

Loss Control Bulletin

Land Surveyors

Professional Liability Insurance

Written Agreements

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This Bulletin on written agreements, written by David Bishop, Gowling Lafleur Henderson LLP in Calgary, includes a sample one-page confirmation letter. Other acceptable contracts can be found in the CCLS Practice Management Guide available on the CCLS website www.ccls-ccag.ca/PLICguide.htm.

The use of engagement or confirmation letters such as the one attached to this Bulletin is part of a basic risk management program. Integration between risk management and client satisfaction is easily incorporated into most aspects of surveying practice since the objectives of sound management and good field practice are the same — reliable professional service. Taking the time to do a job right is accepted as a business cost. This is an outward-looking cost that supports the goals of the business in delivering its services and in reducing risk.

There are at least two inward-looking costs associated with risk management. These are inward-looking because they do not directly serve the interests of clients. Acknowledging these costs accepts that claims arising from errors and omissions (even unfounded claims) are a business risk, and written agreements can protect both the business and its employees.

The first inward-looking expense is the cost of a comprehensive insurance program. Appropriate insurance will provide land surveyors, whether practising as individuals or in a partnership or as a land surveyor's corporation (collectively "Practice"), with professional resources to evaluate claims and ensure that only legitimate claims are settled. Access to legal advice when appropriate can also be a benefit. Even though insurance is primarily inward-looking, there are client service considerations. Where a covered loss arises, the client's interest is protected to the extent that the policy can be accessed by the land surveyor to indemnify the client for loss the client incurs due to the land surveyor's error, and a professional adjuster will assist the land surveyor in resolving the client's claim.

A second inward-looking expense is the cost of negotiating and entering into written agreements. Although the agreement is made with the client, key clauses and language may significantly reduce liability for the practice and for the individual land surveyors and employees carrying out the work. The inconvenience associated with written agreements often leads to an "all or nothing approach" to proper contracting practices. However, the use of even simple engagement letters can:

1. reduce exposure to claims
2. increase the effective protection of your insurance program
3. shield individual land surveyors and employees from personal liability

To reference our archive of loss prevention materials, claims examples and detailed product information, please go to our website — www.encon.ca.

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Written Agreements

In order to understand the most effective use of agreements, it is necessary to review the two circumstances in which a land surveyor may have liability. The first is what might be considered “direct liability.” Such liability arises where the practice provides services directly to the owner of a property or project. In this case, the land surveyor makes a contract directly with the owner. If an error occurs, there is a breach of contract or other duty owed directly to that owner. The liability for direct claims is more easily controlled because the party who experiences the loss has a direct relationship with the party that is alleged to have caused it. A contract can limit liability between these parties.

The second possibility arises out of what might be considered an “indirect liability.” In this circumstance, the land surveyor is engaged by a general contractor or other intermediate party, such as an engineer, to provide land surveying services for the benefit of the owner. In this case, the owner does not have a contract with the land surveyor, but a land surveying error that causes losses to the owner may give rise to a claim against the land surveyor by the owner. With indirect liability, it is often difficult for the land surveyor to be protected from direct claims by the owner. In large-scale construction projects, subcontractors may be protected by the agreement between the owner and the consultant.

The possibility of both direct and indirect liability provides a basic context for understanding strategies for limiting liability. Wherever possible, land surveyors should:

- contract directly with the owner as client as this will limit the liability of the practice, which is preferable as the possibility of indirect liability is reduced
- avoid entering into a contract with a third party, if possible

Where a project has a high value, regardless of the complexity or value of the land surveying contract, it is prudent to ensure that a comprehensive contract is in place. Such a contract typically includes warranties and limitations on liability and insurance requirements. There are many strategies in these contracts for limiting liability, such as limiting liability to insurance

or the price of the land surveying contract or otherwise. In a high-value project, the parties would understand and even expect more comprehensive forms of agreement. The value of the land surveying contract may not be great, but liability can be significant. For example, the cost of construction layout errors can be significant even though the land surveying contract was not.

Basic contracting practices are not typically time or resource intensive and these can provide significant protection. Proper contracting practice addresses not only concerns about potential liability with respect to litigation but can reduce exposure of an individual’s personal assets and time away from the business and the mental energy that litigation consumes. We recommend that no work be done without a written agreement that includes the “Three I’s”: **Identification, Indemnity and Individuals**. Although there is no certain way to eliminate risks, there are simple steps that can reduce risk exposure.

Identification

We recommend in every instance that the **parties** to the contract, the **location** of the work, the **scope** of the work and the **fees** be clearly identified. This is true even for the simplest jobs. If the services are provided through a land surveyor’s corporation, the agreement should clearly specify that. There is case law to suggest that individual employees acting in their normal or usual course of employment duties are not liable to a plaintiff. This area of law is unclear and a court recently stated that in this area of the law “there is no precise path to follow¹.” In the absence of clarity in this area of the law, it is prudent to contract as a corporate entity and provide employees to perform the work. Identifying the scope of the work can limit liability where clients later allege that the practice had a duty to perform some task, or give some information that was not part of the work. As an added benefit, the **Identification** information can assist where there is a dispute over fees and the account is sent into collection.

¹ Canada (Attorney General) v. ATCO Frontec Logistics Corp., [2007] OJ No 1355 (SCJ)

Indemnity

Since insurance is a necessary part of a risk management plan, we recommend that every engagement letter include a term that limits the liability of the practice and individual land surveyors and employees to the limits of “valid and collectible” insurance; the aim of such wording is to limit claims where no insurance is available. The limit should be stated as a maximum, such as \$1 million. Clients who are concerned about additional indemnification can bring this to the attention of the land surveyor prior to signing the engagement. The practice must assess the risk associated with each engagement and ensure that the available insurance is appropriate given the risk involved. This is necessary because liability cannot be eliminated completely.

Individuals

Finally, we recommend that every engagement letter limits claims against individual land surveyors and employees by restricting claims to those made against the land surveyor's corporation. (We recommend that non-corporate practices consider the advisability of incorporation with the assistance of legal counsel.) When an error occurs, clients often claim directly against individual professionals or employees who carried out the work. Where an individual provides a professional service such as land surveying or engineering, the law often permits such direct claims. This is particularly true where the client could be said to have awarded the work on the basis of the personal reputation or skill of the professional. Where a claim exceeds the available insurance, or insurance coverage is not in effect, the individual's personal assets may be at risk. A simple, but clearly worded term in the engagement letter can reduce this personal liability.

Closing the Deal

We often deal with situations where a party's terms and conditions appear on the reverse side of a standard pre-printed form. Where documents are transmitted by fax, it is imperative that the reverse side be photocopied so that clear and legible terms and conditions are provided to the client. Ideally, no work should commence until the client acknowledges in writing that they accept the terms and conditions of the engagement.

If the client resists incorporation of terms put forward by your practice on the basis of their own standard agreements, we recommend reviewing ENCON's Loss Control Bulletin for Land Surveyors No. 11 dated May 2005 (available from the Resource Centre at www.encon.ca) which sets out a number of pitfalls in standard form contracts. As some contract wording may limit the insurance coverage available to the practice or increase its liability, familiarity with basic contracting principles is essential.

The Fine Print

We provide some standard clauses that can be considered for incorporation into every engagement letter. These recommendations should be reviewed with your own independent lawyer to ensure that they are appropriate for your circumstances. In addition to independent legal advice, any changes should be reviewed with your insurance broker to ensure that the language is compatible with existing or desired liability insurance coverage.

Sample Engagement Letter

(based on CCLS Sample Agreement, 1995)

Confirmation Letter

Client Name (herein "Client")

Address

City Province Postal Code

Dear Mr./Ms. Client

Re _____

Regarding your recent telephone request for professional surveying services from [insert name of Land Surveyor] (herein "Land Surveyor") for your _____ Project. This is to confirm our agreement and to inform you we are beginning work on the Project on or about _____ based on your verbal description of the Project.

This Project is located at _____ and our services consist of _____

Our services are being provided, as agreed, on hourly rates (lump sum, guaranteed maximum, etc.).

(Describe fee payments)

Payments shall be due within _____ days of invoice and, in the event of default, you shall be liable for all costs of collection, including reasonable attorney fees and court costs.

In consideration of provision of services by the Land Surveyor to the Client, the Client agrees that any and all claims that the Client has or may have against the Land Surveyor and its servants, employees, subcontractors or representatives (whether in contract or tort, including negligence) shall be absolutely limited to the amount of the Land Surveyor's valid and collectible professional liability insurance.

The Client agrees that the employees and principals of the Land Surveyor shall have no personal liability in respect of any error, omission or breach of duty (whether in contract or tort, including negligence) arising directly or indirectly out of this engagement and the Client expressly agrees that it will bring no proceeding and take no action against any employees or principals of the Land Surveyor.

The Client agrees that under no circumstances will the Land Surveyor be liable for consequential loss, injury or damages incurred by the Client, including claims for loss of profit or loss of opportunity regardless of the cause of such consequential loss.

This agreement is governed by the law of (insert name of applicable province).

If there are any questions, please let me know.

Sincerely
Land Surveyor, PLS

Above terms acknowledged as agreed upon:

Client

Date

Client, please sign and return one copy to Land Surveyor so that work can proceed.

The following suggested wording assumes that “Client” and “Land Surveyor” are terms clearly set out in the **Identification** section of the engagement letter.

“In consideration of provision of services by the Land Surveyor to the Client, the Client agrees that any and all claims that the Client has or may have against the Land Surveyor and its servants, employees, subcontractors or representatives (whether in contract or tort, including negligence) shall be absolutely limited to the amount of the Land Surveyor’s valid and collectible professional liability insurance.

The Client agrees that the employees and principals of the Land Surveyor shall have no personal liability in respect of any error, omission or breach of duty (whether in contract or tort, including negligence) arising directly or indirectly out of this engagement and the Client expressly agrees that it will bring no proceeding and take no action against any employees or principals of the Land Surveyor.

The Client agrees that under no circumstances will the Land Surveyor be liable for consequential loss, injury or damages incurred by the Client, including claims for loss of profit or loss of opportunity regardless of the cause of such consequential loss.

This agreement is governed by the law of (insert name of applicable province).”

Summary

When entering into an engagement contract, it is very important for a land surveyor to prepare a written agreement which clearly identifies key elements of the project. This will reduce their exposure to claims and shield individual land surveyors and their employees from personal liability.

