Are You Going To Jail, Dad?

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by Allan W. Tunbridge, BCLS, BSc. Surveying Engineering, Dipl. Surveying Technology

Recently, our firm concluded its involvement in a British Columbia Supreme Court case which I will endeavour to highlight and condense for the consideration of all practicing land surveyors. It is a difficult task to condense same with absolute clarity, after six full days of court proceedings, pre-trial evidence and countless preparation hours.

The case, Mark's Service Centre Limited (No. C942004 Vancouver Registry) the plaintiffs, several named defendants, as well as our firm named as "third parties" holds an intriguing collection of "law" issues, "surveying" issues, and a continuum of historical treasures.

At issue was the plaintiff's sole reliance on registered subdivision Plan 8221 and, in particular, Lot 4 therein. The said plan showed a road frontage (westerly boundary) of 197.2 feet and this is what the plaintiff demanded and claimed contrary to all survey evidence on the ground.

Mr. A. E. Humphrey, BCLS (deceased) originally surveyed the land in question and created the subdivision plan which was registered in 1945.

In 1965, W. Kerr, BCLS (deceased) conducted a legal survey and reposting of Lot 4. He found a shortage of 10 feet on the road frontage between the nearest undisputed survey evidence, then proportioned this shortage into two lots, one of which was Lot 4.

During the course of the trial, Mr. Justice Curtiss gave credit to Mr. Kerr as a professional land surveyor and, in particular, gave Kerr the benefit of the doubt as he was the "surveyor on the ground" during the reposting survey. The plaintiffs' council tried hard to dispute why Kerr had proportioned a shortage of such magnitude. (I do not wish to clutter this article with several drawings and details for the sake of brevity).

Item 13: June 4, 1996 (Reasons for judgement) state that "he would have considered the evidence available from plans, field notes and on the ground in 1965 and made his determination in accordance with proper surveying practices."

The plaintiffs' council questioned the noted "O.I.P.s" on Kerr's plan and suggested that they were not the original iron posts set by A. E. Humphrey, and/or they had been moved or set by persons unknown. Luckily, the learned judge did not accept this line of reasoning when tremendous survey evidence was found by Kerr and, in subsequent surveys, by our firm prior to this case.

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Note carefully that the plaintiff purchased Lot 4 in 1971, well after Kerr's reposting. The plaintiff surprisingly placed great emphasis on a "Site Certificate" done by a long time friend of mine, David Trevorrow, BCLS, which showed registered Plan 8221 dimensions (i.e. a frontage of 197.2 feet).

However, this plan was utilized by the plaintiff's council whenever possible.

I wish to stress that David had all of the usual warnings and disclaimers on his "C of E," especially the one we all rely on regarding the fact that these drawings and offsets to structures are not to be used for defining boundaries. However, this plan was utilized by the plaintiff's council whenever possible.

In case you are wondering where our present firm comes into this scenario, we did a subdivision plan including a road dedication adjoining said Lot 4, and northerly from it in 1988. Several lots were consolidated into a single lot, then further re-subdivided by a bare land strata plan. Bear in mind that our subdivision plan, the bare land strata plan and further rights of way are all registered and deposited in the New Westminster Land Title Office. Now the fun begins!!

W. A. (Bill) Tunbridge, my father and current partner, found an identical 10 foot discrepancy with Plan 8221 north of Lot 4 in 1971. Indeed, the lots more to the north of Lot 4 were found to have an excess frontage of 10 feet. Remember that Kerr found a cancelling shortage of 10 feet involving Lot 4 and the lot immediately north of it but didn't ascertain its source.

As an aside, consider what Kerr did; between the nearest undisputed survey (road) evidence he found a shortage of 10 feet and proportioned this over 2 lots. (i.e. the owner of Lot 4, Plan 8221 had a registered frontage of 197.2 feet which Kerr posted as 190.6 feet) He was there, you were not, think of fences, occupation and so on. No other lot corners were in any way disputed.

Next, consider doing a subdivision plan in 1988. You are faced with an O.I.P. at the (road) N.W. corner of Lot 4 set by Kerr in 1965, 23 years previous. It obviously doesn't match Humphrey's original dimensions on east/west bearing. Do you throw out what Kerr did or consider it as being the "accepted" corner undisputed for 23 years? Our firm chose to accept it, many of you will disagree, or will you?

Houses were constructed on the strata lots we created adjoining Lot 4 in 1989, as well as a major wall, new rights of way, and several very visible surveys during building construction and "driveway" creation. No complaints from the owner of Lot 4 were ever lodged.

Amazingly, our firm was engaged by the owner of Lot 4 in 1988 to do building tie-ins, and future concept plans. His frontage shown on our proposed plans reflected Kerr's reposted distances, not 197.2 feet as per Plan 8221. Said owner was made very aware at the time that our firm considered his frontage as 190.6 feet as we so indicated on that plan.

In 1994, the plaintiff commenced this action claiming trespass of the strata lots which adjoined his Lot 4. Mr.

Humphrey's original field book was located in our office. Contained therein in Humphrey's writing are notations showing "849.4", "859.3 old" and "appears to be 9.9 short of old...." Additionally, Lot 3's road frontage is shown as 187.2 (197.2 is crossed out) and the frontage of Lot 1 (more to the north of Lot 4) is shown as 210 feet, not 200 feet as Humphrey has crossed out, and is as per Plan 8221. This relates perfectly to the shortage Kerr found, and the subsequent excess W. A. Tunbridge found. I proved mathematically that originally Humphrey intersected the "road" from the north west to a temporary point, then went 200 feet southerly to create the south west corner of Lot 1; his intersection point was 10 feet south of a known boundary line yielding the 210 foot true frontage of Lot 1. Humphrey's Plan 8221 shows a 200 foot frontage as previously stated, mistakenly from his intersection point.

"...we have prime evidence that the original surveyor knew he had made mistakes but unfortunately did nothing officially to correct them..."

Here we have prime evidence that the original surveyor knew he had made mistakes on Plan 8221 but unfortunately did nothing officially to correct them at the L.R.O.

Prior to the actual trial dates, any consideration of negligence on the part of our firm was dropped by the defendants and suddenly we were no longer "Third Parties." Time to celebrate right? Wrong!!

In order to release us as "third parties," our solicitors agreed to work with the defense. What did this mean? Simply stated, all of our time and effort would be done for free, we were paid nothing. If the defense won the case, that would be the end; if the plaintiff won, then a brand new trial would result between us and the defendants. If you tire of reading this rather long article, imagine living through this ongoing stressful process for 2 years.

Item 19: (Reasons for judgement) "The result of this finding is that, while the plan filed in the Land Registry recorded the westerly boundary of Lot 4 as 197.2 feet, the monuments placed at the time delineated Lot 4 as having 187.2 feet frontage - that is the registered plan and the boundary markers contradicted each other

Item 20: (Reasons for judgement) "A plan filed in the Land Registry does not relate to the ground until the monuments shown on the plan are placed...The monuments themselves are an integral and necessary part of the plan's delineation of Lot 4."

Part Item 21: (Reasons for judgement) "Boundaries are best understood by seeing them on the land rather than viewing a plan alone."

Items 22 and 23: (Reasons for Judgement) Consider Sec. 23 (1)(i) and Sec. 25 (1)(d)(2) of the Land Title Act.

Item 25: (Reasons for judgement) "Which of the conflicting descriptions should prevail? The notation of 197.2 on the plan itself or the iron post driven into the ground, which in effect says 187.2?" (Note that Humphrey actually set a wood post, not an iron post at the north west corner of Lot 4, but this is a minor point).

Item 26: (Reasons for judgement) "I am satisfied that the placement of the original monument decides the issue in this case."

The plaintiff's council argued forcefully that basically posting plans were worthless and indeed do not affect the land's title.

The learned judge did not accept this line of reasoning and was made aware that the surveyor conducting a legal reposting is still under the same duty of care, quality, as on a subdivision plan.

Item 32: "The evidence establishes the original limits in this case. The plaintiff's property never had a frontage of 197.2 feet; and there is no trespass by the defendants.... The argument that the plaintiff took indefeasible title to Lot 4 is of no use to the plaintiff because the Lot 4 it got did not have the 197.2 frontage claimed."

Item 34: "Here the survey evidence provided the objective evidence necessary to decide the issue."

Item 36: (My favourite) "The plaintiff's case is dismissed."

It is impossible to convey the enormity of this case to you in this article but it is my hope that it has made you think, key aspects stood out for you, and that now very important and recent "case law" emerges from this case which may be useful to you.

The actual "piece of land" claimed as trespassing by the plaintiff would have been a slender triangle of land in my opinion worth about $5,000 to $7,000.

The actual cost of this trial including our lawyers, the plaintiff's lawyers, and the defendants' lawyers likely exceeded well over $100,000.

"...our firm lost close to $20,000 not including the associated stresses..."

I am convinced that a case(s) like this will happen to 90% or more of every practicing land surveyor during his or her career.

In billable hours, our firm lost close to $20,000 not including the associated stresses involved which translated beyond our office to my house where a server awaited my late arrival one night to subpoena me. Try explaining this to two young daughters who asked "are you going to jail, Dad?"

The knowledge and professionalism demonstrated by F.E. Tunbridge (my former partner) and my father were outstanding throughout the trial. Their knowledge of surveying and surveying law has always impressed me and their first hand knowledge of Humphrey's handwriting could not be disputed. I could never pick two more adequate people to be "on my side" on any case, anywhere.

Guess what, the case was just recently appealed and then dropped. It's over again, this time hopefully forever.

Best of luck and good surveying all.