

RE-USE OF OLD SURVEY DOCUMENTS

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"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." -- LeBlanc v. DeWitt (1985). 34 R.P.R. 196 (N.B. Q.B.)

Old Documents Should Not Be Re-Used

It appears to be the practice that a lawyer acting for a mortgage company or a real estate agent will call a surveyor and ask the proprietor for a copy of a plan of an old survey for a parcel of land. The term "old survey" is used to define a document which has not been prepared for the current transaction, but was rather prepared previously, either for a real estate transaction or for a mortgage application. In some instances, the surveys may be only months old, and at other times they may be many years old. The question has arisen: What is the liability of both the surveyor in issuing the plan and the lawyer or real estate agent in re-using the old plan? Although the land surveyor can do little to curtail the person from re-using the plan if he finds a copy elsewhere, the surveyor will not promote the re-use of the documents. Due to both the liability that he is incurring, as well as his professional responsibility, the recommendation must be made to members of the legal and real estate profession that they not participate in this re-use.

We have to look at the purposes to which the mortgage company and the lawyer put the survey. The mortgage company is obviously advancing money to a purchaser and the security for that advancement is the property itself. It is, therefore, necessary that good title exists for the property, and that the paper title portrays the property properly. The term "paper title" is that portion of title to a parcel of land that is registered in the Registry Office and which is searched and verified by a lawyer and, if it is incorrect, may subject the lawyer to a claim in negligence. Paper title does not necessarily show the true physical aspects of the parcel of land. As was outlined in the previous paper, The Survey and Real Estate Transaction, misdescription may have always existed from the time the parcel was first described on either a plan or description. Also, many factors may have occurred over the years to physically change the true nature of the property, - i.e., the erection of a fence, near or over the property line. While paper title may very well show that "A" is the owner of a parcel of property, "B" very well may have acquired a legal right to a portion of the property by the principle of adverse possession, or the property itself, as owned by "A", may be misdescribed in the deed.

The survey of the property indicates the actual physical characteristics of the parcel of land in relation to the boundaries and extent of title **on the date that the survey was prepared**. A survey, therefore, serves as a comparison between the actual physical characteristics of the parcel of land (extent of title) and the paper title. As long as the two correspond, a purchaser and the mortgage company, which takes the property as security, can be satisfied that they are getting what they believe to be getting. The survey, therefore, is vital to the requirements of the mortgage company's verification of the paper title and the security which they require.

The survey is, as well, a "representation" as it represents the physical characteristics, or extent of title, as of a certain date. It can be argued that the surveyor preparing the survey makes a representation not only to his client for whom it was first prepared, but also to any other person that the surveyor may provide copies to in the future, or to any person the surveyor must reasonably assume may obtain and rely upon the survey in the future. It is this notion of representation that must be considered in determining whether or not the surveyor can, as a responsible professional, re-issue old plans or, if the lawyer as a responsible professional, should re-use the plan.

A representation made in a contractual context has always been actionable. A surveyor who contracts with a client to prepare a survey has a duty to exercise reasonable skill and knowledge in its preparation. If the survey is not accurate, the surveyor will be held liable by the Court for breach of contract. In this context, see MacLaren-Elgin Corp. Ltd. et al vs. Gooch, (1972) 1 O.R. 474. In this decision, the Supreme Court of Ontario held that a surveyor is under a duty to use reasonable care and a reasonable competent degree of skill and knowledge. A surveyor is under a duty to supply accurate information which could reasonably be relied upon.

The more important issue, however, is the situation where the surveyor has not been contracted with to prepare a new survey, but is merely asked to provide an old survey which may have been prepared many years before. There may be a small fee charged for the copy or no fee at all; however, the situation in law, as will be seen, is the same. The important factor is that a representation is being made by the surveyor when supplying an old survey, whether for payment or gratuitously.

Prior to 1964, Courts had ruled that where there was no contract of fiduciary relationship, a negligent misrepresentation was not actionable. In 1964, however, the English House of Lords, in the decision of Hedley Byrne & Co. Ltd. and Heller & Partners Ltd., (1964) A.C. 465, dramatically changed this law. In that decision, it was held that despite the lack of contractual or fiduciary relationship, a negligent though honest misrepresentation, whether verbal or in written form, is actionable. The Court based this decision on the fact that the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts that party to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgement. The effect, therefore, is that even in a gratuitous situation, the duty will arise.

Since Hedley Byrne, the Courts have taken to heart this "duty of care" and have applied it quite liberally, both in England and in Canada. In Town of the Pas vs. Porkey Packers Ltd. (1976 65 D.L.R. (3d) 1 (S.C.C.), the Supreme Court of Canada upheld the Hedley Byrne principle. In that case, the Court held that a representation made to a person who does not have expert knowledge of a judgement in the matter creates a duty on the representor. If the representor is in breach of that duty, that breach is actionable despite the lack of any contractual or fiduciary relationship. To put the duty more succinctly, Spence, J. adopted the definition of the duty in Charlesworth on Negligence, Fifth Edition (1971), and quoted:

"The House of Lords has thus expressed the opinion that if in the ordinary course of business, including professional affairs, a person seeks advice or information from another who is not under a contractual or fiduciary obligation to give it, in the circumstances in which a reasonable man so asked would know that he was being trusted or that his skill or judgement was being relied on, and such person then chooses to give the requested advice or information without clearly disclaiming any responsibility for it, then he accepts the legal duty to exercise such care as the circumstances require in making his reply; for a failure to exercise that care, an action for negligence will lie if damage or loss results."

Clearly, looking at the Town of the Pas decision, a number of key elements of the duty are established.

1. A person who seeks advice or information from another.
2. That other person is not under a contractual or fiduciary obligation.
3. It is reasonable for the person to know that he is being trusted or that his skill and judgement are being relied upon.

If the above elements are present, a legal duty will arise, and if the duty is breached, then any losses which flow will be recoverable.

This same duty again set out in Toromont Industrial Holdings Ltd. et al vs. Thorne, Gunn, Helliwell and Christenson (1976) 10 O.R. (2d) 65. In this case, the Ontario Supreme Court held that a party will be liable for negligent misrepresentation if:

- a) there is a duty of care;
- b) there is a negligent misrepresentation;
- c) there is a reliance upon the negligent misrepresentation; and
- d) losses flow from the reliance.

The Court went on to hold that a duty of care arises whenever there is a "special relationship" existing between the parties which casts a duty upon one to exercise reasonable care in making a representation to the other. The Court held "special relationship" is one where a reasonable person would realize he/she is being trusted by the recipient of the information to be in a position to give advice or information on the subject matter involved. The trial decision in Toromont was upheld by the Ontario Court of Appeal in 1977 14 O.R. (2d) A.D. 7).

This duty was also dealt with in Windsor Motors Ltd. vs. District of Powell River (1977) (1969) 4 D.L.R. (3d) 155 (C.A.). In that decision, the Court of Appeal held that the law implies a duty of care when and where a party seeking information from one possessed of special skills trusted that person to exercise due care, and the party who made the representation knew or ought to have known that reliance was being placed on his skill and judgement.

What then is the implication of this law on a surveyor supplying an old survey to a mortgage company or a lawyer acting on its behalf? Does the land surveyor fall within the special duty created by Hedley Byrne and adopted by the Supreme Court of Canada? The answer must be an unequivocal "yes". When a land surveyor supplies an old survey, whether gratuitously or for a fee, he is accepting a legal duty to exercise skill and care under the circumstances. The mortgage company, or its lawyer, has come to the land surveyor in the ordinary course of business and is seeking information from him. In this case, it is a survey for a particular parcel of land. It is reasonable for the surveyor to assume that he is being trusted and that his skill and judgement are being relied upon by the mortgage company.

The importance then becomes what skill and judgement is being relied upon? That is the crux of the problem. Does the mortgage company believe that the survey represents the actual physical characteristics of the property? In the Kenneth Glenn Kovalik et al vs. Grant Lyis Schick et al decision, the County Court of Winnipeg made an interesting determination. It held that where an offer provided for the vendor to supply a survey, it meant one that was up to date. The Court further held that the ordinary meaning of the words "survey certificate" is that the property and buildings located on it are shown. In other words, that it be an up-to-date survey.

When a mortgage company received an old survey is it expecting that, despite the fact that it is old, it represents the property today? This is the argument the mortgage company will make. The mortgage company receives the survey and relies on the fact that it accurately portrays the physical characteristics of the parcel of land. If, in fact, the physical characteristics have changed, has the surveyor not breached the Hedley Byrne duty? The answer is arguably "yes" and certainly puts surveyors in a position where actions can and likely will be successfully brought against them.

In addition to our responsibility and the possibility of negligence in re-issuing these old documents, one must look to our professional responsibility as a totally separate item. Professional responsibility, as seen by the land surveyor, is the manner in which he undertakes business in order that the public interest be protected. The argument has been advanced that the surveyor should not be concerned in giving a copy to a member of the legal profession because the lawyer will then be assuming responsibility for the use of the document. The surveyor cannot advocate this attempt to transfer the responsibility for the re-use of the survey document to another professional.

In the past few years, many surveyors have been placing the copyright symbols on documents. This copyright is a clear notice to the user that the right of copyright rests with the surveyor. We would point out that the right of copyright rests with the surveyor on all prepared documents, whether or not they have the symbol. However, the copyright symbol is a reminder to the user of the rights of the surveyor.

The question is raised periodically as to how old a plan of survey or building location survey can be before it can be considered out of date. This, of course, is an impossible question to answer. We would point out, however, some general guidelines. Any plan prepared showing a building under construction or a foundation **is out of date and should never be re-used once the building has actually been constructed.** It is unbelievable to find the number of documents showing only basements which are used in title transactions some 10, 20, or even 30 years after they were prepared. The basement or foundation survey is prepared for a very limited use, being to enable the contractor to get a draw on funds and to shown the municipality that the house is being constructed, at least the basement level, to comply with the local building bylaws. We stress that this is only at the foundation level because once the house has actually been constructed, the purchaser may find that many portions of the house, brickwork, porches, etc. do not comply with the local building by-laws. The basement survey should never be used in the real estate transaction, either for a sale or for the mortgage for the purchaser. This type of survey becomes outdated very quickly.

It is impossible to set any guidelines on how soon other surveys go out of date as it is determined by a variety of factors. We could point out, however, that a general rule of thumb should be that the survey is either prepared or brought up to date during the time of the current real estate transaction. The surveyor is the only person qualified or able to determine the suitability of the old document.

Conclusion

It is obvious that the professional, in today's society, has a greater responsibility and a greater risk of liability than ever existed before. In order to undertake day-to-day professional duties, one must be ever vigilant to protect clients and oneself from chance of future problems.

It appears, from the litigation reported today, that the lawyer must be cautious in giving advice to his client, and this includes the mortgage company. The recent case of Lac Mortgage Company v. Reginald Tolton at the Queen's Bench in Manitoba emphasizes the lawyer's responsibility and the standard practice of a prudent solicitor: "The defendant failed to follow the accepted standard practice of a prudent solicitor in advising his client of the danger of advancing mortgage monies without a building location survey, and that he is liable to the plaintiff for any damages following from his failure".

It is of interest to note that the Judge has not simply stated that the lawyer had to notify the mortgage company to obtain a survey, but rather the danger of not getting one. Justice Jewers also ruled that the defendant was not entitled to rely on the sworn declaration of the owner.

Therefore, as it relates to the survey in the real estate transaction, it would appear prudent that a lawyer or real estate agent not re-use an old survey document without having the same brought up to date or re-surveyed. The fact that one indicates to a client that a document is old would appear to the land surveyor as being insufficient notice to the client of what is missing from the plan. It is always important to address what is not on the plan rather than only what is on the plan.

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".¹¹ 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.

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