

Loss Control Bulletin

Land Surveyors

Professional Liability Insurance

Property records research and risk evaluation for land surveyors

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Introduction

This is the first Loss Control Bulletin produced as a result of collaboration between the Canadian Council of Land Surveyors (CCLS) and the Ordre des arpenteurs-géomètres du Québec (OAGQ) Professional Liability Insurance Programs. The purpose of this Bulletin is to inform land surveyors across the country of the different provincial challenges and risks faced by surveyors in each jurisdiction. It will focus on liability risk inherent in the search for, and use of, property records as a source of boundary evidence in many jurisdictions within Canada. It will also describe automation, title conversion and cadastral renovation projects currently underway in several provinces.

The state of property records and their use outside of Quebec

Outside of Quebec, common law legal principles guide surveyors in the preparation and completion of legal boundary surveys. In the completion of any survey, the primary duty of a surveyor is to search for, evaluate and apply evidence germane to the completion of that survey. It is up to the surveyor to find and consider all available evidence, weigh the value or reliability of each piece of evidence, and come to a conclusion. A primary source of evidence other than direct field evidence are filed property records.

If a surveyor's plan or report defines a boundary based on evaluation and interpretation of evidence, it is a statement of opinion regarding that boundary. This boundary opinion must be based on evidence that meets a burden of proof required by common law standards of evidence. The research to find that evidence must meet standards of duty to care both in contract and in tort, in other words, both to the client and to the public. Liability risk for the surveyor will decrease as the thoroughness of the research increases. The more complete the research, the lower the risk.

The quality of information found during the research, and subsequently relied upon to reach a conclusion, is equally important. A surveyor must understand the reliability of a given piece of evidence and take that into consideration when drawing conclusions. The first section of this Bulletin will focus on two identified areas of liability risk inherent in the search for, and use of, property records as boundary evidence in many jurisdictions within Canada.

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These two areas are the use of hearsay or secondary evidence and the use of records resulting from the automation and/or conversion of Land Registry office records.

Hearsay or secondary evidence

It is paramount that hearsay evidence be avoided unless primary evidence is unavailable. Depending on the type of survey to be completed, various sources for records will be reviewed and evaluated for reliability. In the case of legal boundary surveys, it is imperative that the relevant Land Registry office be the first and primary source of title records. Other government sources such as Legal Surveys Division of NRCan, CN/CP offices, and provincial MNR departments may be consulted. Roads, shorelines, historic grants, Indian reserves, railroads, etc., have specific sources of title documents that are peculiar to specific areas and are “primary” sources. Outside sources of title information such as lawyer’s records, assessment records, surveyor office records and client communications should all be considered to be hearsay evidence and should not be relied upon without corroboration. In the case of records from a surveyor’s office, there is a risk involved in using the research done for a previous project. Search records, copies of documents and information on the face of plans or in reports may not be complete or correct in the context of the current project. There may be prior mistakes, new information available, or simply a different focus that didn’t make note of evidence relevant to the current search. Unregistered documents, such as purchase and sale agreements, are considered to be secondary to Land Registry office records and may lead to erroneous conclusions as to title and boundaries. In areas where the Land Registry office records are known to be poor, extra caution and due diligence is suggested in order to avoid potential risk. If the evidence is unclear, it may not be possible to accurately determine some boundary or property rights.

Automation of Land Registry office records

A second possible area of liability risk for the surveyor is the currently ongoing automation and in some cases conversion to Land Titles of provincial Land Registry office records. In the case of automation of current Land Titles records, the risk for the surveyor is minimal, as the parcel information should be duplicated exactly in the newly automated version. It is important not to deviate from the parcel description and clearly understand the intent of the wording.

In instances where Land Registry office records are being automated and converted to Land Titles from Registry, as is the case in Ontario, New Brunswick and Nova Scotia, it is important to note that only the ownership is being certified, not the boundaries. Descriptions still require full analysis and care should be exercised when using descriptions created specifically for the automated system. Errors such as inappropriate use of aliquot parts, inappropriate use of description qualifiers and non-recognition of subsequent transfers due to breaks in the chain of title have been evident. Overlaps, gaps and outright omissions are possible and are commonplace in some areas where records are poor. Merging of properties may occur where multiple adjoining properties have one common ownership.

In Nova Scotia, where this process represents the first major change to the land registration system since 1749, the allowance of the use of PIDs (Parcel Identification Numbers) to replace legal descriptions could easily lead to confusion regarding description. In rural areas of Nova Scotia, descriptions are already poor, with original Crown grants often being poorly defined. This results in poorly recorded title information making standard title searching and survey retracement techniques difficult at best. The current mapping system being used by Registry 2000 in Nova Scotia incorporates a digitized version on the assessment mapping, registered and unregistered survey plans supplemented by aerial photography to create PIDs. The correlation between this product, the available title descriptions and the actual physical boundaries on the ground may not be the best.

It is recommended to use extreme caution. In the case of estates in Nova Scotia, it will be the responsibility of the personal representative of the deceased to provide the appropriate descriptions for probate documents. In many cases, this will involve individuals not familiar with land transactions. Care should also be taken if this is the case. Adverse possession principles are also not clearly defined.

The processes being used in converting properties to Land Titles varies from province to province. In Ontario, complete blocks of properties are being analysed and converted simultaneously. The process involves independent analysis of the last three “arm’s length” transfers in each individual chain of title. It was felt that analysis of title by a lawyer on three occasions was sufficient to ascertain title. In Ontario, Planning Act compliance has been included as part of the process. Non-compliant parcels are non-converted and will remain in the Registry system. In Nova Scotia, a system is currently being implemented whereby conversion to Land Titles occurs only as individual properties are being conveyed. It is up to the conveying lawyer to “certify” the title. It is therefore necessary to define the current system for the subject property and each abutting property and to research boundary evidence accordingly.

In both systems, **mapping prepared for use in conjunction with the automated title records should only be used as a guide.** The conversion process may identify problems with description but will do little to rectify those problems without the benefit of a survey plan. It is also possible that problems may have been missed entirely if they predate the last transfer considered for conversion to Land Titles. The accuracy and completeness of the records used in the conversion process directly correlates to the accuracy of the end product. It can be expected that areas of newer, well-established fabric such as newer urban subdivisions will yield a more reliable product than areas with more ambiguous records such as rural areas or older town and urban cores.

From a liability perspective, it is important to note that the conversion process is only certifying ownership and is not intended to certify the boundaries. If the surveyor uses the results of that same conversion process in the search for boundary evidence, care must be taken. Failure to account for variations in the quality of evidence exposes the surveyor to increased and unacceptable risk.

The state of property records and their use in Quebec

In the province of Quebec, the cadastre is a registry started in 1860 and is comprised of approximately 4 million lots represented on 400,000 written lot plans. These plans contain property information, including measurements, area, shape and positioning in relation to neighbouring lots and lot number. Lot numbers are used to register real property rights at the Registry office. However, the cadastre was made up of many cadastres, each covering a specific registration division of the province and held only in that registry division. No global cadastral plan existed; 850,000 lots were not identified in any Land Registry and some 750,000 others contained inaccuracies.

In 1985, the Quebec legislator enacted the Act to promote the reform of the cadastre in Quebec. In 1994, Quebec’s department of natural resources undertook the reform of the cadastre, a large-scale project that would span over 15 years. The department called on land surveyors, giving mandates progressively that would cover all of Quebec’s territory. The objectives of this cadastral reform, aside from the creation of a global cadastre for Quebec, were the following:

- Introduce a new number system to include all lots (to facilitate the transition between old and new cadastral plans, a lot number cross-reference list is supplied to municipalities and registry offices).
- Transfer all data for lots that were correctly represented in the old cadastres.
- Identify and include properties that did not have a distinct lot number.
- Identify and correct inaccuracies found in old cadastral data.
- Group lots forming one and the same property, unless the owner does not wish grouping of lots to be done.
- Produce an electronic version and a hard-copy version of the reformed cadastral plan.

Before the cadastral reform carried out in each area becomes official, property owners are invited to participate in a consultation. This allows them to learn more about the project and to voice their opinions regarding representation of their property. If need be, the property owner may request an additional evaluation of evidence and submit documentation relevant to the evaluation. Since the cadastre is only a graphic representation of property, it does not take away nor grant any property rights. The cadastral plan outlines property boundaries, but it does not determine them: only a determination of boundaries may establish a property's boundaries in a definite manner.

It is sometimes necessary to take note of the former cadastre to carry out certain survey operations (certificate of location, staking out, etc.). In fact, one should not take for granted the data contained in the renovated cadastre, but rather validate it with the former cadastres, the titles, the occupation, etc.

Today, in 2004, approximately 40 per cent of all lots have been reformed and the mandates given since the beginning of the reform now cover nearly 60 per cent of the entire territory to be reformed.

Summary

Land surveyors from different jurisdictions across Canada face differing, yet equally important, liability risks when setting legal survey boundaries. It is important to recognize these risks in order to reduce their potential liability exposure.

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