THE SURVEYOR AND THE LAW

CONTINUING EDUCATION PROGRAMME
ASSOCIATION OF ONTARIO LAND SURVEYORS

THE SURVEYOR AND THE LAW

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SEMINAR
"The Surveyor and the Law"

Contractual Law and the Surveyor

The current explosion of litigation involving professionals and the publicity accompanying such litigation suggests an ever-increasing awareness amongst the public of our somewhat unique and perhaps tenuous position in society. From the moment you are permitted to use the designation "O.L.S.", the public is entitled to regard you as an expert, properly trained to undertake with unerring accuracy the full and complete range of professional land surveying as defined in Section 1(f) of The Surveyors Act. And no one but an Ontario Land Surveyor (except perhaps an honorary land surveyor) has the right to practise professional land surveying in Ontario. It is your livelihood.

From my brief experience with your Association, I recognize that all of you are competent and worthy members of your profession. Unfortunately, society does not always share our attitude. Improved technology and teaching methods, a tremendous expansion of facilities coupled with an ease of obtaining the latest thinking and expertise on almost any subject and higher academic entrance requirements have raised the level of professionalism to unprecedented heights. And yet, at this time, society as a whole appears to be resentful or sceptical of the professional. I am not

professionally qualified to suggest why this attitude prevails except to submit that an answer might lie somewhere in the confusion, frustration and feeling of impotence facing the individual today. If the average person has lost control of his destiny, then the professional may be responsible, and if not responsible, we are deemed to have privileges and rights which are denied others. Therefore, right or wrong, the surveyor and other professionals are likely to be singled out as candidates for the "Kicking the Dog" syndrome - the dogs being kicked by society today. To avoid being kicked too hard, the surveyor must be prepared to conduct his practice, not only on a professional level, but also in a prudent and businesslike manner.

Over the next few years, it is quite likely that the surveyor and the lawyer will be dealing with one another more frequently. Hopefully the relationship between our two professions will be mutually profitable. It is the intention of this seminar, if I can speak perhaps more for my brothers in law than myself, to review various contacts which the surveyor is likely to have with our court system. In this regard, I feel somewhat like a fish out of water as my areas of concentration pertain primarily to real estate and commercial law. However, the courts have to deal with substance and consequently, if you and I can handle our business affairs in a prudent and careful manner, then it is possible that the only time we will be required to attend in

court is to assist the Learned Counsel which follow. With this in mind, I would like to consider contracts and their enforceability through due legal process.

The most popular description of a contract is that it is a promise or set of promises which the law will enforce. A contract differs from most other branches of the law of obligations in one important respect, namely, that the parties themselves are free to make their own rules as to what shall and shall not bind them. Elsewhere, the parties concerned have no such power. Thus, one difference between liability for breach of contract and liability for a tort or crime is that the obligation sued upon has normally been created by the parties themselves and not by some external rule of law. It is one thing, however, to define a contract and quite another to apply it to a given situation, or, from a lawyer's point of view, to a given set of facts.

But I am getting ahead of myself. Before proceeding with a consideration as to how the law provides for the enforcement of a contract, it is perhaps advisable to review the components of a contract. Before a contract can be said to exist, the following elements must be present:

1. Offer and acceptance of that offer;
2. Consideration - the contribution made by one party for the promise of the other;
3. The intention on the part of both sides to create a legally enforceable agreement;

4. Capacity or competence to enter into a contract; and
5. The object of the contract must be "legal".

An offer is a tentative promise made by one party, the offeror, subject to a condition or containing a request to the other party, the offeree. When the offeree accepts the offer by agreeing to the condition or request, a contract is formed. The promise is no longer tentative. The offeror is then bound to carry out his promise while the offeree is bound to carry out the condition or request.

We are accustomed to thinking of an offer as being communicated orally or in writing, but an offeror can also express his offer by conduct without words. Holding up one's hand for a taxi, raising a finger at an auction, and the gestures of floortraders at a stock exchange are examples of conduct which, according to custom, will constitute an offer.

On the other hand, a mere invitation to do business is not an offer to make a contract. The display of an item in a window of a store does not amount to an offer to sell; a mail order catalogue does not guarantee that the goods pictured or described will be delivered to all who try to order them. These are merely merchandising or advertising devices for introducing possible customers to an arena in which negotiations towards the formation of a contract may be conveniently started. In many of the above cases, it falls to the prospective customer, acting in response to the invitation, to make an offer - an offer which the businessman

in his turn may accept or refuse. On the other hand, it may be the businessman who confronts the prospective customer with an offer as soon as he shows interest.

An offer cannot be accepted by the offeree until he has first learned of it. Thus, a man may find and return a lost article to its owner and afterwards learn that a reward has been offered for its return. The finder is not entitled to the reward because he did not act in response to the offer. The offer must have been communicated before it can be accepted. Similarly, a person cannot be obligated by someone for whom that person does work without the first person's knowledge. The first person is entitled first to receive an offer to do the work, which he may then accept or reject. A person for whom work has been done without his request, and without his knowledge, may well benefit from it; but as he has not accepted any offer to have the work done, he has no contractual obligation to pay for it.

Quite often, those who deal with the general public present the terms of their offers in written documents posted or handed to their offerees or they post notices containing them on their business premises. Sometimes both methods are used together, the delivered document referring to the terms posted in the notice. Common examples of such documents are tickets for theatres, railways and airlines, receipts for drycleaning, fur storage, watch repairs and checked luggage. In most such cases, the person receiving any one of these documents is not asked to read or approve

of its terms. Here we have a "take it or leave it" situation. Thus, in most standard form contracts, the offeree is in no position to change any of the terms of the contract and there is no real element of bargaining involved. The offeror has the tempting opportunity to disregard the interests of his offerees, the general public, and to give himself every advantage. He rarely resists. The public has two means of protection. Firstly, if the business carried on by the offeror falls within one of the classes of business regulated by government boards or commissions, the terms of these documents will be subject to their approval. When these boards operate effectively, the public is usually well protected and unreasonable and onerous terms are excluded; and secondly, in the vast range of unregulated activity, the public receives whatever protection the courts have to offer under the auspices of the general law of contract. On occasion, this protection may be found to be unsatisfactory, but in the absence of government regulation of every aspect of business activity, no other means is readily available.

Consideration, as outlined above, is essential to make a contract binding at law. A person may, however, make a promise to another when the element of a bargain is completely absent. A promise made in the absence of a bargain is called a gratuitous promise and, although accepted by the person to whom it is made, does not constitute a contract and is not enforceable at law. A promise to make a gift and

a promise to perform services without remuneration are common examples of gratuitous promises. The law does not hinder the performance of a gratuitous promise; it simply asserts that if the promise is not performed, the promisee has no remedy at law to compensate him for his disappointed expectations.

Though a promisor is not bound by his gratuitous promise, once he undertakes the performance of it, he is under a duty to carry it out without negligence. If through his negligence he injures the promisee or the promisee's property, he will be liable to compensate the promisee for the loss. A defence that the donor received no consideration for the promise will be of no avail. An example relative to your situation as professional surveyors, would be if you undertook to do a survey for a friend; should the friend rely upon your survey and expend income for example, on the sale of a parcel of land and the survey was later shown to be incorrect with the consequence that the transaction was not completed, the friend, having relied upon your representation as a professional to his detriment (for example, by having incurred reasonable legal costs in preparation for closing of the transaction), would have recourse against you for damages in the event that it could be shown that the errors in the survey were due to your negligence even though the survey was performed without any agreement or expectation as to compensation for your efforts. The standard of care is imposed upon the person undertaking the work not by the promise but by the rules of the law of torts: he may, in

fact, be liable for any damages caused by his negligence not only to the friend, but also to a stranger. In the same way, a surveyor who gratuitously undertakes to conduct a survey for a charitable organization may be liable for damages caused to that organization through his negligence. He is under no obligation to perform the survey, but upon the commencement of the work, he must proceed with care.

The parties to a contract must have the intention to create a legally enforceable agreement, whether or not they direct their minds to the legal effect of the agreement. The legal term used to describe this requisite intention is called "consensus ad idem" or, in other words, "the meeting of the minds".

There is, however, a legal presumption that the necessary intention is present in most cases. This presumption is especially strong in dealings between strangers and, generally, in most commercial transactions. It is easier to rebut this presumption in arrangements between friends or members of the family where often there is no intention to create legal relations, such as a promise to perform some act for your spouse. There is likely no intention to create a legally enforceable contract and the required "consensus ad idem" might not be present as in a marital situation, the meeting of the minds is prone to termination once the honeymoon is over.

It is a requirement of an enforceable agreement that the parties thereto have the legal capacity to contract.

There are a number of individuals who are considered incapable of possessing the capacity to contract. Among these are minors, bankrupts and lunatics.

Finally, the object of the contract must be "legal". A contract must neither offend public policy nor violate any law. A contract may be regarded as illegal although it does not contemplate the commission of a crime or of any of the recognized private laws. Public policy may dictate that a particular contract is prejudicial to the interests of the country, its relations with foreign countries, its national defence, its public service, or the administration of justice within the country, with the consequence that the contract may be declared illegal although the performance of such a contract is neither a tort nor a crime in itself. One of the most common instances in which business contracts are challenged on grounds of public policy is that they are in restraint of trade. The courts have long considered competition a necessary element of economic life, and regard agreements that diminish competition as undesirable. In relation to the position of a professional surveyor, a contract which could possibly be declared to be illegal or void as against public policy would be one in which the surveyor, as an employee of a firm of surveyors undertakes that, after leaving his present employment, he will not compete against the firm either by setting up his own business or by taking a position with a competing firm. Another example would be the situation where, in contravention of the Combines Investigation

Act, a group of surveyors were to agree to a fixed minimum price for the provision of their services.

Assuming that a contract has been brought into existence, let us now consider how to do away with it.

A distinction is made at law between a contract which is said to be void and one which is said to be voidable; in the first instance, the law holds that the contract was never formed at all and, in the latter case, the contract is recognized but may be set aside at the instance of the innocent party.

One argument made in an attempt to avoid a contractual obligation is that of mistake, which, if proven, may in some instances render the contract void and in others voidable. There are three common types of mistake:

1. Common mistake, arising when both parties understand each other but both are commonly mistaken about certain facts. They are thinking about the same thing and fully intend to make the contract they have made. But, unknown to both, the subject matter of their contract is in fact very different from what they believed it to be. A common mistake is a mistake shared by both parties;
2. Mutual mistake arises when one party is thinking about one type of subject matter and the other about another type of subject matter, and neither party is aware that he is misunderstanding the other. In contrast to common mistake, here the parties do not understand each

3. Unilateral mistake, arising when one party is mistaken about an important fact concerning the contract; the other party knows the true fact and is also unaware that the first party is mistaken.

The grounds upon which a contract may be impeached may be loosely classified as:

(a) misrepresentation;

(b) undue influence; and

(c) duress.

Misrepresentation is a false assertion of fact which induces another party to enter into a contract. If the assertion was made with knowledge of its falsity (or at any rate without an honest belief in its truth), the misrepresentation is fraudulent; if the assertion was made in a belief that it was true, the misrepresentation is innocent. It is the duty of one who has made a mistake innocently and who later learns of its falsity to inform the other party of the true situation if it is not too late to avoid injury. Innocent misrepresentation becomes fraudulent if the party responsible fails to correct this statement when he is in a position to do so.

In addition to the remedies of avoiding the contract and claiming damages for breach of the contract where the false assertion can be regarded as a term of the agreement (which such remedies are available when the misrepresentation is shown to have been innocent), where the misrepresentation

is fraudulent, the injured party may sue for money damages based upon the tort known as deceit.

Undue influence is the domination of one party over the mind of the other party to such a degree as to rob him of his free will. The contract formed as a result of undue influence is voidable at the option of the victim. The victim may only avoid the contract if he acts promptly after he is freed from the domination. If he acquiesces or delays, hoping to gain some advantage, the court will refuse to assist him.

Generally, undue influence arises where the parties stand in special relationship to each other; one party has a special skill or knowledge causing the other party to place his confidence and trust in him. Typical examples of this relationship are doctor and patient, lawyer or surveyor and client, clergyman and parishoner, parent and child. Sometimes undue influence arises when one party is temporarily in dire straits and will agree to exhorbitant and unfair terms because he is desperate for aid.

Finally, duress consists in actual or threatened violence or imprisonment as a means of coercing a party to enter into a contract. The effect of duress is similar to that of undue influence: the contract is voidable at the option of the victim. The threat of violence need not be directed against the party being coerced - it may be a threat to harm his wife, parent or child.

Once a contract exists, it is effective whether it is oral or written. Some of you may think that a contract, to be enforceable, must be in writing. Generally speaking, this is not true. There are, however, certain contracts relating to the disposition of interests in land and contracts of guarantee which must be in writing or at least supported by a written memorandum. An oral contract can lead to difficulties, especially for the party trying to enforce it. The first hurdle to be overcome by him is to establish the existence of the contract. Assuming its existence is proven, then, as memories are fallible, the parties may disagree as to the terms of the contract--especially if the terms were not clearly understood at the outset.

At one time, the law was quite formal, requiring many contracts to be in writing. Under the Statute of Frauds, an oral contract to employ a person for one year was enforceable, but an oral contract to employ a person for two years was not enforceable. As a result, it was in the employer's interest to argue that the oral contract was for the longer period of employment if faced with a suit for wrongful dismissal. Consequently, by promising more, the employer would be responsible for less. A learned judge, when faced with this situation, said that "the distinction would be difficult to explain to an intelligent foreigner". In this area, the techniques used by the courts to circumvent unfair statutes make interesting reading. But, in spite of the enforceability of oral contracts, the formality of a written contract can

serve a useful purpose in a legal system. A promise in writing is said to have, firstly, a cautionary function in that both parties tend to regard their obligations more seriously; secondly, an evidentiary function in that the elements of the arrangement are readily ascertainable; and, thirdly, a channeling function in that the nature of the transaction is particularized. Consider, in this regard, the use of a standard form of contract, approved by the Association, for use whenever a client requires you to undertake professional services. Assuming for a moment that a standard form could be used, then how simple contract law would become. Unfortunately, or perhaps fortunately, depending upon our perspective, it is virtually impossible, however to standardize the manner in which we carry on our practices.

Where the parties have embodied the terms of their agreement in a written contract, the general rule is that a court will not admit evidence to add to, vary, subtract from or contradict the terms of the written contract. This rule is known as the "parole evidence" rule and applies to all written contracts. Inadmissible evidence is often referred to as "extrinsic evidence" and is not restricted to oral evidence, but includes extrinsic matter in writing, such as correspondence.

As in the case of most rules of general application, there are a number of situations where the written contract is not conclusive evidence of the contract alleged to be embodied in it. These situations may be regarded either

as exceptions to the general rule or simply as falling outside the general rule.

Extrinsic evidence as to the validity of a written contract is admissible to show that no contract exists at all due to a mistake, failure of consideration, lack of intention or that it is void on the grounds of illegality, fraud or duress.

Extrinsic evidence is also admissible to show the nature of the contract and the capacity of the contracting parties, to resolve conflicting provisions or to give effect to custom or the usage of a particular trade. Extrinsic evidence would be admissible, for example, to explain the meaning of technical words appearing in a written contract between a surveyor and a client.

I note from the dossier or agenda that I am required to say something on ambiguity in contracts. On the premise that this is not a slur against those of the legal profession involved in commercial and real estate law, I intend to look upon this topic as an exception to the parole evidence rule in that a contract should speak for itself, except, where it is necessary, to introduce extrinsic evidence to clear up an ambiguity. Somewhat over 100 years ago, a learned English judge, in the case of Shore v. Wilson (1842) 9 Cl. & Fin. 355 at 565, made the following statement:

"...where the words of any instrument are free from ambiguity in themselves, and where external circumstances

> do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves...and that evidence for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible..."

He then went on to indicate exceptions to the above rule, as a restatement of the parole evidence rule, that extrinsic evidence was admissible where any doubt arises upon the true sense and meaning of the words themselves or with respect to any difficulty as to their application under the surrounding circumstances or with respect to the meaning of the language itself. With respect to an ambiguity, the law does not regard the introduction of extrinsic evidence to replace the authority of the written contract, but rather strengthens this authority by assigning a definite meaning to the contract terms.

A patent ambiguity in a contract is one where, for example, a blank has not been filled in in a printed form. Normally, the courts will accept extrinsic evidence to resolve this type of ambiguity, especially in those circumstances where the written contract would fail completely for uncertainty. A latent ambiguity is an ambiguity which does not appear from the face of the instrument, but which emerges

when the language of the contract is applied to the circumstances under consideration. Whether because of some vagueness, generality or inaccuracy of words, or because the words themselves have some special or peculiar meaning or application, extrinsic evidence will be admitted to explain, but not to vary, the contract.

In addition, the identity of the parties themselves may be established by extrinsic evidence where it is not clear from the contract to whom it refers. For example, if you prepared a survey for the owner of Blackacre, then it might be necessary to introduce evidence to identify the owner, even though no mention of his name appeared in the contract. Similarly, the subject-matter of the contract may be identified by extrinsic evidence. A contract to perform a service for a stipulated consideration of "your land" will likely require evidence as to the identity of the property.

Finally, a contract may, through inadvertence, refer to more than one person or thing. In this case, direct evidence is admissible to show the intention of the parties at the time the contract was formed. The preparation of a survey of "my ten-acre parcel in the Regional Municipality of Waterloo" will require further explanation if I happen to own two or more such parcels.

Now, for the time remaining, I would ask you to consider the failure of the contract. I have made allusions

throughout my talk in this direction and, undoubtedly, those gentlemen who follow will be casting aspersions in the same direction.

Sometime ago, I was told that the only important thing to remember about contracts was the difference between a condition and a warranty. A condition is an undertaking which, if breached or not carried out, allows me to repudiate or void the contract. A warranty, on the other hand, a word related to guarantee, does not justify rejection, but merely a right to pursue the offender for damages. However, during the past few years following graduation, the distinction between these terms has all but disappeared. A variety of expressions are now used to define a broken promise, such as dependent covenant, fundamental breach, repudiation and renunciation. Behind them all, it is suggested, lies a single notion--that of substantial failure of performance. A contract is breached, for example, if I refuse to carry out my undertaking, or if I place myself in the position where performance is impossible (for example, if I sell a piece of land, which I have contracted to sell to you, to someone else, or if I do not carry out an undertaking within the time limits prescribed by the contract).

Neither party is responsible for the lack of performance which results through frustration. For example, if you agree to carry out a survey on Scarborough Bluffs and the

subject property happens to fall into Lake Ontario, then you will be relieved of responsibility. There is nothing that can be done by you or the other party to require performance.

Once it has been established that a contract has been breached, the injured party is entitled to his remedy which, in most instances, constitutes monetary damages. The injured party is entitled to be placed in the same position monetarily as if the contract had been performed. Damages will be allowed to the extent of, and as a direct result of, the breach. Care must be exercised, however, not to extend the incidence of damages beyond proper boundaries. If, as a result of an error in a survey, a client, as owner, has a proper claim for damages, then can it be also said that a purchaser who also relies on the same survey also has a claim for damages by relying on the same survey? Should a surveyor be responsible to his client solely or to some subsequent user, especially if the surveyor was aware that the survey was being prepared in order to facilitate a sale of property? What weight should be given to the client's intention? In order to put your mind at rest, it is likely that in Canada, the relationship of surveyor and client is still important and, beyond that, depending upon the ultimate use of the survey, a third party does not have the right to support a claim for damages, as his claim is too remote.

As you might expect, the general rule applicable to a claim in damages is also subject to exception. If I am entitled to claim damages from you for a breach of contract,

I may have to establish that I have endeavoured not to make the damages excessive by looking to such alternatives as are available in an attempt to reduce or at least not to increase my exposure to injury. This is known as mitigation of damages and it constitutes part of the equitable doctrine that no one should come to court to seek a remedy without clean hands.

Finally, in lieu of damages, an injured party might request the court to seek redress through specific performance of the contract. In essence, the party responsible for the injury is ordered to perform his obligations under the contract. This is an unusual remedy and will not be granted where damages, in the opinion of the court, are adequate. Moreover, the courts will not grant specific performance if they are required to supervise the carrying out of the directive.

And there you have a brief exposure to contract law. It is the business of my profession and a most helpful tool in your profession. If I have created some confusion in your minds regarding this subject, rest assured that there is much confusion in the minds of many lawyers concerning the same subject--perhaps, therefore, you and I can agree on something.

THE ONTARIO LAND SURVEYOR

AS AN EXPERT WITNESS

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John M. Clow, LL.B.

THE ONTARIO LAND SURVEYOR AS AN EXPERT WITNESS

In discussing the surveyor as an expert witness in Court proceedings, I intend to emphasize the role of the surveyor rather than the lawyer, although this is admittedly difficult for one who is used to assuming the perspective of legal counsel. This is not intended to be a legalistic review of the law of the practice, procedure and evidence in respect of expert testimony. Rather, it will represent an attempt to summarize the general rules, principles and techniques of preparing to give and giving expert testimony.

In his work, the land surveyor, much like the lawyer, has occasion to deal extensively with the discovery, appraisal and use of evidence. In this respect, the surveyor and the lawyer have a great deal in common. For both, the value and validity of their work will depend largely upon the skill and judgment with which they deal with evidence. Accordingly, I wish to stress from the outset that the theme of this discussion must in my opinion, of necessity, be the ways in which the surveyor and lawyer can work together to present evidence and proof effectively to a Court or an adminstrative tribunal.

After dealing with the relevance, role, techniques and limitations of the surveyor as an expert witness, I shall discuss the following topics:

1. Preparation of and by the Expert Witness

2. Preparation and Presentation of Documentary Evidence

3. Testifying as an Expert Witness

4. Hypothetical Questions and Examples

5. Use of Texts and Articles

6. Reports

7. Admissibility of Survey Notes of (a) Living and (b) Deceased Surveyors

8. Cross-Examination and What to Expect

9. General Demeanor of an Expert Witness

10. Expert Witness Fees

11. Subpoenas and Consequences of Failing to Answer One

12. The Use of the Court-Appointed Expert or "Amicus Curiae"

The Relevance of the Surveyor as an Expert Witness

Our law regards a land surveyor as an expert rather than an ordinary or lay witness because he is one whose specific knowledge in a particular field allows him to draw inferences and conclusions from a certain given set of facts and deliver those inferences and conclusions in the form of an opinion. Such evidence would normally not be admissible in a Court if given by an ordinary person, but is accepted from an expert who will be permitted to give his opinion if the following circumstances exist:

(a) His opinion must be relevant to some issue in the Court action;

(b) The expert can be shown to be qualified in the particular field in which the opinion is being given; and,

(c) That field must be one in which a layman would not have sufficient knowledge or experience to be able to draw an inference from or form an opinion from the same set of facts.

Land surveying is clearly an endeavour in which a high degree of expertise or specialized knowledge is developed beyond that which could be held by a layman.

The importance and significance of expert witnesses generally arise first from the fact that in a world dominated

by experts of every size, shape and description, it can be a difficult matter for lawyers and judges alike to make rational arguments and decisions when dealing with issues where the more qualified person to speak is one who possesses the special knowledge of that subject by virtue of his education; his experience; and, offices held by him in professional organizations. Secondly, the frequent necessity of expert testimony in our Courts arises from the need for objectivity. The expert witness, although usually called by one party or the other, is generally viewed by the Court as one who has less at stake in the litigation than the litigants themselves and therefore may be a more credible witness.

The Role of the Surveyor as an Expert Witness

The surveyor has certain general purposes as an expert. First, he can be of valuable assistance to the lawyer in the preparation of his case. Secondly, he can assist both counsel and the Court in giving evidence and proving facts, especially by giving his opinion and answering hypothetical questions. Thirdly, he can assist the Court by answering questions which the judge may ask in order to understand the matters in issue more clearly or if called as a friend of the Court or amicus curiae (a term which I will describe in more detail later).

The surveyor will likely be called as an expert witness to comment upon the manner in which another surveyor

has prepared a survey. This might arise in a situation where a surveyor has been sued for negligence on the ground that he has prepared an inaccurate survey. In such a case, he might be asked to give evidence on any one of a number of aspects of the survey including the use of a description based on an actual survey, the absence in a description of a reference to a plan of record, the use of natural boundaries in descriptions, the use of the words "more or less", the use of bearings in descriptions, the description of remainders, description by exception, description of railway rights-of-way, exception of minerals in descriptions, interpretation of faulty description or the content of a preamble.

A judge is entitled to reject the opinion of an expert witness in the sense that he is not bound to accept any piece of evidence as given at the trial, but he cannot do so without some sound reasons. Perhaps the most important point to remember about the contribution which the surveyor can make as an expert witness is that a judge is not entitled to disregard an expert opinion if there is no opinion to contradict it, because the trial judge does not possess the necessary qualifications to be able to reject the expert opinion from his own knowledge. Similarly, a trial judge cannot form his own conclusions from the evidence in a field beyond the experience of laymen without an expert opinion upon which to base that conclusion.

One example of a decided case in which the evidence

of surveyors was central to the litigation is the case of Shupe and DeSutter v. The Rural Municipality of Langenberg. This was a case which arose in Saskatchewan in a situation where neighbouring owners of land declared, in a written memorandum, that they would accept a new line of roadway. On the strength of this agreement the Municipality of Langenberg constructed the roadway. When one of the signers of the memorandum sued the Municipality for recovery of the road or, alternatively, to prevent the Municipality from using and maintaining it, one of the questions which arose, arose from conflicting evidence of surveyors as to whether a certain mound as a boundary was at one point as sworn to by one surveyor or at another point, as sworn to by another surveyor. This case, decided in the early 1900's is one of the first reported cases where one surveyor was called upon to testify about the method in which another surveyor performed his work.

An even earlier example is the New Brunswick case of Byram and Violette, a case which was decided before the turn of the century and which illustrates the use, at an early time in the development of the law of expert testimony, of a surveyor in an action for trespass, to show that boundary lines had not been accurately ascertained by a proper survey but rather were left doubtful.

The Techniques of the Surveyor as an Expert Witness

The techniques available to the surveyor as an

expert witness are basically twofold. First, he can give evidence and prove facts by his oral testimony. For example, he could testify about the way in which he would have prepared a survey which is in question by telling the Court of the way in which he would have approached the surveying of the property where a surveyor has been sued for negligence, perhaps because he is alleged to have drawn a boundary improperly. Secondly, and most significantly under our law, he can give opinion evidence usually through answering a hyphothetical question.

The Limitations of a Surveyor as an Expert Witness

The limitations of a surveyor as an expert witness are basically the same as for any other expert. The opinion which an expert is asked to give cannot answer the question which the judge himself has to decide. The expert, as a general rule, is not entitled to undercut the function of the judge or jury under the guise of giving an opinion as to an issue in the action. A lawyer can ask an expert about the standard of care in a specialized field to be observed by those practising in that field. For example, he can ask whether a surveyor sued for negligence did or did not, in a particular case, conform to that standard. However, the expert surveyor cannot be asked whether or not the defendant surveyor was negligent.

Preparation of and by the Expert Witness

For the most part, the preparation of the expert for the giving of evidence in Court is the function of the lawyer who is calling him as a witness. However, I feel that it is essential in order to be a good expert witness to understand what the lawyer will expect of the expert and what the expert should expect from the lawyer.

Even before a meeting between the lawyer and the expert, the expert should be provided with all the documents and evidence in the case so that he is fully familiar with the facts. If you as an expert are not given these materials by the lawyer you should ask him for them. Similarly, you should ask for an explanation of the legal issues in respect of which you will be testifying.

At the first interview, the expert witness should use simple, lay language and demonstrate his theories or ideas by simple examples or sketches as often as possible. Technical labels and jargon can be added later.

The competent lawyer will go through your opinion with you step-by-step from the beginning to the end; if he does not, you should remind him to do so. You can assist in this regard by making sure that you never move from one step in the opinion to the next until you are fully satisfied that the lawyer understands the previous point which you have made. You must make the lawyer understand your theory or he

will never be able to use it to the advantage of his client and may in fact damage his case by using a theory that he only half understands, thus opening up the adverse side of the opinion, and there usually is one, to his opponent.

A useful way of approaching the difficult problem of informing a lawyer about your field of expertise is to assume that he knows nothing about the field in which he has asked you to render an opinion. In the field of land surveying I feel that it is particularly important that one not assume that because many lawyers practising in the field of real estate have some knowledge about surveys and how they are made that all lawyers do. Like most fields today, law is a highly specialized one and, as a result, a lawyer doing Court work will often know very little about real estate law, let alone the intricacies of surveying. Start, therefore, with the assumption that he knows nothing and, if he surprises you to the contrary, you will be able to move ahead more quickly from this basic position.

Another matter which should be attended to at the initial meeting is that you should recommend reading material for the lawyer such as relevant texts, papers, etc. that he should consult. At first, these should be reasonably simple.

Usually a lawyer will have a second interview with an expert witness, hopefully after he has read the texts or papers, at which time he will attempt to move to more refined aspects of the opinion and a more refined discussion of the

matters in question. At this meeting he will explore contrary opinions and ask you how they fit the facts in the present case, if at all. This is an extremely important and difficult area both for the lawyer and for the expert witness. From the point of view of the expert, it is very important not to suspect the lawyer of doubting the expert's opinion. The lawyer is doing no such thing; he is simply doing his job properly by trying to anticipate the position that will be put forward by his opposition in Court to the opinion which he will attempt to have you give to the Court. At this stage, you should suggest reading material to the lawyer in respect of any contrary opinions which you can identify.

By the end of the second meeting with the lawyer, the surveyor should know the following:

1. All the relevant facts of the case;

2. The legal issue or issues to which his opinion is directed;

3. The critical facts referrable to that opinion;

4. The weaknesses in the opinion that may be exploited by the other side;

5. The contrary opinions;

6. How to explain his opinion clearly in lay language; and,

7. How to defend his opinion against the contrary opinions.

He should now be as ready as he is going to be to give his evidence at trial.

Preparation and Presentation of Documentary Evidence

From a practical point of view it is extremely important for a lawyer and his witness to be of one mind when it comes to the making and marking of a map or plan which may be introduced into evidence.

The main trouble with maps and plans as documentary evidence is that nearly always there are too many of them. However, given a little cooperation, it should be possible for surveyors to the parties to prepare jointly a map of the subject property and its surroundings which will give the Court a general picture. In addition there should be a block plan of the property, likewise agreed, and in some cases an agreed floor plan. When properties are to be referred to in evidence as comparable to the subject property, particularly if the Court is to be asked to inspect them externally, it is useful to agree upon plans showing the internal layout. It should be unnecessary to add that every map or plan produced by a competent surveyor should bear a scale and a northpoint.

I want to emphasize the need for care in preparing any sketches or maps which are going to be introduced along

with a survey in order to assist the surveyor in giving his expert testimony.

Bear in mind too that another problem with maps and plans is that they tend to be too big. Unless it is necessary for the Court to know the lie of the land for several miles in all directions, chop off those bits of the map which are superfluous and reduce it to manageable proportions. Secondly, never roll a map if you can possibly help it. A rolled map, which is no sooner unrolled then it rerolls itself with the force of a clock spring, can be awkward for everybody.

Testifying as an Expert Witness

For most surveyors, as with many experts, unless they are very experienced in giving evidence, a trial is an unusual, anxiety-producing event. If the lawyer calling you does not do so on his own, you should ask him to explain to you fully the practices and procedures of, and generally what to expect in, the Court or administrative tribunal in which you will be appearing as a witness. He should explain to you ahead of time not only what you will be testifying about but how you will be testifying.

In this regard, it is important for you to know that in order to introduce your expert testimony into evidence, the lawyer will be obliged to do what is known as "qualify" you as an expert. That is, before you can provide any information

issues involved in the case and state your opinion and conclusions, it must be demonstrated that you possess sufficient background in the area in question so as to be able to assist the Court. The test of expertise so far as the law of evidence is concerned is skill in the field in which it is sought to have the witnesses' opinion. As has been mentioned earlier, the admissibility of such evidence does not depend upon the method by which the skill was acquired, as long as the Court is satisfied that the witness is sufficiently experienced in the subject matter at issue. Accordingly, the lawyer will ask introductory questions of you about your experience and education and you should be prepared to describe this to him both at your initial preparation meeting and, certainly, by the time of the day of the trial.

Hypothetical Questions and Examples

Peculiar to the examination of expert witnesses is the use of hypothetical questions based on examples and the utilization of textbooks.

The use of the hypothetical question when facts upon which the expert bases his opinion are in dispute means that, unlike other witnesses, an expert is not confined to testifying as to personal observations. He is allowed to state inferences and conclusions from facts introduced into evidence by others and put to him in the form of an example followed by the request that he assume the facts given and

answer certain questions about his opinion in respect of those facts.

The hypothetical question need not include all the facts relevant to the expert's opinion. As long as the question incorporates sufficient, assumed facts to enable the witness to give answers of value, it will be proper.

Of particular concern in the area of giving expert testimony as a land surveyor, is the fact that in certain cases the land surveyor will have personal knowledge of the facts upon which he is giving expert testimony. This could arise, for example, where a surveyor has been asked to prepare his own survey of a property in respect of which another surveyor is alleged to have made an inaccurate survey. In such a case a surveyor is entitled both to testify about his own work and observations and to give his opinion.

Use of Texts and Articles

Also peculiar to the examination of experts is the use of texts and articles as an instrument of giving evidence. In support of any theory or opinion, an expert is permitted to refer to authoritative texts and the like, and any portion of them upon which he relies is admissible into evidence. If the written work forms the basis of the expert's opinion, a lawyer is generally allowed to read an excerpt to him and obtain his opinion on it. The written view of the author thereby becomes the opinion of the witness. If the witness

does not adopt the writing as being authoritative and in agreement with his own opinion, nothing may be read from the text, because that would be in violation of what is known as the hearsay evidence rule.

Since, as an expert, you will be cross-examined by the lawyer for the opposition, it is important to realize that texts may be used in cross-examination of an expert to confront him with an authoritative opinion which contradicts the view expressed by him on the witness stand. By doing this, the books or articles are not used for the purpose of proving the truth of the opinion which they contain, but as a means of testing the value of the expert witness' conclusion. It is used to challenge the expert's credibility and to test whether the witness has intelligently and competently read and applied what has been authoritatively written on the subject. An important point here is that the witness can be confronted with such a work only if he first recognizes it as authoritative. This is a matter which you should discuss with the lawyer calling you as a witness at your preparation meetings. Normally this would arise when discussing the opinions which may be raised contrary to your own and when providing the lawyer with written texts which support those opinions. You should make it clear to the lawyer whether or not you accept the works as authoritative and, if not, why not.

Reports

In some cases, experts will do reports which can be filed as evidence in Court after the lawyer has satisfied certain technical qualifications under the Rules of Court and the Ontario or Canada Evidence Act. It is generally a good policy to call oral evidence rather than file reports, except where required to do so as for instance under the Federal Court Rules, or where the matter reported on is largely factual and not really contentious as may well be the case with a survey. If a lawyer is going to call an expert to give evidence, he will generally not file a report at the same time. Not only would it be repetitive to do so but it affords too fruitful a ground for cross-examination in case there is some difference of phraseology or expression of opinion between the written and the oral presentation. The lawyer, while introducing expert evidence, may file supportive material such as statistics, graphs or maps, which illustrate his evidence. However, usually he will not file a written summary of the opinion and then ask the expert to give evidence orally as well.

Admissibility of Survey Notes of (a) Living and (b) Deceased Surveyors

With respect to the very technical area of the admissibility of the survey notes of living surveyors, such notes fall within the general rule that notes may be referred to in order to refresh one's memory. However, refreshing one's memory does not mean the notes become evidence but only that

the surveyor can look at them and refer to them in giving his oral evidence. For example, in one case the field notes of a surveyor recorded in a sort of diary were held inadmissible by a Court on a question of boundary, because they were not shown to be recorded in the performance of any duty and were not shown to be recorded contemporaneously. However, the result was to the contrary in another case where it was considered that it was the duty of the surveyor not only to report the ultimate result of his survey, but also to record everything without which he could not arrive at that ultimate conclusion; also in this case it was presumably proven that the notes were recorded in the performance of the surveyor's duty and contemporaneously. Field notes have also been held by our Courts to be admissible in evidence when they formed an essential part of the work which was necessary in order to make a plan available.

Certain rules also exist with respect to the admissibility into evidence of surveys made by official surveyors of Crown lands. Maps or surveys of Crown lands on file in Crown lands offices are admissible, even apart from any statute requiring them to be filed in such offices. The description in such surveys may be used to interpret a grant in which it is described only by numbers and letters, but such maps or surveys are not admissible when the only evidence of them is derived from local and private publications. Field notes of provincial land surveyors prepared and filed pursuant to the statutory duty in that behalf are admissible. Field notes

not prepared or filed under a statutory duty are not admissible even if made by a provincial land surveyor.

Generally, the same rules apply to the admissibility of the surveying notes of deceased surveyors. Declarations which have been made by a deceased person, in the ordinary course of his business, in the discharge of a specific duty to a third person, contemporaneously with the facts stated in those notes, and without any intention to misrepresent the facts, are admissible as an exception to the hearsay rule.[2] This exception is obviously based on the principle of necessity because of the difficulty of introducing evidence in such cases. The field notes must have been made in the ordinary or usual course of business by a person whose duty it was to make them and it must appear that it was his duty not only to do the act but also to make a report or entry concerning it. It must have been his duty to do the very thing to which the reporting entry relates and then to make a report or record of it.

One can expect, however, that a judge will be more strict in requiring that these tests be met when dealing with a deceased surveyor's notes, because from an evidentiary point of view, the opposition (and the judge) is faced with the problem that the person who will be cross-examined about these notes is not the person who made them.

Cross-Examination and What to Expect

In instructing any witness about what to expect in cross-examination, I try to emphasize that, with very few exceptions, they are not going to experience any of what was referred to on the Perry Mason television program as "badgering the witness". That does not mean that you will not be asked searching and possibly difficult questions in respect of the matters about which you are testifying. However, it does mean that you are entitled to the respect of the lawyer cross-examining you and, almost always, the judge.

Being prepared for cross-examination is a matter of your lawyer's reviewing with you ahead of time the areas upon which he expects you will be cross-examined. He should point out the potential difficult areas to you and discuss with you how you are going to handle them in the best possible way. If he does not do so, you should ask him to review this with you.

While discussing the question of cross-examination of an expert witness, it should be pointed out that one of the most valuable contributions that an expert witness can make to a lawyer and a trial is to assist the lawyer in cross-examining the other side's expert or experts. This is done both in preparation for the trial, as discussed above, and at the trial by sitting with counsel and taking notes, which should be discussed with him before he commences his cross-examination of the other side's expert. You should remember, at this point, what the lawyer has told you about the key matters in

issue and restrict your advice to him to these important areas. Usually, in most trials, there are only one or two critical issues and you should make every endeavour to assist the lawyer who has called you as an expert witness, or who is going to, in understanding any possible inaccuracies or misconceptions in the testimony of the other side's witness on such critical issues.

General Demeanor of an Expert Witness

An expert witness should realize that a judge or jury does not necessarily have to believe or accept what he testifies to, and that his credibility will be greatly affected by his fairness and demeanor while testifying. He should be objective and fair to the other side, but at the same time alert to any question which might be asked that is designed to destroy or cast doubt on his opinion. He should be cautioned not to become an advocate upon the witness stand and that any attempt on his part to argue with the opposing lawyer may be held against him by the Court. If the opposing lawyer attempts to argue with him, he will make the best impression by maintaining his poise. He should be forthright, speak clearly and look at the judge or jury as much as possible while testifying. He should be courteous. He should be instructed to bring all his records to Court so that there will be no question that he is leaving out something important; usually the lawyer calling the expert will go over these papers from his file with him beforehand.

Expert Witness Fees

Before you are formally and officially retained as an expert, a decision should be made regarding the total fee which you are to receive. Leaving this matter to be dealt with later is generally a bad idea. The terms of payment for your services should be understood before any work is begun.

Now, especially in the United States, most consultants or expert witnesses will request an advance retainer covering the estimated fee for the particular type of assignment contemplated requesting that the balance be placed in trust with the lawyer. Keeping the matter on a pay-as-you-play basis, is usually acceptable to the lawyer, his client, and you - the expert. Another matter which you will want to discuss at this stage is who is going to be responsible for your fee, the lawyer or the client. In many cases, it will be desirable to agree with the lawyer that he will pay your fee and collect it from his client.

In terms of the amount of an expert fee, an expert will have to be paid an appropriate amount for his services. It is difficult to lay down any sort of standard as to what is appropriate for one expert as opposed to another and it must, of necessity, depend upon the field in which he practices or the availability of the expert. In most cases, expert witness fees are not recoverable by the client and must be absorbed by him.

You will know, better than me, the value of your services based on a per hour or per diem basis. The important thing is to establish the amount of the fee, at least in terms of an estimate, at the outset of your engagement to perform as an expert witness.

Subpoenas and Consequences of Failing to Answer One

If a lawyer requires the attendance in Court of a witness, expert or otherwise, he has the right to issue a subpoena to that witness along with what is known as conduct or expense money (modest in amount). Failure to respond to a subpoena and appear in Court amounts to contempt of Court for which a judge has the power to issue a bench warrant compelling the attendance of the witness or even to imprison him. In practice, this is rarely, if ever done, primarily because it is not necessary.

A lawyer will often find it necessary to subpoena an expert witness who is quite willing to testify voluntarily (for a fee) on behalf of his client. This may occur for one or two reasons. First, the lawyer wishes the protection of knowing that he has compelled, by law, the attendance of the witness. Secondly, the witness himself may wish to have a subpoena to show his employer to enable him to attend at the trial.

It should be noted that there are different types of subpoenas. In particular, a subpoena duces tecum is a

subpoena requiring a witness to bring with him to Court certain documents listed in the subpoena. Normally, assuming that the subpoena comes from the lawyer who intends to call you as a witness, the type of information requested in the subpoena will have already been discussed between you and the lawyer.

The Use of the Court-Appointed Expert or "Amicus Curiae"

In cases which require specialized knowledge or experience not possessed by a judge, we have now reached the point in the development of our law that in addition to the parties selecting and calling their own expert witnesses, impartial Court-appointed experts sitting with the judge, and Court experts submitting opinions in the form of written reports available to the judge, are being used. Mr. Justice Haines, who recently used this technique in a case involving the Ford Motor Company, said as follows in a 1973 article:

> "Much can be said concerning the use of experts who assist the trial judge. The court owes a duty to be scientifically correct as well as legally correct, and the judge in an adversary system is apt to encounter each side presenting skilled experts who present quite persuasively, opposite views. He may find himself somewhat bewildered. However, if he has beside him on the bench experts whom the

parties agree are impartial, he will have the benefit of their guidance in the understanding of the evidence, and no less important, the restraint of their presence will serve to dampen the enthusiasm of the adversary expert witnesses."[1]

To date, when an expert witness has been used in this capacity his role has been restricted to answering the judge's questions and assisting him in interpreting the evidence given by other experts. Judges have strongly criticized any practice whereby the expert participates in the examination of witnesses.

This procedure is still unusual enough in our Courts that it is unlikely that any of you will ever be called as an amicus curiae or friend of the Court. However, if this does occur, it should prove useful for you to remember that in this role your function will be somewhat different than when you are called by one party or the other. The adversarial system upon which our legal system is based, which pits one side against the other, necessitates that in calling witnesses, each side prepares its witnesses and, to a certain extent, bias is bound to creep in. However, when acting as a friend of the Court, it is important that you, as much as the judge is supposed to, remain impartial to all parties involved in the dispute.

Conclusion

The other experiences which await some of you and which will be discussed at the conference under the general heading of the land surveyor and the law may not be as pleasant as giving expert testimony. However, I hope that the information which I have discussed here will assist you in the event that you should be called upon to give expert testimony about your field of endeavour. This is an experience which should be both rewarding for you and invaluable to the lawyer calling you, his client, and our judicial system.

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FOOTNOTES

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COSTS IN LITIGATION

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Douglas C. Shaw

C O S T S

This paper concerns the question of the costs of litigation and the effect which such costs have on the conduct of litigation, and in particular, on the settlement of litigation.

"Costs" in the context of litigation, are composed of (1) the fees for the time of the lawyers involved in the action and (2) the disbursements or out of pocket expenses incurred by the lawyers on behalf of their clients which are subsequently charged to the clients, such as the costs of transcripts, court fees, travel expenses, witness fees and the like.

The costs of litigating a claim are high. Dealing firstly with the question of fees, the hourly rates charged by lawyers in Ontario for conducting litigation range from approximately $50.00 per hour to $120.00 or $150.00 per hour, depending largely on the skill and experience of the counsel involved. Many firms have started to charge out their lawyer's time by 10ths of an hour. Thus for every 6 minutes a lawyer spends on a case, including telephone calls, drafting letters, reviewing the facts and the law, as well as appearing at examinations for discovery and trial, it costs the client from $5.00 to $15.00. With the meter ticking over at this rate it does not take long for the bill of even the most efficient lawyer to mount.

Secondly, the disbursements which a lawyer is required to make on behalf of his client during the course of an action have also become expensive. By way of example, each page of the transcript of the testimony given on examinations for discovery costs $2.25. It will cost in the area of $350.00 per day for the services of an expert retained to testify at trial. One can expect to pay a minimum of $300.00 for a brief, straightforward engineer's report prepared for the purposes of litigation.

In short, litigation is expensive. The fees and disbursements which would be charged to a client in a relatively uncomplicated professional negligence action against a surveyor, involving a trial of 2 to 3 days duration, would probably range from $5,000.00 to $10,000.00. The more complicated the issues and evidence and the longer the trial, the greater the account.

The size of the fees and disbursements of one's own lawyer, in themselves, are sufficient to encourage settlement of a claim either before or shortly after the commencement of an action. However, our judicial system has built into it a further incentive for settlement of actions. The incentive arises out of the principle that the unsuccessful party in an action must pay a large portion of the costs incurred by the successful party. Costs follow the result. These costs are described as "party and party" costs, to distinguish them from the costs between a party and his own lawyer, which are called "solicitor and client" costs. Party and party costs are intended to indemnify to a large degree the successful party for the expenses to which he has been put by reason of the litigation. Therefore if the party bringing the action succeeds with his claim, he will not only be awarded all or part of the damages he has claimed, but he will also be entitled to collect party and party costs from the defendant. Conversely, if the claim has been successfully defended, the defendant then will not only pay no damages but will be entitled to look to the party who brought the action for payment of costs. If it is impossible to say that either party was successful, then likely no order as to costs will be made.

It should be added that the trial judge has a discretion to withhold costs from the successful party, but such a situation is rare. The discretion may, for example, be exercised where the successful party has alleged fraud on the part of the other party but has failed to prove his allegations.

It is important to note, however, that party

and party costs are intended to be only a partial indemnification for the actual fees and disbursements which the successful party pays to his lawyer. The amount of party and party costs are assessed by a judicial officer, known as a taxing officer. His assessment is based on a tariff which prescribes the amount of fees and disbursements payable to the successful party. Certain items in this tariff are subject to increase at the discretion of the taxing master. As a rule of thumb, one can expect that party and party costs will cover approximately 1/2 to 2/3 of the amount of the bill which the successful party will actually receive from his lawyer.

In any action, therefore, from a strictly financial point of view, there will always be an incentive for the plaintiff to settle for something less than his claim and for the defendant to pay something towards that claim. Even if a party is entirely successful in his claim or his defence, and even though he is awarded costs at trial, he is still going to be out of pocket a significant sum for his own lawyer's fees and disbursements. On the other hand, the unsuccessful party faces not only the loss of his claim, if he is a plaintiff, or the amount of damages awarded against him, if he is a defendant, but also faces the prospect of paying both for his own lawyer and the lawyer of his opponent.

This matter of costs, together with the difficulty of predicting with any great accuracy the outcome of a contested action, the time and effort required of the respective parties to assemble their case, and the emotional strain of having one's abilities and credibility attacked in court, are the reasons why more than 9 out of 10 actions settle before trial.

Continuing to focus on the expense of litigation, the situation in this province differs markedly from that prevailing in the United States insofar as costs are concerned. In the United States it is common in negligence actions for the lawyer for the plaintiff to be retained on a contingency fee basis. The party bringing the action and his lawyer agree that should the lawsuit be successful, the lawyer will receive a fixed percentage of the damages awarded. A typical contingency fee retainer will

have a sliding scale, such that the lawyer will receive 30% of any settlement made prior to trial, 40% of damages awarded after trial, and 45% of damages sustained or awarded on appeal. However, the plaintiff and his lawyer also agree that if the action is successfully defended, the lawyer will not be entitled to anything in the way of fees. His fee is therefore contingent upon the successful resolution of the action in favour of his client.

In this province contingency fees are expressly prohibited by The Solicitors Act, although they are permitted in at least 2 of the other provinces, Manitoba and Quebec. The reasoning behind this prohibition is that a contingency fee makes a lawyer a co-litigant with his client, tending to erode his role as an independent advisor of his client and as an officer of the court. The spectre of the professional ambulance chaser, hustling after the injured and the suffering, provoking litigation, coaching witnesses and striving by fair means or foul to obtain a favourable verdict and part of the spoils, has haunted the law makers of this province. Proponents of contingency fees argue, on the other hand, that if properly supervised to ensure that the contingency agreement is fair and reasonable to the client, contingency fees would enable parties of limited funds to pursue worthy actions, and that potential abuses of the system could be controlled by the self - policing of the legal profession.

Another significant difference between American jurisdictions and Ontario is that it is not the practice of courts in the United States to award party and party costs to the successful litigant. This, coupled with the contingency fee, provides little inducement for settlement and in fact tends to encourage litigation. A plaintiff in a negligence action in the United States, who has entered into a contingency fee agreement with his lawyer will be cognizant of the fact that if he is not successful in his action not only will he not have to pay his own lawyer, but, he also will not have to indemnify the defendant for his costs. In Ontario, reflecting the British system, the prevailing attitude is one of encouraging the settlement, rather than the litigation, of disputes.

At first blush it would appear that the provisions in this province, whereby costs follow the result, work largely in favour of the plaintiff in settlement negotiations. If the plaintiff

has a valid, provable claim, he can confront the defendant with the prospect of paying the amount of the claim now or paying the claim plus costs at a later date. However, there are several other aspects to costs which are of significant tactical advantage to the defendant in negotiating a favourable settlement.

Firstly, and of greatest assistance to the defendant, is the concept of "payment into court". The Rules of Practice governing litigation in Ontario provide that a defendant may virtually at any time prior to trial pay into court a sum of money in full satisfaction or settlement of the claim of the party bringing the action. The plaintiff is notified of this payment into court and may elect to take the money paid in in full satisfaction of his claim or may elect to proceed with the action. The judge trying the case, however, is not advised of the fact or of the amount of the payment into court until after he has given his decision as to the amount of damages, if any, to be awarded to the plaintiff. If the plaintiff elects to take the monies in court in full settlement of his claim, then he is entitled to look to the defendant for his party and party costs up to the date of payment into court. If the plaintiff elects not to accept the monies in court in settlement of his action, proceeds through trial, and recovers less than the amount paid into court by the defendant, he will still be entitled to his costs up to the date of payment into court, but will be liable for all party and party costs of the defendant incurred after the date of payment into court. If the plaintiff recovers more at trial than the amount of the payment into court, he is not penalized at all and can look to the defendant for his party and party costs from the date of commencement of the action through to judgment.

In effect, if the defendant makes a payment into court the plaintiff who wishes to proceed with a trial of the action must gamble that he will recover more than that sum or face drastic consequences in the way of costs.

For example, a dissatisfied contractor might sue a surveyor for negligence claiming $25,000.00 in damages. The lawyer for the defendant surveyor, in assessing the probable outcome of the action might estimate that while the surveyor has likely been negligent the contractor will likely be able to prove that he has only suffered damages in the amount of $10,000.00. The defendant might then decide to pay the sum of $10,000.00 into court, on the basis that if the plaintiff elects to accept that $10,000.00, that will be the end of the action. If the contractor does not accept that payment into court in full satisfaction of his claim and elects to pursue his action, and if after trial the judge awards him $10,000.00 or less, then the contractor will be entitled to party and party costs only up to the date of the payment into court. The defendant surveyor, even though the contractor was successful as to a portion of his claim, would be entitled to be paid his costs for all proceedings after the date of payment in. If the payment into court is made early in the action, and should the defendant succeed in limiting damages to less than the amount he has paid into court, he will be given his costs for the examination for discovery, for preparation for trial, and for the trial itself.

Let us say that the mythical contractor who sued for $25,000.00 only recovered $10,000.00 at trial, the amount of the payment into court, and that the actual solicitor and client costs of each of the parties incurred after payment into court at a very early stage of proceedings, was $5,000.00. The contractor would now have to pay his own lawyer $5,000.00, plus whatever had been incurred prior to the date of payment into court, let us say $1,000.00, and would also have to pay the costs of the surveyor, in an amount, using the rule of thumb of 1/2 to 2/3 of actual solicitor client costs, of from $2,500.00 to $3,300.00. The contractor would collect from the surveyor $500.00 to $650.00 for costs up to the date of payment into court. The contractor's net recovery after paying his own lawyer's account, the party and party costs of the surveyor incurred after the date of payment into court, and after

receiving his party and party costs from the surveyor up to the date of payment into court, would amount to from $1,700.00 to $2,150.00, a small sum after all the aggravations of a law suit. However, if the contractor, using the example above, had accepted the payment into court he would have had to pay his lawyer $1,000.00 for fees incurred up to the date of payment into court, he would have received $500.00 to $650.00 for party and party costs from the surveyor and he would not have to pay anything for the surveyor's costs. His net recovery in this alternative would be approximately $9,500.00.

It is therefore apparent that the right of a defendant to pay into court in satisfaction of the plaintiff's claim is a powerful weapon in effecting a settlement at less than the full amount of the claim of the plaintiff. If the defendant concludes that he is likely to be found liable for a certain amount of damages, he has really little to lose by paying into court, even if his estimate of the outcome is wrong and a greater sum is eventually awarded in damages. The plaintiff, on the other hand, has a considerable amount to lose if he errs in his estimation of the amount that will be awarded to him at trial.

The second aspect of costs which favours the negotiating position of the defendant arises when the party who brings an action in Ontario resides outside Ontario. The defendant is then entitled to apply to the court for an order requiring the foreign plainitff to pay to the court an amount equal to the estimated costs to which the defendant would be entitled should he succeed in defending the action. This money stands in court as security for the payment of the defendant's costs. The rationale behind this rule is that if the defendant succeeds at trial and is awarded his costs, an Ontario court could enforce against a plaintiff situated in another jurisdiction its order to pay these costs. An Ontario court has no authority beyond the boundaries of this province. However if the plaintiff, although not resident in Ontario, has property in Ontario, the rationale behind the provisions for security for costs disappears, since the court can authorize the

seizure of that property, and it is unlikely that in such circumstances an order for security would be granted. It is also not uncommon for an Ontario solicitor acting for a non-resident plaintiff to require a significant retainer before commencing the action, again for the reason that it is difficult to collect a debt from someone residing outside the jurisdiction. This initial outlay of money, both by way of security for the estimated costs of the defendant and for the retainer of the plaintiff's own lawyer, before the action has gotten off the ground and without any guarantee that the action will be successful, may in itself dissuade a non-resident plaintiff of limited funds from pursuing his claim or may, at least, encourage him to accept an amount less than that he is claiming.

A third aspect of costs which is effective in obtaining a settlement favourable to the defendant arises where there has been an error in judgment by the plaintiff's lawyer and the action is brought in the wrong court. In Ontario there are 3 levels of monetary jurisdiction. The Small Claims Courts have jurisdiction to try cases involving up to $1,000.00. Cases involving between $1,000.00 and $7,500.00 are properly tried in the County Courts and cases involving more than $7,500.00 may be tried in the Supreme Court of Ontario.

The lawyer for a plaintiff might estimate that the likely award of damages to his client will be in the area of $10,000.00 to $15,000.00. On the basis of this estimate he advises his client to sue in the Supreme Court of Ontario. If at trial, the unfortunate plaintiff recovers only $7,000.00 in damages, $500.00 less than the monetary jurisdiction of the Supreme Court, he will be penalized in costs, for unless he can convince the judge otherwise, the plaintiff, although successful in recovering part of his claim, will not be entitled to look to the defendant for the full amount of his party and party costs; and if the judge makes no order as to costs under Rule 656, the successful party will recover no costs.

If prior to trial the defendant can persuade the plaintiff that there is a possibility the plaintiff has misconceived

the strength of his case and is in the wrong court, the defendant's leverage in negotiating a settlement on his own terms is significant.

Finally, there is the advantage which a financially secure defendant has over an impecunious plaintiff in using costs to his advantage. A plaintiff of unlimited means who is faced with the demands of his own lawyer to keep that lawyer's account current, is often effectively discouraged by the defendant who assumes a posture of determination to fight the action to the bitter end. It is similar to a poker game where the player with the money can continue to raise the betting, while the player without funds, although he may have a better hand, simply cannot afford to see those raises and stay in the game. A good example is the case of an employee who has been wrongfully fired from his job and who has brought an action against his former employer for damages for the termination of his employment. Unless that employee is able to find another job or has another source of income, the employer can bargain from strength, knowing that his former employee is going to be hard pressed to finance his action. Such a plaintiff is under considerable pressure to settle for less than the real value of his claim. It is this aspect of costs which lends support to those who argue for a contingency fee system.

Costs are therefore a critical factor in determining how and when to pursue an action. It is dangerous for a client to close his mind to settlement. The costs of litigation, in all the aspects mentioned above, are simply too high to permit the luxury of fighting an action solely as a matter of "principle". The only persons who do not lose money on a lawsuit are the lawyers.

THE ONTARIO LAND SURVEYOR AS A PLAINTIFF OR DEFENDANT

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Brian M. Campbell, LL.B.

THE ONTARIO LAND SURVEYOR AS PLAINTIFF OR DEFENDANT

Ladies and Gentlemen, the purpose of this Seminar in general, is to acquaint you not only with Courtroom procedure and the structure of the Court System as it prevails in Ontario today, but to additionally acquaint you with what might be expected of you as Surveyors were you to be in the position of a Plaintiff commencing a law suit against an individual, company or other entity, or on the other hand as a Defendant, defending against a suit brought against you or your firm.

You have already heard how law suits can occur by virtue of a breach of contract made by you as a Surveyor, and you have also been appraised of the responsibilities and ramifications of being an expert witness in a court of law.

The subject matter of this particular phase of the proceedings, and my objective, is to explain what happens to you as a Plaintiff or Defendant quite apart from the obvious and seemingly only tangible fact of having to "shell-out" substantial fees win, lose or draw!

In a lawsuit which proceeds all the way to judgment, the trial is perhaps only the tip of the iceberg, certainly with respect to time and probably as regards effort. In Ontario today cases are being tried that commenced two or three years

ago because the pretrial process of instituting an action, exchanging pleadings and production, together with the examination for discovery, prior to the filing of the Certificate of Readiness, passing the Record and setting a matter down for trial, take a great deal of time, not to mention the delay of the trial list and the problems of agreeing on a suitable trial date once you reach assignment court.

I propose to discuss briefly with you, the process of a law suit from its inception to judgment with a view to indicating in practical terms the mechanics of litigation and hopefully leaving you with a clearer understanding of not only how it operates, but perhaps even why it was designed to operate in the way in which it does.

Therefore let me deal with the problem of a surveyor involved in litigation under the following headings:

(i) The Surveyor as a Pre-Trial Plaintiff;

(ii) The Surveyor as a Pre-Trial Defendant; and

(iii) The Surveyor as Plaintiff and Defendant at trial.

(i) THE SURVEYOR AS A PRE-TRIAL PLAINTIFF

As Plaintiff, you will commence your cause of action against the Defendant either by way of Specially Endorsed Writ, especially if you are suing for services rendered on an account

which can be readily calculated or is for a specific amount of money, or in the alternative, by Generally Endorsed Writ and Statement of Claim, if you are suing for damages for breach of contract which damages cannot specifically be ascertained, or for negligence, or for a cause of action for which the ultimate award to you, should you be successful, cannot be pre-determined or pre-calculated.

The range of situations in which a Surveyor may become a Plaintiff parallels the range of claims for which any Plaintiff sues from suing for the collection of an account for services rendered, suing a Municipality for misrepresentation, misappropriation or passing-off as its own, a survey made by you, enjoining non-surveyors from advertising themselves as capable of surveying, to suing for the right to preserve your firm or Corporation's name from encroachment by others.

I suppose to pursue the idea of the Surveyor as Plaintiff one could imagine the situation of you, as a surveyor suing a lawyer, if you were for example, sued by a client and you instituted third party proceedings against the lawyer blaiming him on the basis of the inadequate instructions you received from him. This of course would be lunacy, as no one in his right mind would sue a lawyer, because if you lost you might have to pay the lawyer and the lawyer's lawyer, and if you won, who would believe you!

Initially, you will meet with a solicitor, explain to him as best you can the facts which surround your grievance, produce to him the documents or other information which substantiate your claim and instruct him to commence proceedings on your behalf. A small retainer at this point in time quite often spurs the lawyer on to an initial flurry of activity on your behalf!

Once the Writ has been issued and served, the exchange of allegations by yourself as Plaintiff and subsequently by the Defendant are called pleadings, which at a minimum involve a Statement of Claim, a Statement of Defence and perhaps Counterclaim, and very often, Third Party Proceedings, all with a view to expressing as between the parties, the allegations that are being made by you as Plaintiff and the counter allegations that are being made by the recipient of your grievances, in which the recipient denies your claim and puts you to the strictest proof thereof.

Once the alleged facts have been presented in a civil action by way of these pleadings, the next step is to examine the actual facts which surround the allegations made in the pleadings; this is normally done either by way of cross-examination on an Affidavit of Merits if the action was commenced by Specially Endorsed Writ, or through examination for discovery, if you have proceeded by way of Generally Endorsed Writ and Statement of Claim.

Dealing with a Specially Endorsed Writ situation followed by an Affidavit of Merits from the Defendant, you as Plaintiff, have the option of cross-examining on the Affidavit of Merits to try and expose the fact that the Defendant has no real defence, or if you think he has no defence based on the contents of the Affidavit of Merits itself, you can move for summary judgment before a Judge without the necessity of prior cross-examination. For example, I can recall where our firm, acting for the Plaintiff, sued a Defendant on an N.S.F. cheque and the Defendant's Affidavit of Merits stated that the Defendant signed as Officer and/or Agent of a corporation and that this corporation was the proper Defendant to the action, therefore the action as against the Defendant in his personal capacity should be dismissed. On cross-examination on this Affidavit of Merits, the Defendant was simply asked his name and whether he had signed the cheque. We were able to obtain judgment as against the Defendant because the law as it exists will not presume the kind of agency which was being alleged in the Affidavit of Merits unless it is expressly stated to be the case on the cheque, promissory note or other such instrument. The point here is that if you as Plaintiff sue by way of Specially Endorsed Writ, the Defendant is obliged to raise a triable issue in his Affidavit to avoid speedy judgment against him.

Should you be unsuccessful in defeating an Affidavit of Merits, then of course a triable issue will have been established

by the Defendant and you will be obliged as Plaintiff to treat the cause of action as one that has been commenced by Generally Endorsed Writ, at which point in time, you will deliver or exchange proper pleadings and proceed onto examinations for discovery with the Defendant.

In a reasonably complicated or involved cause of action, examinations for discovery will be preceded by the production of documents by way of an Affidavit on Production, which Affidavit indicates to the other side, the documentation which you will produce at discovery and upon which you intend to rely to substantiate your position; these documents can be studied by the solicitor for the Defendant, or he can make copies, even prior to the examination for discovery.

If no Affidavit on Production is requested by the other side or by yourself, then after pleadings have been noted closed, and as has been mentioned, a time and place will be arranged for you, through your solicitor to search behind the allegations made in the pleadings and attempt to establish the specific facts upon which the Defendant will rely based on the allegations made in the Statement of Defence and/or Counterclaim.

By the same token, the Defendant will have the opportunity to inquire into the facts upon which you intend to rely in support of the allegations you have made in your Statement of Claim; the purpose of this exercise is to, in the

venacular, lay all the cards on the table, as well as establish the issues that are contentious, eliminate the superfluous and try to assess the possibilities of ultimate success at trial.

The examination for discovery is done before a Special Examiner who merely transcribes everything that is said by you as Plaintiff or by your solicitor on your behalf, and this transcript can be read into the record at trial as evidence. Therefore, it is important to be properly prepared for an examination for discovery, just as it is important to be properly prepared for trial, so that there is consistency as between what you have said as Plaintiff at discovery and what you subsequently say at trial, in order to maintain your credibility.

At the discovery stage it is not necessary for you to reveal the name or names of the witnesses which you intend to call at trial or reveal the testimony which they will elicit in your favour or in corroboration of your own testimony. If for example, you are suing on an oral contract made with a developer for payment for a plan of subdivision which you have prepared, then it is not necessary for you to reveal the name of your party chief or chainmen or the testimony which they might give, because that would afford the other side the opportunity of approaching these individuals, whether or not they still work for you, and hopefully obtaining from them a signed statement

which would limit the testimony which they could subsequently give at trial, in the same way in which your testimony on discovery limits what you can say at trial.

With respect to the surveyor as a Plaintiff in a law suit, he stands in the same position as any other Plaintiff vis-a-vis his solicitor, insofar as both he and his solicitor are interested in proceeding with all due dispatch, once it has been decided that a cause of action is necessary; the longer the matter is delayed, the more faded become the memories of any witnesses that may be called upon as indeed with the party's own memory, and the greater the chance of the loss or misplacement of crucial documentary evidence which may be used to support allegations made in the pleadings and necessary to prove your case.

In civil actions in which the surveyor appears as Plaintiff, the onus is on the Plaintiff to prove on the balance of probabilities, that his claim against the Defendant has been proven, which decision can either be determined by a Judge alone or by a Judge and Jury, depending on whether or not the Plaintiff feels that his best chances lie either with a Judge alone deciding on conclusions of fact and law or with a Judge and Jury with the Judge advising the Jury as to the law and the Jury being the ultimate trier of fact.

This decision will usually be made initially by the Plaintiff's solicitor, but can also be made by the solicitor for the Defendant. If it is felt by the Plaintiff's solicitor that a Judge alone would be best suited to the case at hand, either because the Plaintiff and/or his witnesses might not be suited to a Jury situation or because a Jury might not understand the claim, then he will proceed in that manner; but the solicitor for the Defendant can always file a Jury Notice and it would take a contested motion to decide whether or not it would be appropriate for a Jury to hear the particular cause of action in question. If the action is a complex one involving a lot of highly technical information such as detailed plans of subdivision or draft plans needed for an application for certification under the Certification of Titles Act, then it would be argued that the matter is beyond the comprehension of an ordinary lay jury and the issue would be that it should be heard by a Judge alone. If the Jury cannot tell the difference between a "hanging line" and a "suspended plumb-bob" then your case may get out of hand and be sacrificed to the confusion and ultimate indifference of the unenlightened Jury members!

In any event at the trial, the case for the surveyor as Plaintiff will be made first and this will involve in most instances, placing on the stand as the key witness, the Plaintiff, to be examined in chief by his solicitor, at which time the surveyor as party-Plaintiff will recount to the court the

the circumstances surrounding his claim as drawn from him by questions asked by his own solicitor.

The Plaintiff's own solicitor will not be in a position to cross-examine his own client and so therefore the client has to be very well prepared to be able to recount his story in an intelligible fashion to the Judge and/or Jury with a minimum of prompting from his own solicitor, and in that regard, the preparation is probably the most important aspect of the trial, because a properly conducted trial should reveal few surprises by way of answers to questions from either side.

This, of course, is far easier said than done, and I can recall an instance when absence of preparation by way of prior contact with the client led to a high drama for me in the Provincial Court. The client accused was to meet me at Old City Hall 20 minutes prior to trial, in order that I could counsel him on how to present his defence, and how best to overcome the policeman's evidence. I arrived early, the courtroom was empty, until a single individual entered and sat down near the back. I called out my client's name, the individual nodded and we both proceeded out into the corrider to confer. I asked him to explain the facts and then advised him of how the policeman would proceed and how to overcome this, and what I was going to do by way of cross-examination of the policeman. The individual was not a very talkative sort, so I concluded by asking him if he had any

queries with respect to the up and coming case. He then asked me why I was so interested in explaining the case to him when he was the policeman and sole witness for the prosecution! (My client had not yet even arrived!)

The conclusion to this story was that I never got to talk to the accused prior to the arraingment at which time, when asked if his name was as stated on the information he answered "No", and because he had yet to plea and it was a Highway Traffic Act offence, the case was dismissed on this technicality, no amendment at that point in time being permitted by law.

After the surveyor as Plaintiff has been examined, then he will be subject to close cross-examination by the Defendant's lawyer in an effort to break down testimony which has been given directly at trial, or reduce the credibility of the surveyor who has just testified, by comparing it with varying testimony given on a prior occasion, namely at the examination for discovery.

For example, in a case in which our firm was later involved, a corporation had sued two individuals A and B, obtained default judgment against B, but the other Defendant resisted and at th discovery, the Plaintiff admitted that it was its understanding that B acted as agent for A. As there was judgment against B,

at trial counsel for A read in this statement which was made at discovery and asked that the action be dismissed because one cannot get judgment against both a principal and agent. It was very difficult to overcome this prior statement, but we were successful because we were able to argue firstly that the Plaintiff had been asked to make a conclusion as to the state of the law, at the discovery, and secondly that the real agent of A was someone other than B.

The major point to be emphasized in pre-trial proceedings, is that there is an element of risk, because of the exposure of the surveyor as Plaintiff on the stand and the possibility of being broken down on cross-examination, or failing to elicit all the necessary facts on his examination in chief; in addition, one is exposed to the pecularities, pecadilos, proclivities and prejudices of the Judge and/or Jury members and therefore one can never guarantee what the final outcome will be for any given cause of action which is launched in the County or Supreme Court. Some Judges and Juries award judgment on the basis of the last thing they have heard, some give you judgment because you have confused the issue sufficiently, and some actually give judgment based on the evidence which has been adduced!

Needless to say after you, as party-Plaintiff, have been examined and subject to cross-examination and have been

re-examined by your own solicitor then the case will proceed by your own lawyer placing on the stand all the witnesses you have brought to support and corroborate your cause of action, and these individuals will be subject to the same cross-examination as you were as party Plaintiff.

Again, preparation is the essence of success and is the best way of guaranteeing that the strongest case can be presented to the court; in this regard, only cases in which there are basic issues of disagreement between the Plaintiff and the Defendant usually come to trial because the settlement process eliminates the majority of all cause of action which are launched in the Province of Ontario.

(ii) THE SURVEYOR AS A PRE-TRIAL DEFENDANT

The process in most normal situations in which the surveyor would be a Defendant, as opposed to a Plaintiff in a civil law suit, is different insofar as there is a marked change in emphasis because as Defendant there is less urgency in bringing the matter to trial; therefore there is less urgency in completing with dispatch the pleadings and discovery process, with much more interest being placed on either stopping the proceedings at an early stage if possible, or, in the alternative, calling for the most complete and detailed evidence which will be relied on by the Plaintiff prior to trial, in order that you as Defendant, will be totally aware of the claim against

you and aware of the possibilities and risks of succeeding at trial. The surveyor would initially assume the role of the Defendant, if sued by a client for an improper survey resulting in financial loss to the client, as in the case where a survey gave rise to an incorrect legal description on a deed, thus rendering the property less marketable than otherwise. A surveyor could be sued for failing to complete a contract in which he had made a firm quotation, or run the risk of a law suit for anything on a plan of survey which, if not qualified, represents certain facts upon which the recipient relies. The catalogue of instances in which a surveyor could be sued appear to be virtually endless! If he is not being disciplined, he is being sued. If he is not being sued, he is being badgered for not paying his dues. If he is not being pursued for any of these reasons, then he is either retired or dead!

With respect to the change in emphasis which I alluded to earlier, this of course is not always the case and can in fact work to the contrary if the situation should arise that you somehow want to seize the initiative from the Plaintiff, because the Plaintiff at trial, has the advantage of making his initial address to the judge or jury and final reply subsequent to any addresses made by the Defendant. For example, a Plaintiff may sue you upon a Specially Endorsed Writ and in your Affidavit of Merits your Counterclaim may be so strong

that on cross-examination, the Plaintiff feels that he cannot continue by way of Specially Endorsed Writ and your Counterclaim seems so compelling that before he can continue by way of Generally Endorsed Writ and Statement of Claim, you might take the opportunity to serve the Plaintiff with a Writ and Statement of Claim yourself, thereby turning the tables on the Plaintiff and making the Plaintiff the Defendant in a general civil action.

With respect to Defendants, the discovery and/or cross-examination process is the same as when the surveyor is acting as Plaintiff except that the initiative lies with the Plaintiff, and the Defendant in most instances merely responds and provides information to the Plaintiff while the Plaintiff diligently pursues his claim, depending upon the outcome of the discoveries.

It is at the conclusion of the discovery process that both the solicitor and the client, whether the client as surveyor is the Plaintiff or Defendant, that a hard look is taken at the transcript and pleadings and the prevailing law in the Province, in order to determine whether or not success will be forthcoming should the matter proceed to trial.

There are of course risks of proceeding to trial, but it is at the post-discovery stage that very often the

decision is made as to whether or not to in fact proceed; this decision may be made, on the basis of the argument that can be made with respect to the combined facts and law as they exist or on the fact that the risk with respect to costs is not a sufficient deterrent to proceeding to trial given refusal by either side to settle. During the interval between the conclusion of the discoveries and the actual date set for trial, a great length of time will pass because of the backlog of cases on the trial list, and during this period, much can be done towards negotiation of a settlement should that be in the minds of either party, and in virtually all instances, this is a fact that does enter into the proceedings at this point during the "phoney-war".

One other aspect of civil proceedings which was alluded to earlier was the fact that they do not always involve just a Plaintiff and a Defendant, but can involve more than one Defendant, each blaiming the other, and can in fact involve other parties being blaimed for the alleged claim or allegation being made by the Plaintiff; this gives rise to third party proceedings in which case, if a surveyor who is a Defendant is served with a Third Party Notice and Statement of Claim, by another named Defendant, then he is obliged through his solicitor to defend not only the initial claim, but the claim that is now being made by this other Defendant. Of course the reciprocal can occur and the surveyor as Defendant

can decide that another named party Defendant is to blame, and can Third Party that Defendant and demand from him a Statement of Defence, as he could another party altogether.

The point to be made is that the pleadings and subsequent discoveries bring out the facts behind the claims being made by the various parties, and given the cost system which exists in the Province of Ontario, the overall effect of these pre-trial procedures is to have all the facts and evidence revealed so that in most instances, both sides know basically the other side's case and this quite often engenders a climate in which settlement can be reached. It would not be possible for every cause of action that is launched to go to trial and in point of fact, in a majority of instances there is no necessity for trial, because the matter can be resolved to the satisfaction of both parties; in any event, there would be no possibility of trying every claim ever instituted because the great number of law suits that are launched as compared to the few number that are tried still results in a substantial backlog of cases in the Courts.

It appears to me that a surveyor as Plaintiff or Defendant in a law suit, whether he is involved in Small Claims Court or a major Supreme Court law suit should bear in mind the following points prior to trial in order to maximize his chances of success at trial:

(a) preparation of the case is the cornerstone to any successful outcome at trial;

(b) good rapport with the solicitor acting on your behalf is essential because you must tell him all the facts so that he is not surprised and/or embarrassed by facts coming out which you withheld from him, and he can better assess your chances of success or failure if he knows all of the information which you have at your disposal, good and bad;

(c) it is advisable in most instances to take the advice of the lawyer who you are paying to handle your case because his experience will indicate whether your cause of action should be proceeded with or whether you should attempt to negotiate an effective settlement in order to cut your losses;

(d) it is necessary to be patient with respect to a complex law suit because of the time involved in the whole procedure, which time is spent both in preparation and in giving the parties an opportunity to really understand their own case and that of their opponent so that the opportunity to resolve the matter prior to trial is maximized;

(e) realize that the ultimate decision of whether or not to proceed to trial and attempt to win a suit or defend the suit successfully must lie with you as the client, and the only thing that a lawyer can do, based on his expertise, is advise

you as to the prospects of success or failure; he cannot be expected to guarantee these, given the variables that inevitably are part and parcel of a civil law suit in this jurisdiction.

(iii) THE SURVEYOR AS PLAINTIFF AND DEFENDANT AT TRIAL

On the assumption that the pleadings and the examinations for discovery have not resulted in any settlement of a cause of action, whether you as a surveyor are a Plaintiff or a Defendant, the most interesting and important part of the process is the actual trial itself; interesting because the day of reckoning has arrived, and important because at the trial's conclusion, judgment will be rendered.

In a civil court trial, it is extremely important to present your case in its most favourable light or defend yourself properly, in order to maximize your chances of victory, and to that end your conduct while in the witness box must be such that you do not, annoy the Judge, confound your own counsel, or become ensnared by the cross-examination of counsel for the opposing side.

I think there are a number of general observations that are applicable to all witnesses that appear on the stand whether they be the parties to the action or witnesses in general, and I would like to discuss with you briefly the

do's and dont's in this regard, with a view to explaining how to best conduct yourself on the stand and what can happen when the basic rules of conduct are ignored, forgotten or unknown by either the lawyer or the surveyor or both!

(a) first and foremost, be sure that any question that is asked of you is understood completely and that when the question is asked do not guess at the answer; the greater your tendency to guess at an answer, the greater the likelihood of your being trapped by your own testimony before you have finished being cross-examined. This is because your answer is not perceived as a guess, and if made without such qualification, can reduce your credibility if later you are obliged to admit to a qualification;

(b) if a "yes" or "no" answer is demanded, you have the right to explain, and you should exercise that right, because the opposing lawyer often attempts to confine a party as to a specific answer by saying, "answer yes or no", and in a situation such as that, if you feel that you are not able to answer in such a fashion, then give the answer and provide an explanation if possible. You have the right to explain a "yes or no" answer and your lawyer will ensure that such a right is exercised, assuming your lawyer is awake at this point in time!

(c) never allow yourself to become angry or endulge in sarcasm with your cross-examiner because this may be

precisely what he is trying to accomplish, in order that you either annoy the Judge or become rattled on the stand and make admissions which under normal circumstances you would never make, and which may harm your case by virtue of the existence of overstatement, embellishment or unnecessary abrasiveness. For example, I had a situation in which monstrous statements were being made by my clients, who were four in number, about the character, intelligence, height, weight, looks and other characteristics of the party Defendants; the Defendants and the Judge became incensed at these outbursts, and my clients received a warning from the Judge that he could cite them for contempt of court. I recall at a recess that threats of bodily harm, arson and other pleasantries were exchanged between the parties! I found myself, although acting for the Plaintiffs in this action, striving for a victory, in order to save the Defendant and the Defendant's family from death and dismemberment at the hands of my own clients, who were indicating that should success not be theirs in the final analysis, then justice would take to the streets!

(d) do not be too positive when there exists the possibility of faulty or incomplete recollection, on your part, because if you are absolutely positive with respect to, for instance, the terms of an oral contract, then you may be interrogated on cross-examination on your recollection with respect to other facts which by comparison, would also be known as completely by you,

but about which you are fairly vague because you have not directed your mind to them and suddenly on cross-examination, are confronted with same; this could give rise to the question of whether or not you have contrived some of the evidence which you initially expounded so positively and without hesitation. For example, on an oral contract made two years ago, you may state definitely the date it was made, the fee estimate you gave to the penny, who was present, and the client's exact response to you. On cross-examination you may be asked whether or not you make contracts on a daily basis, and if they are usually oral, and did you make one the day before the one in question, and what were its terms, who was present, and other specific questions, the answers to which you are most unlikely to have. In all probability, you will not remember anything about other contracts made two years ago and the cross-examination will have the effect of reducing your credibility and jeopardizing your case because it will appear as if you have memorized a certain self-serving set of facts, rather than appearing spontaneous and credible with respect to an oral contract made that length of time ago.

(e) be frank about having discussed the case with counsel, including any conversations at recesses, if you are asked, because it is quite proper to do so. Frequently, a party can become unnerved on the witness stand if the following type of cross-examination is commenced by counsel for the other side:

Question:

Is your name Mr. X?

Answer:

Yes.

Question:

And I understand that you are an Ontario Land Surveyor and that you are the Plaintiff to this action?

Answer:

Yes, that is correct.

Question:

Have you at any time prior to the first two questions that I have just asked of you, and prior to the convening of this trial, ever discussed this case with your lawyer?

Answer:

No.

The way that the third question is asked of the witness, leads him to think that if he answers "yes" to the question he has somehow prejudiced himself in some way, but in fact if he had not discussed the case with his lawyer he would scarcely be in a position to have proceeded to trial, and there would be absolutely no necessity for him having a lawyer in the first place.

Even if you say "yes" then the question might become "and your lawyer told you what to say"? If the answer to that question is "yes, then much can be made of the fact that you were "primed" for the trial and are not answering questions spontaneously or letting the true facts speak for themselves. So always answer this type of question by saying that you have discussed the matter with your lawyer and that his advice to you was to answer the questions as truthfully as possible.

(f) it is important not to blurt out answers or alternatively, not to take too long in answering questions. If an answer is blurted out, you may say more than you intend to say and you do not give your lawyer a chance to object to the question. On the other hand, if you take too long to answer a question, then it may appear to the Judge and/or Jury and most certainly the solicitor for the other side that you are trying to think up an answer which is contrived and this will be pointed out by the opponent's solicitor to the trier of fact, whether it be judge or jury.

(g) always when being subject to cross-examination hope that you will be answered the question "why". This is because it presents the opportunity to explain many things and talk yourself out of a corner if you have in fact painted yourself into one in the first instance. On occasion, I have followed up

a number of questions on cross-examination by the fateful question "why" only to be faced with an outpouring of information from the witness, in which he has gone on at length and for extended periods of time, to explain away a multitude of sins, thereby reducing any effect that the prior cross-examination may have had, to a minimum. Therefore, if you are in the position where your testimony has not been completely effective, when you are asked the question "why", you can elaborate extensively as to the why's and why not's and frequently do yourself a lot of good with respect to increasing your credibility and explaining away a lot of answers which you made initially that were harmful.

(h) be sure to tell both the good and the bad with respect to your cause of action; this can be effective because the bad will undoubtedly come out anyway, and if it is brought out by you through your counsel initially, then the tactical advantage is that it cannot be overly exploited by the solicitor on cross-examination, because you have already revealed that unfavourable facts exist and it appears that in spite of this evidence, you still submit that your case is the stronger of the two and that the bad evidence does not detract from the fact that you will be ultimately successful at the conclusion of the trial.

(i) during the trial process, permit the lawyer to present the case at hand to your best advantage because there will invariably be points in your case that are weak that should be treated a certain way, and strong points which should be emphasized a different way. Leave the tactics and strategy at trial to your solicitor. Win or lose you will still pay for the time he must spend in proceeding with your case.

(j) Lastly, but not least, with respect to your lawyer, I cannot stress too strongly that you should be humbly greatful in victory and totally magnamonous in defeat.

THE SURVEYOR AND THE LAW

Everything the Surveyor wanted to know about the Law and was afraid/or too bored to ask.

* * * * * * * * * * * * * * * * * * *

J. Douglas Crane

"The Surveyor & The Law"

"Everything the surveyor wanted to know about the law and was afraid/or too bored to ask."

If an individual suffers some loss or detriment through the actions or conduct of another, our legal system allows him to seek a remedy from a Court. Whether or not the Court will, in the circumstances of the particular case, grant him that remedy, is the concern of the substantive law - e.g., the law of torts, contract or property. In contrast, civil procedure is concerned with the process by which the aggrieved person, called the plaintiff, brings his case before the Court for adjudication. The rules of civil procedure are aimed at securing the just, speedy and inexpensive determination of every action.

In Canada, the Commonwealth, and the United States, the principles of civil procedure are largely embodied in written Court Rules. In Ontario these Court Rules are known as "the Rules of Practice and Procedure of the Supreme Court of Ontario".

In addition to the Rules, one must also be aware of the decisions of the Courts interpreting and applying the Rules, the statutory provisions which affect the conduct of an action and the common law.

Every lawsuit contains two basic elements - the

facts and the law.

What we mean when we cite the facts is the actual event or occurrence that has given rise to the lawsuit. Our system of jurisprudence leaves to the parties to an action the preparation of their claim or defence, the definition of the issues between them and the presentation of the case in Court for the testimony of witnesses. On the basis of the evidence he has heard, the Judge or a Jury will then make findings of fact as to what actually occurred. Neither the Court nor the Judge is involved in preparing or presenting the case. It is entirely in the hands of the parties and their lawyers to present and to prepare the case; it is for the Court to decide the case.

This party preparation, definition and presentation of the case is at the heart of the adversary system - the most basic characteristic of Common Law procedure.

The other element in every case is the law. Even though a party may have established the facts upon which he bases his claim, there remains the question of

whether those facts entitle him in law to a remedy. This is for the Judge to decide. The law does not always give relief in every situation which involves injury to a citizen, or seemingly unusual or abnormal conduct. In some cases, the party asserting the claim may establish all of the facts which afford him a legal remedy, but the Court will refuse in giving judgment to the plaintiff if the other party has established facts that provide a legal excuse.

For example, a person may establish that another hit him but not be granted relief when the person who hit him establishes that he was justified in doing so in self-defence.

By applying the law to the facts, the Court makes its decision in a case and renders judgment for or against the party asserting the claim.

Any discussion of the organization of the Courts in Canada must commence with an examination of the British North America Act, 1867. That Act provided for the federal union of several former British Colonies into the Dominion of Canada and divided legislative power between the Parliament of Canada, on the one hand, and a Provincial Legislature, on the other.

By Section 92, s. 14, exclusive legislative competency was conferred on Provincial Legislatures with respect to the administration of justice in the province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction and including procedure in civil matters in these Courts; furthermore, Section 96 of the same Act requires that Judges of the Superior, District and County Courts in each province be appointed by the Governor General.

Generally speaking, the salaries, allowances and pensions of these Judges are fixed and provided by Parliament.

Finally, by Section 101 of the Act, power is conferred on the Dominion Parliament to provide for the constitution, maintenance and organization of a general Court of Appeal for Canada and for the establishment of any additional Courts for the better administration of the laws of Canada.

Courts with Civil Jurisdiction in Ontario:

A. Small Claims Courts:

In the Province of Ontario there are three levels

of trial courts with civil jurisdiction. At the lowest level are the Small Claims Courts. Generally speaking, their jurisdiction is determined by monetary, subject matter and territorial considerations.

Ontario is divided territorially into 54 Counties, United Counties, Regional Municipalities and Districts. In each of these territorial divisions, there are one or more Small Claims Courts depending on the size and the population of the division.

In the Judicial District of York, which includes the Municipality of Metropolitan Toronto, there are eleven Small Claims Courts. Actions may be commenced in them where the amount in dispute does not exceed $1,000.00; however, certain kinds of more serious actions may not be tried in these courts, notwithstanding that the amount of money or the value of the property in dispute is under $1,000.00.

For example, a Small Claims Court does not have jurisdiction in actions for the recovery of land or for damages for defamation.

The raison d'etre of a Small Claims Courts is that they provide a form in which small claims may be disposed of quickly, informally and inexpensively. For example, to commence an action, a Plaintiff is merely required to secure the issue of a Claim in which his cause of action is set out informally. Cumbersome, complicated and costly pleadings are not required. Jury trial is not available in a Small Claims Court, and a Judge is directed to dispose of all matters in dispute summarily and to "make such Order or Judgment as appears to him just and agreeable to equity in good conscience".

An appeal may be taken from a Judgment of a Small Claims Court to the Divisional Court of the High Court of Justice for Ontario only where the amount in dispute exceeds $200.00.

This Court has been established by the Legislature of the Province of Ontario, and its practice, procedure and jurisdiction are governed by the Small Claims Court Act.

B. COUNTY AND DISTRICT COURTS:

At the intermediate level of trial courts for civil jurisdiction in Ontario are the County and District Courts.

There is a County Court for each County or group of United Counties, and a District Court for each District in Ontario. The northern part of the Province is divided into Districts rather than into Counties.

Generally these Courts have jurisdiction where the amount in dispute does not exceed $7,500.00. As in the case of Small Claims Courts, regardless of the amount of money involved, the County Court has no jurisdiction to try certain actions - for example, actions for liable. For the most part, the procedure in these Courts is the same as in the Supreme Court of Ontario, and is neither informal nor inexpensive. In many cases, either party to the action may require the trial to be by a Judge with a Jury. Any party to an action may appeal a trial Judgment of a County or a District Court to the Ontario Court of Appeal.

These Courts have been established by the Ontario Legislature and their practice, procedure and jurisdic-

Judicature Act, and the Rules of Practice and Procedure of The Supreme Court of Ontario.

C. THE SUPREME COURT OF ONTARIO

This Court consists of three distinct Courts:

(1) The High Court of Justice - which is a trial division;

(2) The Divisional Court of the High Court - usually referred to as a Divisional Court; and

(3) The Court of Appeal - exclusively an Appellate Court, and the highest Court within the province.

(1) The High Court of Justice for Ontario:

The trial division of The Supreme Court of Ontario is the High Court of Justice for Ontario,

Ontario, or simply "The Supreme Court". This Court consists of a Chief Justice, the Chief Justice of The High Court, who acts as its President, and 31 other Judges. It has general jurisdiction in all civil matters.

Actions are properly commenced in the High Court when they are beyond the jurisdiction, monetary or otherwise, of either the Small Claims Court or the County Court. With certain statutory exceptions, any party may elect trial by a Judge and Jury, but most actions in this Court are disposed of by a Judge alone.

An appeal to the Court of Appeal for Ontario lies from all trial judgments of this Court.

(2) The Divisional Court of The High Court of Justice:

Created in 1972 by an Amendment to The Judicature Act, the Divisional Court is a division of The High Court of Justice. It consists of the Chief Justice of the High Court, who is President, and such other Judges of the High Court who may be designated by him from time to time as Judges of the Divisional Court.

The jurisdiction of the Divisional Court is defined by Section 17 of The Judicature Act and includes appeals from final judgments, final judgments for Orders of the Master and, with leave, from interlocutory judgments or orders of a Judge of the High Court.

It also has jurisdiction to hear applications for judicial review under the Judicial Review Procedures Act, 1971, which are basically administrative tribunal actions and all appeals to the Supreme Court under any Act other than the Judicature Act and the County Courts Act.

(3) The Court of Appeal for Ontario:

This Court is the Appellate Division of The Supreme Court of Ontario, and the highest appeal Court in the province. It consists of a Chief Justice, the Chief Justice of Ontario, who acts as President, and 13 other Justices of Appeal. (Judges Act, R.S.C., assented to 19 June, 1975).

All appeals are heard in the City of Toronto.

This Court obtains its jurisdiction from The

Judicature Act, and exercises a general jurisdiction in appeals from judgments of The High Court of Justice and the County or District Court.

In a limited number of cases, an appeal lies as of right from an Order of this Court to The Supreme Court of Canada.

(D) THE SURROGATE COURT:

The Surrogate Court is presided over by a Judge appointed by the Lieutenant Governor in Council - i.e., by the Province. As a matter of practice, Judges of the County and District Courts are appointed to be the Surrogate Court Judges. They have a wide jurisdiction which includes, with certain express exclusions, all jurisdiction and authority in relation to matters and causes testamentary, and a relation to the granting or revoking probate of Wills and Letters of Administration of the property of deceased persons, and all matters arising out of or connected with the grant or revokation of grant of probate or of administration.

This Court has been established by the Provincial

Legislature, and its practice, procedure and jurisdiction are governed by the Surrogate Court Act.

Appeals from the decision of this Court are heard by The Divisional Court.

COURTS WITH CRIMINAL OR QUASI-CRIMINAL JURISDICTION:

The law relating to crime is uniform throughout the whole of Canada. It is primarily codified in a statute of the Dominion Parliament, the Criminal Code, which also prescribes the procedure to be followed in criminal matters.

In addition to the Criminal Code, other federal legislation creates criminal offences - e.g., in the areas of Narcotic Drugs, Custom, Excise, Taxation, Combines and Immigration.

Although the Criminal Law is enacted by the Parliament, it is administered to Courts established by the Province.

The following is a brief outline of the criminal jurisdiction exercised by Ontario Courts:

(a) Trial Courts:

(1) The High Court of Justice:

Subject to certain exceptions, the High Court of Justice for Ontario has jurisdiction to try any indictable offence; however, the vast majority of indictable offences tried in this Court are murder, manslaughter, criminal negligence and rape. Persons tried for these offences and any other indictable offences in the Supreme Court must be tried by a Court composed of a Judge and a Jury.

(2) Provincial Courts, Criminal Division:

Until the latter part of 1968, these Courts were known as "Magistrates' Courts" or "Police Courts", and were presided over by Magistrates or Justices of the Peace.

The Provincial Courts Act of 1970 renamed the Courts "Provincial Courts, Criminal Division"; and re-named the Magistrates "Provincial Judges".

The Provincial Courts, Criminal

charged with most offences created by The Criminal Code and other federal legislation and all offences created by Ontario Statutes.

All federal offences are either indictable or serious offences, or summary conviction or less serious offences; all offences created by the Statutes of Ontario are summary conviction offences - for example, careless driving under The Highway Traffic Act of Ontario.

In 1971 the Provincial Courts, Criminal Division heard two million, thirty thousand , seven hundred and eight cases, (2,030,780), which included one hundred and sixty-four thousand, a hundred and fifty-three offences (164,153), under The Criminal Code.

A Provincial Courts' Judge has absolute jurisdiction to try an accused where he is charged on an Information with those enumerated in Section 483 of The Criminal Code, for example theft of property valued at less than $200.00, obstructing a Peace

Officer in the execution of his duty, common assault.

The Supreme Court has an overriding jurisdiction to try an indictable offence and thus, at the election of the Attorney General, any offence enumerated in Section 483 of the Code that is an indictable offence may be tried in the Supreme Court.

With regard to the large residue of indictable offences that are not within the absolute jurisdiction of the Provincial Judge, the accused may elect to be tried by:

(a) A Provincial Judge; or

(b) A Court composed of a County Court Judge and a Jury, known as the General Sessions of the Peace; or

(c) A Court composed of a County Court Judge alone, known as "The County Court Judges' Criminal Court".

As to those serious offences, such as rape and manslaughter, customarily tried in the Supreme Court, an accused may elect to be tried by a Provincial Judge - that is Section 429.1 of The

If the accused is to be tried in the Supreme Court, or elects to be tried in the County Court, a Preliminary Hearing is held before the Provincial Judge.

OTHER COURTS OF CRIMINAL JURISDICTION:

A person accused of an indictable offence, other than one customarily tried in a Supreme Court or within the absolute jurisdiction of a Provincial Judge, as already mentioned, may elect to be tried by a Court composed of a Judge alone, or by a Court composed of a Judge and Jury.

In Ontario, the former Court is styled "The County or District Court Judges' Criminal Court", and the latter is styled "Court of General Sessions of the Peace". Both of these Courts exist in every County, group of United Counties or District in Ontario, and both are presided over by a County or District Court Judge.

(b) Appellate Courts:

In Ontario, appeals may be taken to the Court of Appeal for Ontario by persons convicted of indictable offences as of right in certain circumstances and only with leave of that Court in others. These circumstances are set out in The Criminal Code.

(c) Provincial Court Family Division:

In every County and District there is a Provincial Court Family Division. All Judges of these Courts are appointed by the Lieutenant Governor in Council of the Province of Ontario.

The jurisdiction of this Court falls into three general categories:

(1) The conduct of the child, so-called "Juvenile Delinquency";

(2) The conduct of adults toward the child contributing to Juvenile Delinquency; and

(3) The relevant obligations of parents toward one another and to their children.

Thus, the Court has broad responsibilities dealing with the trial of juveniles, persons under the age of 16, and of adults whose conduct affects juveniles. See The Juvenile Delinquents Act.

It also has a jurisdiction vested in it by some nine Statues of Ontario, the most frequently applied: The Deserted Wives and Children's Maintenance Act and The Child Welfare Act.

(d) The Supreme Court of Canada:

The Supreme Court of Canada was established by the Dominion Parliament as a Court with general appellate jurisdiction in 1875. It has been said that this Court has been created to speak with authority for the Dominion as a whole and, as far as possible, to establish a new form of jurisprudence, especially among matters falling within Section 91 of The British North America Act where legislation is for the Dominion as a whole, such as with respect to criminal law, or where purely Provincial Legislation may be of general interest throughout the Dominion; however, it should be noted that on appeals from Provincial Courts of civil or criminal jurisdiction, the Court sits as

a Court of Appeal for that Province and not as a federal Court. This is crucial, for example, in appeals from the Courts of Quebec. In these appeals, the Civil as opposed to the Common Law governs.

Prior to 1933, in the case of criminal appeals, and prior to 1949 in the case of civil appeals, a further appeal could be taken from an Order of the Supreme Court of Canada to the Judicial Committee of the Privy Council in England. However, since these dates, the Supreme Court of Canada has acted as a final Court of Appeal for Canada.

Prior to December 20, 1974, there was an absolute right to appeal civil actions to the Supreme Court of Canada provided the amount in dispute exceeded $10,000.00; and leave was required in those actions where the amount in dispute was less than $10,000.00. The amendment of December 20th, 1974, means, for all practical purposes, that a litigant will require leave in civil and criminal matters from a judgment of the Court of Appeal of one of the Provinces or from the Federal Court of Appeal and, to succeed on an application for leave, counsel must establish two points:

1. That the question involved is by reason of its public importance a matter that ought to be decided by the Supreme Court, or

2. The question involved raises an important issue and is so significant as to warrant a review by the Supreme Court

The jurisdiction and procedure of the Court are regulated by the Supreme Court Act. The Court is composed of The Chief Justice of Canada and eight Puisne Judges. Its sittings are held in Ottawa from October to June.

4. FEDERAL COURTS:

Certain additional Courts have been constituted by the Dominion Parliament pursuant to its constitutional powers under the BNA Act. The Exchequer Court of Canada was established in 1875 and in 1971 it was replaced by the Federal Court of Canada.

The Federal Court of Canada is divided into two divisions:

(a) The Federal Court, Trial Division; and

(b) The Federal Court, Appeal Division.

The seat of the Court is in Ottawa, but each Division of the Court can sit at any place in Canada.

The Trial Division has exclusive original jurisdiction in all cases where relief is claimed against

The Crown, Her Majesty in right of Canada; to

issue an injunction
a Writ of Certiorari
a Writ of Prohibition
a Writ of Mandamus,
a Writ of Quo Warranto, or

to grant declaratory relief;

to hear and determine appeals under:

The Canadian Citizenship Act,
The Income Tax Act and
The Excise Tax Act;

and, with regard to certain types of relief involving patents, copyright, trademark or industrial design.

The Trial Division has concurrent jurisdiction with Provincial Courts and is concerned with a large number of admiralty and shipping matters.

An appeal lies to the Appeal Division from any filed Judgment, Judgment on a question of law determined before trial, or interlocutory Judgment of the Trial Division.

With certain exceptions, an appeal lies from the Appeal Division to the Supreme Court of Canada.

question that is not a question of fact alone from a final judgment or judgment directing a new trial pronounced in a preceding where the amount in controversy exceeds $10,000.00.

DECIDING TO SUE:

What steps must be taken in order to commence an action and properly guide its journey to the Courtroom?

The first step is deciding whether or not an individual has a good cause of action. To do that, the individual will usually retain a lawyer. It is the lawyer's job to determine whether or not the law will afford his client relief based on that fact situation.

Of course, at this point we must assume that the client will be able to prove the facts upon which his complaint rests. If the lawyer is able to reach an affirmative conclusion on this issue, he then has a good cause of action.

The next step is to select the appropriate forum or Court - whether is is a Small Claims Court, County Court of the Supreme Court of Ontario; and, again, as I have already explained, that will be determined on the basis of the subject matter of the case.

Next, the action will be commenced by means of a document known as a Writ of Summons. Using a standard form, the Writ of Summons is prepared and then issued at the proper Court office, whether it is the Small Claims Court, County Court or Supreme Court of Ontario.

As an example, let us use the Supreme Court situation. There the Clerk will collect a fee from the client, affix a seal to the original Writ, assign a number to it and date it and sign the name of the Registrar of the Court on the Writ. The Clerk will retain a copy of the Writ for the Court files and return the original to the lawyer.

The Writ contains a description of the parties to the action - the Plaintiff and Defendant. The Writ also contains an endorsement which consists of a short statement of the nature of the client's claim. The purpose of the endorsement is to provide the Defendant with an indication of the Plaintiff's claim against him.

Having issued the Writ, it is then up to the lawyer for the Plaintiff to serve a copy of it upon the Defendant by means of personal service. To do this, someone will have to locate the Defendant and hand him a copy of the Writ. Usually, the Plaintiff will engage the service of the Sheriff's Office or employ a private process server to carry this out.

Should the Plaintiff be unable to locate the Defendant

for the purpose of serving him personally, or if it appears that the Defendant is purposely evading service, the Plaintiff can ask the Court to grant permission to allow him to effect substituted service. In this way, the Court will permit the Writ to be served in a manner other than by personal service, perhaps by an advertisement in a newspaper or by mailing a copy of the Writ to the Defendant.

The Writ will also inform the Defendant that if he ignores the action, the Plaintiff may be able to obtain a default judgment; consequently, if the Defendant wishes to defend the action, he must respond to the Writ of Summons by filing an Appearance at the Office of the Court in which the Writ was issued, and serving a copy of it on the Plaintiff's lawyer. By appearing, the Defendant acknowledges that the Writ was served upon him and that, prima facie, he intends to defend the action.

By the endorsement on the Writ of Summons, the Plaintiff will have given the Defendant a brief description of his claim.

Now, it is up to the Plaintiff to prepare a pleading known as a Statement of Claim, elaborating the nature of that claim and then serve it upon the Defendant's lawyer and file a copy of it with the Court office.

What is the purpose of the Statement of Claim? Its

major purpose is to inform the Defendant of the relief which the Plaintiff is seeking and the ground upon which it is sought. Thus, it is an elaboration of the claim contained in the endorsement on the Writ.

If the facts alleged in the Statement of Claim do not disclose a cause of action, the Defendant is entitled to ask the Court to dismiss the action.

After the Plaintiff has delivered his Statement of Claim upon the Defendant, the Defendant, if he wishes to avoid Default Judgment, must file his own pleading, which is known as the Statement of Defence. What must it contain? The Defendant must allege the facts upon which he relies in support of his defence.

If the Defendant's defence is a denial, for example, that he did not strike the Plaintiff with his motor vehicle, he must allege this as a fact. This type of defence is known as a denial or traverse; however, his defence may be that he did, indeed, strike the Plaintiff with his motor vehicle but that he is relieved of liability, because the Plaintiff commenced his action after the expiry of the applicable limitation period. Again, the Defendant must plead this defence, which is known as a plea in confession and avoidance, or an affirmative defence by alleging the facts upon which it is based.

After the Defendant has served his Statement of Defence upon the Plaintiff, if the Plaintiff wishes to respond to it, he may deliver a further pleading known as a "Reply".

Also, it is important to realize that a Defendant can also counterclaim against the Plaintiff, and that is done by serving the counterclaim at the same time as he serves the Statement of Defence.

The pleadings serve the function of defining the issues in the case. Also, it is important to realize that when the action reaches trial, both the Plaintiff and the Defendant will be permitted to produce evidence only with regard to the allegations set forth in the pleadings. The proof offered by a party must conform to the issues raised in the pleadings.

The pleadings are not the only device available to the Plaintiff and Defendant for the development of the issues in their case. Our procedural system is premised on the philosophy that each party is entitled to go to trial knowing the case that he must meet. Pleadings go only part way to achieving this goal. Various discovery devices provide the means by which a party is able to obtain more information about his opponent's case. Also, these devices

permit a party to gather facts or information to support or prove his own case.

The Plaintiff can obtain discovery of documents by requiring the Defendant to disclose under oath, by means of an Affidavit on Production, all documents now, or previously, in his possession pertaining to the action.

The Defendant will also have the right to conduct an oral examination for discovery of a Defendant. Our procedural system permits the parties to an action to examine one another under oath before trial, concerning the issues in the action. On such an examination, the Plaintiff will be able to ask the Defendant to disclose the facts upon which the Defendant relies in support of his case. The questions and answers will be transcribed and will be available to the parties for use at the trial.

If the answers given by the Defendant at trial differ from those which he gave on his examination for Discovery, then the examination may be used for the purposes of impeaching the credibility of a Defendant. Also, any admissions which the Defendant makes upon his examination for discovery may be used at the trial by the Plaintiff to prove his case.

Just as the above discovery devices are available to the Plaintiff, they are also available to the Defendant.

Do the parties have any alternative methods of resolving their dispute, short of taking the case to trial? Usually, the prospects of settlement are best after the parties have had discovery, because it is then that each party, for the first time, will know the facts upon which the opposite party is relying.

With this information at their disposal, the parties are in a good position to negotiate a settlement. What are the formal devices provided for disposing of a case short of trial? As already mentioned, the failure of the Statement of Claim to state a reasonable cause of action is a ground for the dismissal of the Plaintiff's action. Similarly, if the Statement of Defence fails to raise any matter that could, in law, amount to a defence, the Plaintiff can apply for judgment in his favour. In other circumstances, if a party has made admissions in his pleading or on discovery that clearly entitle the opposing party to succeed in the action, that party may move for judgment.

After the pleadings are completed and the Plaintiff has conducted pretrial discovery, he will serve a Certificate of Readiness on the Defendant and file it with the Court. When the Defendant has also served a Certificate of Readiness, the case will be set down for trial. The Plaintiff must then

serve and file a Notice of Trial.

Our legal system provides for two methods of trial: by a Judge alone, and by a Judge sitting with a Jury.

In trials before a Judge alone, he decides all matters, both of law and fact. In Jury trials, these functions are divided, with the Jury deciding questions of fact, and the Judge deciding questions of law.

In most actions, either party, if he so chooses, is entitled to have the case tried by a Jury; however, there are some cases which, for historical reasons, cannot be tried by a Jury.

Either side may request a Jury trial.

At the commencement of a trial, the parties must select the members of the Jury. In Ontario, there are six persons on a civil Jury. A Jury in a criminal case has twelve members.

At the trial, the Plaintiff's lawyer , after the Jury has been selected, will make his opening statement. For the benefit of the Judge and Jury, he will outline the

nature of the case and the facts which he intends to prove through the evidence of his witnesses. He will then proceed to present his evidence.

He will do so by asking questions of each of the witnesses for the Plaintiff and obtaining their answers on oath. The examination of a witness by the lawyer for the party calling him is known as "Examination in Chief".

After the Plaintiff's lawyer has examined a witness in Chief, the Defendant's lawyer will have the opportunity to cross-examine that witness. The main purposes of cross-examination are to test the veracity of the witness and to obtain answers which assist the case of the cross-examining party.

Following the cross-examination, should there be any points which the Plaintiff's lawyer wishes to clarify, he may then re-examine the witness. This procedure will continue until the Plaintiff has called all of his witnesses.

Strict rules, known as "Rules of Evidence" apply with regard to the testimony which is permitted at the trial. These Rules of Evidence are somewhat complex, and their study forms a basis of an entire course at Law School;

however, at the very least, to be admissible evidence must be relevant to the issues which the parties have raised in their pleadings. It is for the trial Judge to make rulings throughout the trial with regard to the admissibility of evidence.

After the Plaintiff's lawyer has called all his witnesses, he will close the case for the Plaintiff. At this point in the trial, the Defendant's lawyer may wish to contend that the Plaintiff has failed to induce sufficient evidence to establish his case. In other words, he may apply for a non-suit, and ask the Judge to dismiss the Plaintiff's action.

The trial Judge will not rule upon this motion unless the Defendant's lawyer elects not to call any evidence. If a Defendant's lawyer indicates that he intends to call witnesses, the trial Judge will reserve his decision on the motion until all the evidence in a case has been completed. On the other hand, if the Defendant's lawyer elects to call no evidence, the trial Judge may rule upon the motion for non-suit at once.

Next, the Defendant will then present his case. He will do so in exactly the same manner as did the Plaintiff - by calling witnesses who will be examined in Chief, cross-examined and re-examined.

After the Defendant has concluded his case, the Plaintiff will be allowed to meet any issues raised by the Defence evidence by calling evidence in reply; however, the Plaintiff cannot use the right to call reply evidence for the purposes of introducing evidence that he should have introduced initially but which, for some reason, he has overlooked.

The right of reply is restricted to meeting new issued raised by the Defendant.

After all the evidence has been concluded, the counsel for the parties will have the opportunity to address the jury. In a jury trial the jury has a duty of finding the facts; it is the duty of the Judge to make all decisions with regard to the law.

At the trial the Jury must accept the directions of the Judge as to the law that they are to apply to the facts as they find them.

In addressing the Jury, the Plaintiff's lawyer will attempt to convince them that the Plaintiff has discharged those burdens which rest upon him. The Plaintiff has the burden of persuading the members of the Jury that they should accept a version of the case given in evidence by his witnesses and himself, and that the conduct of the Defendant amounted to being wrong.

Then the Defendant's lawyer will also have the opportunity to address the Jury. He, too, will summarize the evidence, but will attempt to convince the members of the Jury that the Plaintiff has not proved his case. He may do so by arguing that the Plaintiff has not established an essential ingredient of his case; or he may attempt to convince the Jury that the Plaintiff has not met his burden of persuasion, in other words that the evidence may not be sufficient to bring to the minds of the Jurors that state of persuasion or conviction required in a civil action - satisfaction on a balance of probabilities as opposed to satisfaction beyond a reasonable doubt as in a criminal trial.

After counsel have addressed the Jury, it is then the function of the trial Judge to deliver his charge. He will also summarize the evidence in a case; but, unlike the lawyers, he is permitted to express his own opinion with regard to what evidence he believes and what evidence he does

not believe. He must, however, caution the Jury that they are to keep an open mind and that they can accept or reject his comments with regard to the credibility of the witnesses according to their own view of the evidence.

His major function is to instruct the jury on the law that they must apply to the facts as they find them.

After he has concluded his charge, the Jury will retire to consider the case.

The Judgment of the Court is the final determination of the lawsuit, subject to any appeal. In the appropriate case, the Court may make a declaration of right between the parties, order the specific recovery of property, or make an Order requiring or prohibiting some future activity.

The fact that the Plaintiff may have been awarded damages against the Defendant will be of little significance unless the Plaintiff can collect the amount of the damages. The burden lies upon the Plaintiff to make the appropriate procedure to collect his money.

Execution is a common method of forcing a losing party to satisfy a money judgment in situations where he does not voluntarily do so. The Plaintiff will obtain a Writ of Execution from the Court commanding one of its officers,

usually the Sheriff, to seize the Defendant's property and, if necessary, to sell it at a public sale and to use the proceeds to satisfy the Plaintiff's judgment.

Costs, as provided by the tariffs contained in the Rules of Practice, are usually awarded to the successful party and are included in the judgment of the Court.

Subject to the right of appeal, the judgment rendered in an action is final and binding on the parties and may not be challenged in any subsequent proceeding.

The judicial system in Ontario, as in other jurisdictions, provides the right of appeal in almost every case. The powers of the Court of Appeal are very broad. It may affirm the decision appealed from, reverse it or vary it. In appropriate cases, if the appeal is allowed, it may substitute for the decision of the trial Judge the decision which he ought to have reached. In other cases, however, it may be necessary to direct that there be a new trial.

While the powers of the Court of Appeal are broad, there are certain limitations. The major limitation is in relation to the findings of fact made at trial. Even though

the Court of Appeal would have come to a different finding of fact if it had been the initial tribunal, it will not substitute its own finding for that reached at trial if there was evidence upon which the trial Judge or Jury could reasonably have found the facts as it did. Therefore, relatively few cases are successfully appealed on the ground that the finding of fact at trial was in error.

Rather, most appeals are based upon errors of law.

Another common ground of appeal relates to the admissibility or non-admissibility of evidence. In such circumstances, where the trial Judge's error with regard to the admissibility of evidence has resulted in a miscarriage of justice, the Court of Appeal will order a new trial so that the proper evidence can be considered by a new Trial Judge or Jury.

Appeals are usually argued on the basis of a transcript of the evidence of the witnesses taken at trial. Thus, no witnesses are called before the Court of Appeal, and the argument is based on the written record of the evidence at trial. Counsel will present their oral arguments before the Court of Appeal.

There is a limited right of appeal from a decision

of the Court of Appeal to the Supreme Court of Canada.

The foregoing is, I believe, a reasonably accurate description of the Common Law Courts and how they function; but many of you will be appearing before extra-judicial tribunals, so I thought I would close my address by bringing you down to earth from the Supreme Court of Canada to those tribunals where you are likely to appear as witnesses.

I don't propose to list all of the administrative tribunals, but a short list would include the Ontario Municipal Board, the Ontario Labour Relations Board, the Workmen's Compensation Board, the Land compensation Board, the Ontario Energy Board, the Mining and Land Commissioner, Coroner's Inquests, Environmental Appeal Board, Human Right Commission and numerous other provincial and federal Boards.

In addition, as you know, there are Royal Commissions set up from time to time to study various problems, and at the present time I believe there are seven or eight Commissions operating in Ontario:

The Aluminum Wiring Inquiry
The Northern Environmental Commission
The Royal Commission into the Don Jail
The Royal Commission into Pensions
The Royal Commission studying the Wrongful Disclosure of Medical Records (OHIP)
The Royal Commission into the study of French in Ontario Public Schools

The Ontario Commission on The
Freedom of Information.

There are also several Federal Commissions operating at the present time, and the one that you hear most about is the MacDonald Commission studying the activities of the R.C.M.P.; but there are also other Commissions studying other Federal matters such as Freight Rates, etc.

The whole point I want to make in this area is that you should be alerted to the fact that each one of these Board and Commissions has its own Rules and Regulations as to procedure which might differ from the stricter rules of evidence and procedure of the Courts which I have previously mentioned in this speech.

In other words, if you can function in the Courts, you should be able to hold your own before the abovenoted Boards and Commissions, but you should not expect to be treated easier or more gentlemanly because, in some cases, untrained persons could get status as counsel and could attempt to cross-examine you unmercifully while they are riding their hobby horse on their way to establishing their particular crusade.

An example of this might be if you were retained by a land developer who wanted to use his land for a garbage dump. You might be cross-examined by various environmental groups at length, even though your evidence only strictly related to a couple of straight lines.

There is also the danger that the person questioning you in these extra-judicial tribunals may make speeches about surveyors generally and not ask you specific questions; and, to compound matters, you may find that the person presiding has no legal training, and thus the confusion isn't even organized.

To be fair, even a law degree is no guarantee that the Chairman has any common sense or brains, because recently I was involved in a hearing before an administrative tribunal where a municipality was attempting to legislate my client's industry out of existence; and, notwithstanding this serious question, it took me the better part of a day to get the Chairman's attention that my client had a right to be heard - because, initially, the Chairman wanted to blow me and my client out of the room after about five minutes of procedure.

The only suggestion I can make to you from a practical point of view is to be prepared, have your files

and notes in order and expect to be asked a lot of questions that may or may not relate to your specialty.

The final extra-judicial tribunal is the media, and what I am referring to here is what one lawyer in Kenora referred to as "trial by newspaper". In other words, it has unfortunately become a phenomenon of recent times that certain interest groups want to advance their particular point of view and, since their minds are made up, they don't want to be confused with the facts; and often what you read in the newspapers is not evidence given at the hearing but was a corridor interview given by one of the participants.

In conclusion, I hope that none of you is involved in litigation and that everyone pays your bills; but, in the unhappy event that you are involved in litigation, I hope the foregoing has been of assistance to you.

For those of you whom I have put to sleep, you can blame Brian Campbell in part, because he requested a 45-minute talk. Secondly, you can blame my learned Student who provided me with much of the text; and, thirdly, you can blame yours truly for the delivery.

QUESTIONS AND ANSWERS FROM PANEL DISCUSSION

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LAW SEMINAR

PANEL: QUESTIONS & ANSWERS

Question 1:

Having successfully won a litigation suit and been awarded damages and costs, what guarantee is there that the monies will be collected?

Answer 1:

There's none. But hopefully, before the lawyer started the lawsuit for you that involves any significant amount of money, he's done some investigation to determine the financial situation with respect to the defendant. He may have gone to Dunn and Bradstreet, gone to one of the credit agencies.

Question 2:

What further steps may be taken to collect? How do you obtain payment after receiving judgment in Small Claims Court?

Answer 2:

After you've taken out your judgment, if there hasn't been an appeal launched, you generally file an execution with the Sheriff, if you know where this person has any property located. More than likely if you are not successful in receiving payment from the defendant on a voluntary basis,

you convene what is called a judgment debtor examination' and compel the attendance of the defendant, who is now the judgment debtor, before a special examiner. You examine him as to all his assets, all his liabilities and you determine where his propery, real and/or personal, if any, is located. Following that, you file with the Sheriff, in the Registry Office, an execution which attaches to his real property, which gives you some leverage. You also determine if he has any more sources of income, or any debts owing to him and you can attach these by way of a garnishee order. These two procedures, executions and garnishee orders, are generally how one collects from a defendant who doesn't voluntarily pay your judgment and your costs.

Question 3:

Surveyor A and Surveyor B surveyed adjoining properties, but disagree on the location of the common boundary involving a serious encroachment. Litigation ensues and Surveyors A and B are called as witnesses. Are they, under these circumstances, deemed to be expert witnesses? If not, how must they conduct themselves?

Answer 3:

Under these circumstances, the witnesses would not be expert witnesses. Their testimony would be subject to limitations

because they would have to testify from personal observation and personal knowledge. Presumably in a situation like this, other surveyors might be called as experts to testify about the propriety or impropriety of the approach which the two surveyors took to the establishment or purported establishment of the boundary line. It's much the same thing as would happen if a doctor were involved in a car accident, testifying as to what happened during the accident. He is not being called as an expert witness, as he would be in other situations where he might be testifying about the treatment that should have been given to a patient. He is restricted to telling what happened and to testifying from personal observation.

Question 4:

In the event that an Ontario Land Surveyor receives a request from a lawyer to perform a certain survey, and if the lawyer did not discuss the fee, would the lawyer or his client be responsible for the bill from the OLS? Can the lawyer, after receiving the account insist that he is not responsible for the account? Further, can the OLS collect the account from the lawyer's client?

Answer 4:

The lawyer requesting the work is responsible. It would be advisable for you, after a telephone conversation in the normal course, to write the lawyer confirming that you are undertaking

the work and you will look to him for payment. I think a simple letter to that effect is probably sufficient. I don't think you really have the right to go after his client or your client in some respects, because there's really no contractual relationship between you. If you go after the client and are successful, it is probably on the basis that you have performed the work and he has used it for his own benefit, and therefore you are entitled to payment. Consequently, I think it should be a standard practice that whoever commissions the work should be responsible.

Question 5:

Please explain further when a signator on a cheque is an agent for a corporation and when he is personally liable when signing a company cheque.

Answer 5:

If you sign a cheque and the cheque is not qualified by either the name of the corporation or with the name of the corporation on the face of the cheque, and the fact that you are signing as agent for the corporation, then you will be personally responsible. If those two facts do exist, then the corporation is responsible for honouring the cheque and will be the proper defendant in that instance.

Question 6:

On occasions a solicitor will ask that a surveyor's plan leave off a bit of information, that in a plan for an accident survey "don't show the clump of bushes or show the vertical scale five times the horizontal one". Should the surveyor give in because of the insistence that such is not in the best interests of the case?

Answer 6:

No, he shouldn't give in. He should always tell the truth whether he is giving evidence orally or doing it in writing or by a plan. I can see an extreme case in which he perhaps might be charged with suppressing evidence if it was a criminal type of case, or interfering with the administration of justice. If I were the person, and if it actually happened, then I would think it is something that should be referred to the Law Society, because I don't think any lawyer should be asking a surveyor to come up with some sort of a inaccurate diagram or an inaccurate survey to make the light look a little better or the intersection a little closer to the accident scene.

Question 7:

A self-employed individual pays only $1,000.00 of the surveyor's $1,700.00 invoice for a survey ordered by that individual and no estimate was given by the surveyor to the individual ordering

the survey, nor was an estimate requested. The individual client states that the fee, in his opinion, is too high. Is the surveyor wasting his time and money to try to collect the remaining $700.00 in the courts?

Answer 7:

The monitory jurisdiction of the Small Claims Courts is up to $1,000.00 and this is a typical situation for a $700.00 claim. The surveyor wouldn't be wasting his time if he had a provable claim. It is not generally the practice for lawyers to appear in Small Claims Court. Small Claims Courts are relatively informal, and generally speaking, it is the parties to the lawsuit itself that conduct the litigation. Therefore, depending on whether the fee was really reasonable in all the circumstances, I think it would be worth the time suing for a $700.00 claim.

Question 8:

The expert was depicted somewhat as an advocate for his opinion. Should he not reply to questions rather than volunteer opinion?

Answer 8:

The expert like any witness should not become an advocate in the witness box, nor should he argue with the Judge or the

Lawyer from the other side. On the other hand, in an adversarial system, such as the one upon which our legal system is based, it is inevitable that when each side lines up his witnesses, including expert witnesses, that a certain degree of bias, collaboration and woodshedding, (you've heard all these terms) will creep in. There is a certain tight rope that you have to walk in these situations. You are retained by one side or the other, except in that rare situation that I described, where you're called as a court appointed expert. You have to remember that you are being coached to a certain extent by the lawyer who is calling you as a witness; you also have to remember that you have a certain duty as does the lawyer to the court, to give your opinion honestly and fairly. The expert like any other witness should reply to the questions that are asked of him. The difference between the expert and the ordinary or lay witness is that he can be asked a certain type of question, a hypothetical question, or a question based upon a hypothetical set of circumstances which will be based on facts that have to be proven in other ways at the trial. That is something which distinguishes the expert from the lay witness and allows him not to volunteer an opinion in the sense of giving one when it is not asked for, but rather to given an opinion in a very specific way by answering a question that is based on a hypothetical set of circumstances instead of his personal knowledge.

Question 9:

A surveyor prepares an initial plan of survey for Smith showing a building on Smith's property, and subsequently the property is sold to Jones and the plan of survey is used unbeknownst to the surveyor. The plan proves to be in error and Jones claims damages against the surveyor. Would Jones have a valid claim?

Answer 9:

The answer is no. An argument appeared in 'The Ontario Land Surveyor' several years ago on the Doctrine of Detrimental Reliance. In England, approximately four to five years ago, there was a case which indicated that if you as a surveyor had prepared a survey knowing that your client was going to hand it out to someone else, and that person was to rely on the survey, then it is likely that that third party, the person relying on the survey, would have a cause of action against you as a surveyor. I don't think that the law is currently in effect in Ontario.

With respect to matters of this type, the courts have to be reasonable and when I say that, I sort of qualify the word 'reasonable', but if you pursue the concept that you are responsible to third parties, where do you draw the line? The doctrine is really restricted at the present time, especially in this area, but it seems to me some day somebody is going to have to make a successful claim.

Question 10:

An Ontario Land Surveyor is employed by ABC Ltd. OLS. He supervised a project and subsequently signed a plan of survey. It is discovered that the survey is in error causing the sale of the property to fall through. Who can the owner of the land take to court, (a) the limited company, (b) the principals of the company, or (c) the OLS who signed the plan?

Answer 10:

I would suggest that the company is the proper party defendant for a cause of action, because it is responsible for any work done by it and especially if the company's name appears on the plan. If for some reason the company's name does not appear anywhere on the plan, then even though the OLS is an employee of a company, he is also an Ontario Land Surveyor and has signed the plan and so he also could be joined as a party defendant. Where a plan is signed by the surveyor but the company's name doesn't appear, I would think that you would sue both the company and the surveyor in question.

Question 11:

Is the surveyor liable for "off the cuff advice" (i.e. no consideration). If so, can a third party sue?

Answer 11:

If "off the cuff and no consideration" means it was in the beer parlour or the men's or women's locker house at the golf course, then generally speaking, you couldn't sue. On the other hand, if "off the cuff" means over the telephone, i.e. someone phones up and you give off the top of your head advice, you might be on the wrong end of some litigation.

Question 12:

Do lawyers increase fees to reflect responsibility at law?

Answer 12:

Basically, the fee reflects the time that is expended on a case, i.e. subject to adjustment upward and occasionally downward by a percentage based on the amount involved in the case, the complexity of the case, the result you have achieved for your client, the ability of the client to pay, and the question of whether you've had to spend two weeks of evenings down at the office, or your weekends on the case. This is a very rough way of setting a fee.

Question 13:

Can a surveyor's/engineer's fee be increased to reflect the responsibility factor?

Answer 13:

I don't know whether you have governing legislation or not imposing a tariff on your work. If I were an engineer, I know I'd want in a situation where I've been asked to prepare a complex report involving a lot of money of importance to the clients, to increase my fee for that report based on the same factors that a lawyer could increase his fee. That is subject to whatever governing regulations that engineers and surveyors are working under.

Question 14:

In regard to the court appointed expert or amicus curia, a friend of the Court, does the lawyer help him?

Answer 14:

No. The general function of the court appointed expert is to advise the judge, answer questions put to him by the judge, and certainly not to enter into the questioning of witnesses himself. It is clear he has to know about the case before he walks into the court, and his knowledge and expertise is to be used in answering technical questions.

Question 15:

Is there a time limit on oral contracts involving payment of monies for surveys?

Answer 15:

Normally, an oral contract would be valid for six years under our Statute of Limitations, which is presently under review. Even if there is a six year limitation period, you'd look pretty silly going to court after two or three years. The courts would wonder why you waited so long.

Question 16:

At law, to what extent is an estimate binding, and where is the fine line between estimate and contract drawn with respect to it being a fixed amount?

Answer 16:

If you give an estimate and you vary substantially from it, then you begin to look a little strange to your client and he wonders why you're away out. If you come back and say "I gave you an estimate based on a rectangle and I find out that the survey that I had to do is through water courses, down a hill, with a river on one boundary', then an explanation may be possible. If you are going to give an estimate, and I believe you do in most instances, I think you probably should try to hedge it in some way. What I'm trying to say is, an estimate is valid. With respect to it being a fixed amount, I doubt whether anyone giving an estimate would not just say 'this is an estimate of ...' Therefore, I don't think you

should be too concerned whether you are within a certain percentage either way. Just what that percentage will be is hard to say, but I think if you irritate a client he might come after you and even try to upset the contract.

Question 17:

Can a lien be placed on a property that you have surveyed, but for which you have not been paid?

Answer 17:

There is a case to the effect that an architect was able to lien a property upon which he had made architectural drawings. It was presumed or decided by the judge, that he had improved the value of the property to the extent that the architectural drawings he had made were of value to the owner. Therefore, by analogy, one could say that if you can improve the value of a piece of property by surveying and placing on that property a plan of subdivision, for instance, then I think that the value of the property would be enhanced. You would be able to at least place a claim for lien on the property, whether or not it would be ultimately successful, is not certain.

Question 18:

What is an Exchequer Court, and what matters are decided there?

Answer 18:

The Exchequer Court died a few years ago when they brought in the Federal Court which took over the duties. The Federal Court decides matters between a subject and Her Majesty, the Queen, in right of the Dominion of Canada, and generally speaking, the matters that are decided there are income tax cases, trade marks, copy rights, patents, and all Federal matters. You might be in the Federal Court if you did some surveys for the Federal Department of Mines; that's where you would have to sue.

Question 19:

In Hearings under The Boundaries Act, a great deal of time is consumed, introducing irrelevant testimony and questioning the opposing witnesses to create issues. Could the process of examination for discovery be introduced into such proceedings, or should it be restricted to litigation leading to the courts?

Answer 19:

With respect to admissable testimony under The Statutory Powers of Procedures Act, most administrative tribunals, such as the Boundaries Act Tribunal, acting under the

auspices of The Boundaries Act, are allowed to admit hearsay testimony, and it's not excluded as it would be under normal circumstances in a court of law. To that end, that kind of testimony cannot be excluded, although the members of the tribunal can decide to put limited weight on that kind of testimony. Further, I don't think under the Statutory Powers of Procedures Act that there is any definite reference made to examinations for discovery, but I've found in most cases which I've had before administrative tribunals, especially with a solicitor on the other side, that there is an exchange of information. He can demand of me, and I'm obliged to give, and will give to him, to expedite matters, any documentation that I will be relying on to support my case and vice versa. For instance, if I'm appearing before the Commercial Registration Appeal Tribunal to argue a specific case, this is often asked of me by the other side, or when I have done disciplinary hearings before the council of The Association of Ontario Land Surveyors. I think the answer to the question is that whereas it is not specifically set out in any statute that there will be examination for discovery, there is ample scope for pre-trial communication as between the two parties in order to narrow the issues and perhaps agree on a certain set of facts prior to the hearing.

It has been recommended that there be an agreed statement of facts rather than calling in a lot of witnesses to prove things that are so obvious in a disciplinary hearing. That is what the Law Society does in prosecutions. As long as you do not have these procedures formalized by examinations for discovery, etc., you can save some money and get the same thing another way, by exchanging information prior to the hearing.

Question 20:

A surveyor has completed all his field work and final plans required in connection with a plan of subdivision. Progress billings have been sent to the client over a period of nine to twelve months on a regular basis and payment has not been received. What are the merits of withholding registration of the plans until payment is received?

Answer 20:

You should diplomatically tell the developer you're not a charitable institution and your secretary and your technical staff would like to be paid. I see nothing wrong with your holding up that plan, but why wait that long? If you don't control the client at an early stage and set the ground rules as to who is paying and how much you're going

to charge, the survey gets off the rails. You shouldn't get into an argument with the client when your crew is north of Sioux Lookout in the bush. Get a good deposit before they go. You're in business and you have to pay bank interest, and to my knowledge, none of you are financial institutions. Set the ground rules from day one.

Question 21:

At the level of the Small Claims Court where a surveyor is trying to collect his fee, the client pays one-half of the fee into court. What are the advantages of proceeding further if no lawyer is involved?

Answer 21:

There is no concept of payment into the Small Claims Court. I think the matter must be resolved without the benefit of the tactic of payment into court.

Question 22:

If the details of a survey are almost completely obliterated from my mind through the passage of time, would testimony from field notes made by me at the time of the survey be acceptable as evidence?

Answer 22:

Our law is now at the stage where most notes would be admissable into evidence, because field notes have been held by our courts to be admissable in evidence when they form an essential part of the work which was necessary in order to make a plan available.

The law in Ontario is that a surveyor is required, by statute, to make field notes, and that being the case, the duty to keep those notes is clearly there, and the notes themselves would probably be admissable into evidence.

There is a distinction between the admissibility of a piece of evidence and the weight that a court is going to give to it. It is one thing to say that you can be asked a question, give an answer, introduce certain documents into evidence and be allowed to do so; and it is another question as to how much weight the judge will attach to that evidence.

If you have notes from which you can refresh your memory, it is much better to use them in that way than stick those notes into evidence when they may be capable of many interpretations. Otherwise a Judge can take them away and look at them at his leisure, should he reserve judgment, that is, not give judgment at the end of the trial, but go away to think about it for a while. Unless

those notes are very self-explanatory, you are much better off, in my opinion, to use them to refresh your memory than to enter them separately.

Question 23:

Many contracts for professional services contain penalty clauses of one nature or another. This is probably more common among engineers than surveyors, perhaps a financial charge per day for late filing or a threat of cancellation if the deadline is not met, or if there is unarranged or unproved costs overlay. In such contracts, does there have to be a reward for early filing of survey returns to make the penalty provision legal?

Answer 23:

A penalty or some type of charge, if you do not meet the terms of the agreement, is really a pre-estimate of damages for not fulfilling the terms of the agreement. A true penalty is really not enforceable unless it can be backed up by some type of damage claim. There does not have to be a reciprocal agreement for early filing. The contract is a bargaining between two parties, or a set of private rules, and if one party gets an advantage over the other, then that's the victim's tough luck.

Question 24:

If during a cross-examination the testimony begins to distort the issue as you see it (i.e. apples are being compared to oranges), can you thwart this scheme by pointing out the discrepancies immediately, or are you forced to continue with the yes/no answers and perhaps become trapped.

Answer 24:

When you are being cross-examined you should just answer the questions that are put to you. If the question is put to you in such a fashion that you know that the questioner doesn't understand what he is asking, then you can straighten him out in that regard, but do not try to anticipate what the questioner is asking you.

Question 25:

Is it possible that a surveyor could be held liable if his client has been sued for misrepresentation by a third party, because of negligence on the part of the surveyor?

Answer 25:

If a client has been sued by a third party, and the client is the defendant, then it's the client who should be worried, not the surveyor. In this regard you have nothing to fear

from the fact that your client has been sued by a third party, until such time as your client decides to third party you. (i.e. until such time as your client decides the blame is actually is yours and not his). When that occurs, then you will have to defend the action, by way of third party proceedings.