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Professional Authority in Property Matters

Prepared jointly by the Association of Ontario Land Surveyors and the Law Society of Upper Canada

The Access to Justice Act, 2006 emanated from an obvious need for better protection of the public interest as an increasing number of individuals began to provide certain legal services in Ontario without regulation or insurance.

Under that Act, the Law Society of Upper Canada undertook to qualify, license and govern all “legal services” in Ontario under the authority and terms of the Law Society Act and By-Law 4. Persons acting in the normal course of carrying on a profession or occupation governed by another Act of the Legislature are deemed not to be practicing law or providing legal services.

In one year the Law Society has implemented regulatory procedures governing over 2000 paralegals in a process that has been open and efficient.

However, minor confusion regarding professional authority occasionally comes to light as it has with one or two Ontario Land Surveyors appearing for clients at municipal planning and land division committees in their capacity as licensed Ontario Land Surveyors.

The following article has been prepared jointly by the Law Society of Upper Canada and the Association of Ontario Land Surveyors to clarify this issue.

A licence to practice cadastral surveying in Ontario is an exclusive right issued under the Surveyors Act, R.S.O. 1990, c.S.29 by the Association of Ontario Land Surveyors. A licence empowers holders to practice cadastral surveying defined as “advising on, reporting on, conducting or supporting the conducting of surveys to establish, locate, define or describe lines, boundaries or corners of parcels of land or land covered by water”.

Licensed Ontario Land Surveyors provide this exclusive and professional service to the public under the additional authority of a Certificate of Authorization issued under the authority of the Surveyors Act by the Association of Ontario Land Surveyors. By virtue of their specific professional knowledge and certification governed by an Act of the Legislature, licensed Ontario Land Surveyors may provide expert witness testimony before an adjudicative body. Licensed Ontario Land Surveyors regularly appear before such bodies to provide support and evidence on behalf of their client’s applications for minor variances, severances, encroachments, draft plans of condominium, draft plans of subdivision, official plan amendments, rezoning, consents under the Planning Act and so forth.

Further, many applications to adjudicative bodies require that an oath or written certification of the validity of information be provided by the ‘owner, solicitor or agent’. In the case of property dimensional information and the relationship of physical features to property boundaries, only a licensed Ontario Land Surveyor may provide such an oath or certification.

The Law Society Act R.S.O. 1990 c.L.8 governs the provision of “legal services” to the Ontario public. “Legal services” is defined in part to include services whereby a provider “selects, drafts, completes or revises, on behalf of a person, (i) a document that affects a person’s interest in or rights to or in real or personal property or (vii) a document for use in a proceeding before an adjudicative body”. However, this would not provide any authority for the lawyer or paralegal to draft, complete or revise a survey document.

It is generally said (and taught) that a surveyor cannot be an advocate for his or her client. The surveyor must determine, to the best of his/her ability, the proper location of the boundary or boundary corner being investigated regardless of impact on the client. The surveyor does not represent the client as an advocate but does provide expert evidence on the client's behalf. A lawyer or licensed paralegal will advocate for his or her client and argue on behalf of the client's sole interest. A lawyer or licensed paralegal may officially represent a person before an adjudicative body but may not provide expert evidence in defending or promoting the client's interest.

In those instances where lawyers and surveyors are involved in adverse positions before adjudicative bodies such as Land Division Committees, Planning Committees, Committees of Adjustment, etc. the roles can become blurred as comments converge and surveyors seem to become advocates and lawyers seem to become experts. It is the job of the chair or judge to ensure lawyers and surveyors act within the limits of their proper rules. There are specific legislative and other guidelines that can be looked to:

- ▣ The Surveyors Act and the Law Society Act each provide for penalties for any person proven to be providing or offering to provide licensed services who is not authorized to do so.
- ▣ The Law Society Act provides that persons acting in the normal course of carrying on a profession or occupation governed by another Act are deemed not to be practicing law or providing legal services.
- ▣ A person not represented in a proceeding by a person licensed to provide legal services will be deemed to be self-represented.
- ▣ The common refrain that the lawyer is responsible for the 'quality of title' and the surveyor is responsible for the 'quantity of title' provides a helpful and accurate description of the distinct roles of each.

Finally, there are specific steps that can be taken to ensure the capacity in which one is acting is clear and obvious.

- ▣ The surveyor appearing on a client's behalf must ensure he/she is known to be there in his/her professional capacity as an Ontario Land Surveyor. This provides a secondary benefit in clearly ensuring that the surveyor's professional liability insurance is supporting his or her professional opinion.
- ▣ While it is usually clear to all that the lawyer/paralegal advocates and speaks on behalf of the client and client's interest, taking steps to ensure one's professional liability insurance is not jeopardized by acting beyond one's professional bounds is always good practice.

Can lawyers or surveyors have dual roles? Absolutely, but they must be licensed by each regulating body and they must ensure clarity of their role when providing professional services to the public.