case, the appellants admittedly failed to draw the boundaries of an existing gravel road that was intended to become a right of way in accordance with the owner's specifications. The boundaries of the right of way are not inalterably defined by the misdescribed boundaries on the R-Plan. The legislative scheme of the Land Titles Act does not guarantee boundaries. The language of ss. 159 and 160 of the Land Titles Act confers jurisdiction on the court to correct the boundaries of Part 4 on the R-Plan.

[53] I am satisfied that there is no injustice in ordering the rectification of the register in this case. It is clear that all of the parties, including the Salos, believed that the plaintiffs had the benefit of the right of way for purposes of accessing their respective properties and that this right of way was delineated by the gravel road that crossed the Salos' property. It was not until 2007 -- some 15 years after purchasing the property -- that the Salos learned that Part 4 on the R-Plan does not accurately reflect the location of the roadway as it existed on the ground when they purchased the property. Indeed, if there is a risk of injustice, it would be if rectification were not ordered in these circumstances.

F. Conclusion and Disposition

[54] The court's powers of rectification under ss. 159 and 160 of the Land Titles Act are qualified by reference to the indefeasibility of title that follows from registration. A purchaser only obtains the benefit of indefeasible title if he or she is a bona fide purchaser for value without notice. This continues to be the law in Ontario, despite any suggestion to the contrary by the motion judge.

[55] In the instant case, however, the question whether the respondent Ms. Salo had actual notice of an interest in land that varied from the registered interest before she purchased the property does not need to be answered to decide whether the court may invoke the rectification provisions in ss. 159 or 160 of the Land Titles Act. The request for rectification concerns an admitted surveying error in showing the location of a right of way on a reference plan. [page238]

[56] In contrast with a registered instrument, the deposit on title of a reference plan does not itself create an interest in land triggering s. 78(4) of the Land Titles Act. Section 140(2) of the Land Titles Act provides that the description of registered land is not conclusive as to the boundaries or the extent of land. The deposit of the R-Plan and the reference to Part 4 in the legal description in the registered transfers does not create an interest in land precluding the statutory remedy of rectification.

[57] I would thus allow the appeal from the motion judge's order dismissing the appellants' request for rectification.

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[58] The remaining issue is that of the appropriate terms of a remedial order. The appellants and the OBA did not specify whether the remedy in this case should be ordered pursuant to s. 159 or s. 160 of the Land Titles Act, but instead referred to these provisions interchangeably.

[59] Section 159 contemplates an order for rectification of the register as a consequence of a court deciding that a person is entitled to an estate, right or interest in registered land. Section 160 provides for a right to apply to rectify the register where a person is aggrieved by an entry thereon. In my view, s. 160 of the Land Titles Act is the more pertinent provision given that the issue on the motion concerned the court's jurisdiction to rectify a deposited reference plan.

[60] Neither the appellants nor the OBA provided specific guidance as to how to best fashion a remedial order that is consistent with the land titles scheme.

[61] The appellants handed up to the court a copy of a sketch that was before the motion judge. This sketch -- titled "Sketch Showing Proposed Right of Way Realignment to Fit Existing Centreline" -- is attached as Appendix B to these reasons. The sketch illustrates how the R-Plan would need to be corrected if rectification were granted. As depicted on the sketch, the width of Part 4 remains as it was in 1986, but the corrected location of Part 4 avoids the rock outcrop.

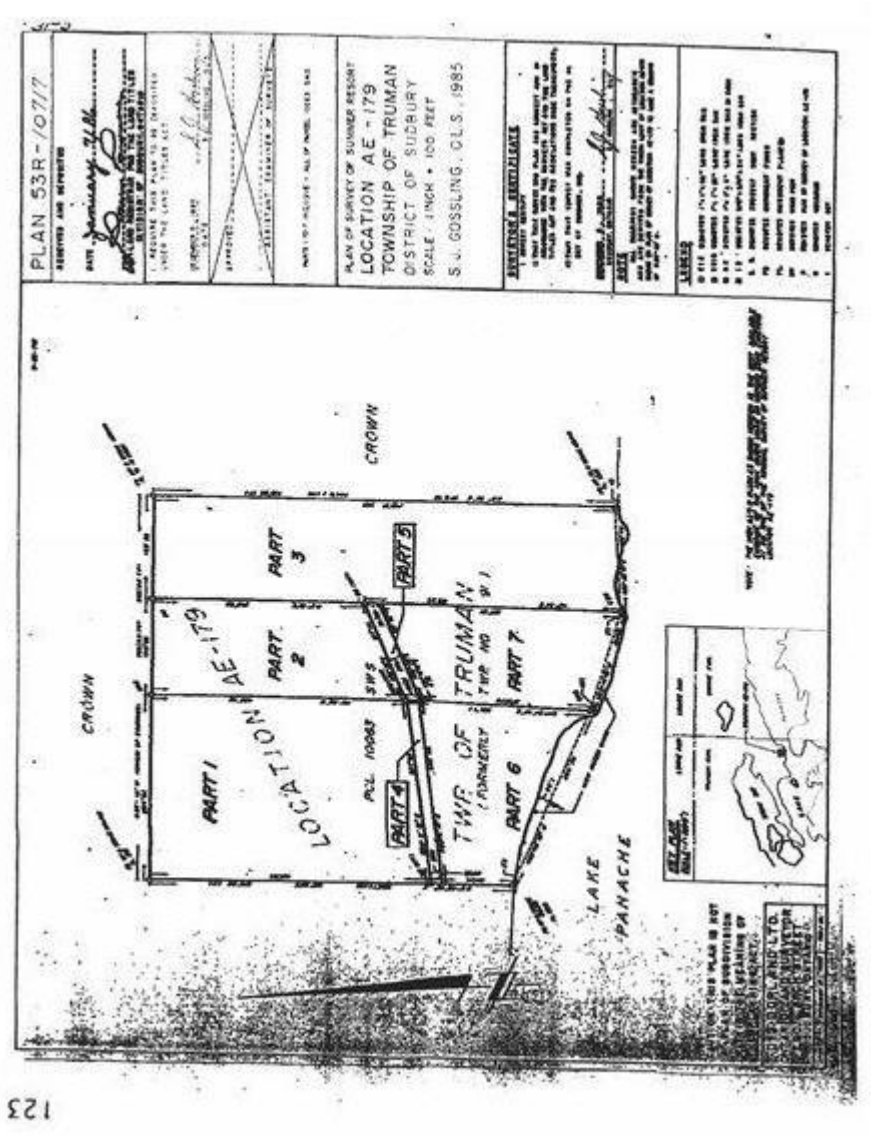
[62] Pursuant to s. 160 of the Land Titles Act, I would order the appellants to correct Reference Plan 53R-10717 in the manner shown on the sketch in Appendix B. The appellants shall deliver a copy of the order of this court and the corrected version of Reference Plan 53R-10717 in a form and content that is satisfactory to the land registrar. Upon receipt, the registrar shall make any entry on the parcel registers for the affected properties as he or she deems necessary to give effect to the order for rectification of Reference Plan 53R-50717 in accordance with these reasons. If necessary to give effect to this order, the examiner of surveys shall certify the correction in accordance with these reasons. [page239]

[63] I would award the appellants the costs of their appeal on a partial indemnity basis fixed in the amount of $15,000, all inclusive.

Appeal allowed.

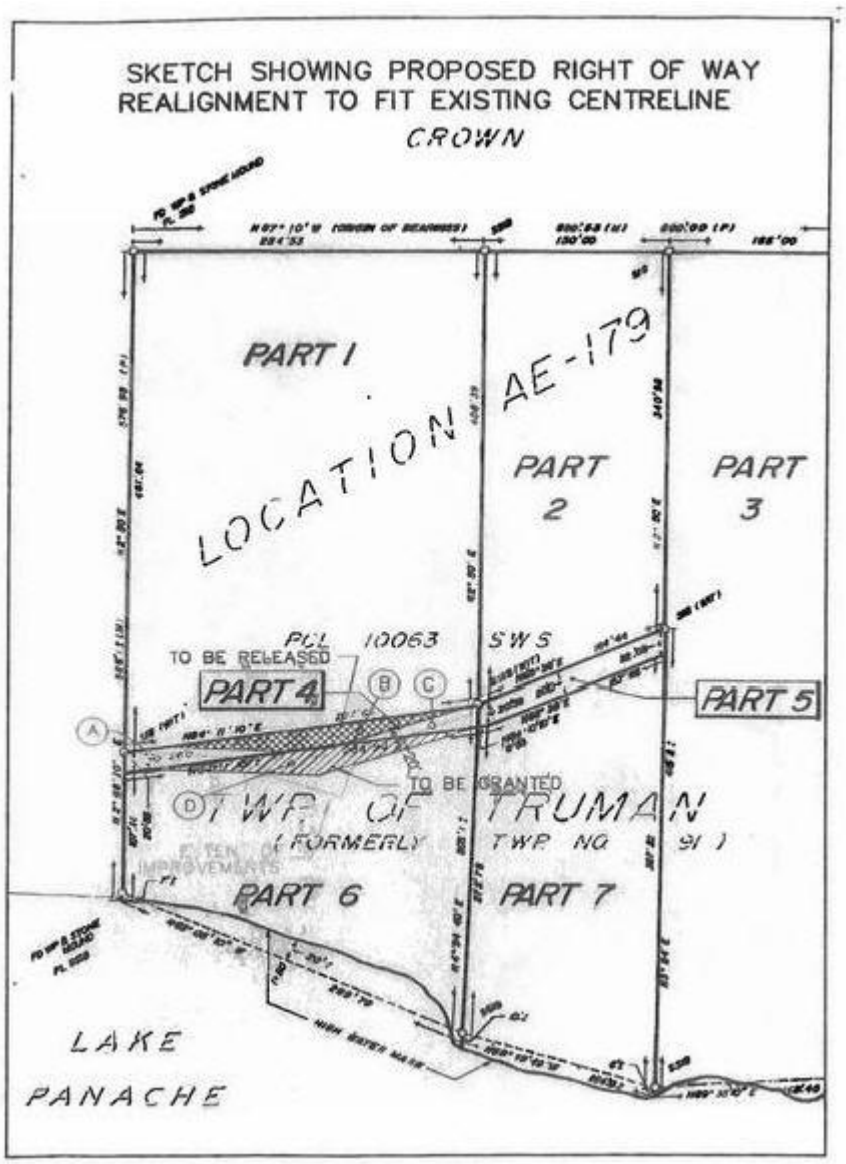
Appendix A

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Appendix B

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Notes

1 While it would have been more appropriate, in my view, for the plaintiffs to have brought the motion for rectification, no issue was taken with the appellant surveyors' carriage of the motion, presumably as agents of the plaintiffs. In their statement of claim, the plaintiffs' prayer for relief requests an order to rectify the register for land titles in accordance with s. 160 of the Land Titles Act. Even though the plaintiffs are seeking this relief, counsel for the appellants advised the court that the motion judge directed the appellant surveyors to bring the motion for rectification.

2 Section 51(1) of the Land Titles Act states: "Despite any provision of this Act, the Real Property Limitations Act or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription."

3 Lorraine Petzold, "The Survey and the Real Estate Transaction" (Paper delivered at the Law Society of Upper Canada Continuing Legal Education Seminar, October 1983) (Revised September 1993).

4 Regulations under the Surveyors Act, R.S.O. 1990, c. S.29 provide for the preparation of a surveyor's real property report by a trained and licensed Ontario surveyor. The report, also referred to as a survey or a locate survey, accurately illustrates, as of a specified date, the location and dimensions of property boundaries, related lots and plans, location of buildings, fences, adjacent properties, roads, encroachments, easements and setbacks to property boundaries: see Title Searching & Conveyancing in Ontario, at p. 56.

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