

Educational Corner “Stones”

The Facts Relative to the Fine Lines

By Michael Marlatt, OLS

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“...may result in the surveyor not informing the client about facts that represent potential interests and claims...”

In the Summer, 1997 issue of *The Ontario Land Surveyor* (Vol.40, No. 3), John Middleton, OLS, CLS, outlined the problems encountered when surveyors make decisions and express opinions about adverse possession, beyond their expertise, and provide reports that misinform or mislead the client about the extent of their title. During the course of comprehensive file reviews we observe other instances where the surveyor's opinion is not only beyond his or her expertise, but may result in the surveyor not informing the client about facts that represent potential interests and claims affecting the client's title, enjoyment, or use of the land. In these instances, as in the adverse possession situations, the client may be misinformed and misled. Under S. 21 of O. Reg. 42/96, the Performance Standards Regulation, the surveyor is required to show all topographic information that indicates an “encroachment” or that “may indicate an interest in the title to a surveyed parcel”, together with “all survey data necessary to define” its position.

While a dwelling, garage, or commercial structure that is partially situated over a boundary is usually noted and reported, ancillary structures such as eaves and troughs, sheds, and concrete or asphalt pads, and driveways so situated are often not located, not illustrated, or not reported to the client. Most often the stated reason is that the field staff “forgot” or “missed” the information; however,

sometimes the stated reason is to the effect that the shed was “moveable”, or was of “no value”. In other cases the reasoning is that “we never show overlapping eaves because a lawyer views them seriously, as having the ability to jeopardize a deal”. In any case, by not locating, illustrating, or reporting such circumstances, the surveyor has failed to provide the client with factual information necessary to facilitate the client's own determination regarding the significance of the structure overlap and what subsequent action to take.

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“It is more appropriate to provide the information as a statement of fact;”

In those instances where the surveyor illustrates structures overlapping boundaries and reports them as “encroachments”, the Department recommends that the use of the word “encroachment” be avoided. The use of the term, which in the legal sense¹ implies an unlawful act, suggests a conclusion beyond the expertise of a surveyor to provide. Since a boundary could be created by a severance that established a line beside a structure but under the eaves, or satisfied a minimum new parcel frontage that did not enclose or exclude all of an existing driveway, or if a shed was located over a line with permission of the neighbour, it follows that a structure that overlaps or overhangs a boundary does not necessarily encroach. It is more appropriate to provide the information as a statement of fact; either that the structure overlaps the boundary by a stated amount, or indicate

the direction of the tie relative to the boundary.

The existence and location of aerial utility wires that service or pass through a parcel being surveyed, may represent a limitation to the extent of enjoyment or to the development of a parcel. Some surveyors do not locate and illustrate such features based on the opinion that they are not significant. A main service pole line crossing a series of properties, with service drops at each parcel, may be sanctioned by executed, but unregistered, agreements with prior landowners; and may not be readily capable of revised location by the utility company. Individual service feeds to dwellings often include lines that cross one or more properties to service neighbouring dwellings. In any case, again, the client should be informed of the existence and location of these facts, and have the opportunity to be aware of, and deal with, any alternative arrangements with the service provider if the client deems it necessary. For example, before starting construction of a back yard pool or tennis court, or erection of a new two and a half storey dwelling or small apartment building.

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Further, utility service works, both aerial and buried, are usually located within unopened lanes and streets by general permission and arrangement with the vested municipality. Reference plans prepared to facilitate closure and conveyance of such lands often ignore the

existence of utility structures. The facts relating to the existence and location of such works should be drawn to the attention of the municipality when it proposes to close and convey such lands. This provides the opportunity to protect the works by appropriately surveyed easements, to be created and reserved at the time of conveyance.

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"Municipal drainage ditches which cross lands being surveyed may also represent a limitation..."

Municipal drainage ditches which cross lands being surveyed may also represent a limitation to the extent of enjoyment or to the development of a parcel. The fact that a large drain is within the parcel,

rather than part of the road works, may be relevant to the client as to the 'price by area' of the lands being purchased, or the minimum area of useable lands available for proposed parcel development. A decision, or 'opinion' of a surveyor that such information is neither important nor relevant deprives the client of the opportunity to address, or ignore, the matter as the client, possibly in conjunction with legal advice, may decide.

The surveyor is the land professional uniquely authorized to provide an opinion as to the location of the boundaries of parcels of land. Once the boundaries are determined, the surveyor, as the professional person on the ground, is also uniquely positioned to bridge the gap between the theoretical 'title' determinable through documentary information, and the parcel on the ground by locating the actual facts and circumstances that may exist to either add or detract from the client's interests. The

existence and location of those facts and circumstances must be noted, illustrated, and reported; to both inform the client, and to permit the informed client to determine his or her own responses.

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"...locating the actual facts and circumstances that may exist..."

¹Encroachment - The unauthorised extension of the boundaries of land. *Osborne's Concise Law Dictionary*.
Encroachment - undue or unlawful trespass on the privileges, jurisdiction, etc, of another. *The New Webster Encyclopedic Dictionary of the English Language*.

