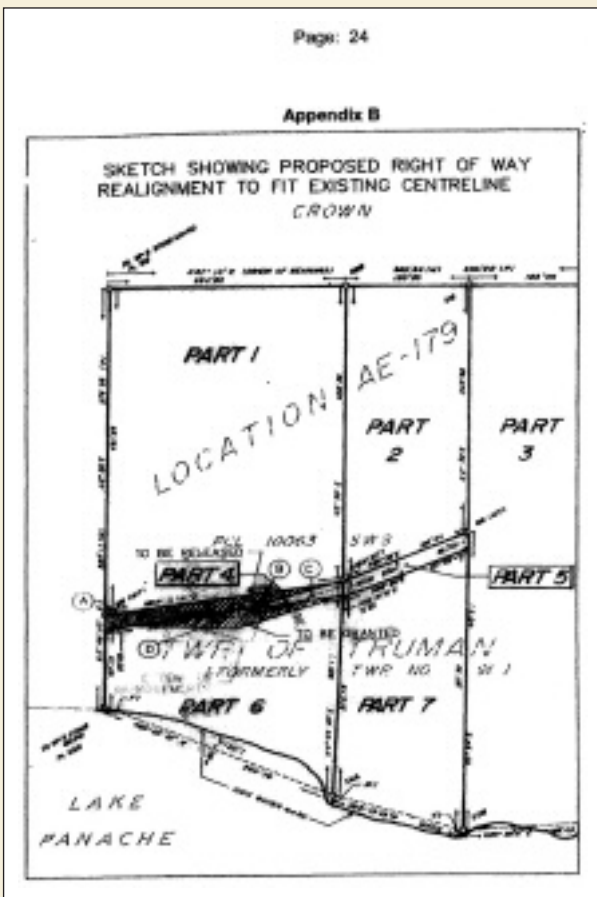
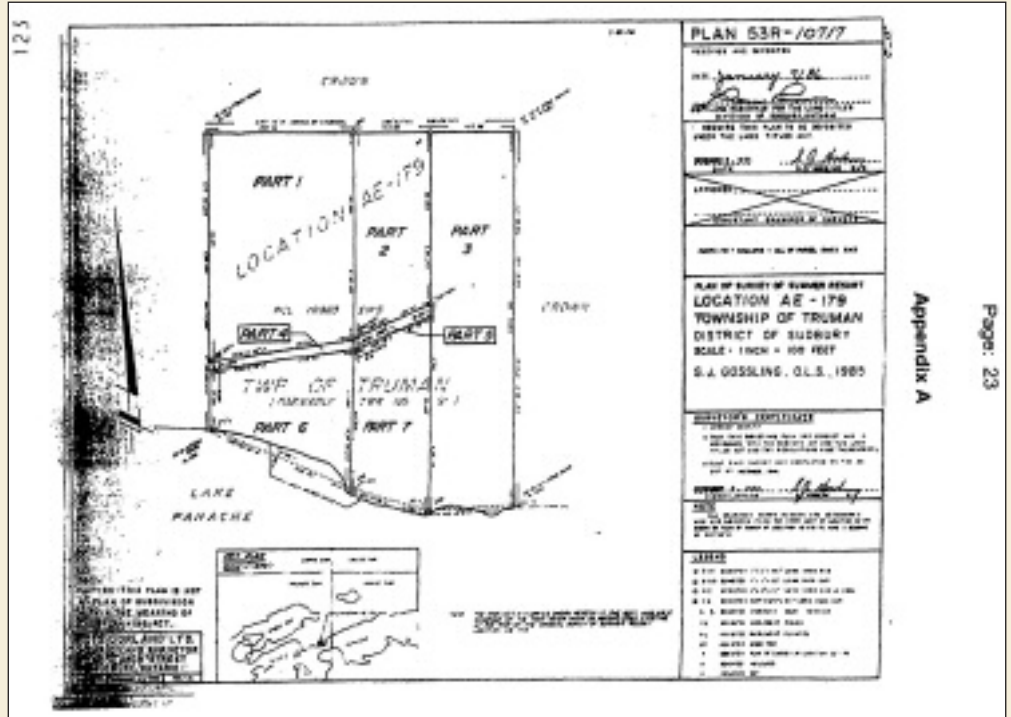


# Correcting Errors in Registered Reference Plans

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The Ontario Court of Appeal recently released its decision in *MacIsaac v. Salo*, 2013 ONCA 98, which provides surveyors with a mechanism for correcting mistakes relating to boundaries in parcel registers. The Court provided guidance as to the definition of the term “boundary,” which it found is not limited to boundaries of separately owned parcels, but also to the boundaries of an easement, including a right of way.

The court concluded, among other things, that a parcel description of a property, such as a reference plan is not definitive of the boundaries or the extent of the land. Rather, 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 the land.

## Facts

Veikko Kivikangas was the owner of a property in Northern Ontario which he wanted to sever into three parcels. In 1985 he retained a surveyor to survey the property and prepare a reference plan showing the three parcels, designated from west to east as Parts 1, 4, and 6; Parts 2, 5, and 7 and lastly, Part 3. Parts 4 and 5 were created as 20 foot wide Parts across the two westerly parcels to enable the granting of rights-of-way for access to the two easterly parcels as required.

The Part 4 right-of-way was to follow an existing dirt/gravel path and Kivikangas claims that he told the surveyor to locate the right-of-way in the same location as the path. In setting out Part 4, the surveyor placed monuments at the northwest and northeast corners of the path where they met the western and eastern boundaries of the westerly parcel, joining them with a straight line to designate the northern limit of Part 4. The surveyor then drew a parallel line 20 feet to the south of the northern limit to designate the southern limit of Part 4. The Reference Plan was completed in December 1985 and recorded on January 7, 1986 (the “R Plan”).

The MacIsaacs purchased the middle parcel (comprising Parts 2, 5, and 7) in October 1990 and the Johansens purchased Part 3 (the easternmost parcel) in September 2000 (collectively, “the plaintiffs”). The Salos purchased the westernmost parcel (Parts 1, 4, and 6) in March 1992. For several years (15 in the case of the Salos) all of these parties assumed that the right-of-way over the Salo property was located within Part 4. The MacIsaacs and Johansens obtained the benefit of a right of way over the Salos’ parcel, while the Salos took their parcel subject to one. All of the parties acquired their properties with the belief that the registered easements crossing the Salo property reflected the location and dimensions of the actual roadway which crosses the properties.

Over the years, the Salos incurred significant expense in making improvements to the gravel road that ran across their property. Controversy ensued between the parties after the plaintiffs intensified their use of the improved road, including using it to transport commercial trucks and construction equipment. The MacIsaacs had a survey prepared in 2005, which revealed that the roadway which crosses the Salos’ property is not entirely within the confines of the right of way as depicted in the R-Plan. Unfortunately, the surveyor mistakenly depicted the right of way as two straight lines, even though the gravel road dipped to the south at one point to avoid a large rock outcrop. Thus, the right of way as shown on the R-Plan failed to show the dip in the road, so that the right of way essentially runs directly into the rock outcrop. The result is that if the plaintiffs wanted to access their properties in the manner originally intended, they would have to traverse the Salos’ private land where the road curves south outside of the right of way and where they have no registered right of way. In order to relocate the access roadway so that it would be entirely within Part 4 it would be necessary to undertake substantial blasting of the rock outcrop as well as removal of trees and brush and the installation of a suitable road base and surface material.

After learning that the roadway was not entirely within the right of way, the Salos barricaded the use of the part of the road that was outside the right of way and on their property. The plaintiffs responded with an action claiming damages from both the Salos and the surveyors. The appellant surveyors admitted that they had made a mistake, and that the R-Plan did not reflect the true boundaries as located on the ground.

## The Motion Judge’s Decision

The surveyors brought a motion before a judge in Sudbury for rectification under the Ontario *Land Titles Act*, RSO 1990, c L.5, so that the R-Plan corresponded with the actual boundaries of the roadway on the ground. On the motion, the surveyors conceded that they had failed to show the right of way on Part 4 as instructed by Mr. Kivikangas.

The motion judge acknowledged that the court has the power to rectify the land titles register pursuant to sections 159 and 160 of the *Land Titles Act*. However, the motion judge dismissed the motion for rectification on the basis that the interests shown in the *Land Titles* register must prevail based upon indefeasibility of title – the basis of the Land Titles system. He ruled that since the Salos’ “title” would be impacted by rectifying the right of way, he did not have jurisdiction to grant rectification.

## The Court of Appeal’s Decision

The surveyors appealed from the order dismissing their motion. The Court of Appeal overturned the motion judge’s decision, and found that he failed to distinguish between (i) a registered instrument in the land titles system, such as a transfer or a charge, and (ii) a reference plan that is deposited for record in the land registry office. The Court stated that the function of a reference plan is to provide a convenient graphic description of the property being transferred or subject to a charge. In contrast to a registered instrument, the deposit on title of a reference plan does not independently create an interest in land. According to the Court of Appeal, registering a reference plan under the *Land Titles Act* does not preclude the correction of a registered instrument containing a mis-description of the boundaries or the extent of land.

The unanimous decision of the Court of Appeal is an important reminder that the description of registered land in a reference plan, which is registered in a land registry office, is not conclusive as to the boundaries or the extent of land. Many people lose sight of this fact because they assume that everything is guaranteed under the land titles system. However, the Court of Appeal concluded that only an up-to-date survey can confirm the location of the boundaries of a parcel of land as they exist on the ground.

The Court did not discuss what limitations, if any, there may be as to when rectification under the *Land Titles Act* is available (e.g. if a land owner’s interests would be seriously prejudiced if the boundary correction is approved). Although the *Land Titles Act* confers jurisdiction on the court to rectify boundaries contained in reference plans, it is discretionary relief where the courts can make an order “in such manner as considered just.” As a result, there could be situations where rectification would not be contemplated or available under these sections, such as cases where rectification would cause the dominant properties to no longer have the right of way, or where it would defeat the intention of the right of way.

In this case, the Salos argued that they had a registered interest in the land over which the appellants were attempting to impose a right of way by rectification. In other words, because the R-Plan did not accurately reflect the location of the roadway as it existed on the ground when

they purchased property, the Salos would essentially be “losing land on paper” if the rectification was granted and would thus, suffer prejudice. However, the Court’s reasons imply that actual prejudice would need to be shown (which it was not in the case) and not simply prejudice on paper. Indeed, 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. It was not until 15 years after purchasing the property that the Salos learned of the mistake contained in the R-Plan. In the Court’s view, the risk of injustice in this case would be if rectification was not ordered in these circumstances. The Salos would not suffer any prejudice. In this case, no parties were involved in the action who might suffer prejudice, so that was not a consideration.

## Implications

The Court of Appeal’s decision is very helpful for surveyors in Ontario, as it allows for mistakes made in a reference plan to be rectified under the *Land Titles Act*. This decision now gives surveyors the opportunity to rectify a reference plan before or as part of a lawsuit with respect to a surveyor error. If the motion to rectify is successful, a lawsuit against the surveyor becomes unnecessary.

The Court of Appeal also provided guidance as to what a

reference plan is, and is not. The function of a reference plan is to simply provide a convenient graphic description of the property. The deposit on title of a reference plan does not independently create an interest in land.

Finally, the gist of the decision is that only an up-to-date survey can confirm the location of the boundaries of a parcel of land as they exist on the ground. The Court cautioned prospective purchasers of property in the land titles system that the parcel description of a property, which includes a reference plan, is not definitive of the boundaries or the extent of the land. Thus, prospective purchasers may be more inclined to obtain a survey where there are rights of ways and other forms of easements involved.

The Salos have sought leave to appeal to the Supreme Court of Canada.



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