

## 5.1 Introduction

*Text provided by ENCON Group Inc.*

In the same way that ‘defensive driving’ establishes a different vision of the road, we hope that “Practice Management” and other communications from ENCON help to set up a “loss prevention” mindset.

In the Canadian construction milieu, there was a six-fold increase in claims between 1965 and 1980. As well, the cost of each claim went up sharply. Surveyors did not become more negligent; society has become more litigious, and lawsuits are much more common against all categories of professionals.

Even groundless claims cost the surveyor time, money and valuable reputation. This guide provides advice on minimising those costs. Whether a claim is settled before trial or determined in a judgement, the surveyor will still have to pay the deductible amount of the policy. Every effort should be made to prevent claims, but if they do occur, they will be defended vigorously and effectively.

### 5.1.1 What is ‘professional liability’?

The sources of surveyors’ professional liability lie in two areas of law, “**liability in contract**” and “**liability in tort**”.

Strictly speaking, under “liability in contract”, the surveyor is answerable for either the breach of a term in the contract or for the failure to perform the services described in the contract with due care and diligence. (ENCON policies do not cover all breaches of contract, since they may not be professional liability claims arising from

issues like error, omission or negligence in the performance of professional services.)

“Tort liability” is a physical or economic wrong done to someone that can lead to claims against the party responsible, not just surveyors. If acts of negligence or omission by surveyors harm people, whether or not the surveyor has a contractual relationship with those persons, then the surveyor can have “liability in tort” to those persons.

### 5.1.2 How professional liability insurance can protect you

Because surveyors are *personally* liable for the consequences of their actions or failures to act, anyone in active practice should be protected by professional liability insurance. This coverage not only protects your personal assets, it provides a means of maintaining a good reputation by defending allegations that might be frivolous, malicious or false.

### 5.1.3 When professional liability insurance cannot protect you

Liability insurance is not armour plating. It can help you manage claims, but it cannot prevent them. Professional liability insurance cannot protect surveyors: who assume liabilities that are specifically excluded; when they do or fail to do something that voids or invalidates their insurance; or when the damages exceed the limit of liability purchased by the surveyor.

After a claim is made, the insured may take some action that can lead to a loss of insurance coverage. That could include a delay in reporting the claim, which means the insurer loses valuable time needed to prepare an effective defence or otherwise is prejudiced because of the delay.

‘Practising outside the profession’ could also lead to a loss of coverage. An example of this would be giving the client advice about legal or insurance matters.

#### 5.1.4 When a claim occurs or is expected

Surveyors should protect their talent, their businesses and their profession by heading off claims whenever possible and, when they appear, by fighting them vigorously and effectively. Among the best defences against claims are members of a firm who have been educated about insurance matters, impeccable documentation of all relevant communications and, efficient and well-enforced office procedures.

Sometimes, however, claims are unavoidable. When a claim does come in or is expected at any time, the surveyor should implement a plan to contain and manage the situation. Each firm will probably want to prepare its own plan for handling claims. Here, we offer some general advice and some specific points that might be included in a plan.

##### **A Claim or an Incident**

As implied above, there may be times when you have an expectation that a claim could be forthcoming. You may have become aware of an apparent mistake or that a client is unsatisfied with some aspect of your work. Regardless of whether the situation evolves into a formal claim against you or your firm the ‘incident’ should be treated in the same manner as a claim and the following guidelines should be followed.

##### **Keep Cool**

Even though claims are submitted in a highly emotional atmosphere and nobody likes to be confronted with a direct and specific accusation of negligence, it is important to treat the matter on a professional level and avoid any increase

in the level of anger or animosity. *But, in no way, shape or form should anyone on staff at the surveyor’s firm apologise, offer to make the situation right or assume any responsibility!* This can make it impossible for the insurer to mount an effective defence against the claim. Without giving offence, try to only receive information and do not transmit. You may not be in possession of all the facts. For more information on this topic please refer to Loss Control Bulletin # 5 in Section 7 of this guide.

##### **Contact insurer promptly**

Report all the circumstances surrounding the claim to your insurer immediately. Delay can compromise the insurer’s ability to defend the claim, while early notice allows for a well-prepared and confident response. Any action taken after the claim arrives should be cleared with the professional liability insurance company. ENCON has the staff, the expertise and the experience to help find a reasonable solution. There is no reason to delay or avoid calling on our services; after all, you pay for them with your premiums and helping resolve your difficulties is why ENCON is in business.

##### **Maintain communication**

Keep working on the project and continue communicating normally with all parties, including the party that submitted the claim. This may be difficult but it is very important. Failure to communicate may leave the surveyor subject to additional liability.

##### **Assemble documentation**

The desire to take some kind of effective action in a threat situation can be channelled into the practical and necessary task of assembling and organising all the relevant information for the insurer’s representative.

**Make no response**

Do not respond to the claim until you have thoroughly researched the documentation and any available information and sought the advice of your legal counsel or ENCON.

**5.1.5 Warning signs of potential claims****The contractor is in financial difficulty**

When it is obvious that the contractor is in trouble, and there is a strong possibility that there will probably be a claim for extras, it's time to strengthen the alliance with the client and lay the groundwork for a common defence.

**The client is in financial difficulty**

When clients restrict services to save money, it is appropriate to warn them in writing of the limitations placed on the survey firm in so doing. Remember – surveyors are not just liable to owners. In tort, they are liable to the world at large. Where issues of safety are concerned, it is the professional's duty to stop the project by reporting them to the proper authorities.

**Unexpected site conditions**

Every time surveyors report an unforeseen condition, clients should be briefed. The surveyor should force a decision. The worst thing surveyors can do is allow work to continue for any significant length of time with a promise to discuss extras later.

**Owner must be sued for fees**

There are only two reasons for non-payment; either the client is out of money, or the client is unsatisfied with the surveyor's services. In either case, it is worth considering the possible or probable consequences of a lawsuit against the owner. Almost every time a consultant sues a client, the client immediately files a counter-suit. Usually the counter-suit is ten times the amount of the fee claim. Often the claim

has no merit, but is costly to defend, both for the insured and the insurer. Are the unpaid fees worth the time and trouble of a lawsuit?

**5.1.6 The Claims Process**

Briefly, here are the steps in the claims process:

**Step One**

It all starts with some form of Notice of Claim. It can simply be someone telling you that he or she believes that you have made a mistake and that will hold you responsible for the resulting loss. Most commonly, it is in the form of a letter but sometimes as a lawsuit – a Statement of Claim. Once you receive notice, regardless of the form it is in, you should immediately report the matter to ENCON. A Claim/Incident Report form, included in this section of the guide, is provided by ENCON to help in the reporting of a claim. As the name implies, this form should be used to submit information about a claim or about an incident that may lead to a claim. Your surveyors association may also require that you notify them in the event of a claim.

**Step Two**

Assignment of the ENCON Claims Analyst: As soon as ENCON receives notice, an in-house claims specialist, known as a claims analyst, will be assigned to the claim or incident and will contact the surveyor to advise him or her of the next step to be taken. If the matter is a claim the process will continue, otherwise an incident file will be maintained for a period of time.

**Step Three**

That next step could involve the appointment of an adjuster and/or a lawyer from ENCON's panel of service providers. Many of them have been working in the construction insurance business for 20 or more years. All members of the panel bring considerable experience, knowledge, creativity and a high level of service to you, our mutual client.

Generally, an adjuster is appointed solely to conduct an investigation as long as the matter is not at the legal proceeding stage. However, once a lawsuit is served on the surveyor, ENCON must appoint a lawyer to ensure that all legal deadlines are met in order to protect the surveyor's interests. Some surveyors will see both the adjuster and the lawyer working side by side with the surveyor on a claim.

**Step Four**

Investigation of the claim is the next step. Steps two and three may be completed and the investigation begun within days of the notice of claim being made.

**Step Five**

The thorough evaluation of the claim follows the initial investigation.

**Step Six**

The final step is the resolution of the claim. It should be realized that even fairly straight forward claims can take up to a year or more to fully resolve and that more complex or contested claims can take several years to settle.

**5.1.7 The People****The Claims Analyst**

This person is an ENCON employee. Claims analysts have a variety of backgrounds from engineering, architecture and project management as well as insurance claims resolution experience.

The analyst's role is to direct the management of the claim. He or she is responsible for:

- (a) devoting the appropriate resources to the claim (legal, investigation, expert);
- (b) assisting in the evaluation of the claim;
- (c) focussing the other team members toward some type of resolution of the claim.

The claims analyst will be the person holding the purse strings at the end of the day if the surveyor chooses to settle a claim. The analyst will sit with the insured and other members of the team at the negotiation table or in mediation, and decide with the insured the amount to offer as settlement.

The claims analyst's job is to make the decision with the insured as to whether the claim should be settled or adjudicated (by trial or arbitration) if we are unable to obtain a dismissal of the action prior to adjudication.

**The Adjuster**

The role of the adjuster is to meet with the surveyor to assess whether there is any validity to the allegations made against the surveyor. The adjuster conducts the initial factual investigation and provides the ENCON analyst with ongoing reports on the evaluation of liability and damages. The adjuster assists the analyst in settlement negotiations and mediations.

**The Lawyer**

If the claim evolves into a lawsuit or is initiated in the form of a lawsuit, the claims analyst will appoint a lawyer to your file in order to navigate through the legal process. This involves investigating the allegations against the surveyor, assessing whether there is evidence to support those allegations and applying the law to the facts. Ultimately, this means defending the surveyor.

A defence may require suing other parties who have contributed to the loss including the claimant. The lawyer and the analyst work together with the surveyor to arrive at a defence strategy and it is the lawyer who implements the strategy.

If the claim is in the form of a lawsuit, then the lawyer will also attend the mediation with the insured surveyor and the analyst as part of the resolution team. Of course, should the matter need to be adjudicated, it is the lawyer who will represent the surveyor in that session.

### **The Expert**

The central issue in a claim involving professionals is whether you met the required standard of care. ENCON will often require an expert who is a peer to comment on whether, in this particular situation, the surveyor met that professional standard. Likewise, an expert will comment on the conduct of the other parties whether they are professionals, the owner or the contractor. ENCON also uses experts to assist in the assessment of damages or to develop a remedial plan and costing. Where possible, ENCON insureds are retained as experts.

### **The Insured Surveyor**

Your involvement or the involvement of people from your firm is essential to the effective defence of a claim. The surveyor is the person with the best knowledge of what may have caused or contributed to the claim. The surveyor has the best understanding of the other players, and can review expert reports and provide unique comments. In short, the surveyor is the person who can provide the rest of the team with the information necessary to build a proper defence. Finally, the surveyor's consent is required should the team recommend settlement.

Once the team is assembled, it is time to progress to the next two stages of the claims process:

## **5.1.8 The Investigation and Evaluation of the Claim**

### **Determine the Scope of Your Mandate**

The first step in the defence of any claim is to determine the scope of the surveyor's mandate with the project so as to determine the duty owed to the claimant.

At this point, the surveyor should gather all relevant documents (contract, letters, your notes) and meet with the appointed service provider being the adjuster or lawyer. The scope of the mandate may be entirely within a written contract but may have been modified by further agreements with the client, or you may have taken on additional duties during the project.

Then ENCON will assess the mandates of other design consultants and the contractor, if required.

The team then must investigate the facts that led up to the claim – in other words, what is the cause of the loss?

- Was it a surveyor error?
- Did the contractor fail to adhere to the survey or make independent changes?
- Was there an oversight?

This preliminary fact gathering exercise then leads ENCON to the assessment of the insured's liability exposure.

### **Assessment of Your Liability**

Evidence must now be gathered that will be required to defend the surveyor and assess how strong that evidence is in light of the applicable law. The evidence gathering may take the form of Oral Examinations for Discovery where counsel will attempt to obtain admissions of liability from the other parties. The surveyor will also be subjected to the same level of scrutiny by

the plaintiff's counsel or it may involve the adjuster undertaking a more detailed investigation and obtaining written statements from potential witnesses and project workers.

A major part of this assessment of liability stage is hearing what the expert has to say about the surveyor's standard of care and that of the other parties. ENCON will then compare this to the expert reports of the other parties in order to evaluate the strength of the defence.

### **The Defence**

Then we proceed to assert the defence whether that be by an adjuster assembling evidence to support the case and advising the claimant that the surveyor is not liable or, where the claim is in the form of a lawsuit, the additional step of filing a Statement of Defence.

A large part of that defence involves evaluation of the alleged damages:

- What are the actual damages versus what is claimed?
- Is the claimant partially to blame for its own loss (contributory negligence)?
- Has the claimant benefited in some way from the remedial work undertaken?
- Has the claimant properly mitigated the damages (that is, was the problem corrected or was it allowed to deteriorate)?

All of the foregoing can take months or years. Although ENCON is proactive in assessing liability exposure in a claim, we are not always in a position to be in control of the speed with which a claim proceeds. The other parties, particularly the plaintiff, may be slowing the case down by their inactivity or unwillingness to be proactive. Often, if the insurer sticks its neck out to push the case forward, the effect may be to increase the expectations of the other parties that the insurer accepts the bulk of liability

and is willing to put large amounts of money on the table. If a lawsuit is dragging due to the inaction of the plaintiff, ENCON often will apply to the court to have a judge "case manage" the litigation thereby requiring that all parties adhere to specific deadlines for Discoveries and filing of reports. In this way, ENCON may be able to pressure the plaintiff to prove its case or drop it altogether.

The final step in the claims process follows the investigation and evaluation of the claim.

### **5.1.9 Resolution of the Claim**

At this stage, the ultimate defence strategy is both determined and implemented.

There are three choices:

- i) settling the case;
- ii) denying liability and applying to the court for a dismissal of the plaintiff's case or writing to the claimant advising that the insurer and the surveyor do not accept his view of liability;
- iii) proceeding to adjudication – that is, a trial or an arbitration.

### **Settlement**

If it is clear that the surveyor has liability then, with the surveyor's consent, ENCON will endeavour to settle the claim through negotiations or mediation while obtaining contributions or concessions from other parties.

### **Adjudication**

If it is clear that the surveyor has no liability and there is strong evidence to support the case, then trial or arbitration may be the way to proceed.

There are some negative consequences to choosing the route of a 'full blown' trial, such as:

- (a) the amount of the surveyor's time needed to testify; a trial can stretch for many weeks depending on the number of parties involved and the complexity of the case. In addition, the parties can become bogged down in procedural issues;
- (b) the risk of an adverse decision – even the best case can have negative, unexpected outcomes perhaps because a witness changes his or her story or perhaps the judge decides to accept the plaintiff's expert rather than ENCON;
- (c) that judges are experts on the law, not on construction and surveying issues. If a case is complex or doesn't present well, then the judge may not quite appreciate even the most proficient lawyer's arguments or expert testimony. Often, trials become 'beauty contests' between experts.

In spite of the risk, there are cases that proceed to trial.

Arbitration may be preferable, if all parties agree, because ENCON may be able to access one or more arbitrators who have design or construction experience. These proceedings can sometimes get tied up in procedural wrangling as well if the rules aren't determined beforehand and aren't respected by all parties.

Generally, this is the procedure for a surveyor's claim.

## **5.2 Claim/Incident Report Form**

The following form is used by the Professional Surveyors Canada supported, Professional Liability Insurance Program, managed by the ENCON Group Ltd. in cooperation with the Professional Surveyors Canada Professional Liability Insurance Committee. It is designed to be filled out by the insured at the first indication of a claim or incident and forwarded directly to the Broker and the Insurance Managers. The form should be filled out carefully and forwarded immediately as the information on the form provides the preliminary information to initiate the managed response to a claim or incident.



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 Fax 613-238-7180  
 www.encon.ca

# Claim/Incident Report

## Professional Surveyors Canada Professional Liability Insurance Program

Date: \_\_\_\_\_ Your Policy No.: LS\_\_\_\_\_

Full Name of Insured: \_\_\_\_\_

Address: \_\_\_\_\_

Phone No.: \_\_\_\_\_ Contact Name: \_\_\_\_\_

(LS responsible for project)

Claimant(s): \_\_\_\_\_

Other Defendant(s): \_\_\_\_\_

Date of Incident: \_\_\_\_\_

Date you were Notified: \_\_\_\_\_

Brief Description of Claim/Incident: \_\_\_\_\_

\_\_\_\_\_  
 \_\_\_\_\_

Please circle the code description on the attached sheet that most accurately describes the claim/incident.

\_\_\_\_\_  
 Signature

**PLEASE FORWARD THIS FORM ALONG WITH A COPY OF ANY DEMAND LETTER AND/OR LEGAL PROCEEDING TO BOTH ENCON GROUP INC. AND YOUR BROKER AT THE ADDRESSES LISTED BELOW:**

The CG&B Group  
 120 South Town Centre Blvd.  
 Markham, Ontario L6G 1C3  
 Toll Free: 1-800-267-6670  
 Fax: 905-479-9164

ENCON Group Inc.  
 500-1400 Blair Place  
 Ottawa ON K1J 9B8  
 Toll Free: 800-267-6684  
 Telephone: 613-786-2000  
 Fax: 613-238-7180

**PLEASE NOTE THAT ANY CLAIMS REPORTED COULD BE DISCUSSED WITH THE PROFESSIONAL SURVEYORS CANADA PROFESSIONAL LIABILITY INSURANCE COMMITTEE, THE INSURERS, THE BROKER, AND ANY OTHER RELEVANT PARTIES.**



Please **circle** a code from each box that most accurately describes the claim/incident.

2 Discipline codes

Type of Survey Project	Clients/Claimant
01 Seismic 02 Geodetic/Control 03 Mapping/Topographic 04 Marine/Hydrographic 05 Engineering Surveys 06 Construction Layouts 07 Oil/Mining 08 Mortgage Certificates/Building Certificates 09 Legal Surveys/Quieting of Title Surveys 10 Other – please list _____ _____ _____ _____	01 Municipalities 02 Government (Provincial/Federal) 03 Commercial/Developer 04 Resource 05 Private/Individual 06 Agricultural 07 Lawyers 08 Engineers 09 Industrial 10 Other – please list _____ _____ _____ _____

3 Cause Codes

Alleged Error/Allegation	Resulting Problems/Loss
01 Transposition of Number 02 Technical Computation 03 Horizontal Measurement 04 Vertical Measurement 05 Lack of Information/Incorrect Information provided 06 Incorrect Survey Monument Used 07 Improper or Insufficient Check of Documentation 08 Drafting Error 09 Communication problem between LS and Client 10 Other – please list _____ _____ _____ _____	18 Elevation Incorrect 19 Horizontal Location Incorrect 20 Encroachment Problem 21 Property Boundary Located Incorrectly 22 Property Damage 23 Bodily Injury 24 Area Calculation Error 25 Delay 26 Other – please list _____ _____ _____ _____

Please **circle** a code from each box that most accurately describes the claim/incident.

2 Discipline codes

Type of Survey Project	Clients/Claimant
01 Seismic	01 Municipalities
02 Geodetic/Control	02 Government (Provincial/Federal)
03 Mapping/Topographic	03 Commercial/Developer
04 Marine/Hydrographic	04 Resource
05 Engineering Surveys	05 Private/Individual
06 Construction Layouts	06 Agricultural
07 Oil/Mining	07 Lawyers
08 Mortgage Certificates/Building Certificates	08 Engineers
09 Legal Surveys/Quieting of Title Surveys	09 Industrial
10 Other – please list _____	10 Other – please list _____
_____	_____
_____	_____
_____	_____

3 Cause Codes

Alleged Error/Allegation	Resulting Problems/Loss
01 Transposition of Number	18 Elevation Incorrect
02 Technical Computation	19 Horizontal Location Incorrect
03 Horizontal Measurement	20 Encroachment Problem
04 Vertical Measurement	21 Property Boundary Located Incorrectly
05 Lack of Information/Incorrect Information provided	22 Property Damage
06 Incorrect Survey Monument Used	23 Bodily Injury
07 Improper or Insufficient Check of Documentation	24 Area Calculation Error
08 Drafting Error	25 Delay
09 Communication problem between LS and Client	26 Other – please list _____
10 Other – please list _____	_____
_____	_____
_____	_____
_____	_____



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# Preliminary Interview or Fact Sheet for Surveyors

Name of Insured: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

**IMPORTANT:** The Insured should assemble copies of all documents relevant to the problem.

Name of Claimant: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Is claimant represented by legal counsel? \_\_\_\_\_

## A. POLICY DETAILS

1. Certificate No.: LS \_\_\_\_\_ 2. Certificate Period: \_\_\_\_\_ to \_\_\_\_\_  
(dd/mm/yy) (dd/mm/yy)
3. Continuing Cert. No.: LS \_\_\_\_\_ 4. Limit: \$ \_\_\_\_\_ Agg: \$ \_\_\_\_\_
5. Deductible: \$ \_\_\_\_\_

## B. PARTICULARS OF JOB

1. Job description, Address and Location: \_\_\_\_\_  
\_\_\_\_\_
2. Owner of Project: \_\_\_\_\_
3. General Contractor (if applicable): \_\_\_\_\_
4. Other Consultants (list of known): \_\_\_\_\_
5. Description of Insured's mandate: \_\_\_\_\_  
\_\_\_\_\_
6. Date Survey Started: \_\_\_\_\_ Date Construction Started: \_\_\_\_\_  
(dd/mm/yy) (dd/mm/yy)  
Construction Halted: \_\_\_\_\_ Date of Substantial Completion: \_\_\_\_\_  
(dd/mm/yy) (dd/mm/yy)  
Date of Final Acceptance: \_\_\_\_\_  
(dd/mm/yy)
7. Provide copy of contract between insured and owner or letter of confirmation or description of contract.

## C. PARTICULARS OF THE POTENTIAL PROBLEM

1. Type of Survey (please check applicable category)  
(a) Seismic  (b) Geodesic/Central Surveys  (c) Mapping/Topographic  (d) Marine/Hydro   
(e) Engineering Surveys  (f) Construction Layout  (g) Mortgage Certificates/Building Certificates

(h) Oil Mining  (i) Legal Surveyors/Quieting of Title Surveys  (j) Other

2. Type of Clients/Owners (please check applicable category)

(a) Municipalities  (b) Government – Provincial /Federal  (c) Commercial/Developer   
(d) Resource  (e) Private Individual  (f) Agriculture  (g) Lawyers  (h) Engineers   
(i) Industrial  (j) Others

3. Allegations involving your work. Provide full description: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4. Alleged error causes code (please check applicable category)

(a) Transposition of number  (b) Technical computation error  (c) Horizontal measurement error   
(d) Vertical measurement error  (e) Lack of information/incorrect information provided   
(f) Incorrect survey monument used  (g) Improper or insufficient check of documentation   
(h) Drafting error  (i) Communication problem between insured and his client  (j) Other

5. Who is making the complaint/allegations? (please attach letter) \_\_\_\_\_  
\_\_\_\_\_

6. How is the complaint/allegation made if no letter? \_\_\_\_\_

7. Date of allegations/complaint: \_\_\_\_\_  
(dd/mm/yy)

8. Insured's opinion as the cause of problem: \_\_\_\_\_  
\_\_\_\_\_

9. Estimated or actual cost of remedial work if applicable: \$ \_\_\_\_\_

10. Is there a potential for delays or other costs? \_\_\_\_\_

11. Are insured's fees being paid? If not, what is owed: \$ \_\_\_\_\_

12. What action is to be taken on fees? \_\_\_\_\_

13. Is there any property damage involved? \_\_\_\_\_

14. Is there any bodily injury involved? \_\_\_\_\_

15. Resulting problem (please check applicable category)

(a) Elevation Incorrect  (b) Horizontal Location Incorrect  (c) Encroachment Problem   
(d) Property Boundary Located Incorrectly  (e) Property Damage  (f) Bodily Injury   
(g) Area Calculation Error  (h) Delay  (i) Other

16. Describe atmosphere between insured and owner/client: \_\_\_\_\_  
\_\_\_\_\_

Date Prepared by Adjuster: \_\_\_\_\_ Date Received by Adjuster: \_\_\_\_\_  
(dd/mm/yy) (dd/mm/yy)