

CONVEYANCING DESKBOOK

EXCERPT FROM CHAPTER 4

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II. PLANS [§4.23]

A. FIRST STEPS [§4.24]

Obtain and review copies of the plan of property and all other plans affecting the property (such as right-of-way plans or plans of lands transferred off the title). Copies of plans may be obtained at the land title office. Some plans are available electronically; survey plans may now be submitted electronically to the LTSA using the Electronic Filing System.

B. CONFIRM LOCATION OF PROPERTY [§4.25]

The purchaser's lawyer should ensure that the purchaser reviews the plan and confirms the location of the lot being purchased. This may prevent the problems that some lawyers have had as a result of conveying the wrong property.

Check that the subject of the conveyance is a legal lot (that is, one not requiring subdivision).

C. EASEMENTS, COVENANTS, AND OTHER CHARGES [§4.26]

An easement, restrictive covenant, lease, or other charge may relate to only a portion of a parcel. The portion may be defined by reference to:

- a reference plan (a plan based on a survey);
- an explanatory plan (a plan based on existing land title documents);
- a right-of-way plan (if the charge is a statutory right-of-way); or

- a sketch plan (if the charge is a lease in which the tenant can show hardship in obtaining an explanatory or reference plan).

All documents should be examined to determine the extent of all easements, restrictive covenants, or other charges. The *Land Title Act* does not warrant the accuracy of plans filed with the land title office (see s. 23(2)(h) of the *Land Title Act*).

D. ENCROACHMENTS [§4.27]

If a building or a fence encroaches on a parcel of land, the Supreme Court may declare an easement for the encroachment under the *Property Law Act* (s. 36), notwithstanding the actual boundaries of the parcel. Therefore, it may be important for the purchaser to determine if there are any encroachments on the land. The court may also order removal of the encroachment, or vest the title of the encroaching area. If the encroachment is on municipal land, it may be possible to enter into an agreement with the municipality.

Section 36 provides an equitable basis for resolving disputes over encroachments. The “balance of convenience” has been established as the test to be applied to the given circumstances. Some common factors include: (1) the knowledge of the location of property lines (for example, whether or not the parties knew the correct boundary line before the encroachment became an issue); (2) the nature of the encroachment (for example, whether or not the encroachment is a lasting improvement, and the effort and cost involved in moving the improvement); and (3) the size of the encroachment (which determines how the encroachment affects the properties in present and future value and use). For discussion of the case law, see chapter 50 of the *Land Title Practice Manual*, 3rd ed. (CLEBC, 2007–).

The purchaser should also determine whether its building encroaches onto neighbouring land.

E. INDEPENDENT SURVEY [§4.28]

The preparation of plans is controlled by qualified land surveyors, not the land title office. Thus, if there is an error in the boundaries or dimensions shown on a plan, there is no claim against the assurance fund set up under the *Land Title Act*. For this reason, it is always prudent to discuss with the purchaser the advisability of obtaining an independent survey of the parcel before completing the purchase. Accuracy of plans may be verified only by a full survey that replots the corners of the lot without relying on the land title office plan. Such a survey would be prepared by a B.C. Land Surveyor and would be very expensive. See §4.30–§4.35 for further discussion of the options and practice.

F. WATER BOUNDARY [§4.29]

Notwithstanding the accuracy of the plan, if the parcel borders on water, the water boundary may vary because of accretions and subsidence.

If water runs through, or is found on, a parcel of land, the bed of the water or the water itself may belong to either the provincial or federal Crown. For example, the *Water Users’ Communities Act* (formerly the *Water Act*, as renamed by the *Water Sustainability Act*, S.B.C. 2014, c. 15, s. 197, effective February 29, 2016) (s. 2) provides that the property in and the right to the use and flow of all water in any stream in British Columbia are vested in the government. Thus, where a stream flows through a parcel, the owner of the parcel does not own the water in the stream and may be required to obtain a water licence from the province to use the water. Water licences are not recorded in the land title office, but must be transferred to the new owner, complete with consideration of prepayments or arrears. See §1.6.

III. SURVEYS [§4.30]

A. OBTAIN INSTRUCTIONS [§4.31]

If the client is concerned, or the lender requires it, a survey or survey certificate should be ordered to confirm the location of all the buildings on the land as well as the boundaries of the property. The survey confirms the size of the lot, reveals any encroachments, and allows the purchaser to check with the municipality as to whether the property complies with the municipal setback requirements.

Some lenders no longer require a survey certificate. If a survey certificate is not referred to in the lender's mortgage instructions, the lender's lawyer should confirm whether this is a requirement of the lender. Even if the lender does not require a survey, many lawyers recommend to their purchaser clients that they should obtain one.

Some lenders require title insurance in lieu of a survey (see §4.36). Alternatively, the lender may accept a Solicitor's Opinion under the Western Law Societies Conveyancing Protocol (see §4.35).

In transactions involving title insurance, there may be reasons for the purchasers to obtain a survey, despite the insurance protection. The title insurer should discuss the terms of the title insurance policy with the lender and the purchaser to ensure that everyone understands the protection offered. Use of title insurance does not lessen a lawyer's professional responsibility to the client. For information on title insurance, see §4.36 in this book and §7.55–§7.60 of the *British Columbia Real Estate Practice Manual*, 3rd ed. (CLEBC, 2006–).

From the purchaser's point of view, it may be important to define the location of swimming pools, garages, fences, and other improvements on the property; their location can become a contentious issue after the purchaser takes possession of the property. Moreover, in many areas, it is impossible to determine the boundary of the city's property without a survey. If the purchaser decides against a survey, the lawyer should advise that the risk of an encroachment, a non-conforming setback, or an unforeseen boundary lies with the purchaser and not the lawyer.

A survey certificate is generally not required for strata property because the strata plan will indicate the location of improvements.

If the lawyer is instructed not to obtain a survey certificate, the retainer letter should confirm this.

B. BRITISH COLUMBIA LAND SURVEYORS [§4.32]

Professional accreditation of land surveyors in British Columbia is provided by the Association of Land Surveyors of British Columbia. An accredited surveyor uses the designation "British Columbia Land Surveyor".

C. SURVEY CERTIFICATE [§4.33]

A survey certificate issued by a British Columbia Land Surveyor depicts the location of improvements on the property relative to the property lines. A sample letter ordering a survey certificate appears at FP 28. During construction a survey of "forms" is sometimes obtained. This is generally not acceptable for mortgage purposes, since the forms may be relocated before the footings or foundations are poured. A survey certificate as to "foundations" may be acceptable for construction financing purposes.

D. USING OLD SURVEYS [§4.34]

To save the borrower the expense of a new survey, the lender may be prepared to accept a survey certificate obtained for a previous transaction if it is verified by a statutory declaration. The statutory declaration should state that the declarant has current knowledge of the property, that the survey certificate accurately describes the location and extent of the currently existing improvements, and that no changes to those improvements

have been made since the date of the survey certificate. A sample statutory declaration to accompany a survey certificate is included at FP 27.

Unless the lender's instructions clearly specify that an existing survey certificate is acceptable, the lender's lawyer should obtain approval from the lender before relying on an existing survey certificate with a statutory declaration.

E. WESTERN LAW SOCIETIES CONVEYANCING PROTOCOL [§4.35]

Institutional lenders normally require a survey of the property if mortgage monies are being provided. Alternatively, if the institutional lender accepts a Solicitor's Opinion under the Western Law Societies Conveyancing Protocol in place of a survey, the procedures under the Protocol must be followed. Although some different practice standards are set out for lawyers issuing Protocol opinions, nothing in the Protocol diminishes or changes the usual practices of prudent law firms or the standard of care for lawyers acting on mortgage transactions.

The Protocol was established in 2001 by the law societies in the four western provinces. Each of the law societies has adopted a version of the Protocol that is tailored for use in that jurisdiction. In British Columbia, the Protocol provides that a lawyer who acts for a financial institution is permitted to advise the institution (through a short, standard form opinion) that, if there are no known building location defects on a property, the institution need not obtain an up-to-date building location survey as a condition of funding a mortgage loan. If the financial institution relies on a Protocol opinion to fund a mortgage and suffers an actual loss as a result of an unknown building location defect that would have been disclosed by an up-to-date survey, the Lawyers Insurance Fund will, on behalf of the lawyer, accept liability and, as appropriate, pay the cost of repair or any actual loss suffered. In other provinces, the Protocol also addresses specific problems related to the release of mortgage and purchase funds on closing.

For more information on the Protocol, consult the Law Society website at www.lawsociety.bc.ca, currently in the "Practice Support" section. For a copy of the Protocol, see FP 56 of the *British Columbia Real Estate Practice Manual*, 3rd ed. (CLEBC, 2006–).

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