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.

Whereas a competitive real estate market favours purchasers able to make unconditional offers, lack of reliable information about the property through the listing details poses a risk. Prospective buyers could get stuck with a property they are unable to use as anticipated or, if they choose to back out of the deal, risk forfeiting a hefty deposit and further damages.

Such was the case in the recent decision of *Hosseinzadeh v. Pringle,*[1] in which a buyer made an unconditional offer to purchase a property that he had intended to subdivide, only to discover later that the properties dimensions would not allow for such plans. While under some circumstances a discrepancy between lot size stated in an offer and the dimensions on the ground may be enough for a buyer to back out of an agreement of purchase and sale, the situation in this case meant the purchaser's (sizeable) deposit was lost. Of course, had a survey been available at the time of the offer to purchase, such trouble could have been avoided.

Discrepancies in Lot Dimensions and a Buyer's Right to Rescission: What a Survey Could Have Avoided

Key Words: *agreement of purchase and sale, lot size, geospatial data, survey*

The availability of an accurate and up to date survey at the time a prospective buyer puts in an offer to purchase has enormous value. For developers looking to either build upon or subdivide a lot, the survey will be an authoritative source of information on lot dimensions – critical to determining whether the lot is suitable for their future plans. Unfortunately, many a real estate transaction occurs these days without such information being readily available to a buyer. In a sellers' market, unconditional offers favour those buyers who are willing to jump in without first conducting the full inquiries into verifying lot dimensions. In some cases, a discrepancy between the actual lot dimensions and the information provided in the listing material can

[1] *Hosseinzadeh v. Pringle*, 2018 ONSC 1947 (CanLII), http://canlii.ca/t/hr90m

allow the purchaser to back out of the deal, if discovered before closing. Unless there is specific coverage or an endorsement in the terms of a policy, title insurance will not provide compensation if the discrepancy is discovered after the fact.

But a court's finding in such circumstances is highly fact dependant and a sophisticated buyer put on notice of the potential of lot dimensions who does not verify same is, as the Plaintiff was in *Hosseinzadeh v. Pringle,* unlikely to be let out of an agreement of purchase and sale without consequences. In this case the Plaintiff sought "the return of a $100,000 deposit paid in connection with a failed residential real estate transaction on the basis that the property was significantly smaller than described in the agreement of purchase and sale. The Defendant sought summary judgment and an order declaring that the deposit be forfeited.[2] The court summarized the facts as follows:

> The Defendant is the former owner of the property municipally known as 38 Alder Road, Toronto, Ontario (the "Property"). The Property comprises a detached 2-story residential home on an irregular corner lot.
>
> On or about January 9, 2017, the Property was listed for sale on the Multiple Listing Service ("MLS") at a price of $1,288,888. In order to list a property on the MLS, the lot dimension is a mandatory field. The Defendant's real estate agent, [...] asked the Defendant whether she had a survey of the Property and was informed that she did not. [The Defendant's real estate agent] also accessed the Municipal Property Assessment Corporation's ("MPAC") database to obtain the lot dimensions. The MPAC database indicated that the Property had a frontage of 87.64 feet and a depth of 0 feet.
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> [The Defendant's real estate agent] subsequently attended at the Property and physically measured the depth of the lot in order to provide a measurement for the MLS listing. He was not, however, able to precisely ascertain where the property lines were located. The measurements as stated on the listing were "87.64 x 100 feet". The listing also noted that the Property was "Irreg Corner Lot - Depths To Be Verified" and that "Buyer/Buyer's Agent To Verify All Measurements & Taxes."
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> The Plaintiff carries on business as a renovator and builder. [...]On January 26, 2017, [The Plaintiff's real estate agent] contacted the Plaintiff to bring the listing for the Property to his attention. The Plaintiff and [the Plaintiff's real estate agent] attended at the property that day to view it. That afternoon, the Plaintiff went to the Clerk's office at the City of Toronto to inquire as to whether the Property could be subdivided. He was advised that in order to subdivide a lot, the resulting lots to be created would require a minimum frontage of 40 feet and a lot area in the "high 3000 square foot size".

[2] Ibid. at para 1

> The Plaintiff and [the Plaintiff's real estate agent] visited the Property a second time in the early evening of January 26, 2017, following which the Plaintiff decided to put in an offer to purchase the Property. [The Defendant's real estate agent] informed [the Plaintiff's real estate agent] that there were competing offers for the Property. That evening, the Plaintiff made an unconditional offer to purchase the Property for a price of $1,200,000. The offer described the Property as "having a frontage of 87.64 feet more or less by a depth of 100 feet more or less". It also included standard language in Schedule B to the effect that all measurements provided had been obtained from sources deemed reliable, but that this information "has been provided for information purposes only" and that "Buyer is advised to verify any measurements or information upon which he or she is relying."
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> The Defendant signed back the offer leaving the lot dimensions untouched but inserting the words "To Be Verified" directly above the depth dimension. The Plaintiff accepted the Defendant's signed back offer and initialed next to the words "To Be Verified". The Plaintiff also provided the Defendant's real estate agent with a deposit in the amount of $100,000. The agreed purchase price was $1,233,000 and the closing date for the transaction was February 15, 2017.[3]

Figure 1: *Aerial view of irregularly shaped corner lot at 38 Alder Rd, Toronto. Image from Google Maps, all rights reserved.*

An aerial view of the property can be seen above in Figure 1. Aware that there was some uncertainty as to the dimensions of the lot and having the intention to subdivide the property, the Plaintiff made inquiries with his real estate agent as to how a subdivision might be done [...]

> In the course of those discussions, [the Plaintiff's real estate agent] went online with a program named "GEOWarehouse" which showed the Property as having measurements of

[3] Ibid. at paras 4-9

> 78.3 feet x 69.17 feet x 145.17 feet and a total lot area of 5866 ft.² The Lot Measurement Accuracy on the Geowarehouse website was described as "Low".[4]

Based on the information from GEOWarehouse, the Plaintiff requested an abatement of the purchase price; the seller refused and the Plaintiff buyer subsequently refused to close.

The property was relisted and sold at a slightly higher price, the re-sale transaction closed and subsequently the plaintiff buyer brought an action seeking return of the $100,000 deposit money. The defendant seller brought a motion for summary judgment. In the course of the litigation, the Plaintiff commissioned a survey of the property which showed the following:

> [...] The surveyor described the lot dimensions as follows:
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> [T]he northerly limit being 23.706 m (77.77 feet), the easterly limit fronting Alder Road being 9.144 m (30 feet), the southeasterly rounding having a radius of 12.107 m (39.72 feet), arc of 23.372 m (76.67 feet) and chord of 19.908 m (65.31 feet), the southerly limit fronting Parkview Hill Crescent being 11.303 m (37.08 feet) and the westerly limit being 21.024 m (68.97 feet).
>
> The September 12, 2017 survey also described the area of the Property as 5,787.7 square feet.[5]

The motions judge held that summary judgment under the circumstances was appropriate, concluding that the court was in a position to resolve the issues in a fair manner. The key issue was whether or not the plaintiff was entitled to refuse to close the transaction on the basis of an inaccuracy in the description of the property in the agreement of purchase and sale (APS).

Parties are bound by the terms of an agreement of purchase and sale. However, where there is a significant inaccuracy in the lot dimensions described therein, a purchaser may avoid the transaction. In summarizing the case law in this area, the court noted the following examples:

> [...] in *Bouskill v. Campea*, a property was described as being "100 feet more or less by 172 feet more or less…". In fact the property had a frontage of 100 feet and a depth of approximately 161 feet. The Court of Appeal held that whether this discrepancy was substantial enough to entitle the purchaser to avoid the transaction was a question of fact and depends upon all the circumstances of the case. Here, the Court held that the approximately 11 foot discrepancy in the depth of the lot was material, since the purchaser intended to subdivide the property. Nor did it matter that the purchaser had failed to communicate his intention to subdivide to the seller. The discrepancy did not fall within the scope of the phrase "more or less" included in the description of the property. Accordingly,

[4] *Ibid.* at para 10
[5] *Ibid.* at paras 15-16

> the Court was of the view that the purchaser was entitled to refuse to close the transaction. Similarly, in *Olsznewski v. Trapman*, where an agreement of purchase and sale described the property as being "approximately 1.5 acres" in area, but was in fact 1.15 acres, the inaccuracy was found to be "a substantial overstatement which, having regard to the purchaser's intention for the property, was such as to entitle the purchaser to rescind the contract."
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> In response, the Defendant relies on cases refusing to permit a purchaser to avoid transactions where an agreement contemplates the sale of a whole parcel of land that is clearly delineated by fencing or other visible markings, and not a sale by square footage or any other unit of measurement. For example, in *Kuhirtt v. Lamb*, an agreement of purchase and sale for a "corner lot" in the City of Ottawa inaccurately described the subject property as having a depth of 120 feet, whereas the depth was actually 100 feet. Morrissey J. relied on the fact that the boundaries of the property were clearly identifiable by reference to a cedar hedge and two street lines. Although the discrepancy was "not insignificant", the purchasers had had an opportunity to view the land and they purchased what they saw. Since they were "not deceived as to the actual land which was being sold and conveyed", they were not entitled to refuse to close the transaction.
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> Similarly, in *John Beattie Farms Ltd. v. Stevenson*, the subject property was said to be "98 acres more or less" while it was actually "85.5 acres more or less". The court found that the sale was for "the whole parcel and not a sale by acres" and thus the discrepancy did not entitle the purchaser to an abatement in the purchase price. However it should be pointed out that there was a period of over three months between the execution of the agreement of purchase and sale and the closing of the transaction, and during this period the purchaser had waived the requirement for a survey of the property. No objection was made to the inaccuracy in the description of the property until some months after the transaction had closed.[6]

The question then was whether there was a significant inaccuracy in the description of the lot measurements in the APS. This the court answered in the affirmative. Evidence to this effect included the GEOWarehouse description, an affidavit by a partner at the law firm representing the Plaintiff and the survey commissioned by the plaintiff in the course of litigation. Of these, only the survey was admitted, for the following reasons stated by the court:

> The GEOwarehouse data is not admissible for the accuracy of the lot size. It would be hearsay; no evidence is tendered indicating how the measurements were determined. Further, the printout in fact indicates that the accuracy is low. The GEOwarehouse printout is nevertheless admissible to provide an explanation as to how the Plaintiff became

[6] *Ibid* at paras 22 - 24 [citations omitted]

concerned about the dimensions of the Property, prompting him to conduct further investigations.

Fleury's Affidavit is also problematic. The Fleury Affidavit appears to be tendered in order to provide Fleury's opinion that there was a shortfall in the Property frontage of approximately 20 feet and in the Property depth of approximately 23 feet. Yet Fleury was not tendered as an expert qualified to assist the Court in determining the lot size. Moreover, even if he were otherwise professionally qualified to express an opinion as to the lot size, Fleury owes a duty to his client and thus lacks the independence that would be required under Rule 53.

As Myers J. explains in *Ferreira v. Cardenas*, generally, lawyers' affidavits are not appropriate for motions for summary judgment. Myers J. points out that Rule 5.2 of the Law Society of Ontario's *Rules of Professional Conduct* stipulates that a lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the Court, subject to certain limited exceptions (none of which is relevant here). This accords with the Supreme Court of Canada's instruction in *R. v. Boucher,* to the effect that lawyers ought not to express their personal opinions as to the merits of their client's case. While Fleury is not himself counsel in this matter, he is a partner in the firm representing the Plaintiff, making these same concerns relevant and applicable.

Fleury's evidence is also problematic if it is tendered solely for demonstrating that the Plaintiff had legitimate reasons to be concerned that the lot size might be inaccurate. This raises concerns related to the partial or limited waiver of solicitor-client privilege. The key concern is that partial disclosure could be used to mislead the court. For example, Fleury's Affidavit suggests that he advised his colleague Alborzi that a variance of more than 2% in the measurement of a lot frontage or 5% in a lot depth would not be saved by the "more or less" qualification generally included in agreements of this kind. However, no disclosure is made as to whether any opinion was sought from or expressed by Fleury as to whether the variance in the lot size was saved by the "To Be Verified" proviso in the APS. Counsel for the Defendant requested all communications between the Plaintiff and his solicitors on the basis that privilege had been waived, but the Plaintiff refused to make such disclosure. This refusal merely reinforces the inappropriateness of the Fleury Affidavit in the context of this litigation.

Finally, the Plaintiff relies on the September 2017 survey. Despite the Defendant's objections, I find that the survey is reliable evidence.

The Defendant argues that the September 2017 survey did not comment on the accuracy of the measurements in the APS and did not state the correct frontage or depth of the Property. The Defendant also objects to the fact that the survey evidence is hearsay and cannot be admitted to prove the truth of its contents.

> At the hearing of this motion, counsel for the Plaintiff sought to introduce an affidavit from the surveyor describing his qualifications, attaching the survey and affirming the accuracy of the survey measurements. Although counsel for the Defendant objected to the introduction of the surveyor's affidavit, I see little basis for the objection. Having raised the issue of the accuracy of the survey, he cannot now contest the introduction of an affidavit seeking to address the point. Moreover I see no prejudice from the introduction of the surveyor's affidavit and the attached survey since the Defendant was clearly aware of the survey well prior to commencing this motion.[7]

Readers may wish to take note of the use of online geospatial data from both government and private sources that may not in fact have the level of accuracy or state of currency that is assumed. While the survey did not describe the lot in terms of frontage and depth – *ie.* In a manner directly comparable to that stated in the APS – it did provide dimensions that the court concluded were sufficient to reach the conclusion that the difference between actual area of the lot and that set out in the APS was substantial. The measurements within the APS were unjustifiably inaccurate.

> While the September 2017 survey does not directly state the lot frontage and depth of the Property, it does identify the northerly limit as being 77.77 feet and the westerly limit as being 68.97 feet. There is no boundary of the Property that is greater than 77.77 feet and the total lot area is 5787.7 square feet. Given these dimensions, it does not seem credible that the lot is close to the stated dimensions in the APS of 87 feet by 100 feet. The Defendant has not lead any evidence to rebut this common sense conclusion. While I am unable to determine the exact dimensions of the lot, I find that the discrepancy between the description in the APS and the actual dimensions of the Property to be substantial.
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> In my view, a discrepancy of this magnitude falls well outside of the "more or less" language typically included in agreements of this kind. Nor am I persuaded that the presence of visible fencing and two street lines surrounding the Property, or that it was being sold as a single parcel of land rather than on a square foot basis, justifies the inaccuracy.[8]

Although the discrepancy was significant, this was not the end of the matter for the Plaintiff. The language of the APS had referred to the lot dimensions as being "To Be Verified." Such an inclusion, added by the seller, and drawn to the attention of the buyer who initialed (thereby agreeing to) same, had impact on the Plaintiff's entitlement to refuse to close the transaction on the basis of a discrepancy with the actual boundaries. Here the court looked to the context of the transaction, the sophistication of the buyer and how the Plaintiff and his real estate agent read the added language, and found as follows:

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[7] *Ibid* at paras 27-33
[8] *Ibid* at paras 34-35

> In my view, the explanations provided by [the Plaintiff and his real estate agent] as to their apparent lack of concern over the meaning and significance of the "To Be Verified" wording in the APS are evasive and implausible. This is particularly the case given the Plaintiff's intention to subdivide the property, and his acknowledgement that the dimensions of the Property were crucial to him. I accept [the seller's real estate agent's] uncontradicted evidence to the effect that he specifically drew [the buyer's real estate agent's] attention to the inclusion of this proviso and explained that the Defendant was not confident that the dimensions set out in the APS were accurate.
>
> I find, therefore, that the Plaintiff was specifically put on notice through the inclusion of the "To Be Verified" proviso that it was his responsibility to verify for himself the accuracy of the lot dimensions. This conclusion is further reinforced by the wording in Schedule B to the APS which advises Buyer to "verify any measurements or information upon which he or she is relying."
>
> The Plaintiff was an experienced purchaser and developer of residential real estate properties. He was well aware of the consequences of entering into an unconditional APS for the Property. Notwithstanding his intention to subdivide the Property, and having been put on notice regarding concerns over the accuracy of the lot dimensions, he chose not to add any language to the APS entitling him to conduct appropriate due diligence to determine whether severance of the property would be permissible.[9]

However, verification of the boundaries, takes time. An authoritative survey may take weeks and even a cursory look on GEOWarehousea – the accuracy of the results of which may end up being low - will involve some delay. Ideally a conditional offer would be put in place, but the real estate market's realities may not allow for such investigation. On this the court stated,

> Nor can the Plaintiff rely on the fact that [the seller's agent] had advised that the offer had to be unconditional, given the fact that there were competing offers for the Property. If the Plaintiff had inserted a condition regarding the accuracy of the lot dimensions, or deleted the "To Be Verified" proviso that had been added, the offer might well have been rejected. Instead, in his haste to acquire the Property, the Plaintiff elected to proceed without adding any protective wording to the APS, thereby assuming the risk that the lot dimensions might turn out to be inaccurate.
>
> In short, the Plaintiff is the author of his own misfortune. The "To Be Verified" proviso meant that the Plaintiff had the responsibility to satisfy himself as to the accuracy of the lot dimensions. If he was unwilling to accept this responsibility, he should have simply refused the Defendant's signed back offer. By initialing the "To Be Verified" language and accepting

[9] *Ibid* paras 40-42

> an unconditional APS in the face of known risks, he cannot now seek to avoid its binding effect when those very risks materialized.[10]

The deposit was forfeited. In spite of the significant discrepancy in lot size, the context of the circumstances - namely the sophistication of the buyer and the specific wording changes made to the APS form – all led the court to conclude that the Plaintiff was not intended to back out of the deal and instead ended up losing his deposit. This tension in allocation of risk could, of course, have been avoided had a survey been readily available.

Guest Editor: Megan Mills

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.[11] 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.

Fifth Annual Boundary Law Conference

We thank all who attended this year's conference: *Waterfront Properties in Ontario: Best Practices for Resolving Title & Boundary Issues.*[12] This full day event responded to the uncertainties resulting from recent legal treatments of water boundaries in a manner to ultimately benefit professionals, property owners and the public. For the convenience of those unable to attend due to distance or a scheduling conflict, the online version of the conference will includes the presentations, papers and slide decks from presenters.

Coming in June — Electronic Survey Plan Registration Course

This training course is being developed for Ontario Land Surveyors interested in electronically submitting survey plans to ServiceOntario through Teraview® for deposit or registration.

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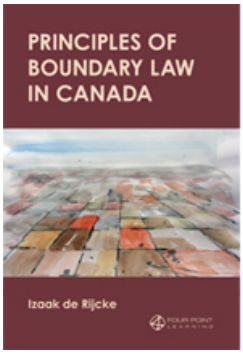
[10] *Ibid* paras 43-44

[11] 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.

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

Principles of Boundary Law in Canada



In the context of (1) the complex and ever-evolving nature of boundary law, (2) the challenges of doing legal research in this area, and (3) the constant interplay between land surveying practice (as a regulated profession with norms codified in statutes) and common law principles, land surveyors would benefit from a current reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable. See *Principles of Boundary Law in Canada* for a list of chapter headings, preface and endorsements. You can mail payment to: ***Four Point Learning*** (address in the footer of the first page of this issue of *The Boundary Point*) with your shipping address **or** purchase online. (*NB: A PayPal account is not needed to pay by credit card.*)

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