

# Background Paper on the "PROTOCOLS ON THE USE OF SURVEYOR'S REPORTS"

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*The Manitoba Bar Association has very graciously provided us with permission to reprint the paper in its entirety, for which we offer our sincere thanks.*

*The Association of Ontario Land Surveyors believes that this paper reflects the best interests of all parties, and suggests all members read and circulate the document.*

*This paper was prepared in May of 1992 by the Co-chairs of the Real Property Section of the Manitoba Bar Association, Mr. Edward Brown of Buckwald, Asper, Henteleff, Winnipeg and Mr. Bruce King, Pitblado & Hoskin, Winnipeg.*

*The purpose of this paper is to give an explanation as to what has led to the formulation and approval of the "PROTOCOLS ON THE USE OF SURVEYOR'S REPORTS."*

1. What originally prompted this paper are the recently expressed concerns of Manitoba Land Surveyors regarding the misuse and abuse of the reports, certifications and plans (hereinafter "Surveyor's Report") which are prepared for consumers of surveyors' services ("Surveyor's Client"). The concerns are twofold, namely;

(a) where a Surveyor's Report is prepared in connection with a particular real estate transaction intended to occur fairly soon after the surveyor conducts the survey (on or the "Original Surveyor's Report," and, on or the "Original Transaction"), but thereafter (and more likely, a copy of it) is submitted to be used and relied upon

by one or more parties to a subsequent transaction (a or the "Subsequent Transaction") involving the same property ("Submission of and Reliance Upon the Original Surveyor's Report");

(b) the actual or potential economic loss which a surveyor sustains when an Original Surveyor's Report is photocopied or otherwise reproduced and submitted to a person or persons outside the original group of persons involved in an Original Transaction (which would obviously include the Surveyor's Client), without the prior consent of the surveyor who prepared the Original Surveyor's Report ("Unauthorized Reproduction").

2. Submission of and Reliance Upon the Original Surveyor's Report by persons involved in or interested in a Subsequent Transaction is dangerous for those persons - aside from any danger or exposure to the surveyor himself or herself. Why? Because the Original Surveyor's Report may not accurately reflect what is on the ground at the time of the Subsequent Transaction. What is on the ground may have changed. Surveyors have advised us that it sometimes even happens that an Original Surveyor's Report is altered by one or more of the persons involved in the Subsequent Transaction. Sometimes this is done in an honestly intended but incompetent attempt to update the Surveyor's Report to reflect what is currently on the ground. Sometimes this is done to intentionally deceive other persons. In either of these cases, the person or persons relying on the Original Surveyor's Report (or the altered Original Surveyor's Report) may be misled as to the physical status of the improvements on the

property and/or the extent of the property ownership, easements, etc. Where the Original Surveyor's Report does not reflect the current status of the property, the cost of engaging a surveyor to do a new survey and prepare a new Surveyor's Report will probably be far exceeded by the costs which will have to be incurred to remedy the problems which may have arisen by virtue of the property owner (or those claiming under or through the property owner) having relied on the out-of-date Original Surveyor's Report. This situation can also be dangerous for the lawyer or lawyers acting for the persons involved in a Subsequent Transaction. Where a lawyer relies on an inaccurate, old or altered Original Surveyor's Report and provides an opinion (or perhaps even a certification) based on the same, that lawyer is probably acting negligently. The Manitoba Courts have held that it is negligence on the part of the lawyer not to at least advise his or her client of the need to obtain an up-to-date or current Surveyor's Report.

3. Submission of and Reliance Upon the Original Surveyor's Report can also result in the surveyor who prepared the Original Surveyor's Report being exposed to certain claims and liabilities where persons who rely on it in conjunction with a Subsequent Transaction are misled to their detriment.

4. The surveyors have told us that many of their members have had to spend a very substantial amount of time dealing with complete strangers to Original Surveyor's Reports (and the Original Transactions) who phone up and complain (and threaten law suits!) about the fact that the Original Surveyor's Report they now hold (or more likely copies of them,

perhaps altered, perhaps not altered) do not correctly reflect the current status of the property on the ground.

5. The actual or potential economic loss to a surveyor where there is Unauthorized Reproduction or distribution of the surveyor's Original Surveyor's Report should be obvious. If we recognize that surveyors have a property right with respect to Original Surveyor's Reports - and in our view surveyors do have such a property right - the Unauthorized Reproduction amounts, in effect, to the theft of property belonging to the surveyor. This property right is acquired by the surveyor under the Canadian Federal Copyright Act and it arises immediately upon the surveyor producing an Original Surveyor's Report. A surveyor's right of copyright entitles the surveyor to restrain Unauthorized Reproduction and to seek damages for the loss the surveyor sustains by reason of the Unauthorized Reproduction. When the Original Surveyor's Report is provided to the Surveyor's Client, the ownership of the copyright does not pass (unless the parties specifically so contract).

6. Starting January 1, 1992, Manitoba land surveyors have been signifying their claim to copyright by a notation to that effect on all of their Surveyor's Reports. Although copyright arises independently of whether or not the author of the copyrighted work does specify that copyright is claimed, these notations by Manitoba surveyors should remind everyone involved in handling Surveyor's Reports - including lawyers - of the fact that surveyors have this property right and have always had this property right.

7. A surveyor's rights under the Copyright Act are not limited to prohibiting unauthorized copying or reproduction of the Original Surveyor's Report. The surveyor is also entitled to prohibit any alteration of the Original Surveyor's Report.

8. The Surveyor's Association's Executive Council have also advised us that at least some of their members are quite prepared to commence legal action with respect to Unauthorized Reproduction. Surveyors would do this, not only to protect their copyright, but also because taking

such action - or perhaps the threat of it - may be the only practical tool which surveyors have to induce others to stop Unauthorized Reproduction and thereby eliminate or minimize the problems and claims which surveyors encounter when an Original Surveyor's Report is subsequently utilized in connection with a Subsequent Transaction.

9. (a) It is proposed that all Original Surveyor's Reports and authorized copies thereof contain a statement warning any person who may review it that no one should rely on the accuracy of the Original Surveyor's Report if the status of the property (including in particular, the physical status of the property) has changed subsequent to the time when the surveyor conducted the survey which resulted in the production of the Original Surveyor's Report.

"Copies of  
Surveyor's Reports  
that do not bear  
an original embossed seal  
of the Surveyor who prepared  
the Report,  
are not considered to be  
'Authorized Copies'  
for the purposes of  
this protocol."

(b) Implicit in the warning referred to in subparagraph (a) above is the concern that while in most cases, those involved in an Original Transaction may safely rely upon the accuracy of the Original Surveyor's Report prepared for the Original Transaction, reliance on the Original Surveyor's Report (or any copy of it) in connection with a Subsequent Transaction involving the property is dangerous for the reasons described above. Of course it is always possible that the status of the property has not changed between the time of the Original Surveyor's Report and the time of the Subsequent Transaction. However, because such changes do frequently occur, it is submitted that (entirely aside from any other considerations) prudent practice would dictate en-

gaging a surveyor to review the property (and to report upon the same) at the time of (or just before) the Subsequent Transaction. Where the persons involved in a Subsequent Transaction can engage the same surveyor who produced the Original Surveyor's Report for the previous Original Transaction, in most cases (and depending upon the degree of changes to the property involved), the surveyor should be able to update the Original Surveyor's Report at a cost less than the cost of conducting a completely new survey.

10. Surveyors recognize that when a surveyor is engaged to do survey and prepare an Original Surveyor's Report in connection with an Original Transaction, the Original Surveyor's Report will not simply be reviewed by the Surveyor's Client and locked away for no one else to see and review. In other words, surveyors recognize that there are other persons who have legitimate interests in reviewing - and indeed relying upon - the Original Surveyor's Report in connection with the Original Transaction. To take a typical example, if an intending purchaser of real property engages a surveyor to do a survey and prepare a Surveyor's Report covering that property, surveyors recognize that it is reasonable for the Original Surveyor's Report (or surveyor authorized copies of it) to be given to and relied upon by the intending purchaser's lawyer, the intending seller, the intending seller's lawyer, the intending purchaser's mortgage lender or lenders (and its or their lawyers) and local government or municipal planning and zoning authorities who require the Original Surveyor's Report (or a copy thereof) to provide an opinion or certification as to the property setbacks, yards and alignments and the like. In other words, surveyors recognize that it would be unreasonable and impractical if the Surveyor's Client was limited solely to showing a single produced Original Surveyor's Report to such other interested persons without such other interested persons being able to obtain copies of the Original Surveyor's Report for their own records.

11. The Executive of the Real Property Subsection has worked out with

the Executive Council of the Surveyor's Association certain proposed guidelines ("Protocols on the Use of Surveyor's Reports") as to just what should be the limits of legitimate use - and reproduction - of Original Surveyor's Report. We are realistic enough to recognize that since any such guidelines will considerably proscribe certain current practices involving the use of and photocopying of old Surveyor's Reports, and will probably increase the frequency with which people involved in real estate matters will have to pay for surveyor's services, acceptance of any such guidelines by lawyers (and others) may be difficult to achieve. However, if guidelines can be established which reflect the legitimate concerns and needs of both surveyors and other people involved in real estate, this will assist lawyers in determining the legitimate uses of Original Surveyor's Reports.

The following words and expressions used in these protocols shall have the following meanings unless otherwise specified.:

- (1) "Surveyor" means a duly qualified Manitoba Land Surveyor licensed or registered as such under the Manitoba Surveyor's Act.
- (2) "Surveyor's Report" means the report, certification and plan typically prepared for consumers of surveyor's services in connection with a private land transaction.
- (3) "Authorized Copy" means a photocopy of the Original Surveyor's Report sealed with the Surveyor's seal of office.

The reproduction and distribution of reproduced documentation pertaining to surveys made by a Manitoba Land Surveyor (Surveyor's Reports), where such documentation is not registered in the Land Titles Office, is governed by the provisions of the Copyright Act, R.S.C. 1985, Cap. 55. The purpose of this protocol is to establish a standard recognized by the membership of the Manitoba Bar Association and the Association of Manitoba Land Surveyors with respect to what may be considered fair dealings with Surveyor's Reports. The protocol is intended to apply to

all Surveyor's Reports regardless of the date of origin. Copies of Surveyor's Reports that do not bear an original embossed seal of the Surveyor who prepared the Report, are not considered to be "Authorized Copies" for the purposes of this protocol. In a real estate transaction, only "Authorized Copies" may be used to facilitate the transaction.

1. The Surveyor will produce and provide to the Surveyor's Client the Original Surveyor's Report which will be sealed with the Surveyor's seal of office and signed in ink in a colour other than black. The Surveyor will also produce and provide to the Surveyor's Client a number of Authorized Copies of the Original Surveyor's Report. In the ordinary real estate transaction, the Surveyor will ensure that the Original Surveyor's Report and Authorized Copies are provided for:

- (a) one for use by the purchaser or proposed purchaser;
- (b) one for use by the mortgagee or proposed mortgagee of the purchaser; and
- (c) one for use by the appropriate municipal or local government zoning Authority (this Authorized Copy will include the following words in a colour other than black: "CERTIFIED TRUE COPY").

The Original Surveyor's Report will be given to the person who has engaged the Surveyor (i.e., the Surveyor's Client) and the others will receive Authorized Copies.

Where there is more than one purchaser or mortgagee or governmental authority involved it is necessary for the seller or the seller's lawyer to have a copy of the Surveyor's Report, the Surveyor should be advised and the Surveyor will, upon payment of a reasonable fee for additional reproduction, provide additional Authorized Copies of the Original Surveyor's Report.

2. Each of the lawyers who are acting for the purchaser, the seller and the mortgagee in the real estate transaction will be entitled to make one photocopy of the Surveyor's Report to be kept for those lawyers' respective records.

NO OTHER COPIES  
MAY BE  
MADE BY ANYONE  
AND  
NO OTHER ORIGINALS,  
OR AUTHORIZED COPIES  
OF THE ORIGINAL  
SURVEYOR'S REPORT  
WILL BE ISSUED  
BY THE SURVEYOR,  
UNLESS THE SURVEYOR  
IS REQUESTED  
FOR THE SAME  
AND  
CONSENTS TO THE SAME.

3. The Surveyor's client is the person who engages the Surveyor. This will usually be the purchase (or intending purchaser) but in some cases it may be the seller (or intending seller) or the purchaser's mortgagee (or intending mortgagee). In the usual situation, the Surveyor's Client would identify himself, herself or itself to the Surveyor and also advise the Surveyor as to whether or not he, she or it is the purchaser, the seller or the mortgagee. However, in many cases, it will be a lawyer acting for one of these parties to the transaction who engages the Surveyor. That lawyer should always identify the client for whom he or she acts (and advise the Surveyor as to whether the client is the purchaser of the seller or the mortgagee) so that the Surveyor can properly address the Original Surveyor's Report to the actual client.

4. It is recognized that there may be situations which do not fit within the above guidelines but where it may be legitimate (and safe) for a person or persons other than those described in paragraphs 1 and 2 above to obtain Authorized Copies of the Original Surveyor's Report. Where one of the persons described in paragraphs 1 and 2 above believes that they have encountered such a situation, that person should contact the Surveyor who produced the Original Surveyor's Report and discuss the matter with him or her.

