

# A Legal Opinion About Liability

## The Question

*"Mr. Tom Jones, O.L.S. entered into employment with the firm of Black & White, Ontario Land Surveyors, in 1962. In 1965 Mr. Black died and Mr. Jones obtained a partnership with Mr. White. In 1972 Mr. White sold his interest to Mr. Jones who is now the sole proprietor. Mr. White is now deceased also.*

*What legal liability falls to Mr. Jones regarding surveys undertaken by the firm in the past? Would the liability be affected if Mr. White was still alive, but retired from the Association?"*

## The Answer

Pursuant to Section 45 of the **Limitations Act**, all of the following analyses will be subject to the proviso that the limitation upon mistakes made with respect to surveys requires that the writ be issued within 6 years after the cause of action arose. Therefore mistakes made in any given year cannot be sued upon subsequent to 6 years following the commitment of the mistake by the surveyor or partnership in question.

In your fact situation, the firm of Black & White became in 1965 on the death of Mr. Black, the firm of White & Jones. Later in 1972, Mr. White sold his interest to Mr. Jones, who operated the business as a sole proprietor presumably under his own name. In the years 1962 to 1965 before Mr. Black died, Mr. Jones was under no legal liability for any faulty plans made by the firm during that period or in the past as he was only an employee and not subject to any partnership liability, jointly or severally.

Subsequent to 1965, and after Mr. Jones became a partner with Mr. White, if there was no agreement entered into regarding past liabilities as between the partners themselves, then the following provisions of the **Partnerships Act** prevail.

Under Section 10 of the **Act** it states as follows:

"Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner, and after his death his estate is also severally liable in a due course of administration for such debts and obligations so far as they remain unsatisfied, but subject to the prior payment of his separate debts"

In conjunction with that Section 15 (2) states that:

"Where after a partner's death the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part thereof does not of itself make his executor's or administrator's estate or effects liable for partnership debts contracted after his death"

Lastly, Section 18 states that:

1. "A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner
2. A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement".

Therefore, when Mr. Jones became a partner in 1965, he would not thereby become responsible for any prior mistakes made by the partnership, even if a Writ was issued after he became a partner because the liability of a partner does not commence until his admission into the firm unless there is an agreement to the contrary as between the partners themselves it being of no consequence to third parties unless they are privy to such document. Between the years 1965 and 1972, when the firm operated under the name of Black & White or White & Jones, then of course Mr. Jones would be jointly liable with Mr. White for any mistakes made during that period by the firm, but for mistakes made prior to 1965, Mr. Black's estate and Mr. White would be the responsible parties.

Subsequent to 1972, after Mr. White retired and sold his interest to Mr. Jones, had there been a mistake made between 1965 and 1972 and a Writ issued after 1972 when Mr. Jones ran the business, then Mr. White would be equally responsible with Mr. Jones, provided the limitation period had not run, unless the provisions of Section 18 (3) applied, which states as follows:

"A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted".

If Mr. White was dead instead of retired, then he could be caught within the provisions of Section 10 as previously mentioned.

With respect to the second hypothetical problem in which you pose predominantly the same fact situation, but indicate that the firm, instead of being a partnership is an incorporated entity, the fundamental principle to be applied in this situation is that a corporation is continuous in its existence and is not reconstituted every time an individual is brought in as a member of the corporation and the corporation remains liable no matter how often there is a change in its human composition, its only safeguard being the extent of its assets as an incorporated entity and the limitation period provided by Section 45 of the **Limitations Act**.

It is necessary lastly to consider the present provisions of Section 26 of the **Surveyor's Act**, R.S.O. 1970, Chapter 452, which section refers to the certification of authorization regarding partnerships, associations of persons or corporations. Pursuant to the provisions of this section upon certification the official representative or representatives will be responsible for ensuring that the Act, regulations and by-laws are complied with by the legal entity. This responsibility means in effect that the official representative or representatives bear the responsibility on behalf of the members of the legal entity which has obtained a certificate of authorization, but third parties will sue the legal entity itself and will not be concerned with the provisions of Section 26. Section 26 in effect states that the official representative or representatives have a duty to ensure that the Act, regulation and by-laws are complied with by the legal entity and that where the holder of a certificate of authorization fails to comply with the aforesaid Act, regulations or by-laws the council may reprimand the holder or suspend the holder or revoke the certificate of authorization.

Lastly any agreement entered into by members of a corporation or partnership which has obtained a certificate of authorization as to limiting the liability of a particular member of such entity is only effective amongst the members of the entity who have knowledge of the agreement and does not affect the public at large who, pursuant to the law can proceed against the partnership as a whole, the sole proprietor or the corporation.