ADVISING CLIENTS ABOUT OPTIONS FOR ASSURING TITLE

Brian Bucknall and Scott Lau[1]

1. INTRODUCTION

It is beginning to sink in that conveyancing, the oldest, the most pervasive and unquestionably the most boring of legal skills, is in the midst of a revolution. It is only fitting, of course, that a revolution in conveyancing takes decades and is almost imperceptible except to the most skilled observers. But a revolution it is, and we are in the middle of it. The question which we now face is whether, as solicitors, we should seek to do "business as usual" (the bakers continued to sell baguettes during the French Revolution) or alternatively, we should look for new services to provide or new ways to make use of our traditional skills (though carpenters were, we are told, in high demand for the erection of scaffolds and the construction of coffins).

The revolution in conveyancing is, to a degree, a reaction to the evolution of an almost Byzantine real property regime in the middle decades of this century. Buying and selling property was not always the complex and perilous undertaking that we have come to know in our professional lives. I once reviewed a file in which a gentleman purchased the southeast corner of the King Street and Bay Street intersection in Toronto just before the First World War. The title searches and associated enquiries could have been completed, and probably were, in a day[2]. If you contrast that to the standard "checklist for real estate transactions" published from time to time by the Law Society, you might begin to wonder what sort of a monster we, as lawyers and as a society have created.

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2 "My Dear Osler", "My Dear Boland: Chronicles of an Early Real Estate Flip". The *Law Society of Upper Canada Gazette*, Vol. XXIV, pg. 331, 1990.

Part of the problem of course, has been that we have used real property, a necessarily stable element in the midst of economic, social and cultural flux, as a tool to achieve all sorts of goals not necessarily related to the use and development of real estate. Why, for example, should a failure to comply with the severance control provisions of the *Planning Act* invalidate a title? Invalidation of title is simply a highly effective mechanism to achieve one of the proper goals of our planning regime. The lives of lawyers, however, would have been considerably simplified if the province had elected to rely on fines. At the same time that the province's planning regime was being strengthened, the conveyancing regime was being rendered both complex and perilous. Our revolution in conveyancing practice, though seldom justified in this way, appears to me to be an effort to re-establish a degree of efficiency, simplicity and certainty.

The first volley in our revolution may have been the preference which Registrars began to show for Reference Plans as an accepted means of legal description. The *Land Registration Reform Act*[3] made our documents simpler and more straightforward and allowed for the introduction of Standard Charge Terms. The Polaris project which is now ripening into Land Titles (Qualified) registrations throughout the province (and where LTQ fails, Parcelized Day Forward Registration systems under the *Registry Act*) is a major transformation of our title searching obligations and capabilities[4]. The move to electronic searching and electronic registration makes the abstract books, registry offices and subsearches which we grew up with the stuff of a past generation.

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3 *Land Registration Reform Act*. R.S.O. 1990, Chapter L.4. The Act was first passed in 1984.

4 The Land Titles (Qualified) registrations are initiated by Registrars (with the assistance of the Teranet project) through the exercise of the Registrar's prerogatives under Section 46 of the *Land Titles Act*, R.S.O. 1990, Chapter L.5. Land registered under Land Titles (Qualified) registration does not have its boundaries certified by the Registrar and may be subject to possessory and prescriptive claims. On the other hand, such lands, as will be noted later in this paper, are not subject to severance control issues and escheat issues arising prior to the date of the conversion.

These musing are, perhaps, somewhat high flown as an introduction to a paper on "Advising Clients About Options for Assuring Title". I hope, to justify these observations in the pages which follow. The challenge for all of us is to become comfortable with the idea that we can allow conveyancing to become both less complex and less expensive without compromising either the interests of our clients or the standards of our profession.

2. THE TRANSACTIONAL CONTEXT - WHAT DO YOUR CLIENTS NEED, WHAT DO YOU NEED?

In exploring what our revolution has done to us (and for us), it might be useful to take another look at a typical conveyancing transaction to assess what lawyers do and why they do it. One of the significant concerns in reviewing our conveyancing practices is the degree to which the interests of the lawyer and the interests of the client intersect. These intersections are sometimes convergences, in which both parties interests are served, and sometimes (implicitly or explicitly) divergencies, in which the interests of one party may be at variance with the interests of the other. Obviously, our professional ground rules call on us to avoid at all costs divergencies, but the issue needs some rethinking.

Let's use a conventional transaction as an example. A purchaser wishes to buy a house and lot on a plan of subdivision in Georgetown for $400,000. The house was built in 1970. What does the purchaser want? What does the purchaser need? In practical terms the purchaser has made his or her most important decisions before the lawyer gets involved. The important decisions are "I like the house", "I like the location", "I can pay for it". Many modern purchasers want assurance on a third matter, "Is the house in good condition, has it been well constructed, are its utility systems in order?" Many of these issues are beyond the expertise of lawyers, though lawyers can be of assistance in inserting conditions in an Agreement of Purchase

and Sale which will give the purchaser the opportunity to solve any suspected problems.

As lawyers we like to think that purchasers are eager to be assured that they will have "good title" to the property. My own experience suggests that there is some wishful thinking in this assessment of the situation. Most purchasers assume that good title exists and is available - the lawyer is the technician who presses the buttons and pulls the levers that bring everyone to the proper result. The unexpected encumbrance and the unanswerable requisition are rarities for vendors, purchasers and their legal respective advisors. The question of title should be important to a sophisticated purchaser in two respects. Is the title which is being transferred acceptable to a financing party? Will the title be acceptable to (or capable of being forced upon) a subsequent purchaser? On all of these points, a lawyer's legal skills are fully engaged and the advice which he or she provides can precisely meet the client's needs, whether or not the client has a sophisticated appreciation of what those needs are.

Of what importance to the client is the balance of our classic "checklist"? Imagine, for example, that the purchaser of the Georgetown house has made a house inspection and has been advised that the shingles are in bad repair and that the roof, in fact, is leaking. With this advice at hand, the client decides that the transaction is still a desirable one. Is it of practical concern to the client that a work order is or is not outstanding against the property? The house sits on a street lined with single family detached homes. Is it of practical concern to the client that he or she be informed that the zoning permits single family detached homes? Could a client excuse further enquiry on that point? If the client advises that he or she has visited the area, that the subdivision is on gently rolling land and that a river valley lies a kilometre to the east, should the client expect enquiries to be made with the local Conservation Authority?

To press our Georgetown home example a step further, imagine that while the plan of subdivision is perfectly conventional in every way, there is no up-to-date survey showing the boundaries and the location of the house. Absent the survey, the municipality cannot confirm compliance with the setback requirements in the zoning by-law. While we may pay the usual fee to get confirmation of the seemingly self-evident fact that single family dwellings are a permitted use, we will qualify our report by saying that we cannot give any opinion on compliance with the zoning by-law in any other respect. We shift this risk to the purchaser for a number of reasons, many of which remain unarticulated. The lawyer could order an up-to-date survey and send the survey to the local building department for confirmation of compliance. Whether this could be completed prior to closing, always remains a question and the expense involved is significant. The procedure can only have two consequences, "Yes, the house complies with the zoning by-law in all respects" or "No, the house is not in compliance with the zoning by-law". Absent a demonstration that the building constitute a lawful non-conforming use, the land owner's option is to seek a minor variance.

A purchaser who understands the expense involved and the risks associated with detailed enquiry is not, in my opinion, being imprudent in accepting that risk. The only difficulty is that at some future date, the purchaser may find him or herself in the role of vendor and be faced with a reluctant buyer who uses a zoning requisition to defeat the transaction. Once again, the purchaser would not be imprudent in assessing this risk and considering it a manageable one. (As will be pointed out hereafter, zoning is an area where conventional title insurance policies provide coverage only where you are forced to remove the building or you cannot use the land as a single-family residence. Otherwise, compliance with zoning is an exception to coverage.)

Of course, the purchaser is just one of the interested parties in most transactions. What does the mortgagee say? Even if a purchaser would waive a search with regard to work orders would the mortgagee be as accommodating?

On all of these points, and on the numerous other details that can bedevil a transaction, the interests of the lawyer and the interests of the client intersect, though whether they are converging or diverging is an open question. Much of what we as lawyers do on these transactions protects the clients but also protects us. Enquiring with regard to zoning, checking for corporate escheats and ensuring that there are no work orders protects us from claims of negligence hereafter. This protection is, of course, purchased by the client through legal fees and disbursements. Could we, in the future, trust our clients to, with our advice, assess the practical risks which they face and choose which risks to accept and which to limit through detailed investigation?

Is this then our new challenge? Should we, and can we, move from what has been our standard approach - that all risks associated with a real estate transaction should be identified and eliminated on closing - to a new approach - that risks should be assessed and the client should be asked to provide guidance on which risks he or she is willing to live with.

3. THE TRADITIONAL VIEW OF A LAWYER'S OBLIGATIONS

If there is, in fact, a revolution in conveyancing, it appears to be fomented by legislators, registrars, technocrats and, most recently, title insurance companies. There is a great deal about the revolution that lawyers can applaud. Unfortunately, our traditional understanding of our roles in conveyancing, and the guidance we get from the Law Society of Upper Canada necessarily makes us reluctant revolutionaries. A review of our current situation will help to define our prerogatives for change.

Lawyers find that they get involved in real estate transactions at various stages. In large transactions, they craft the Agreement of Purchase and Sale in consultation with the client and negotiate contentious matters with the lawyer for the other side. It is not, I believe, self-serving to say that this is the optimum situation, it simply isn't a realistic option for small transactions. Sometimes lawyers will review Agreements of Purchase and Sale drafted by real estate agents. Not infrequently, of course, we simply find the completed agreement placed before us with no option other than to see to its implementation.

At whatever stage the lawyer enters the transaction, the expectation of the Law Society is that the lawyer should thereafter "control" the process. The person who controls, of course, takes responsibility for the work done and attracts liability for errors[5].

General Duties of Lawyers

The lawyer is bound by the Rules of Professional Conduct[6] in carrying out any tasks that he or she undertakes for the client. The lawyer must act in a manner consistent with professional standards. For example, the lawyer must:

- act with integrity[7];
- be conscientious, diligent and efficient[8];

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5 Law Society of Upper Canada, *Professional Standards Checklist: Residential Real Estate Law* (April, 1991) as reprinted in CCH Canadian Limited, ed., *Ontario Real Estate Law Guide* (toronto: CCH Canadian Limited, 1993+) vol 1 at ix.

6 Professional Rules of Conduct Handbook, Law Society of Upper Canada 1996 edition.

7 *Rules of Professional Conduct* Rule 1.

8 *Rules of Professional Conduct* Rule 2(b).

- seek advice from experts in other fields, when needed[9];
- keep the client reasonably informed, including responding to requests for information[10];
- maintain office staff and facilities adequate for the lawyer's practice[11];
- avoid self-induced disability which interferes with client service[12];
- be honest and candid[13];
- advise the client promptly when a mistake has been made and recommend independent legal advice[14];
- hold information received from the client in confidence[15];
- disclose any conflicting interest[16];
- not stop acting for the client except for good cause and upon appropriate notice[17].

The lawyer also has express obligations when dealing with financial matters for the client. The Rules of Professional Conduct cover:

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9 *Rules of Professional Conduct* Rule 2, Commentary 6.

10 *Rules of Professional Conduct* Rule 2, Commentary 8(a)-(b).

11 *Rules of Professional Conduct* Rule 2, Commentary 8(i).

12 *Rules of Professional Conduct* Rule 2, Commentary 8(o).

13 *Rules of Professional Conduct* Rule 3.

14 *Rules of Professional Conduct* Rule 3, Commentary 10.

15 *Rules of Professional Conduct* Rule 4.

16 *Rules of Professional Conduct* Rule 5, Commentary 4.

17 *Rules of Professional Conduct* Rule 8.

- the duty to preserve and exercise safekeeping over a client's property entrusted to the lawyer[18];
- the narrow circumstances in which a lawyer may borrow from a client[19]; and
- the principles governing fees and disbursements[20].

There are also extensive rules regarding the handling of client monies in Reg. 576, under the *Law Society Act*.[21]

Furthermore, many of the lawyer's obligations fall within the scope of the "fiduciary duties" which the lawyer owes to each client. Breach of a fiduciary duty may be pursued by a client in the Courts, and negligence by the lawyer need not be proven. Once the breach of fiduciary duty is proven, a variety of remedies is available.

Generally, the real estate lawyer has at least three roles in every real estate transaction: conveyancing technician, general counsellor and advisor, and fiduciary.

There is extensive protection for the client relying on the work of the lawyer. The lawyer is held to high standards by (a) the *Rules of Professional Conduct*, (b) the standard of care that has evolved over time, and (c) equitable fiduciary principles. These are overseen by both the Law Society of Upper Canada and the Courts.

4. RULES GOVERNING THE LAWYER'S SERVICES

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18 *Rules of Professional Conduct* Rule 6.

19 *Rules of Professional Conduct* Rule 7.

20 *Rules of Professional Conduct* Rule 9.

21 R.S.O. 1990, c. L.8.

In addition to the general duties of the lawyer as discussed above, there are specific rules that apply to the lawyer when advising clients about options for assuring title. The major legal sources to consider are:

(a) Section 50(1) of the *Law Society Act*, R.S.O. 1990, Chapter L.8;

(b) Section 1 of the *Solicitors Act*, R.S.O. 1990, Chapter S. 15;

(c) The Rules of Professional Conduct established by the Law Society pursuant to its powers in this regard under Section 63 of the *Law Society Act*. The relevant rules are Rule 5 - Conflict of Interest, Rule 9 - Fees and Disbursements, and Rule 30 - Lawyers' Duties with Respect to Title Insurance in Real Estate Conveyancing;

(d) The Code of Professional Conduct established by the Canadian Bar Association.

(e) Ontario Regulation 666 (Revised Regulations of Ontario, 1990) pursuant to the *Insurance Act*, R.S.O. 1990, Chapter I. 8.

(f) The Criminal Code - Concealed Commissions

(g) The Fiduciary Obligations of a Lawyer to a Client

(h) The Contractual Duties of a Lawyer to a Client

(i) The Tortious Duties of a Lawyer to a Client

(a) The *Law Society Act*

Under section 50 of the *Law Society Act*, every person who carries on the law in Ontario must be a member of the Law Society. Section 50(1) of the *Law Society Act* contains the general prohibition against unauthorized practice. This section reads as follows:

> 50(1) Except where otherwise provided by law, no person, other than a member whose rights and privileges are not suspended, shall act as a barrister or solicitor or hold himself, herself or itself out or represent himself, herself or itself to be a barrister or solicitor or practice as a barrister or solicitor.

The prohibition against unauthorized practice protect members of the legal profession who have been admitted, enrolled and are duly qualified against wrongful infringement by others. The prohibition also protects the public by ensuring that persons carrying on the practice of law are qualified to do so.[22]

Section 50(1) ensure that anyone offering legal advice in connection with title problems will be a member of the Law Society of Upper Canada and therefore be governed by the Rules of Professional Conduct.

(b) The *Solicitor's Act*

The *Solicitor's Act* contains provisions that generally govern the fee arrangements between a lawyer and his client.

Section 1 of the *Solicitor's Act* contains provisions similar to the prohibition of unauthorized practice found in the *Law Society Act*. This section reads as follows:

> 1. If a person, unless a party to the proceeding, commences, prosecutes or defends in his or her own

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22 *R. v. Mitchell*, [1952] O.R. 896 (C.A.). See also *Law Society of Upper Canada v. Burch* (1989), 63 D.L.R. (4th) 275 (Ont. H.C.).

> name, or that of any other person, any action or proceeding without having been admitted and enrolled as a solicitor, he or she is incapable of recovering any fee, reward or disbursements on account thereof and is guilty of a contempt of the court in which such proceeding was commenced, carried on or defended, and is punishable accordingly.

Section 1 of the *Solicitor's Act* therefore like section 50(1) of the *Law Society Act* ensures that anyone offering legal advice in connection with title problems will be a member of the Law Society of Upper Canada and will be governed by the Rules of Professional Conduct.

(c) The Rules of Professional Conduct

The Law Society of Upper Canada has passed rules of professional conduct which are to be observed by all lawyers.[23] In addition to possible disciplinary proceedings, a failure to comply with the professional rules of conduct may in an appropriate case be evidence in support of a finding of negligence or breach of a fiduciary duty in a civil suit. The rules are an important guide to the courts in determining the nature of the duties flowing from the professional relationship.

There are three rules which are relevant to lawyers providing advice in connection with title of a property.

Rule 5

Rule 5 deals with "Conflict of Interest" and states:

> The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned,

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23 Similar rules exist in all the other provinces.

> should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.

Commentary 1 states:

> A conflicting interest is one which would be likely to affect adversely the lawyer's judgment on behalf of, or loyalty to a client or prospective client, or which the lawyer might be prompted to prefer to the interests of a client or prospective client.

Commentary 7 states:

> The same basic considerations apply where the conflicting interest arises not by reason of the lawyer's duties or obligations to another client but by reason of the financial or other interest of the lawyer or the lawyer's associate. For example, the lawyer, or a family member, or a law partner might have a personal financial interest in the client or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client.

Conflicts of interest in conveyancing transactions are, of course, a perennial problem. As I noted above, the optimum arrangement for both clients and lawyers is to have each party to a transaction independently represented. We all concede, however, that the optimum situation also involves the greatest expense and imposes unrealistic burdens on the participants in small transactions. With the appropriate disclosures in place, therefore, lawyers will frequently act for both purchasers and mortgagees in an apparently uncomplicated transaction[24]. I will consider hereafter whether adding a title insurer to a transaction could create a further conflict of interest.

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24 Interestingly, the Rules of Professional Conduct in British Columbia are specific on this point. A lawyer can act for both sides only in an uncomplicated transaction and the term "uncomplicated transaction" is defined.

Rule 9

Rule 9 deals with "Fees and Disbursements" and is particularly relevant. Commentary 7 of Rule 9 reads, in part, as follows:

> 7. Any arrangement whereby lawyers directly or indirectly share, split or divide fees with conveyancers, notaries public, students, clerks or other persons who bring or refer business to the lawyer's office, is improper and constitutes professional misconduct. It is equally improper for a lawyer to give any financial or other reward to such persons for referring business.

The prohibition on fee splitting is grounded on the principle that a solicitor should not deal with a client in any manner which makes the solicitor's private interests a factor in the advice the client receives. The solicitor is obliged to deal with his or her client strictly by reference to the client's interests and in a manner which allows the client to make the most objective possible assessment of the options available to him/her.

Rule 30

Rule 30 is a newly enacted rule dealing with "Lawyers' Duties with Respect to Title Insurance in Real Estate Conveyancing".

Section 2 of the rule states:

> The lawyer cannot receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to his or her client. The lawyer must disclose that no commission or fee is being furnished by any insurer, agent or intermediary to the lawyer with respect to any title insurance coverage.

Commentary 3 states:

> The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. For the purposes of this rule, "lawyer" includes the lawyer's firm, any employee or associate of the firm or any related entity.

Rule 30 and its commentary is, I believe, simply a specific application of the principles in Rule 9. Any private reward to a lawyer for recommending one title insurance company over another (for "steering" the client to one title insurance company and away from another) is unprofessional. The fact is, of course, that we will frequently find ourselves recommending one or another insurer and the reasons behind the recommendation will relate to matters such as the nature and extent of the coverage, the premiums charged, the claims experience and the numerous other items that go into making this sort of business decision.

I am sure qualms of conscience will arise from time to time as the insurers throw dinner parties or present gift pens, though I believe our professional antennae are sufficiently finely tuned to know where the line falls between congeniality and corruption.

(d) The CBA Code of Professional Conduct

In addition to the Rules of Professional Conduct, the Canadian Bar Association has passed rules and commentary under a Code of Professional Conduct. The Code is to be observed by all lawyers and is largely similar to the Rules of Professional Conduct. Where there is a conflict between the rules adopted by the Law Society of Upper Canada and the Canadian Bar Association, the law society rules should prevail.[25]

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25 *Essa (Township) v. Guergis* (1993), 15 O.R. (3d)573 (Div. Ct.) at 581.

The sections of the Code relevant to lawyers providing advice in connection with the title of a property are identical to those of the Rules of Professional Conduct discussed above except the Code does not have an equivalent to the newly enacted Rule 30 of the Rules of the Professional Conduct. As mentioned, the substance of the rule would likely be included in the section dealing with "Fees".[26]

(e) The *Insurance Act* and Regulation 666

Section 139 of the *Insurance Act* deals with title insurance but is not relevant to the issue of the lawyer's duties in advising clients. Regulation 666 under the *Insurance Act* governs the "Classes of Insurance" that can be offered in Ontario. Section 3(3) establishes a specific control on title insurance:

> 3. A licence issued to an insurer to undertake title insurance in Ontario is subject to the limitations and conditions that no policy of title insurance shall be issued unless the insurer has first obtained a concurrent certificate of title[27] to the property to be insured from a solicitor then entitled to practice in Ontario and who is not at that time in the employ of the insurer.

This Section was added to the Regulation in 1957. It has been the subject of vigorous attack in recent years but there does not appear to be any movement on the part of the government to change it.

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26 *Rules of Professional Conduct* Rule 9 and *Code of Professional Conduct* Chapter XI.

27 It is unfortunate that Regulation 666 uses the phrase "Certificate of Title" in defining the services which are to be provided by solicitors. "Certificate of Title" has a very technical meaning under the *Land Titles Act* and, as well, under the Torrens system of land registration which is used in Western Canada. The Certificates of Title spoken of in the land registration statutes are issued by Land Registrars. The most usual term for a solicitor's report on title is a "title opinion".

(f) The Criminal Code

We all shudder when the Criminal Code is mentioned. Anyone who is practising in accordance with the provisions of the Rules of Professional Conduct will not come within range of the prohibition on secret commissions which is established in Section 426(1)(a) of the Criminal Code. It is, however, useful to be reminded of how serious these issues can become. Section 426(1)(a) states:

> Every one commits an offence who
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> (a) corruptly
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> (i) gives, offers or agrees to give or offer to an agent, or
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> (ii) being an agent, demands, accepts or offers or agrees to accept from any person,
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> any reward, advantage or benefit of any kind as consideration for doing or forbearing to do, or for having done or forborne to do, any act relating to the affairs or business of his principal or for showing or forbearing to show favour or disfavour to any person with relation to the affairs or business of his principal.

A lawyer for the purposes of this section might be treated as the agent of a purchaser of property. If, as agent, the lawyer sought title insurance for the purchaser and received a commission of which the purchaser was unaware, the code would be violated.

(g) The Fiduciary Obligation of a Lawyer to a Client

A fiduciary relationship arises when one party places a trust or confidence in another or is dependent upon the other in some significant way. The solicitor-client relationship is one of the generally accepted categories where fiduciary obligations exist. The fiduciary's obligations have been defined in various ways, but central to it are qualities of loyalty and selfless responsibility. Any activity inconsistent with the

concept of adherence to utmost good faith toward the client is a breach of fiduciary duty.

The fiduciary duties of a lawyer include:

- the duty of loyalty,
- the duty of good faith,
- the duty to avoid a conflict of interest,
- the duty of full disclosure,
- the duty to account for secret profits, and
- the duty to avoid personal use of a trust opportunity.

An example of a breach of fiduciary duty is a solicitor acting for both sides in a mortgage transaction.[28] In *Carlofsky*, Mr. Justice Lerner of the Ontario Supreme Court described the appropriate test for a solicitor in such a position:

> .... the solicitor must act with caution and keep the lender fully informed of any risks involved in making the loan. The lender is entitled to be aware of the risks if he has to decide whether he is prepared to accept them.
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> Where a solicitor has information which he know or ought to know might affect the decision of the proposed mortgagee as to the soundness of the investment if he were made aware of the facts, failure to make that information known is a breach of the solicitor's fiduciary relationship to his client.

(h) The Contractual Duties of a Lawyer to a Client

A solicitor will be in breach of contract if he fails to carry out an express or implied term of the contract between himself or herself and the client. One term the courts will imply into the contract is that the solicitor is to carry out his work in accordance

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28 *Carlofsky v. McGuire* [1979] 3 A.C.W.S. 250 (Ont. H.C.); see also *Lapierre v. Young* (1980) 30 O.R. (2d) 319 (H.C.).

with the standard of care performed by a reasonable, competent solicitor performing similar work in similar situations.

(i) The Tortious Duties of a Lawyer to a Client

A solicitor can also be sued in tort for negligence (or in some cases, for a specific tort such as fraudulent misstatement). The solicitor has the duty to exercise a reasonable degree of care and skill having regards to the standard adopted by the members in the profession.

Therefore, on a given set of facts, quite often the client will be able to bring actions against solicitors for breach of fiduciary duty, breach of contract and/or negligence.

5. SOME PROFESSIONAL AND ETHICAL DILEMMAS

(a) Is There a New Conflict of Interest When a Title Insurer is Involved?

Rule 5, dealing with conflicts of interest was discussed above. We can, working within the Rule's structures act for both a purchaser and a mortgagee. Does the addition of a title insurance company change the equation?

As has been noted, title insurance companies are required by the regulations under the *Insurance Act* to obtain a "Certificate of Title" from a solicitor before issuing a title insurance policy. Can a lawyer, with proper disclosure, act concurrently for a purchaser, a mortgagee and a title insurance company? Is there any impropriety in a purchaser being asked to pay for the lawyers service to the other two parties?

Once again, assuming full disclosure and assuming a transaction in which the lawyer can remain confident that the interests of the parties are not diverging, I see no conflict of interest in this set of relationships. In financing transactions, the

borrower frequently pays its lawyer to provide opinions on which the lender and the lender's counsel rely. Paying a lawyer to provide a certificate on which a title insurance company will rely is no different.

(b) What liabilities does a lawyer have with regard to Certificates of Title?

A title insurer must have a "concurrent Certificate of Title" from an independent solicitor in order to issue a title insurance policy. What is the nature of the relationship between the title insurer and the solicitor? Is the solicitor retained by the insurer as a second client in the same transaction? Alternatively, is the preparation and production of a title certificate simply a service which the purchaser requests the solicitor to provide to the insurer?

The latter arrangement is likely to be the standard, though I will explore hereafter the question of whether the solicitor could take two retainers on the same transaction. The model most frequently used will, I believe, be the model used with residential financings - the lawyer acts for the purchaser as well as the mortgagee and provides legal opinions to both, at the expense of the purchaser.

What if the title certificate is inaccurate or incomplete? What if a title problem surfaces after the policy of title insurance has been put in place? A lawyer who is retained and paid by a title insurer would, of course, have the same obligations to that client as to any other. I do not believe the situation is materially different if the lawyer is engaged, and paid, by the purchaser to provide the title certificate to the insurer. It is clear that the insurer is intending to rely on the title certificate and to undertake legal obligations based on the lawyer's work. At the very least, a suit for negligent misstatement would apply if the certificate is wrong.

Would the title insurance company pursue a lawyer where the title certificate is wrong? The answers given by title insurers to this perennial question are, to put it

politely, indirect. The insurers clearly have a right to sue, though we are frequently told that the right is seldom exercised and is exercised only where the most egregious errors have occurred. To date, there have not been any cases in Canada brought by any title insurance company against a solicitor.

Paragraph 23 of the TitlePLUS Subscription Agreement between the solicitor and LPIC provides that the solicitor will not be liable for any costs, expenses or legal fees incurred in connection with any claim made under the TitlePLUS policy. In addition, LPIC agrees to waive any rights of subrogation it may have against the solicitor.

Paragraph 24 of the TitlePLUS Subscription Agreement provides that the solicitor will be liable to LPIC for any loss resulting from the solicitor's failure to comply with the terms of the Agreement because of his/her intentional act or omission or gross negligence, or any fraudulent act or omission by the solicitor.

Paragraph 25 provides that the solicitor will reimburse LPIC for the first $500 paid by LPIC in respect of each claim. Therefore, in effect, the solicitors will pay the deductible of $500 for any claims paid out by LPIC.

The issue of liability is briefly dealt with in the First American Title Insurance materials. It is stated in "A brief on title insurance prepared for solicitors" that with the use of the title insurance policy, the solicitor will still be liable for his/her opinion to the title insurer, but only to the extent of willful misconduct or gross negligence.

One important element to understand is the exact nature of the allocation of risk among the title insurer, the lawyer and the purchaser. The standard title insurance policies, for example, protect the purchaser in the event that title is impaired by reason of a forgery in the earlier chain of documents. Fraud and forgery, of course,

has never fallen within the scope of the conventional legal opinion. We always "assume the authenticity" of all documents and registrations. The risk, in this regard would clearly have been shifted from the purchaser to the title insurer. Executions against former owners in the chain of title raise a different set of considerations. Searching for executions and obtaining satisfactory evidence that none are outstanding is part of a lawyer's conventional services and in the standard transaction, that risk has been shifted from the purchaser to the lawyer.

Title insurance policies protect purchasers against judgements and liens encumbering the property and the practical and monetary risk has thereby been shifted to the insurer. To what degree, however, is the lawyer protected by the insurer's assumption of risk? Does the insurer expect a clean certificate of executions with regard to each title? Does the insurer provide coverage in circumstances where there is evidence of an execution but the question of whether the judgement debtor was or was not one and the same as the person in the chain of title cannot be settled?

The final issue is whether the title insurer would have access to the lawyer's professional insurance where an inaccuracy in a certificate caused damage to a purchaser. My understanding is that a lawyer who provides a title certificate to a title insurer is in exactly the same position as a lawyer who provides a title opinion to a lender. The work involved is a legal service and the lawyer is insured with regard to difficulties which arise by reference to that service.

(c) Can a Title Insurance Company Pay a Lawyer?

Another aspect of this question, however, is whether an insurance company, as part of its approach to the title insurance market could engage a solicitor and pay a solicitor's fee for the preparation of a title certificate. (To accord with Regulation 666, the solicitor cannot be a member of the title insurance company's staff but there is

no prohibition on a title insurance company retaining and paying an independent lawyer.) The insurance company would pay the fee directly but the fee would not be paid for the "recommendation" (as is prohibited by section 2 of Rule 30), but rather for the legal expertise involved in creating the certificate. Similarly, a fee for a legal service would not be a "commission" within the meaning of Rule 30. A transaction of this sort would, of course, be tested by the rules with regard to conflict of interest discussed above. There is no reason if the conflict of interest tests are met, that a lawyer cannot serve, and independently bill, two clients in a transaction in which the lawyer's services are interconnected.

A further consideration may arise. What if a title insurance company offers to set a flat fee for the preparation of the title certificate in a particular transaction? Imagine a title insurance company which states that it will pay a fee of $200 for the preparation of a title certificate in a transaction in which its policy is used. Imagine, as well, that the solicitor realistically estimates that the work to be done will cost $600. Is such an arrangement proper? Would such an arrangement contravene the Rules of Professional Conduct?

Obviously, the arrangement will have been fully explained to all participants. Anything less than full explanation would be an impropriety. That having been said, the first question in analyzing such an arrangement is, "Does the lawyer obtain some private advantage which is of no benefit to the client?" Perhaps an example will illustrate both the problem and a potential answer. At the beginning of this paper, we considered the purchase of a house and lot in Georgetown for $400,000. Imagine that the purchaser comes to the lawyer and asks for assistance. The lawyer is happy to oblige and, in accordance with the proposed procedures gives the client the Law Society's booklet on home buying (which will be discussed hereafter) and, explains the options for title insurance as being:

- A conventional legal opinion.

- A policy of title insurance from a private title insurer in lieu of a conventional legal opinion.
- A TitlePLUS policy of title opinion.

The lawyer might explain that in his or her experience, the fees and disbursements associated with a conventional legal opinion would be $1,500. Insofar as a policy of title insurance was purchased, the lawyer would be excused from certain searches and disbursements and the legal fee could be estimated to be $1,000. The client would save the difference between the title insurance premium and $500. If the lawyer went on to say that the use of any title insurance policy would involve the preparation of a certificate of title which would, in the lawyer's estimation, cost $600 but that a specific title insurance company had agreed that it would bear $200 of that fee, the result to the client would be that its charges on the transaction would be lowered by $200 while the lawyer's renumeration remained unchanged, though it comes from two sources.

The Rules of Professional Conduct contemplate circumstances in which a lawyer provides one service for the benefit of two clients and advises that the cost of the service should be split between the clients (the lawyer cannot "double-dip" the fees) but if they are split other than equally, the clients should agree to the split which is being made[29].

My overall conclusion is that there is no ethical problem in an arrangement where an insurer offers a financial benefit which is directly relevant to the client's expenses on a transaction and there is no increase in the lawyer's renumeration.

(d) The Problem of Private Advantage for a Lawyer

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29 *Rules of Professional Conduct* Rule 9, Commentary 3.

Many of the themes touched on in this paper are various ways of addressing the lawyer's obligation to be independent, objective and personally disinterested (in the ethical sense) in the advice the client receives. This obligation is another way of expressing the lawyer's "fiduciary obligation" to treat the client with complete good faith and not to let the lawyer's personal interests colour or influence the advice given to the client or the course of action on which the client embarks. Another phrase that sometimes comes up, and one I have already used in this paper, is the ethical prohibition on "steering" clients. Lawyers will inevitably, and quite properly, continually find themselves making recommendations with regard to one or another course of action which their clients might pursue.

A lawyer who had good experiences with the local credit officer at the "Brown Bank" will naturally suggest to clients that this would be a good person to contact about a loan. The issue becomes an ethical one if the Brown Bank provides some advantage, direct or indirect to the lawyer by reason of the recommendation which has been made. The issue here is, perhaps, more subtle than it would first appear. Successful commercial relationships among professionals and other parties serving the client are an essential, and highly useful, part of a lawyer's services. Impropriety creeps in only where the recommendations themselves begin to garner some private advantage for a lawyer of which a client or a series of clients might be unaware.

As I have already noted, if a private advantage problem could arise with a real estate broker or a banker, it could certainly be of concern in the relationships made among lawyers, clients and title insurers.

The private advantage issue is, of course, exactly the issue which is addressed by Rule 9 and Rule 30 as previously discussed. I do not believe that these rules will impede our revolution. Rather, they will simply allow us to explore new conveyancing territory with an already well-developed caution.

(e) Would the Choice of the Title Insurance Option itself be a Private Advantage to a Lawyer?

In the example previously used concerning title insurance and its impact on the fees paid by the client, I suggested, somewhat hopefully, that a client's title insurance premium could excuse the lawyer from certain searches and opinions and, thereby, could lower the fee for legal services and, perhaps, the overall cost of the transaction. If such an analysis proved correct, the arrangement appears to be advantageous for all parties.

One further consideration should be addressed - the insurance premium paid by the client for title insurance will go some way toward limiting the lawyer's potential liability on the transaction. (The degree to which some limitation is available is, of course, dependent on the instructions which the title insurer gives concerning the title certificate and on the practices which the title insurer follows with regard to the lawyer who gave a title certificate when a title problem arises). Is this a type of "private advantage" which should be brought to the attention of a client?

When TitlePLUS is brought into the equation, some further, though admittedly remote, advantage might be discerned for the lawyer rather than the client. TitlePLUS is the profession's title insurance vehicle and its success will be reflected in the success which the profession's insurer enjoys and in the legal insurance premiums which are ultimately paid. On this second point, the Law Society counsels us to explain to our clients the type of interest which we, as lawyers, have in one of the title insurance vehicles.

I think these "private advantages" should not be over-stated. One could discern a whole network of benefits unrelated to client interests in almost every professional relationship that arises in the context of client work. The key element must remain

that the client is objectively and disinterestedly guided among the options available and allowed to choose the one most exactly relevant to his or her concerns.

6. HELPING A PURCHASER TO UNDERSTAND THE OPTIONS FOR TITLE PROTECTION

Whether we recognized it or not, there have always been a number of ways in which a purchaser could address issues with regard to title. A purchaser could choose among:

(a) Taking no protection whatever with regard to title[30];

(b) Obtaining a lawyer's opinion and relying on the lawyer's insurance in the event that the lawyer is proven to be negligent;

(c) Obtaining a policy of title insurance.

The first option, taking no protection whatever, has sometimes been selected by my clients, always with my strong disapproval. We once assisted a client in buying a chain of gas stations and complied with the client's advice to simply obtain and register deeds without title searches or opinions of any sort. We protected the firm, of course, with very carefully drafted directions and acknowledgements from the client. The fact that the client is now out of business was, I trust, unrelated to any problems with regard to its real property.

The second option, the lawyer's opinion on title, has heretofore been the most substantial vehicle of title assurance. Any of you who have access to conveyancing files that go back five or six decades will note that the role of the opinion letter or

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30 Yes, this would be unusual. The Law Society's booklet on home-buying does not even recognize it as an option.

reporting letter has evolved over the years. A two page letter in the 1950s which simply offered the firm's opinion that "good and marketable title" was acquired on closing, subject to specified mortgages was not unusual. Reporting letters have become longer and longer over the years and, arguably, have given correspondingly less and less assurance to the purchaser. Our qualifications with regard to title, "the exception set out in Section 44 of the *Land Titles Act*", "any defects which might be revealed by an up-to-date survey" all identify areas where the lawyer does not intend to take any responsibility and the risk is shifted to the client.

One may, from time to time, wonder whether the clients who receive these letters read them, or if they read them, understand the allocation of risk which has been made on their behalf. Having said that, however, I do not see any reason in principle why a sophisticated and well advised client couldn't negotiate for a broader set of exceptions to title in return for lower fees and disbursements. A client might, for example, accept an exception with regard to corporate escheats on the understanding that no disbursements would be incurred to search out and examine corporate names. A client might accept an exception with regard to *Planning Act* contraventions. Any understanding of this sort between a lawyer and a client would have to be documented with the greatest care at the time the retainer is received and the file is opened. The courts are, unfortunately, filled with cases in which the lawyer did "X" and the client, some years later, recalls that his or her instructions to the lawyer were to do "Y". The courts are also filled, in this era of litigation over independent legal advice, with plaintiffs whose understanding of fundamental legal concepts becomes remarkably vague when problems subsequently arise.

As noted previously, the purchaser is seldom the only interested party. Any exceptions to an opinion approved by a purchaser would also have to be approved by a mortgagee.

The third option, title insurance, has always been available though seldom used. Conventional wisdom has been that a title insurance company would not issue a policy except where the lawyer has already done the work necessary to assure both the client and the title insurance company that title was good. The title insurance company is a "Johnny come lately" that offers no relief from legal fees and little of practical benefit for the premium it receives.

As the title insurance companies never tire of explaining, views are changing on the third option. At one end, extremely complex, and, in particular, multi-jurisdictional transactions with closings in various times and places, can be eased with thoughtfully crafted policies of title insurance. Title insurance can, for example, be an alternative to an escrow closing and can cover the "gap" between an advance of funds in one jurisdiction and final title registration in another jurisdiction[31].

Title insurance companies can also assume risks that clients do not wish to assume for themselves and that it is unnecessarily expensive for lawyers to assume. Title insurance companies will assure you that one final advantage should be considered: When a problem arises for which they have given coverage, they will simply get to the bottom of it and correct it. There will be no need for the purchaser to embark on litigation, prove the standard of care and show that the standard has not been met.

A further matter to consider is the fact that financial institutions may, in the future, decline to place mortgages except where a policy of title insurance protects the mortgagee. Title insurance in that case is fundamentally related to the institutions

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31 I have to confess that my own experience on title insurance for complex transactions has not been encouraging. In a transaction involving several square miles of property, we wondered whether a policy of title insurance could be of assistance in addressing the problem that the descriptions in numerous title deeds had to be plotted and matched to ensure that there were no gaps and overlaps. Title insurance could have covered the issue, but, as it turned out, engaging a surveyor to do computer-assisted boundary plotting solved the problem at less than a quarter of the title insurance premium.

mortgage portfolio and the ability of the institution to treat the various items in that portfolio as commodities which can be traded with other institutions. The title insurance policy would provide mortgagees with a type of advantage of which the purchaser may be wholly unaware.

With the introduction of TitlePLUS, the third option becomes somewhat more complicated. Not only will we be expected to explain that title insurance is available by the Lawyers Professional Indemnity Company and TitlePLUS but also that other types of title insurance from independent title insurance companies are available for consideration. If a client elects to take the third option, what advice must you, can you and should you give?

Under Rule 30, we will be obliged to advise that the TitlePLUS option is sponsored by our profession (and to some, admittedly remote, degree) our own self interest is served by the selection of that policy. (The question of private advantage raises itself again and again in these transactions. The client who chooses any policy of title insurance may advantage the lawyer in a practical way by limiting the scope of the lawyer's liability, the client who chooses a TitlePLUS policy will strengthen the Lawyers Professional Indemnity Company.)

One aspect of the selection of title insurance is going to be difficult for a number of years. Our experience, both professional and personal, with insurance companies, is highly various. You will often hear people exchange stories of how difficult, or easy, it was to get a settlement after a car accident. Most of us will have virtually no experience with regard to the various title insurance companies available and, of course, TitlePLUS will have had no experience whatever that we can use for guidance. On one point, the financial strength of the companies, we can at least take comfort in the fact that they are all licensed under the Ontario *Corporations Act* and *Insurance Act* and administered in accordance with the federal *Insurance Companies Act*.

Federally incorporated and foreign insurance companies seeking to carry on business in Canada must be authorized by the federal Superintendent of Financial Institutions before commencing business. In order to keep its licence in good standing, a federal or foreign insurance company must file regular reports with the federal superintendent and must continually demonstrate compliance with statutory solvency requirements.[32] In addition, a federal or foreign insurance company must be licensed in the provinces in which it does business.

Provincially incorporated insurance companies must be licensed under provincial insurance legislation which has similar requirements to those imposed by federal legislation.

Having considered all of these points, can a lawyer help a client choose between, for example, TitlePLUS and First American Title Insurance? The actual comparison of different clauses has been done elsewhere in this programme and I would not be able to improve on the points made by Jim Leal, Audrey Loeb, Bruce McKenna and Harry Herskowitz. Once again, the question is "What does the client need?" The client needs:

- A policy that he or she can understand and rely on when issues arise.

- An understanding of which risks the title insurance company takes, which risks the lawyer will be responsible for and which risks he or she will be taken to have accepted.

- An understanding that the use of a title insurance in one transaction does not guarantee that it will be used, or even available in a subsequent transaction and that while the client has protection in the event of a subsequent sale which cannot be completed, the possibility

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32 *Insurance Companies Act*, ss. 664-69, 679, 680.

exists that the existence of an insured risk may upset some subsequent clients.

7. HOW WILL THE LAW SOCIETY AND TITLEPLUS ASSIST IN SELECTING OPTIONS?

The Law Society is developing a booklet which will be a sort of "plain language" introduction to how purchasers can be assured of title on their residential transactions. The booklet, which is provisionally titled *Working With a Lawyer When You Buy A Home,* will be available in quantity and could be handed out to clients at almost any time. Obviously, it would be most relevant when the client is actually buying a home, but the information might even be of interest to people buying properties other than residential properties.

Coupled with the booklet is the "Acknowledgement and Direction from Purchaser" which is a highly detailed form of retainer letter which is to be used to organize the transaction. The retainer letter, like the booklet, is intended to be useful whether or not TitlePLUS, or any other form of title insurance is selected. The first item addressed in the retainer is whether or not the purchaser will rely on the lawyer's opinion, TitlePLUS or some other form of title insurance. The retainer letter will, of course, be part of the software available at the lawyer's computer. The relevant points are filled out with detailed information and the points not relevant to the specific transaction can be deleted.

I am sure that both the booklet and the retainer letter will quickly find their way into conventional residential practice, they are simply too useful to be ignored. I predict, as well, that they will not only make title insurance a familiar part of residential practice, they will almost make it, in the minds of purchasers, an expectation. We will probably find ourselves challenged to explain why a title insurance premium is not a useful expenditure.

8. WHAT ARE THE IMPLICATIONS OF THE OPTIONS FOR LAWYERS?

The point has been raised a couple of times already. A lawyer is apt to see some degree of private advantage through the limitation of his or her work and the corresponding limitation of his or her liability in having a client use a title insurance policy. This should not be regarded as an ethical dilemma. The corresponding dilemma exists on the other side, a client who chooses to rely on the lawyer's searches and opinion will undoubtedly pay a higher legal fee.

Where a client elects to use a title insurance policy, the most salient issue is how the exclusions in the policy are to be covered. How, for example, should a lawyer advise a purchaser on the use which he or she can make of the property? A friend recently purchased an unusual condominium unit which consisted of a main floor and a basement in a four unit building. The basement had itself been adapted as a independent rental unit. My friend intends to use the entire property as one dwelling unit and to renovate the basement as additional living space for the family. Should my friend be concerned as to whether or not the basement unit was a lawful use?

The First American Title policy lists as an exclusion any zoning by-law. However, zoning coverage is provided as an exception if you are forced to remove your existing structure or you cannot use the land because use as a single-family residence violates an existing zoning by-law. The TitlePLUS policy gives coverage against "the inability to use your land as a single residential dwelling because such use contravenes the zoning by-law" but excludes any further restriction on use based on a zoning by-law. There is, however, an option to purchase "Future use endorsement" which provides additional coverage for losses from any specified future use from violations of zoning by-laws as at the date of the policy.

If my friend had been offered title insurance (which, of course, he wasn't) the TitlePLUS policy would have an obvious advantage. Would a cautious lawyer, however, have suggested that the question of whether the basement apartment was lawful, should be addressed, since that might be a significant element in the resale value of the property at a later date? If, in an analogous case, a purchaser selected the TitlePLUS policy and advised the lawyer that it was unnecessary to review zoning issues, should that advice be reflected on the lawyer's report on the transaction?

Similar considerations arise on environmental matters. Title insurance policies typically offer no coverage for environmental contamination. In my experience, residential purchases are almost never made subject to environmental audits or conditions concerning environmental contamination. Is it sufficient for a lawyer to simply point out the fact that no enquiries are made and no assurance given on this point or should that be expressed in a report with regard to the transaction?

9. TITLE INSURANCE IN THE CONTEXT OF REFORMS IN THE REGISTRY SYSTEM

The fact that title insurance is being introduced at the same time that our registry system is being modernized raises some interesting considerations. Both the TitlePLUS policy and the First American policy protect a purchaser against contraventions of the severance control provisions of the *Planning Act*.[33] Titles in both the Land Titles system and Registry system are, in general, equally vulnerable to such a defect and may no longer have to be searched in accordance with the usual standards if title insurance was obtained. Where, however, *Registry Act* land has been brought under the Land Titles system with qualified registration, no

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33 Under both TitlePLUS and First American coverage of violations of the *Planning Act* are provided under an exception to the exception to coverage.

contravention of the *Planning Act* prior to the date that the LTQ parcel is created will affect the property.

In addition, both the TitlePLUS policy and the First American policy appear to cover the risk of a loss of corporate status and the associated escheat to the Crown. The Crown would be someone else who "owns an interest in your title" in the words of the First American policy or has "any other interest" in your land in the words of the TitlePLUS policy. Once again, however, an LTQ registration has eliminated any concerns with regard to corporate status up to the date of the creation of the LTQ parcel and there is very little protection required on that point.

10. EXAMPLES OF ADVICE IN SPECIFIC TRANSACTIONS

As noted above, the option of using title insurance has been available in Ontario for many years, though it was not frequently resorted to. TitlePLUS will be available only in residential transactions but the increased familiarity with title insurance will undoubtedly leave us in a position where commercial clients are also seeking advice on this option for assuring titles. Perhaps it would be useful to go through a series of examples to consider how we might find ourselves responding to our clients. I will make the examples quite specific so as to illustrate as many issues as possible. The rule for all of us must remain that we have to take the time to know what the client wants before we can establish the appropriate advice.

(a) **A Single Family Home:** A client comes to you with an executed Agreement of Purchase and Sale for a 25 year old single family home on a subdivision lot. You assume at the outset, that the property is registered with absolute title under the *Land Titles Act*. The property is fully fenced, but the vendor does not have an up-to-date survey.

Since the Agreement of Purchase and Sale has already been executed, you will not be called upon to craft any special conditions concerning financing and home inspections. Within the very near future, a lawyer will probably be able to find the Parcel Identifier Number for the property and call up the parcel page on his or her computer at the start of the interview. You could advise the client whether the property was registered under the *Registry Act*, the *Land Titles Act* or the *Land Titles Act* with Qualified registration and you could consider the implications of each of those types of registration as they might affect boundaries and surveys. If time and money permitted, you might suggest that an up-to-date survey would be a good investment and that such a survey would help you ascertain whether the building was in compliance with the zoning by-laws. As indicated previously, I would not consider it unreasonable for a purchaser to waive both of those steps.

It would be at this point, with an understanding of the applicable registry system and some knowledge of the parcel that you would have to address the issue of whether title insurance would be useful to the client. What conventional legal searches and disbursements could you avoid if a policy of title insurance was put in place? Would you advise the client that you will not search behind the parcel page for issues concerning corporate existence or executions if a title insurance policy is put in place? (Would you allow the client to excuse you from those searches and take those risks for his or her own account?) Is insurance under, for example the TitlePLUS policy against "any improperly completed, delivered or registered document" or invalidity caused by "any fraudulent act, forged document, exertion of undue influence or lack of capacity of any person" a sufficiently high risk to make a title insurance premium appropriate?

Canadians tend to be risk-averse and insurance-prone. I expect that in this example, I would conclude that the benefits of a title insurance policy would be marginal. I expect, as well, that if the title insurance premiums were not prohibitively high, the client would be apt to say "Oh go ahead, sign me up".

One further point should be considered. What would the purchaser's lender have in mind? If the purchaser already has a mortgage commitment, the mortgagee should be consulted on the type of title assurance which it thinks appropriate. Taking instructions from a purchaser to proceed with a conventional title opinion and getting subsequent instructions from the mortgagee that a policy of title insurance is essential, is the worst of both worlds.

(b) **Condominium Purchase:** The purchase of a condominium unit is, of course, an even more simple transaction. The "survey" was established once and for all with the registration of the condominium declaration and all of the pertinent facts are registered on title. No *Planning Act* issues arise and the current standard of practice is not to search for questions of corporate status or escheat prior to the registration of the condominium declaration. Absent a financial institution which insisted on a policy of title insurance, there would be very little to gain from using title insurance in addition to the standard searches and enquiries.

(c) **Purchase of an Industrial Building:** A client asks you to assist in the purchase of a 40 year old industrial building in Aurora and the parcel of land it sits on. The property is fully fenced and a recent survey shows that the fence does, in fact, follow the legal boundary. The client comes to you before the Agreement of Purchase and Sale is executed

and you insert a provision that the agreement is conditional on a satisfactory engineering inspection of the structure and a satisfactory environmental audit of the structure and the surrounding land. The property has recently been brought under LTQ registration. The client will have to finance the acquisition and anticipates major renovations with additional financing in a couple of years' time.

This transaction would appear to be relatively simple from a financing point of view. The boundaries are confirmed by a recent survey. While LTQ registration would not cut out possessory or prescriptive title, the practical implication of the fence is to ensure that none exist. With LTQ registration, no *Planning Act* or corporate escheat problems can lurk behind the parcel page.

In this circumstance, the conventional searches are inexpensive, comprehensive and certain. The risks which a private title insurance policy might cover are relatively remote. The purchaser might, however, find a policy of title insurance useful in its negotiations with financing parties.

(d) **The Purchase of Vacant Land for Development:** Your client asks for your assistance in buying a 100 acre parcel of farm land which he intends to redevelop as a residential subdivision. You are able to draft the Agreement of Purchase and Sale and you insert the usual "developer's terms". The vendor will sell the property and take back a mortgage for 80% of the purchase price which will be interest-free during the period that the development is under way. The land is registered under the *Registry Act* and your search goes back to the concession lot. There are three chains of title in the 40 year title search period which coalesce five years previously. Portions of the land have

been surveyed within the last 20 years, but there is not comprehensive survey. The vendor has agreed to postpone its mortgage to a construction mortgage when draft plan approval has been obtained.

In this circumstance, of course, the client's major issues are associated with land use controls, official plans, zoning by-laws and subdivision agreements. Title insurance has little to say on any of these matters. The title investigation, however, is potentially complex and the problem of adverse claims, particularly, around the boundaries, is a lively one. Declarations of possession are of limited value given that no one has been in actual occupation. The client will clearly need a very precise survey of the property at some point in the application for draft plan approval but may not wish to incur that expense at the time of the initial closing.

If a title insurance policy were available which shifted the risk over possessory and prescriptive rights, corporate escheats and gaps and overlaps in metes and bounds descriptions were available, it could provide a real service to both the lawyer and the client. The lawyer might consider explaining this to the client and then attempting to negotiate a new policy of title insurance.