



Interesting Recent Cases

BY LORRAINE PETZOLD

Recent Cases

It is important that each surveyor in private practice is aware of cases that are being settled in the court which relate either to his business or survey practice. Many of our members subscribe to newsletters or case summary reports that enable them to review these cases and be aware immediately when a case is reported. We are going to try with our up-coming issues of the Quarterly to keep you advised of some cases that we have noted in the publications which we receive. We are not going to attempt to write case summaries on these particular law suits but rather to point out what is of interest in them and have you aware that the courts are making decisions which directly affect us in our day to day practice.

Mortgage Company Sues Solicitor

A recent case in Manitoba was reported in the Ontario Lawyers Weekly. A solicitor acting for a mortgage company had not advised the mortgage company sufficiently regarding the obtaining of a survey before the advancing of funds. He had in fact obtained a sworn declaration from the owner of the property that the house was being built on the mortgaged lands. The lawyer argued in his defense that the mortgagee had personal expertise in real estate transactions and that would relieve him of the duty to ensure that the mortgage company knew of the dangers of proceeding without the necessary survey.

It is important to note that Mr. Justice Jewers in the case wrote "The defendant failed to follow the accepted standard practice of prudent solicitor in advising his client of the danger of advancing mortgage monies without a building location certificate and that he is liable to the plaintiff for any damages flowing from this failure." You will note that the word certificate in Manitoba does represent the building location survey in Ontario. The point of interest here is the fact that the judge has not stated that the defendant should have advised

the mortgage company to get a survey but rather also was responsible for advising them of the dangers of advancing money without the said survey. This puts a great deal more responsibility on the lawyer. In addition the judge ruled that the defendant was not entitled to rely on the sworn declaration of the contractor that the building was actually located on the proper lot.

One surveyor has notified the Association Offices that he has used this particular case in arguing with lawyers who try and still get copies of old documents. One can see that the suing of a solicitor by a mortgage company in the matter of a survey is a very important item to be known throughout the survey community and the legal community. One must ask oneself would this case be any different if the lawyer had used an old foundation sketch which he managed to find rather than an up-to-date survey at the time of this representing the interests of the mortgage company.

(Case *Lac Mortgage Company Limited v. Reginald Tolton*, Ontario Lawyers Weekly, February 28, 1986.)

Charter of Rights and Professional Status

The following case is reprinted from the *als* news, Spring 1986. It is the report of a case in Alberta wherein the judge has cited a similar Quebec case that quite clearly shows that advising the mortgage company to obtain an up-to-date survey of professional status, although it does give an individual certain rights and responsibilities also takes from that individual certain rights which the rest of the population has under the Charter of Rights. This is important as many members of professional groups do not realize that being a member of a self governing profession removes them from the protection of parts of the Charter of Rights.

Fang v. College of Physicians & Surgeons

(Alberta Court of Appeal #17496)

Facts: The appellant Hsing Fang, M.D. appealed a decision of the Council of the College of Physicians and Surgeons finding him guilty of unprofessional conduct. The decision resulted from an allegation that the practitioner had allowed his name to be used advocating the sale and/or use of a product known as Acussage-lounge.

Issues: In a preliminary hearing the appellant objected to the proceedings on the grounds that the proceedings were contrary to the Charter of Rights in that the appellant was being denied his right to earn a living. The objection was rejected. The appellant was then called to give evidence against himself as set out in the Medical Professions Act to which he again objected by reason that the Medical Professions Act was ultra vires the Charter which states "11. Any person charged with an offense has the right . . . (c) not to be compelled to be a witness in proceedings against that person in respect of the offense." The main issue argued was whether the appellant was a person "charged with an offense" within the meaning of the Charter.

Held: In citing a previous decision of the Court of Queens Bench in *Re Lazarenko* which held that Lazarenko was indeed a person charged with an offense, Justice Belzil noted that the Court had further found "that the provision of the Legal Professions Act compelling a member to testify was a reasonable limit demonstrably justified in a free and democratic society."

He also cited a similar Quebec case "*Belhumeur v. Discipline Committee of Quebec Bar*" and quoted:

"The practice of a profession is a privilege. The law grants to certain groups a monopoly to carry on certain well-defined activities and imposes upon the members of those groups an obligation to prevent abuse and to ensure that the monopoly will be exercised for the public good. It is normal that those who enjoy these privileges should be subjected to a more rigorous discipline than that which applies to ordinary citizens. This discipline is peculiar to them and is not part of penal law. In consequence of this, the right to silence preserved in Article 11(c) of the Charter does not apply to professional

disciplinary law. One cannot claim in the same breath the so-called right to silence and the privileged status as a professional."

In conclusion, he held that professionals were not shielded by the provisions of the Charter and could be held to testify against themselves.

A Quote to be Used

In reviewing different court cases one looks at quotes that can be used when trying to emphasize a point. Quite often we are engaged in discussions with the legal profession or the real estate profession regarding the value of the survey. In the recent case of *LeBlanc v. Dewitt* (1985), 34 R.P.R. 196 (NBQB) the judge made the following statement, which is so applicable in such arguments.

"The client does not ask, 'Do I have paper title to the land?' He asks 'Do I have good title to the land?' The statement that someone has 'good paper title to the land' is meaningless."

This above statement in a recent court case is so useful in demonstrating to either the legal or real estate profes-

sion the present feelings of the court regarding clients only finding out about half of the title, i.e. the paper title. This quote can be used to show that a survey is part of the necessary documentaion for every transaction as well as being used for showing that old surveys i.e. paper documents which do not reflect the current situation should not be used in a transaction. ●

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16. Instead of an after-work cocktail, try ice water followed by a 10-minute quiet time, relaxing with eyes closed. Remember the peace there is in silence.

17. Note things that chronically bother you and avoid them. Work on developing an awareness to the stressors in your life.

18. If you've been working 60-hour weeks, cut back. Research shows that productivity drops among people under high stress, but peaks under moderate stress.

19. Work at building a few supportive relationships. Remember friendship takes time. Those with supportive relationships suffer less consequences under stress than the socially isolated.

20. Give in when you have little to gain. Save your energy for what's important.

21. Cut back on caffeine, it's a stimulant.

22. If little things bother you a lot, dig deep for the reasons. Molehills often mask mountainous problems. If something major is causing stress, seek counselling.

23. When you're uptight, tense and untense muscle groups. Start with arms, then face and neck, then shoulders and abdomen, finally legs.

24. Work on developing the capacity to recognize when you are under stress. If you don't recognize the stress you are under, you'll never deal with it well.

25. If a stressful event is approaching, visualize yourself doing it well and in a relaxed manner. Visualization works.

26. When you arrive home from work and need to unwind, explain to

your spouse and children that you need one half hour to yourself before grappling with family problems. If explained, family resentment will disappear.

27. Studies show that vigorous exercise, even brisk walking, about two miles in half an hour, is as good as a chemical tranquilizer.

28. Try to make work and living areas as pleasant and comfortable as possible with pictures, plants and ornaments.

29. Don't try to control family members. Be supportive instead of nagging.

30. Take a warm shower or bath to soothe tense muscles and provide a few moments of "sensory deprivation" - also known as privacy.

Finally, don't use any of these techniques as a panacea. Develop and use a repertoire of techniques for dealing with the stresses in life.