# Copyright and Fair Use of Surveyors' Real Property Reports

The following is the transcript of the panel discussion held on March 3, 1993, during the 101st Annual Meeting of the Association of Ontario Land Surveyors, at the Toronto Hilton Hotel. The Panel consisted of William Snell (Moderator), Bart Ristow, Peter Johannes, Jack Monteith, Jim Wardlaw and Ed Walsh (see cover photograph).

*William Snell introduced the members of the panel and asked each to respond to the Association's position.*

**RISTOW**: The bank is trying to stay as neutral as it can on this issue. We have concerns over the quality of title on real estate lands and, our job as lenders is really risk management. We try to mitigate, but obviously not eliminate the risk. In terms of the copyright issue, that's really not for the bank to decide. Our concern, and certainly the bank's position at this point, has been that when we are looking for an up-to-date survey we do instruct our lawyer or the lawyers handling the registration of the document to look after the interest of the mortgagor in terms of good marketable title, and at this point I think we are still going to hold to that.

If there was a change that would affect the bank's position in terms of risk, we would have to address the issue. From previous experience the bank has had few situations where we experienced losses as a result of a problem with title.

**JOHANNES**: The role of the broker, be it a real estate or mortgage broker, and I am fortunate to represent both, is to mediate a transaction in the most expeditious and cost-efficient way - cost-efficient relating to the cost of the principal parties involved. As agents we have to show strict obedience to our clients and have to provide correct information about the real estate properties; the real property we are involved in.

We have to do everything we can, to keep our clients and ourselves from being sued, especially in this lawsuit drunk society of ours. Many people in my field often regard the land survey simply as a necessary evil in a transaction. Lenders want one. Lawyers need one for their file. The purchasers will need one to pass along to their purchasers when they sell.

There appears to be little appreciation by the parties involved concerning the surveyor's copyright, and just how recent the survey report might be. Property owners generally have the impression that once they have a survey, it's theirs to do with as they please. They also feel that because land boundaries and dwelling locations are pretty static and don't tend to move around a lot, the survey, or at least aspects of it, are good forever.

Generally speaking, the land survey appears to be acceptable to many lawyers and lenders that I have had experience with as long as it's legible enough to make out the measurement numbers and the date of the survey, and hopefully that it was somehow signed by an Ontario Land Surveyor.

Brokers are being educated to appreciate how an up-to-date survey can protect them specifically from lawsuits. In my own practice, I strongly recommend a client commission a new survey when a property is under Land Registry, and particularly if there is a danger of encroachments leading to adverse possession problems, or if the property had significant and permanent improvements.

Like lawyers, however, we can only recommend to our clients that they get a new survey. The final decision and cost rests with the principals to the transaction, and generally we get something in writing, if possible, indicating that we have advised them to do that and that they have rejected that advice.

Besides the cost concerns of ordering a new survey, there is often a time constraint to consider. In busy times, and I don't know if we have experienced that for a few years, it can sometimes take several weeks, even several months, to get a new survey done. That can sometimes delay the entire transaction. If Ontario Land Surveyors were able to enforce their copyrights and prevent re-use of survey reports, the effect could be to create a giant bottle-neck delaying and preventing many real estate transactions.

A new wrinkle in the whole arena of real estate and mortgage transactions that I am on the forefront of is title insurance coming up from the United States. Companies such as First American Title Insurance Company will guarantee a transaction without the need for land a survey or lawyer's opinion of title.

A few mortgage lenders that I've been involved in have already begun using title insurers, and certainly given the choice for a client between laying out $800.00 plus legal fees versus going to a title insurance company for $595.00 complete, you can see how the tendency might be to start using title insurers.

Although this won't eliminate the need for residential surveys, it could seriously reduce demand. You will see, if you are successful with imposing copyright restrictions, more and more lenders, going to a title insurance way of doing their refinances and transfers. It is a fine line that you are walking here.

**MONTEITH**: I can only speak about the initiative that we've commenced in the City of Sarnia and the County of Lambton in conjunction with all the survey firms in the county.

I am only going to speak to the policy we are now formulating in our own firm. I want to emphasize the word "formulating," because since we started down this road we have had considerable co-operative dialogue with the various lenders in our area, as has the other firms, I understand, in the county.

Monteith and Sutherland has adopted a policy which is predicated

on acting in the best interest of the public who use our services, and also protecting our rights afforded by law under the Copyright Act. The cornerstone of this is the protection of the public and our policy, as it is formulating, is a culmination of melding the Manitoba Protocol. The Association of Ontario Land Surveyors' Guideline regarding re-distribution of survey plans.

This guideline is set out in a bulletin that was published in 1990, and for your interest the guideline, word for word, was agreed to by the Competition Bureau.

In Sarnia, we talked about this for quite some time. The first step was having the Association-sponsored seminar come to Sarnia in the fall of last year. It was attended by the lawyers, lenders, and real estate, conducted by Mrs. Lorraine Petzold, and it had a very positive impact on all the attendees.

We were advised that we should put the people that we are dealing with on notice. Initially, we sent out a letter to all the lenders in Sarnia.

Our next step, as we see it, is to similarly advise the lawyers and the real estate people with regard to what we are trying to do.

The results so far with our letter to the lenders has been positive. We are reasonable people, and fair use has been a continuing topic with them. We understand that the survey industry is market driven. We want to work in concert with the people that are involved in this gigantic industry.

I want to emphasize that we do not want to be the sand in the gears of this massive industry; we want to be the lubricant, and so we are, still formulating a policy.

**WARDLAW**: Several years ago, your then President, Jim Nicholson, contacted the Law Society to see if a set of protocols could be developed between our two professions with respect to the use of surveys. That got sidetracked when you got involved with other matters, but it was again revived this past winter.

We met a few years ago, and again we met a couple of months ago. The then Treasurer of the Society asked me if I would meet with you. Anything I say, however popular or unpopular, must be regarded at this point as my personal opinion. No protocols have been developed. No committees or sub-committees of Convocation have studied the matter.

Let me also confirm that I am as concerned as you are about the abuses to which old surveys can be put or, unfortunately, sometimes are put by some members of my profession and some members of other professions. And, for good reason. I can be perhaps held responsible in negligence in addition to my clients suffering injury.

Now, reasonable men can agree on basics, but there may be a lot of disagreement when it goes beyond basics and there may be also disagreement as to what are basics. I am sure there are bound to be disagreements between our two professions as to what can and cannot be done. Obviously, we can recognize the abuses and both agree what abuses are: a changing of a date, photocopying a plan that you have done to illustrate a description and then taken a surveyor's signature and cutting in out from somewhere else and photocopying it onto it, drawing in the location of a building and then photocopying it so that it just doesn't look like it is something that is new.

But these are obvious fraudulent activities. They are against the criminal law. We are not going to be able to police that, no matter how hard we try. We can say in any protocol what shouldn't be done, but it isn't going to stop it because it's criminal activity.

There is the other end of the scale, which you obviously recognize, where the use of a survey is proper in the original transaction, but there are gray areas in between where there are going to be disagreements. I am going to list some of the points that I think are relevant. You have indicated, and I agree with this, that the public interest must be protected. That, to me, does not mean that a new survey has to be prepared every time a property changes hands, or every time new financing is being prepared. It seems to me that a person, two or three, or ten or fifteen times down the chain should be protected without needing a new survey if there has been, in fact, no change in the property's status. Now, how do you achieve that? That is one of things that a protocol would have to address.

As a corollary, I suggest that the public interest can be abused by you if you insist on copyright, and I suggest to you very strongly that you have got to be very concerned about that, because while I am not a policy-maker in Ottawa or in Ontario, except in my own profession, any attempt by you to use the public interest in what is perceived to be a financial grab, and it can be perceived in that way, will be regarded as being self-serving, and will be regarded by the policy makers as the cause for a need for a change in existing laws.

Now, it may be that in existing laws you are able to enforce copyright, but if you do, I suggest to you that you run the very strong danger of having those laws changed.

**WALSH**: Although I am a lawyer, I am also a building contractor and a consumer. I just finished writing a book and the primary purpose is to protect the consumer. So if you will bear with me, my hat is off as a lawyer and I am looking at it from the standpoint of the purchaser or consumer - the one who is using the services of a surveyor.

I have a number of comments to make, but I think with the questions as they are prepared and addressed to each of the individuals, they probably cover each of the areas of concern that I have.

The book that I wrote is strictly on that basis. I am not concerned with the interests of the legal profession, per se, although I am from the legal profession. So, with that, I will wait to hear the responses to the answers of these questions.

**SNELL**: We have prepared a number of questions for discussion amongst this panel.

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***A Plan of Survey or a Surveyor's Real Property Report is often a requirement of a lender before forwarding mortgage funds. Why are surveys required, and what information do you expect a survey to illustrate?***

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**RISTOW**: There are many reasons why a survey is required from a lender's point of view. Our number one concern is that we are the biggest investor of real estate. We have got the most to lose, and with the eroding equities in the last three to four years, it is obviously a very serious issue for us. We also have an obligation to third

parties, in the case of MICC or CMHC, when they are insuring a loan, and they have their own requirements in terms of having a survey, so that we have to protect our ability to claim against the insurance at some point, if we'd have to do that.

We also have to consider, that the original appraisal on the real estate was done assuming a good and marketable title.

Those are the guidelines that are given to the appraiser, and if not given to them, those are the guidelines covered off in their own errors and omissions insurance. The values are predicated on good and clear title, and for that reason we have to be sure that it's there.

Ultimately, the reason we have to be sure that we have a survey and clear title is that we may, in fact, end up taking the property and then trying to realize on the real estate, either under power of sale or foreclosure, and more likely power of sale, and having to market property certainly we have to be able to offer marketable title at that point. So those would be the main reasons that we would require the survey.

In terms of what we would require on the survey, I suppose we put a lot of onus on the solicitors, and we actually have a set of fairly complex instructions that we send to our solicitors when they are registering a mortgage document. The first thing we ask for is that they ensure that the mortgagor has made good and marketable title. That is key. Beyond that, we want to be sure that the buildings or any ancillary buildings are in fact on the property and don't encroach on neighbouring properties, also that the uses are legal and are not in contravention of local by-laws or provincial statutes.

Third, we also ask the lawyers to ensure that the existing easements or encroachments will not adversely affect the marketability of the real estate. So we pass those instructions on to the solicitor. In addition, we also cover off what we look for in a survey.

The first thing we like to see is a lot and plan or the concession number; the measurements of the boundaries of the lands; any discrepancies in the legal description of the lands; all buildings and structures, or the foundations of all buildings under construction on the lands; the dimensions of all existing buildings and structures on the lands; are all improvements under construction; any encroachments from the adjacent lands are from the adjacent lands; the location of all easements; the municipal address; and a fairly contentious issue is, if the survey is more than 20 years old, we ask for a declaration of possession to be given that would let us know if any changes or additions had been made to the property. Under certain circumstances we are prepared to waive appraisal, or to waive surveys, and you should appreciate, too, that every proposal for a loan, every loan application, has a very unique set of risks, and there is a lot more to consider than just the survey. There are certainly situations where very low loan amounts, what we would deem very low-risk lending situations, we may waive that requirement.

**WARDLAW**: The comment, that I want to make is the title isn't necessarily the same as location of building. Title is really the title to the land it's on. A survey is needed to show the location of the building.

A survey is needed, from my standpoint as a lawyer acting for a borrower, to do two things.

(1) Is there a building on the property?
(2) Does that building comply with zoning standards?

Now those are, in an urban property, what I am looking for when I am acting for a borrower. I might indicate that the Lac Mortgage and Tolton case you referred to you in your paper,

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*"If Ontario Land Surveyors were able to enforce their copyrights and prevent re-use of survey reports, the effect could be to create a giant bottle-neck delaying and preventing many real estate transactions."*
P. Johannes

Bill, was a situation where there was no survey, and the comments of the judge have to be regarded from that point of view. He was criticizing the fact that the lawyer didn't advise that there should be a survey. He wasn't saying that, because there is no survey, the lawyer is responsible. It was his lack of advice that created the problem.

**WALSH**: As Bart has indicated they have the largest risk, by and large, in the majority of transactions, so naturally they are concerned in terms of value, risk, and re-saleability.

In that instance, they should be as much concerned as the purchaser is. I am somewhat surprised that the lending institutions have, in their wisdom, placed most of the responsibility for certifying marketability with the solicitor, because the solicitor, in order to make a determination of marketability, is dependent to a great extent upon the evidence as found in a survey document. The lawyer rarely goes out and physically looks at a piece of property, and I dare say, even if he did, in all likelihood he wouldn't know what he was looking for in the first place.

With that in mind and with the types of municipal regulations that we are running into every day, it would seem prudent that the lending institution should pay as much attention to what documentation they are receiving, as does the purchaser, because as indicated, the lender could end up being the owner.

**JOHANNES**: As a mortgage broker, I am frequently confronted with mortgage applications going to a host of lenders. I have found that competition in the market place for high-quality borrowers is such that lenders are willing to compromise, on a daily basis, their need for the proper documentation, including an up-to-date survey. In many cases, this provision has been waived, where the loaned value is acceptably low and there seems to be little risk.

I don't know if the feeling is that the liability in that case can be transferred to the lawyer preparing the mortgage documents or not, but that's the impression we get. It seems that the problem has been getting worse as far as lenders, especially smaller lenders that are hungry for business, and the long-term prognosis is not likely to get better, at least until the economy gets better.

**MONTEITH**: Most of the people here know, with regard to a Surveyor's Real Property Report, we have standards that actually set out exactly what is to be shown, both our standards and regulations or statutes and the regulations thereunder. As far as I am concerned, it's a standard kind of product that we are trying to put out these days.

**SNELL**: Bart, you indicated there that anything over 20 years would be reviewed a second time. Is that to imply that anything under 20 years is accepted without question?

**RISTOW**: I wouldn't say without question. I think that you have to identify that there are many different kinds of real estate in Ontario, even at the underwriting level when somebody is underwriting a deal, they look at the type of real estate they are dealing with.

If it's a property in Erin Mills that has been there for 15 years compared to acreage in New Liskeard, you are looking at a different risk and a different lending situation. Certainly there is some discretion given to every underwriter, in fact, they may insist on a new survey.

There are some general rules; I know MICC and CMHC are looking for something that is 20 years old or newer with a declaration, but it is definitely not etched in stone. It would depend a lot on the real estate.

***How do you view, as a real estate agent, the importance of an up-to-date land survey?***

**JOHANNES**: I'll note, first of all, that you have got the word "up-to-date" as opposed to "new", so that sidesteps the copyright problem, I assume. As a real estate broker, when I contract to represent the vendor in the marketing of a property, my obligation to both the vendor and the potential purchaser is to represent the property correctly, especially in terms of its dimensions, the improvements, which might include, let's say, a hedge or a fence which is possibly on the property, but not necessarily.

The title is something I am concerned with. I may, and often do, go to the Registry Office and execute my own mini title search, looking specifically for easements, and so on, that were created.

The long and the short of it is, my liability is at stake here to make sure that I am representing the property correctly, the frontages, the depths, the total area, the improvements, and the survey is the best source of information and the only reliable source of information for me.

So if I don't have an up-to-date survey, if the vendor is not able to provide me with one, then I get very, very nervous, and have to make all sorts of exceptions and indicate that my opinion is being given here that the information is not definite, and recommend to any potential purchaser that the information that I am giving them is not necessarily accurate.

Now, that's me. Obviously I might be the exception to the rule. There have been relatively few Ontario court cases that have held real estate agents up because of misrepresenting or incorrectly representing a property because of a bad survey, or an incomplete or a not up-to-date survey, but I think those are going to come fast and furious now that the magnifying glass is shifted over to the real estate community a little more.

The general feeling of the profession, thanks to ongoing instruction courses held by the Ontario Real Estate Association and our individual boards, is that when an up-to-date survey is not available the agent should make every attempt to convince the principals to get one as quickly as possible prior to selling the property. Failing that, the purchaser should be advised of an incomplete survey -- and no representations are made about the property until such time as a survey is obtained.

Now, that is the hard and fast principle. The actual practice is probably far less well thought out than that. Many transactions proceed with an original survey attached to the copy of the Agreement of Purchase and Sale, and the agent has basically tried to avoid his liability by simply indicating that that is what we know about the property, as per the attached. Again, that has not been challenged in court yet, but it's just a matter of time before that happens.

From the mortgage brokerage perspective, we have far less liability

there because we are just a go between. It's the lender's judgement call of course the lawyer's opinion that really protect us and buffer us from that problem. So we are liable to hand in anything, just as long as it appears to fit the basic criterion of the lender in that case.

***Should an up-to-date survey be a requirement of every real estate transaction?***

**WARDLAW**: The problem is, in my view, obviously no, but there are problems with the fact that a survey may show nothing more than an unfinished concrete basement. It came as something of a shock to me last week looking at a survey, recognizing that I had had something to do with the original building of a building and it showed an unfinished concrete basement, and this was about 40 years ago, I didn't think time had passed nearly that quickly.

I recognize that a statutory declaration is a self-serving document, but it seems to me, also, that the parties have to make their own decision on the point, not the surveyor. My view is that as part of a declaration of possession, and I might says it's my view, if there is a survey, an old one meaning 40 years old, an old one meaning 5 years old, an old one meaning 3 years old, if it is not the original parties -- that as part of the statutory declaration there has to be the following statements, and this probably is in contravention of your copyright: - Exhibit A to this Declaration is a photocopy of a survey, or part of a survey, prepared by, naming the surveyor, prepared on, giving the date, identifying or stating "this is a survey of my property", stating what changes if any have occurred.

It is the lender that has to be satisfied, if the lender says, no, I am not satisfied, then usually a new survey has to be obtained. But you have got to come down to the basic line; who is going to pay?

Acting for a vendor, and those are the normal Agreements of Purchase and Sale that come in, where the real estate agent has put in the fact that the vendor agrees to provide a new survey at his expense, I have invariably struck that clause out, and invariably the purchaser accepts the fact that that clause has been struck out. I can't recall one occasion when the purchaser has refused to accept that he is going to prepare the survey. That is number one.

Number two, you have to recognize who pays the survey, and in the absence of agreement to the contrary, it is the purchaser that has to pay. If you are talking about a purchaser of a new house, that to him is new, but it may be ten years old, or twenty years old, he usually doesn't have the money to come up with that extra thing, and the purchaser is normally very satisfied to take the type of declaration that I have talked about.

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*"... it's a matter of us [OLS's] attempting to educate all the players in the real estate transaction, just exactly the part that the surveyor plays in this total picture."*

J. Monteith

But I might also say that from the purchaser's stand-point I very rarely get to see a purchaser before the agreement is signed. I quite frankly prefer it that way, because I can't be nailed for failing to advise him of something at that point that I should have. The purchaser -- is normally satisfied. Then it becomes, is the lender satisfied. But I don't think this is something that can be imposed by surveyors, and as I say probably what I am doing is in contravention of your copyright, but that, I think, is the standard of practice among lawyers in Ontario. I think that the majority of lawyers probably would agree with what I do.

**WALSH**: There is a clause in the standard Ontario Real Estate Association Agreement of Purchase and Sale, and it indicates that the vendor is to produce any surveys in his possession along with other documents such as deeds. It may perhaps be misleading to the purchaser in that the purchaser, having read that clause, may believe that the survey that's being produced truly represents what the present facts are. I know that in many cases real estate agents them-

selves do not know of the effect and sometimes don't appreciate the exact ramifications of what can actually happen in the intervening period from the time when the survey is prepared and the time that it is used as a representation to the purchaser.

From that standpoint, I think that that provision of providing a survey that is in his possession, albeit a very old survey, may be more misleading than any problems it solves and perhaps it should be deleted.

As to whose responsibility it should be the decision between the negotiators, the vendor or purchaser, and it is up to them to decide who should have or supply the survey. I think, from the real estate standpoint, they have a real duty to make sure that they tell the purchaser that this particular document, if they are producing it, does not necessarily represent what is on the ground.

I can understand Jim's position in terms of him indicating that an up-to-date survey is not necessarily required in every transaction. I ran around on a number of occasions scurrying around trying to find some document that I thought might be acceptable to a mortgage company as well as to a purchaser, and as a result of that, I would prepare a number of declarations, if I was on the vendor's side. If I was on the purchaser's side, I would be reviewing those declarations to see whether or not there was some adequate protection. I think I would have to take issue with the statement that an up-to-date survey is not required in every instance. You don't see a lawyer closing a real estate transaction and transferring the deeds between the individual parties without doing a sub-search immediately before registration.

**MONTEITH**: I would like to make a comment. It has always puzzled me, that is the deal breaker. The whole thing -- for $100,000.00, three-quarters of one per cent of the total picture of the transaction. If you go to $200,000.00 just divide that in half.

**JOHANNES**: You have to understand that in the early stages of marketing -- you realize there probably isn't even a survey available or the survey is a crude survey that just is a plot survey that shows maybe the original foundation that the present owners got by way of the builder. We are actually on the ground. I am actually having to answer questions about whether that tree over there is part of the property or if it is on the other property.

So we are having to make opinions and judgements sometimes in the absence of a good survey, knowing that even if a survey is ultimately required, it is going to be three or four weeks before we will have it in hand and we will know the answer for sure.

We are marketing something, we are not exactly sure of all the ramifications, of all the consequences of what we are doing, and we are having to qualify our opinions as we go, especially with regards to new structures that are not represented on a current survey and we don't know whether the set backs are legal or not.

That is a real sticky problem, and to protect ourselves and our clients we always pass the ball off to the next professional, who also has errors and omissions insurance, and pray that it does not bounce back to us, as it may inevitably do.

The other consequence of getting involved in surveys and recommending them, and the reason that real estate agents sometimes are shy about this, it is often a deal breaker and we end up eating the survey cost. Now, for the total deal it seems insignificant, but when you've already taken a one-and-a-half per cent commission cut, and this deal is still not coming together because of a survey, because the expectations of both parties is that they didn't really need one, there you are stuck. I certainly paid you my share over the years. So those are actual real-life situations that I have experienced that hinge on this question.

As with regards to the clause, the clause is written in a vendor-biased way. We are generally agents for the vendor, and although this is a fairly neutral Agreement of Purchase and Sale form it does tend to drift to the side of the vendor's interest.

The first part of the clause actually says, "The purchaser shall not call for the production of any deed, abstract, survey or other evidence of title to the property, except as are in the possession or control of the vendor," which means that since the inception of the Registry Office, and that being the absolute proof, that we don't actually have to give people deeds in exchange for money anymore, or hold a deed to prove that we actually own a property. The clause simply says that the vendor doesn't pay for the survey. If he happens to have one, he will give it to you, and he is obligated to give it you by virtue of this clause.

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***A requirement of the standard Agreement of Purchase and Sale is that any survey in possession of a Vendor shall be provided to the Purchaser. Do you feel this is appropriate, if not, please suggest a possible revised requirement?***

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**JOHANNES**: It must be understood this form is a blank canvas, and we paint all over it attempting to be lawyers. Essentially, virtually every Agreement of Purchase and Sale that I have that involves a residential property has a typed-in clause regarding the survey that supersedes clause number 11 that we have been reading to you. The verbiage in that clause varies considerably from agent to agent, office to office. Certain companies, Royal LePage and so on, have fairly standardized versions. Other companies basically allow their individual agents to come up with whatever is going.

My standard verbiage involves having the vendor, if I am working with a purchaser, bringing in a purchaser's agent offer or as a co-operating agent, put in that the vendor agrees to provide at his own expense an up-to-date copy of the survey. And invariably, during the course of negotiating the offer "up-to-date" gets crossed out and "existing" gets inserted, and often "as per attached" added to the bottom of it.

There is usually a balking by the vendor, to provide an up-to-date survey, and they almost always feel that it's the purchaser's responsibility. In greater Southern Ontario, from Peterborough to the Niagara area, I've experienced that that is the general assumption. If the purchaser wants a survey, the purchaser can pay for it. Otherwise here is the scrap of paper that we got, and, it was good enough for us, so why isn't it good enough for you. The purchaser is probably the right person to go out and get a survey. They can then select the superior quality, which shows

literally every bush and cobblestone on the property, and know exactly what they've got. But if the vendor is requested to go and get a survey, he is going to go and get the most cut-rate survey that he possibly can.

Just to finish up the point. The purchaser is also dealing with this time constraint, and there have been cases, in busier times, but even recently, where you have had to actually shop surveyors in our area to try and get someone who was available to be able to go out and do the property in time for us to make application for the mortgage so that the whole thing could close on time.

As a real estate agent with the liability problem that I mentioned earlier, I am reluctant to push a deal through if I am not absolutely sure that all the bases are covered and that I am not actually selling something that has a major easement across the back or is encroached in some way.

***It is becoming a common occurrence for a solicitor or lender to accept an out-of-date survey, together with a statutory declaration from the present owner stating that no changes have occurred to the property since the date of the survey. Do you feel that this practice adequately protects the interest of the purchaser or lender?***

**MONTEITH**: I think Jim covered it completely, really, that they are probably not the route to go.

**WARDLAW**: There is one comment on it, Bill, and that again refers to the Lac Mortgage case that you were referring to. The statutory declaration in that case was prepared by the builder, and the builder's declaration was that I am building a house on the property. It turned out to be the property next door. The matter did get resolved with an action for rectification whereby the property was -- all of the registers were amended to become the proper property.

But it was in that context that there was no survey, and the survey that was relied on is that "I am building a house on the property".

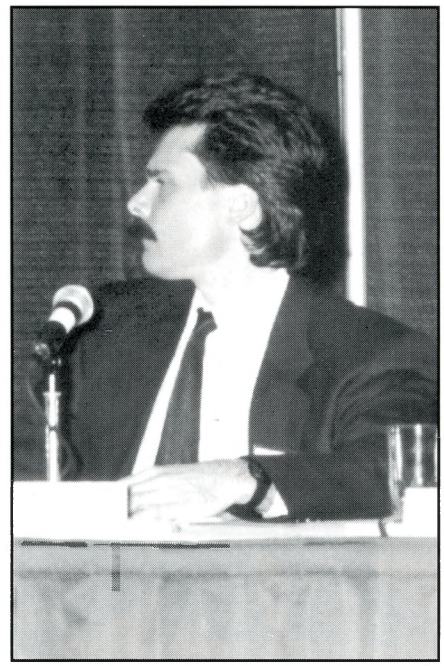
***As an Appraiser what similarities do you see with the profession of surveying regarding the use of out-of-date documentation and what actions have appraisers taken to deal with the problem?***

**RISTOW**: CIBC Mortgage Corporation doesn't have this problem internally because we have an in-house appraisal operation where we do our own appraisals, and we don't release copies of our appraisals to anybody other than bank personnel. We do have situations where, outside of the Greater Metro area, we rely on fee appraisers, and it's quite common-place for mortgage brokers to have copies of an appraisal attached to an application done by an appraiser we may or may not know. The date could be current or it could be a couple of years old.

Appraisers are not bound by any legislation. They are not licensed. Anybody can be an appraiser. Right now the Appraisal Institute probably is the most widely recognized, but a bank does not have to use an accredited appraiser from the Appraisal Institute. He can use John Doe down the street who has a lot of real estate knowledge.

The fee appraisers have dealt with this problem in a couple of ways. First, in their limiting conditions, they state very emphatically the purpose of the appraisal report, that it is done for a particular date and time, for particular clients, and that it cannot be used elsewhere.

In practice, what happens of course is that the fee appraisal is shopped around everywhere, it is photocopied, faxed, and it can end up in four or five financial institutions. From what I have seen, cases in Ontario have found appraisers to have liability even when their limiting conditions suggest that the appraisal should not be released. Judges have decided that an appraiser should expect, because it is common practice that appraisals are released, that their appraisal could be used by other



*Bart Ristow graduated from Trent University in 1981 with a Bachelor of Science in Biology. He is a licensed real estate salesman and has several years experience in that field. He is presently the manager of Appraisal Services at the Head Office of the CIBC Mortgage Corporation in Toronto.*

*"most lenders who are going to demand an up-to-date survey may lose a customer."*

B. Ristow

parties. Liability is something that, I guess, a lawyer could comment on better than I could. Even though appraisers emphatically spell out the terms and conditions on how the appraisal is to be used, to date the courts have still often held appraisers liable regardless.

I think that what regulates the passage of appraisals more than anything else is not the appraisers themselves, but that most reputable lenders recognize the quality of certain appraisal firms, and will not accept just any appraisal.

Not all appraisers are equal and most reputable lenders have a list of preferred appraisers that they use. When they look at an appraisal, they will look at the date, they will look at the quality of the report, they should be well versed in real estate and underwriting skills, and they make their own judgments as to whether or not the appraisal is acceptable.

Financial institutions, generally, avoid the problem entirely because they will not accept an appraisal unless it meets their lending guidelines, and they tend to set the standard for the industry rather than the appraisers.

***Recently, the Manitoba Association of Land Surveyors and the Manitoba Bar Association reached an agreement regarding the re-use of surveyors opinions. One of the provisions in that agreement was that it was fair use for a solicitor to make one photocopy of a surveyor's report for his or her file. What do you consider to be fair use of a surveyor's opinion?***

**WALSH**: Maybe we will mix up the pot a bit. I read that report which attempts to address the issue of "fair use". What is fair use and controllable use presents two totally different problems. It seems obvious to me, if a purchaser obtains the survey as part of the evidentiary documents of title, then that document is owned by the particular owner, or potential owner, because it represents a state of facts about the property at a specified period in history.

I believe a good argument could be made that copyright of the surveyor's real property report lies within the owner, and not the surveyor, at least for certain specified purposes. Many survey plans are registered in offices of public record with the very intention that they be reproduced by others. Certainly photocopying for the sake of providing information about a specific property should not necessarily constitute a misuse, but reliance in its entirety may be another matter, especially when changes have taken place and there is intervening time between its presentation and subsequent use.

In my opinion, lawyers perform a disservice when they attempt to take an old survey document and plaster it up with self-serving declarations, simply to save the client money when in fact they are potentially exposing themselves to a negligent liability suit, not to mention the disservice they have rendered to their client.

I cannot see how any lawyer can make any opinion as to the marketability to either the purchaser or the mortgage lender when they do not have all of the current facts that are easily ascertainable with an up-to-date survey.

I say this bearing in mind that there may be potential problems in regards to the cost factors. The dollars and cents, if someone is caught by that, is very large in some instances, and if we accept something less because of dollars and cents, I think we are on the wrong track.

***Surveyors often encounter not only naive re-use of dated survey documents but blatant misuse and alteration of plans. Please discuss what actions you feel are necessary and appropriate to control these activities.***

**MONTEITH**: Well, it's very difficult, as we all understand, but I must say, alterations of plans, in our experience, has not been a serious problem. It's re-use of our documents and opinions without permission that is the biggest problem.

It really doesn't matter what you are going to do, they are going to continue to do it anyway. I think with reasonable people, it's a matter of us attempting to educate all the players in the real estate transaction, just exactly the part that the surveyor plays in this total picture.

**SNELL**: We have a number of written questions from the audience, primarily for Jim Wardlaw and Bart Ristow. I'll ask Jim and Bart to read and respond to those questions.

**WARDLAW**: There are three questions that are roughly the same here. What I want you to understand is that consistency is not my second name.

*"Would you recommend to the public to close a current or new real estate transaction based on an old opinion by a solicitor?"*

My answer is no. You will find that from there on I am going to be inconsistent. The second part:

*"If the answer is no, and old written opinions are not available from solicitors' offices, then the surveying profession should commence giving their opinions by letter or written form, and not allow reproduction."*

Then:

*"Should the surveying profession commence giving their opinions by letter or written form and not allow reproduction?"*

Well, that is up to your standards association to determine. It is not up to me.

*"In attaching a copy of the planner's survey to a declaration with a copyright symbol, if the surveyor in fact holds the copyright, who is violating the Copyright Act, the preparer of the declaration or the declarant?"*

Certainly, if I prepare the declaration with the intention that my client sign it, I am sure that I am responsible; I am sure that I am in breach of your copyright. I don't know if that is a matter of law, but certainly I am the one who induced my client to sign it, so I would think I am the one who is breach of it.

*"Does the copyright notation get struck so that the Registrar will accept the declaration as a deposit?"*

I don't think that the Registrar ever looks for the copyright symbol. I have never taken any action to have it removed or struck it out. I don't think that whether or not it is registered means anything.

**RISTOW**:

*"Jim Wardlaw stated that the solicitor's Certificate of Title was used by the lending institution as proof of future marketability. However many derogations from the title may exist on the ground -- i.e., unregistered easements, right of ways, adverse possession.*
*Doesn't an up-to-date survey provide a far better indication of marketability than any solicitor's certification of title?"*

From a lender's point of view, I would say that certainly it may. We are trying to mitigate risk, as an underwriter you've got to use your best judgment.

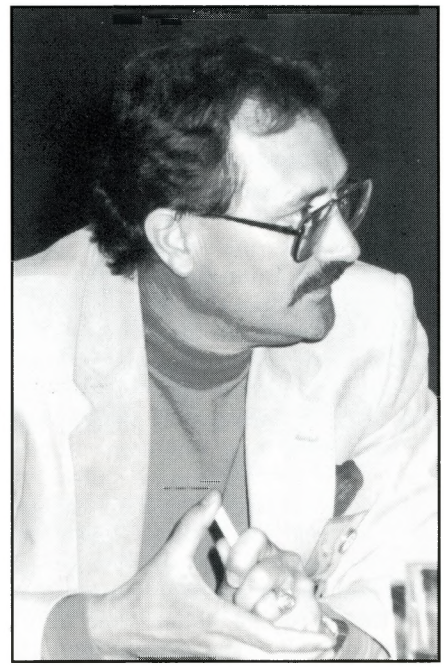
You've got to look at the real estate in question, and you have to make a decision based on what you've got in front of you, whether or not you are going to accept a dated survey or whether you are going to demand an up-to-date survey.

One thing that was touched on before, in this market today, most lenders who are going to demand an up-to-date survey may lose a customer. A lender may find it prudent not to take that risk, because they don't want the real estate on their portfolio.

So I would say, yes, certainly an up-to-date survey is always a better situation, however, it won't cover you in all cases.

*"Does the CIBC Mortgage Corp. condone the distribution of copies of surveys to potential mortgagors by the CIBC Loans Officer who may have an old copy from a previous transaction?"*

I am not sure I understand the question, but I'll try to answer it. If the question is asking: do we, if someone purchases a property, go into our files to see if we happen to have a mortgage on that property currently, do we use that survey for a different mortgagor, the answer would be no, we would go to the mortgagor and ask them for a copy.



*Ed Walsh is a resident of London and a member of the Law Society of Upper Canada. He was born and raised in Nova Scotia. He is a business graduate and has specialized in real estate and mortgage law. He is President and chief officer of Walsh Holmes Inc., and during 20 years experience has been involved in over 4500 real estate transactions. He has served on several committees of the Elgin County Bar Association, and he is currently finalizing a book entitled "Step by Step Strategy for Home Buyers".*

*"As a lender, would you accept a solicitor's certification as to the marketability of title prepared for a past transaction? If not, how does this differ from the policy regarding the surveyor's certification of extent of title? Could not a vendor sign a document stating there had been no changes? If yes, what would be your requirements?"*

Yes, we would, in some cases, and there again it would be a discretionary call. It would depend a lot on the type and quality of real estate, where it was located, and there may be a reason why the underwriter who is underwriting the loan may decide that, based on what they've got in front of them, they're not prepare to accept it, but as a general rule we would accept that.

**WARDLAW**:

*"If your unsophisticated client is paying you to protect his interest, who is being served, protected, by using statutory declarations attaching old survey reports?"*

*"Who determines no changes in justifying re-use of old reports?"*

Well, you are using the phrase "unsophisticated client" and true, clients are not sophisticated in all areas of law, and clients are not sophisticated in all areas of surveys, but this is a matter of passing off your responsibility with what your client can pay, and it doesn't mean your unsophisticated client is blind.

Your unsophisticated client is able to go to the property that he is buying and look at it with the document that he has got in his hands, and say, is there an addition to the house. He can do that. He can look at it and say, is there a fence on that side, is there a fence on that side, is there a fence at the back; are these illustrated on here? Is there a telephone line?

Your client isn't blind, and he is able to say, okay, I have looked at the survey, I recognize that I may have to pay for getting a new survey, but I am not satisfied. That is not the majority of them. I have them say, I am satis-

*"... lawyers perform a disservice when they attempt to take an old survey document and plaster it up with self-serving declarations, ..."*
E. Walsh

fied that this does not illustrate properly what is there, but I am satisfied with the risk. Now, if it is all his money, then fine, from his point of view.

Then I have got to go to the lender and say, are you satisfied with this? And then the lender has got to be satisfied.

It's the people knowingly accepting the risk. It's not the lawyer protecting their interests. A businessman's risk the lender and the purchaser have to say, we will accept this, or, we will not accept it.

**WALSH**: What happens, Jim, in the case of where a purchaser buys the parcel of land, and he looks at an old survey, and it turns out that there is a fence existing across the back of the property. This fence was erected after the original vendor purchased the property.

For illustration purposes, let's say that the vendor purchased the property 12 years ago. He prudently obtained a survey at that time. Then a year later his neighbour constructs a fence over part of his lands unbeknownst to the vendor that actually encroaches on his property. Let's suppose 11 years later this survey is brought up and it is produced to the purchaser, and the purchaser looks at the survey and all appears to be in order. In fact, the vendor didn't construct the fence but rather the neighbour constructed the fence.

What bothers me is, if it's outside the statutory period, and assuming I guess we are dealing under the Registry Act and not the Land Titles Act, there is an issue of whether or not the purchaser gets what he thought he was going to get, if in fact the declarations support that the vendor has made no changes to alter the survey. And in fact he hasn't, and he has no knowledge it was done unintentionally. I know there is law that establishes the proposition that even though it was unknown to the vendor that there was an encroachment, if it existed beyond the statutory time period, he loses his title to the property.

I am just posing the illustration to say, you could run into this situation where everybody is acting in good faith. You've prepared the declarations to state that -- in fact, your vendor did not do anything, and to his knowledge there had been no changes to the property since the time that the vendor obtained his survey, and he actually thought that was the case. So in that particular instance, whose interests are served by using these declarations?

**WARDLAW**: I am not a judge, but I will tell you what I think. Number one, the purchaser looked at the property and knew what he was getting, in the sense that he knew the fence was in a certain location. He knew the depth of the distance from the house to the fence. He was able to see what he was buying as opposed to what might be a legal description. He is able to see what he is buying, and he has made his judgment when he decided to pay a certain price for that property.

My view is that he knows what he is getting, and he may not in fact have the proper back property line, but he knows what he is getting and he is satisfied with what he is getting even if it should be out by something less than a foot. Even if it was out by three feet, he knows what he is getting.

**WALSH**: Let me add another little caveat to this situation. Let's say the purchaser says, this is a great piece of property, and the rear yard is sufficient for me to put a family room on and he has gone down to the municipal offices, and from that survey it shows he has X number of feet from the back of the house to the end of his lot line. It turns out that the municipal department says, "yes, that's fine, you have enough room to construct this family room." And that's the purpose for which he bought that property. owever, when it turns out that the fence is located on the inside of his property, he doesn't have the rear yard requirements nor does he have the area that is necessary to accommodate the additional building. On those two counts, he is turned down for a building permit, and he can't do what he initially wanted to do when he purchased the property. What do you say about that?

**WARDLAW**: I have never in those circumstances had a Committee of Adjustments refuse to grant a minor variance. It may happen, but I have not experienced it.

**WALSH**: Is it a question of remedying something less than he thought he was going to get? Why give him (the buyer) something other than what he initially intended to buy. When in fact if we follow the rules that are laid down and the procedures that are laid down, he is going to get what he has contracted to buy.

If you can convince the purchaser that he understood that by not getting this up-to-date survey, he understood the consequences then there is no liability placed on the solicitor. I think that is a well- established law.

But the problem that I have is, in many cases, the purchasers don't understand the implications. Likewise, I don't think the mortgage institutions do either. They accept these documents, and I am sure that when you get consent from the mortgage lender as to the approval to issue funds based upon that mortgage loan, you don't sit down and list these potential problems you could run into, I guarantee they would say, no! We want an up-to-date survey, once that is made known.

**WARDLAW**: I will talk about lending institutions first, and then about the purchaser second. When you have a problem with a survey with a lending institution, you always make it front and centre what the problem is so that they can make a businessman's risk call, because you do not want to be called on for your deductible on your insurance. You know our deductible is $5,000.00 a wack, so you are very careful when you are talking with the lending institution just what the risk is. Then they make the business decision as to whether they accept it or not.

With the client, and I shouldn't divorce the lending institution from the client, because they are both clients, but with the client it becomes a matter of what is he willing to pay for. That is the bottom line; what is the purchaser willing to pay for.

**SNELL**: I would like to call on Lorraine Petzold, the former Executive-Director of the AOLS, to make some comments. Lorraine has a great deal of experience and expertise in the areas of fair use and mis-use of survey opinions.

**LORRAINE PETZOLD**: I find it interesting, that the argument seems to be that the public interest is the public purse, and I don't perceive it as being that. I think if our Act only

wanted to save the public money, it would have said it much clearer.

There is one thing we haven't talked about today, the prior-to-1983 survey. We have put the legal and real estate professions on notice so many times that prior to 1983 we did a half survey or a partial survey, and if they are attaching an unregistered document prior to 1983, it probably never did reflect a full retracement of the boundaries. How would either the lawyer or the mortgage company know whether that plan in fact was a full plan of survey to begin with, or if it was a document that we, at that time, called a mortgage survey? It was not a full survey and we don't produce them anymore.

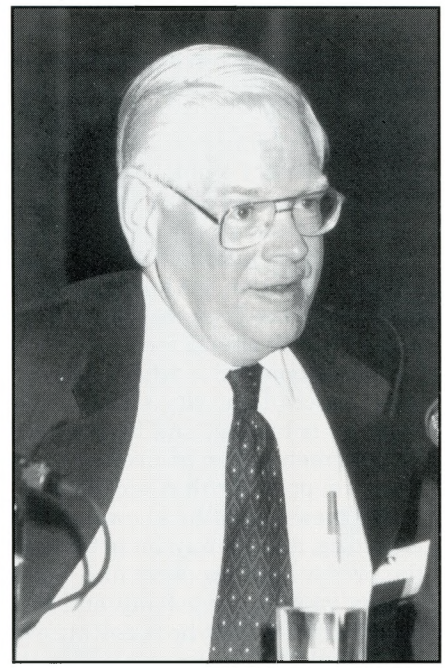
Last February, I had a lawyer drive from Mississauga to Toronto to see if I could decipher the name on an old plan. It was a concrete building or basement from 30 years prior and right on the plan it said, "This is not to be used for transactions, it is for mortgages only." It was still being used. In fact, it was a cut and paste; it was very clearly an altered document. Yet, a week later he phoned and said, "I hate to tell you, but I had to use it." So I am very, very nervous about the usage of these pre-1983 documents when we have put everyone on notice so strongly that they possibly were not a full survey.

There is a case in New Brunswick called LeBlanc v. DeWitt, which I think has a couple of very good statements in it pertinent to today. I haven't got the case in front of me, so I'm paraphrasing. The judge said the clients do not ask 'do I have good paper title', the clients ask 'do I have good title'. To tell the client he has good paper title is meaningless. I think that is what we are arguing about today. Does the client have good title or good paper title? The judge went on to say that a self-serving declaration by an interested party was not sufficient to prove title. In those two statements, I think we have the crux of the disagreement, if there is one. We are forgetting one thing. If people do not want to use an original document, which is a usable document, a 1972 original print, which you can use, we don't argue. You may be using it wrong, but that is your right to use it. We argue if you make copies. If there isn't anything that you can use, do it without a survey. I put it to you that that is what you should be doing. If the lawyer's client does not want to pay for a survey, and you have got a sketch from 1952 showing a basement, I believe it is misleading to have them use it. I think it is better to close the deal without a survey, and the mortgage company can lend them money without a survey.

There is no way a non-surveyor knows what's not on that plan. If you are going to want to use that - use nothing; I think the public is misled less. I don't think it is a matter of surveyors trying to pad their pockets. We know we are not going to get surveys for every new transaction. Let's take the public interest as it is written in the Act and in all self-governing acts to *mean* the public interest - money is only a small part. Very few adverse possession cases do succeed in court right now, and the cloud on title by fences not being along the lines can be great. In dealing with complaints at the AOLS for 16 years, I found fences made great enemies -- chasing each other with axes, and cutting down fences -- because people didn't know where their boundaries were. The purchaser has the right to know what they are buying. If we only go with paper title, they only know that they are getting a piece of paper.

We have come a long way in the last ten years. I have been doing a lot of lectures for the real estate accounting groups lately, and I find that they are very up on liability. When I go to the meetings, they are telling me what their liabilities and responsibilities are. I am heartened by that.

But, I would ask you to address the fact of the 1983 and prior survey, because you haven't mentioned that at all. Also, why not, instead of violating our copyright, and I say showing a lack of professional respect on our product, simply not use the survey if you haven't got a new one.



*Jim Wardlaw graduated from law school in 1956 and has been practising in Orangeville since that time in a general practice with a focus on real estate. The author of several articles in real estate law over the years, he is a member of the Canadian Bar Association, Real Estate Section, and was formerly the editor of that section's newsletter. He is a member of several Law Society and Bar Association committees and has been a Bencher of the Law Society for the last 14 years.*

*"... any attempt by you [OLS's] to use the public interest in what is perceived to be a financial grab, ... will be regarded as being self-serving."*
J. Wardlaw