Issuing of Field Notes

The Council of the Association of Ontario Land Surveyors asked that we seek a legal opinion to address various scenarios involving the issuing of field notes. Over the past year, we have received inquiries from members as to what is the policy of the Association when dealing with specific problems related to the issuing of the field notes.

The following is the text of the legal opinion:

Description of Problem Scenarios

A surveyor is consulted by another surveyor to produce field notes that may be in his possession regarding the retracement of a boundary. The surveyor explains to the surveyor who has the notes that he has been hired to simply review the first surveyor's work in order to provide a second opinion to a client. The first surveyor refused to produce the field notes since he is concerned that the second surveyor might disagree with his opinion or, not base his second opinion on full and complete research, including a field attendance.

Variations on this scenario could include a request for field notes being made by a surveyor who has completed all work on a particular site, including finalization of his survey plan, from a second surveyor who has prepared a survey and opinion on the same property. The requesting surveyor may no longer have a "client" or the second surveyor may be instructed by his client to not produce field notes since they are viewed by the client as confidential and privileged.

The Nature of Field Notes

The Surveys Act, R.S.O. 1990, c.S.30, s.4, requires field notes to be kept and requires a surveyor to "exhibit or give copies of same to any surveyor for a reasonable charge". Field notes are not defined in the Surveys Act. It is, however, considered common knowledge as to what is or is not included as "field-notes".

Given the statutory obligation for surveyors to keep field notes and to also produce them to other surveyors upon payment of a reasonable fee, they have come to be recognized as having value. Field notes appear to have value in two senses of the word.

First, they are recognized as having value in almost every commercial transaction in which a surveyor buys into or sells his professional surveying practice. Such transactions usually include whatever field notes are in the possession of the surveying firm and are recognized as having tangible, monetary value with respect to the goodwill associated with them.

Field notes also have value from the point of view of keeping information on file for the public with respect to the fabric of legal boundaries throughout the Province. It could be argued that the public benefits from the maintenance by the surveying profession of the various field notes that are kept in surveyor's offices since they assist in retracement problems that occur between neighbouring property owners in the public domain. As a result, the value that exists in connection with field notes in this sense appears to lie in the preservation and advancement of the public interest.

Surveyor's Research Activity and Field Notes

Standard practice on the part of cadastral boundary surveyors in Ontario dictates that surveyors consult all sources of potential information with respect to the parcel's title and extent of title information that might be available. In the retracement of a boundary, such information can be expected to be found in a variety of locations, one of which extends to researching the existence and contents of other surveyors' field note records. This has not only been accepted practice for a substantial period of time, but has now become entrenched in the standards of practice that codify the acceptable level of research that surveyors are to pursue when beginning work on a particular retracement project.

Scope and Terms of Engagement of Surveyor's Services

Although the method by which surveyors' work is to be pursued is fairly well understood and accepted, this standard seems to apply for predefined "standard" tasks. For example, the preparation of a Surveyor's Real Property Report has come to be recognized as consisting of a written and a graphic part and is produced only after certain minimum kinds of field work, research, and such similar activity has taken place. This would not only be the case for a surveyor's Real Property Report, but other standard types of work that a surveyor might be expected to perform for members of the public. Other examples include a reference plan, subdivision plan, application for first registration under the Land Titles Act, etc. Each of these types of "jobs" have a predefined set of expectations as to how the surveyor is to proceed, and the standard and scope of work to be done for a client is thereby defined accordingly.

> *"... the value that exists in connection with field notes in this sense appears to lie in the preservation and advancement of the public interest."*

In our opinion, we do not believe that any legislation or by-law or other "rule" now exists by which a surveyor is only limited to performing services for the public within these predefined "job labels". In other words, if a client were to ask a surveyor to perform services in order to meet a client's needs and which involved activity that did not consist of what has commonly been understood to be a reference plan, a surveyor's Real Property Report, etc., then the surveyor should be free to accept such work from the public. Further support for this can be found in the nature of the contractual relationship which the courts generally allow a professional to negotiate with a member of the public, in terms of cost, scope, etc. This is part of the underlying common law principle known as "freedom of contract".

The countervailing concern is that a surveyor could, for only a standard fee ("reasonable charge"), be able to obtain another surveyor's field notes, even to the point of using them in order to express an opinion simply on the infor-

mation shown in just those field notes. A surveyor producing these field notes, and knowing the circumstances of the receiving surveyor's terms of engagement, may well be concerned about a client or other member of the public receiving a "second opinion" based on such limited review and information. This is the very situation that the scenario referred to above appears to highlight. One must ask at this point in time whether there is in fact anything wrong with a surveyor expressing an opinion on simply field notes obtained from another surveyor, or for that matter, just on the basis of title records. Such an opinion would certainly be considered "half baked" in that it is based on information that is not complete and exhaustive and, therefore, the opinion could well be considered worthless. On the other hand, there may well be circumstances under which the public interest is in fact served by a surveyor providing such an opinion sufficiently well so that the terms of engagement form part of the basis for the opinion. An opinion which is then "qualified" in sufficiently clear and strong language, may therefore not necessarily be such a bad thing.

Form a legal point of view, there certainly appears to be no obstacle to a surveyor being permitted to do this, provided all concerns could be properly addressed and satisfied, including implications for managing risk (insurance) and ensuring that the opinion was embodied in a report which contained sufficient explanatory or educational context so as to not result in abuse.

The Field Note Requesting Surveyor Without a Client

Although there is no prohibition in the Surveys Act which would prevent a surveyor requesting field notes from another surveyor if the requesting surveyor had no client or reason to make the request, it does seem reasonable to presume some "purpose", or connectedness, with the site in order to justify the making of a proper request. It may be a question of judgement as to what would constitute a reasonable basis for a surveyor making a request if he has no active involvement with the property, let alone a client who has retained him to do further work.

If a surveyor who had completed a survey on a site and had finalized his survey plan, and then receives subsequent information to suggest that a second surveyor has also prepared a survey plan which expresses an opinion differing from his own, this in itself may be a sufficient basis for making a request for field notes. The obvious interest on the part of the surveyor in making the request should be to go beyond mere satisfaction of his own curiosity. The potential of a malpractice claim arising out of the discrepancy, or the potential participation in a resolution of the discrepancy by the surveyor himself may be examples of sufficient purpose or connectedness.

Yet, a further variation may be the surveyor who, having completed his work on a site, is then requested by way of a subpoena to appear in a civil proceeding and bring along with him, his field notes. He may not be hired by a client before being subpoenaed and would be expected to co-operate and attend in this civil proceeding to give evidence and explanation as to his field notes if properly called upon to do so.

These are both examples which, in the writer's opinion, illustrate circumstances in which there probably exists sufficient purpose or connectedness between the surveyor's request for field notes and the surveyor's past or present interest in the property in question, even though no client is instructing the surveyor.

> *"... address the issue of ownership of field notes and copyright of survey plan in the initial engagement letter ..."*

The Field Note Producing Surveyor With A Client Who Instructs Non-Disclosure Of The Field Notes

It is not uncommon for a surveyor's client to assume that, having paid the surveyor's professional account for services, the client is then the owner of the survey plan, including the field notes which the surveyor was paid to prepare. An obvious method of handling such misperception or confusion is to address the issue of ownership of field notes and copyright of survey plan in the initial engagement letter which the surveyor should probably send to each client to confirm the receipt of instruction and the terms of relationship. Such a letter would not only have the benefit of providing an opportunity for the surveyor to educate the client as to the nature of what was embodied in a survey plan, but also the subsequent use that could be made of the surveyor's opinion as it was expressed in the survey and accompanying report. Such subsequent use could include the giving of expert testimony in an administrative or civil law proceeding at a later date. Dealing with these issues in initial communications with a client would probably go a long way in avoiding misunderstandings between clients and surveyors.

It would likely reduce the confusion that might arise on the part of clients who felt that they could tell a surveyor to not produce field notes which the client considered the client's own property. Such field notes are often essential information in an administrative law or civil litigation context and such a view on the part of a client would appear to conflict with the statutory obligation of a surveyor in Section 4 of the Surveys Act.

If a surveyor received a request from another surveyor to produce field notes and at the same time received instructions from a client to not produce or disclose such field note information, the surveyor finds himself in a dilemma which, in all fairness, should not necessarily be his to resolve. The wording in Section 4 of the Surveys Act is clear enough. However, the rules of privilege and the obligations of parties in civil litigation to disclosure of reports and opinions of experts are also fundamental to the administration of justice in this province. As a result, a prudent surveyor would probably be expected to write to both the surveyor requesting the field notes, and also to the client prohibiting disclosure of the field notes, of the dilemma that he faces. Such correspondence should probably indicate a need to have the solicitors respecting each of the parties to the dispute to work out and resolve the apparent impasse that the surveyor faces. In such circumstances, the statutory requirement of the Surveys Act could be in conflict with the evidentiary rules regarding production of expert's reports, privilege, and expert evidence. In our opinion, we do not consider it proper for a surveyor to allow himself to be placed in such a

dilemma by a client. The surveyor does have means available to himself to avoid such circumstances.

Need for Directional Policy

The short answer in this writer's view appears to be that it is legally permissible for a surveyor to obtain the field notes for whatever purpose, including the expression of whatever opinion, the receiving surveyor might wish to employ the field notes for. However, as this letter has pointed out above, the narrow question of whether or not it is legally permissible inevitably touches on broader issues for which the need for some directional policy from Council appears to deserve consideration. It would seem prudent for Council to address this issue in light of the fact that this has come up in the past on a number of occasions and had presented a problem, not so much because of potential risk or danger to the public, but rather the withholding of field notes for satisfying concerns and objectives which are not directly related to the availability and production of the field notes themselves. The law seems to be quite well settled on this and can be found in Section 4 of the Surveys Act. It is this writer's view that the withholding of field notes between surveyors so as to prevent a review of the field notes themselves by another surveyor engaged by a member of the public to render an opinion on limited information consisting of those field notes only, is an indirect means of addressing or attempting to control a broader issue and therefore without legal basis or authority.

The above completes the text of the legal opinion. In my view, it is of paramount importance that surveyors open the lines of communication and be forthright, preferably by stating their request in writing and the reason for the field note request so as to enable the holder of the records to address your concerns and hopefully, the ability to respond to your findings. The definition of a boundary is a matter of "weighing of evidence". The scales may tip one way or the other as new evidence comes to light. In all cases, we as surveyors must be flexible to ensure that the public is not being put to "undue hardship", in the resolution of a boundary dispute. That is not to say that we as professionals may have differences of opinion in regard to the "weighing of the evidence". We must always ensure that we have made every effort to have all of the information in hand before we express our opinion.

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NEXT ISSUE:
Surveyors' Marketing/Promotional Effects