

Loss Control

Bulletin

Land Surveyors

Professional Liability Insurance

Land Surveyors and Contracts

by Michael E. Mestinek, Partner
Gowling Lafleur Henderson LLP

Introduction and revision by Stephen J. Black, B.Sc.,
Claims Analyst
ENCON Group Inc.

From a risk perspective, it is becoming readily apparent that all land surveyors would benefit from a basic understanding of contracts. The days of a verbal retainer being sufficient are past. At least a written job confirmation, and at best a contract, should be agreed to by both the land surveyor and their client. Written contracts have distinct advantages over an oral agreement:

- they encourage careful consideration
- they allow all parties to review their respective sides of the agreement
- they allow land surveyors to evaluate their client's expectations

Perhaps most importantly, they are objective, documented evidence, which can be crucial in the case of a lawsuit or insurance claim.

Several insurance claims have recently arisen because of either poor contracts between the parties or the absence of a contract. A basic understanding of some contractual terms is required to be able to successfully enter into a contract and understand some of the risks and ramifications involved. It is hoped that this Bulletin will provide comfort to land surveyors when dealing with contract issues while reducing the risk of a claim. It is important, however, to realize that when

faced with complex contracts, legal advice is essential to protect your business.

Contracts

The goal of this Bulletin is to educate land surveyors regarding the fundamental elements of contract law that may arise in their day-to-day activities as professionals. It also specifically addresses specific contract issues that have recently arisen in large commercial projects involving land surveyors.

It is important that the land surveyor be aware of the necessity of ensuring that the terms of any project are clearly spelled out in a written contract before beginning the work. This is increasingly true in the modern business environment. Written contracts force both parties to put their minds to critical aspects of the work, including its scope, timing and price. They reduce uncertainty about the terms of the engagement and assist with resolution of any disagreements that may arise regarding the work.

Modern commercial contracts, including those relating to the provision of survey services, are often complex. Unfortunately, they often contain complex language, usually drafted by lawyers. The reason for this is that contract language has evolved over many decades of legal and court interpretation. This means that using accepted contract language provides certainty as to how the contract will be interpreted by a court, if that becomes necessary. This makes it difficult to replace accepted contract language to make the document easier to read. This Bulletin will try to minimize the "legalese," however, it is important to remember that the language of contract law is complex.

Mike is a partner in the Calgary office where he practises insurance and commercial litigation. Mike's insurance practice is concentrated in the areas of professional negligence, product liability and insurance defence.

Mike's expertise in commercial litigation is focused on the areas of shareholders' disputes, contractual disputes and pre-judgment remedies.

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The Fundamental Elements of Contracts

A contract should contain the following: an agreement as to the work, the consideration required, the parties must be legally able to participate, the purpose must be legal, and the parties must be legally competent.

In order for legally binding contracts to be created, all of the following essential elements must be present:

1. **Agreement**—This has three parts.
 - (a) Intention to create a binding contract—This intention must be tangible, clear and objective.
 - (b) Certainty among the parties regarding the material terms of the agreement—All of the necessary terms of any contract must be agreed to by the parties, and those terms must be capable of being understood or interpreted clearly by the court.
 - (c) Offer and acceptance of the offer—An offer must be made, received, and accepted. The acceptance can be either express or implied. This is often called the “meeting of the minds” between the contracting parties.
2. **Consideration**—The exchange of something of value between the parties, most typically an exchange of money for goods or services. Generally, consideration should create some benefit to the recipient or some trouble or inconvenience to the provider.
3. **Capacity**—The parties to the contract must be legally capable of being bound by contractual obligations, most typically competent adults or legal business entities.
4. **Legality**—The purpose of the contract must be legal.

Contract Clauses

1. **Terms:** These are provisions in the contract that state an obligation imposed by the contract. The obligation can be on one or more of the parties involved in the contract. For example, John Doe Surveyor agrees to provide a Real Property Report for the residential property at 12 Maple Street, Anytown, Canada for John Q. Public, by June 1, 2005, for \$750 paid on delivery. All contractual

provisions are terms. As discussed below, they can also include representations, conditions, warranties, covenants and exclusion clauses.

2. **Representations:** These are statements made before or at the time of entering into the contract about some matter or circumstance relating to the contract. Representations typically induce a party to enter into the contract. For example, auto manufacturers often represent to the public that their pickup trucks have the most horsepower in their class. False or inaccurate representations usually lead to actions to declare the contract at an end, or actions for damages, depending on whether the representation is in relation to something within the contract or merely ancillary to the contract.
3. **Conditions:** These are representations that are essential to the contract and found within the contract. If a party fails to perform a condition, the other party is entitled to consider the contract ended. In the example noted above under Terms, a condition would be to complete the survey.
4. **Warranty:** This is a representation in a contract with less drastic effect than a condition. A warranty does not go to the root of the agreement between the parties but expresses some lesser obligation. A breach of a warranty does not confer a right to treat the contract as ended, but does give rise to a claim for damages. An example would be a warranty of performance. In our earlier example the requirement that the survey be completed by June 1, 2005 could be a warranty.
5. **Warranty vs. guarantee:** There is a considerable amount of confusion regarding the difference between a warranty and a guarantee. The short answer is that they are essentially the same concept. “Warranty” is the legal term used to describe a representation in a contract, not amounting to a condition, and usually speaks to the quality of a good or service being offered. “Guarantee” is often used by lay people to describe what is in essence a warranty or a condition, depending on whether it is found within the contract and whether it goes to the root of the contract.

6. **Covenant:** This is a promise or agreement to do something, unlike representations, conditions, or warranties, which typically describe a state of affairs existing at a particular time. A breach of a covenant will result in an action to terminate the contract where the covenant goes to the root of the contract. If the covenant is less important to the main purpose of the contract, the remedy will be an action in damages.
7. **Exclusion clauses:** These are clauses designed to bypass conditions and warranties, and thus protect parties from potential liability for breach of contract. Courts will sometimes classify certain conditions and warranties as “fundamental terms” of a contract, in which case the law provides that the exclusion is unenforceable.

Specific Contractual Provisions of Concern

Indemnification and hold harmless provisions

Indemnities are obligations to pay another person's loss that might arise in the course of acting at that person's request or for his benefit. Hold harmless provisions are a sub-class of indemnity that occur when one party agrees not to pursue recovery against the other party for losses involving the work or location. Indemnity and hold harmless provisions are common features of agreements with independent contractors for the provision of services. An indemnity shifts economic risk onto the party chiefly responsible for the loss, regardless of whether they directly caused the loss. Appropriate indemnity clauses should be negotiated to protect both parties and should reflect actual responsibility for any loss incurred under the contract.

Here is an example of an indemnification and hold harmless clause that you may see included within a contract:

“The contractor shall indemnify and save harmless the owner from any and all losses, liability, claims, demands, and costs (including legal costs) howsoever caused.”

If you had agreed to this clause, you would have assumed all liability and would have agreed to indemnify the owner for any problem that the owner encounters during the completion of a project. In other words, you would have taken on the risk of any loss to the owner, whether or not you were responsible for causing it in any way. This is an example of a “broad form” hold harmless agreement.

An appropriate clause to have included within a contract would be a “limited form” hold harmless agreement, such as the following:

“The indemnifying party agrees to protect the indemnitee only against claims related to the agreement, arising out of the indemnitor's (and its agents) sole negligence.”

Here, you would be taking on the risk of loss that you actually caused through your negligence.

Unlike other contractual provisions, an indemnity does not require a breach of its terms to be triggered. It can impose liability for direct losses of parties not involved in the contract and for losses not recognized or commonly awarded at common law. Further, an indemnity may operate where a claim would otherwise be barred, such as by limitations legislation. Considerable litigation has revolved around the issue of whether a particular indemnity clause applies only to contractual claims or claims of negligence as well.

Because of the serious legal obligations and financial risks involved, you should always get independent legal advice before entering into any agreement that includes an indemnity or hold harmless provision in favour of another party. You should also consult with your insurer before considering any kind of indemnity or hold harmless provision to determine whether the resulting liability is covered by your insurance policy.

Binding agreements vs. agreements to agree, letters of agreement, and memoranda of understanding or intent

Many parties enter into a preliminary “agreement” or document prior to creating a formal written contract. These documents usually set out the framework for negotiations of the terms of the contract. These documents are often called letters of agreement, memoranda of understanding, or something similar. The following questions arise in the context of these documents:

1. Does the document create legally enforceable obligations? Or, does it set out negotiation points?
2. Do any of the parties actually intend to create legally binding obligations prior to signing the final written contract?

The question of whether the parties intend to create legal obligations is critical. This question is part of a larger consideration of whether all of the essential ingredients of a contract described above are present.

An “agreement to agree,” such as when parties have purported to contract that they will make a contract in the future, is unenforceable. However, a legally enforceable contract may be found where one party is given or granted an option by the other to enter into a future contract, or where the parties have reached a final agreement, but some additional formality is envisaged.

Warranties of performance

Land surveyors are professionals. They do not guarantee perfection in their work or opinions. The quality of the work required of a land surveyor is that which is set out by the accrediting body, the legal standard set by legislation and that determined by precedent through common law. Any contract that contains a requirement that the land surveyor perform to a certain standard of performance in excess of this, or even perfection in terms of their work, should not be agreed to.

One example is when the land surveyor “guarantees” or “warrants” that their work is “correct.” These are often found in standard certifications that are required by legislation in some jurisdictions. While it might be appropriate to certify that your calculations or measurements are correct, it is not proper for you to certify as correct what is in essence a legal opinion rendered by the land surveyor. A good example of this is where the land surveyor makes a judgment regarding a natural river boundary that in his or her view has moved over time by accretion and therefore the boundary has changed as the river moved, as opposed to having suddenly avulsed, in which case the natural boundary does not change.

Land surveyors should take care to ensure that their certifications pertain only to that part of the work that can be classified as “correct,” namely, mathematical calculations and objectively determinable measurements. Judgments made by the land surveyor should not be certified as “correct.” Do not agree to warranties within contracts that exceed this basic principle.

Penalty causes

Similarly, contracts that contain penalty clauses or, as discussed above, indemnity or hold harmless clauses in either fixed or undetermined amounts, should not be executed. Please note that most errors and omissions insurance policies exclude coverage for penalties or other forms of punitive damages.

Put simply, the land surveyor is not a contractor. These types of clauses often find their way into land surveyors’ contracts from contractors’ agreements with developers and owners. They are inappropriate to form the basis of contractual relations between a land surveyor and a third party.

New exclusions to coverage

The above provisions relating to indemnity and hold harmless provisions and express warranties, guarantees and penalty clauses have been addressed by new exclusions attached to the Errors and Omission Insurance for Land Surveyors Policy. They read as follows:

“This policy does not apply to CLAIMS:

- e) arising out of or attributable to the liability of others the INSURED has assumed under contract or agreement, unless such liability would have existed in the absence of the contract or agreement.
- f) arising out of or attributable to express warranties, guarantees and penalty clauses the INSURED has given for the benefit of others, unless such liability would have already existed at law in the absence thereof.”

These exclusions already exist in one form or another on most other professional errors and omissions policies.

Jurisdiction and applicable law

Standard commercial contracts usually contain what are called “choice of law” or “choice of jurisdiction” clauses. Choice of law clauses, bind the parties to accept the law of a particular jurisdiction (the law of Alberta, for example) as being applicable to the interpretation of their agreement. Choice of jurisdiction clauses bind the parties to accept a particular jurisdiction for the trial of any disputes arising out of the agreement.

Land surveyors should consider including choice of law and choice of jurisdiction clauses in their written contracts (invoices, job confirmation slips etc.) and should obtain the advice of counsel to assist in the drafting of these provisions. Including these clauses eliminates uncertainty about what law or jurisdiction is applicable for the interpretation of the agreement or the trial of any resulting actions. This is important from a risk management perspective. These clauses provide certainty regarding what law applies to an agreement and where any trials arising from it will be held. They enable the land surveyor to choose the


most favourable law and jurisdiction and are especially important in an era where many professionals are performing work across multiple jurisdictions.

Conclusion

Land surveyors are being exposed with increasing frequency to the use of written agreements in respect of their work. These agreements often contain commercial terms that are either difficult to understand or which bind the land surveyor to obligations that are either not covered by their professional liability insurance policy, or create unreasonable risks. For these reasons, land surveyors should consult with their insurers when presented with written contracts to ensure that the type of work that they are being asked to undertake is not excluded from coverage and that there are no provisions in the contract that invalidate coverage.

It is also important that land surveyors develop a close working relationship with legal counsel and that written agreements are reviewed by counsel prior to execution. This enables land surveyors to obtain legal advice regarding the rights, obligations, and risks that arise from written contracts they are being asked to execute.

This Bulletin is an alert to practising land surveyors to read all paragraphs of contracts that they intend to sign with respect to their services. Some of the contracts presently being received by land surveyors for proposals appear to be extracted from construction trade contracts between owners or general contractor and their sub trades. These contracts may contain express warranties, guarantees or penalty clauses, or a commitment to assume the liability of the owner or other trades on the site. There may also be statements committing the land surveyor to accuracies of work well above the legal standard. Generally, all professional liability insurance policies have exclusions for warranties and guarantees. The CCLS Professional Liability policy as from June 1, 2005 will contain exclusions related to additional liability “arising out of express warranties, guarantees and penalty clauses,” within the policy wording.



Land surveyors considering contracts containing these or similar terms should contact their broker for clarification of existing liability coverage and obtain independent legal advice regarding the contract. Clients should be advised that land surveyors are professional consultants and not contractors. While the land surveyor may encounter resistance to requested changes in contract wording, it is important that the land surveyor insist that inappropriate terms be amended or removed as required.

Developing better awareness and new practices relating to written agreements will provide for smoother business transactions, better certainty for the land surveyor regarding legal rights and will lower the risk of claims arising for which the land surveyor is not covered by their policy of professional liability insurance.



ENCON Group Inc.
Telephone 613-786-2000
Facsimile 613-786-2001
Toll Free 800-267-6684
www.encon.ca