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THE CHANGING REAL ESTATE PRACTICE OF THE NINETIES
WHY CHANGE IS UPON US

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The changing practice of real estate law in the early 1990s

In the fall of 1993 I began to plan for the CLE seminar I called *Surviving the New Practice of Real Estate*. The more I thought about it the more concerned I became that there really was a *new practice*. And I wondered how the new practice came to be if we never got a communiqué from the Law Society that the old practice was now obsolete?

When I became a lawyer in the early 70s, it was still possible for members of the real estate bar to take some pride in their work, to enjoy some prestige in the community and, frankly, to take satisfaction that they were making some contribution to society. But something happened along the way to the *new practice of real estate law*.

I identified three problem areas:

1. The public perception of real estate lawyers.
2. The industry perception of real estate lawyers.
3. Our own view of ourselves as members of the real estate bar.

In all three of these areas I think we have hit an all-time low.

It seems to be a "given" in the minds of the public in general and real estate brokers and agents in particular, that "any lawyer can handle a simple real estate deal."

Well, I need hardly say how wrong this is, and I don't think there is any such thing as a simple real estate deal anymore. In the last twenty six years, I have seen the evolution of the practice of real estate law grow from something which was fairly simple and straightforward to a nightmare of legal landmines, a bizarre pyramid of legislative intervention, an oasis of insurance funds for ex-clients who lose money in real estate, and a gold mine for our litigation colleagues who are hired to assist our ex-clients to dip into our insurance funds.

And as if this isn't enough, we seem determined to charge our clients less and less to do more and more until one day we may well be doing everything for nothing. We stand idly by while our colleagues advertise in the Yellow Pages ads "We'll match any fees!" and "Real Estate Fees So Low You'll Never Believe It." Nothing about experience or quality of work, just fees.

And there was hardly a peep from the real estate bar when the Canadian Imperial Bank of Commerce and others decided to set and publicize a "base" and I mean base, line for our legal fees. I don't set the bank's service charges and I think they should keep their hands off our fees.

Back in the early 70s, land surveyors were charging perhaps $200 for a residential survey in Toronto, about what a real estate lawyer might charge for the proverbial simple real estate deal at the time. Today they are charging a minimum of $750 and up, and getting it in the midst of a recession. I know many real estate lawyers who are charging a lot less than that.

Real estate agents were charging 5% and 6% in the early 70s and are still getting that today on much higher property values and with little flexibility or negotiating room. I don't see many agents who are willing to cut each other's throats and slash fees like real estate lawyers have.

It can't be supply and demand - the oversupply problem probably exists for surveyors and agents as it may exist for real estate lawyers. So what is it about real estate lawyers in this New Practice of Real Estate Law who are so determined to work for fees lower than they charged in the late 1970s? Why have the charges for surveyors and real estate agents gone up and our fees have gone down? Are we that desperate? I have a lot of questions but few answers.

In recent years I've been seeing clients who want me to negotiate the *disbursements* or to provide them with a guaranteed ceiling. Now you know why I'm so nostalgic for the "old days."

And have you noticed how much more difficult it is to close even the simplest transaction these days? Is it any wonder, with the fear of being sued on the one hand, and complying with our Law Society rules on the other, not to mention working for next to nothing, that we, at least in Ontario, have begun to treat each other as adversaries in many transactions?

We have stopped treating each other as gentlemen and women and have begun to act like adversaries.

When was the last time you loaned a fellow solicitor a discharge of a private mortgage to use on a tender or even just a simple closing without a 6 page undertaking? What ever happened to trust and respect among members of the profession?

In late 1993, I came to the conclusion that the real estate bar was fed up with the situation I've outlined, and that we shouldn't stand idly by and watch ourselves self-destruct.

Sooner or later we would have to stand up and stand together and say enough is enough. I felt like the Peter Finch character in the film *Network* who sticks his head out the window and yells "I'm mad as hell and I'm not going to take it anymore."

How would we fight back? The first response I suggested was education. Secondly, I said we can start treating each other as professionals, as commercial advocates, as gentlemen and women, and not as adversaries.

Thirdly, we can start feeling better about ourselves and our contribution to our clients and to society. And finally, we can stop killing each other by working for nothing.

I would like to be able to stop measuring a "good day at the

office" as one in which I wasn't sued by an ex-client.

And finally, we can join together to oppose those in our Society whose corporate policy is to put us out of business; and to rally around and wholeheartedly support those measures which will guarantee that the real estate bar will still be around into the next century.

The origins of title insurance in Ontario

Back in 1956, any insurance company licensed in Ontario as a guarantee company was permitted to issue title insurance policies. In that year, an insurance company applied for a licence to issue title insurance policies and the Law Society Benchers of the day became concerned that this type of activity might constitute the unauthorized practice of law.

A series of meetings was held with the title insurance company, the Attorney General's office, Law Society Benchers, the Superintendent of Insurance and the Master of Titles.

This resulted in the passage of Regulation 666, which reads as follows:

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 to the property to be insured from a solicitor then entitle to practise in Ontario and who is not at that time in the employ of the insurer.

Following the passage of Regulation 666, there was little if any activity in title insurance in Ontario for many years.

Fast Forward to 1991

Now we fast forward to 1991. First American Title Insurance Company established its Canadian Head Office in Mississauga and soon became licensed in *all provinces*.

Initial Reaction to First American

The initial publicity about First American's activities was fairly low-key and, I must admit, title insurance didn't sound like a bad idea at the time.

In November of 1993, I chaired a CLE program for the Law Society in Toronto on the theme *Surviving the New Practice of Real Estate Law*. I invited a First American representative to participate in the program, and it sounded too good to be true. Fewer disbursements. Fewer searches. No surveys. Someone else to take the risk. Good for the client. I even used First American myself to try it out - my first and only First American policy.

The Hidden Agenda

What none of us realized back in 1993 was that First American appeared, to many of us, to have its own hidden agenda.

By May, 1994, the truth was out. Canada Trust - a subsidiary of IMASCO or Imperial Tobacco - had gotten into bed with First American to effectively put lawyers out of the refinance business. An internal memorandum to CT branches in Hamilton and Mississauga read:

> *Most financial institutions require that you hire a lawyer when getting a mortgage increase or a home equity line of credit on their present home. Not us. At Canada Trust, we look after the required paperwork ourselves. Since your customers will have no legal representation, they will incur no legal fees. They'll pay only $295..."*

Canada Trust announced it would go after other lenders and the Ontario real estate bar became concerned that if the re-fi business disappeared, purchases and sales wouldn't be far behind. I wrote at the time: "Are we destined to become another Florida, where title insurance companies handle all residential real estate. [First American's] Grifferty says no, but don't bet on it."

The Canada Trust program was the thin edge of the wedge, because it encourages the consumer to dispense with legal advice in all refinancing transactions. At the time, we thought if the program was successful, purchasers, vendors and mortgagors could well be receiving no legal advice in the future.

Who is First American?

We all know about Canada Trust, one of the country's largest financial institutions. We all know about IMASCO, its parent company. We know that its subsidiary Imperial Tobacco manufactures a product which, when used as intended, kills more than 30,000 Canadians a year. And aside from their partnership with First American, that's why I don't like to deal with Canada Trust, or its sister company Shoppers Drug Mart.

But who is First American? When I was preparing this paper, I looked up First American Financial Corporation on the Internet. Without much effort, I was able to download literally hundreds of pages from its American and Canadian websites, as well as copies of its U.S. Securities and Exchange Commission filings.

First American Title Insurance Company traces its roots back to 1894. It is the largest title insurer in the United States and owns dozens if not hundreds of subsidiary title insurance companies. It's also into a host of other related businesses in the financial and insurance sectors.

It operates in 49 states, the District of Columbia, Guam, Puerto Rico, the Bahamas, Canada, Mexico, Bermuda, the UK, and Australia. It does not operate in Iowa - where title insurance is illegal. Wouldn't it be nice to practise real estate law in Iowa?

The company's sales force consists of 1,000 people dedicated solely to marketing, with total employees at the end of 1996 being 11,611.

In 1990, the company was named a defendant in US federal antitrust suit alleging rate fixing. A Court order of July 1996 approved a settlement agreement in the litigation.

1996 consolidated revenue was $1.6 billion, and total net income was $53.5 million.

The Public Reaction

With respect to the Canada Trust arrangement for no-lawyer refinancing, as far as the public was concerned, if they could get refi's at half the price - without legal advice - so much the better. Real estate conveyancing is, for many consumers, strictly price driven. The choice often was, and is, simple: "if it costs more money, I'm not interested."

The Reaction of the Bar

How did the Bar react? By the fall of 1994, many of us in the real estate bar were not only concerned about the development of title insurance, we were petrified.

We had formed the Ontario Real Estate Lawyers Association, ORELA, as a political action group and we had enjoyed phenomenal success within a short period of time. For the first time in Ontario, a group ran a slate for the elections to the Law Society's board - Convocation, and we elected 11 out of our 12 candidates - one of whom, Susan Elliott, went on to become Treasurer.

Following the election of the new Benchers in the spring of 1995, the Treasurer appointed a Real Estate Issues Committee. We quickly formed a title insurance subcommittee which soon became a full-fledged committee of Convocation, devoted to studying the problem and reporting back to Convocation.

At the same time, Craig Carter and Maurizio Romanin were exploring the possibilities of a rapprochement with First American. When that possibility fell through, they - to their great credit - conceived the idea of the Lawyers Professional Indemnity Company, LPIC, creating its own title insurance company. LPIC is wholly owned by the Law Society of Upper Canada.

Maurizio and Craig approached Malcolm Heins, the president of

LPIC, and Harvey Strosberg, the Bencher who was then chair of the LPIC Board of Directors.

The LPIC Position Paper

Fortunately for the real estate bar, the reception Craig and Maurizio received from Malcolm Heins, Harvey Strosberg, and ultimately Convocation, was very gratifying.

It became apparent to LPIC and to those of us on the Title Insurance Committee that we were going to need a scholarly paper to provide the intellectual underpinnings if we were to proceed with a lawyer-owned title insurance company in Ontario.

LPIC president Malcolm Heins and I discussed the need for such a paper, and I recommended Sidney Troister. I've known Sid socially and professionally for many years. He is the co-chair of the Bar Admission Course section on real estate, and is the author of a number of books and articles on real estate.

Sid, and his associate Kathy Waters, produced a superb position paper. Following a very detailed explanation in more than 100 pages, they concluded that, through a combination of history, the development of contract law, the establishment of professional duties and responsibilities and the computerization of Ontario's land registration system, the lawyer has become the "quarterback" of the land transaction. They said that the solicitor-client relationship and our professional obligations ensure not only proper title but also the protection of clients' rights under agreements of purchase and sale or mortgage commitments.

Sid and Kathy looked at Regulation 666 and concluded that if it was to be repealed, the public interest would demand that it be replaced by a new regime of adequate consumer protection and underwriting in accordance with reasonable risk evaluation.

Their conclusion was that the most appropriate solution encourages the involvement of a lawyer with a clear duty to represent the interests of the purchaser or vendor, even if the same lawyer is also representing the interests of the insurer.

The paper said that changing the system by eliminating the role of the lawyer - in other words repealing regulation 666, would require altering responsibilities and eliminating the quarterback for the transaction; in other words, eliminating the person with fiduciary duties to hold the monies and advise and disclose legal obligations, and on behalf of the vendor or purchaser to coordinate the various players in the transaction (the players being lenders, lawyers, agents and government departments).

Title insurers, they thought, may be capable of taking over some of the technical title work that real estate lawyers currently undertake, but they do not currently appear to offer a replacement for the lawyer as fiduciary or as counsellor or

advisor.

The Troister-Waters paper determined that the worst possible scenario for the consumer is that transactions be completed without a quarterback, someone who, for what has become a modest fee, takes charge of the transaction and has the duty to protect the client. That raises the dual possibilities of no one having carriage of the transaction and of title defects being uncovered, creating future problems for the homeowner.

Finally, the Troister-Waters paper concluded: "Given the insurance provided under the mandatory requirements of the Law Society, and the ever-increasing standard of care imposed on lawyers by clients, the issuance of a title policy standing behind the lawyer's opinion would not constitute any significant change from the status quo. The purchaser would still be free to choose any lawyer, knowing that the lawyer should or could fulfil technical, advisory and fiduciary roles. The client would be fully protected from any error of the lawyer -- whether arising from negligence or contract and with respect to any matter arising from the lawyer's retainer. The client would receive an opinion of good title consistent with the client's rights under the contract and the integrity of our land registration systems would be maintained."

The Introduction of TitlePLUS

With the Troister-Waters paper as its academic underpinning, the Lawyers Professional Indemnity Company brought before the Law Society's Convocation - the meeting of our Benchers - a proposal for TitlePLUS. At the time, Ontario's lawyers were struggling to pay off a pre-1995 deficit of $154 million in our insurance program, much of it due to claims against real estate lawyers.

The TitlePLUS initiative had two objectives. Firstly, it would remove the bulk of the real estate exposure from the professional liability insurance coverage. Secondly, it would improve the quality of conveyancing services provided by lawyers.
In this way it would reduce the number of errors and omissions claims being reported and protect the public from inadvertent problems that arise in residential real estate conveyancing.

As you will see and hear later today, the TitlePLUS software has a superb checklist built into it, ensuring that lawyers who write the policies will not be able to overlook often forgotten matters - such as whether a condominium unit comes with a deeded parking spot, whether the tax bill has been paid, or whether there is a problem with the survey.

The TitlePLUS concept created by LPIC offers two advantages over traditional title insurance: it provides broader coverage on the title-related aspects of a transaction; and it also provides coverage for legal services provided by the lawyer in the transaction.

TitlePLUS also provides - and requires - a standardized retainer contract for services, a contract which clarifies our role and directs us to purchase a TitlePLUS policy.

TitlePLUS benefits

TitlePLUS has the potential to improve residential real estate conveyancing in several ways:

- The first is cost savings. Although I have found that sometimes there may not be a cost savings, a TitlePLUS policy can often save $100 to $150 of its $296 cost. In condominium purchases, the policy can actually be cost-free to the client - depending on the municipal search charges - since it insures over many of the searches we would otherwise have to perform. In cases where there is no survey or an old survey, it can actually save several hundred dollars.

- Secondly, TitlePLUS provides comprehensive consumer protection. In my view, it provides better protection than First American.

- Third, it standardizes reporting to lenders. There are now approved, and simplified formats for reporting letters to institutions. It's easier for us, and easier for the lenders. Reporting to mortgagees on TitlePLUS deals now takes me a fraction of the time, and the reports don't have to be typed on individual forms for each lender.

- Consumers still have access to their lawyers for independent advice.

And finally, there is the transfer of liability risk to TitlePLUS.

Transfer of Liability

One major advantage of TitlePLUS is that, on a transaction-by-transaction basis, it moves much of the risk currently within our professional liability program to the title insurance contract. The risk on the TitlePLUS policy is underwritten on an occurrence basis and the policy is in force as long as the insured retains his or her interest in the property. Shifting the bulk of the real estate exposure from the professional liability plan to the TitlePLUS program will enable LPIC to move closer to a risk-rated structure without "the dislocation that would otherwise occur."

Risk rating means that each area of law would pay E&O premiums according to the relative risk of that area, with criminal, perhaps, having the lowest premiums, and tax the highest - if real estate is moved from the equation. The premiums of real estate lawyers could drop substantially if much of the risk of our area of law is transferred to title insurance or TitlePLUS.

TitlePLUS approval

Convocation approved TitlePLUS on September 27, 1996.

The unholy war with First American

During the time TitlePLUS was under development, it was one of the Law Society's best kept secrets. But when the announcement was finally made, the gloves were off.

First American's public position was that "competition is a healthy thing," according to the company's Tim Hyde.

Behind the scenes, it was nothing less than an "unholy war," in the words of LPIC chair and our current treasurer, Harvey Strosberg. First American was on one side, and the Law Society, LPIC, ORELA, our county law associations, and the CBA Ontario branch were on the other.

First American launched a massive - and very expensive - campaign to abolish Regulation 666 so that it could write insurance policies without an independent lawyer. So much for its public contention that it wanted to work with the bar and not without it.

First American filed a formal complaint with the Bureau of Competition Policy in Ottawa in 1995. The Bureau swallowed the First American position without even offering the Law Society a chance to respond. It took a preemptory court challenge by the Law Society against the jurisdiction of the Competition Bureau to get them to back off. The court ruled that self-governing professions are exempt from the Competition Act to the extent of their regulatory mandate.

First American then launched a monumental lobbying campaign with every single government Cabinet and backbench MPP to force the government to repeal regulation 666. Had 666 been repealed, there is no doubt that there would have been a loss of at least 3,000 Ontario real estate lawyers - including me.

In my view, these intensive activities by First American are inconsistent with its position that it wants to work with lawyers. Many of us in the Ontario Real Estate Bar feel that First American would be very happy if the bar just shrivelled up and died, and it wouldn't even send flowers to the funeral.

I am bound by the rules of Convocation not to discuss the confidential measures the Law Society employed to respond to First American's government challenge. I can say, however, that we set up a government relations committee which met the First American assault head-on, and we won the battle.

Getting the TitlePLUS licence from the Ontario Insurance Commission

Someone was working very hard to prevent or delay TitlePLUS from getting its licence to issue title insurance policies. It took from September 1996 to July 1997, and again, much more lobbying was required by the Law Society.

As a result of tremendous resistance from the Ontario Insurance Commission to the TitlePLUS licence, Convocation was pressured into passing Rule 30 .

The new rule reads as follows:

Rule 30

Lawyers' Duties With Respect to Title Insurance in Real Estate Conveyancing

RULE 30

1. The lawyer owes the client a duty to assess all reasonable options to assure title when advising clients with respect to a real estate conveyance. The lawyer must advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

[In other words, lawyers must be familiar with the options to assure title and should formulate a reasonable approach to knowing when and how to use them. Clients should be told that title insurance is not mandatory and that a lawyer's opinion can still be used.]

2. 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.

[In other words, lawyers can be retained by title insurers to provide legal services but should tell their clients that they cannot accept kickbacks, commissions or referral fees.]

3. The lawyer may not permit a non-lawyer to:

(a) provide advice to the client with respect to any insurance, including title insurance, without supervision;

(b) present insurance options or information regarding premiums to the client without supervision;

(c) recommend one insurance product over another without supervision;

(d) give legal opinions regarding the insurance coverage

obtained.

[In brief: Lawyers should not let support staff give advice on title insurance without proper supervision and opinions on title insurance must come from a lawyer.]

4. If discussing TitlePLUS insurance with the client, the lawyer must fully disclose the relationship between the legal profession, the Law Society of Upper Canada and the Lawyers' Professional Indemnity Company (LPIC).

[In summary - lawyers must tell clients that TitlePLUS is offered by LPIC, their malpractice insurer, and that LPIC is owned by their governing body, the Law Society.]

COMMENTARY

1. The lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

2. The lawyer should be knowledgeable about title insurance and discuss the advantages, conditions and limitations of the various options and coverages generally available to the client through title insurance with the client. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and undergo such training as may be necessary in order to acquire such knowledge.

3. 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.

"Working With a Lawyer When You Buy a Home"

With every new home purchase I handle, I now mail out a copy of this booklet *"Working With a Lawyer When You Buy a Home"*. The book is in my opinion a good introduction to the legal services we provide on a home purchase. If you look at the inserted chart in the back, it compares the three methods for assuring title to the consumer:

- our opinion on title
- title insurance
- TitlePLUS

I commend this booklet and chart to my clients, as one way of satisfying my obligations under Rule 30.

I also send out the video which LPIC has prepared: *TitlePLUS. For Peace of Mind When You Buy a Home.*

How Do We Comply with Rule 30

Many of us feel that Rule 30 is simply a restatement in a title insurance context of the existing obligations of lawyers under other Rules of Practice.

In order to comply with Rule 30, I took the TitlePLUS instruction course, and I attended the TitlePLUS all-day seminar. I have a working knowledge of the policy and the program.

I comply with Rule 30 by giving each purchase client the booklet and the video. In each case, I either discuss TitlePLUS with the client or at the very least, send them a written recommendation based on my experience and their particular transaction.

The CBAO Real Property Section is currently working on a position paper advising lawyers how to comply with Rule 30 in residential transactions.

Responding to the marketplace

Not all of my colleagues are entirely comfortable with TitlePLUS. What they fail to understand, I think, is that TitlePLUS is the only thing that - in my opinion - is keeping the forces of evil away from the front doors of our offices.

Why do banks use lawyers? The fact is that lawyers exist in the real estate marketplace because banks - for the moment - deem our role important.

We do, however, cause them problems. We are late with our reporting letters. We forget to sign the forms. We fill them out incorrectly. We sometimes make mistakes in the registered documents. And sometimes the odd one of us disappears with the bank's money.

Wouldn't it be nice for the banks to do away with us entirely? To register documents electronically, and advance funds without issuing paper cheques?

Consumers are driving change in the banks' business practices. They want no legal fees, or cheap legal fees, and no advice. They don't want lawyers in refinance deals, and the banks are thrilled to hand the chore to First American processing everything - they feel - internally, efficiently and quietly.

It wouldn't surprise me if banks soon stopped using lawyers for conventional first mortgages - even in the context of a house purchase.

First American's Response to TitlePLUS - The Closing Centre

Last spring, First American Title Insurance Company finally came out of the closet with its plans to compete with TitlePLUS, and to put to rest the myth that it wanted to co-exist with the real estate bar.

It announced the establishment of First Canadian Title Closing Centres, with the stated purpose of "minimizing the role of the lawyer and centralizing and automating the clerical functions." In so doing, it has, in my view anyway, left the public at considerable risk of closing real estate transactions without adequate advice or legal protection.

In a letter announcing the set-up of First Canadian Title, Thomas H. Grifferty, Regional Vice-President of First American, recently wrote to real estate agents, brokers, lawyers, lenders and others:

"Since 1991, First American Title has been introducing innovative alternatives to the traditional methods of completing real estate transactions in Canada. Whether offering an alternative to a real property survey, reducing disbursement costs by streamlining procedures, or facilitating the in-branch signing of mortgage documentation for instant funding we have continually evolved the concept of title insurance. Since first becoming licensed to conduct business, it has been our goal to bring these innovative solutions to the purchase and sale transaction. We are confident that we can re-engineer this process which has remained largely unchanged for over a century and are now poised to take this next step. I am writing to you now to share our ideas with you.

"A real estate transaction is comprised of two components, legal and clerical. The fact of the matter is that the legal component of the transaction is very small with most of the transaction being clerical in nature. It is our intention to separate these two components so that each home buyer receives legal advice with respect to the legal issues while the rest of the transaction is handled by a trained title officer. **By minimizing the role of the lawyer** and centralizing and automating the clerical functions, we are confident that we can offer a very cost effective closing service to purchaser, vendors, and lenders alike.

"One of the key advantages to purchasers and vendors is that by completing the transaction on the strength of the title insurance policy, transactions will be able to be closed instantly in our closing centre, even on weekends or evenings.

"In 1997 we will begin establishing a nationwide network of closing centres under the name of our Canadian subsidiary company, First Canadian Title Company. These centres (known as FCT Closing Centres) will become a law firm's real estate conveyancing arm. By moving the real estate conveyance practice

away from the firm's traditional practice, the centre is able to offer a better service and provide purchasers and vendors with additional products and services not previously offered by lawyers. This will be a win for consumers and a win for the law firm as well. ...

"Realtors will also benefit from a transaction closed at an FCT Closing Centre. First Canadian Title will provide a limited commission guarantee to the agents after certain criteria have been met. ...
...

"We hope to start a pilot operation in the greater Toronto area by the second quarter of 1997. We anticipate that this pilot could last for a three to four month period before we begin to expand the closing centre concept to other communities through our network of law firms. "

The proposed boycott and the libel chill

The relationship between First American and the Hamilton-Wentworth real property bar was stormy in 1997.

On April 15, before the first closing centre opened, detailed letters began circulating amongst members of the Hamilton bar reporting on rumours that a closing centre was about to be opened in the area, and calling for the Hamilton Law Association to endorse a boycott of the closing centre.

Members of the Hamilton-area bar were apparently concerned that the closing centres would effectively put them out of business.

The following day First American's vice-president Ed Frackowiak sent a blistering letter to several members of the Hamilton boycott committee.

The letter reads, in part:

"I am writing to you because it has come to our attention that there are a number of allegations being made about First American and its activities particularly in the Hamilton area that are absolutely false. The allegations are based on wrong information and conjecture at best... Here is our immediate response...

"First American has no plans to open its own chain of real estate closing centres in Hamilton or across the province. What we have discussed, and it is only at a discussion stage, is one closing centre at which we can determine how a purchase transaction can be handled more efficiently with independent legal representation for the purchaser while at the same time offering other purchase related services to the consumer which a lawyer cannot provide. It is not our intention to cut lawyers out of a real estate purchase and sale transaction.

"First American has not been promoting closing centres to real estate companies. However, several real estate offices have been approached to discuss the realtors' role in the transaction and what concept would attract a realtor to it. One concept under review but certainly not settled or practiced, is a limited commission guarantee. ...

Following distribution of the Frackowiak letter, members of the Hamilton real estate bar - under what some felt was an implied threat of litigation - immediately withdrew their call for a boycott. Letters were circulated, addressed to the Hamilton Law Association, stating that a proposed boycott was not appropriate.

The unspoken agreement, one lawyer said in April, was that if the closing centre became a reality, the lawyers would reconsider their position.

With the closing centre now a reality, Hamilton-area lawyers are starting to express some concern.

In October, I received an unsolicited letter about First Canadian. "I have long languished on the sidelines," the lawyer writes, "but it's time for me to stand up and contribute."

The lawyer sent along the complete promotional package First American has been giving to local real estate agents and the Bank of Montreal.

In the brochure for real estate agents, First American lists the first problem title insurance wards off as "solicitor ... fraud and forgery."

In the Bank of Montreal package, under a plan for Title Insured Mortgage Programs for non-purchase related mortgages, the First Canadian brochure says that the programs "offer customers cost savings and the convenience of not having to attend at a lawyer or notary's office."

For bank mortgages in conjunction with a purchase, there is a confirmation that all signing of mortgage and other purchase-related documents will take place in the lawyer's offices. First Canadian also offers deferred closing costs, a home warranty program, discount coupons, and relationship pricing on home inspections, movers, and other home closing services. First Canadian promises the Bank of Montreal "no fault" claims resolution. We were unable to find a similar promise in the promotional material of First Canadian or First American to consumers. There is a huge number of reported U.S. decisions against title insurance companies.

First Canadian offers the Bank of Montreal centralized processing of mortgage transactions, unspecified state of the art technology, and complete elimination of post-closing followup.

How the closing centre works

In the closing centre process as set up by First Canadian, , the title company's clerical staff does the title searches. The purchaser's lawyer confirms the issue of a title insurance policy and exclusively looks after the purchaser's interests.

First Canadian is responsible for the clerical services to the lawyer, and the lawyer is responsible for them to the client. First Canadian provides the lawyer with an indemnification contained in a Closing Protection Letter issued by First American.

The lawyer's role is to review with the client the offer, financing, Rule 30, fire and liability insurance, tenancies, the manner in which title is held, the need for a survey, inspection rights, fixtures and chattels, adjustments, and other legal issues.

On a sale transaction which may not require title insurance, the closing centre will provide all necessary clerical services.

Cost of the process

The total cost for a combined purchase and sale through the closing centre, where the purchase price is less than $500,000, is $975 plus taxes, and registration costs. The price includes all necessary disbursements, and a First American Gold Policy. Not included are taxes, and registration costs.

For a purchase only, the price is $725 plus taxes, registration costs and the LPIC levy - including the insurance policy.

For a standalone sale only, the price is $250 plus taxes, registration and the levy. This does not include a title insurance policy for any defects in the vendor's title.

First American and First Canadian agree to waive subrogation rights against lawyers using the closing process. As a rule, they do not waive subrogation against lawyers who routinely use their title insurance policies.

The response of the Hamilton bar

The first closing center was set up in Hamilton, not far from the offices of a lawyer who I spoke to this past weekend. This lawyer walks by the closing center every day, and is aware of who is closing what at the Hamilton Registry Office.

"It's very quite there," he said. "There's very little action. I've never seen anything going on there."

"We can do it better," he told me. "We have our own secretaries.

They provide secretarial services, but we can do it ourselves."

The siren song, however, is the limited commission guarantee that First American provides to the agents, and the $250 or $350 one-year warranty on major systems in the house provided to purchasers by First American Warranty company.

If we lawyers are going to co-exist in this marketplace, we are going to have to aggressively market similar or even better products and services or we could soon be cut out of the marketplace. Lawyers' offices are going to have to be more consumer-friendly, to meet the closing centre threat head-on.

As in Halifax, First American and First Canadian have gave a number of seductive presentations to members of the local bar in Hamilton, particularly several high-volume firms.

Following at least one of the presentations, some of the lawyers in Hamilton met privately and agreed that the First Canadian concept was "a waste of time" for them.

They advised that the concept might work in some situations, for example - law firms with a low real estate volume, who would then need little expertise in processing real estate transactions; or as backup for the inexperienced lawyer; or if the title on the property was known in advance to be a bad one.

One Hamilton real estate lawyer told me, "It's a lot cheaper for me to hire a free-lance secretary and, if I need to, to buy a title insurance policy separately. I have greater control of the transaction, I have a higher profit margin, and I get title insurance only if I want it for my clients."

"If [First Canadian president] Pat Chetcuti thinks this thing will fly," the lawyer said, "he's dreaming in Technicolour. We all listened very politely to him and we talked amongst ourselves. It's not organized but there's a silent boycott going on. We're not using it."

Using the closing centres

On Monday I phoned the Hamilton closing centre and asked for a Closing Centre User Guide. The first question I was asked was, Are you from a bank or a real estate office. It appears to me that the main source of business for these closing centres may well be lenders and agents, who will divert the files to the closing centres before we even get to see a client.

Instead of the User Guide, I received an Overview for Lawyers, which wasn't very helpful on the nuts and bolts of the centre's operation. The more material I see from the closing centres the more confused I get. Maybe that's the intention. It's obvious First American and First Canadian are here for the long haul, and they're here to stay - whether or not any lawyers ever use the

process.

The best response

My award for the best response to closing centres was Chicago Title's full page ads in many of the legal publications. In large bold letters, they proclaimed "We're Not Opening a Closing Office."

The text reads: "Chicago Title Insurance Company prefers to work with lawyers to find creative solutions that benefit your clients."

Chicago Title, incidentally, is the reinsurer for LPIC and the TitlePLUS program.

The future of closing centres

Real estate lawyers in Ontario and here in Nova Scotia will now be watching and wondering:

- Will the closing centres catch on? With whom?
- What percentage of the available purchase and sale transactions will flow to the centres?
- What effect will their pricing and marketing strategies have on fees to real estate lawyers?
- Will TitlePLUS come up a strategy to "take back" the collateral mortgage and refinancing business?
- Will banks and real estate agents embrace the closing centre concept and start steering business to First Canadian?

The future will be interesting, to say the least.

Electronic Registration

In November, more than 3,000 Ontario real estate lawyers across the province attended a demonstration of the electronic registration process. It was held live at the Convention Centre in Toronto, and beamed live by satellite across the province.

The implementation of electronic title searching and registration in Ontario is being driven by Teranet Land Information Services - a 50-50 consortium of the Ontario government and a large pension plan. It is being done for eventual profit.

The Teranet technology is already slated for export to Lebanon, Puerto Rico and Jamaica. There is no doubt that it is going to be a world leader in title searching, recording and registration, in Ontario, Nova Scotia, and many other places.

Here is my scenario of real estate practice within a few months in Ontario and early in the next decade in Nova Scotia:

Right now, from the desk in my office, I can search titles on

line. I can search writs of execution in the Sheriff's office. I can write title insurance policies.

This scenario is a true story. It takes place in the not too distant future. Some of it will be happening in a beta test in London, Ont. later this year.

The Land Registry Office in 2000

Your client buys a house. A copy of the offer arrives in your office by e-mail. Cardboard files, paper correspondence, typewriters, and fax machines are obsolete. Everything is electronic. Even the secretary.

Your computer automatically sets up the file while you are sleeping and greets you in the morning with the news that you have a new deal.

Your clients have e-mailed to you a confirmation that you are indeed acting for them. If you have an old model computer, you press a button to start the searches. If you have one of those newer 986 models with 1000 mhz, you tell the computer to start the searches and away it goes.

The machine dials up the Teranet system and goes to work.

The entire province of Ontario, with its 4 million parcels of land, is now in either Land Titles or the Land Titles Qualified system. Forty-year searches are ancient history.

All the old Registry Act titles are now in Land Titles, and qualified as to extent - they are subject to possessory rights, easements, and the traditional Registry exclusions. But they are Land Titles nevertheless.

Within minutes, your computer has downloaded the entire title search, including all the outstanding documents. The adjacent land has also been searched, and plotted by your FastMap-5000 plotting software.

Your state-of-the-art search software reads the search for you and prints out your requisition letter which it automatically e-mails to the lawyer for the vendor.

Your computer has also dialled into the databases at the municipality and produced **all** your searches - taxes, work orders, zoning, water, hydro, subdivision agreements, front yard parking, soil contamination, gas, and oil.

Your file is now complete. Total elapsed time - 12 minutes, on a slow day. There is no paper. There is not even a file folder. Some of the old timers, of course, feel insecure without **something** in writing, so they print out the search, the inquiries and the correspondence. An old timer is defined as anyone called

to the bar before the year 2000.

The disbursements are electronically withdrawn from your bank account, and a billing trail is generated for your computerized accounting system.

Teranet bills you 30 cents a minute for your search time, plus the government disbursements. The average time to complete the title search portion of your file is four minutes.

While the searches are electronically entering your computer, your computer e-mails your clients, thanks them for their confidence in you, and invites them to e-mail or, if they're old fashioned, to telephone you if they have any questions.

You won't need their birthdates or marital status, of course, because the information has been preprogrammed into the electronic offer by the agent, or it has been downloaded from an Equifax data base. (Even the old "credit bureau" companies have entered the 21st century.)

The solicitor for the vendor opens his file, and uses his mouse to click on the "make document" screens. Using the pointer, the lawyer clicks on the address, then on the names of his clients, then on the type of document he wants, then he keys in his access code, and a few other options, and his deed and all the other documents are produced within 10 minutes - and e-mailed to you - along with answers to your requisition letter. Generated by his RequiResponse program.

The vendor's lawyer submits his documents to the Teranet registration "queue" for pre-approval, and the file (we still use the old word for a set of paperless documents) is ready to go.

Similarly, you receive electronic instructions to prepare a mortgage from your client's bank. Your computer program translates the instructions into an electronic mortgage and e-mails it back to the bank for approval.

The mortgage process is time-consuming at 65 minutes. This is understandable, of course, since it includes a full hour and you had been out for lunch. When you got back, you had to press the "prepare mortgage" code on your computer before the program would start.

You want to meet the clients, but they don't actually have to come in to see you, because there is nothing to sign. Deeds, mortgages, discharges, are all registered without signatures - electronically.

No certified cheques are required, of course, since the clients' funds are wired into your trust account and then wired by you directly to the trust account of the vendor's lawyer, pausing along the way to pay off the old mortgage on title and pick up

and electronic discharge.

When both lawyers are ready to close, they each type a "release" code into their computers. This releases the documents from the preapproval queue to an instantaneous registration. Fees and transfer tax, of course, are automatically debited from your trust account.

The new system is working well. Your clients get the reporting letter by computer even before the key is delivered by the real estate agent.

You don't need a big office. Or a secretary. Or a fax machine, telephone answering service, or for that matter - any office. All you need is a computer and a phone line.

Of course, the Law Society has recommended getting your clients to actually "sign" paper copies of the documents, and a "paper trail" of the trust records is required for bookkeeping purposes. A teenager in Scarborough in late 1999 cracked the Teranet security system using the security code of the lawyer father of a friend who made the mistake of leaving his computer on at home one afternoon. The teen discharged the mortgages on all of his classmates' homes.

The level of fraud is much higher than anticipated, but there are always bugs in any program and after all, the public pays.

And that's just the good news.

You nostalgically recall the old days when you could get $99 in fees for a real estate transaction. Now, the public knows how "easy" it is to practise real estate law, and how "rush" deals can now be closed in 15 minutes. And fees have dropped accordingly.

Not only that, but every real estate office, every bank, every trust company, even some grocery stores now offer conveyancing services. The lawyer doesn't have to be on site, of course. The lawyer can be anywhere in the age of cyberlaw.

Movers are offering free legal and conveyancing services because the automated system has made lawyers' services so cheap, while movers still charge by the hour. Not surprisingly, some lawyers have handed in their diplomas for moving vans.

And the Registry Office? Oh yes, the government - for public relations purposes - has maintained Registry Offices for public access, for those who don't want a lawyer to do title searches and conveyancing from estates, or between spouses. The Registry Offices are about half the size of a decent donut store, and hold a couple of computer terminals with debit card slots for immediate payment.

After all, who needs a lawyer?

Some aspects of this scenario, such as the impact on fees and the spread of conveyancing services to banks, as well as the programs which read title searches and prepare and answer requisition letters, are speculative. The rest of the scenario will be in effect in Ontario within four years. And in Nova Scotia? Who knows.

Why worry about the future?

Albert Einstein once said, "I never worry about the future. It will be here soon enough."

And in the real estate bar, we don't have to worry about the future either, because whether we like it or not, it's already here. We can either jump on the bandwagon, or be left behind at the station.