

**OPTIONS FOR ASSURING TITLE IN THE CURRENT MARKET Catherine S. Walker, Q.C. Comments:**

The way that a real estate transaction is done in the current market, will not be the way that a real estate transaction is done in the year 2000.

Conveyancing is undergoing a revolution and only those most determined will survive- those who are prepared to work with other lawyers, stakeholders and government- those who are prepared to carve out a new system, one which will meet the challenges of a new millennium, and provide more certainty for the consumer that the continued possession of their home and property is guaranteed.

Lawyers do and have done good work. The quality of our existing land information system is in large measure due to the work that lawyers have done for 200 years. It is the end of the 1990's though, and we are doing that work in a registration system that was designed over 200 years ago. One only has to look at our current environment- technology, centralization of banks, globalization, absence of local decisions by financial institutions to understand why there is a need for change- both a change of attitude, as well as a change in the way conveyancing is done. We must explore the way in which changes can be achieved which will serve to maintain the integrity of the public land information system while reducing if not eliminating the repetitive nature of what we do now. In this climate our challenge is to identify a solution which is cost effective. This will require creativity, and the pooled resources of all the stakeholders in the real estate industry.

Conveyancing cannot have either a local or provincial focus anymore. A conveyancing system which can meet the challenges of the new millennium requires a national perspective. As **lawyers** and accounting firms merge, and form networking relations, as banks move to centralize their products with 1-800 numbers to market their products nationally, so too must lawyers look beyond their immediate environment.

Our current system of organization of land title and land use information has outlived its usefulness. In today's world it cannot provide adequate title security, nor can it meet the needs and expectations of the public. Is the blanket answer to these limitations to paper or insure over them, adding further cost, but adding nothing to the security of the land information system or the homeowners security of title? As was demonstrated in 1996 with the passage of *The Marketable Titles Act*, we have proven that substantive change can occur, change that makes the process of title security more cost effective, and efficient, while maintaining the integrity of the land information system.

Is this revolution about title insurance? No. Title insurance is not a new product- it has been a tool in the resource chest of property lawyers for many years. So why is so much **attention being paid** to it in our current market? The title insurance companies are like other businesses. If the market for their product is saturated, and a business wants to continue to grow, it will look for new markets. The title insurance industry in the United States reached a saturation point, and so some of these large multimillion dollar American companies decided that Canada was a fertile market to test.

Title insurance has been marketed in Canada with some new packaging and so appears to be a different product from the one that we have traditionally considered as appropriate and at times a valuable tool to deal with unresolvable title problems. It is being packaged with a process or "service", and as a product that is appropriate for all transactions, in some cases in lieu of any inquiries that a lawyer would make in a purchase transaction. Some of the marketers have indicated that the reason they are convinced that their product is an appropriate replacement for the way conveyancing is currently being done, is because our system of conveyancing cannot change, and so, their product insures over the shortcomings of the public land system. Lawyers are not so doubting however, and believe that the

system can continue to change in a way that benefits the consumer, saving both time and costs, and ensuring the continued protection and integrity of their public land information system.

The purpose of this panel is to stimulate thought in the audience as you apply or consider in your practices the various options that currently exist, and those that will soon be available, mindful at all times of the rules that currently govern what we do, and our constant objective which must be to objectively advise our clients as to what is in their best interest, for their transaction. We must take the time to learn the particulars of all the options available, including a familiarity with title insurance policies, and the differences of products that different companies offer. Above all, we cannot be lulled into a false sense of security by the promises of commercial title insurance companies that they will protect you from not knowing enough about their product to explain it to your client. The courts will not be so quick to relieve you of your responsibility, and if something goes wrong, you can be assured that your client will look to you in the first instance for an answer to any problem that they have with their title insurance product.

We will review two fact scenarios, and attempt to identify what we believe would be **options that** are available for you to discuss with your client. You may in turn identify more, or disagree with those that we believe apply, but the critical point is that you have to know about the options to be able to assess for yourself if they are appropriate for your client. You must take the time to understand all of these products in the marketplace, and understand that they are complex, and require your commitment of purpose to fully understand.

Understanding the new options that will be available in the marketplace requires each of us to reexamine each option in the context of our professional standards and the Rules of Professional Conduct. For example, considering the closing centre option- what does informed consent **mean?** What will a retainer look like? What must we advise our clients at the outset of the transaction? What is a conflict of interest? What is our limited role, and will we be restricting the options that are available to our clients if we elect to utilize the 'administrative efficiencies' that are offered by the closing centre? How do our standards apply or vary if our client elects this option, and how do we advise them if they have committed to the option before we are retained? This is to be contrasted with those companies that seek to replace our product in the marketplace- as they operate in a totally unregulated environment, having no duty to the consumer, the public, and facing no disciplinary proceedings or regulatory body for the way in which they conduct themselves.

Change is upon us. We have seen the beginnings- computerized storage of data, deed transfer tax, assessment information, tax information, and merging of municipalities into larger and "more efficient" units. As practitioners we have experience increased frustrations over the past number of years as the courts have confirmed our increased obligations to our clients, as mortgage lenders continue to require that we certify "that the subject property complies with all laws, **orders, rules,** regulations, and ordinances of every governmental authority of every level of government", and as inquiries become more difficult to make, more repetitive, more expensive, time consuming, and filled with disclaimers as to their reliability.

We have a constant challenge- to comply with all of our professional obligations, while at the same time providing a competitively priced product to the consumer. This is a highly competitive environment- and as can be seen- will continue to be so. However, competition is not new for us. We have been each others strongest competitors for years. But at least we have all been accountable to play by the same rules. For these new players on the block, there are no rules, and so we must continue to act as defender for the consumer and the public system that we serve, as we have in the past, but perhaps more vigorously, and

more vocally than has been the case before.

There was an excellent article written in 1982 and reported in the UCLA Law Review that is enclosed for your interest. Also enclosed is an article from the Ontario Lawyers Gazette September/October 1997 regarding Rule 30 of the Rules of Professional Conduct in Ontario. This rule requires lawyers to inform their clients about the availability and merits of title insurance. Even in the absence of a rule specifically requiring such disclosure, it is believed that a lawyer's general professional obligations would require lawyers to be in a position to advise their clients as to all options that are available to them, and which is most appropriate for their circumstances.

Attached as appendices to this paper are the fact situations which we will be discussing, and as well a general description of the options that are either in the current market, or soon to be available in the market ("the Closing Centre"), or available in another market (Title Plus- in Ontario).

In any review of the options for assuring title in the market, one must understand the features and distinctions of the options. The option chosen by the bar society in Ontario was Title Plus, which encompasses both title insurance and errors and omissions (legal services), providing the consumer with a combined product. Inherent in that product is a streamlined process of reporting and documentation such as an authorization and direction for the client retainer. Samples of these documents are enclosed.

This afternoon in the last panel of the day you will hear about ideas that are currently being discussed and pursued by all of the stakeholders in the real estate industry and government for reform to the land information system, and which if pursued and implemented will have the effect of providing the optimal change- an innovative and streamlined system that will be capable of meeting the new millennium head on.

#### APPENDIX #1

##### OPTIONS FOR ASSURING TITLE IN **THE MARKET**

###### **Lawyers Opinion:**

Some features: governed by all the rules that the courts, and our legislation impose including sanctions for non compliance in the form of disciplinary action mandatory errors and liability insurance coverage; governed by standards of practice as to the steps that must be followed in a conveyance transaction; highly regulated profession that acts as safeguard to the public, and also limits the unilateral ability of lawyers to decide what they can or cannot do in the context of a transaction-threshold of perfection on every transaction, and the reexamination of title each time a property changes hands; duty to comply with the ethical Rules of Professional Conduct, and to answer for any failure to comply; duty as officers of the court to contribute to the maintenance and integrity of the public systems, including the registry and land information systems, and to contribute to the furthering of the profession, and protect the public in the practice of their profession requires standard of perfection in that each time a property changes hands, the same repetitive inquiries must be carried out. The lawyer has no ability to decide that because there have been five owners of a particular property, that title need not be examined; there is no ability formally underwrite that kind of risk in our current regulatory framework; a client, in the event that they have a problem with the title that has been certified by a lawyer must in the strict sense prove that the lawyer has been negligent, although practically, most title matters are resolved in some fashion to the satisfaction of the client without resort to any formal proof; while a lawyers certificate

of title is not protected by our mandatory insurance for fraud, there is a reimbursement fund created by our Barristers Society for the reimbursement of clients that have been defrauded by lawyers, lawyers are required to have all trust accounts audited, and are subject to rigorous scrutiny with regard to funds that are handled for clients;

Generally: Generally speaking, a lawyers opinion may be categorized as risk elimination in a property purchase. The object of a lawyer's task is to identify each and every possible risk that might be associated with the property of their client and to deal with each as identified. This risk elimination objective covers a wide spectrum of activities, from title defects to off title inquiries such as zoning, occupancy, and contractual issues. Lawyers are highly regulated, and they are obligated to follow specified professional standards of practice, which dictate, investigations that must be undertaken. They are required to carry mandatory insurance for their activities, and are subject to discipline if they don't carry out their obligations responsibly. The practice of law is highly regulated. There is no formal risk management that lawyers have the ability to carry out in transactions, and the same spectrum of inquiries are therefore required to be carried out in all transactions.

#### **Title Insurance:**

features:

this is a product which protects the consumer from certain known risks that the lawyer cannot resolve, or that cannot be resolved without an unwarranted expense, and which the client does not wish to assume the title without protection.

a title insurance policy is an insurance contract. It is an agreement to indemnify an insured regarding a specific interest in a property in the event that a loss arises from one or more specified causes. Because it is a contract of insurance, it traditionally contains many exceptions. It does not guarantee to cure the title defect, but rather promises as with any insurance policy to pay in the event of a loss. Care must be taken to ensure the client understands the terms of the policy, the basis on which a claim can be made, and the circumstances in which they will not be compensated. Unlike car insurance policies, there is no regulation as to the standard coverage, and title insurance companies are at liberty to describe their coverage as they feel is appropriate. They are spreading their loss over all policies, as with any other kind of insurance.

the client is not assured the property, they are assured to be compensated in the event of a loss that is covered under the contract of insurance.

Generally:

title insurance option, contrasted with a lawyers opinion, incorporates elements of risk management. Risk management is a principal characteristic of all insurance policies. If the likelihood of potential risk is relatively small, the principle is to spread the risk over the large number of people who might be negatively affected. In this option, each pays an amount of money (through a premium) and the few that end up being affected are able to draw on the pool of money for compensation. Thus, rather than examining the risks associated with each transaction, the expected loss from a statistical analysis of the historical patterns of loss experience likely to be suffered is spread over all customers.

Obtaining no Opinion or assurance of Title:

at first glance, this option may seem irrelevant, as it is rarely appropriate, but it should be remembered that irrespective of the sophistication of the client it is their decision as to whether title, or any other aspect of land inquiries will be pursued, or whether the client will assume the risk associated with the subject of the inquiry. The decision will be made for them if a lender is involved, as the lender will require formal protection,

but this remains as an option in the current market.

#### **Closing Centre Option:**

this is a new concept for our conveyancing market, and an example of the new "packaging" of a title insurance product. While the particulars of this concept have not yet been circulated to anyone in writing, at least in this province, there are some particulars that have been described in conversation with its proponents. This concept has at its base the philosophy that a title insurance policy is appropriate in every transaction, and that no minimum inquiries need be made in a property purchase or sale, except those that the title insurance company feel should be made. There are no requirements as to what minimum inquiries would be made on behalf of a purchaser, and no court decisions, legislation, or regulatory body that mandates their activities. They can rely on, and profit from the gruelling work that lawyers have done for the past 200 years in Nova Scotia, and bank on the fact that maybe the odds are good that title is okay. Irrespective of whether it is or not, this concept of title insurance will be sold in the context of an "administrative process" that will save lawyers offices money and overhead. Lawyers need only fire their employees, including legal assistants, and title searchers, and allow the "Closing centre" to process their clients purchase or sale transaction. The transaction of course includes the issuance of a title insurance policy for the purchaser and lender, and the title company will act for the lender, thus removing any 'conflict of interest' that the lawyer was previously subject to. The closing centre will "administer" the transaction, and the lawyer's role will be restricted to advising the client at the outset of the transaction as to the terms of the agreement of purchase and sale, and matters such as how they wish to take title, and attendance to the execution of documents on closing. All other matters including liaison with the lender, completion of instructions, ordering funds, preparation of adjustments, and all inquiries including title will be handled by the staff of the closing centre

in the event that a lawyer decides to take advantage of this option, they have precluded the traditional option from their repertoire, and therefore they would be unable to advise their client as to the option best suited for their transaction, unless they were similarly prepared to refer the client to another lawyer in the event that the client chose the lawyers opinion option.

#### **Title Plus Option**

would prefer to leave the description of this option to those who know it best, namely the representatives from the Lawyers Professional Indemnity Corporation (LPIC) in Ontario. Maurizio Romanin, and Kathleen Waters will be describing this product which is available currently in the Ontario market. Suffice to say that this option combines coverage for legal services and title insurance, and introduces a streamlined process to the consumer and lender, including documentation and reporting.