

Avoiding Mis-Use of Survey Opinions

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The following report is the Association of Ontario Land Surveyors' position paper regarding the use and mis-use of surveyors' opinions. This paper was used as the basis for the panel discussion held with representatives from the legal, realty, surveying and banking industries. The frank exchange of views begins on page 22.

The Association of Ontario Land Surveyors is concerned about the common occurrence of the re-use of the land surveyors' product, many years after its preparation and for purposes other than that for which it was originally prepared. A plan of survey or a Surveyor's Real Property Report is considered to be a professional opinion based on the best available evidence at a point in time, and is prepared for a specific transaction or occurrence. The use of the plan and report for that transaction is entirely appropriate and considered fair use. Any reliance on the surveyor's product beyond the original intended use is potentially dangerous to both the user and the surveyor and probably is an infringement of copyright.

The Value of a Current Survey

A surveyor prepares a plan to illustrate a professional opinion on the extent of title and the relationship of topographic features and improvements to the limits of a property. The survey will also illustrate any rights-of-way or easements which affect the property and also disclose any potential unregistered interests such as prescriptive rights or adverse possession. Encroachments to and from the subject property will also be shown. The plan is a time limited document. As stated by L. Petzold, former Executive Director of the Association of Ontario Land Surveyors, "the survey of the property indicates the actual physical characteristics of the parcel of land in relation to the boundaries and the extent of title **on the date that the survey was prepared**". {Petzold, N.L. *Re-Use of Old Survey Documents* Summer 1986 Terravue - pp.17 to 21 (TERRAVUE is an annual publication of the Canadian Council of Land Surveyors)}

It is conceivable that a plan would not reflect the conditions on the ground even on the day a property transfer is completed, usually only a few weeks or days after a Surveyor's Real Property Report is signed. While it is not practical or even possible that every plan be updated to the day of the transaction, it is interesting to note that this is exactly the process a solicitor follows. It is common practice, that on the day of a transaction, a lawyer, by way of a sub-search, confirms if the title situation has changed in any way from the original title search which may have occurred only a month earlier. The same lawyer who is so diligently confirming the title status of the property to the date of closing has been known to encourage the purchaser to use an out of date survey. In the Manitoba case of Kovalik et al v. Schick et al, the County Court of Winnipeg ruled that where an offer of purchase requires a

survey to be provided, anything less than an up-to-date or current survey is unsatisfactory.

It is clear that an up-to-date survey is essential in a real estate transaction to illustrate the current conditions and that each of the participants in the transaction can benefit from an up to date survey.

The lender requires a current survey showing the property and the improvements thereon, as they act as security for the loan, and the mortgagee needs to be assured that what is being described and illustrated in the mortgage documents is actually what is being conveyed.

A lawyer has a professional responsibility to ensure his client is aware of what is being purchased. In the Manitoba case of Lac Mortgage v. Tolton (1986) 38 R.P.R. 236, a solicitor was successfully sued for both not advising his clients to obtain a survey, and for not indicating to the client, the dangers if the survey was not done. In the 1971 Nova Scotia case Marwood v. Charter Credit Corp. the court stated "It may well be that purchasers do not always wish to go to the expense of making a survey, but as a matter of practice it is my view that solicitors should always advise them in advance on this matter and make it clear that the certificate of title which will be issued is at all times subject to a survey. If this is done ahead of time and a purchaser still insists on going forward without retaining a surveyor, then the responsibilities are obvious." {*Marwood v. Charter Credit Corp.* (1971), 2 N.S.R. (2d) 743 (C.A.)}

Real Estate Agents also have a duty to exercise reasonable care and skill when advising purchasers. "It is now well established that real estate brokers who elect to provide information and advice to the third parties with whom they may have dealings must exercise reasonable care and skill in the performance of their undertaking



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in ensuring the completeness and accuracy of such information and advice." {*Sedgemore v. Block Bros. Realty* (1985) 39 R.P.R. 38 p.49 quoting Real Estate Agency Law - W.F. Foster (1984) at p.243}

In both *Charter-York Ltd. v. Hurst et al.* (1978) 2 R.P.R. 272 and *Sedgemore v. Block Bros. Realty Ltd.* (1985) 39 R.P.R. 38, the courts ruled realtors were negligent in not confirming the accuracy of information, regarding the property, which was relayed to the prospective purchaser. If a real estate agent passes on survey information or points out the boundaries of a property to a prospective buyer, the agent must ensure the accuracy of such information. Only a surveyor is entitled or able to provide such assurance, with an up-to-date Surveyor's Real Property Report.

The purchaser and lender should also be concerned if a current survey is available, as it may reveal some conditions that would have a direct bearing on the purchase price of the property, or even the possibility of voiding the transaction.

The surveyor is concerned with the re-issue and re-use of out-of-date plans and documents. Since the 1961 English case of *Hedley Byrne & Co. v. Heller & Partners Ltd.* [1964] A.C. 465, and the adoption of the principles established by *Hedley Byrne* in Canada, "it is generally accepted that a surveyors' liability is not restricted to his client" {*Penfound, Rosalind C., Survey Plans, Copyright and Government Process in the Maritimes: Ownership and Use of Plans and Third Party Liability*, CISM Journal, Vol.44 No.3 Autumn 1990 p.260} and extends to any party who could reasonably be expected to depend on the survey. The 1984 New Brunswick case of *LeBlanc v. Dewitt* follows the *Hedley Byrne* reasoning and states that a surveyor "is liable in negligence to any who might reasonably be expected to rely on that information". {*Leblanc et al v. Dewitt et al* (1984), 34 R.P.R. 196, pp.213-214}

Certainly it is very likely that it could be successfully argued that a surveyor, by releasing out-of-date information would be subject to the law of negligent misstatement and third party liability. ".....the practice of releasing old prints of a survey plan, even for a nominal fee or charge, should be discontinued altogether. The risk of the outdated plan being treated at law as a negligent misrepresentation is

very real and one must question whether liability in such circumstances can ever be effectively disclaimed". {*de Rijcke, Izaak, Liability in Negligence and Contracts*, Chapter 9, Survey Law in Canada, Carswell, 1989, p.347}

What is an Up To Date Survey?

A survey document is considered current if it reflects the present conditions on the site. Subsection 28(1) of the Association of Ontario Land Surveyors' Standards for Surveys states:

"An existing plan of survey cannot be considered to be 'up-to-date' unless,
(a) the survey and plan are in accordance with the current Standards, the statutes of Ontario and the regulations made thereunder;
(b) upon a field inspection it can be determined that no changes have taken place since the plan was signed; and,
(c) an up-to-date land registry office search has been made."

It is entirely possible that a plan a month old in a new area of development is out of date and that a ten year old plan in a more settled part of the community is still current. Only a professional surveyor who has had many years of academic and practical training, and who is licensed by provincial statute is qualified to make such a determination. Neither the lawyer, the lender, the realtor, nor the purchaser is adequately able to interpret the survey, the regulations, the standards and other pertinent information and relate them to the current site conditions. In fact it has been argued by some that any supposed determination of the extent of title, including a statutory declaration of possession, by anyone other than a licensed surveyor is a contravention of the provisions of the Surveyors Act. The true value of a sworn declaration by a property owner is extremely limited. The person swearing the declaration clearly has a vested interest in stating that no changes have taken place. In *Lac Mortgage v. Tolton*, the court ruled that the defendant lawyer could not rely on such a declaration and it in no way lessened liability.

Copyright and Fair Use

Over the past decade, the Association of Ontario Land Surveyors has reviewed the applicability of copyright to surveys and surveyors. Survey plans are an illustration of a surveyor's opinion of the extent of title, and they

clearly fall within the definition of an artistic work under Section 2 of the Copyright Act R.S.C. 1985 c. C-42. The Association of Ontario Land Surveyors Standards for Surveys require non deposited or non registered plans to indicate the retention of copyright and the use of the universal copyright symbol © is recommended. Although copyright is automatically acquired with the creation of the plan, this approach places both the naive and the malicious misuser on notice that the surveyor retains copyright.

The ownership of the copyright is addressed in Section 13 of the Act. This issue has been discussed by both R.J. Meisner xx7 and Rosalind Penfound, former Executive Director of the Association of Nova Scotia Land Surveyors. {*Supra. Penfound ...*} Their views coincide with a legal opinion obtained by the Association. To briefly summarize their comments, the usual business transaction between surveyor and client can be classified as a contract for services and thereby the copyright will rest with the author (surveyor), unless specifically agreed to the contrary.

As stated in subsection 27(1) of the Copyright Act, the infringement of copyright is deemed to have occurred when "any person who without the consent of the owner of the copyright does anything that by this Act, only the owner of the copyright has the right to do". This includes any copying, reproduction, distribution, alteration, in whole or in part of a surveyor's product without the author's express written permission.

The Association of Ontario Land Surveyors is not aware of any cases where the issue of copyright of a surveyor's plan has been addressed, but there are several which discuss the matter with respect to architect's plans. In a 1992 Supreme Court of British Columbia case, *Bemben and Kuzych Architects v. Greenhaven-Carnagy Developments Ltd.*, *McKenzie J.* states "it is clear that an architect retains copyright in architectural drawings and designs of his creation". It must be noted that in architecture, copyright exists in both the plan and the structure, and the copyright in one is quite distinct from the copyright in the other. The analogy for surveyors applies only to the copyright in the plan. The decision continues: "it is also clear that use of these drawings without consent is an infringement of

copyright unless there is been a written assignment of the ownership of that copyright".

The corollary to infringement of copyright is fair use. In *Netupsky v. Dominion Bridge Company* the court discusses the use of an architect's plan and quotes the Supreme Court of New South Wales in the case of *Beck v. Montana Construction Property Limited*, "the engagement for reward of a person to produce material of a nature which is capable of being the subject of copyright implies a permission or consent of licence in the person making the engagement to use the material in the manner and for the purpose in which and for which it was contemplated between the parties that it would be used at the time of the engagement". {*Netupsky v. Dominion Bridge Co.* [1972] S.C.R. 368 quoting *Beck v. Montana Constructions Property Limited* (1963), 5 F.L.R. 298, 80 W.N. (N.S.W.) 1578, [1964-5] N.S.W.R. 229 (N.S.W.S.C.)} "Under fair use, a surveyor has the right to use the information from a plan in the preparation of another plan, a lawyer has the right to use a copy of a plan in order to do title research and obtain the necessary consents as required in a conveyance of

title, a professional association has the right to critique a surveyor's plan and a client has the right to use the plan for his own private use in accordance with the purpose of the plan, without infringing copyright". {*Meisner, R.J. Who Owns The Plan?* Summer 1986 *Terravue* pp.5 to 7.} Fair use may also include making copies to complete the transaction for which the plan was prepared, however, subsection 29(3) of Regulation 1026 R.R.O. 1990 under the Surveyors Act states:

"A print of a plan of survey is not a valid copy unless it bears the embossed seal of the licensed member who signed the plan or the embossed seal of a licensed member employed by the corporation or public agency responsible for the plan's preparation or the corporate seal of the corporation holding a certificate of authorization that was responsible for the plan's preparation."

The surveyor therefore, has a responsibility to supply sufficient embossed copies of the plan and report to the original client, so that the client may complete the requirements of the transaction for which the survey was prepared. Any further copies would be released solely at the surveyors discre-

tion, and any unsealed copies in circulation should not be accepted as a valid document.

Conclusion

The Association of Ontario Land Surveyors' principal object is to regulate the practice of professional land surveying in the Province of Ontario, in order that the public interest may be served and protected. The use of an up-to-date survey opinion in every property transaction is in the best interest of everyone. The continuing education of fellow professionals of the benefits of up-to-date survey opinions is essential. "The time worn phrase of 'let the buyer beware' must be replaced in today's society with 'let the public trust'. The public must trust those persons with whom it deals in the real estate transaction". {*Petzold, N.L., An Up-To-Date Survey Will Reduce Your Risk*, *The Real Estate Journal*, Fall 1986, Toronto Real Estate Board} All of the parties involved in the real estate transaction must work co-operatively towards reducing the risk for themselves, their client and the public at large, and the consistent use of current survey opinions will be a significant step towards that goal.