LAW AND SURVEYING

Legal Surveys Division-Department of Justice

EDITORIAL

The Surveyor's Certificate and Completion of Condominium Construction

There has arisen in the past few months some question in the minds of surveyors, developers and solicitors wishing to register Condominium plans, as to the meaning of completion of construction. We have to date been saying that complete means complete, done, past tense, no more work left to be done. However, we have been and are presently shading this somewhat in practice. We have allowed the registration of projects where, for example, the landscaping (particularly in winter) and perhaps the inside finishing, painting, etc. have not been completed.

Surveyors preparing condominium plans and surveys have in certain instances signed the surveyors certificate signifying completion, before, in fact, the construction is finished. For example, a surveyor recently signed the surveyor's certificate on an incomplete condominium project and passed the plans to his client. The developer and his lawyer immediately moved to register the project where only the wall framing, basements and roofs were complete (no outside brick, heat, hydro, plumbing, etc.) and argued that the Unit boundaries were fixed and that our responsibility ended with the determination of extent of title. (6 units had 1 foot of snow inside.) They argued further that we in Land Registration were not public watchdogs, that the doctrine of **"caveat emptor"** should prevail and that it was none of our business whether or not the various things inside or outside a Unit were, in fact, completed. Our response was to state our position under the Act and give the reasons for our policy.

The Condominium Act, Sec. 4 (2) states: **"A description shall not be registered unless it has been approved in accordance with the regulations"** and the regulations (O. Reg. 299/67) provide for:

(a) field examination by our staff, Sec. 35 (2)

(b) and under Sec. 43 (1) (e) a certificate by the surveyors as follows:

"I hereby certify that the buildings shown on this plan are in existence and that the units designated on this plan substantially represent the units within the structure."

The Examiner of Surveys then, prior to approving a plan for registration, is empowered and further has the duty to make field and office checks as necessary to be satisfied as to the correctness of the information shown on the plan, including the information that **"the buildings are in existence",** as stated in the Surveyor's Certificate

There has been discussion on the meaning of the words **"in existence"** in this context. It has been argued that a building is in existence even though only the basement, wall framing and roof have been built. Reference is made to Sec. 4 (1) (e) of the Act which requires that the description contain **"a certificate by a surveyor that the buildings have been constructed and that etc."** It would seem that the **"in existence"** of the surveyor's certificate of Form 14 of the regulations means the same as the **"have been constructed"** of the Act; in fact, no interpretation of the regulations could override the statutory principle stated in the Ac.

In the Explanatory Notes for Bill 65, (which ultimately became the Condominium Act 1967) presented to the Legislature by Mr. Wishart, in explanation of Sec. 4 (1) (e) of the Act, appears the following:

"The certificate is required — to ensure that the buildings are completed before the Act is invoked. The building must be completed to avoid the possibility of hopeless confusion. If the Act could be invoked before or during construction, and if several units were sold when finished and the remainder were never finished, the proportions of common interests and for sharing the common expenses would be meaningless, and no happy resolution of the difficulty can easily be made available.

This appears pretty clear-cut and it is obvious that the legislative draughtsmen did not feel that the Unit buyer should rely on his own judgmen and common sense for protection, but felt that some protection should be written itno the Act. Some will argue that these Explanatory Notes represent the intentions and reasoning of those draughting the preliminary Bill, but not necessarily the philosophy accepted and passed by the Legislature. This, of course, is true, but when the Act or portions of it are passed in the form presented, then it is reasonable to conclude that the Legislators accepted the reasons given by the framers.

Alvin B. Rosenberg, Q.C. in his **"Condominium in Canada"** ends Section 402.2 (dealing with the Ontario Act) with the words: **"it is clear that the Act can only be invoked with respect to completed projects."**

J. Richard Shiff, Q.C. in his lecture entitled **"The Flying Fee"** (See **"Special Lectures 1970",** Law Society of Upper Canada, pages 89 and 90) says in his comments on Sec. 4 of the Condominium Act: **"It is clear that the section contemplates a physically completed project prior to the Condominium being declared."** He goes on to say that this **"requirement of completion of the buildings prior to the creation of the Condominium can cause somewhat of a financial burden to the builder . . ."**, but then points out that financing during the progress of construction has in some instances been arranged through Central Mortgage and Housing Corporation and Ontario Housing Corporation. He seems to feel that this possible difficulty in arranging financing is something with which the developer will have to live.

So state some of the authorities outside government; next is an examination of some of the possible implications of Condominium registration prior to completion of construction.

1. If, as Professor R. C. B. Risk points out, the Act could be invoked during construction and if some units were sold when finished and the remainder (due, for example, to the developer going bankrupt) was never finished, the percentage proportions of common interests and common expenses would be meaningless.

2. Sec. 16 (1) of the Act provides that **"the obligation to repair after damage does not include the repair of improvements made to units after registration of the declaration and description".** Subsections (2) and (5) provide that if the declaration is silent **"the corporation shall repair the units and common elements after damage".** Considering now the registration of a 250 unit town house project where 10 units are completed to broadloom and furniture, as model suites and the rest are under various stages of construction down to the last group of 50 units which have only basements, 2" x 4" framing in the walls and finished roofs. Suppose that a number of years later, long after initial construction was completed and all units sold, a block of 20 of these last completed units is completely gutted by fire. The damage is less than 25% of the value of the whole project, so the corporation automatically moves to repair these damaged units at common expense in accord with Sec. 16 of the Act. Any, or all, of the owners of the model suites could refuse to contribute

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to the repair of these units beyond the basement, stud walls and fininshed roof stage. The owner of the model suite unit on the other hand, would quite rightfully feel entitled to the repair of any damage even to fixtures or finished kitchen closets.

The obvious difficulties and inequities here point up the dangers of a policy other than that being used. If we have erred, it is in the shading of the interpretation of **"have been constructed"**, to allow registration before final completion down to the dotting of the last **'i"** and the crossing of the last **"t".**

Bankruptcy prior to registration would affect only the developer, his creditors and inconvenience proposed purchasers. However, bankruptcy after approval and registration and **before** completion would surely bring legitimate and severe criticism of government and our condominium policy.

We suggest, therefore, that any surveyor signing the surveyor's certificate under the Condominium Act keep in mind that he has two responsibilities: Firstly, the traditional one, to set and illustrate boundaries and ownership, and secondly, a new responsibility conveyed by the Condominium Act, to certify that the project is, in fact, in existence and construction is, in fact, complete. We believe any conflict that may arise in determining this responsibility can be settled by referring again to the statute — Section 4 (1) (e): **"A description shall contain a certificate of a surveyor that the buildings have been constructed . . ."**

The surveyor should realize that the success of the project from the unit owners' view can at times rest squarely on his shoulders. If he certifies completion before the construction is finished and on this false assurance the half finished project is registered and then goes bankrupt, the repercussions for him financially and professionally could be very serious.

May I suggest that we meet this new kind of professional responsibility carefully and competently and ensure that our certification is trusted and accurate.

Your questions or comments are welcomed.

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QUESTIONS AND ANSWERS

The following question probably has arisen in the minds of all practising land surveyors who have reached their own decision in the matter.

In answer to the question we quote an opinion of the late Marsh Magwood, Q.C. as printed in the booklet, **Legal Principles and Practice of Land Surveying** on pages 17 and 18.

Q. What are the duties of a surveyor to his client? Is it sufficient for a surveyor merely to re-establish the limits of lands described in a deed of land given to him by the client or his solicitor, or is it incumbent upon the surveyor to make his own search of the lands as well as adjoining lands?

A. "Following one of the important principles laid down by Justice Cooly, a surveyor should in re-defining boundaries, conduct his search for evidence and assess it in the same manner as it might be assessed in a court.

Clearly, therefore, one of the important duties of a surveyor is to search for evidence, and that means **all the evidence available** of the particular boundaries or limits he may be called upon to re-define.

Whereas the majority of surveyors appear to understand very well that all the evidence of a client's property may not be contained in his deed alone, there are a great many surveyors who feel, if a client or his lawyer hands them a deed with the simple instruction to "survey it and report any encroachments", their duty to the client is satisfied if they adhere strictly to, and monument, the limits therein described, showing the various encroachments.

I do not know how or where this conception came into being, but I can speak with considerable authority on the deplorable results of such practice.

Let us try to examine this situation in a logical manner. Each and every property line, limit, boundary, etc., separating one ownership from another is or should be a matter of interest to both owners. In effect, all properties have adjoiners and the lines separating properties are not the exclusive responsibility of any one owner. Theoretically therefore, all deeds should reflect this condition of contiguity and if this were so there would be no overlaps of paper title.

In fact of course contiguity of title is not as common as it might be, owing to faulty descriptions, physical loss of evidence, erroneous surveys and poor conveyancing practice. It is a rule of law . . . that the limits of land described in a deed may under certain circumstances be varied by extrinsic evidence, and in surveying land described in a particular deed it must be realized that a lead to the existence of further evidence may be found in **adjoining** deeds.

The duty of a surveyor therefore is not merely to lay out his client's land, but lies more in the direction of determining from all the evidence available that land to which his client is entitled, no more and no less, and in so doing the surveyor is bound to consider the rights of adjoiners.

The necessity then for searching adjoining titles devolves upon someone. The question is, upon whom? Should a boundary prove to have been erroneously re-defined owing to failure to search adjoining titles, then in the lawyer's opinion the surveyor was negligent, and in the surveyor's opinion the lawyer was negligent in not providing him with searches of adjoining lands.

It seems to me that the answer must be sought in the respective training and interests of the two professions. In conveying land, a lawyer, in accordance with the best practice, is interested in giving a good paper title. He concerns himself with tracing ownership back through a 40-year period and thus establishing a good chain of title. Such things as mortgages, liens, easements and other rights and interests are exclusively in his province. He is also interested in the physical extent of ownership but in this connection he relies upon the surveyor who is trained to detect in a deed any references to natural or artificial features which will most likely still exist on the ground and which frequently are all-important in defining the limits of the property.

The surveyor with his training in the science of measurement of distance and bearings, his familiarity with the survey statutes, etc., is in a far better position to deal with the various governing factors in descriptions. His interest therefore in searching titles is very specialized and quite different from those of a lawyer.

With this in mind, and in view of the fact that the surveyor signs the plan, I think a good case is made for the surveyor to do his own searching."

QUOTABLE QUOTES

Following is an interesting legal opinion as to what constitutes an accretion.

Re Bulman, 57 D.L.R. (2d) p 658

"Accretion means adding to existing dry land by horizontal progression outwards from the shore, gradually, naturally and imperceptibly. Where water recedes from the land, or where land by alluvial deposit is added to the foreshore, there has been an accretion for the benefit of the adjoining owner. However, where there has been a vertical development over a wide area, rather than a gradual extension of existing upland, as where a fast flowing river laden with sand and silt deposits the sand and silt in a fan shaped pattern at the entrance to a lake so that the lake bottom appears above the water level in the form of sandbars which eventually become joined to the upland by further sanding and silting, there has been no accretion. This is so even where the land only becomes arable by the gradual advance of the top soil across the raised lake bottom from the existing upland, since nothing turns on the nature of the soil."

(Clarke v. City of Edmonton (1929) 4 D.L.R. 1010, (1930) S.C.R. 137; A.-G. B.C. v. Neilson, 5 D.L.R. (2d) 449, (1956) S.C.R. 318, apld)