

What is Copyright and Fair Use of a Survey Plan?

A plan illustrates a portion of the surveyor's opinion of the extent of title and falls within the definition of an 'artistic work' under Section 2 of the Copyright Act R.S.C. 1985 c. C-42. Copyright is automatically acquired with the creation of the plan.

"Fair use" allows any party to use the plan for reference in a research mode only. It is not "fair use" to use it for benefit in any transaction beyond the time of the preparation of the original plan. Under "fair use", a surveyor or a lawyer has the right to use the information on a plan for title research. The original client has the right to use the plan for private use in accordance with the purpose of the plan. It is most inadvisable to pass on a photocopy of the SRPR to another party as, without the knowledge of the current status of the land's extent; it may be highly misleading and is a breach of the strict copyright laws of Canada.

A client does not have the right to unlimited use of the plan in subsequent dealings. The client does not have the right to re-use the plan for some other purpose than was originally intended. No one other than the surveyor, who prepared the plan, has the right to alter the plan. And, no third party, such as a real estate professional, has the right to use a plan for a use not intended at the time of the original opinion's preparation.

Title Insurance is Not an Alternative to a Boundary Survey Plan

Absolutely nothing, can replace the full knowledge of the physical and legal facts of the land in the real estate transaction as is disclosed by a current Surveyor's Real Property Report. Title Insurance **is not an alternative** to a SRPR as it requires less diligence in the investigation of title, is assumed to be "no fault" insurance when it isn't, and provides a misleading and shallow assurance of savings to a

mortgagee [the borrower]. It is usually sold to only benefit the lender not the purchaser/borrower.

Current full opinions of the quality of title by a lawyer and extent of title by a surveyor are the best assurance a party can obtain. Both the lawyer and the surveyor have their own mandatory professional liability insurance to cover any errors that may occur.

Title Insurance may mask, or hide, potential title and boundary problems, rather than identifying and addressing them before a property is acquired.

Any purchase of title insurance by a party thinking they are "saving money" is like asking the dentist to sell them insurance so that their teeth won't need maintenance. The title insurance purchasers think they save the cost difference between an insurance policy and a surveyor's opinion but, in reality, they surrender the assurance of a clear title.

Questions to Ask when Retaining the Services of an Ontario Land Surveyor

Selection should be based on fair fee for all professional services provided. Consideration should be given to the following: professional service expectations, specific expertise, qualifications, experience, resources, timing, fees for service, and method of payment.

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Real Estate Professionals Should Know

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What is Title?

The word Title as in; [A] “the title to this person’s land is free of encumbrances”, and [B] “I have surveyed this person’s title”, has completely different meanings.

In [A], title is intended to mean an opinion of the quality of the chain of title, being the factors which affect the capability of ownership of the land. In [B], title is intended to mean the opinion of the extent of title being the boundaries of land.

A lawyer searching [A], title records, in the Land Registry Office, is normally investigating the quality of the chain of ownership over the 40-year period prior to the last transaction. The surveyor, in searching [B] the same title records to determine the extent of title, may go beyond the 40-year period to the original creation of the parcel of land, possibly another 200 years.

What is a Survey?

There is no definition of the word survey in legislation in Ontario. However, the AOLS has determined that the survey of a parcel of land has four components; research, measurement, monumentation, and a plan and/or report comprising the surveyor’s professional opinion. There is no mandatory rule for a plan and/or report, as a survey may mark a limit without a plan.

Each survey to determine the boundaries of a parcel of land, or to re-establish these boundaries, may consist of all these four components. The surveyor is often directed to just “survey the deed” and not undertake the necessary research and investigation that would constitute a complete opinion. It is unethical for the professional land surveyor to breach the rules of practice and accordingly, mislead the public by not following the four components when rendering an opinion.

What is a Surveyor’s Real Property Report [SRPR]?

A Surveyor’s Real Property Report is a legal document that clearly illustrates the location of all visible public and private improvements relative to property boundaries. It generally takes the form of a plan illustrating the various physical features of the property along with a written report highlighting the surveyor’s opinion of any concerns. The plan and report may be combined in one document.

What Does a Surveyor’s Opinion Represent?

Before preparing an opinion, a surveyor refers to the documentary evidence related to both the subject land and the adjoining land. This will include, but not be limited to, applicable documentary evidence obtained during research of her/his own files, those of professional colleagues and a Land Registry Office search. There may also be a need to search through archives at all government levels. A surveyor shall carry out a thorough field investigation for the best available evidence of all boundaries, lines, and corners and give priority to the evidence in accordance with *Case, Common and Statute Law*. The best disclosure of the extent of title can be obtained through obtaining a current Surveyor’s Real Property Report [SRPR], which is a cadastral [boundary] surveyor’s professional opinion of the extent of title at a specific time.

Types of Boundary Survey Plans

Plans of Subdivision (M-Plan, Registered Plan, Condominium Plan) Upon registration in the Land Registry Office, these divide property into lots and set out boundaries for the first time after appropriate approvals have been obtained.

Reference Plans (R-plans) These are deposited plans, graphical representations of descriptions, as well as representations of divisions of land under the Planning Act.

Plan of Survey This is a reference plan, or an undeposited plan in the form of an SRPR, or a standard survey plan.

Surveyor’s Real Property Report (SRPR) This is a plan of survey under O. Reg. 42/96 S.27(1) and is retained as the property of the surveyor.

What is Misuse of a Survey Plan?

The re-use of surveyors’ products after their original release is a misuse. Any reliance on a surveyor’s product beyond the original intended use is potentially costly to both the user and the surveyor, and in most cases an infringement of copyright.

What is an Up-To-Date Survey Plan?

A plan of survey may be up-to-date if:

- The plan complies with the Statutes and Regulations of Ontario;
- No physical changes have taken place to the property or the monumentation since the plan was signed; and,
- A search for documentary evidence (including in the Land Registry Office) indicates that no changes have occurred.

The term “old survey” is used to define a document which has not been prepared for the current transaction. A current opinion must have an embossed seal of the surveyor on the print. Without the seal the question of liability then arises.

What is the Real Estate Professional’s Liability?

The Real Estate Professional is assuming all liability by using and re-using documents that were never intended as opinions. It is similar to using an appraisal of the value of the same parcel beyond the time of the transaction. Both the appraisal and the plan must be current to reflect the accurate value and extent of title. It has always been important to address what is not on the plan rather than only what is on the old plan.