

Surveyors' Products are Being Mis-used



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The digital way of doing business has major implications on the geomatics industry, especially on the products commonly provided by Ontario Land Surveyors (O.L.S.). We are a society of laws; and professionals and others that rely upon the geomatics industry should be reminded about their duty of care to the public when using information in the form of surveyors' products.

The Association of Ontario Land Surveyors (AOLS) remains concerned about the common occurrence of the re-use of surveyors' products long after their release. Their products are re-used often for purposes never intended in the first

for the acquisition and disposal of real property, and most recently, combine corporate and spatial data to provide new commodities for public consumption. Such new commodities include real estate transactions over the Internet, real-time travel information based on atmospheric and surface conditions through satellite imagery, and publicly and privately owned geographic information systems. It is very important to not mis-use a surveyor's product, as our society has become dependent on digital technology, and the databases that support that technology, located in the virtual offices of the geomatics professional. In a digital society, databases are highly accurate and products become dated quickly.

It is most important to ensure that survey products are current and accurate at the time of use. This is necessary to keep the geographic information systems of a community accurate in the event of mishaps such as house fires, storm damage and essential service disruptions such as water-main breaks in the winter months. It is only a matter of time and cost before most communities in our society are managed and financed based on an accurate geographic information system. There is no reason to wait for someone else to pay for survey products (sometime in the future) when accurate products are required now, to manage the community. Paying for this need in today's dollars will generate savings for everyone. Title insurance (which is purposed to be an alternative product to surveys to facilitate real estate transactions) does nothing to enhance a community's digital database needed for its geographic information system. Despite its usefulness in certain situations, usually related to industrial and commercial development, it only adds to future costs.

When an O.L.S. is commissioned to prepare a property survey, the surveyor prepares a plan to illustrate a professional opinion on the extent of title and the relationship of topographic features and

improvements to the limits of a property. The survey will also illustrate any rights-of-way or easements, which may affect the use of a property and disclose any potential unregistered interests such as prescriptive rights or adverse possession. Encroachments to and from the subject

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property will also be shown. The plan is a time limited document. As stated by L. Petzold, former Executive Director of the AOLS, "the survey of the property indicates the actual physical characteristics of the parcel of land in relation to the boundaries and the extent of title on the date that the survey was prepared."

It is clear, based in law and the need for accurate digital data, that an up-to-date survey is essential in a real estate transaction to illustrate current conditions. All participants in the transaction can benefit from an up-to-date survey. The lender requires a current survey showing the property and improvements thereon, as they act as security for the loan, and the mortgagee needs to be assured that what is being described and illustrated in the mortgage document is actually what is being conveyed. The lawyer needs an accurate and reliable product to complete his or her duties to their client, as the attorney has a professional responsibility to ensure the client is aware of what is being purchased.

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place. Any reliance on a surveyor's product beyond the original intended use is potentially costly to both the user and the surveyor, and in most cases an infringement of copyright.

Ontario Land Surveyors are responsible for delivering certain products, by law, and storing spatial and physical data for public use. They are the professionals who hold the key to massive amounts of digital and non-digital data that describe the relationships between people and their environment that penetrate every form of business and sense of community in our society. The products delivered by professional surveyors provide order to our relationships with neighbours, define the location and interrelationship between buried and surface infrastructure and the natural environment, facilitate financial transactions

continued on page 11...

And, the surveyor does not want to attract third party liability through no fault of his or her own. Even the vendor benefits by leaving behind an asset without loose ends that will not come back into his or her life as a liability.

What is an up-to-date-survey?

The AOLS interpretative guide and supplements to O.Reg. 42/96 Section 19 under the Surveyors' Act states "an existing plan of survey may be deemed to be (up to date) if,

(a) both the plan and the survey on which it is based comply with the application requirements of the Statutes & Regulations of Ontario;

(b) upon a field inspection, it can be determined that no changes have taken place to the property or to the monumentation since the plan was signed that would necessitate a change in the plan;

(c) an update search for documentary evidence has been made, as required by clause 3(a) of the Performance Standards Regulation, and no changes have occurred that would necessitate a change in the plan".

It is common practice for a lawyer, acting on behalf of a mortgage company or real estate agent to call a surveyor and ask for a copy of a plan of an old survey for a parcel of land. The term "old survey" is used to define a document which has not been prepared for the current transaction, but was prepared previously, either for a real estate transaction or for a mortgage application. The question of liability arises. What is the liability of both the surveyor in issuing the plan and the lawyer or real estate agent in re-using the old plan? Although the land surveyor can do little to curtail the person from re-using the plan if it is acquired elsewhere, the surveyor will not promote the re-use of the documents.

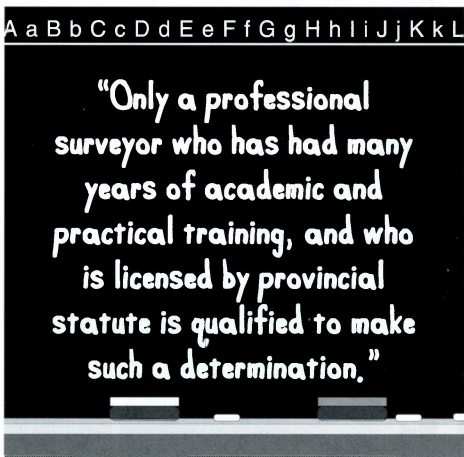
It is entirely possible that a plan a month old in a new area of development is out of date and that a ten-year old plan in a more settled part of the community is still current. Only a professional surveyor who has had many years of academic and practical training, and who is licensed by provincial statute is qualified to make such a determination. The lawyer, lender, realtor, or purchaser are not adequately able to interpret the survey, the regulations, the standards, and other pertinent information and relate them to the current site conditions.

The survey is a "representation", as it represents the physical characteristics, or extent of title, as of a certain date. It can be argued that the surveyor preparing the survey makes a representation not only to his client for whom it was first prepared, but also to any other person that the surveyor may provide copies to in the future. The surveyor may also make such rep-

resentation to any person that the surveyor must reasonably assume may obtain and rely upon the survey in the future. It is this notion of representation that must be considered in determining whether or not the surveyor can, as a responsible professional, re-issue old plans or, if the lawyer as a responsible professional, should re-use the plan.

When a drawing is not a survey

1. Documents, which were never surveys, are constantly being re-used by the client and the lawyer, including building permit sketches and sketches used in variance applications. In a little known case held in Ontario Provincial Court, Civil Division, Etobicoke Small Claims Court: Action No. 16160/86, Provincial Court Justice Lamb "the tracing or photocopying of sketches or the compilation of parts of docu-



ments, which might appear to have been prepared by persons with some knowledge of drafting techniques, whether such documents have been attached to registered or other legal appearing documents, cannot be considered "surveys". The essence of a survey is that it must bear the "imprimatur" of a registered surveyor, in all aspects, to indicate to the observer that he or she can assume ascertainable principles have been followed in the survey's preparation with reference to specific property investigated.

2. The old "mortgage sketch" which was only concerned with showing the relationship of the house to two of the lot lines, usually the front of the property and the one side line, again is not suitable to use for certification of title. This product has been replaced by the more comprehensive *Surveyors Real Property Report*.

It is generally accepted that a surveyor's liability is not restricted to his or her client and extends to any party who could reasonably be expected to depend on the survey. The 1984 New Brunswick case of *Leblanc v. Dewitt* states that a surveyor "is liable in negligence

to anyone who might reasonably be expected to rely on that information." It could be argued successfully that a surveyor, by releasing out-of-date information would be subject to the law of negligent misstatement and third party liability.

The Surveys Act R.S.O. 1990 Chapter S30 provides that: "no survey of land for the purposes of finding, locating or describing any line, boundary or corner of a parcel of land is valid, unless made by a surveyor or under the personal supervision of a surveyor". A "surveyor" is defined as a person who is an Ontario Land Surveyor registered under the Surveyors Act R.S.O. 1990 Chapter S29.

The practice by some is to have the owner take an old plan of survey and sign a declaration that the plan, which may have been prepared anywhere from 5 to 25 years ago, is accurate and up-to-date. This is not proper procedure as the owner is not knowledgeable in survey law and does not realize if there are changes such as easements. The owner is unlikely to know if the plan is a full survey showing all components which must be reflected if the lawyer is to use the plan to certify title. Is the lawyer risking liability by using such a declaration? Who will be held liable if the purchaser has problems with extent? In real estate transactions, it would appear prudent that a lawyer or real estate agent not re-use an old survey document without having the same brought up-to-date or resurveyed. The fact that someone would indicate to a client that a document is old would appear to the land surveyor as being insufficient notice to the client of what is missing from the plan. It has always been important to address what is not on the plan rather than only what is on the plan.

Copyright

The use of survey products for purposes other than the original intent also raises the question of who owns the product, and the issue of copyright.

In the early nineties, the AOLS reviewed the applicability of copyright to surveys and surveyors. Cadastral survey plans are an illustration of a surveyor's opinion of the extent of title, and they clearly fall within the definition of an artistic work under Section 2 of the Copyright Act R.S.C. 1985 c. C-42.

The AOLS Standards for Surveys require non-deposited or non-registered plans to indicate the retention of copyright and the use of the universal copyright symbol "c" is recommended. Although copyright is automatically acquired with the creation of the plan, this

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approach places both the naïve and the malicious mis-user on notice that the surveyor retains copyright.

The corollary to infringement of copyright is “fair use.” Under fair use, a surveyor has the right to use the information from a plan in the preparation of another plan, a lawyer has the right to use a copy of a plan in order to do title research and obtain the necessary consents as required in a conveyance title, a professional association has the right to critique a surveyor’s plan and the client has the right to use the plan for its own private use in accordance with the purpose of the plan without infringing copyright. Fair use may also include making copies to complete the transaction for which the plan was prepared, however, subsection 29(3) of regulation 1026 R.R.O. 1990 under the Surveyors Act states:

“A print of a plan of survey is not a valid copy unless it bears the embossed seal of the licensed member who signed the plan or the embossed seal of a licensed member employed by the corporation or public agency responsible for the plan’s preparation or the corporate seal of the corporation holding a certificate of authorization that was responsible for the

plan’s preparation.”

The surveyor, therefore, has a responsibility to supply sufficient embossed copies of the plan and report to the original client, so that the client may complete the requirements of the transaction for which the survey was prepared. Any further copies would be released solely at the surveyor’s discretion, and any unsealed copies in circulation should not be accepted as a valid document.

Supported by the provisions of the Canadian Copyright Act, there is direction on the use and mis-use of survey products. A client does not have the right to unlimited use of the plan in subsequent dealings. The client does not have the right to re-use the plan for some other purpose than was originally intended. No one other than the surveyor who prepared the plan has the right to alter the plan. And, no third party has the right to use a plan for a use not intended in the original application.

Summary

The demand for survey products within and outside of the geomatics industry continues to change, sometimes as rapidly as the applica-

tion of new technology. Major issues are being addressed within the industry that deal with copyright of digital files, and ownership of data. As new products are developed for public consumption, some fundamentals remain unchanged because of their ties to Canadian law and need for accurate spatial data.

The products of the geomatics industry promise great benefits to our society and way of life. But during this time of growth and development of a new industry, professionals such as lawyers, planners, engineers, and real estate agents must remain vigilant and not mis-use survey products to save time and money. The potential harm and liability arising from the inappropriate use of survey products should be obvious.

(Material used for this article taken from “Avoiding Mis-Use of Survey Opinions” by William D. Snell, O.L.S., 1993; “Who Owns the Plan” by Robert J. Meisner, O.L.S., 1986; “The Survey And the Real Estate Transaction” by the AOLS, 1995; and Re-Use of Old Survey Documents” by L. Petzold, O.L.S., 1993.)

