

## Question 10 – Survey

1. Do you discuss with your client the need to obtain a survey, whether or not one is stated to be available in the Agreement of Purchase and Sale (“APS”)?

### Results:

- 40% of respondents indicated they discuss the need to obtain a survey in a transaction where the title search indicates a description discrepancy or other concern
- 37% of respondents indicated they discuss the need to obtain a survey in every transaction
- 36% of respondents indicated they discuss the “benefits of” and not the “need” of a survey or set it out in their retainer letter

### Working Group (WG) comment:

These results are very encouraging as everyone indicated addressing the survey question with their clients. The survey, even if many believe it has been surpassed by title insurance, remains a critical part of the due diligence of any real estate transaction. Clients should be aware of the benefits of having a survey (new or older) and the risks of completing the transaction without one. Title insurance is a great tool and may be the only practical solution where there is a limited time to close a deal, but it is not a perfect replacement for a survey.

2. What factors influence your decision to recommend that the client get a survey?

### Results:

The most popular responses were:

- 98% - title search indicates a description discrepancy or other concern
- 78% - client concerns / notation in APS
- 48% - age of the property – older more likely to recommend a new survey
- 48% - survey is old or illegible
- 43% - recent construction on property or neighbouring property
- 35% - if there was a building addition in the past
- 35% - if a well and septic were on the property
- 30% - if there was an existing pool

### WG comment:

In addition, a few respondents raised the issue of the future use of the property as a factor. All of the above factors are good reasons to recommend getting a new survey or at the very least having a specific discussion with the client about it. We

recommend you make a notation of this discussion in your file. You will not necessarily remember the discussion or what was discussed, but having a note in your file will protect you if the client's memory fails and he/she later points to you for not raising the matter. It is also recommended that you communicate the discussion to the client in the reporting letter or other written communication.

3. If you receive a survey, do you review the survey with the client purchaser/borrower?

**WG comment:**

All respondents indicated that they do review the survey with their client. Some lawyers have a practice of having the client initial the survey or the lot/condo unit being purchased or mortgaged, as additional confirmation of the review. This is an easy way to document the discussion for your file and to protect yourself. Consider doing the same for parking and storage units.

4. Do you document all survey-related discussions with the client?

**Results:**

- 61% - Always
- 39% - Sometimes

**WG comment:**

Lawyers have many clients over the years and it is impossible to remember everyone, much less the specifics of any discussion with them on a particular file. Although it might be your standard practice to discuss a certain matter, it is invaluable to have a written indication of this discussion in the file, if asked to confirm this years later. A checklist is a simple way to accomplish this, with a notation for matters that were emphasized during the meeting. Also, documenting this discussion to the client in writing is a great way to avoid future questions on the matter.

5. If you do document your discussion, how and where is it documented?

**Results:**

- 61% made a note to the file (paper file or digital file/program)
- 57% sent an email or letter to the client
- 57% added a notation in the reporting letter to the client
- 48% got the client to sign an acknowledgment and retained in the file

**WG comment:**

The important factor is to document and retain a record of the discussion. Where a lawyer can demonstrate that they did have the discussion and it was brought to the client's attention at the time of the transaction, it will be helpful if the matter is ever litigated. The best practice is to document the discussion and provide this to the client contemporaneously as it is always easier to address any client concerns, differences of opinion or additional requirements prior to the completion of the closing.

6. What elements of the survey do you review with clients?

**Results:**

Respondents indicated discussing the following:

- Registered easements and/or unregistered easements (65%)
- Access to the property (65%)
- Location of structures/improvements (61%)
- Encroachments/overhang (61%)
- Driveway – private/mutual (61%)
- Placement of fence/retaining walls (57%)
- Dimensions of boundaries (53%)
- Setbacks of structures (48%)

**WG comment:**

Respondents also added: (1) pointing out if something is missing from an old survey and (2) inquiring if any construction or other changes had occurred from what the survey shows.

7. Which of the following would you accept as a survey for a purchase or mortgage transaction?

**Results:**

86% indicated a Building Location Survey

**WG comment:**

This is the only acceptable response for residential transactions. None of the following have all of the technical attributes of a building location survey: Plan of subdivision (M-Plan); R-Plan; R-Plan showing the house; sketch of survey; Registrar's Compiled Plan or Town Plan; architect or engineer rendering for building permit application or Site Plan or elevation plan.

8. How do you verify if the survey you received is up-to-date?

**Results:**

- 60% of respondents indicated that they ask/review the plan with the client
- 57% indicated relying on the date of the plan
- 43% do a Google Maps search and comparison
- 39% compare it to other plans
- 22% indicated relying on a statutory declaration from the vendor

**WG comment:**

Surveyors will advise you that a survey once signed and delivered is out-of-date, because they do not know what changes have been made to the property or adjacent lands since the date the survey was completed. From a practical standpoint, the real relevance of the date of the survey is that the older the survey, the greater the likelihood that something has changed. In addition, the requirements of what a survey denotes may have changed since the survey was produced. The best practice is to review the survey with the client and have them compare it with what they know of the physical state of the property. While a statutory declaration of possession from the vendor would be helpful, bear in mind that the standard OREA APS contains no obligation for the vendor to provide such a declaration.

9. How can a survey be updated?

**Results:**

- 83% of respondents said hire a surveyor to provide a new survey
- 74% of respondents said hire the original surveyor to do a field survey update and
- 65% of respondents request the vendor to sign a statutory declaration confirming accuracy of existing survey or declaration of possession

**WG comment:**

All three avenues are possibilities, but with varying degrees of reliability. The options involving a surveyor are more time consuming, costly and offer the best information. The vendor's statutory declaration although the least costly route carries a higher degree of risk, as vendors may be wrong in their statements.

10. Are you aware that copies of existing surveys may be available (for a fee)?

**Results:**

Many respondents indicated being aware that existing surveys may be obtained via the following:

- [www.landsurveyrecords.com](http://www.landsurveyrecords.com) (70%)
- [www.onland.ca](http://www.onland.ca) (45%)
- [www.protectyourboundaries.ca](http://www.protectyourboundaries.ca) (38%)
- Municipal building department (32%)

**WG comment:**

Although reliance on an old survey has its challenges, in the absence of any survey, it is a good starting point to get a copy of any existing survey of the property or adjoining properties. These surveys may provide comfort, further information, or indicate a need for further investigation or obtaining a new survey.

11. Are you aware that a survey is an opinion reflecting the state of the property at a point in time only?

**Results:**

95% of respondents confirmed that a survey only reflects the state of the property at a point in time.

**WG comment:**

A survey reflects existing conditions at the time it was created, the purpose for which it was created and is subject to the regulations governing the content of a survey. Over the years, the survey preparation requirements imposed on surveyors under the *Surveyors Act (Ontario)* have been increased. It is crucial, if not getting a new survey or having it updated by a surveyor, to inquire of the client if they are aware of any changes to the property or abutting properties, such as additions, new structures, etc., and to advise clients that reliance on an existing survey is subject to any changes since it was prepared. In addition, a survey produced as a foundation survey, where only foundations are noted or with the notation DUC (dwelling under construction), is not the same as an as-built survey which is more extensive, showing easements, encroachments, overhanging eaves, rights of way, etc.

12. Are you aware that your client can only sue the original surveyor if he/she was the party who actually contracted for the survey work or later received a supplementary letter of reliance?

**Results:**

96% of respondents understood that only the parties to the original survey may rely upon it with the ability to pursue any recourse against the surveyor in the case of any discrepancy or error.

**WG comment:**

A third party can be put in a similar position of privity of contract provided they obtained a letter of reliance from the surveyor who authored the survey. This is not a common process in residential transactions but might be desirable and affordable in larger commercial transactions. There is typically a cost for obtaining this letter of reliance. Any such letter of reliance only allows the third party to rely on the accuracy of the survey as of the date it was produced and it is not an update.

13. In a condominium transaction, what do you review with the client?

**Results:**

- 61% of respondents reviewed the location of the unit on the plan
- 26% of respondents reviewed the horizontal survey plans
- 22% of respondents reviewed both horizontal and elevation survey plans
- 9% of respondents reviewed the elevation survey plans
- 43% of respondents indicated all of the above responses

**WG comment:**

The review of a plan in a condominium transaction is as important as in a fee simple transaction, but offers some unique challenges. Firstly, the lawyer should have the client verify the location of the unit on the applicable strata level. Initialling the unit on a production of the appropriate level floor plan is a good practice. Secondly, if dealing with a **multi-level unit**, the plans should be reviewed to ensure that the levels being acquired are all identified as part of the unit on the plans and that no part of the unit forms part of the common elements. The case of [\*Orr v. Metropolitan Toronto Condominium Corp. No. 1056\*](#) (also known as Rainville), is said to be authority for the proposition that a solicitor must present and review with the purchaser client all of the available plans affecting the unit.

14. When there is a survey available, what do you compare it to, if anything?

**Results:**

Respondents indicated comparing the survey to the following:

- Legal description in the title documents (100%)
- Legal description in the Agreement of Purchase and Sale (96%)
- M-Plan (74%)
- R-Plans, if available (74%)
- Other plans on title (61%)
- Google maps (43%)

**WG comment:**

It is important to ensure that the property is consistently described throughout the various documents of the transaction, such as, the legal description, the APS, survey, plans on title, etc. A purchaser or lender should be getting the property they contracted for. Discrepancies should be addressed with the client and further action undertaken, as necessary, including identifying the issue to the title insurer.

15. If there is no survey, do you get clients to acknowledge reliance on title insurance?

**Results:**

- 83% of respondents agreed they always
- 17% said they sometimes

get clients to acknowledge their reliance on title insurance if no survey is available and the clients do not want to incur the expense or there is no time to request a survey.

**WG comment:**

Title insurance is a great tool for lawyers to complete transactions but it is not a perfect replacement for a survey or does not always offer the remedy most desirable for clients. For this reason, it is always beneficial to review with the client the role of the survey and title insurance, their benefits and shortfalls.

16. Which form of client acknowledgment of their reliance on title insurance do you have clients sign?

**Results:**

52% of respondents indicated that they use their own form of acknowledgment. Some used a form found in their document preparation software or a title insurer's suggested form.

**WG comment:**

It is always best to document this acknowledgment. One responded that it is done verbally with the client but then confirmed in the reporting letter. There is no required form of the acknowledgment. Documenting the matter is good practice.

17. What is currently required for a document to qualify as a building location survey?

**Results:**

All of these elements were identified as being an important part of a survey and required for a valid building location survey:

- Surveyor's certificate
- Dimensions of boundaries
- Monumentation of corners
- Dimensions of structures
- Location of structures
- Setback of structures
- Legible date and signature of surveyor
- Surveyor's Part 2 Written Report
- Legal description of property
- Indication of scale
- Legend of markings
- Indication of compass north direction

**WG comment:**

In order for a survey to be valid under today's requirements, all of the above information must be available. Older surveys may be valid if they were prepared under the then existing regulations. A "sketch of survey" is a survey, which even by older standards did not have all of the legal attributes of a survey. As well, surveys contain two parts, with the survey and the certificate forming one part (Part 1) and the surveyor's comments forming a second part (Part 2). Parts 1 and 2 may be shown together on the survey document or they may be presented as two separate



documents. If the surveyor's comments are not shown on the survey (Part 2), then something is missing and there is another related document which you will need to review. Be cautious of what is provided as a survey.

18. If the offer calls for a survey to be provided, and you receive a copy which is illegible, missing the date and/or the surveyor's signature, do you requisition a new survey?

**Results:**

- 43% of the respondents indicated they would requisition a new survey
- 57% said they would only request a legible, signed and dated survey if a new or up-to-date survey is required in the APS

**WG comment:**

A seller is only required to provide what has been agreed to in the APS. The standard OREA APS only requires that the seller provide any survey in their possession. Only if the APS specifically requires a new or up-to-date survey would the seller be obligated to provide a new survey.