



ROWP News Bulletin

Practice and Industry Updates for Practitioners

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LETTER FROM THE MANAGER

The ASTTBC AGM had a significant increase in ROWP attendance this year and many expressed how they were surprised and impressed with what they heard and saw. As an association of 10,000 members from backgrounds as diverse as intelligent traffic control management to thermography for inspections of buildings and subsystems, we heard how our members are applying technologies in amazing ways. Considering how onsite sewage systems have evolved over the past 10 years and the advances in technologies coming at us, its not surprising to see how we connect by way of our specialized group we call ROWPs.

During this AGM, one particular presentation of interest to many, especially the ROWPs in the audience, covered contracts and liability. The lawyer giving the presentation did so at the AGM the previous year but due to problems that have occurred with home inspectors and ROWPs, he was invited back to give special emphasis to these groups. It is very important for ROWPs to understand the liability and responsibility on us as part of the professional reliance process we work in. The risk cannot be down played and certainly not ignored. For this reason, highlights of the presentation are the second topic in this bulletin with the first being recent changes to the SSR. An understanding of these changes will also help avoid problems with the other.

ROWPs named for Top In Technology Awards

For the first time, several ROWPs were acknowledged for their contribution to the onsite industry. Their time spent promoting best practices, use of technologies in their work, and demonstration of professionalism was recognized with awards presented by John Leech, Executive Director of ASTTBC.

Recipients of the Top In Technology Awards are Harold Kindopp of Creston and Deon Kinnee of Prince George. Congratulations and thanks for your great work representing ROWPs.

As always, I encourage you all to contact me with your thoughts and concerns.

Ron Hein
Manager, Onsite Wastewater Registration Program
ASTTBC

CHANGES TO THE SEWERAGE SYSTEM REGULATION

Changes made to several parts of the Sewerage System Regulation, by the Ministry of Healthy Living and Sport through an Order in Council came into effect on June 25, 2010 and are attached. One is an improvement to the definition of a health hazard, and it is not just when sewage is flowing across the land. Other portions clean up wording around being a registered practitioner and the ASTT Act that empowers ASTTBC as the regulator of ROWPs.

A particular amendment (Sec. 6 (1)(b)) has raised some questions from ROWPs. It deals with allowing a homeowner to construct or maintain a sewerage system on their own property under the supervision of an authorized person. All sewerage systems still require a Filing be made with their local Health Authority and the Filing still needs to be made by an authorized person. Filings still need to be made BEFORE the system is constructed and an authorized person is still needed to provide all the final Filing documents, including the O&M plan and LoC, just as they do now. No change there.

A ROWP allowing the property owner to be involved with constructing the system is still an option which the authorized person must decide if they wish to allow or not. Where the property owner has suitable equipment, the ability to provide labour, or some other skill that could reduce the cost, then the Authorized Person can elect to utilize the property owner. If the Authorized Person does not find safe working equipment or demonstrable skills that make this option feasible, or if they see the associated liability as being too high, they don't need to enter into such a contract. It is a choice.

If a ROWP does agree to involve a homeowner, then all other aspects of ASTTBC's Onsite Wastewater Registration Policies still apply. A Planner undertakes the site and soil assessment, creates the plan, and registers the Filing. If the Planner is not also an Installer, then they will have to retain the services of an Installer because **a Planner cannot supervise installations**. Construction review, absolutely and all Planners should provide this but the review is not a supervision of the installation itself other than to confirm the installation substantially meets the Planner's intended design. In the same manner, **a Planner or Installer cannot supervise maintenance work** if they don't hold registration as a Maintenance Provider. A ROWP can only work and supervise within the category of registration they hold.

Property owners cannot create a Filing, stamp paperwork, or carry out any other task that is not supervised by the appropriate ROWP or Professional.

A ROWP involved with the planning and installation may have a property owner assist them in whatever capacity they wish, but **the ROWP is still 100% responsible and liable for all aspects of the planning and installation including the quality of work carried out by the property owner.** The Onsite Wastewater Registration Policy sets out the requirements for ROWPs supervision the work of others and is as follows:

Oversight Guidelines for ROWPs per Policy Section 9.0 & Appendix D

A general definition of Oversight is “the act of watching over, including having control of, the work or tasks of another who may lack full knowledge of the concept or requirements at hand and taking full responsibility/liability for the work or services provided”.

For a Registered Onsite Wastewater Practitioner (ROWP) oversight means:

1. Oversight of a Trainee or a ROWP:

To oversee and assume responsibility for the activities related to onsite wastewater services being carried out by an ‘unqualified’ ROWP contractor or a registered Onsite Wastewater Trainee; to ensure that all work is performed according to the requirements of the Standard Practice Manual. While it is expected that there should be sufficient ‘on site’ reviews (recommended to be present ‘on site’ for key stages of the project or work), the amount of oversight required will be at the discretion of the ROWP taking responsibility for the work performed.

Oversight of Trainees and ‘unqualified’ ROWPs should take into account that mentoring (Appendix ‘H’) may be a part of the process and guidance should be provided to assist in their career development.

Note: That while oversight is not required for a ‘qualified’ ROWP, Planners are responsible for Project/Construction Reviews.

2. Oversight of Contractors or others:

The ROWP must be in charge and take full responsibility and liability for the actions of a contractor or others, who are non-authorized persons, engaged in an onsite wastewater activity or task; to ensure that they perform their work in accordance with the requirements of the Standard Practice Manual. The oversight requires that the ROWP must be present ‘on site’ while the work is being performed.

ROWPs must ensure that the level of oversight in all cases will ensure their due diligence as to the public health and welfare and their responsibilities for good practices as defined by the Standard Practice Manual. ROWPs must not provide oversight for any function for which they are not certified or registered.

CONTRACTS & LIABILITY

During the lawyer’s presentation at the AGM, he explained how legal judgements holding professionals accountable when things go wrong are resulting in larger insurance claims and settlements - no surprise there. The most notable court action in BC involved a home inspector who did not take appropriate measures which the presenter explained was more a classic “what not to do”.

For an in-depth explanation of the court outcome, Google “Salgado v. Toth” and you can find a number of hits that will outline the case in considerable detail. In brief, the home inspector carried out an insufficient level of inspection and did not convey his concerns to the client that warranted further inspection possibly requiring specialists. The report was vague and didn’t convey the seriousness of the problems or what the next step should be for the client.

There are also discussions around professional reliance, but the one particular item that I see concerning ROWPs involves contracts. Either the lack of a contract or the poor content within it. This home inspector had a clause stating his limit of liability was to the cost of the inspection itself, namely the \$450 he charged to the client. Based on the circumstances of how this limitation was presented to the client, the court declined giving effect to the provision within the contract and gave a judgement against the home inspector of almost \$200,000.

Drawing up contracts that work well takes an investment in time and the assistance of a lawyer - preferably one who specializes in contract and liability matters and is familiar with current court outcomes that may affect the content of contracts. The need for a written contract with clients is part of Principle 1 of the ASTTBC Code of Ethics where:

“All members who provide services directly to the public or perform work as independent contractors, have a duty of care to ensure financial protection to their clients in the event of their errors and omission.” It further states the “Council of ASTTBC may also from time-to-time specifically name certain registrants (practicing), who then become obliged under the ASTT Act, to carry error and omission insurance.”

Obviously error and omission insurance doesn’t come cheap, but the rates are also set by the degree of risk the underwriters either predict, or have paid out. The best way to reduce these rates is to take measures to reduce the risk. So here are some recommendations the lawyer passed along:

- Define in your contract and your work product the limited scope and purpose of your work product. If you are proposing to plan a system, describe in detail what you are planning to provide, what you are planning not to provide, and for what fee. Items that are not included in the fee need to be spelled out and if someone else is expected to provide some portion of a service or work, then be very clear on this.

For example, the Planner will carry out site and soil assessments but the fee does not include the use of an excavator, so spell out what costs this might reasonably be, how long it might be needed, and whether you expect the client to arrange for this or if you will do so. If the possible location of the dispersal field is under 3 meters of brambles, who is expected to clear the area and just how large an area do you require? If no water is readily available on the site for you to do perc tests, do you require the client to arrange and pay for water to be delivered or will you include this as one part of the fees charged.

- Include in your contract that you will be disclaiming liability to third persons. Your client may pass or sell your work to someone else and what you planned or reported to the original client may be misinterpreted by others.

- Limit the length of of time for liability. In BC, a statute limits the length of time different matters can be taken to court. For example, two years for physical damage or injury to a person, six years for economic loss and so on. There is a section that defines when a person can initiate an action, but there is no prohibition against setting a term within an engagement letter reducing the limitation period.

Keep it reasonable, such as 2 years from providing a report, a plan, the last invoice, substantial completion, suspension or termination, or other point that can show the client received a product. If they sign the contract knowing this, the limitation is agreed upon.

- The limitation language must be clear and unambiguous. If it is full of legalese and gobbledygook that appears to be intended to confuse the client, don't expect the court to be supportive.
- Limiting liability should still provide some compensation for loss, and just like limiting the time period in which the client may sue, so must the amount of compensation be reasonable. A suggestion by the lawyer was an amount up to \$20,000 as this still fits well within provincial Small Claim Court where more informal means of resolving a contract dispute can be handled, often in a much quicker manner as well.

As the lawyer has worked for many insurance companies over some 25 years, he stated the insurance companies "would be delighted if you limit your liability to some reasonable number that the Court will enforce."

- Establish a clear intent of the client to be bound and make it clear that only the parties involved in the contract are to sign the contract.
- Promote the client's freedom to the contract and indicate a willingness to negotiate specific terms. For example, if the client wishes to raise the limit of liability to \$50,000 instead of \$20,000, then indicate what the difference in the fee will be for the higher risk. Instead of an inspection estimated to take 3 hours, it becomes 6 hours and the extra costs are for the extra work to undertake a higher level of diligence.
- Do not begin any work until the client has indicated in writing, either by fax or by an email, that he/she will accept the terms of the contract, or better yet, has given you a signed copy of the contract with the date indicating when the contract takes effect.
- Establish the mutual obligations between the parties, whether it be work carried out, access to the site, payment for specific points of completion, and defining when the job is completed. Estimated time periods and issues that might delay some portion of the work, such as weather conditions, are also important to include.
- Beware of entering into "cost-plus" agreements as these need extra attention to spelling out details to ensure the client knows what the probable end costs will be. The Code of Ethics also strongly discourages the use of such contracts as they are wide open to misinterpretation, especially for installation of systems, rather than a fixed price quotation. Choosing to use a "cost plus" agreement puts the ROWP in a very hard to defend position.
- Adhere to the professional standards and realize the more you deviate from them, the more liability you attract.

The last suggestion from the lawyer was "charge more and do it right the first time". Undercutting to get a job and doing the least amount of work to complete the job will likely cause the client to take legal action against you. These would also be contrary to the Code of Ethics and something that is coming before the Practice Review Board far too frequently.

This information was provided to ASTTBC by Mr. David B. Wende of Alexander, Holburn, Beaudin and Lang LLP, 604-484-1700.