The fact situation for the purchase of "Greenacre" is loosely based on an actual transaction that closed recently in Nova Scotia using title insurance but the claims were "invented" for this example. The problem is meant to illustrate differences between Lawyers' Opinions On Tide and Title Insurance particularly in matters of survey, extent of protection of purchasers, and the handling of claims.

It is important for Lawyers in Nova Scotia to learn the specific coverage of title insurance policies so we may advise our clients about the advantages and limitations of title insurance. By not informing ourselves we may give bad advice leading clients and ourselves into avoidable trouble.

Title insurance is a "lender's friend" but it is not a panacea for all transactions. Title insurers provide Lenders with more favourable coverage than they do purchasers. This seems intended to cause lenders to require title insurance in purchases with mortgages for their own benefit not the purchaser's.

Title Insurers, appropriately, now require a solicitor's opinion on title before issuing a title insurance policy for a purchaser. After assessing the risks disclosed by the opinion they will insure over the immaterial "theoretical plaintiff" risks that cause us much grief but except **liability for material risks which** must be released or borne by the insured. I am concerned about accounts suggesting **that the new Title** Insurance Processing Centre in Metro intends to issue title insurance policies to Purchasers based on limited searches and inquiries determined by acceptable insurable risks to the insurer **but not necessarily** the Barrister's Society' Practice Standards which are in place to avoid risk.

While possibly less expensive initially, it may be quite prejudicial to a purchaser to make selective title inquiries and to insure over survey, land use, and "off title" matters instead of checking for problems upfront. Insuring over these matters may leave a purchaser with a property that has an incurable problem or with exposure to significant uninsured costs. It will be of limited comfort to the purchaser that his/her insured mortgage lender is fully indemnified while he or she, alone, is saddled with an uninsured cost or an unresolved problem.

I believe we should consider using title insurance, where warranted, as a valuable tool. It should not be used to ignore or paper-over significant problems or to perpetuate problems that should be cured. We should not work around the problems in our present system by embracing another system that is a "bandaid". The correct solution to current problems is to improve the land tenure system - to cure the disease; not treat the symptoms. Fortunately this process has started with the partnership of our Society and the Nova Scotia Government called "Registry 2000". Registry 2000 will be discussed in this afternoon's sessions but I have added some postscripts to this problem noting how some recommendations from *the* Registry 2000 Business Area Analysis Sub-Committee, if adopted, would have greatly benefitted the purchaser of Greenacre.

I believe we should support the Registry 2000 initiative to make our Registry Office and Off Title records systems more easily accessible, safer and economical for all to use. It will mean changes in the way we practice but changes, probably much less desirable to all of us, will overtake us regardless if we do not help direct the processes of change.

SAMPLE TITLE PROBLEM - GREENACRE

1. Purchaser agreed to buy 50 acre "Greenacre" from Vendor in January 1998 for $20,000. Purchaser intends to build a residence on Greenacre in May 1998 using mortgage financing from Lender. Greenacre is part of Vendor's 110 acre tract, "Bigacre", in rural Nova Scotia. Vendor and Purchaser intend to create Greenacre by conveying Greenacre to Purchaser under s.102(i) of the *Planning Act* which permits sub-division without survey or approval when the resulting lots are greater than 25 acres. Vendor and Purchaser have shown Greenacre and the remaining parcel on Vendor's 1994 boundary survey of Bigacre by drawing a line, themselves, between two survey markers noted on the plan. The plan was prepared for Vendor by a licensed Nova Scotia land surveyor. The plan is not filed in the Registry Office; it discloses no encroachments or possessory interests affecting Bigacre.

2. The registered documents in the chain of title for Bigacre and Greenacre are as follows:

1900 - Warranty Deed to Owner One without limitations.

1927 - Owner One's Will devising life interest in Bigacre to his Son & Daughter for their lives with remainder, equally, to unspecified grandchildren. Public records and extensive inquiries do not disclose the existence or identity of grandchildren nor if Son and Daughter are still alive.

1937 - Quit Claim Deed from Son (his wife releasing dower) & Daughter conveying "all *their* right, title and interest" in Bigacre to Owner Two. (Conveys their life interests)

1957 - Quit Claim Deed from Owner Two conveying "all *Owner Two's* right, title and interest" in Bigacre to Owner Three. (Conveys the life interest received by Owner Two)

1963 - Quit Claim Deed from Owner Three (widower) conveying Greenacre to Vendor without *limitation as to interest conveyed.* (Purports to convey Bigacre in fee simple - a potential *Marketable Titles Act* root of title after 40 years)

1998 - Statutory Declaration of Vendor declaring Vendor's exclusive possession and use of Greenacre from 1963 to date with no adverse claims made against Greenacre in that period.

3. Purchaser's solicitor is concerned about certifying title because the interests of the grandchildren in Greenacre are not accounted for and there is no *Marketable Titles Act* root of title since the life interests of Son and Daughter were created. However, Purchaser's Solicitor believes that if there were grandchildren, their claims are unenforceable by virtue of the *Limitation of Actions Act* (either by "constructive dispossession" of the grandchildren by the 1937 or 1957 deeds or by over twenty years possession) or latches as illustrated by *Nemeskeri v. Nova Scotia (Attorney General) v. Meisner* (1993), 125 N.S.R. (2d) 67 (N.S.C.A.). Purchaser's Solicitor also reckons that Purchaser will have marketable title based on the 1963 deed within five years, in 2003, under the *Marketable Titles Act.*

QUESTIONS & COMMENTARY

1. Note: the following comments are based on First American Title Insurance Company Plain Language Policy Form 3 (3/89) and Loan Policy Form 1 (4/94) and may not apply to other policies. Read each policy you consider carefully; policies may vary considerably.

2. Question re Assuming Risk: Should Solicitor assume this apparently low risk title and certify title without qualifcation as to the grandchidren's interest?

There may be an enforceable claim against Solicitor if Solicitor certifies title to Greenacre without qualification, accepted by Purchaser and Lender, as to the grandchildrens' potential claim as this certification would be contrary to Practice Standards No. 2 - Root Of Title and No. 3 Grantor Search.

3. Question re Survey: Assuming Purchaser closes in January then starts building and

mortgages Greenacre to Lender in May, what happens if, after **first mortgage advance of $20,000, the 1994** survey of Bigacre is determined to have substantial errors materially affecting the extent and value of Greenacre?

Title Insurance. Purchaser is not covered for survey problems under title insurance because Greenacre was not created by a plan of subdivision, was not surveyed for the transaction and was not the subject of a prior survey that could be declared to be correct at closing. Leer is covered for survey problems under title insurance because its policy is more favourable than the Purchasers policy.

Solicitor's Opinion on Title. If a solicitor's Opinion on Title is used neither Purchaser or Lender will be protected if Solicitor observed Practice Standard No. 32 - Survey.

4. Question re Grandchildrens' Claim. Assuming Purchaser closes in **January then starts**

building and mortgages Greenacre to Lender in May, what happens if, **after first mortgage advance** of $20,000 Owner One's elderly and aggressively litigious grandchildren appear "from away" and commence an action for recovery of Greenacre, inter alla?

Title Insurance. Purchaser and Lender are both covered against loss *to the extent of their* policies. Lender is indemnified to the mortgage amount - presently the $20,000 advanced. Purchaser's indemnification is limited to the Policy Amount (purchase price - $20,000) less any amount paid to Lender and amounts expended to correct problems (there is no deduction for costs, legal fees and expenses paid). The Insurer may correct the survey problems and defend the grandchildren's claims. If, however, the Insurer reckons that the combined costs of correcting the survey problems (under lender's policy) and defending the grandchildrens' claim will exceed the Policy Amount it may elect to cancel the policy by paying the Policy Amount then in force and only those costs, legal fees and expenses incurred up to that time that it is obligated to pay. In this example the mortgage advance, $20,000, equals the Policy Amount therefore it is likely that Purchaser may receive no payment other than the benefit of any corrective steps taken by the Insurer and repayment of the advance to Lender. This would leave the Purchaser to correct the survey and defend the claim on his\her own to protect Purchaser's interest in the home and property. The title Insurer does not necessarily have to "stand and fight".

Solicitor's Opinion On Title. Neither Purchaser or Lender are covered against loss assuming Solicitor properly excepted liability for this potential claim in his/her Opinion to each and each closed accepting the risk. If there is liability the Solicitor may be liable for foreseeable damages to Purchaser or Lender for breach of retainer or negligence in the provision of services. Liability may exceed the purchase price limit of the title insurer's policy. In this example the title insurance limit is $20,000 while the solicitor's liability would likely extend to loss of the building as well. If there is claim against the solicitor the Society's Insurers will become involved on receipt of notice. The Society's insurers will attempt to correct any error and settle the claim. The **Solicitor and the** Society's insurers have little choice but to settle the claim or "stand and fight" until it is resolved by litigation - at their expense.

5. Note: Title insurance is a contract of insurance so cause of the loss is not material to the obligation to pay. The Insurer's liability is the Policy Amount stated in the insurance policy (the purchase price subject to an increase in fair market value up to 200% in the Plain Language Policy and the amount of the mortgage in Loan Policy). It is not a "per occurrence" policy so the Policy Amount is the limit to be paid for all risks. Indemnity is limited to the stated risks for a specified property to a named insured - one must read the policy carefully to see what is, and is not covered. The Insurer does not insure that the insured risk will not occur - only that it will pay the insured for insured's loss as required by the policy if the risk occurs. The Title Insurer is not obliged to pay the insured until the insured suffers an actual loss. *The Policy Amount will be reduced by all payments made under the Policy - except for costs, legal fees and expenses. The Policy Amount will also be reduced by any amount paid to the insured holder of any mortgage shown in the Policy or a later mortgage given by the Insured.* If a risk materializes the Title Insurer has several choices of action in dealing with it including:

Paying the claim against title.
Negotiating a settlement.
Prosecuting or defending a court case relating to the claim.
Paying the Owner the amount required by the policy.
Taking other action to protect the Owner.

Cancelling the policy by paying the Policy Amount, then in force, and only those costs, legal fees and expenses incurred up to that time that we are obligated to pay.

6. **Question.** What, if any, liability may Solicitor incur for the uninsured amount of Purchaser's foreseeable losses if he or she advised Purchaser about title insurance versus an opinion on title and Purchaser chose title insurance relying on that advice?

COMMENTS ARISING FROM THE REGISTRY 2000 BUSINESS AREA ANALYSIS SUB COMMITTEE RECOMMENDATIONS

1. The Sub-Committee has recommended, *inter alia*,

a. That the limitation period for recovery of interests in real property be reduced *to* 10 years and the ultimate limitation period for recovering interests in real property and the *Marketable*

Titles Act period be reduced to 30 years. The limitation periods will then be consistent with most other common law Provinces. Most of our "theoretical plaintiff" claims arise from our absurdly long limitations periods. (This change would have given Purchaser marketable title *to* Greenacre based on the 1966 deed.)

b. That absence from the Province be removed as a "disability" under the *Limitations of*

Actions Act - see the criticism levelled against the "40 year rule" for "theoretical plaintiffs" who are absent from the province in *R. B. Ferguson Construction Ltd. v. Ormiston* (1989), 91 N.S.R. (2d) 226 (N.S.C.A.) at pages 230-231. There are legal mechanisms for transferring interests of minors and of incompetents in Nova Scotia but not for absent owners who cannot be traced. (This change would have clearly prevented the "come from away" grandchildren from possibly having a forty year limitation period simply because they have not looked into the state of their property

interests for up to forty years.)

c. That there be no subdivision without survey. (This change would have required the Vendor to formally subdivide Greenacre under an approved plan of subdivision. **The further** survey work may have disclosed the surveying error and, if title insurance was used, title insurance would have indemnified against Purchaser's survey related loss.)

3. Based on comments from the Executive Director of the Association of Nova Scotia Land Surveyors it would have been prudent for Purchaser's Solicitor to have cautioned Purchaser that he/she and Vendor may be subject to a copyright infringement claim by the Surveyor who prepared the plan of Bigacre because of their unauthorized use of the plan.