



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.

Saskatchewan is unlikely to be the only jurisdiction in Canada that regulates real estate salespersons regarding the representation of facts about a property that is listed for sale (such as measurements, or the area of property), but a recent decision in that Province underscores the risks in using unverified property information when listing real estate for sale and attempting to acquire boundary information without a survey. Should real estate salespersons bear the responsibility for incorrect distances for property frontage or depth? What is the level of skill expected of a salesperson in measuring property or identifying a boundary location?

In this issue we consider a published decision of the Saskatchewan Real Estate Commission Hearing Committee in which a registered salesperson under the provisions of *The Real Estate Act* in Saskatchewan was fined and reprimanded for having misstated the dimensions of property.

Real Estate Salespersons and Property Information

Key Words: *professionalism, measurement, representation, public interest*

*Stroeder*¹ involved a discipline proceeding before the Saskatchewan Real Estate Commission Hearing Committee. The issue before the Committee involved a single charge against a real estate salesperson for having made “a statement, record, report, notice or other document required by the Act, the regulations or the bylaws that contains an untrue statement of a material fact, that being the square footage of a property.”² The reasons for the outcome in the decision in *Re Stroeder* in September 2017 are an opportunity to also reflect on an entirely different event in another Province that gained high profile exposure in the national media this past summer.

¹ *Stroeder (Re)*, 2017 SKREC 9 (CanLII), <http://canlii.ca/t/h5rr5>

² *Ibid.*, at para. 1

The listing for the property indicated an area for the home as 1280 square feet. Ms. Stroeder had taken this number from the province's property assessment authority, the Saskatchewan Assessment Management Agency. It was explained that when this information was obtained, it was a very cold day so there was no attendance at the property to verify outdoors, or otherwise take independent measurements.

After the property was listed with this information in 2013, it was sold to buyers who subsequently discovered that the area was only 1120 square feet – a shortfall in area of 12.5%. The agreed statement of facts that was reported included the statement that,

The Buyers' Agent told Ms. Stroeder that the Buyers were upset to learn of the difference in the square footage.³

There was no evidence that there was a financial loss or shortfall in a subsequent sale that was attributable to the difference in square footage. The Hearing Committee accepted the agreed statement of facts and found Ms. Stroeder guilty. In imposing a fine of \$1750.00 and a reprimand as a penalty, the following was considered as an "Aggravating Factor":

Members of the public relied on the accuracy of the information Ms. Stroeder recorded about the size of the Property. Approximately one year after purchasing the Property, the Buyers decided to list it for sale. The Buyers' Agent conducted her own measurements of the Property in the course of the listing and discovered the discrepancy.⁴

The decision in *Stroeder* is the latest in a series of disciplinary cases involving real estate salespersons in Saskatchewan. Other jurisdictions in Canada have similar requirements that are imposed on members of the real estate profession, but the deeper question that emerges from decisions of this kind is this: *Why are real estate salespersons expected to be proficient in the measurement and calculation of lot size and square footage of homes?*

Equally interesting is a consideration of whether that expected proficiency extends to being able to locate property corners and measurement of boundaries. It turns out that the answer is even more intriguing when considered against the backdrop of the high profile story on CBC News in Nova Scotia last summer in which a first time homebuyer was shocked to discover that he did not own the back yard and a shed that he assumed were part of his property after he purchased.

Readers will recall the picture of the disappointed owner's view of his backyard and shed as it is reproduced in Figure 1 below. In the purchase of this property, the homebuyer had used title insurance but did not get a current survey as part of the transaction. Some of the commentary

³ *Ibid.*, para. 19

⁴ *Ibid.*, para. 25

in the news article included references to the role that the title insurer, the buyer's lawyer and the buyer's real estate agent played in resolving the matter and finding a solution.



Figure 1: Image from the news story by Yvonne Colbert dated June 23, 2017, with caption, "Manning now owns the shed and the backyard where it sits."⁵

The problems were described as:

Manning was shocked because the property was fenced and the listing's real-estate agent had told him the fence was his boundary. The original listing also included a picture of the backyard. He was even given the keys to the shed when the purchase was finalized.⁶

Presumably both the law firm and the real estate salesperson worked with the title insurer to reach a solution, the details of which remain confidential. However, the activity of a real estate salesperson in pointing out the boundaries or making other factual statements about the property lines and their dimension deserves a closer look.

In *Stroeder*, the Hearing Committee made reference to an earlier decision of the Deputy Superintendent of Real Estate in Saskatchewan in *Re Elder*,⁷ an appeal from one of the Committee's own decisions in 2012. In *Elder*, the real estate salesperson had pleaded guilty to

⁵ From CBC News story, "3 years after moving in, homebuyer can finally call backyard his own," at: <http://www.cbc.ca/news/canada/nova-scotia/buyer-beware-home-purchase-title-insurance-realtors-1.1863690>
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⁶ *Ibid.*

⁷ *Elder (Re)*, 2013 SKREC 7, <http://canlii.ca/t/grn0j>

several charges of professional misconduct arising out of circumstances that can be found summarized in several paragraphs of the agreed statement of facts:

4. As part of the listing Ms. Elder stated that the water supply to the Property was "from own well approximately 50 feet deep" and this information became part of the MLS listing. Ms. Elder represented that the Property lot was approximately two acres by two acres, rectangular in shape and had a gravel driveway.
5. Ms. Elder did not take any steps to verify the information set out in the said listing contract as she indicates that she had listed and previously sold the Property in 2002. In November 2002, Ms. Elder had listed the property for \$24,900.00 on behalf of another party. The Seller had purchased the Property from this other party for \$22,000.00 with a closing date of February 15, 2003.
6. As part of the 2003 transaction it was stated in the Residential Contract of Purchase and Sale that, "Surveyor's Certificate would be included." This writing was crossed out and initialled "EE" followed by the statement "Sellers will assist Purchaser in finding property boundaries (NO MONETARY VALUE)." In the Notice to Remove Conditions form dated January 31, 2003, it is stated that "property boundaries will be determined in spring 2003."
7. On or about May 2003, Ms. Elder attended the property to attempt to locate the corner pin on the Property with a metal detector, and was unable to do so. She then used some wooden stakes to mark one square acre on the Property. It was not intended that these markings were the boundaries of the Property.
8. In listing the Property in August 2007, Ms. Elder relied on information she had in May 2003, that the property was a rectangular shape, including the house, the garage, the water well that serviced the Property and the access road to the Property. In doing so, she relied on her own information and did not take steps to verify the Property Boundaries.⁸

The decision in *Elder* reports the property as having been abandoned while parties continued with litigation. Land surveyors might raise an eyebrow at the prospect of a real estate salesperson attempting to locate iron bars marking property corners with a metal detector. Is this what is expected of real estate agents today? Would the Nova Scotia first time home buyer have benefitted from the real estate salesperson attempting to locate the boundary?

The decision in *Elder* has appeared in the educational materials for CPD purposes for real estate salespersons in Saskatchewan. The reported decision in *Elder* was used in the *Real Estate*

⁸ *Ibid.* at para. 1

*Update 2014-2015, Continuing Professional Development Workbook*⁹ as a lengthy fact scenario for teaching purposes and concluded with the following two questions:

1. What should the registrant have done upon initially listing this particular property to have avoided the future problems associated with it? How were the mistakes compounded five years later?

and,

2. Should registrants take on duties for which they are not professionally qualified to carry out? Why or why not?¹⁰

As a learning resource, the *Workbook* does not offer answers. However, the discussion that likely ensued, and the “take away” from the *Elder* decision is no doubt a heightened awareness that real estate salespersons should not try to do the work of land surveyors and not make assumptions about the correctness of property boundary data. In the Deputy Superintendent’s summary of decision in *Elder*, the following explanation appears:

Protection of the public is fundamental. As previously stated, other registrants and the public must be able to rely on the accuracy of listing representations in making their recommendations and decisions. In preparing the 2007 MLS Exclusive Seller's Brokerage Contract between the Seller and Remax of the Battlefords, Elaine Elder relied on information she had from the 2002 listing, that the property was a rectangular shape, including the house, the garage, the water well that serviced the Property and the access road to the property. In doing so, she relied on her own information and did not take steps to verify the property boundaries. The description of the listed property has been subsequently shown to be woefully inaccurate. Elaine Elder's actions resulted in a contract that did not provide an accurate description of the property being offered for sale. This failure was carried through to the MLS advertisement of the property. Had someone purchased the property based upon this information, they would potentially have suffered significant loss. This is totally unacceptable.¹¹

If this was totally unacceptable, why are real estate salespersons not compelled to ensure that an up to date survey is available in every instance in order to protect the public – as well as themselves? The scenario in Nova Scotia as reported in national media, if the same principles applied in that jurisdiction, might never have occurred. To be fair, the origin of incorrect property measurement information in *Elder* was entirely different from that in *Stroeder*. In *Elder* it was previously recorded incorrect information from an earlier listing. In *Stroeder*, the

⁹ Saskatchewan Real Estate Commission, *Real Estate Update 2014-2015, Continuing Professional Development Workbook*, previously available at: <http://asreducation.com/cpd>

¹⁰ *Ibid.*, at page 1-21. All rights reserved.

¹¹ *Elder (Re)*, 2013 SKREC 7, at section VI

measurements were obtained from the province's property assessment authority, the Saskatchewan Assessment Management Agency. Almost every jurisdiction in Canada has an agency or public service that permits municipalities to levy property taxes and will also have some property map sketch or graphic that illustrates the configuration of the property. *Stroeder* could well be an example of the unintended use of such products as a substitute for a proper plan of survey, and what can then go wrong.

The difficult answers to the questions posed above will inevitably engage a consideration of the role that title insurance has come to play in routine real estate transactions, and the cost factor of an up to date survey for home buyers. Land surveyors would be wise to offer help to real estate professionals and home buyers in determining whether or not there are sufficient risks to justify insistence on an up to date survey in any particular instance – not *instead* of title insurance – but *in addition to* title insurance.

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Cross-references to *Principles of Boundary Law in Canada*

In *Principles of Boundary Law in Canada* there is extensive discussion in Chapter 1 about the nature of boundaries and what a lay person might assume to be their property limit. Sometimes an assumption about a fence, for example, as marking a boundary turns out to be correct. Other times, the fence, as an assumed marker of a boundary, turns out to be wrong. The risks that are present in the making of assumptions by real estate salespersons and home buyers when no up to date survey is available is painfully apparent in the material reviewed in this issue.

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.¹² These resources are configured to be flexible with your schedule, range from only a

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.

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.

Fifth Annual Boundary Law Conference

This year's conference theme: [Waterfront Properties in Ontario: Best Practices for Reducing Ownership Conflict](#), responds to the confusion created by a series of seemingly inconsistent decisions concerning waterfront properties over the last decade. Presenters – lawyers, surveyors and government representatives – will explore a common set of recent court cases and provide insight and analysis focused on problem-solving waterfront ownership and boundary issues from their unique professional perspectives. The day will end with a multidisciplinary panel discussion that aims to establish broad consensus on emerging best practices to reduce conflicts among stakeholders, mitigate the risk for professionals, and minimize uncertainty for members of the public in this consistently complex area of boundary law. A draft agenda for this 1-day event (November 13, 2017) is now available.¹³

With this year's conference we are introducing a new feature "[The Mic is Open](#)"¹⁴ for communicating with and among participants. Similar to what may be asked during an Open Forum, this pre-conference forum invites your comments and questions. The purpose is to identify, in advance, issues that ought to be considered or addressed during the event. Presenters will be invited to monitor and even contribute to this forum. Many questions will be answered in the forum in a principled way, but legal advice on a specific boundary problem will not be offered.



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

¹⁴ You need to be registered for the conference to access this feature.