



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 relationship between allegations of professional misconduct and allegations of negligence. Is there a link between the two for professionals generally? If so, what is its nature? If not, why do the two often arise out of the same set of facts? In the case commented on, a surveyor had signed a survey certificate for the client of a technical survey services firm. The homeowner, who had suffered a loss because of a measurement error in the layout of a building setback, brought a monetary damages claim against the technical firm and against the licensed BC land surveyor. The plaintiff used an expert who pointed to standards and by-laws as defining the regulator's Standards of Conduct. The court held this to be irrelevant for the purpose of determining whether or not liability in negligence existed at all. The surveyor's report was dismissed in its entirety as not helpful to the court.

Managing Risks When Using "Technical Survey Firms"

Key Words: *construction, measurement layout error, negligence, misconduct, expert's report*

A recent practice which has developed in some jurisdictions in Canada is the subcontracting of field work by a licenced surveyor to a technical survey firm. The field work necessary to obtain information on the ground for the licenced land surveyor (and the subsequent marking of property corners) is performed under close supervision by the licence holder. Generally speaking, this would appear to be different from the scenario in which the technical survey firm proactively solicits work from the public and directly engages in the practice of "cadastral surveying" as was dealt with in an Ontario case over 10 years ago.¹ On the other hand, "technical survey firms" may find themselves in demand if there is primarily a measurement role and a construction layout character to the work – and a licenced surveyor is willing to endorse (certify) that work. The reason for the emergence of this practice may be attributed to land surveyors' reluctance to keep a full complement of employees on staff at all times.

¹ *Association of Ontario Land Surveyors v. Van Loon*, 2004 CanLII 8847 (ON CA), <http://canlii.ca/t/1g9tn>

Technical surveying staff persons, are undoubtedly resourceful in the formation of their own independent companies so as to enjoy the benefits of being self-employed – but still needing the supervision and certification from a licenced surveyor. While all of this may be understandable, this trend has slowly changed the relationship between licenced surveyors and the technicians and technologists who were often their former employees in some jurisdictions. New risks may emerge when relationships change and this can lead to claims and litigation.

In *Gill v. Dal Survey Services Ltd.*,² the Plaintiff sued for damages arising from an error in laying out the foundation of a home within the setback distance required by the zoning bylaw. The Municipality³ issued a stop work order, thereby halting construction. There were initially four defendants: the Municipality⁴, Dal Survey Services Ltd.⁵, Mr. Dal⁶, and Mr. James⁷.

Mr. Gill hired Dal Survey to provide the needed paperwork in order to obtain a demolition permit and a building permit. Dal Survey charged fees to Mr. Gill, in exchange for Mr. Gill receiving a Survey Certificate signed by Mr. James on the basis of fieldwork done by Dal Survey. The Certificate enabled Mr. Gill to get the needed demolition and building permits.

As work progressed on Mr. Gill's home, he acted as his own general contractor. Once the foundation was ready to proceed, a required inspection by the Municipality took place but, this time, the inspector rejected the Survey Certificate. The relevant reasons were,

- Discrepancy between survey and permit for legal description;
- Provide setback dimension for South East corner; and
- Slab compaction review required at frame.⁸

The further compaction required the removal of the foundation forms so that heavy construction equipment could place and compact the additional fill. Thereafter, the foundation forms were reinstalled and a revised Survey Certificate was submitted to the Municipality with corrected legal description and the entry of the missing setback distance. A witness for Dal Survey testified that he was told about other deficiencies and the removal and replacement of the foundation forms. As so often occurs, the presence and activity of heavy construction activity on a site means that many of the survey pins placed near that activity are at risk of

² *Gill v. Dal Survey Services Ltd.*, 2015 BCSC 1499 (CanLII), <http://canlii.ca/t/gkw7k>

³ The City of Surrey, BC

⁴ The claim was dropped before this summary determination proceeded.

⁵ Essentially, a technical survey firm (herein "Dal Survey").

⁶ A survey technician who owned the corporate Defendant

⁷ A licensed BC Land Surveyor

⁸ *Gill v. Dal Survey Services Ltd.*, at para. 19

being disturbed. This appears to have been the case in respect of Mr. Gill's home. The amendments were made by Mr. James to the Survey Certificate based on information from Dal Survey; he did not conduct a "new" Survey and his evidence was that he did not know the foundation forms had in fact moved in location. Construction proceeded again and after completion of all the framing, roof, windows and the rough-in for plumbing and HVAC, a stop work order was received.

The City explained that it had received information from other land surveyors, confirming that the house was built one foot *into* the setback distance. Despite efforts to negotiate a right-of-way with neighbours and a planning variance from the bylaw, all attempts failed; the entire house was torn down. The lawsuit which followed was based on claims from the Plaintiff which the Court summarized as,

To summarize, the plaintiff's claims revolve around alleged errors in the survey certificate or certificates that had been produced and certified by the defendant Mr. James. In Part 3 of the amended notice of civil claim (under the heading "Legal Basis"), the plaintiff brings claims against Dal Survey, Mr. Chand and Mr. James in negligence and breach of contract. He also asserts that Dal Survey and Mr. Chand were not licensed land surveyors and that Mr. James facilitated the unauthorized practice of Dal Survey and Mr. Chand. As well, the plaintiff alleges a claim under s. 18 of the *Sale of Goods Act*, R.S.B.C. 1996, c. 410, stating that the survey was not reasonably fit for its intended purpose.⁹

In advancing its claim, the Plaintiff relied on expert evidence in a Survey Report by a BC Land Surveyor which addressed the issue of "practice procedures of an experienced land surveyor". The Report drew objections from the Defendants and after considering the Report, the Court also concluded that the evidence was not helpful in coming to a determination on liability. The two reasons for the Court's rejection deserve repeating:

Firstly, several of the facts upon which Mr. Taylor based his report were not supported by the evidence. For example, at p. 4 of his report Mr. Taylor stated "Christopher James sometimes signs these surveys without attending the site". In this case, Mr. James signed certificates stating that as of February 15, 2010, the forms were in the location identified by him in the certificates. Accordingly, this statement by Mr. Taylor was not correct. Also at p. 4, Mr. Taylor stated that two months after delivery of the amended survey certificate the City informed Mr. Gill that the "building location is incorrect and the survey is incorrect". There is no evidence supporting the allegation that the survey was incorrect after the clerical errors were corrected and the City had accepted the amended survey certificate signed by Mr. James. There were no inaccuracies in the survey certificate which was submitted to get the permit to pour concrete in the forms. There is no evidence before me which would support any errors on the part of Mr. James in preparing the survey

⁹ *Ibid.*, at para. 47

certificate, in particular no evidence indicating the setbacks or the location of the forms as surveyed on February 15, 2010 was different in any way from the locations referenced on the survey certificates. Considering the plaintiff's claims primarily revolve around the allegation that the survey certificate was not correct and prepared negligently, reliance on such a mistaken fact by Mr. Taylor negates his opinion.

...

A second reason I have rejected Mr. Taylor's report is that in several of his opinions, he references by-laws of the Association of B.C. Land Surveyors which Mr. James is alleged to have breached. In several of those opinions, however, compliance with particular by-laws is not relevant to the issue of whether Mr. James in particular was negligent in the services he provided for the project in question. For example, in opinion no. 3, Mr. Taylor refers to situations where a surveyor does not take instructions directly from the owner of the property but from a contractor or "middle man" and opines that in such situations the surveyor should obtain a written contract with the owner and the contractor. Such an opinion is of no assistance in this case. Likewise, it is irrelevant to the negligence claim whether or not Mr. James relied in part upon information provided by non-surveyors, as there is no evidence in this case that any information relied upon by Mr. James and provided to him by Mr. Chand or his company was incorrect. Also, to opine whether a registered surveyor can contract out some of his obligations to a third party who is not a registered surveyor is irrelevant as in this case Mr. James did not contract out any of his work. While breaches of the by-laws is relevant to discipline proceedings instituted by the Association against its members, those by-laws do not establish a standard of care in negligence.¹⁰

For the Court to conclude that compliance or noncompliance with the bylaws of a Professional's regulator as being irrelevant to a determination of liability in negligence is not only interesting – it clarifies that issues before a regulator's Discipline Committee do not establish a standard of care in negligence. Further reflection by readers on this conclusion raises even more questions, such as: is this always the case? Might these be elements of conduct which, had compliance with bylaws been established, do satisfy the standard of care threshold and which would be evidence of no negligence? Is there an overlap between these two spheres of activity as shown in Figure 1?

¹⁰ *Ibid.*, at paras. 51 and 54

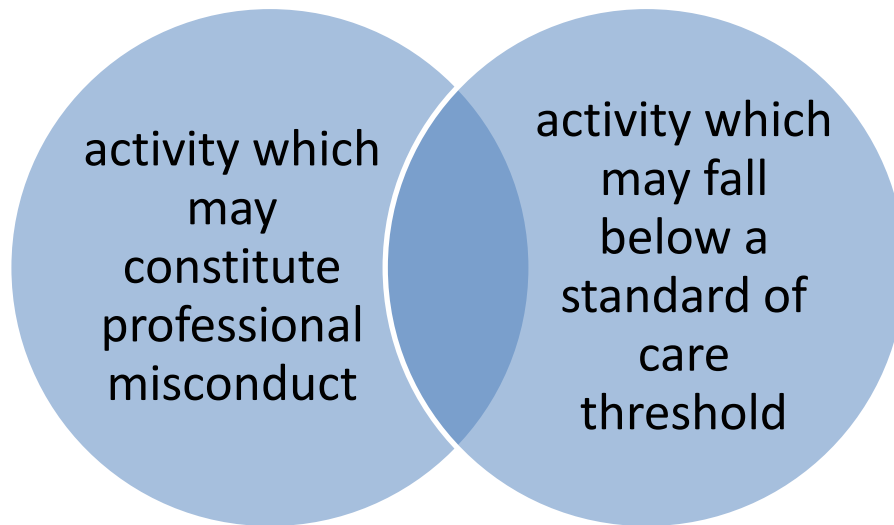


Figure 1

Certainly the Plaintiffs in *Gill v. Dal Survey Services Ltd.* thought the two were connected. In fact, it appears to be more complicated than that. Mr. Gill’s claim was dismissed.

We may be reminded that negligence is but one area of tort law. The purpose of the law of torts is to provide a structure for recourse to a remedy which is primarily one of compensation – hence monetary damages are usually sought by a successful Plaintiff as a result of the Defendants wrongful activity. In contrast, and perhaps surprisingly, professional misconduct most often does not trigger financial compensation for an individual who has been wronged by a professional’s misconduct. The reason is because the overarching purpose is to protect the public¹¹; this rarely includes the financial compensation to, or for, any one member of the public who may have been harmed. That compensation is a remedy in a separate lawsuit which may even run its course in parallel or tandem with but entirely separate from a disciplined process under a regulator’s Statute.

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

¹¹ “Public” in its broadest sense – and looking at the prevention of future harm.

hours.¹² 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*.¹³ 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.

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

This [presentation](#),¹⁴ 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.



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¹² 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.

¹³ This conference qualifies for 12 *Formal Activity* AOLS CPD credits.

¹⁴ This resource qualifies for 2 *Formal Activity* AOLS CPD credits.