Document! Document! Document!

By Christopher L. Hluchan, Barrister

Trust me when I say that litigation is not an enjoyable experience for the parties involved. While many people enjoy a good argument or defending one's position, to do so in the context of civil litigation can be a long, time consuming and frustrating process. In my fourteen years of defending Ontario Land Surveyors, I have never heard any of them say, "That was great. Let's do it again."

While sometimes litigation cannot be avoided due to circumstances and events beyond a professional's control, the following are some suggestions of how surveyors can approach their profession in a way that, firstly, makes it difficult for a client or other person to make an allegation of professional negligence and, secondly, if an action is commenced against you, to assist your defence counsel in defending your position to the fullest extent possible.

The following suggestions are by no means exhaustive as there are many ways in which you can attempt to limit your exposure to liability, but rather they are examples of largely preventable situations gone awry that I have observed over the course of the many files that I have been involved with in the past.

The importance of documentation:

Generally speaking, surveyors are very good at recording events in the field on a contemporaneous basis. Obviously, this is part of your education and part of your professional responsibility. Documentary evidence is the best way in which to defend yourself when confronted with a client whose "recollection" of events is at odds with yours. In my experience, the Courts are reluctant to decide between two competing versions of events and will eagerly rely on contemporaneous documents to resolve the stalemate.

While field notes are an excellent example of this form of documentary evidence, many times they are not enough to be a complete defence to a client's claim. The following can be illustrated by an example of a case which recently went to trial where the client changed the instructions in the field. Briefly stated, the facts were as follows:

- The Surveyor was retained to conduct a stakeout for excavation of a large new house.
- There was no general contractor on the Project. Instead, it was being run and supervised by the Owner of the property who had limited experience with property development.
- The design of the rear of the proposed new house extended right up against the limit of the rear yard setback.
- The client provided the Surveyors with the Site Plan approved by the City which they used to commence their stakeout work.
- While the crew was in the field, the Owner produced a new drawing that had also been approved by the City which contradicted the dimensions shown on the Approved Site Plan. He instructed the crew to lay out the house at a greater length, thereby causing it to encroach into the rear yard setback.
- The Surveyors explained that the extended length would cause a setback violation and that the City could potentially force the Owner to tear down the rear portion of his new house in order to bring it into compliance with the zoning by-law. Nonetheless, the Owner instructed them to proceed with the new length, which they did.
- Of course, the City caught on after construction was completed and because there were other zoning infractions (not related to surveying issues) the Owner became embroiled in a long and protracted dispute with the City and his neighbours.
- Several years after the fact the Owner commenced an action against the Surveyors and claimed that they had negligently conducted the stakeout by failing to ensure that the proposed new house complied with the rear yard setback. Not surprisingly, the Owner denied ever instructing the Surveyors to change the dimensions or that the Surveyors cautioned him about the obvious violation of the rear yard setback.

As a result, we were faced with a pure credibility case which turned almost entirely on whether the Surveyors had warned the Owner that his instructions in the field, if followed, would violate the zoning by-law. If the change of instructions had been confirmed in writing, the Surveyors' position would have been significantly enhanced since it would have led to one or two outcomes. Firstly, the Owner may have responded by either acknowledging the caution or indicating that he was not consenting to a layout which caused a zoning violation. In either case, any issue or confusion about the instructions or the resulting consequences would have been resolved. Secondly, if the Owner failed to respond to the letter, then he would have been found to have accepted its terms. Once he received it, it would have been his responsibility to respond if he did not agree with the contents. Under this scenario, any confusion or mistake would have been clarified before construction commenced or the Surveyors would have had an excellent defence at trial in the form of their uncontradicted letter.

While the field notes in that case did indicate that the change in dimension was made in the field and also reflected what work was done by the crew, there was no documentary evidence which

proved that the change was communicated to the Owner and, more importantly, that the change had been requested by the Owner with full knowledge of the potential negative ramifications.

The failure to make such a confirmation opened the door for the Owner to allege that the Surveyors made a mistake. When litigation ensued with the City, the Owner pointed the finger at the Surveyors. While the ending of this particular case is a happy one (subject to a pending appeal), the Court was forced to decide whether it believed the Surveyors or the Owner. This is always a risky proposition as the trend has been for the Courts to give clients the benefit of the doubt where there is a subsequent dispute over instructions. Several cases have held that the professional party has an obligation to document the terms of the relationship, which would include any changes in the scope of the engagement or the instructions given.

While defence counsel love to see those field notes, the moral of the story is that sometimes they are not enough. A letter to the client which details material events or circumstances will go a long way to assisting in your defence and may even prevent the claim from being commenced in the first place.

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