The Boundary Point
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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

In this issue we consider the remedy available under a title insurance policy for an encroaching septic system tile bed. A purchaser of rural property did not get an up-to-date plan of survey and after closing discovered the encroachment. In this proceeding, the title insurer pursued a claim against the neighbour, but in the name of the insured. The claim was dismissed, but what can this tell us about the relative value to the house buying public of a title insurance policy as opposed to a survey plan in managing risks?

Title Insurance, Surveys and Managing Encroachment Risks

Key Words*: encroachment, boundary, survey plan, septic system, title insurance, subrogation*

In *Strutt v Franko*[1], a home purchaser in a rural setting of southern Ontario discovered that the septic tile bed encroached onto the neighbour's property. Clearly, this is information that could have been discovered if a plan of survey had been obtained prior to closing. What is especially interesting is the fact that this dispute ended up at all in Small Claims Court. In addition, this claim was brought by a title insurance company in exercising its rights of subrogation[2]. For the

[1] *Strutt v Franko*, 2013 CanLII 71368 (ON SCSM), http://canlii.ca/t/g1sj7

[2] From: http://en.wikipedia.org/wiki/Subrogation: "Subrogation is the legal doctrine whereby one person takes over the rights or remedies of another against a third party. Rights of subrogation can arise two different ways: either automatically as a matter of law, or by agreement as part of a contract. Subrogation by contract most commonly arises in contracts of insurance. … the basic premise is that where one person (i.e. typically an insurer or a guarantor) makes a payment on an obligation which, in law, is the primary responsibility of another party, then the person making the payment is subrogated to the claims of the person to whom they made the payment with respect to any claims or remedies which are exercisable against the primarily responsible party." In Ontario, subrogation is a statutory right that exists by reason of s. 278(1) of the *Insurance Act*:

> An insurer who makes any payment or assumes liability therefor under a contract is subrogated to all rights of recovery of the insured against any person and may bring action in the name of the insured to enforce those rights.

land surveyor, *Strutt* is an interesting peek at how a home owner may receive compensation under a title insurance policy, but the insurer pursues a claim in any event – thereby not reducing litigation, but perpetuating it through the exercise of the right of subrogation.

Likewise, for the real estate lawyer, this is also a useful case to consider. The making of a claim under a policy on behalf of a client may bring monetary satisfaction in some respects, but that may come at an unexpected cost. For example, the subrogated claim which may be advanced by an insurer against a client's neighbour brings the risk of forever poisoning that neighbourly relationship. Arguably, this may not be a monetary "cost", but it may be a very real and undesirable consequence of making a claim[3].

Most of the dispute in *Strutt* was about the information given by the seller to the buyer in the agreement of purchase and sale (APS) by which Strutt had bought the property. In fact, the process of offer and counter-offer which led to a final version of the APS is described by the court as follows:

> Before putting in an offer, Strutt testified he had discussions with his agent about whether the septic system was working properly. To provide some protection for Strutt, the agent had included in the proposed Agreement of Purchase and Sale ["the Agreement"] [APS] the following wording:
>
> > Seller warrants that, to the best of his knowledge and belief, the septic system was installed according to all relevant regulations at the time of installation and continues to operate satisfactorily. On or before completion of this transaction, the Seller shall provide confirmation from the Ontario Department of Health that there are no outstanding work orders on file with respect to the septic system. Seller shall have the septic tank fully pumped out at his own expense, on or before completion.
>
> In the give and take leading up to the executed Agreement, Strutt acknowledges the wording was changed to the following:
>
> > Seller states that, to the best of her knowledge and belief, the septic system was installed according to all relevant regulations at the time of installation and continues to operate satisfactorily.
>
> In short, there were three amendments: 1) the second sentence was deleted 2) 'warrants' was changed to 'states' and 3) 'his' was changed to 'her'. Strutt testified his agent had told

[3] In some respects, one could argue that the making of a claim against a neighbour was simply inevitable – the neighbour was to blame for having built the encroachment. Accordingly, the cost of attempting recovery might as well be incurred by the insurer rather than the homeowner who has been wronged.

> him the first redrafted sentence should be 'okay'. Strutt wanted to be sure the septic system was not leaking into the backyard where his children would play[4].

The fact that this representation turned out to be untrue (there was an encroachment of a portion of the septic system) was characterized by Strutt in his claim as a "negligent misrepresentation". How then did this case turn into a consideration of the value or importance of a survey for Strutt at the time of buying? Was Strutt wrong in not trying to negotiate language in the APS which would provide truth about the *absence* of an encroachment? The court eventually concluded as follows:

> While Strutt testified he relied on the [APS] relative to the septic system, he took the advice of his real estate agent not to get a survey and in reality relied instead on title insurance. There was no evidence led that had Strutt been aware of the fact his septic system encroached on the [neighbour's] lot he would not have proceeded with the transaction. The issue did not stop [the prior neighbour] from buying the neighbouring lot. While a close call, I find the required reliance has not been demonstrated to the degree necessary to establish [liability]. If a vendor tells a purchaser there is no flooding, there is little in the way of options for the purchaser than accepting the statement in most situations[5].

Upon discovering the untruth of the septic statement, Strutt claimed under his title insurance policy and the insurer responded by paying for its relocation … and also pursued its subrogated rights. This was not lost on the court when it dismissed the claim. Before doing so, it summed up the case and its disposition as follows:

> While the vendor/purchaser relationship between the parties [set the stage for a duty of care on the part of the person making the statement], I find the underlying statement in issue was true. The septic system was built according to all the requirements of the local health department. 'Relevant regulations' refers to those of the local health department. As this statement was true and accurate, it was not negligently made. There was no evidence led that Strutt relied on the statement for anything more than it plainly states, quite apart from the fact the very wording in issue was supplied on behalf of Strutt. He opted for title insurance to deal with such issues. That is his right to do so but Chicago Title, standing now in his shoes, is in no higher position. Had liability been found, damages of $3,000.00 would have been awarded[6].

From the point of view of the home buying public, this case is instructive – but necessarily only for the reasons that have been touted as justifying the importance of a survey in the context of a real estate purchase. One could say that this is a perfect example of why a survey is needed

[4] *Strutt v. Franko*, *supra*, at paras 4 to 6

[5] *Ibid.*, at para. 78

[6] *Ibid.*, at para. 85

and that the inconvenience and expense of resolving the encroachment could have been detected and addressed before the closing of the transaction. This is echoed in a recent article which appeared in the Real Estate section of a major newspaper. *Strutt* was the subject of a comment by Bob Aaron in his regular column[7] and in the *Toronto Star* newspaper. The newspaper article included the following conclusions by Mr. Aaron:

> For both urban and rural homeowners, the Strutt case provides important lessons when buying houses:
>
> - Title insurance is not a substitute for a land survey. It may pay to rectify a problem but not for the inconvenience involved, or the aggravation of a lawsuit.
> - It's far better to have a survey before closing so that encroachment issues can be resolved in advance than have to deal with them later — even if the title insurer pays for the costs.
> - A land survey is the most important document in a real estate transaction. Don't buy a house without one.[8]

These comments are perhaps welcome to land surveyors and, in many respects, make very good sense when lawyers work with members of the public in the purchase of a house. In fact this may be even more true when the house is situated in a rural setting, has a known septic system with a tile bed and there are no clear features which may allow for property lines to be identified such as a fence or a hedge[9]. In *Strutt* this certainly appears to have been the case. But is this always true? Can one draw a generalized statement of best practice from this one example? If one wishes to delve deeper, one needs to look closer at the site, what a survey did show and, more importantly, what a survey is — and is not.

[7] http://aaron.ca/columns/2013-12-21.htm

[8] Aaron, B., Title insurance will help cover costs if alterations needed, *The Toronto Star*, available on line at: http://www.thestar.com/life/homes/2013/12/19/land_survey_trumps_all_documents_in_a_purchase.html

[9] Of course a mere fence or hedge may not be a reliable indicator of a property line, but perhaps the existence of *nothing* signals a greater need for some verification of boundary location.

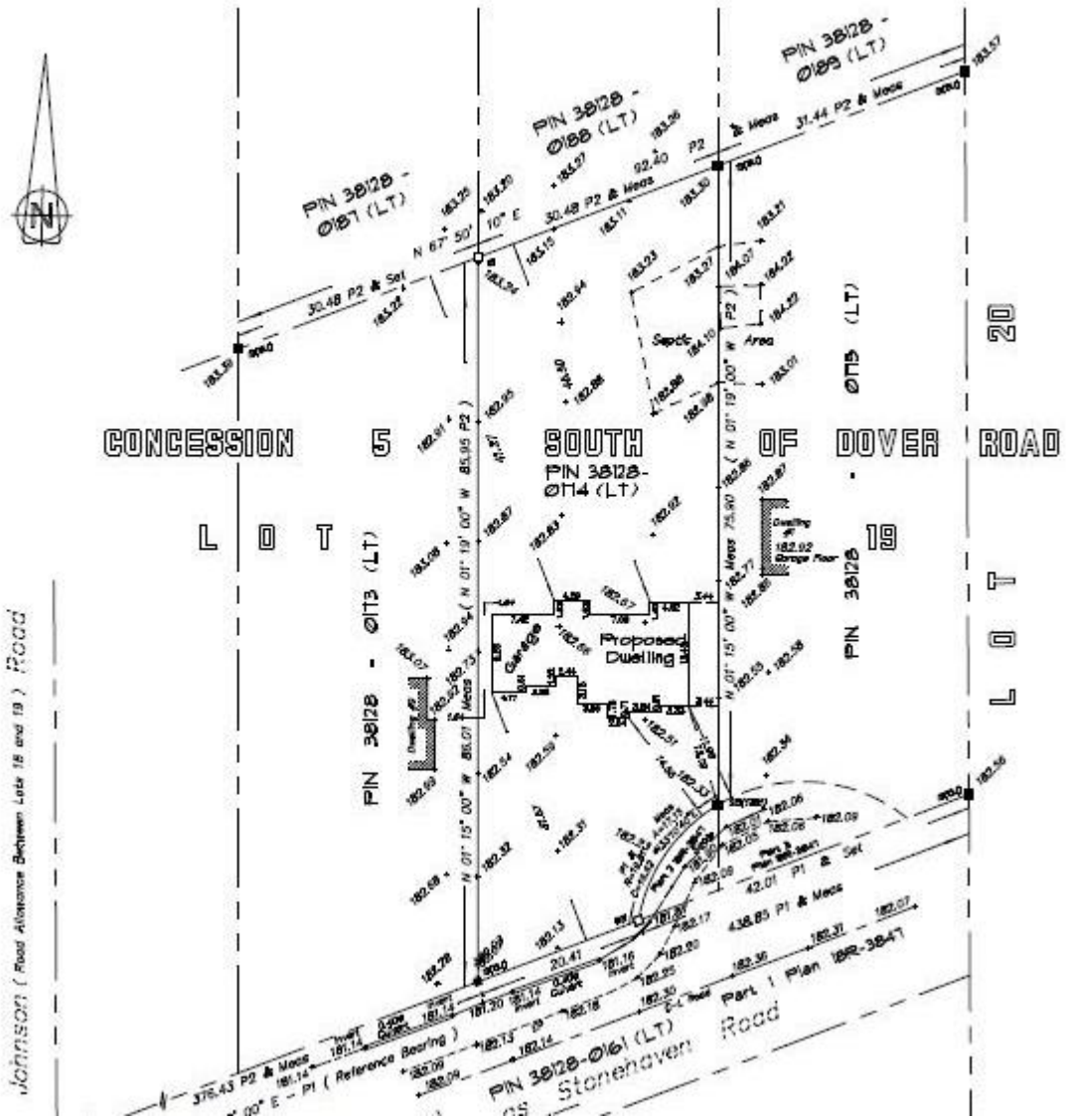
Aerial image of site – 1 Stonehaven Drive, Haldimand

Aerial photography from the Haldimand County GIS mapping website[10] shows some of the features of the site; an image from that source has been reproduced below. The image shows the relatively large lot in a rural setting. The septic tile bed is no longer visible (although it can be seen as a lighter shaded area of lawn when compared to the survey sketch below) and the lot to the west (at 5 Stonehaven Drive) is undeveloped. Nothing appears to demarcate the boundary, such as a fence or a hedge.

A survey[11] had been prepared for the neighbouring vacant lot for the purpose of illustrating a proposed building location for permit purposes.

[10] From http://maps.niagararegion.ca/Navigator/?config=haldimand ©Haldimand County, 2014. All rights reserved.

[11] Used with permission from RASCH & HYDE Ltd. All rights reserved.



Sketch for Building Permit purposes

This sketch clearly signalled the existence of an encroachment.

The standard residential policy used by Chicago Title Insurance in Canada includes the following clause as one of several specific situations which give rise to a claim:

> 13. …you are forced by the affected neighbour or a party who benefits from the easement, to remove or remedy your existing structure, or any part of it, other than a boundary wall

> or fence, or you cannot use it for a one to six family residential property or a condominium unit because: a) it extends or is located onto adjoining land or any easement…[12]

In view of the encroaching tile bed and other features, which are discussed in *Strutt*, the claim was paid out – albeit not with 100 percent satisfaction for the home buyer.

In pausing further at this point, and reflecting on Mr. Aaron's assertions one can agree that the availability of this information to a buyer before buying the property may have allowed for the problem of encroachment to have been dealt with. As noted, both land surveyors and real estate lawyers understand the value of a survey obtained in connection with a real estate purchase. However, one may also wish to consider the public view point while also getting greater insight as to the nature of a survey plan and its value. Implicit in getting a survey at the time of buying a house in order to avoid encroachment problems, is the assumption that the survey plan will be authoritative and reliable. In all fairness to lay people, surveyors themselves know that most survey plans prepared for this purpose are in fact "retracements" and furthermore, represent mere opinions. Although survey plans are not guarantees of the information shown, they are similar to "representations" of what surveyors have formed as opinions based on research and the application of surveyors' professional skill and knowledge. Ultimately, the correctness of a boundary position shown on a plan is left to the legal process to confirm – either by a court or by a specialized tribunal. Nonetheless, (and fortunately) retracements are most often reliable and, if knowledge of encroachments is wished for, then a properly researched survey plan is the best starting point. But does the public know this? Is the public better off by:

- getting a survey (which is a retracement and a professional opinion);
- negotiating the language of a representation in an APS; or,
- buying a title insurance policy?

The answer is, of course, a guarded, "It depends…". The reason for no clear answer is because the choices are not all the same in terms of protection, cost and reliability.

Perhaps the most startling thing about subsequent comments written about *Strutt v. Franko* is the unqualified declaration that a survey is assumed to be correct. It is no surprise that court decisions in Canada report outcomes in which surveyors have disagreed profoundly with respect to the location of an existing boundary. Why can the public not be made more aware of the fact that survey plans are retracements – opinions – and, at their highest, become statements of certainty only after a legal process? These facts may give small comfort to the house buyer.

[12] From the Chicago Title Insurance Company Canada website here: https://express.ctic.ca/residential.aspx and the Owner Policy Jacket here: https://express.ctic.ca/Documents/en-CA/owner_jacket.pdf

As recently as March, 2014, another reported case in Newfoundland and Labrador highlighted the potential for different opinions in respect of the same boundary. In *W.E.H. Enterprises v. McNeil*[13], the court heard from two surveyors called by the respective litigants regarding a disputed or unknown boundary. The court considered or heard evidence from four surveyors in the proceeding and ultimately settled on the fourth one, who had preferred a "new", or different location of the boundary:

> Based on my review of all of the surveyors' evidence, and as already stated, I am not persuaded that Mr. Squires accurately depicted the northern boundary of the W.E.H. property. Granted, Mr. Squires' evidence was that he relied not only upon the direction of Herman McNeil, but also physical indicators, such as a driveway, when plotting the boundary. However, given the evidence of joint use of the garage by Francis McNeil, and the McNeil family business, it was not established, on the balance of probabilities, that a driveway in proximity to the garage was indicative of the boundary between the two properties.
>
> Further, Mr. Squires provided no plausible explanation as to why he chose to position the controversial boundary in a manner which left Francis McNeil with a triangular piece of property. As well, Mr. Squires' boundary line was clearly placed without regard for the dimensions of the property conveyed to Francis McNeil under the Pennell deed.
>
> Further, and again as already stated, when Mr. Squires prepared his survey of the W.E.H. property, he used the information contained in the Holden survey, and he relied upon the accuracy the Holden survey. However, as I have already indicated, I accept Mr. Vallis' evidence that Mr. Holden's survey is very likely inaccurate with respect to the starting point.
>
> Similarly, it is my view that, after considering all the evidence, Mr. Duffett's survey plan also inaccurately depicts the boundary line, as he also relied upon Pat Holden's survey when placing his iron pins.
>
> Indeed, based upon the evidence adduced at trial, I conclude that it is most likely that no one really knew, with precision, where the southern boundary line was on the property described in the Pennell deed; nor does anyone know how much "more" or "less" the dimensions are of the property described in the Pennell deed.

[13] *W.E.H. Enterprises v. McNeil*, 2014 CanLII 9255 (NL SCTD). This decision is an example of the multiplicity of opinions that may be present at the same time in respect of the same question. In some respects, it is an anomaly for its characterization of the problem to be addressed as being one of both title uncertainty and boundary vagueness so as to result in a disputed title to a strip of land under the *Quieting of Titles Act*, R.S.N.L. 1990, c. Q-3. The court characterized the issue before it as: "the location of the boundary between the W.E.H. property and Mr. McNeil's property. More specifically, a determination must be made as to who has a better claim in title to the disputed property." (para. 12).

> However, after carefully reviewing all the evidence at trial, and as already stated, I have found that the best evidence as to the most likely location of the boundary line between the properties was proffered by Mr. Vallis, in his capacity as an expert. His evidence was credible and reliable, and I have accepted his expert evidence, without reservation[14].

Sadly, this description of the evidence and work performed by the many surveyors who ventured an opinion does not instil confidence. Yet, the ability of different professional surveyors to reach a professional opinion based on the same evidence does not guarantee a consistent outcome at all. This is not a question of negligence; it is a question that is answered by understanding the very nature of what land surveyors do. Perhaps the more accurate statement that could be made about the *Strutt v. Franko* outcome is that title insurance really was a good idea for Mr. Strutt. In failing to obtain recovery in his name, the title insurer had already paid out to Mr. Strutt. The case gives more insight about best practices in managing risk in a real estate transaction than it does about the certainty or guarantee of what a survey can say. All of this discussion does not engage the question of relative cost of title insurance as opposed to a survey – which is separate topic altogether.

Editor: Izaak de Rijcke

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[15] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

The Land Surveyor as Expert Witness

Developed with the support of ACLS and GeoEd, this online, self-paced course[16] explores all aspects surrounding the role of the professional land surveyor in Canada in assisting – as an expert witness – the decision maker in a legal proceeding. From retainer to report writing to court room, this course is a must if planning to assist in a legal proceeding as expert witness.

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[14] *Ibid.*, at paras. 133 to 138

[15] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

[16] The course qualifies for 12 *Formal Activity* AOLS CPD credits.

Note: On April 25, 2014, this self-paced course will be enhanced with a half-day workshop at the Delta Guelph Hotel and Conference Center. The event will build on the e-learning course material with mock hearings, practical demonstrations and discussions addressing:

- the qualification of an expert;
- the cross-examination of an expert to drill down and challenge impartiality and objectivity;
- the specific skill sets held by surveyors: Does mere licensure mean qualification in a formal proceeding?
- ethical obligations.

Introduction to Canadian Common Law — April to May 2014

Understanding the workings of the legal system and the legal process is essential for regulated professionals entrusted to make ethical and defensible decisions that have the potential of being reviewed by a court. This short but rigorous course immerses current and aspiring cadastral surveyors in a reasoning process and real-life applications to develop or bolster skills in forming and communicating professionally defensible opinions that strive to parallel what the courts do. The five 2-hour sessions will take place live on Tuesday evenings: April 22, May 6 and 20, and June 3. The sessions can be attended in-person at Guelph or remotely from anywhere in Canada. Given the course work required beyond mere attendance at the sessions, this learning opportunity qualifies for the full Formal Activity hours CPD requirement of a rolling three-year period.[17]

First Annual Boundary Case Law Conference — Online Version

This online version of the conference *Parcel Title and Parcel Boundary: Where Lawyers and Surveyors Meet* [18]held November 2013 includes the presentations, papers and slide decks from most of the presenters. The purpose of the conference was to review – in a shared lawyer / land surveyor context – recent developments in boundary law as emerging from courts.

Boundary Lines, Fences, and Encroachment Disputes

This webinar[19] explores several boundary line and encroachment scenarios and outlines solutions in working with lawyers and real estate agents to avoid and resolve disputes.

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[17] This course qualifies for 36 *Formal Activity* AOLS CPD hours.

[18] The conference qualifies for 12 *Formal Activity* AOLS CPD credits.

[19] This webinar qualifies for 2 *Formal Activity* AOLS CPD hours.

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