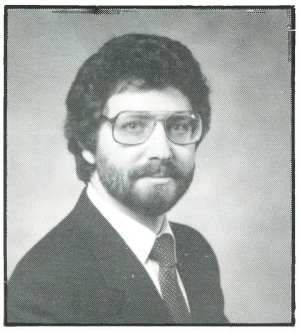

THE SURVEYOR'S REPORT: A LAWYER'S PERSPECTIVE

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INTRODUCTION

THIS PAPER will, within the context of the Jurisdiction of the Province of Ontario, explore what a lawyer in a typical real estate transaction is looking for in a survey and how this bears on the surveyor's report; the legal consequences of what is contained in the report; and recommendations as to what matters in general terms should be contained in the report.

AOLS STANDARDS

The Standards for surveys approved by the Association of Ontario Land Surveyors provide that all surveys are comprised of the following four basic parts:

— research;
— monumentation
— measurements; and
— plans and report.

The writer conducted an informal survey with a dozen lawyers practising real estate in downtown Toronto and surprisingly only one of that dozen was aware that in addition to the plan, a survey includes a written report in each case. Query, how many members of the general public are aware of the written report? It is the writer's experience that in the vast majority of cases the only report accompanying the delivery of a plan of survey to a surveyor's client is a pre-printed standard form simply stating that the survey has been completed and rendering an account for the service provided.

The only guidelines contained in the above mentioned Standards relating to what the report should contain are those set out in Part D, paragraph 1 which provides as follows:

"(1) Where no obvious problems or contentious issues are found to exist, a letter or pre-printed form acknowledging the inclusion of copies of the plan of survey, if applicable, the return of documents, the rendering of accounts, etc., may constitute sufficient notice to the client of the completion of the survey.

"(2) If obvious problems or contentious issues are found to exist during the course of the survey the written communication provided to the client shall draw his attention to all such problems or issues."

LAWYER'S REQUIREMENTS

In most real estate transactions whether acting for a purchaser or mortgagee, a real estate lawyer will typically utilize the survey to confirm the following matters:

(a) To re-establish the boundaries of the property and determine whether there are any discrepancies between the description of the property contained in the documents registered on title and the boundary as it was originally established on the ground. It would be very helpful if any material discrepancies between the re-established boundary on the ground and the written description in the registered documents be highlighted and where possible an indication of where the discrepancy arose or an explanation of how the discrepancy arose could be contained in the report.

(b) To determine the existence of any easements or rights-of-way which were not disclosed by the documents registered title (e.g. footpaths or utility easements). These matters can normally be adequately shown on the plan and do not usually need further embellishment in the written report. However there may be the odd circumstance where this is not the case and further discussion in the written report would be appropriate as determined in the professional opinion of the surveyor.

(c) To estabish whether the existing buildings and structures on the subject property encroach onto any adjoining lands and whether any buildings or structures from adjoining lands encroach onto the subject property. As in the case of unregistered easements or rights-of-way, these matters can usually be adequately shown on the plan but may require further discussion in the written report as determined in the professional opinion of the surveyor.

(d) To determine whether the subject property complies with the applicable federal, provincial and municipal statutes, by-laws and regulations. The two most common items to be determined are set-back requirements and lot coverage requirements, however, other items such as expropriation notices and green belt designations may also be applicable. These items should be clearly set out on the plan and where this is not possible fully covered in the report.

The practice of relying on photocopies of old plans when completing real estate transactions in order to avoid the additional cost of preparing a new survey is all too frequent within the legal profession. In almost every case, the lawyer will have

obtained a photocopy of only the plan and not the written report forming an integral part of the completed survey. The failure of the lawyer to obtain a copy of such report as well as the plan, may result in the completion of a real estate transaction without knowledge of material information in regard to the property or the preparation of the survey and thereby cause potential monetary loss to the clients in the transaction. In addition, some surveyors have provided copies of old surveys at the request of lawyers or property owners for the same purpose. These plans are sometimes stamped with a disclaimer on the front of the plan limiting the accuracy of such plan to a particular date. Where the surveyor provides only a copy of the plan whether stamped with such a disclaimer or not and does not provide a copy of the written report as well, he may be opening himself up to liability where the report contains material information. This liability relates to the representations implicit in the surveyor issuing his survey and will be more fully discussed later in this paper. The resulting risk should make it clear that lawyers should not rely on, nor should surveyors provide, photocopies of old survey plans in order to facilitate completion of subsequent real estate transactions.

NEGLIGENT MIS-STATEMENT

When a surveyor is retained to prepare a survey he is required to use reasonable care and a resonably competent degree of skill and knowledge, which he has acquired as a professional land surveyor, in the preparation of such survey. The surveyor is presumed to know that people will rely in the ordinary course of business on the survey which he prepares. (See *MacLaren-Elgin Corp. Ltd. et al v. Gooch*, [1972] 1 O.R. 474.) In effect, the surveyor is representing to members of the public who are less skilled and knowledgeable in these matters that the survey accurately sets out the state of the property and he is deemed to know that other people coming into contact with the property will be relying on the survey in their dealing with the property.

Although at one time it was thought that this duty of care only extended to the client directly contracting with the surveyor for the preparation of the survey, it now seems clear that the courts will extend this duty to third parties coming in contact with the property (see *Parrot v. Thompson*, [1984], 51 N.R. 161 (S.C.C) and *Hedley, Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575). In one of the leading cases in this area of negligent mis-statement, the presiding judge indicated that this concept specifically should apply to "persons, such as accountants, **surveyors**, valuers and analysts, whose profession or occupation it is to examine books, accounts and other things, and to make reports on which other people - other than their clients - rely in the ordinary course of business." (*Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164 (C.A.) at p.433.) Accordingly, parties other than the surveyor's direct client may be in a position to recover damages against a surveyor for negligence in the preparation of a survey.

In the Parrot v. Thompson case mentioned above, the defendant surveyor prepared a survey in 1956 for Mr. M. and erroneously stated the area of the property as 80,340 square feet instead of 73,660 square feet which was the true area of the property. In 1973, some seventeen years later, the property was sold by Mr. M. to the plaintiff, Mr. T., who relied on the surveyor's statement from the 1956 survey that the property contained 80,340 square feet. Mr. T. had agreed to resell the lands in separate lots containing specific areas and was unable to complete these transactions as a result of the actual lesser area of property. The Supreme Court of Canada held that the defendant surveyor could have been liable to the plaintiff, Mr. T., notwithstanding the lack of a direct contract between the parties.

The Court of Queen's Bench for the Province of New Brunswick held a surveyor liable to the purchaser's solicitor and not to the purchaser where the solicitor certified title in reliance on a survey prepared by the surveyor which incorrectly showed the western boundary of the property (see *LeBlanc v. Dewitt* [1984], 34 R.P.R. 196).

SPECIAL CIRCUMSTANCES

The courts have held that the degree of skill and care to be applied by a surveyor in the preparation of a survey will be gauged in relation to the surveyor's knowledge of the exact purpose for which the survey was required by the client and the time limits within which the client has requested the survey be completed (see McLaren-Elgin Corp. v. Gooch referred to above). In the McLaren case the Ontario Supreme Court held a surveyor not negligent in the preparation of a survey notwithstanding certain variations in the front and rear lines and angles which required a redesign of a six storey apartment building and alterations in the specifications for steel for the construction of such a building. The decision was based on the fact that the client, at the time that it ordered the survey, did not state the exact purpose for which the survey was required, the limited time period within which the client required that the survey be completed and the Court's determination that the variations were within tolerable limits for the ordinary purposes of a survey. The Court found that if the exact purpose of the survey had been disclosed "certain angles and bearings would have been included in the plan", "all items would have been checked more carefully, including the examination of all records" and "the surveyor would not have allowed himself to be rushed but would have taken extra time-consuming precautions."

This case highlights the fact that it is imperative that the surveyor bring to the attention of anyone who is likely to rely on the survey prepared by him, any special contractual terms or circumstances under which the client retains the surveyor to prepare the survey, in order to limit the liability of the surveyor. In many cases, the terms on which a surveyor is retained to prepare a survey are verbally communicated between the client and the surveyor and are not reduced to writing. Some of these terms which may bear on the liability of the surveyor in the preparation of a survey are: the purpose to which the survey is to be put; whether the survey was required in a shortened period of time; specific instructions as to whether or not certain items are to be shown on the survey (e.g. building location survey); etc. It is submitted that the proper way to bring this information to the attention of parties potentially relying on the survey is to include such items in the written report accompanying the plan. By so doing, all parties relying on the survey will have full knowledge of these matters.

This is even more important in view of the decision of the Ontario Supreme Court in *Viscount Machine & Tool Ltd. v. Clarke*, [1981], 21 R.P.R. 293, which held that the negligence of a surveyor is an independent tort (failure to meet a legal duty) independent of his duty imposed by the contract for his services and accordingly the limitation period within which a legal action must be commenced against a surveyor

did not begin to run when the survey was completed but rather when damages were suffered. In this case a survey prepared negligently in 1972 was not discovered to be erroneous until a building was under construction in 1979 but the Court held that the limitation period of negligence did not begin to run until 1979 and therefore the action was in time. As a result of this case, the surveyor may find himself the subject of a negligence action many years after the survey was prepared and long after the surveyor had thought the file was completed.

The surveyor may be able to use any special circumstances surrounding the preparation of the survey in defending an action for negligence if these circumstances are fully reflected in the written report accompanying the plan and the plaintiff knew or ought to have known of these matters.

"OBVIOUS PROBLEMS OR CONTENTIOUS ISSUES"

As already stated, the Standards of the Association of Ontario Land Surveyors permits the use of a letter or pre-printed form where "no obvious problems or contentious issues are found to exist". In view of the previous discussion in this paper it is suggested that land surveyors carefully re-assess what will constitute an "obvious problem or contentious issue" and thereby necessitate the use of a more involved written report than a pre-printed form or letter. It would seem that there are two major areas that should be dealt with in the report.

The first of these deals with problems or contentious issues which cannot be adequately and clearly detailed on the plan. Examples of these may be expropriation notices, designation of the property as a green belt and other restrictive governmental regulations. The word "clearly" is stressed in the depiction of these matters on the plan as a surveyor must satisfy himself that the survey including both the plan and the written report, clearly represents the property in a manner understood by lay persons not possessing the superior skill and knowledge of a professional land surveyor and who are likely to rely on the survey.

The second area to be dealt with in the written report is any special instructions received by the surveyor in regard to the preparation of the survey and any special circumstances surrounding the preparation of the survey which might be material to any party relying on the survey. This is the surveyor's opportunity to reduce to writing any verbal instructions which would be hard to prove many years down the road against a denial by his client or which might be unknown to third parties relying on the survey in the future (see discussion earlier in this paper under "Special Circumstances"). If these matters are set out in the written report and received at the time of delivery of the survey to the client or third party prior to his relying on the survey then the surveyor can argue that the client or third party, as the case may be, was fully aware of these circumstances when it relied on the survey and did so with full knowledge.

It is also for this reason, that it is recommended that when a surveyor is asked for a copy of a plan he ensure in all circumstances that a copy of the written report also accompany such plan, in order that any party relying on the survey be made aware of any of the information contained in the written report prior to his relying on the survey.

CONCLUSION

In view of the serious legal consequences arising from what is contained in the report it would seem that a greater attempt be made to publicize the existence of the written report accompanying the plan and that the written report forms an integral part of the survey. Perhaps the words:

"THIS PLAN IS SUBJECT TO THE WRITTEN REPORT DATED ..... AND PREPARED BY ..... , O.L.S."

should be added to each plan in order to avoid any doubt as to the existence of such written report and its importance to the survey as a whole.

It is also suggested that in an increasing litigious world the land surveyor should make increased use of a non-standard form written report along the lines set out in this paper. After all, when determining a land surveyor's ultimate liability, what is *not* set out in the written report may be just as important as what is said in the report. ●