NON-SURVEY LEGISLATION WHICH AFFECTS THE SURVEYOR IN BUSINESS

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I have been asked to speak to you today on the way in which various provincial statutes affect the Land Surveyor in business. I am not telling you something new when I tell you that none of you spend your days solely engaged in the practice of surveying. You are businessmen, running a business, which provides among other things the services of a professional surveyor and you are subject to the laws which affect all businesses and people who carry on those businesses. It would be folly to act like the proverbial ostrich with his head in the sand, because your duties, obligations, liabilities and responsibilities as defined in these Acts affect you whether you are aware of them or not.

It is my intention during this time to outline a few of these Acts which affect all of you and advise you how you are best able to operate your business within the confines of the law and to avoid the entanglements with the law which are always time consuming, costly and cumbersome.

The longest and driest of the Acts which I will speak about today and which I will try and get out of the way at the outset is the Ontario Business Corporations Act, R.S.O. 1980, Ch. 54. I will preface my remarks by saying that I do not hold myself out in any way to be a corporate lawyer and I do not intend to interpret the intricacies of the Statute for you. What I do know after having recently reviewed this Act for the first time since law school, having carefully avoided the subject since that time is that if I were to incorporate a business today or carry on any incorporated business I would seek the advice and guidance of a qualified solicitor and I would retain the solicitor to advise me throughout the period that I carried on the business.

The reason for this is simple. The Act is lengthy and complicated and designed to regulate everything from the two-man survey firm to Anco of Canada Limited. Its provisions are pervasive and often times fraught with loopholes and legalese. For the most part it takes an expert to wade through the material. In my submission, acting without expert advice in this area is to invite trouble.

If I have, in the least way frightened you from entering the corporate sphere without some nature of advice, I have succeeded in doing that job that I was explicitly directed to do. The message I was requested to impart to you today, was that you are professional surveyors, having developed a recognized expertise in a particular field, through education and experience. Be aware that there are other fields where more expertise is required and do not hesitate to employ those individuals who possess such knowledge through their education and experience.

One final note, before I go into the specifics of the Act, which I have been asked to emphasize, make sure, when you retain counsel to help you with your incorporation that you instruct her to review the Surveyors Act before doing anything. There are strict provisions with regard to the corporate name and the make-up of the body politic which are not found in The Business Corporations Act, but which must be complied with by all surveyors.

Now getting back to the dry business of The Business Corporations Act, it among other things sets out the duties and obligations of directors, officers and shareholders. It also

stipulates the timing frequency and nature of meetings and audits and as those of you have been around the last few days now know, it regulates the content of certain by-laws and resolutions. However, today, I am only going to speak to those sections which address the subject of records.

Every corporation under this Act must maintain the following records:

A. A copy of the Articles of Incorporation;

B. All by-laws and resolutions;

C. A register of security holders in which is set out
   1) all persons who are or have been shareholders of the corporation within the last ten years
   2) all persons who have held debt obligations;
   3) all persons who within the last six years after the date of expiry of a warrant registered as holders of warrants of the corporation and their addresses;
   4) a register of directors in which are set out the names and residence addresses of all directors including the street and number of any or all persons who are or have been directors of the corporation with the several dates on which each became or ceased to be a director;
   5) proper accounting records in which are set out all financial and other transactions of the corporation including:

(i) all sums of money received and disbursed by the corporation and the matters with respect to which receipt and disbursement took place;

(ii) all sales and purchases of the corporation;

(iii) the assets and liabilities of the corporation, and

(iv) all other transactions affecting the financial position of the corporation.

6. The minutes of all proceedings at meetings of shareholders, directors and any executive committee.

These records must be open to examination by any director during normal business hours and must be kept at the Head Office of the corporation. To the extent that parts of the accounting records relate to certain parts of the operations, then these records will be kept at that place.

Many of these records must also be open to examination by shareholders and creditors during normal business hours.

The Act also creates an offence for any person who fails to file with the Ministry any document required and the penalty if found guilty, is a maximum fine $2,000. for a person and $20,000. for a corporation. It is also an offence to act

contrary to the Act or fail to comply with any provision of the Act or Regulations and the maximum fine under that section is $1,000.00 for a person and $10,000.00 for a corporation.

The Employment Standards Act, R.S.O. 1980, c. 137, also contains provisions which are applicable to all employers and further enumerates records which must be kept by the employer. The legislation requires that "employer must keep for a period of twenty four months after the work is performed, accurate records in respect of every employee showing:

- the employee's name and address
- the employee's date of birth if the employee is a student under the age of 18
- the number of hours worked by the employee in each day and week
- the employee's wage rate and gross earnings
- the amount of each deduction from the wages of the employee and the purpose for which each deduction is made
- any living allowance or other payment to which the employee is entitled
- the net amount of money being paid to the employee
- any documents or certificates relating to pregnancy leave

An employer is further required to keep accurate records for five years after the work is performed for every employee showing:

- the employee's name and address;
- the date of commencement of employment and the anniversary date thereof;
- the employee's wages during each pay period and the vacations with pay or payment."

With regard to the payment of wages, the Employment Standards Act stipulates that the employer furnishes to each employee a statement of wages at the time the wages are paid setting forth:

- the pay period
- the rate of wages
- the amount of wages
- the amount of deductions and the purpose for which the deduction is being made
- the net amount of money being paid to the employee.

With regard to vacation pay, unless the information is given to an employee in some other manner, the employer shall furnish to every employee at the time vacation pay is paid, a statement setting forth:

- the period of time for which the vacation pay is being paid
- the amount of wages
- the amounts of deductions and purposes
- the net amount.

The Act creates an offence for the failure to comply with the requirements of the Act and sets out maximum fines of $10,000. or six months' imprisonment, or both.

Those two Acts, the Business Corporations Act and the Employment Standards Act set out the bulk of the records which are required to be kept by all incorporated businesses and all employers. There are many other record requirements found in the other Acts which are highly specific, but what I have attempted to give you are the general requirements.

The second category of statutes which I will be explaining to you has to do with your business relations with your clients/ customers. The Consumer Protection Act, R.S. OP 1980, C. 17 is the first of these Acts with which I propose to deal and which has sparked some heated discussion among the members of our firm in the last few days with regard to its applicability to surveyors. The Consumer Protection Act, introduced in the last few years as part of a general trend towards consumer legislation, regulates contracts between buyers and sellers under certain types of circumstances. The Act only applies where the buyer is purchasing goods for consumption or services and is not a person who buys in the course of carrying on business. Further, the Act only applies where a buyer and a seller enter into what is called an "executory contract" which means a contract between a buyer and a seller for the purchase and sale of services in respect of which the performance of the services or payment in full is not made at the time the contract is entered into.

It is my interpretation of this Act, that it would apply to surveyors where they are retained by an individual for personal purposes to have surveying carried on and the survey is not done at the exact time the contract is made, i.e. the survey is ordered, and payment is not made at the time the survey is ordered. If these circumstances exist the Act stipulates that the contract must be in writing and shall contain:

a. the name and address of the buyer and seller
b. a description of the goods or services sufficient to identify them with certainty
c. the itemized price of the services and a detailed statement of the terms of payment
d. where credit is extended, a statement of any security for payment under the contract, including the particulars of any negotiable instrument, conditional sales agreement, chattel mortgage or any other security
e. any warranty or guarantee applying to the services and where there is no warranty or guarantee, a statement to this effect.

The Act also provides that the contract must be signed by the parties and a duplicate copy must be in possession of each of the parties. The consequences of not complying with these provisions is that the contract will not be binding upon the seller.

Essentially, that means that the Act can only be used by a consumer as a defence in an action brought by a surveyor for payment of fees. Non-compliance with the Act cannot ever be

a reason for the consumer to launch an action against the surveyor, nor does it seem in the Act that there is any offence created for non-compliance. In other words, as consumer protection legislation, it is weak inasmuch as there are no real enforcement provisions.

Nonetheless, the applicability of this statute to surveyors and the consequences of non-compliance, are not clear at this time and the most certain way to avoid unwanted litigation, is to meet the requirements set out in those sections.

The Business Practices Act, R.S.O. 1980, c.55, is another of these consumer protection statutes and it specifically regulates representations made to consumers. Again, this Act will apply only to individuals and does not include people who buy your services as a partnership or association of individuals carrying on business. This Act creates a cause of action for a consumer who enters into an agreement as a result of a consumer representation that is an unfair practice as defined and allows the consumer to rescind the contract or obtain restitution. The Act further indicates that in any such an action, the Court may award exemplary or punitive damages against the seller.

An unfair practice is defined to be a false, misleading or deceptive consumer representation including:

a) A representation that the services have a sponsorship, approval, or characteristics they do not have;
b) A representation that the person who supplies the

services has a sponsorship, approval, status, affiliation or connection he does not have;

c) A representation that the services or any part thereof are available to the consumer when in fact they are not;

d) A representation that a specific price advantage exists if it does not;

e) A representation that misrepresents the authority of the representative or employee or agent to negotiate the final terms;

f) A representation that the proposed transaction involves or does not involve rights, remedies or obligations if the representation is false or misleading.

Any unconscionable consumer representation is also defined to be an unfair practice. To determine whether a representation is unconscionable, the court will look to whether the consumer had equal bargaining power or because of his ignorance, illiteracy or inability to understand, was not able to properly appreciate or understand the transaction. A common law right of action exists for any person who has been the victim of an unfair representation with regard to the provision of professional services, notwithstanding the existence of this Act. However, this Act allows the immediate remedy of contract rescission on the part of the consumer and therefore surveyors should be wary.

Finally, with regard to a surveyor's customers, the other Act which is relevant is the Mechanics' Lien Act, R.S.O. 1980, c 261 of which I am sure most of you are familiar. The Act

stipulates that a lien is created in favour of any person who does work upon or in respect of the making, constructing, erecting, improving or repairing of any land, building, structure or works, or the appurtenances to any of them for any owner. The question which has been discussed over time is whether a survey is an improvement to the land. In the past, surveyors have put liens on a property where they have not been paid and in most instances have been able to obtain payment of their account. However, in two cases involving an architect and an engineer, the court has gone both ways. In the case involving the architect the building was never built and the court held that there was no lien created. On the other hand, in the case of an engineer who did plans, it was held that the engineer had the right to a lien. Recently, there was a case in Brockville, where a surveyor put a lien on a property and the owner challenged the right of the surveyor to have such a lien. Unfortunately, for our purposes, the claim was settled. However, there are two interesting items of note. Firstly, at the pre-trial the Judge indicated that on the face of the matter he was convinced the surveyor had a right of lien, secondly, part of the settlement was the signing of a consent judgment which would indicate now that there is a judgment in a Mechanics' Lien Action in favour of a surveyor.

It is arguable, whether in a fully litigated matter, the court would find the survey improved the land or whether it simply allows the owner to engage in further dealings with the land.

In the last section of this talk I will address various statutes which purport to regulate some of the dealings between a surveyor and his employees. First of all, the surveyor is subject to the provisions of the Workmen's Compensation Act, R.S.O. 1980, chapter 540 and the Occupational Health and Safety Act, R.S.O. 1980, chapter 321. Most of you are familiar with the Workmen's Compensation Act inasmuch as you are registered and receive information from the Board. It is important to note that there are strict notice provisions under that Act and an employer can jeopardize his coverage if he fails to comply with them.

In particular, employers must give notices of accidents to the Board within three days after learning of the accident if it is an accident that in any way disables the employee. The notice must contain:

a) the nature of the accident
b) the time of the accident
c) the name and address of the employee
d) the place where the accident happened
e) the name and addresses of the doctors, if any, who attended upon the employee.

The consequence of not filing such notices is to be liable to an offence that is created by the Board, or to be required to pay the Board an amount set by the Regulations.

The Occupational Health and Safety Act has now been in force since the end of 1979 and supercedes the Industrial Safety

Act. This Act applies inasmuch as the work done by a surveyor can be interpreted as construction, which is defined in the Act to include among other things, "land clearing, earth moving, grading, excavating, alteration, erection, demolition, and any work or undertaking in connection with a project". A "project" includes among many construction type things, "any work or undertaking or any land or appurtenances used with construction". It seems likely that the Act would apply to most surveying services except retracing.

Under the Act an employer is imposed with certain duties which include ensuring that:

a) the equipment, materials and protective devices as prescribed in the Regulations are provided;
b) that the equipment, materials and protective devices provided by him are maintained in good condition;
c) that the measures and procedures prescribed by the Regulations are carried out in the work place;
d) that the equipment, materials and protective devices provided by him are used as prescribed by the Regulations.

In addition to those duties just mentioned, the employer shall:

a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;
b) to acquaint a worker or any person in authority over a worker with any hazard in the work;

c) only employ in or about a work place a person over such age as may be prescribed in the Regulations;
d) take every reasonable precaution in the circumstances for the protection of the worker; and
e) post in the work place a copy of this Act.

The supervisor of each particular worker has specific duties which include:

a) ensuring that the worker works in the manner with the protective devices, measures and procedures required;
b) uses or wears the equipment, protective devices, that his employer requires;
c) advising the worker of the existence of any potential or actual danger;
d) where necessary, providing a worker with written instructions as to the measures and procedures to be taken for protection of the worker;
e) to take every precaution reasonable in the circumstances for the protection of the worker.

I am sure you have noticed that throughout the last few moments, the details have been scant, as I have indicated that one is to follow, for example, the procedures prescribed. Those rules are found in the Regulations to the Act and after reading the first few pages of those Regulations, I concluded that time neither permitted my reading them for the purpose of this talk, or your listening to them. This is not to say you should not

be familiar with them and I urge you to acquaint yourself with the Act and Regulations.

The workers have corresponding duties and further have duties to report to the employer or supervisor, any contravention of the Act of which they are aware or the existence of any hazard of which they are aware.

The Occupational Health and Safety Act also includes provisions whereby a worker may refuse to work where he has reason to believe that the physical condition of the work place is likely to endanger himself or that some of the equipment he is using is likely to endanger him. Upon such refusal, the worker must report these circumstances to his employer or supervisor and the employer or supervisor then has the duty to investigate these conditions. Any employer is prohibited from dismissing or disciplining the worker who has acted in compliance with this Act in refusing to work.

Much like the Workmen's Compensation Act, the Occupational Health and Safety Act stipulates that specific notices must be given where there has been an injury or any kind of accident. Notice shall include many of the details which are the same as those in the Workmen's Compensation Act and must be sent to the Director of the Occupational Health and Safety Division of the Ministry of Labour.

It is usual with Acts of this kind, that it creates an offence for contraventions or failure to comply with any provision or Regulation. The maximum fine upon conviction on one

of these offences is $25,000. or twelve months' imprisonment, or both.

Another Act which many of you may not have considered as applying to you in the operation of your businesses but which I assure you is applicable, is the Ontario Human Rights Code. This Act prohibits discrimination in notices and for our purposes today, in any kind of employment practices. The grounds for which discrimination is prohibited may be apparent to all of you but I will review them; they are race, creed, colour, sex, marital status, nationality, ancestry, or place of origin of such person or class of persons. (This paper was prepared prior to the Constitution Act 1982 which includes the Canadian Charter of Rights).

The prohibition of discrimination on these grounds includes prohibition with regard to hiring, promoting, transferring or training an employee. It also prohibits the differentiation of terms and conditions of employment on those grounds. There is an exception to the Act inasmuch as the age, sex or marital status may be a bona fide occupational qualification and therefore it may become a requirement for the position for employment. Certainly in the surveying business you may discriminate on the basis of age when setting a minimum age and it may be that you can set the maximum age if you can establish that there is an occupational qualification. With regard to sex or marital status, I am sure no O.L.S. would ever attempt to assert that either were bona fide occupational qualifications for surveying. It may be that it is better to be single to go to an Annual Meeting, but as for the actual surveying, I am

sure you would agree that there is no difference.

Individuals who believe that they have reason to complain to the Commission under this Act may make a complaint and the Commission will investigate the circumstances. The powers of the Commission are rather broad and an investigator would appear at your office to question you and examine any relevant documents.

Ultimately, upon investigation the director may swear out a complaint and in this regard the Act creates an offence for the contravention of any of the provisions of the Act and the maximum fine upon conviction is $1,000. for an individual or $5,000. for a corporation.

Presumably, one can avoid entanglements in this matter by avoiding any discriminatory practices. However, it is not an absolute guarantee that you will not one day be the subject of a complaint. You can best protect yourself in this regard by keeping records of your employment interviews and personnel records of your treatment of each of your employees so that if need be you can show that you have always treated your employees in an equitable fashion. If upon investigation, you the employer are able to show this, then the complaint may very well be dismissed at that stage. Certainly, this is to your advantage, where your resources and the resources of your office are not spent in lengthy responses to the Human Rights Commission.

The Employment Standards Act, which I discussed previously in respect of record keeping also speaks to relations with your employees. The Act regulates maximum working hours and this is subject of course to the Occupational Health and Safety Act. Of interest, I am sure to all surveyors, is that notwithstanding the number of hours of work in a day, the Act stipulates that every employer shall provide eating periods of at least one half hour, or such shorter period as is approved by the Director at such intervals as will result in no employee working longer than five consecutive hours without an eating period.

The Act also has provisions relating to minimum pay, overtime pay and public holidays. A rather recent and controversial section of the Employment Standards Act provides that every employer shall pay all of his employees equal pay for equal work, that is: "the same rate of pay for substantially the same kind of work performed in the same establishment, where the performance requires substantially the same skill, effort and responsibility and is performed under similar working conditions".

Finally, this Act also speaks to the termination of employment and sets out minimum notice requirements. Where an employee has worked for more than three months he must receive one week's notice in writing of termination. Where he has worked over two years but less than five years he is entitled to two weeks' notice. Where he worked more than five years but less than ten years he is entitled to four weeks' notice and where he has

worked more than ten years he is entitled to eight weeks' notice. These notice provisions do not apply where the employee is only employed for a definite term or task, where the employee is temporarily laid off, where the employee has been guilty of wilful misconduct or disobedience or wilful neglect of duty, in other words where there is cause for termination.

Do not be mislead however, by these minimum requirements under the Statute. The common law has been evolving rapidly in recent time to further define the correct notice required for the termination of an employee without cause. The cases also address the question of cause, and believe me, it is very difficult to prove just cause.

Without unduly repeating myself, I would advise each of you to seek competent advice, preferably legal, before terminating any employee. You may require only summary advice over the telephone or the matter may be more involved and require a researched opinion. In either event, it is my submission that in tough economic times like these and times of consumer protection worker recognition, an employer can save himself a whole load of trouble by obtaining and following expert advice in this matter.

For an employer who becomes a defendant in a wrongful dismissal action, the experience almost assuredly will be unpleasant, costly, disruptive to the individuals and the work, and result in an amount of negative publicity. The best way to

avoid such exposure therefore, is to plan your actions well in advance to a potential problem.

Unsatisfactory or unhappy employees exist and may well work in your company. An employment contract, if entered into at the commencement of employment could include terms and conditions of termination. In the event you have not followed this course, the employer can for the most part write such a contract throughout the employment relationship. This may be done through a series of memoranda or correspondence specifically addressed to the employee and preferably discussed with him. In this way, it is possible to set out the terms of reference of the employment, particularly outlining rights, responsibilities, obligations and provisions to be effective upon breach of any of these. Once such written rules are in place, it is easier for the employer to document unsatisfactory performance.

It is essential that warnings of less than satisfactory job performance be given to the employee and a time period to correct such lapses if the employer is to successfully terminate the employee for incompetence. In any event, such warnings will help substantially lessen any settlement claim upon termination.

Should you come to the decision to terminate an employee, you will wish in most cases, for obvious reasons to have the person leave the company immediately. Notwithstanding notice requirements upon termination, you will find that it reduces stress and office and field distraction if the terminated

employee is removed. Thus, in such situations you will have to determine what severance pay you will offer in lieu of notice.

The trend is towards greater periods of notice and is calculated based on age, experience, the current job market and tenure with the employer. To give totally inadequate notice is to invite a lawsuit. To offer something reasonable will in most cases genuinely help the employee and perhaps remove all thought of litigation from his mind.

I have come to the end of my discourse on some of the Ontario Statutes which affect every Ontario Land Surveyor in the carrying on of his business. I realize many of you carry on very small operations and the requirements which I have set out for you may appear to be paper intensive, cumbersome and overly picayune. I assure you, however, that they will not go away by being ignored. They exist and must be followed.

Non-compliance is enforced in many ways, some Acts, as I have indicated are much stricter than others. The risk however of non-compliance may not be worth it in the long run.

My final advice to you is to seek out professional advice and rely on it to the extent that your business requires it. As professionals ourselves, you should recognize the dangers of attempting to short cut the correct procedures in any field. A legal mistake may be a costly one to remedy - a lot more costly than having been prudent in the first place. In any

event, and on a more positive note, it makes business a lot easier to leave accounting matters to accountants, and legal matters to lawyers; it allows you to do the best and most professional survey work that you are capable of doing and it greatly adds to the probability that you will do it trouble-free.