

Loss Control

Bulletin

Land Surveyors

Professional Liability Insurance

Surveyors, Records and Limitation Acts

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Introduction

The purpose of this Bulletin is to inform surveyors across the country of the importance of keeping proper records and the possible impact of the various provincial and territorial limitation acts on the maintenance of those records.

Records

Records of completed surveys should be archived upon completion of the survey. These are a valuable resource to the surveyor and are important documents either to consult in the future with regard to other projects or in the event of any dispute arising from the completion of the survey. The complete file should include all field notes, final plans, electronic field notebook files, digital files, contracts or job confirmation forms, title search information, engineering and architectural plans, documented conversations and any other communications with the client, whether in the form of letters, faxes or emails. In most jurisdictions, field notes can be produced as documentary evidence in the event of a claim. As such, it is important to maintain both written and electronic field notes.

A standardized procedure for keeping records should be used. Mechanisms for storage can vary, however, the information should be preserved in its

final form as of the date of completion of the survey. If the file contains hard copies of all the documentation, ensure the documents are not modified after the survey has been completed. Modifications to a final plan make it difficult to determine the plan's content at the time the survey was completed and, as these documents may need to be produced to other parties in litigation, modifying the plans could make it more difficult to illustrate the original plan in order to resolve a dispute, which could arise years, even decades, after the original plan. If a survey is used as the basis of an update or new survey, create a separate file and maintain the integrity of the original archived file.

If the file is digital, ensure the file is complete, scan all necessary documents and save it in a secure format so that the data cannot be modified or lost. Be aware of hidden content when using programs such as Microsoft Word. Be sure not to inadvertently change auto-format dates when updating files. When saving to a disk, write-protect the disk and store it in a safe, secure location, preferably separate from your operating premises so that the data can be recovered in the case of a disaster. It may be necessary to update your storage technology and files, as newer forms of data storage become available. For more information on these and other software issues, it is recommended to consult with an information systems expert to address these potential risks.

Why is it important to ensure that a complete electronic file be maintained? All electronic documents are discoverable in litigation. At least one jurisdiction, British Columbia, is also now requiring that all documents be produced in electronic format for any legal case involving three or more parties, more than 1,000 documents or a substantial number of electronic documents.

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Limitation Acts and Records

As with other professional groups, a surveyor can be found liable in contract or negligence, or both. In order to fully defend themselves against a claim, it is necessary for surveyors to have a complete documented record of their work. When developing practices for archiving records, a surveyor should also consider the period for which they may be held liable for their work. Accordingly, it is advisable that a surveyor keep their related documents for *at least* as long as they may be held legally responsible.

The laws of each province and territory limit the time period in which a potential plaintiff may bring an action. They may also define an ultimate period of liability. Unfortunately, these time periods are not consistent across jurisdictions, and the various acts contain language that may affect the interpretation of the relevant limitation period. They are not consistent with regard to the cause of action such as breach of contract or negligence. An action to bring a claim for breach of contract usually must be brought within a specific period from the date of the breach of contract. However, in an action in negligence, the limitation period to bring an action may depend on when the plaintiff became aware of the error, rather than when the error occurred. This is referred to as the “discoverability rule.” The Supreme Court of Canada has stated “a cause of action arises for the purpose of a limitation period when the material facts upon which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.” (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 152; *MacCulloch v. McInnes, Cooper & Robertson* (1995), 140 N.S.R. (2d) 220; 399 A.P.R. 220 (C.A.)) An ultimate limitation period is also defined in the various acts as being the maximum period of time to bring a claim before the court, regardless of when the cause of action was discovered.

Many of Canada’s limitation acts are currently in the process of being revised or have recently been revised. There have already been several court decisions concerning the new acts that affect how they are being legally interpreted. The following section of this Bulletin provides a summary of the limitation acts currently in effect as of the date of this Bulletin, how they are being interpreted in various jurisdictions and their impact on surveyors.

Provincial and Territorial Limitation Acts – An Overview

Limitation acts for the various provinces and territories can be characterized into two groups: older, complex limitation acts and newer, revised limitation acts. Many of the older acts contain different limitation periods for different professions as well as multiple or extended periods to initiate a court action or to ultimately bring a claim. Jurisdictions with revised limitation acts include Alberta, Saskatchewan and Ontario. Newfoundland and Labrador’s limitation act was revised in 1995 but still contains several different limitation periods which are dependant on the cause of action or type of damage, and it is subject to exceptions relevant to the surveying profession. For example, issues regarding possessory title declarations, foreclosure proceedings, easements and restrictive covenants all have no ultimate limitation period. The remaining jurisdictions have older limitation acts but most are in the process of initiating reforms.

The newer limitation acts contain provisions that have yet to be interpreted by the courts, and there are some areas of ambiguity, including the following:

- The 10-year ultimate limitation period in Alberta has yet to be tested. The trigger to establish the starting date is open to interpretation.
- There is a case currently under appeal in Ontario that tests the 15-year ultimate limitation period. In the January 20, 2006 decision of the Ontario Superior Court of Justice, *York Condominium Corp. No. 382 v. Jay-M Holdings Ltd. and Toronto (City)*, the court found the action to be statute barred. The action commenced in 2005, after the implementation of the new act, and the 15-year ultimate limitation period was found to be applicable as the original work causing the action occurred in 1978. This is an example of a very strict interpretation of transition provisions within limitation acts, where under the previous act the action would not have been statute barred. This decision is important because other jurisdictions are considering using the Ontario act as a precedent upon which to base reforms for their own provincial limitation acts.

- New Brunswick is now considering reforms to its limitation act, including a new limitation period of two years to initiate an action either in negligence or contract and an ultimate limitation period of 15 years. This new act would be much like Ontario's, with one important exception; transition provisions have been suggested where the new ultimate limitation period would not be applicable for cases where the original work pre-dates implementation of the new act. The reason being that an ultimate limitation period denies some claimant's access to justice. It is important to stress that at this time the discussions leading to reforms of the New Brunswick limitation act are at a very preliminary stage.

A key issue that has yet to be decided by the courts in Alberta and elsewhere, is the trigger that starts the clock running for ultimate limitation periods. For an ultimate limitation period, does the clock start when the original error occurred (as is described in several jurisdictions) or when damages are discovered? A survey error may be made when a survey is completed, but damage may not be identified or discovered by a property owner until they use the survey many years later. For example, the damage could be identified or discovered when a landowner acts on a negligent survey performed years earlier to erect a fence or build a driveway or even to attempt a sale. The result is that it is difficult to know when the limitation period will begin to run and when an action will be barred by statute. Different jurisdictions may also use different wordings in describing conditions applicable to discoverability, and these wordings can be interpreted in different ways.

Jurisdictional differences may be applicable when attempting to use a limitation act defence. In a recent case, a claim was dismissed due to the expiry of a limitation period in one jurisdiction, but it was then successfully appealed by the plaintiff in a different jurisdiction where the limitation period was longer. This was permitted as the surveyor's client had a legal presence in that alternate jurisdiction, and a choice of jurisdiction clause was present in the surveyor's contract.

As the previous example shows, it is difficult to predict with any precision whether a claim brought against a surveyor can be successfully defended using a defence based on the limitation provisions in the applicable statutes. In any case, it is easier to defend any claim that may arise if the surveyor has maintained his or her records.

It is also important for the land surveyor to enter into properly worded contracts that define obligations, rights and dispute resolution mechanisms. It is advisable to maintain records at least as long as a surveyor may be held legally responsible. A minimal benchmark for this would be the various limitation periods in each jurisdiction. Minimum periods for file retention would vary: possibly 10 years for Alberta, Newfoundland and Labrador, Yukon Territory, Northwest Territories and Nunavut; possibly 15 years for Ontario and Saskatchewan; 30 years for all other jurisdictions. However, due to the nature of the surveying profession, it may be years, even decades, before a mistake is noticed or damage is caused. Interpretation of the various limitation acts could vary depending on the wordings used and by local precedent established by the courts. Therefore a minimum record retention period of at least 30 years, preferably longer if possible, is recommended for all jurisdictions. For more detailed information concerning specific limitation acts, please either consult the various government websites or refer to independent counsel.

Conclusion

Proper record keeping is vital for a surveyor. Records of completed surveys are a valuable resource and could be important in resolving a dispute that could arise as a result of the survey. These should be kept as long as a surveyor may be found to be legally responsible for their work. A minimal measure for this would be the applicable limitation period in each jurisdiction. However, due to ambiguity in how these acts are being interpreted, it is suggested that it is in the surveyor's best interests to maintain their records as long as possible.

