



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 explore the practice of some municipalities in accepting a photocopy of a survey plan as part of an application for a building permit – and then issuing a permit based on the copy of the survey. In the case commented on, the problem arose from a municipality having issued a building permit in error due to the presence of a utility easement, and later corrected the error by cancelling the building permit. However, by then, materials had been bought and construction had started. The owner of the property who had obtained the permit, and which was subsequently revoked, sued the municipality for damages based on a legal theory of negligent misrepresentation. The implications are, of course, much larger: managing survey information, claiming copyright, and how to best protect the public are all undercurrents.

Municipal Risk in Using Photocopied Survey Plans

Key Words: *survey plan, construction, easement, building permit, survey report*

One generally accepts the quality of photocopiers and their ability to reproduce an image as nothing short of remarkable. In today's offices, the photocopier serves an indispensable function in the exchange of information and the meeting of a practical need for multiple copies of the same document. Plans of survey and surveyor's Real Property Reports are also subjected to this reproduction activity – much to the dismay and bane of many land surveyors. Asserting claims to copyright and attempting to prevent the duplication of survey plans¹ has been viewed by some segments of society as somewhat suspect and self-serving – especially if the argument succeeds in surveyors being able to sell more plans.

However, it seems that the public protection goal of surveyors in attempting to prevent unauthorized reproduction has some new validity; it arises from the inherent inability of most photocopiers to faithfully reproduce all of the information which appears on a survey plan. A

¹ The argument from surveyors has been often based on the assertion that the survey plan, which is photocopied, is no longer an "up to date document".

recent decision² from the Small Claims Division of the Provincial Court of Newfoundland and Labrador considered the effect of a photocopied survey report in which the outline of an easement on the graphic image did not appear on the copy. *Collins v City of St. John's* is especially interesting because the Newfoundland land surveyor who had prepared the survey was not a party to the dispute and the question of copyright was not even a factor in the case. Instead, the plaintiff homeowner pursued a claim for damages against the municipality arising from its cancellation of a building permit based on a theory of negligent misrepresentation.

The reported decision offers a succinct summary of what happened:

In June 2014, the Plaintiff decided to erect a shed on his property. Prior to proceeding to do so he researched the City of St. John's (hereinafter "the City") website to determine how he should proceed. Having done this, the Plaintiff proceeded to City Hall to apply for a permit to build the shed.

On June 26, 2014, the Plaintiff describes attending at City Hall with a surveyor's "Real Property Report" for his property. He says that he was assisted by a City employee in preparing the application for a permit. He says that the employee photocopied the Real Property Report and asked him to draw on the photocopied plan where he intended to place the shed.

Immediately after the application was prepared and signed by the Plaintiff and a City employee and upon payment of a permit fee, a building permit was issued to the Plaintiff.

Subsequent to being granted the building permit, the Plaintiff purchased materials to construct his shed. He waited until the appeal period noted on the permit had expired and then he commenced construction.

When the shed was partially constructed, the Plaintiff testified that his wife received a call from City employee, Cliff Rice, who said that a file review had been conducted and it was discovered that there was an easement on the Plaintiff's property where the shed was being erected.

On July 18, 2014, a stop work order was issued under s. 31(c) of the City of St. John's Building By-Law ordering the Plaintiff to stop work on the construction of the shed. Section 31(c) of the Building By-Law says:

31. The inspector may revoke any permit issued under the provisions of this By-Law for any of the following reasons: ...

(c) there has been a violation of this By-Law or any legislation applicable thereto...

² *Collins v. City of St. John's*, 2015 CanLII 28928 (NL PC), <http://canlii.ca/t/gj7td>

The Plaintiff says that on July 21, 2014, he went to City Hall and spoke to an employee who pulled the file and indicated that the permit had been issued in error. He says he was told to go to the legal department, which he ultimately did.

The Plaintiff immediately stopped work on the shed. Because he could not complete the shed on the basis that he had been granted approval, he ultimately sold the partially constructed building and returned some of the unused building materials for refund.

The Plaintiff claims against the City the sum of \$1,988.45 plus costs calculated as follows:

Net cost of materials	\$1,708.45
Labour value	<u>480.00</u>
	2,188.45
Less: Sale of shed	<u>(200.00)</u>
	\$1,988.45

The City denies being responsible for any losses to the Plaintiff. Counsel for the City indicated that although conceding that a duty of care was owed, there was no breach of that duty. In essence, the City takes the position that the Plaintiff was the author of his own misfortune.

At first blush, readers would likely want to know what this shed looked like: what is its size and where was its proposed position on the property? In Figure 1 below we have the benefit of the property's appearance at the home construction stage. The property appears as a lot in a new subdivision with a poured concrete foundation and a line of hydro utility poles along the rear of the property.



Figure 1 – Google® Street View dated August, 2009. All rights reserved.

While construction proceeded, the builder obtained a surveyor's Real Property Report. Only a schematic version³ of the plan appears below in Figure 2.

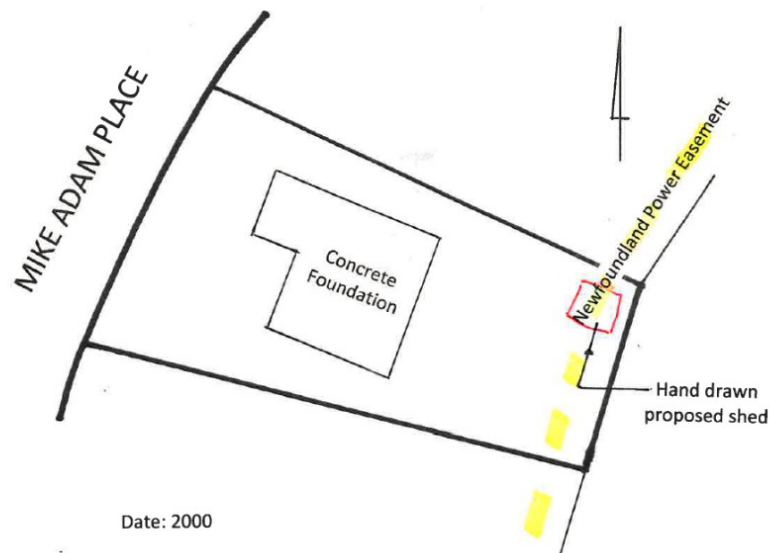


Figure 2: Schematic version of the survey plan prepared as a Real Property Report for the builder while the home was under construction. The act of photocopying the original removed the linework for the power easement from the image. The addition of the proposed shed location by hand [in red colour here] appeared to be fine until further due diligence was done by the municipality *after* the permit had already been issued.⁴

Almost 4 years later, the then owner of the home used this plan in support of an application for a building permit at the City to construct a shed in the backyard. Like the image which appears in Figure 2, the hand-drawn square at the rear of the property was placed on a copy of the plan; the original was not in fact submitted to the City, but *it was available and the original showed, in fainter linework, the outline of the easement for hydro poles at the rear of the property*. The process of making a photocopy failed to reproduce the linework which outlined the easement.

The court summarized exactly what happened:

The uncontradicted evidence of the Plaintiff is that he brought his Real Property Report, which shows the easement, to the City. The City employee who helped him with the permit application photocopied the plan; however, the photocopy does not show the easement as outlined on the original. It is of note that the outline on the original is faint and given the

³ Regretfully, although a copy of the plan was submitted to the municipality and a copy of the plan was marked as an exhibit in the trial proceeding in court, the surveyor asserted copyright over the plan and when requested to give consent to the actual copy being reproduced here, declined.

⁴ A copy was obtained directly from the court file.

evidence of the Plaintiff, which I do accept, that the Real Property Report which he brought to the City did show the outline of the easement, the faint outline must not have been picked up in the photocopying process. After making the copy, the City employee asked the Plaintiff to draw onto the copy where he planned to place the shed. This copy, with the placement of the shed towards the north rear corner of the lot, would have the shed placed within the easement. The Plaintiff was not advised of this, nor that he could not build the shed where shown. Instead, he was issued a permit.⁵

A report of the case also appeared in the local newspaper,⁶ citing attempts to communicate with, and interview, staff at the City.

Many surveyors have pointed to the very risk which prompted this litigation. Insistence on an original version of a surveyor's Real Property Report as evidenced by an embossed seal and/or an original signature could have avoided this problem. In fact a claim to copyright by the surveyor works in the public interest by increasing the likelihood that the survey plan in use is the original version which has issued from the surveyor and can be trusted as authentic and free from alteration.

However, the facts in this case do not appear to be either that simple, nor does this case describe an isolated example. Many instances of similar circumstances can be pointed to anecdotally by surveyors and lawyers alike. Yet a deeper consideration of the facts in *Collins v City of St. John's* suggests another aspect of greater concern, and which has nothing to do with copyright. Mr. Collins did bring an original copy of the Real Property Report to City Hall. It was a staff person there who made the photocopy and asked Mr. Collins to draw in the proposed location of the shed by hand. Aside from blaming the photocopier for not picking up the faint line work, what else was a municipal employee expected to do? Surveyors may read this decision (it is not very long) and confirm in their own minds that it was an outcome which supported surveyors and what they have long claimed as a right to copyright. In fact some readers may be tempted to champion this decision as an example of why only original surveys should ever be used. That may not be realistic. A bigger challenge for surveyors will lie in developing the appropriate notice or warning on the face of a plan which addresses the risk of using anything other than the original. Increasingly, surveyors are asked to provide digital versions of survey plan products – whether as a basis for further use and development of a client's property by the architect, or as a means of effecting registration of a plan in a land titles office. The legal framework for analyzing the consequences of misuse of a digital survey plan

⁵ *Collins v City of St. John's*, 2015 CanLII 28928 (NL PC), at para. 20

⁶ The article by Daniel MacEachern was entitled *City permit gives man a shed-ache* and the first sentence stated, "A St. John's man has successfully sued the city after he was given a permit to build a shed that the city later withdrew." The article in *The Telegram* appears here: <http://www.thetelegram.com/News/Local/2015-06-03/article-4167877/City-permit-gives-man-a-shed-ache/1>, June 3, 2015

may be no different from the framework used by courts in evaluating similar consequences in respect of analogue paper copies of plans which are photocopied.

Moreover, this decision suggests a rather bigger, if not more subtle, public interest concern that smoulders in the background. The fact is that plans of survey and Real Property Reports do get photocopied. Old copies of survey plans get used over and over again. Homeowners do it. Real estate agents do it. Even lawyers do it. And yes, even some surveyors make money by re-selling copies of old survey plans.

In the face of this broad but risky behaviour, what can surveyors do to protect the public? No, not themselves; the public. A shift in the entire focus by which this risk can be addressed may be necessary. Instead of claiming copyright, why not place the old plans into the public domain for free – no copyright claimed, or if so, only under a limited public commons licence?⁷ What if every product had strong warnings such as:

CAUTION: USE AT YOUR OWN RISK.
This survey plan is out of date and does not necessarily reflect what is on the ground. It may no longer be legally correct. If this plan does not bear an original seal and signature, you are assuming any and all risks associated with the use of it.

That would not threaten a user of a photocopy with copyright enforcement; it would instead inform a user, as a member of the public, of the risks of inappropriate and naïve use as just plain risky... and leave individuals to make a choice.

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

⁷ From: <https://creativecommons.org/licenses/>

“The Creative Commons copyright licenses and tools forge a balance inside the traditional ‘all rights reserved’ setting that copyright law creates. Our tools give everyone from individual creators to large companies and institutions a simple, standardized way to grant copyright permissions to their creative work...”

hours.⁸ 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.

Third Annual Boundary Law Conference

This year's conference theme is: *Enhancing Parcel Title by Re-Thinking Parcel Boundary*.⁹ This one day [event](#) (November 16, 2015) engages in critical thinking about boundaries and how we conceptualize them. Traditional assumptions about the nature of boundaries are revisited and new mindsets are introduced so as to better align with what the courts do and conclude.

Administrative Law for Regulated Professionals: A Primer for Members and Statutory Committees

This [seminar](#)¹⁰ relates the various acts, principles, structures and processes of Administrative Law to AOLS members' practice as well as to the workings of AOLS council and committees. This full-day in-person event will take place on **Tuesday, October 27th** at the [Delta Hotel, Markham](#).

Rethinking Land Titles and Boundaries: Integrating Aboriginal Interests with Fee Simple

This [presentation](#),¹¹ sponsored by First Nations and many local professional and education organizations, attracted considerable interest when delivered at the Yukon Arts Centre in June, 2015. Speaking from the perspective of both a lawyer and a land surveyor, Izaak de Rijcke reviewed recent Canadian cases related to Aboriginal title and reflected on how this "collective right" challenges traditional thinking about property rights and ownership within existing property law regimes.

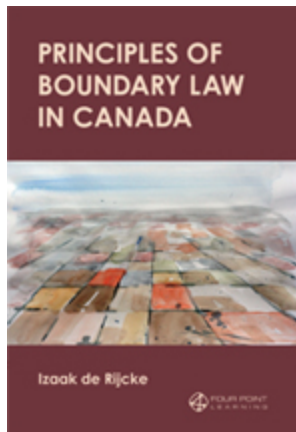
⁸ Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's [Registered Provider Guide](#) for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

⁹ This conference qualifies for 12 *Formal Activity* AOLS CPD credits.

¹⁰ This seminar qualifies for 12 *Formal Activity* AOLS CPD credits.

¹¹ This resource qualifies for 2 *Formal Activity* AOLS CPD credits.

COMING SOON: *Principles of Boundary Law in Canada*



This comprehensive treatment of the principles of boundary law lies at the intersection of law and land surveying. Although the [textbook](#) has its foundation in the law of real property in Canadian common law jurisdictions, it is intended as a resource which bridges two professions. For real estate lawyers, it connects legal principles to the science of surveying and demonstrates how surveyors' understanding of the parcel on the ground has helped shape efficient systems for property demarcation, conveyancing and land registration. For land surveyors, it provides a structure and outlines best practices to follow in the analysis of boundary retracement problems through the application of legal principles. This textbook is not meant to be used as a “how to” guide for the answering of specific questions about boundary problems. Rather, it is intended to serve as a reference tool to support the formation of professional opinions by clarifying the framework for evaluating boundary and survey evidence.

[The Foundation for Legal Research](#) has awarded a grant to assist in the preparation of a manuscript for this textbook. The mandate of the Foundation is to help enable the creation of top-quality legal writing – one of the key tools that Canadian lawyers and judges need in their everyday work.



This publication is not intended as legal advice and may not be used as a substitute for getting proper legal advice. It is intended as a service to land professionals in Canada to inform them of issues or aspects of property title and boundary law. Your use and access of this issue of *The Boundary Point* is governed by, and subject to, the [Terms of Access and Use Agreement](#). By using this issue, you accept and agree to these terms.

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