HINDSIGHT IS 20/20

By Christopher L. Hluchan, Barrister

The job of surveying is difficult enough, but when factors such as time pressures from the client or conflicting evidence in the field are added to the mix, the job becomes even more difficult. Nonetheless, the surveyor is expected to perform to a high standard on every engagement. In the legal world, a surveyor will be required to exercise the due care, skill and diligence expected of a surveyor in like circumstances. While this is typical legalese, it means that you will be held to an objective standard of what a prudent surveyor would have done if faced with the same circumstances as your project.

While the Courts will try to put themselves in your shoes at the time of the engagement, this is always difficult and, accordingly, any analysis/critique of your work will involve a certain element of hindsight thinking, which as we all know, is 20/20. The following are some examples of problems, which surveyors have encountered in the past and how, in hindsight thinking, the circumstances could have been handled somewhat differently in ways, which would have strengthened their defence to the eventual claim.

Rush Jobs

This is a common situation in many claims. The client wants the work done yesterday and advises that the excavator will be on site in the morning waiting for your layout. A large role of plans is dropped off at your office – most of which have nothing to do with the engagement at hand.

When an error is made, the client conveniently forgets about the time pressure that they exerted and points all blame at the surveyor. While it may seem logical to raise the fact that you were pressured to do the work quickly as a defence, it will be the rare case where such an excuse will be accepted by the Court. In short, you are expected to perform your services to the standard of the prudent surveyor. There is no standard of the prudent rushed surveyor of which I am aware.

One suggestion of how to handle this situation is to candidly advise the client that the timeline is unreasonable and that if they insist that you proceed then you will not be responsible for any errors. In other words, try to transfer the risk of the unreasonable timeline back onto the client. Of course, this approach will work best if this is communicated to the client in writing. You may be surprised at how the client finds some extra time in the schedule for you to do your job at an appropriate pace. If not, this may not be an engagement worth taking given the potential risks down the road. You can be sure that if a client is unreasonable at the start of the job, that he or she will be equally unreasonable if a problem develops.

If faced with a mountain of architectural drawings and insufficient time to review them, have the client confirm which ones you are required to review for the purposes of your work. In the case of a stakeout for excavation, you will typically only need to review the Site Plan and Foundation Plan. However, there are occasions where relevant details may be hidden in other drawings and, accordingly, you should attempt to ensure that those are pointed out to you by the client. Again, confirmation in writing of this advice is key.

Go to the Top if there is Confusion

On some occasions, an issue will arise regarding the interpretation of a drawing provided by the client. If the issue arises in the field, there is temptation to try and resolve the issue amongst those persons that are present since this is the quickest and most efficient way of moving ahead to completion of the job. This can be a dangerous practice, however, as those in the field may not have the expertise or the authority to confirm your interpretation of what is expected.

For example, an issue could arise in respect of the location of a grid line in relation to an existing brick wall. Is the grid located at the face of the wall or in the centre of the steel columns inside the wall? While it seems logical to confer with the Site Superintendent to obtain his input into the intended location, this could be problematic in the future. We all expect the Site Superintendent to be familiar with the project and the architectural drawings in particular and, therefore, it could be considered prudent practice to confer with him to obtain his input and then explain to him what you have done in the field.

The potential difficulty with this approach is that if there is a problem down the road, you will be met with the argument that you were retained as the expert and that the Site Superintendent was not qualified to interpret the drawings and assist you in your work. In order to avoid such an argument, it would be best to note the issue and go directly to either the Project Manager or the design professional for clarification. By doing so, you will be transferring the risk of an error to the owner or the professional who is responsible for the design. While this may take some time, and hence delay completion of your work, this short delay will take much less time than defending a future claim. As well, in keeping with the theme of documenting instructions and decisions, make sure that any such communications are confirmed in writing.

Confer with Interested Parties

This one may seem obvious, but we have had numerous cases where a surveyor has prepared a plan of a residential property and an issue about the location of the boundary or whether there is a potential possessory interest arises. In these circumstances, it would be prudent to assume that the neighbours will also have their own opinion about the location of the boundary.

While it may not be necessary from a standards perspective, it may be prudent to seek information from the adjacent landowners about any issues that arise in your mind such as the age of a fence or the use of a laneway. In many cases, this may create an issue between the property owners, but you can rest assured that in most of those cases, it is better that the issue arises before your survey is

completed. In those circumstances, there is an ability to try to resolve the dispute before your opinion is committed to writing. Otherwise, you may be faced with a lawsuit by the neighbour once he or she becomes aware of your survey and takes a contrary position.

This can also lead to problems with your client if he or she relied on your survey in some way. For example, if the client erected a fence in reliance on your opinion of the boundary and it later turns out that your opinion would have been different had you been aware of information possessed by the neighbour, then it is possible that you may be found to be responsible for the cost of removing and replacing the fence into the proper location.

Full communication is always prudent practice and, in most cases, common sense.

Maintenance of Data and Records

It is extremely important to maintain your records. While most surveyors are very good at retaining their field notes and final plans of survey, it is important to retain all of the documents you considered in the course of an engagement, including any raw data. The reason for this is that you could face a claim many years after the engagement is completed due to the manner in which the statute of limitations operates in Ontario.

While the current *Limitations Act of Ontario* stipulates a limitations period of 2 years for claims of negligence and breach of contract, the limitations period does not actually commence until the claimant is aware that he has a claim against you. For example, you may have prepared a survey in 1996, which mistakenly failed to indicate a right of way over the property. The survey is relied upon in respect of a sale of the property in 1999. However, the error goes unnoticed until the new owner enters into an agreement to sell the property to someone else in 2006 and its existence is revealed during a title search by the purchaser's lawyer. If the owner of the property has suffered any damages, he or she could commence a claim against you within two years of the discovery of the error, notwithstanding that the actual work was performed in 1996 (or 11 years ago). This discoverability principle is subject, however, to an ultimate limitation period of 15 years from the commencement of the Act on December 9, 2002.

In many cases, documents provide the best means of defence since they are largely considered independent evidence and not subject to the weaknesses of a failing and inexact memory. With new scanning technology, the retention of documents has become much more affordable and your defence lawyer will thank you for giving him or her the tools to put forth the best defence possible.

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