MANITOBA LAW REFORM COMMISSION

and

LAW REFORM COMMISSION OF SASKATCHEWAN

PRIVATE TITLE INSURANCE

Consultation Paper

June 2005

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CHAPTER 1

PROJECT OVERVIEW

A. SCOPE

This project considers the use of title insurance in conveyancing of residential real property. Both the impact of title insurance on individuals and its potential effect on the public interest are discussed. While title insurance may also apply to commercial conveyancing or to personal property, those areas are beyond the scope of this Consultation Paper.

B. BACKGROUND TO THE PROJECT

In 2002, the Minister of Justice and Attorney General of Manitoba asked the Manitoba Law Reform Commission to review and make recommendations on the issue of private title insurers. Shortly thereafter, discussions between the Manitoba Law Reform Commission, the Saskatchewan Law Reform Commission and the Alberta Law Reform Institute resulted in the decision to collaborate on the project.

Due to differing priorities, the Alberta Law Reform Institute recently withdrew from the project. As a result, this Consultation Paper is now being issued jointly by the Manitoba and Saskatchewan Commissions. We would like to acknowledge the help and guidance received from the Alberta Law Reform Institute and for sharing its research with us.

C. INVITATION TO COMMENT

We invite public comment on the questions discussed herein and hope that as many people as possible will accept our invitation to share their thoughts on the issues and options for reform raised in this Consultation Paper. Once all comments have been received, we will consider them and prepare our final Report which will then be submitted to our respective ministers for consideration. Anyone wishing to respond to the issues raised (or to comment on any other relevant issue) is invited to write to the addresses set out below. We regret that we are unable to receive oral submissions.

Unless clearly marked to the contrary, we will assume that the **comments received are not confidential** and that respondents consent to our quoting from or referring to their comments, in whole or in part, and to the comments being attributed to them. Requests for confidentiality or anonymity will be respected to the extent permitted by freedom of information legislation.

The deadline for submissions is September 30, 2005.

CONTACT INFORMATION:

Manitoba Law Reform Commission
1210-405 Broadway
Winnipeg, MB R3C 3L6
Lawreform@gov.mb.ca
Tel: (204) 945-2896
Fax: (204) 948-2184
website: www.gov.mb.ca/justice/mlrc

Law Reform Commission of Saskatchewan
205 Avenue G North
Saskatoon, SK S7L 1Y9
chair@lawreformcommission.sk.ca
Tel: (306) 347-2101
Fax: (306) 651-4619
Website: www.lawreformcommission.sk.ca

CHAPTER 2

GENERAL OVERVIEW

A. REAL PROPERTY CONVEYANCING

A real property transaction begins with an agreement of purchase and sale. In a complex commercial transaction, a lawyer usually drafts a contract that is tailored to the specific transaction. In-depth inspections and detailed discussions between the parties are also common. By contrast, in a residential transaction, most buyers will enter into a binding agreement of purchase and sale without much inspection or negotiation and without prior legal advice. Many residential buyers use the statutory offer to purchase form which purports to balance the rights, obligations and expectations of both the seller and buyer.[1] It includes terms and conditions that are common to most, if not all, transactions but allows for the addition of terms and conditions particular to the specific transaction. The standard form requires the seller to alert the buyer to any defects in the title or restrictions on the use of land of which he or she is aware.

In many transactions, the purchase is financed by a mortgage. In residential mortgage transactions, the buyer's lawyer will often act for both lender and buyer, preparing and registering the mortgage documents despite the technical conflict of interest. This reduces the cost of the transaction for the buyer. Since the interests of the buyer and lender generally coincide, actual conflicts are rare.

In every transaction, the period of time between signing of the contract and *closing*[2] is the only opportunity for the buyer to discover any defects in the title to the property or restrictions on its use, to ascertain they are getting what they contracted for and to understand the nature and extent of the rights and obligations they will undertake. Where defects are discovered, the buyer may insist that the seller remove or remedy the defect or adjust the purchase price; the buyer may even rescind the agreement in the event of a serious defect.

It is important that the buyer discover any problems with the property before closing because of the doctrines of *caveat emptor* and *merger*. Under these common law rules the buyer steps into the shoes of the seller upon closing, assuming all benefits and burdens of ownership. A prudent buyer will attempt to discover any problems before closing. After closing, the buyer may only have a remedy against the seller if the latter has committed a fraudulent misrepresentation, error *in*

[1] *Real Estate Brokers Regulation,* Man. Reg. 56/88, Schedule A. In Saskatchewan, s. 58 of *The Real Estate Act*, S.S. 1995, R-1.3 regulates the content of the offer to purchase, and standard forms based on the statutory requirements are generally used.

[2] The final or concluding performance of the parties' obligations under the agreement of purchase and sale. Closing involves the exchange of the conveyancing documents and physical possession for the purchase money.

substantialibus, breach of a collateral warranty or breach of a contractual condition entitling the buyer to damages.

While there is no legal requirement that the buyer retain a lawyer to conduct the transaction, most do as the conveyancing process can be complicated and may require expertise. Generally, the lawyer's role in a real property transaction includes:

- confirming the details such as the name to appear on title, the nature of the interest acquired, and the manner of payment (cash, mortgage or some combination of the two);
- identifying any statutory requirements that affect the transaction such as proper authorization by a corporate seller, consent of a spouse or common law partner to dispose of homestead property, consent of the municipal planning authority where the transfer will effect a subdivision of land or court approval of the sale of estate property in certain circumstances;[3]
- undertaking searches and inquiries to ascertain and fulfil conditions and contractual obligations under the agreement of pupreparing, attending to the signing of, and registering conveyance and mortgage documents; and
- providing an opinion on title ("solicitor's opinion") to the buyer and, where applicable, to the lender, describing the steps taken in the transaction, opining on title matters and "off-title" matters (described below) and outlining any restrictions and qualifications arising from agreed-upon limitations on the scope of the retainer.

The lawyer must also engage in some *due diligence* which is, generally speaking, the process of ascertaining and protecting the buyer's and lender's interest in the land, usually by identifying defects in title, survey defects, non-compliance with municipal by-laws or other burdens which may cause loss or affect the buyer's use and enjoyment of the property.

Usually the first step in the due diligence process is an examination of the title to the land and all other interests in the land. A search of the land titles register (described below) reveals most interests affecting the land such as long-term leases, easements, restrictive covenants, building restriction agreements, mortgages, certificates of judgment and social assistance liens, as well as caveats which give notice of, *inter alia*, leasehold interests, homestead interests, purchase agreements and option to purchase agreements.

Land registration in the Prairie Provinces is done using a predominantly *Torrens*-style land titles system, the mandate of which is to simplify and facilitate land transactions while also giving certainty to title.[4] The main attributes of the land titles system include a government-administered *register,* a *guarantee* of registered interests and an *assurance fund*.

[3] Law Society of Manitoba, *Bar Admission Course 2003–04* (Winnipeg: 2003) at 2-1.

[4] *The Real Property Act*, C.C.S.M., c. R30 (hereafter the "MB Act"); *Land Titles Act, 2000*, S.S. 2000, c. L-5.1 (hereafter the "SK Act"); *Land Titles Act*, R.S.A. 2000, c. L-4 (hereafter the "AB Act").

The essential feature of the land titles system is a government-operated register which is the source of all rights in each parcel of land covered by the system. The register indicates who owns each parcel of land and what rights in the land others hold. Upon every transfer of an interest in land, title is surrendered to the Crown and re-granted to the transferee. It is the government, and not the grantor, that conveys the legal interest.[5]

The government's guarantee of the registered interest comes in the form of an indemnity in the event that someone is deprived of an interest in land through the operation of the system or through an error of the officials administering it. The government maintains an assurance fund to provide this compensation. The legislation also protects registered interests by prohibiting most actions by a prior interest holder to recover their interest, even where the claimant might have a superior claim at common law.

The land titles system provides no protection or guarantee against defects in the occupation and use of the land ("off-title" matters). An examination of the title will provide no certainty that the buyer is getting the land he or she has contracted for or that the intended use of the land and all buildings on the land comply with zoning and planning regulations. Accordingly, traditional conveyancing practice includes inquiries into off-title matters relating to the use and physical characteristics of the land and buildings located thereon.

In order to search off-title matters, the buyer might be advised by his or her lawyer to obtain a current survey[6] of the property from a qualified land surveyor to certify that buildings and structures do not encroach onto adjacent property and that the property is free of encroachments from neighbouring buildings and structures.

As well, the buyer might be advised to obtain a certificate from the municipal authority to confirm that buildings and structures comply with certain aspects of applicable zoning by-laws and, where the buyer intends to change the use of the property, that the intended use also complies with the zoning by-law. As part of this process, the municipal authority may identify defects such as improper encroachments, inadequate setbacks, improper construction or structures built without a permit. These defects might require a licence, easement agreement, zoning variance, by-law amendment or removal of the offending structure.

If, after closing, the buyer or lender discovers some defect in title to or use of the land which results in a loss, he or she may have recourse against a number of sources:

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[5]Manitoba Law Reform Commission, *Discussion Paper: Towards a New Manitoba Real Property Act* (Winnipeg: Manitoba Law Reform Commission, 1991) at 7.

[6]In Manitoba, this survey is called a building location certificate. In Alberta and Saskatchewan, a more extensive survey, called a real property report, is the standard practice.

- the seller who breached warranties made in the contract of sale or made fraudulent or negligent misrepresentations;
- the realtor who made fraudulent or negligent misrepresentations;
- the lawyer who negligently failed to discover or correct a problem;
- the land titles assurance fund where the loss is caused by the operation of the Torrens system or an error of the Registrar.

In each case, the buyer has a right of action to recover loss or damage suffered.

B. TITLE INSURANCE

1. General Features of Title Insurance

Title insurance, generally speaking, insures against loss or damage caused by one or more of the following:

- a defect in the title to property;
- the existence of a lien or encumbrance against the title;
- a defect in a document evidencing the creation of a security interest or deed of trust; or
- any other matter affecting the title to property or the right to the use and enjoyment of property, as defined in the policy (subject to the exclusions and limitations in the policy).[7]

A title insurance policy is a contract whereby the insurer agrees to indemnify a person with an interest in land for a loss "of a specific interest in a specific property" due to a "specific" cause.[8] Insurance is available for both commercial and residential property and for owners in purchase transactions and lenders in both purchase and refinancing transactions.[9]

The term title insurance is a misnomer since it neither guarantees title nor is it limited to title matters. Coverage is provided for actual monetary loss arising from problems with the buyer's ability to use and occupy the land, as well as from defects in title and off-title matters such as survey defects, non-compliance with zoning, outstanding taxes or charges, or lack of access. Actual monetary loss usually relates to a loss in or disappointed expectation of market value or to the cost of remedying defects or non-compliance. Lender policies insure the security interest in the land, while owner policies insure the equity and, to some extent, quiet use and possession.

[7] Canadian Council of Insurance Regulators, "Classes of Insurance and Definitions"at 3. Online: Canadian Council of Insurance Regulators website, http://www.ccir-ccrra.org/publications/pdf/Definitions.pdf. (Date accessed: June 30, 2005).

[8] A. Chapman & R. Niedermayer, *Report on Title Insurance* (Nova Scotia Barrister's Society, 1998) at 21.

[9] In a refinancing transaction, the borrower pays off an existing mortgage and arranges a new mortgage with the same or a different lender.

Until recently, an owner could only obtain title insurance in a purchase transaction and not in a refinancing transaction. In the latter transaction, insurance was only available to lenders. As of June 2004, one insurer is now offering policies to existing homeowners in response to demand for fraud coverage, with coverage retroactive to the date the insured acquired the property.[10] The competitive nature of the industry and past experience suggests that other insurers will match this type of coverage.

Title insurance differs from other forms of insurance in that most of the coverage applies to problems existing at the policy date but which are as yet undiscovered. Coverage for known defects is expressly excluded but an insurer may agree to cover known defects by special agreement, usually when such risk of loss is unavoidable, remote or impractical to remedy.[11] Title insurance policies also include coverage for future risks related to fraud, forgery and encroachment by neighbouring structures.

Title insurance policies also differ from other types of insurance in that the premium is paid once but covers the insured for as long as the policy holder can suffer loss — usually during the period of indebtedness or ownership of the land. Thus, a policy may cover a period of some 20 to 30 years or more.

In addition to the duty to indemnify, the policy includes a duty to defend the insured's interest. Where someone challenges the policyholder's interest in the land or asserts a conflicting interest, the insurer will assume conduct of any litigation required to protect the policyholder's interest. Unlike the insurer's duty to indemnify for actual loss, the duty to defend is, in theory, not subject to any monetary limit.[12]

The policy limit on an owner policy is the purchase price or market value at the policy date. Some policies now provide a limit of up to 200% of the value of the property at the policy date to allow for some appreciation in value over time. The limit on a lender policy is the amount of the debt outstanding at the date of the loss.

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[10] "Lawyer Update: Protection From Title Fraud Now Available for First Time Home Owners Across Canada" (June 8, 2004), online: First Canadian Title, http://www.firstcanadiantitle.com/en/products_services/pdf/Lawyer_Update_Western_Canada_June_8_2004_REVISED.pdf. (Date accessed: June 22, 2005).

[11] P. O'Connor, "Double Indemnity: Title Insurance and the Torrens System" (2003) 3:1 QUTLJJ at 3. online:Queensland University of Technology, Law and Justice Journal website, http://www.law.qut.edu.au/about/ljj/editions/v3n1/oconnor_full.jsp (Date accessed: June 22, 2005).

[12] B. Ziff, "Title Insurance: The Big Print Giveth But Does the Small Print Taketh Away?' in D. Grinlinton, ed., *Torrens in the 21st Century* (Wellington: LexisNexis, 2003) at 372. Ziff suggests, at p. 387, that the duty to defend could, in effect, be subject to the monetary limit on the policy as the insurer always has the option to pay the maximum amount and terminate its obligation under the policy.

2. The Increasing Use of Title Insurance

As an insurance product, title insurance has been available for a considerable period of time. Title insurance originated in the United States in the late 1800s to protect against shortcomings in the conveyancing and land registry systems.[13] Its growth was assured when the Federal National Mortgage Association ("Fannie Mae") required title insurance as part of its scheme to facilitate low-cost, long-term mortgages for middle- and low-income earners in the late 1930s. Further demand was generated by the expansion of the secondary mortgage market in the 1980s as mortgages became a commodity to be bought and sold.

The initial use of title insurance in Canada was likely to facilitate land transactions involving American interests. Though the first title insurer was licensed in Canada as early as 1914,[14] it was not until the First American Title Insurance Company entered the market in 1991 that title insurance made significant inroads into the conveyancing market.

Since the early 1990s, however, the use of title insurance has increased dramatically in Canada. First American Title has reported the sale of its second million policies between 2002 and 2004. This is especially notable considering that the sale of the first million took approximately 11 years.

There are currently five title insurers active in Canada including First Canadian Title (the operating name of FCT Insurance Co. Ltd., a recently incorporated Canadian subsidiary of First American Title), Stewart Title Guaranty Company, Lawyers Professional Indemnity Company (LawPRO),[15] Chicago Title Insurance Company and St. Paul Guarantee Insurance Company. With the exception of LawPRO, each is a subsidiary of an American insurer.

3. Utility of Title Insurance in a Torrens System

Critics of title insurance suggest that it is of limited value in a Torrens-style land titles system. Suppose, for example, that a rogue registers a $10 000 mortgage against an owner's property: a title

[13] Title insurance first appeared in Pennsylvania following the decision in *Watson v. Muirhead*, 57 Pa. 161, 98 Am. Dec. 213 (1868). The Court held that a conveyancer was not liable for failing to advise the buyer of a court judgment affecting title. In contrast to Western Canada, Torrens-style land titles systems have not flourished in the United States, existing only in a handful of jurisdictions. For more information on the history of title insurance in the U.S., see *inter alia* Ziff, *supra* note 12 at 373, and N.R. Lipshutz, *The Regulatory Economics of Title Insurance* (Westport, Conn.: Praeger, 1994) at 75.

[14] *An Act to incorporate the Title Insurance Company of Canada*, S.C. 1914, c. 118.

[15] LawPRO is the errors and omissions insurer for the Law Society of Upper Canada.

insurer would compensate the owner for the $10 000, but this only duplicates the coverage that the owner would have under the assurance fund. Moreover, if the title insurer has paid the owner, it would then have a subrogated right to seek reimbursement from the assurance fund. This double-coverage and subrogation also applies where a fraudster sells an owner's property to an innocent purchaser. The redundancy can become compounded when both the owner and the lender have title insurance and the fraud is potentially covered by the assurance fund. How do proponents of title insurance respond to allegations of its redundancy in a land titles system?

First, proponents claim that title insurance covers matters for which assurance fund coverage may be excluded or limited by the legislation. Professor Bruce Ziff states that, while the Torrens system renders much of the coverage provided by title insurance companies redundant, there are ways in which title insurance may complement the Torrens guarantee, such as title insurance's coverage for overriding interests.[16] Proponents further assert that, even where there is duplication of coverage, title insurance offers a procedural advantage, particularly for fraud claims in that it is faster and easier for the insured to obtain compensation. This expedited recovery can help reduce the owner's monetary, consequential and emotional losses.

In traditional conveyancing practice, sale and mortgage proceeds are withheld until registration is complete to avoid loss due to the registration of a prior interest during the "registration gap". This is the period of time between closing and the completion of the process by which an interest in land is created and its priority is established. This delay results in cost and inconvenience for lenders, buyer and sellers. Both title insurance and the Western Law Societies Conveyance Protocol (described below) facilitate the early release of mortgage and sale proceeds, although the latter does so at no additional cost to the consumer. Further, it should be noted that registration gap coverage is not a standard feature in all policies — one must specifically bargain for it.

Proponents of title insurance also point to the coverage for off-title matters, such as survey defects and zoning non-compliance, for which the land titles system offers no protection. Critics, on the other hand, prefer the protection afforded by traditional conveyancing practice, such as an up-to-date survey. By providing coverage for survey defects and zoning non-compliance without requiring an up-to-date survey, title insurance claims to be a lower-cost alternative to traditional conveyancing practice.[17]

Proponents of title insurance also assert a number of procedural advantages of title insurance as compared to the Torrens system and traditional conveyancing practice. Under the latter, claimants have a right of action and may be required to sue and obtain judgment before receiving

[16] Ziff, *supra* note 12 at 389.

[17] R. Zucker, "Title Insurance: Here Today, Here Tomorrow" (paper presented at the Accredited Specialists Conference, New South Wales Law Society, Queensland, July 2001) at 15, cited in P. O'Connor, *supra* note 11 at 7.

compensation. Title insurance, they suggest, provides better and more convenient protection because the insured has an enforceable right under the contract and claims are paid upon proof of loss. It is difficult to assess this last claim since the claims payment (and claims rejection) history of title insurers appears to be a well-guarded secret. Though insurers disclose the total annual amount paid
out in claims, they do not offer details on the number of claims paid, the amount paid for each or the nature of the claims.

4. Additional Advantages of Title Insurance

It has been suggested that large financial institutions are driving the nature and pace of change in the real estate market and these institutions are "marshalling title insurance and technology service providers together in an effort to centralize and streamline the legal aspects of the lending process."[18] For example, the Canada Mortgage and Housing Corporation ("CMHC") recently announced its intention to include some form of title insurance coverage, though it is not yet clear what benefits this will provide to CMHC itself.[19] Title insurers have created demand for their product by focusing their activities on three areas of interest for lenders: demand for mortgage-backed securities, the uncertainty and inconvenience caused by the registration gap and a general desire to reduce costs by streamlining the legal process.

(a) Mortgage-backed securities

Mortgages are now a commodity capable of being bought and sold.[20] Financial institutions pool residential mortgages together and sell units to investors. Similar to bonds, the mortgages can generate income, comprising interest and a portion of the principal, for investors. The units are freely traded on the secondary market. The lender keeps sufficient funds or receives a fee to service the mortgages and its capital is freed up for other uses.[21]

To sell units in the mortgage pool, the financial institution must provide warranties relating to the validity and enforceability of each mortgage in the pool. Title insurance is a cost-effective way to support the lender's warranties, since it is the borrower, not the lender, who pays for the policy.

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[18] Jean Cummings, "Lawyers v. Lenders" (2004) 13:4 C.B.A. National Magazine at 20.

[19] On-line: CMHC website, http://www.cmhc-schl.gc.ca/en/News/nere/2005/2005-04-22-1115.cfm (date accessed: June 24, 2005).

[20] For more information on mortgage-backed securities, see on-line: CMHC website, http://www.cmhc-schl.gc.ca/en/moinin/inmobase/index.cfm (date accessed: June 24, 2005).

[21] B. McKenna, ed., *Title Insurance: A Guide to Regulation, Coverage and Claims Process in Ontario* (CCH Canadian, 1999) at 227.

(b) Registration gap coverage

As will be discussed in greater detail in Chapter Three, the registration gap causes uncertainty and inconvenience for buyers and lenders. The vagaries of the registration process and the statutory priority granted to certain interests create the possibility that a conflicting interest with superior priority might be registered during the gap, adversely affecting the priority and security of the new owner and lender.[22] To avoid this problem, the traditional conveyancing practice is to withhold the purchase money and/or mortgage proceeds until registration of the conveyancing documents are complete and priority is confirmed. Since there can be a delay of days or in some cases weeks between closing and final registration, with even greater delay if there is an intervening registration, the buyer must arrange bridge financing, increasing the cost for the buyer and administrative work for the lender.

(c) Streamlining or centralizing the legal process

Increasingly, lenders are seeking to reduce costs by outsourcing processing and administrative tasks to a third party service provider. Most refinancing transactions are now handled in this way, made possible by title insurance policies in lieu of traditional means of assuring security such as a survey and a solicitor's opinion. The outsourcing of tasks allows the lender to offload administrative cost.

Title insurers/service providers are seeking to participate in purchase transactions as well as refinancing deals. In Ontario, one company has introduced a "lender intermediary" program in which it acts on the lender's behalf. The service provider instructs the buyer's lawyer, advances the mortgage proceeds, receives the solicitor's opinion and then reports to the lender. The service also includes a title insurance policy for the lender.

C. THE RESPONSE TO TITLE INSURANCE

Though the Ontario legal profession initially resisted title insurance, it later decided to offer its own title insurance product, TitlePLUS through LawPRO, the errors and omissions insurer of the Law Society of Upper Canada. TitlePLUS is intended to overcome the perceived shortcomings of private title insurance by incorporating into both underwriting practice and terms of coverage, the following: independent legal advice, minimum due diligence requirements and mandatory registration of instruments. In this way, TitlePLUS claims to retain some of the consumer protection mechanisms provided by traditional conveyancing practice, primarily by maintaining certain standards of practice for real property conveyancing.

[22] In informal consultation, First Canadian Title advised that problems arising during the registration gaps are the second most frequent claim received.

In Western Canada, there is greater resistance to title insurance. Rather than seeking to compete with title insurers directly by offering a title insurance product, the western law societies have attempted to develop practice standards to provide similar benefits by creating the *Western Law Societies Conveyancing Protocol* (the "Protocol") in 2001. The expressed rationale for the Protocol is to increase efficiency for lenders, maintain access to independent legal advice and preserve the integrity of the land titles system. The Protocol attempts to achieve these goals by simplifying and streamlining the conveyancing process for lenders and by providing a source of recovery for both lenders and buyers in the event of a problem.[23]

The Protocol is simply a process which, if followed correctly, allows the lawyer to release the solicitor's opinion on title immediately upon closing rather than waiting for completion of registration. The Protocol provides a few procedural shortcuts, but this exposes the lawyer to some risk in the event that the opinion turns out to be incorrect as a result of an intervening registration. Accordingly, the Protocol provides that the professional liability claims fund will indemnify a buyer or lender who suffers an actual monetary loss as a result of the registration on title, during the registration gap, of an interest which adversely affects the buyer's interest or the lender's security.

The Protocol also facilitates the lender's waiver of a current survey as the professional liability claims fund will indemnify the lender (but not the owner) against actual monetary loss due to a survey defect. If clients choose to forgo obtaining a current survey, the Protocol requires that lawyers continue to advise clients of the benefits of a survey and have clients sign an acknowledgment of such advice.

The Protocol enables a lawyer to meet the lender's security requirements by providing coverage for loss due to survey defects or registration timing issues. Some financial institutions have accepted the Protocol for assuring their security,[24] but most major financial institutions continue to prefer title insurance. One may speculate that while the Protocol addresses some of the risk issues, it cannot compete because it does not offer the conveyancing services provided by title insurers.

Having laid out some of the context and background regarding title insurance, we shall now consider whether law reform is necessary to protect, replace or augment the systems and practices that have been challenged by title insurance.

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[23] Law Society of Manitoba, *Bar Admission Course, supra* note 3 at 2-47.

[24] The Bank of Montreal has approved the Protocol for use in the Prairie Provinces and and GE Capital Canada has approved its use in Western Canada. On-line: Law Society of Manitoba website, http://www.lawsociety.mb.ca/notice_bofm.htm and http://www.lawsociety.mb.ca/communique_may02.htm (Date accessed: June 24, 2005).

CHAPTER 3

THE IMPACT OF TITLE INSURANCE

A. INDEPENDENT LEGAL ADVICE AND CONVEYANCING PRACTICE

For most people, the purchase of real property will be an infrequent event in their life and there is little reason (or opportunity) for the lay person to acquire knowledge and expertise about the conveyancing process. While independent legal advice is not mandatory, the complexities and potential pitfalls of the conveyancing process make such advice a practical necessity and we assume that prudent buyers will retain a lawyer to assist them. Buyers turn to a lawyer to take care of the details, to explain the nature and extent of legal interests, rights and obligations and to make sure that, at the end of the day, buyers get what they paid for.

In refinancing transactions such as second mortgages, lawyers have been all but eliminated from the process. While refinancing transactions are, for the most part, uncomplicated, concerns may arise because there is no longer any one involved who has a duty to protect the borrower. There is anecdotal evidence to suggest that some consumers do not understand the transaction; sometimes, due to error or misunderstanding, the transaction is structured in a way that is contrary to the consumer's understanding and agreement.

Critics allege that title insurance and conveyancing services threaten consumer access to independent legal advice by reducing the lawyer's role in the transaction, replacing the lawyer altogether or by compromising the lawyer's independence in some way. In considering this claim, it is important to understand the role that independent legal advice is intended to play, regardless of whether that goal is realized in traditional practice and despite the extent to which changes in conveyancing practices have eroded the protection offered by independent legal advice.

In contract law, parties to a transaction are entitled to pursue their self-interest vigorously, seeking to maximize their benefits and minimize their obligations. Except in very limited circumstances, neither party is under a duty to protect the other or refrain from exercising an advantage to the detriment of the other. For example, the seller knows more about the property than the buyer in virtually every case, but the duty to inform the buyer is limited. The buyer is thus at a disadvantage from the outset. Furthermore, one party may have greater bargaining power and resources than the other. The lawyer's role is to counteract the client's vulnerability and lack of knowledge and protect the client's interest. To accomplish this, the lawyer must be free of any influence or consideration other than the best interest of his or her client.

While the importance of independent legal advice is understood as a key protection of individual liberty against intrusion by the state, it is also necessary in private transactions.

> It is imperative that individuals be able to obtain independent legal advice and representation in order to defend their legal rights against other non-state entities as well as against the state … . [E]ven in a conveyancing transaction, an individual needs to know that the advice and representation he receives will be independent of the influence of the other side, and the existence of a profession which regards independence as a duty is, in my submission, a safeguard which is imperative in the public interest.[25]

Third party conveyancing services may present a more obvious challenge to ensuring access to independent legal advice. Most refinancing transactions are now completed without the participation of an independent lawyer acting for the borrower. Formerly, the consumer would go to the bank to make an application for a loan. The borrower's lawyer prepared the documents, witnessed the borrower signing and registered the instruments. Now, once the lender approves the loan, the matter is referred to the service provider who prepares the documents and returns them to the bank for signing.[26] The borrower attends at the branch to execute the documents, which are then registered by the service provider.[27]

The lender has a contractual relationship with the borrower but does not have a duty to explain the loan transaction, the title insurance policy or the service provider's role. The service provider has no relationship with or duty to the borrower. If the borrower does not seek independent legal advice, there is no one in the transaction that is under any obligation to ensure that the borrower understands the transaction. This is especially problematic where the lender is bundling products and services or offering a variety of loan products. Consumers who rely solely on information provided by the lender may not understand the relative advantages and disadvantages of the products offered and may not understand that such products are not mandatory. Errors are more likely to go undetected. Lastly, consumers may be misled into thinking that they are obliged to buy a product such as title insurance and that there are no other options.

Service providers are now seeking to extend their services from refinancing to purchase transactions with the introduction of lender intermediary programs and fixed-price closing services. While such services have not yet appeared in any noticeable way in the western provinces, they have attracted the attention of the Law Society of Upper Canada.[28] Concerns relate to the confused relationship between the lawyer and the service provider and the possible conflict of interest, as the

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[25] W.H. Hurlburt, *The Self-Regulation of the Legal Profession in Canada and in England and Wales*, (Edmonton: Law Society of Alberta & Alberta Law Reform Institute, 2000) at 170.

[26] Today, loan applications are not always made in person. It is now possible to arrange a loan over the Internet or by telephone. While greatly increasing the speed and convenience of loan transactions, this may reduce consumer access to information and also make fraudulent transactions easier to perpetrate and more difficult to detect.

[27] At least one service provider provides an "at-home" signing service where an employee attends the house to witness the signing of documents. The witness is not a lawyer and no advice is provided to the borrower.

[28] Notice to the Profession on Use of Third Party Service Providers by Lenders to Process Residential Mortgages (August 2003), on-line: Law Society of Upper Canada website, http://www.lsuc.on.ca/news/pdf/aug0503_notice.pdf (Date accessed: June 24, 2005).

lawyer will have at least three different entities to whom a duty is owed: the client, the lender and the service provider. Lawyers may be asked to provide confidential client information to the service provider or may feel constrained in their ability to assert the client's position in the event of a dispute or conflict with the service provider or lender.

Consumers may be restricted in their choice of lawyer under a fixed-fee program (discussed below at page 30). The service provider gives the consumer the name or names of lawyers who have agreed to provide services for the fixed fee that is lower than the going rate. Consumers may not realize that they are free to retain a lawyer who is not on the list, or they may effectively be discouraged from doing so by the additional cost. Since title insurance is also included in the package, consumers may not question whether title insurance is suitable for them.

Lawyers who participate in the fixed-fee program are independent to the extent that they are not in the direct employ of the service provider but may be influenced, directly or indirectly, by considerations other than the best interest of their client, the buyer. For example, the lawyer has an ongoing relationship with the service provider and an interest in maintaining that relationship. Furthermore, the lawyer's role and ability may be restricted where processing functions, such as the drafting of documents, are completed by the service provider or where the lawyer is instructed by the service provider to perform (or not perform) specified tasks. Will the lawyer have the ability to identify and correct errors or omissions, or will the process determined by the service provider preclude this? Finally, the obligation to provide services at a rate significantly lower than the market rate, which some might suggest is already too low to provide adequate service, may compel the lawyer to find other ways to cut his or her cost. The lawyer may have less time to spend with the client and less direct involvement in the preparation and registration of documents. Thus access to legal advice may be compromised.

B. BUSINESS PRACTICES AND CONFLICTS OF INTEREST

Since title insurance is marketed directly to lawyers (and lenders, real estate agents and brokers, and mortgage brokers) rather than to the consumer, the latter depends upon the lawyer (or the agent or broker) to recommend the most suitable product. In marketing their products to lawyers, insurers promote the benefits of the product *to the lawyer* as well as the client. These benefits include an opportunity for the lawyer to outsource processing and administrative tasks and reduce the lawyer's exposure to liability. As competition for referral business increases, so too does the pressure to offer incentives or referral fees to those in a position to refer business, notwithstanding that such fees are unethical and potentially illegal.[29] Payment of referral fees and incentives drives up the cost for consumers without adding any value to the transaction.

Even without the fear of improper incentives and referral fees, the lawyer's independence may be challenged by the inclusion of protection for the lawyer in the policy or by a waiver of the right of subrogation.

[29] See Law Society of Manitoba, *Code of Professional Conduct*, Chapter 11, Commentaries 9 & 10.

In addition to coverage for title and survey defects, the TitlePLUS policy includes *legal services coverage* which provides indemnity for loss arising from the errors and omissions of the lawyer conducting the transaction. Only LawPRO is licenced to offer legal services coverage, but the other insurers offer a waiver of their right of subrogation.[30] This waiver is offered in all cases except those involving gross negligence, wilful misconduct or fraud. As a result, the lawyer becomes an indirect insured under the client's policy. This benefit to the lawyer may impact on the lawyer's advice regarding whether title insurance is in the client's interest.

Legal services coverage or a waiver of subrogation provides a direct benefit for lawyers by diverting negligence claims away from the lawyers' own insurer, saving the lawyer's deductible and eventually reducing premiums. In Manitoba, for example, lawyers who are the subject of multiple claims must pay a surcharge in addition to the basic premium for professional liability insurance. The minimization of the financial consequences of negligence for lawyers may remove some of the incentive for careful and diligent practice by lawyers and thus result in more errors.

Lawyers in Ontario face another potential conflict in that they are, indirectly, owners of LawPRO, which offers the TitlePLUS product. They are in a position to recommend a product in which they have an indirect interest. Professor Bruce Ziff suggests that "[t]he creation of a for-profit insurance company owned by the governing body of the profession raises ethical concerns. How might the existence of a bar-affiliated insurer affect a lawyer's duty to advise clients?"[31]

The Law Society of Upper Canada has recognized the issue and established rules regarding the professional obligation with respect to title insurance. These rules require that a lawyer: [32]

- advise clients of all reasonable options to assure title, that title insurance is not the only option nor is it mandatory;
- not receive compensation, directly or indirectly, from an insurer, agent or intermediary for recommending a title insurance product and must also advise the client that no compensation was paid;
- fully disclose to the client the relationship between the lawyer, the Law Society of Upper Canada and LawPro;
- not permit a non-lawyer to advise the client about title insurance without the lawyer's supervision.

Another perceived threat to the independence of lawyers lies in the manner in which title insurance is marketed and distributed. As mentioned earlier, title insurance is marketed to lawyers and lenders who then recommend the product to their clients. When instructed to obtain title

[30] That is, a waiver of their right to sue the lawyer in the place of the insured once the insured's claim has been paid.

[31] Ziff, *supra* note 12 at 379.

[32] *Rules of Professional Conduct*, Rules 2.02 (10) - (13) and 5.01(4). Online: Law Society of Upper Canada, website, http://www.lsuc.on.ca/services/contents/rule2.jsp. (Date accessed: June 24, 2005).

insurance, the lawyer submits an application to the insurer, providing the information required by the insurer. The Law Society of Manitoba has challenged this practice, advising its members of The Insurance Council of Manitoba's opinion that it breaches the prohibition on acting as an insurance agent without a licence.[33]

C. LEGAL PRACTICE STANDARDS

Title insurers have directly challenged practising standards which conflict with their desired mode of operation. For example, in British Columbia, First Canadian Title challenged the requirement that lawyers be personally present to witness the signing of real property instruments as it wanted to arrange for the witnessing of instruments via interactive video conference. The legislation requires that instruments be witnessed by a lawyer or notary and the Law Society of British Columbia had interpreted those provisions to require that the lawyer be physically present at the time of signing.[34] First Canadian Title applied for a declaration that the standard was excessive, an application which the Law Society opposed on the grounds that videoconferencing would not meet the consumer protection objectives of the legislation. Lawyers would be unable to ascertain what documents were being signed, would be unaware of off-screen influences and would be unable to ascertain the true identity of the person signing. The Court upheld the Society's power to impose standards as a legitimate exercise of its mandate to protect the public.[35]

In another case, First Canadian Title challenged the Law Society of New Brunswick's authority to set conveyancing practice standards, specifically those which impact on its mode of operation. By counterclaim, the Law Society sought a declaration that First Canadian Title is engaging in the unauthorized practice of law.[36] The fact that these matters are being litigated speaks to the need for law reform in this area.

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[33] *The Insurance Act*, C.C.S.M., c. I40, s. 369(1). See also , Practice Notice Re: Restricted Lawyer Involvement in Title-Insured Conveyances, online: Law Society of Manitoba website, http://www.lawsociety.mb.ca/notice_lsm_conveyance.htm (Date accessed: June 24, 2005).

[34] *Land Title Act*, R.S.B.C. 1996, c. 250 , ss. 41–43. Law Society of British Columbia, Professional Conduct Handbook, Appendix 1, "Affidavits, Solemn Declarations and Officer Certifications", online: Law Society of British Columbia website, http://www.lawsociety.bc.ca/publications_forms/handbook/body_handbook_app1.html (Date accessed: June 26, 2005);

[35] *First Canadian Title Co. v. Law Society of British Columbia*, [2004] 8 W.W.R. 319, 2004 BCSC 197.

[36] *First American Title Insurance Company v. Law Society of New Brunswick*, 2004 NBQB 418. The trial in this matter began in November 2004 but ended in a mistrial when it was discovered that the judge had been a member of the Law Society Council for at least some of the relevant time. A new trial has been scheduled for September 2005.

D. THE INTEGRITY OF THE REAL PROPERTY SYSTEM

In Western Canada, the real property system comprises three components that form the foundation for security of title and quiet use and possession of land: the land titles system, the survey fabric and the land use management system (planning and zoning control).

The land titles system in western Canada facilitates transfer and provides security of title. The integrity and reliability of this system depends in part upon the survey system that establishes the legal boundaries of land and provides the geographic reference for the legal description shown on the register. The land use management system ensures that activity and improvements on the land are contained within the land and do not unduly affect other owners.

The introduction of title insurance into the real property conveyancing system may impact upon one or more of its components. It is therefore important to understand not only how title insurance affects each component, but also what the resulting effect is upon the functionality and integrity of the whole.

1. Land Titles System

Under a Torrens land titles system, the register is intended to be a reliable and comprehensive mirror of all interests in a parcel of land. A search of the chain of title should no longer be necessary. Interests in land are not created by the execution and delivery of a deed but rather by the registration in the land titles office of the required form. Once an interest is registered, the owner thereof has an *indefeasible* title, guaranteed by the state and, *in theory*, secure from all prior interests or claims and subject only to other interests registered in priority.

> In the absence of fraud, a buyer for value … obtains upon registration a title that cannot be impugned on the ground that the seller's title was defective, or that the conveyance from the seller to the buyer was invalid for any reason.[37]

Registration of an interest in land is not, strictly speaking, compulsory, but is so in effect, registration being necessary to protect and preserve the priority of interests. As a general rule, a certificate of title is conclusive evidence of ownership and the statute supersedes the common law action for recovery of the land, replacing it with an action for compensation against the assurance fund.[38]

[37] O'Connor, *supra* note 11 at 9.

[38] MB Act, ss. 59(1), 62, 78 and 182(2); SK Act, ss. 13, 14 and 84(2)(d). The Torrens indemnity only extends to registered interests.

The land titles system is not perfect and indeed has been the subject of earlier law reform recommendations in Canada. In 1990, the Joint Land Titles Committee[39] called for the reform of land titles legislation.

> The existing title registration statutes are based on 19th century Australian or English statutes. Some of their central concepts have served us well. However, they leave problems unsolved. They are opaque, and sometimes downright misleading. They have had to be tortured by courts into new forms to meet current conditions. They hide the light of title registration under bushels of substantive law and administrative detail. They require rationalization and modernization in light of nearly a century and a half of experience title registration.[40]

The Joint Land Titles Committee's goal, in drafting model legislation, was to improve the efficiency and utility of the system, essentially modernizing, clarifying and correcting the system with the added benefits of encouraging harmonization of land titles systems nationally.

The paradox of Torrens is that its protection against prior interests renders the registered owner more vulnerable to future displacement, particularly due to fraud. It may be that it is the salutary aspects of the system, such as simplicity and ease of transfer, which result in greater insecurity. Substantive gaps in the system include the preference given to overriding interests and the exceptions to indefeasibility.

In addition to these substantive gaps in the protection offered, there are some procedural aspects of the Torrens system that also create weaknesses. These weaknesses include the lack of protection during the registration gap as well as the barriers to compensation created by time limitations and the operation of the assurance fund as one of "last resort".

(a) Exceptions to indefeasibility

As a general rule, once the Registrar issues title, the registered owner has an *indefeasible* title to land. Like most rules, there are some exceptions to the principle of indefeasibility which introduce some insecurity.

First, where two certificates of title exist for the same parcel of land, the earlier or first-issued certificate of title prevails regardless of whether the registered owner is a *bona fide* buyer for value

[39] This committee was composed of representatives of the common law provinces and territories of Canada and was established to design a model title registration statute. See its reports: *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* [Joint Land Titles Committee, 1990] and *Final Revisions* : *Renovating the Foundation* [Joint Land Titles Committee, 1993].

[40] [Joint Land Titles Committee, 1990] at 4.

without notice ("innocent buyer").[41] An inflexible preference for the earlier owner could be perceived as illogical and unfair when the later owner is in actual possession. New Brunswick has introduced some flexibility by empowering the Registrar to compensate the earlier owner and allow the owner in possession to keep the land.[42]

Secondly, the Registrar has the power to correct the register in cases of misdescription, error or fraud where the registered owner is not an innocent buyer.[43] In Alberta, a person deprived of land due to a misdescription may bring an action for recovery of the land regardless of whether the current owner is an innocent buyer.[44] Thus, some of the uncertainty that plagued the common law continues today. The difference is that assurance fund compensation may be available to the buyer who is deprived of his or her interest, whereas there was no remedy at common law.

Another exception to the general principle of indefeasibility is the exception for *overriding* interests. These interests may affect title notwithstanding the fact that they are not registered. Some of these overriding interests include:

- reservations contained in the grant from the Crown to the first owner;
- private and public easements and rights-of-way;
- short-term leases (less than three years); and
- rights of expropriation under statute.[45]

These overriding interests create a significant crack in the register's mirror of title since it is not possible to identify, with absolute certainty, all interests in the land. The assurance fund does not compensate for loss due to the existence of these overriding interests.

The exception for overriding interests derogates from the principle that the register is a complete and accurate mirror of the title. An innocent buyer of land may be bound by interests which, despite due diligence, cannot be discovered by a search of the register or any other source before closing.

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[41] MB Act, s. 59(2); SK Act, s. 16.

[42] *Land Titles Act*, S.N.B. 1981, c. L-1.1, ss.68-72 (hereafter "NB Act")

[43] MB Act, s. 23(1), 62(1)(c) and (d); SK Act, s.97. In Saskatchewan, no compensation is available on correction due to misdescription or otherwise (s. 85).

[44] AB Act, s. 183(1)(e).

[45] MB Act, s. 58(1); SK Act, s. 18. The Saskatchewan legislation contains similar exceptions but excludes common law easements.

(b) Fraud

The incidence of fraud in real estate transactions is said to be on the rise and of significant concern, particularly for lenders.[46] Statistically, however, fraudulent transactions remain relatively rare. For example, Manitoba's assurance fund has only had one claim for fraud by forgery in the past ten years and Saskatchewan's fund has had very few fraud claims in its history. Even Alberta, the province that CTV's 'W-Five' dubbed the "mortgage fraud capital of Canada", has an average of one claim per year for fraud by forgery (explained below), though that single claim may be for a substantial amount of money. Alberta's assurance fund has paid out average annual claims of $31 000 for the past 13 years but, when compared to the 400 000 mortgage and transfer transactions in that period, the cost per transaction is less than $0.10.[47] While the incidence of fraud appears to be low and may represent a small cost to the land registration system, proponents of title insurance argue that the consequences of fraud can be financially and emotionally devastating to the average person.

The two most common types of fraud are forgery and impersonation. In fraud by forgery, a rogue forges a transfer of land and a discharge of the registered mortgage and uses the ostensibly clear title to obtain a new mortgage. Once the new mortgage is registered, the rogue absconds with the mortgage proceeds.[48] Impersonation frauds, on the other hand, are often perpetrated by an owner who enlists an impostor to impersonate his or her spouse and execute a transfer of land, consent to mortgage, homestead release, etc.[49] The rogue spouse is then able to sell the property or mortgage it without his or her spouse's knowledge and, again, absconds with the proceeds. Impersonation may also be committed by someone using false identification documents, by a person who shares the same name as the registered owner or in situations where the owner is absent for an extended period or not in possession of the land. Such frauds are often discovered when the mortgage falls into default and the lender begins foreclosure proceedings or where the innocent spouse attempts to deal with the property. Both the owner and the lender are innocent parties who have suffered or will suffer a loss as a result of the fraud.

If an innocent buyer takes title from a rogue who has defrauded the original owner, who gets to keep the land? Where there is *immediate* indefeasibility of title, the Torrens guarantee protects the innocent purchaser as soon as the interest is conveyed. In a *deferred* indefeasibility regime, the

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[46] Susan Leslie, "Title Insurance Can Protect Mortgage Lenders and Consumers Against Fraud, (July 2002) 22 Lawyers Wkly. No. 11, 9(2).

[47] CMHC, *Land Title Conveyancing Practices and Fraud*, May 2004 at 2.

[48] *Durrani v. Augier* (2000), 190 D.L.R. (4th) 183 (Ont SCJ), *Youssef v. Ontario (Ministry of Consumer and Commercial Relations)*, [2003] O.J. No. 622, (Ont. S.J.C.). See also, Bob Aaron, "Mortgage Fraud Victims can also Lose Homes", The Toronto Star, August 2, 2003, online: Aaron & Aaron website: http://www.aaron.ca/columns/2003-08-02.htm (Date accessed: June 26, 2005).

[49] See *Chornley v. Chornley* (2003), 16 R.P.R. (4th) 186 (Ont. S.C.J.); *Crosstown Credit Union v. Babcock Estates* (1999), 141 Man. R. (2d) 102 (Man. Q.B.), aff'd (2001), 153 Man. R. (2d) 269; *Hermanson v. Martin* (1982), 140 D.L.R. (3d) 512 (Sask. Q.B.), aff'd (1986), 33 D.L.R. (4th) 12 (Sask. C.A.).

first person who buys land from a fraudster will not be protected by the guarantee, but any subsequent buyers will be protected. Land registration systems in the Prairie Provinces seem to provide for immediate indefeasibility, but this is by no means settled law.[50] While immediate indefeasibility provides superior protection to the innocent buyer, it is less generous to the owner in possession, who receives only compensation for his or her loss.[51]

We assume that, where the owner is in possession, it will be more difficult for a fraudster to convey ownership of the land to an innocent buyer; cases in which the owner cannot be restored to the register will be rare. Unfortunately, restoring the owner's interest will be more difficult if the fraudster managed to register a mortgage. The lender is considered to be an innocent buyer and, accordingly, the owner's interest will be restored subject to the mortgage.[52] The owner has a right to claim compensation, which she or he can use to discharge the fraudulently obtained mortgage, but the substantive and procedural shortcomings of the assurance fund, discussed below, place the owner in a vulnerable position. Most of these frauds will be discovered when the lender commences foreclosure proceedings. One hopes that, in these circumstances, lenders will agree to postpone foreclosure until the owner can obtain compensation, but delays or uncertainty in the compensation process — for example, the obligation to obtain judgment against the fraudster first — might make such accommodation an unreasonable burden.

In New Brunswick, the land registration system favours an owner in possession, who may retain the land while the person who was defrauded can obtain compensation. New Brunswick's assurance fund also operates as a fund of first resort, meaning that a claimant is not required to exhaust his or her remedies against the wrongdoer before seeking compensation.[53] This common sense approach avoids some of the procedural hurdles in the Prairie Provinces. The defrauded lender can seek compensation directly from the assurance fund, which is likely to be quicker than foreclosure proceedings.

Though the ideal solution would be to prevent fraud in the first place, prevention has proved to be very difficult. A property owner can do little to protect his or her property from fraud — even if the title were searched daily, many frauds would remain undetected until it was too late. Though land titles offices could develop procedures to reduce the possibility of fraud by impersonation or forgery, these would introduce delays and added costs. Since the land titles system must finely balance measures designed to improve security of ownership with those intended to facilitate transactions, attention must be given to the cost-benefit analysis of fraud detection measures.

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[50] Manitoba Law Reform Commission, *supra* note 5 at 8. The Alberta Law Reform Institute (ALRI) suggests that immediate indefeasibility is "probably" the law in Canadian Torrens based jurisdictions. Alberta Law Reform Institute, *Proposals of a Land Recording and Registration Act for Alberta* (Report No. 69) (Edmonton, Alta.: Alberta Law Reform Institute, October 1993) at 146.

[51] O'Connor, *supra* note 11 at 4.

[52] *Toronto-Dominion Bank v. Jiang* (2003), 63 O.R. (3d) 764 (Ont. S.C.J.).

[53] NB Act, ss. 71, 73–77.

In Saskatchewan, the Registrar is required to notify an owner of any transfer, mortgage or discharge submitted for registration.[54] This should alert the registered owner to an attempt to transfer fraudulently or encumber the property and prompt a call to the Registrar. When notified of a possible improper or fraudulent dealing, the Registrar has the power to impose a "lock" on the register, prohibiting further dealing with the title. Once the register is locked, it is not possible for the fraudster to forge a transfer or register a fraudulently obtained mortgage. New Brunswick also authorizes the Registrar to register a "stop order" to prohibit dealings with land when fraud is suspected.[55]

In Manitoba, the Registrar is empowered, in a number of circumstances, to register a caveat against title prohibiting any dealing with the land or an interest in the land.[56] One of these circumstances is the suspicion of fraudulent or improper dealing. Unlike Saskatchewan, however, Manitoba does not notify the owner when someone is attempting to deal with the land or an interest in the land. Other than the power to freeze dealings with the land, Manitoba's Registrar does not have a formal fraud detection program in place and there is no attempt to verify the validity of signatures or witnesses to instruments.

(c) Registration gap

As discussed earlier in Chapter 2, the potential for problems due to the registration gap is one of the selling points of title insurance for lenders. The registration gap refers to the period of time between closing and the completion of the process by which an interest in land is created and its priority is established.

In a Torrens registration system, interests have priority according to the order in which they are registered so, obviously, obtaining registration before someone else can register a competing interest is important. Depending on the procedure followed by the Registrar, the gap can be a few hours, days or even weeks. The longer the gap, the greater the risk for buyers and lenders seeking to register new interests.

In Manitoba, the gap is quite short as each instrument is assigned its serial registration number when first entered into the system. Though completion of the registration may take days or weeks, the instrument will have priority effective as of the date of initial entry.[57] In Alberta, by contrast, instruments do not receive a serial registration number until completion. This can lead to

[54] *The Land Titles Regulations, 2001*, R.R.S. 2000, c. L-5.1, Reg. 1, s. 22.

[55] SK Act, s. 99(1); NB Act, s. 36.

[56] MB Act, s. 22(1)(a).

[57] MB Act, s. 64.

a substantial gap, particularly during times of high volume or when there are problems with the instruments which delay their registration.

Manitoba's process closes the gap considerably but not completely. Instruments are not date and time stamped upon receipt and are not necessarily processed in the strict order in which they are received. Instruments may wait for hours (or days in peak periods) before they are entered into the system and assigned the all-important registration number. It is possible that an instrument affecting title is waiting for processing on one examiner's desk while another instrument affecting the same land is waiting on another's. Which instrument wins the race will depend upon a number of variables, none of which can be predicted or controlled by the registrant.

In Alberta, where the gap can be substantial, lawyers avoid or minimize the risk of a competing registration by including special instructions in their registration requests that identify the last registration number which should immediately precede the new instrument. Where a subsequent instrument has been registered, the Registrar will decline registration pursuant to the instructions. While this practice reduces a risk of loss, it does not avoid the inconvenience, delay and cost arising from an intervening registration.

It is not just the procedural shortcomings of the system that create a registration gap problem. In Manitoba and Saskatchewan there is a substantive obstacle as well due to the preference given to builders' liens. A builder's lien will take priority over a mortgage if the lien is recorded following the registration of the mortgage but *before* the mortgage proceeds are advanced.[58] As a result, mortgage proceeds cannot be released until registration is complete, a process which may take days or even weeks. In the interim, the buyer must either pay interest or obtain bridge financing, thus increasing the cost, delay and inconvenience. If there is an intervening registration, there is additional delay, expense and inconvenience while the problem is corrected.

England has resolved this problem to some extent with its system of electronic registration, which records the exact date and time of submission of instruments, combined with statutory provision conferring priority on an instrument as of the exact time of its submission (rather than completion of the registration).[59]

[58] *The Mortgage Act*, C.C.S.M., M200, s. 17; *The Builders' Liens Act*, C.C.S.M., B91, s. 31; *Builders' Liens Act*, S.S. 1984-85-86, c. B-7.1, s. 71(1).

[59] *Land Registration Act 2002* (U.K.), 2002, c. 9, s. 74. See also The Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Comm No.254, 1998) at 155; Law Commission, *Land Registration for the 21st Century: A Conveyancing Revolution* (Law Com No 271, 2001) at 184.

(d) The assurance fund

There are a number of suggested shortcomings of the Torrens system's compensation scheme. They can be summarized as follows:

- The legislation provides for a right of action against the fund and not for a right of compensation. While the registrar or minister is empowered to settle a claim, this is discretionary and a claimant may be required to sue the Registrar to obtain compensation.[60]
- In Alberta and Manitoba, the fund is one of last resort, available only after other remedies have been exhausted.[61] Saskatchewan and New Brunswick, by contrast, have a fund of first resort so that defrauded owners are compensated and it is the Registrar who may seek to recover from the wrongdoer.[62]
- Claims against the fund are subject to limitations and restrictions such as time limitations,[63] contributory negligence limitations[64] and other exclusions.[65]
- Only actual monetary loss and reasonable expenses associated with a claim are covered. It has been suggested that this will rarely represent a true or complete indemnity for loss suffered, particularly in cases of fraud. For example, the provision for payment of reasonable expenses would not necessarily cover the actual legal costs incurred to pursue the claim. Furthermore, victims of fraud experience non-monetary loss from mental distress and consequential loss flowing from the inability to deal with their property.[66]

2. The Survey Fabric

The survey infrastructure or "fabric" is the system by which land is divided into parcels. This fabric forms the foundation for the quiet possession and orderly development of land as well as providing the "geographic underpinning" of the land title registration system.[67] A certificate of title describes the land owned by reference to its physical boundaries.

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[60] MB Act, s. 191.

[61] MB Act, s. 182(4); AB Act , s. 89.

[62] SK Act, ss. 84, 94; NB Act, ss.74-76.

[63] MB Act, s. 189; SK Act, s. 88.

[64] MB Act, s. 182(6).

[65] MB Act, s. 190(a) and (c); SK Act. ss. 85 and 86.

[66] *Youssef v. Ontario (Ministry of Consumer and Commercial Relations)*, *supra* note 48.

[67] A. McEwen, "The Significance of Land Title Registration: A Global Perspective" at 4. Online: University of Calgary website, http://www.ucalgary.ca/~amcewen/SLltr.PDF (Date accessed: June 28, 2005).

An accurate, well-defined and properly maintained survey infrastructure is required to meet the needs of owners, municipal planners, utilities and land surveyors. It supports efficient and inexpensive real estate transactions, land use planning and enforcement, geographic information and mapping, construction, and flood control measures.[68] The integrity of the survey infrastructure is of the first importance because the effectiveness of the guarantee of title is questionable if the boundaries of the land described therein cannot be ascertained.[69]

Surveyors determine and mark the boundaries of land by installing survey 'monuments' (markers) at regular intervals. Ideally, the legal description shown on a certificate of title will conform exactly to the physical location of boundaries. Where there is an error, however, it is the survey monument and not the legal description on title that is determinative.[70]

Despite the imposition of statutory duties and penalties,[71] the survey fabric has deteriorated due to a general failure to replace or repair survey monuments and to correct errors in the original Dominion Land Survey.[72] Furthermore, lax or non-existent planning controls, poor survey methods and standards, and reliance on metes and bounds legal descriptions until the latter part of the 20th century have resulted in considerable defects in the survey infrastructure.[73]

Maintenance of survey infrastructure has been done on a piecemeal basis. Errors are fixed when they are encountered and monuments are replaced when they are discovered to be missing. The Association of Manitoba Land Surveyors estimates that 20–30% of survey monuments in the

[68] Survey Infrastructure Clearance Program, online: City of Winnipeg website, http://www.winnipeg.ca/ppd/surveys.stm (Date accessed: June 28, 2005).

[69] The Property Registry (Manitoba), Annual Report 2003/2004 at 17. Online: Property Registry website: http://www.gov.mb.ca/tpr/assets/docs/ar2003%202004.pdf (Date accessed: June 28, 2005).

[70] *The Surveys Act*, C.C.C.M., c. S240, s. 3; *Land Surveys Act, 2000*, S.S. 2000, c. L-4.1, s. 16. For example, errors in legal descriptions have occurred when title to land adjacent to railway tracks were issued based on proposed railway plans but the actually location of the railway track differed. Discrepancies between the true boundary and the legal description are, with rare exception, corrected by the Land Titles Office.

[71] *The Surveys Act*, *ibid*., ss.3–7; *Land Surveys Act, 2000*, *ibid.,* s. 80(1)(e)*; Land Surveyor's Act*, C.C.S.M., c. L60, s. 58; *Criminal Code*, R.S.C. 1985, c. C-46, ss. 442–443;;. Under the *Criminal Code*, interference with a survey monument is an indictable offence with a maximum five-year sentence. Provincial legislation also provides penalties of fine or imprisonment.

[72] The DLS has not been refreshed since its was initially conducted. Prior to the 1930s, the Dominion government had begun to re-survey but this ended when jurisdiction over land was transferred to the provinces in 1930 pursuant to the Natural Resources Transfer Agreements.

[73] For example, the City of Winnipeg only began to implement planning controls in the late 1950s. Before zoning by-laws were in place, owners of land developed land according to their particular need or wish; survey monuments were missing or ignored. Surveyors used metes and bounds legal descriptions resulting in errors due to their reliance on markers which were not in their original position. Special surveys continue to be conducted in order to correct boundaries.

City of Winnipeg are missing or unfit for use. In some rural areas, the survey infrastructure has disappeared completely.

In Manitoba, the Land Titles Office maintains an annual fund of $150 000 for outline monument restoration. This fund provides matching grants for municipalities so that, in any year, $300 000 may be spent on restoration. It has been suggested that this is not sufficient to keep ahead of deterioration and it is far less than what is required to remedy outstanding defects.

Despite the lack of diligent and systematic maintenance of the survey fabric, serious boundary disputes are relatively rare. Less serious defects, such as fences, decks and outbuildings that encroach onto neighbouring lands or road allowances are more common and can, in some cases, result in significant loss or inconvenience. Most claims received by First Canadian Title arise out of loss due to failure to respect boundaries.[74]

The deterioration of the survey fabric has been mitigated to some extent by conveyancing practices that satisfy lenders' requirements for assuring the security of mortgage loans. This demand was satisfied by, among other things, the buyer obtaining a building location certificate, which became a standard conveyancing practice.[75] The result was the identification and correction of survey defects.

Detection of survey defects is important because the Torrens guarantee does not extend to off-title matters such as the physical characteristics of the land:

> It is an enduring myth in the minds of many people that boundary descriptions and areas of parcels registered under a land titles system are guaranteed by the state, or that if they are not they should be.[76]

The title indemnity extends to the and described in the title but there is no guarantee that the legal description is itself correct.[77] If the legal description in the certificate of title does not conform to the true boundary and it cannot be corrected, the assurance fund will provide for compensation if the non-conformity results in loss to the registered owner. British Columbia's Land Title and

[74] As reported by First Canadian Title during informal consultation with the MLRC in March 2004.

[75] A building location certificate (BLC) confirms that the buildings and structures on land are located within the boundaries and identifies the nature and extent of any encroachment onto or from adjacent property. In Alberta and Saskatchewan, buyers obtain a Real Property Report (RPR) which is a more comprehensive survey of the land and identifies both visible and invisible features such as easements, rights-of-way, location of electrical and water connections, pipelines etc.

[76] McEwen, *supra* note 67 at 5.

[77] MB Act, s. 59(1);SK Act, s. 13(1)(b).

Survey Authority intends to provide a guarantee of survey matters which may provide better protection as well as incentive to maintain and improve the survey fabric.[78]

Many lenders have now relaxed or removed their requirements for an up-to-date survey and have accepted title insurance instead. Since the lender no longer requires a survey, it is up to the buyer to decide whether he or she will require one. Given the cost of a survey, the buyer may decide to forgo the survey or opt for their own title insurance policy instead.

The trend away from pre-closing surveys could ultimately affect both private and public interests. Private interests are affected because the buyer loses the opportunity to discover and avoid the consequences of a survey defect. Critics of title insurance suggest that insurers overemphasize the cost benefits and downplay the consequences of a survey defect. Consumers should understand the range of possible consequences and the express and implied limits of insurance coverage. Unless these are properly explained to the consumer, the choice to forgo a survey may not be truly informed since the consumer is likely to give greater weight to the immediate cost savings than to the somewhat vague benefits of a survey.

The trend away from pre-closing surveys also impacts the public interest since this conveyancing practice has, in the past, slowed the deterioration of the survey fabric. A current survey increases the identification and correction of specific survey defects; without this practice or some program of proactive maintenance, the deterioration of the survey fabric will only accelerate. If errors are not detected or are simply insured over rather than corrected, the eventual result could be clouded boundaries and an increase in disputes. While the cost of correcting a defect might greatly exceed the cost of one title insurance policy, the accumulated cost of insurance in successive transactions will eventually exceed the cost to correct the defect. Title insurance may eventually become necessary but it may no longer be a low-cost alternative if premiums rise in response to an increase in claims.

3. Land Use Planning and Control

As a general rule of law, a property holder can do anything on or with their land unless it amounts to an actionable nuisance or is restricted by the state in some way. The unfettered exercise of rights by one owner may infringe upon the rights of others, so the state intervenes to balance the rights of neighbours.

Land use management attempts to find a balance between the rights of individual owners and the community as a whole. Zoning by-laws reflect the vision and policies established by the community for orderly and planned development and are intended to achieve certain goals such as

[78] "New Authority to Improve Land & Title Survey Services" (May 13, 2004), online: Government of British Columbia website, http://www2.news.gov.bc.ca/nrm_news_releases/2004SRM0018-000385.htm. (Date accessed: June 28, 2005). See also, Land Title and Survey Authority of British Columbia, Surveyor General Division website: http://www.ltsa.ca/sgd_home.htm (Date accessed: June 28, 2005).

the maintaining of property values, the fostering of economic development and harmony in the community, and the enhancement of public safety.

Upon closing, a buyer inherits the consequences of non-compliance with planning and zoning by-laws. In traditional conveyancing practice, the buyer's lawyer makes inquiries with the municipal authority to identify non-compliance in order to shift responsibility back to the seller. As is the case in identifying survey defects, such inquiries are the primary means of identifying non-compliance for both buyers and municipal authorities. A shift away from this traditional practice, facilitated in part by the availability of title insurance, has resulted in fewer defects being identified and corrected. Risk of loss due to non-compliance with zoning by-laws is not remote: First Canadian Title reports that building permit and municipal zoning claims are the third most frequent type of claim they receive.[79]

Using Winnipeg as an example, one can see the results of this trend away from the traditional practice which is due, at least in part, to the availability of title insurance. Until 1987, nearly every buyer of residential land in Winnipeg obtained a zoning memorandum in a purchase transaction. A zoning memorandum is a statement, provided by the City,and the buildings and structures on a parcel of land, comply with the zoning by-law. Since 1987, demand for zoning memoranda in Winnipeg has dropped by approximately 70%.[80] One of the factors contributing to this decline is the relaxation, by lenders, of their requirement for zoning memoranda. Lenders have, in some cases, decided to self-insure against non-compliance with municipal by-laws or have opted to require title insurance instead. The dramatic decrease in the demand for zoning memoranda has, according to the City, severely impaired the effectiveness of its zoning enforcement mechanism.

To obtain a zoning memorandum/compliance certificate, the buyer submits an original building location certificate/real property report along with the required fee to the municipal planning authority.[81] The authority examines the building location certificate to determine whether the buildings and structures on the land comply with zoning by-laws. If the property does not comply, the authority advises the buyer. Possible remedies include an easement, a licence, a zoning variation or removal of the offending structure.

The required remedies can be quite costly, particularly where building removal or a zoning variance is required. Encroachments on municipal property may be handled differently by obtaining a licence. Although a licence entitles the owner to some indemnity under the City's insurance policy for loss caused by the deviation, over time the annual cost of a licence, currently $40 in Winnipeg,

[79] As reported by First Canadian Title in informal consultation with the MLRC, March 2004.

[80] As reported by planning officials with the City of Winnipeg in informal consultation with the MLRC, January 2004. In Saskatchewan, a compliance a certificate is the equivalent of a zoning memorandum.

[81] Municipalities and planning authorities are not under a duty to provide a zoning memorandum/compliance certificate. See *The Planning Act,* S.M. 2005, c. 30 s.85 (coming into force, January 1, 2006); *A Municipal Administrator's Guide For Rural and Urban Municipalities* May 2004 at 24. Online: Province of Saskatchewan, Government Relations website: http://www.municipal.gov.sk.ca/pdf/adminguide1.pdf (Date accessed: June 28, 2005).

will exceed the cost of a title insurance policy. The City of Saskatoon, by comparison, charges a one-time fee of $100 for a licence.

Encroachments onto private property may be costly to correct, whereas title insurance will cover any loss in value or cost to correct non-compliance for a one-time premium. From the consumer's point of view, title insurance may represent a more cost-effective choice.

Like the trend away from pre-closing surveys, moving away from the traditional practice of obtaining a zoning memorandum will have consequences for both private and public interests. Individual buyers will be unable to shift the consequences of non-compliance back to the seller before closing, and may be responsible for the cost of licences, zoning variation or building removal along with the loss in value and use and enjoyment of their land. The public interest is affected because defects which are undiscovered or simply insured over will, over time, result in deterioration of the integrity of the land management system. Furthermore, municipalities will lose the revenue generated by fees and face increased costs to enforce zoning by-laws.

E. RELATED SERVICES

Increasingly, lenders are cross-marketing other financial products and services to their mortgage customers; some 50% will also obtain a line of credit, credit card or insurance along with their mortgage.[82] Some lenders may also be promoting fixed-fee closing service packages offered by third party service providers. The package includes all services, including legal services, required to complete the transaction and a title insurance policy for both lender and owner. Consumers of the services are provided with the names of lawyers who have agreed to participate in the fixed-fee program.

The Law Society of Upper Canada has identified a number of consumer concerns about these programs:[83]

- consumers are not properly informed and may not be aware that a third party service provider is involved;
- consumer choice of title insurer and lawyer may be restricted;
- consumers may face higher fees than if they were to choose another insurer and may also face hidden fees;

[82] Law Society of Upper Canada, Submission to the Parliamentary Assistant, Ministry of Financing, on *Improving the Mortgage Brokers Act: A Consultation Paper*, September 2004 at 2, citing a 2003 mortgage consumer survey conducted by the Canadian Institute of Mortgage Brokers and Lenders (CIMBL. On-line: Law Society of Upper Canada website, http://www.lsuc.on.ca/news/pdf/oct0704_brokers_submissions.pdf. (Date accessed: June 28, 2005).

[83] Law Society of Upper Canada "Law Society Warns Lawyers About Mortgage Programs" (August 6, 2003). On-line: Law Society of Upper Canada, http://www.lsuc.on.ca/news/pdf/aug0503_mortgage.pdf (date accessed: June 28, 2005).

- mortgage advances may be at risk as third party service providers are not subject to the same solvency and trust management rules that apply to financial institutions and lawyers. Consumers are not protected from the provider's insolvency or defalcation;
- bundling of title insurance with other services may constitute improper tied selling;
- lawyers may be placed in a conflict in which they are unable to act in their client's best interest or may be prevented from properly explaining or disclosing the breakdown of the fee. Lawyers may also be required to disclose confidential client information to the third party.

If the trend of bundling of financial products and services related to real property transactions continues, we may see greater consumer participation in such programs. This bundling of financial products and services appears to be permitted in Canada as long as they are available to all consumers, consumers continue to have choice in products and services, there is benefit to consumers and the lender does not engage in tied selling in which the availability of one product is conditional upon the purchase of another.

The structure of title insurers in Canada also raises concerns about tied selling. First Canadian is currently the largest title insurer in Canada and the only provider which also offers conveyancing services in addition to or in conjunction with its title insurance product. Other insurers have formed alliances with conveyancing service providers. Chicago Title is partnered with sister company, Fidelity National Financial, to offer title insurance to consumers of the latter's conveyancing services. The bundling together of title insurance and other conveyancing services has raised concern about tied selling and conflict of interest.

No one has suggested that lenders or title insurers coerce consumers into obtaining a title insurance policy, but the bundling of insurance with other services may mislead consumers. Consumers may think that they are obliged to buy title insurance or that there are no better or more cost-effective options. Tied selling is expressly prohibited by the *Competition Act*, but perhaps industry-specific legislation is needed.[84]

[84] *Competition Act*, R.S.C. 1985, c. C-34, s. 77. See also, Canadian Council of Insurance Regulators, *Consultation Paper: Issues Related to Inducements, Rebating and Tied Selling* (March 2004). Online: Canadian Council of Insurance Regulators website, http://www.ccir-ccrra.org/publications/index_en.htm (Date accessed: June 28, 2005).

CHAPTER 4

REGULATION OF TITLE INSURANCE AND CONVEYANCING SERVICES

There is little, if any, regulation that is specific to title insurance products. Title insurers are subject to the same regulatory requirements as other insurers in that they must be incorporated (federally or provincially), be licensed in each province in which they offer insurance and for the specific class of insurance offered, maintain adequate reserves and a minimum level of capitalization and report to federal and provincial regulatory agencies. Conveyancing services appear to be completely unregulated at present. Such services do not fall under the insurance regulatory regime except to the extent that they are bundled with an insurance product and, even then, only in a general way. They do not appear to be subject to the regulatory authority of law societies.

A. GENERAL REGULATORY REGIME

The provincial and federal governments share regulatory authority over insurance matters,[85] and there is a significant amount of integration and cooperation between the government bodies, resulting in some harmonization of insurance regimes nationally. For example, once a company has met the licensing and deposit requirements of one Canadian jurisdiction, they may easily obtain a licence and thus be exempted from complying with deposit obligations and some formalities in other provinces and territories.

Regulatory responsibility is generally divided between the federal and provincial governments. The federal regulator oversees incorporation, qualification of foreign insurance companies and financial matters. Federal regulations address the extent to which banks may offer insurance and the relationship between banks and insurance companies and agents.[86] The provincial governments regulate licensing, marketing, distribution and contract matters. Provincial regulation tends to focus upon consumer protection with rules addressing disclosure of information, unfair and deceptive practices, policy provisions, claims procedures, management of premiums and third party rights. While they share concurrent jurisdiction over solvency matters, the provinces leave it to the federal regulator to oversee the solvency and financial viability of insurers and to advise the province when a problem arises.

[85] The federal regulator is the Office of the Superintendent of Financial Institutions Canada (OSFI). The regulators in Saskatchewan and Manitoba are the Saskatchewan Superintendent of Insurance and the Manitoba Superintendent of Insurance.

[86] *Insurance Business (Banks and Bank Holding Companies) Regulations* S.O.R./92-330.

Beyond the definition of title insurance and its inclusion in the list of classes of insurance, Manitoba has no regulations specific to title insurance.[87] Ontario and Alberta require that title insurance policies include a statement expressly limiting the insurer's liability to a sum stated in the contract. Ontario's legislation also requires that the insurer obtain a certificate of title from an independent lawyer and that policies contain a mechanism for settling disputes about the validity of title and the liability of the insurer.[88]

The Ontario legislation addresses unfair or deceptive practices, including:

- dishonest price differences between similar risks;
- misrepresenting the benefits of a policy;
- gifts or inducements, such as referral fees, to gain business;
- conduct that unreasonably delays the resolution of claims;
- making one type of insurance contingent on the purchase of another type of insurance.[89]

Critics of title insurance have identified premiums and referral fees as potential sources of concern. These critics allege that premiums are unreasonable because very little (roughly 10%) of the premium revenue is paid out in claims, hence demonstrating that premiums are excessive in relation to the risk insured.[90]

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[87] *The Insurance Act*, C.C.S.M. c. I40, s.1 and *Insurance Company Classes of Insurance Regulation*, Man. Reg. 390/87R, s. 3(n). Similarly, Saskatchewan's *Insurance Act*, S.S. 1978, c. S-26, s. 2(1) defines "title insurance but is otherwise silent on the topic. In June 2005, (subsequent to the drafting of this paper), the Manitoba legislature enacted *The Consumer Protection Amendment Act*, S.M. 2005, c.16 which will come into force upon proclamation (expected Spring 2006). Currently excluded, the amendments will expressly include mortgage transactions and there is specific mention of title insurance. Saskatchwan has enacted *The Cost of Credit Disclosure Act, 2002*, S.S. 2002, C. - 41.01 (not yet proclaimed) and, while there is no express reference to title insurance, its inclusion may be implied. Both statutes result from the Agreement on Internal Trade which, *inter alia,* aims for harmonization of provincial regimes relating to the disclosure of the consumer borrowing costs (mortgages, loans, credit cards etc).

[88] *Insurance Act*, R.S.O. 1990, c. I.8, s.139; *Insurance Act*, R.S.A. 2000, c. I-3, s. 531(4); *Classes of Insurance Regulation*, R.R.O. 1990, Reg. 666, s. 3 (3) which provides:

> 3(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 to the property to be insured from a solicitor then entitled to practise in Ontario and who is not at that time in the employ of the insurer.

[89] *Insurance Act*, R.S.O. 1990, c. I.8, s. 438 and O. Reg 07/00.

[90] Ziff, *supra* note 12 at 394-395. In Alberta in 2000, First American Title received just over $2.2 million in premiums and paid out $146 000 in claims.

It has been suggested that relying on the marketplace to regulate premiums naturally is ineffective since such competition is "frequently illusory because of infrequent issuance of a policy and reverse competition for referral of business."[91]

> Due to the purchaser's nonparticipation in the selection of a title insurer, the market is an ineffective control on the industry, and the demand for owner's title insurance does not change significantly with changes in policy prices. When the purchase of title insurance becomes an integral step in real estate transactions, as it has in most states, consumer demand becomes highly inelastic, and the effectiveness of price competitiveness between sellers diminishes entirely.[92]

Typically, policies are not marketed to consumers but rather to service providers such as lawyers, lenders, mortgage brokers and realtors. This focus arguably increases the potential for improper referral fees and incentives paid to service providers in exchange for referrals. The payment of referral fees and incentives drives up the cost without adding significant benefit to the consumer.

> [T]he companies' competitive efforts have been channelled toward those individuals or institutions who would be advising the purchaser at the closing stages of the transaction: the brokers, the bankers, and the attorneys. The result is a system of "reverse competition" whereby the insurance companies compete for the recommendations of real estate professionals rather than for the business of the actual consumer. "Reverse competition" has often taken the form of payments to the real estate professional, in the form of rebates, commissions, fees, or kickbacks, and are *far in excess* of the payment justified by the work performed. As a result, the consumer pays a much higher premium that he would pay in a purely competitive situation.[93]

The payment of referral fees from insurers to lenders and lawyers is already prohibited by banking and insurance legislation and by professional codes of conduct. However, critics allege that it is possible for insurers to disguise such fees or incentives as service fees or other charges. It is difficult to discover when such fees are paid as there is no requirement that insurers and service providers furnish consumers with a detailed breakdown of the fees and premiums charged.

In April 2005, the federal Minister of Labour and Housing announced that, in the fall of 2005, CMHC will enhance mortgage loan insurance benefits, protect Canadians' investment in their home and help them keep secure from title-related risks.[94] This is a significant change since these new benefits will extend to the home buyer as well as the lender, whereas previously only the lender

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[91] J.L. Gosdin, *Title Insurance: A Comprehensive Overview*, (American Bar Association, 1996) at 2.

[92] D.J. Cook, "Iowa's Prohibition of Title Insurance — Leadership or Folly?" (1983–84) 33 Drake L. Rev. 683 - 709 at 695.

[93] *Ibid*., at 696[emphasis in original].

[94] On-line: CMHC website, http://www.cmhc-schl.gc.ca/en/News/nere/2005/2005-04-22-1115.cfm (date accessed: June 24, 2005).

was insured. It is unknown what form this protection will take but, if it is a title insurance policy, this will greatly increase the number of policies in Canada. Moreover, since many first-time home buyers obtain their financing through CMHC, title insurance will be 'normalized' — those who get title insurance on their first home are likely to consider it part of the regular process of buying a home. While CMHC's official mandate is to act in the public interest, its shift towards a more competitive commercial approach may result in some conflict between its mandate and its business goals.[95] Do we need regulation or consumer protection legislation to ensure that the interests of the buyers are being adequately served?

B. REGULATION OF TITLE INSURANCE IN THE UNITED STATES

Title insurers in the United States are generally subject to much greater regulation and scrutiny than they are in Canada. However, they also play a much greater role in the conveyancing process than Canadian insurers. Some of this added regulation is directed at the insurers' role in the conveyancing process and not just the provision of insurance; identical regulation in Canada may not be justified. On the other hand, at least one title insurer in Canada is also seeking to provide conveyancing services, potentially blurring the divide between insurer and conveyancer. At the very least, the American experience is instructive and may provide a caution against the potential impact of title insurance on the Canadian scene.

Unlike Canadian jurisdictions, where the conduct of a real property transaction is defined as legal practice and therefore reserved to lawyers,[96] the process for closing or settling real estate transactions in the U.S. varies from state to state and sometimes from county to county. Some states restrict the conduct of transactions to lawyers, while others allow a variety of other actors to conduct closings, including lenders, title insurers, title insurance agents, escrow companies, escrow agents, and real estate brokers.

Individual states regulate title insurance while the United States Federal Government regulates the provision of conveyancing services (referred to as settlement services) in federally regulated mortgage transactions through the *Real Estate Settlement Procedures Act* (RESPA).[97]

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[95] For a discussion of this shift in approach, see J. Dupuis, "Bill C - 66: An Act to Amend the *National Housing Act* and the *Canada Mortgage and Housing Corporation Act*" (, 1999); online:Library of Parliament website, http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/summaries/c66-e.htm (date accessed: June 29, 2005).

[96] *The Legal Profession Act*, C.C.S.M. s. 20; *The Legal Profession Act*, 1990, S.S.1990-1991, c.L-10.1, s. 30.

[97] *Real Estate Settlement Procedures Act,* 12 U.S.C., ss. 2601–2617. Federally regulated mortgages include mortgages purchased, guaranteed or insured by a federally chartered company or federal agencies such as "Fannie Mae" (see discussion earlier at page 8), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), the Government National Mortgage Association (Ginnie Mae), the Federal Housing Association and the Department of Veterans Affairs and other loan transactions secured by a lien on residential property, such as refinancing, equity lines of credit, reverse mortgages, and home improvement loans.

State legislation with respect to title insurance focuses on a number of matters.[98] For example:

- Most regulating states require an examination of title and the application of sound underwriting practices as a pre-condition to the issuance of a policy.
- Regulatory control of rates and forms ranges from simple filing requirements to state approval to state promulgation of rates and forms. For example, Florida and Texas set premium rates. North Carolina ties premiums to the amount of the insured mortgage rather than a flat rate.
- Some states set a limit, called the single risk limit, on the amount of insurance which may be provided for any one property, usually 50% of the insurer's surplus.
- Many states prohibit title insurers from offering other kinds of insurance in addition to title insurance.
- A number of states (Florida, Ohio, New Mexico and Texas) require a current survey as a pre-condition to survey coverage.
- Some states impose liability on title insurers for the errors, omissions or fraud of their agents who act as conveyancers or escrow agents while others require insurers to provide *closing letter protection* which is coverage for loss arising from the acts or omissions of the agent.
- Some states regulate *controlled business arrangements* in which one person or entity, who is in a position to refer settlement business, has a direct or beneficial ownership interest in or is affiliated with a conveyancing services provider. In general, state legislation limits the amount of revenue which an entity can derive from such an arrangement and requires disclosure to the consumer.

In considering whether premiums should be regulated, the difference between Canadian and American conveyancing practice should be noted. Title insurance premiums in the United States are significantly higher than in Canada because of commissions paid to agents and the role that the insurer and its agents play in the conveyancing process. In some jurisdictions, the commission paid to the title agent may represent 80% of the premium charged.[99] Secondly, underwriting costs, which relate to the examination of title, correction of defects and searches are considerably higher than in Canadian jurisdictions. American land registries are weak compared to those in Canada and title insurers must maintain significant land records, some of which operate as a *de facto* land registry. Maintenance of these records, called title plants, is a significant underwriting expense which Canadian title insurers do not have to incur.

The Federal RESPA regulates the title insurer's role in the conveyancing process in federally regulated mortgage transactions. The RESPA is consumer protection legislation intended to "help consumers become better shoppers for settlement services", and to eliminate kickbacks and referral

[98] For a review of the regulatory approach of individual states, see Gosdin, *supra* note 91 at 102 - 179.

[99] Lipshutz, *supra*, note 13 at 37.

fees which increase the cost of such services. It achieves its object by means of detailed and extensive disclosure requirements imposed on lenders and others who provide settlement services.[100]

The disclosure required by the RESPA includes information about various settlement services, an estimate of settlement costs ("Good Faith Estimate") and whether the lender intends to service the loan or transfer it to another lender, and information about complaint resolution mechanisms ("Mortgage Servicing Disclosure Statement").

Since title insurers depend upon referrals or selection by conveyancing service providers, competition for those referrals is intense. The payment of referral fees and kickbacks is a significant issue in the United States with prosecutions netting multi-million dollar fines against title insurers.[101] The RESPA prohibits the payment or acceptance of a fee, kickback or incentive for referral of settlement services involving a federally related mortgage. It also prohibits the practice of fee splitting and the receipt of fees for services not actually performed.

To avoid the prohibitions against referral fees, some American title insurers have entered into controlled or affiliated business arrangements with conveyancing service providers such as real estate agents, escrow agents and others who might refer buyers to the title insurer.[102] The RESPA regulates such arrangements and requires that service providers disclose them to consumers when referring the latter to other providers in which they have an interest. The disclosure must take place before the referral, describe the business arrangement and provide an estimate of the settlement costs. The referring provider cannot require that the consumer use the referred provider unless the latter provider will be representing the lender's interest in the transaction.

The RESPA also prohibits a seller from requiring the buyer, as a condition of the contract of sale, to obtain title insurance from a particular company. The remedy is a right of action for three times the title insurance charges.

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[100] United States, Department of Housing and Urban Development, RESPA - Real Estate Settlement Procedures Act website, online: http://www.hud.gov/offices/hsg/sfh/res/respa_hm.cfm (Date accessed: June 29, 2005).

[101] See "How Vulnerable are AfBA's? Local Plaintiff's Attorney goes after Minnesota "Sham" Title Companies", The Legal Description, February 19, 2001, online: http://www.abraxis.com/roxanna/pdf/TLD_2_19_01.pdf (Date accessed: June 29, 2005); "Thirteen Attorneys and Title Company Agree to Pay $200,000 to Settle Alleged Violations of HUD Anti-Kickback Statute", May 8, 2003, US Department of Housing and Urban Development, online: http://www.hud.gov/news/release.cfm?content=pr03-057.cfm(date accessed: June 21, 2004);"California title insurance anti-kick-back bill passes committee", May 1, 2005, American Land Title Association website: on-line: http://www.alta.org/indynews/news.cfm?newsID=2758 (Date accessed: June 29, 2005);

[102] Such arrangements are prohibited when the affiliate is not a legitimate service provider but rather a "sham" company, primarily established to facilitate the payment of a fee or commission to the affiliate in exchange for a referral of business and where no service of value is provided to the consumer.

There are significant differences between title insurance in the United States and Canada, which may justify a different regulatory regime. At present, in Canada, there is no regulation of conveyancing services and very little regulation that is specific to title insurance.

CHAPTER 5

ISSUES FOR CONSULTATION

Our preliminary review of title insurance and the related conveyancing services industry has identified a number of issues for discussion. While we have attempted a comprehensive review, we invite the reader not only to comment on the issues that we have raised but also to identify additional issues that we may have missed.

As we suggested at the outset, the purpose of this review is to consider how title insurance impacts upon the public interest in the real property conveyancing system. As is evident from the foregoing, this system is complex and comprises a number of distinct components. By responding to the demand for cheaper, simpler, faster and more secure conveyancing practices, title insurance has brought to light weaknesses in traditional conveyancing practice and has offered a solution. However, the solution offered may cause or exacerbate other weaknesses.

There appears to be little disagreement about the value of an efficient and secure real property conveyancing system. Where disagreement does arise, it often relates to the tension between measures promoting facility of transfer and those supporting security of ownership. The balance between facility of transfer and security of title may be upset by changes to the conveyancing system resulting from title insurance and conveyancing services. Law reform may play a role in the balance between the desire of buyers and lenders for conveyancing practices which are inexpensive, easy and fast, and a real property system that is strong and reliable.

Accordingly, we set out below a number of suggestions for discussion. These suggestions should not be interpreted as an indication of our stance on these matters. Rather they are put forth as a starting point for discussion of the value and possible consequences, both negative and positive, of the variety of possible responses to title insurance.

A. PROHIBITING THE SALE OF TITLE INSURANCE

This is, of course, the most extreme solution to the perceived difficulties of title insurance. An absolute ban on title insurance can only be justified where the harm created by the product overwhelmingly outweighs its benefits or, in other words, where the product is of very little value to the consumer but poses a significant threat to the consumer and the public interest.

Critics of title insurance point to the experience in the United States as evidencing, at worst, an active intention to weaken land registration systems further or, at the least, a careless disregard for this result.

> The title industry does not cure the defects of recordation but, rather, imposes its own defects by encouraging continued lack of title security, inefficiency, and unnecessary consumer costs.[103]

Title insurers assert that our strong land titles system benefits their industry. However, one can foresee the potential negative impact upon the integrity and reliability of the land titles system when defects in title or land use are insured over rather than corrected. This is like dealing with cracks in the wall by covering them with wallpaper: there is always a risk that a problem, which may have been initially simple to correct, will become more difficult and expensive to fix with time.

Rather than an outright ban on title insurance, would other forms of regulation not adequately protect the public system? Again, critics suggest that regulation will be ineffective to prevent the negative consequences of title insurance because such regulation will be complex and costly to enforce. Furthermore, they suggest that insurers will simply evolve and the law will be unable to keep pace with, let alone stay ahead of, developments in the industry.

To date, Iowa appears to be the only jurisdiction to prohibit the sale of title insurance.[104] Iowa's ban, enacted in 1947, was in response to the financial failure of a number of title insurance companies, leaving policy holders without recourse. Recently, a repeal of the prohibition was considered and vigorously opposed by the Iowa State Bar Association which objected to private title insurance on the following grounds:[105]

- It is not required for most transactions.
- It is unnecessary due to the low incidence of defects attributable to the public recording system and legislation which provides that a person who can establish an unbroken chain of title for 40 years is deemed to have a marketable title.[106]
- It negatively affects the integrity of the public land records system in that problems are insured over rather than corrected.

An absolute ban may be a disproportionate response to the possible harm caused by title insurance. While not closing our mind to this option, we should consider other measures that may reduce the threat of harm to the public interest while preserving access to a product that may be of benefit to some consumers.

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[103] B. Goldner, "The Torrens System of Title Registration: A New Proposal for Effective Implementation" (1982) 29 UCLA L. Rev. 661 at 661.

[104] *Iowa Code 2005*, Chapter XIII, s. 515.48(10).

[105] Iowa State Bar Association, "Title Insurance: A Fleecing of America". On-line: Iowa State Bar Association website, http://www.iowabar.org.

[106] *Iowa Code 2005*, s. 614.31.

B. REGULATING TITLE INSURANCE

As noted above, title insurers are subject to the same regulation as other insurers but there are no specific regulations aimed specifically at title insurance itself. Ontario, Alberta and New Brunswick have a few title insurance-specific provisions but, in general, there are no regulations that address some of the harms discussed in this paper.

In the United States, title insurance is subject to direct and specific regulation at the state level and more general regulation at the federal level. Canada has almost no regulation directed specifically at title insurance at either the provincial or federal level. Although title insurers play a lesser role in real property conveyancing in Canada, they are seeking to increase that role. In that case, should aspects of the American regulatory regime be adopted in the western provinces and, if so, which aspects?

Other forms of insurance, for example, life and fire insurance, are subject to certain statutory terms and conditions intended to protect consumers from contractual provisions that exclude coverage where it is "just and reasonable that the insurer should be liable."[107] Statutory conditions may be worthwhile if title insurance coverage fails to meet the reasonable expectations of policy holders. What kind of conditions would achieve this objective?

Should premiums be regulated in Canada? Earlier we discussed the criticisms of premiums as being excessive in relation to the risk and potentially disguising incentive fees or charges for other services. Such regulation might include government review and/ or approval of premiums as well as a requirement that insurers provide the consumer with a detailed breakdown of the premium to disclose fees paid or charges for non-insurance services. If lenders are going to insist on borrowers obtaining title insurance as a condition of the loan, should disclosure requirements that are specific to title insurance be included in consumer protection legislation?[108]

Are existing regulations aimed at referral and incentives fees sufficient? Is there a need to regulate affiliated business arrangements in Canada and, if so, how? Should there be some regulation of the manner in which conveyancing service providers such as realtors, lenders, lawyers and mortgage brokers advertise "exclusive" relationships with title insurers or otherwise promote title insurance and specific title insurers on websites and in other promotional materials?

When does the bundling together of title insurance with conveyancing and other services become inappropriate? Would timely disclosure of information or the creation of an obligation to advise the consumer counteract the potential harm caused by bundling of services?

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[107] 19 C.E.D. (West 3d) Title 79 at para. 357.

[108] *The Consumer Protection Act,* C.C.S.M. C200; *The Cost of Credit Disclosure Act*; R.S.S. 1978, c. C-20. As noted earlier (*supra*, note 87), Manitoba and Saskatchewan have amended their respective statutes to creating such disclosure requirements.

C. REGULATING CONVEYANCING SERVICES

There is little or no regulation of conveyancing services provided by non-lawyers and no regulation of the bundling of such services together with title insurance. Who should be responsible for the enforcement of such regulations, particularly those aimed at conveyancing services? This item does not fall under the insurance regulator's jurisdiction, nor would the relevant law societies have authority over the service provider who is not a lawyer. Should such oversight be the responsibility of a governmental consumer protection agency?

Ontario's Rule 30, discussed earlier in Chapter 3, provides guidance to Ontario lawyers for advising clients in title insured transactions and may be a useful addition to the law society rules in Manitoba and Saskatchewan. These rules might afford useful guidance to lawyers; however, they will have little impact on lenders and service providers who are not lawyers.

If lenders and service providers are preparing mortgage documentation, are they engaging in the practice of law? As noted above, *The Legal Profession Act* of both Manitoba and Saskatchewan restrict the conduct of real estate transactions to lawyers.[109] The conduct of real estate transactions is further regulated by minimum practice standards in the form of rules, notices to the profession and checklists, all of which are intended to provide guidance to lawyers and protect the public by creating checks and balances for the conveyancing system. Is it safe to assume that the work of service providerss is performed by a lawyer or under the supervision of a lawyer? If not, how can this practice be justified in light of the prohibition against the unauthorized practice of law? Given that governments in general are moving towards streamlined, simplified and "consumer-friendly" conveyancing processing, is it still reasonable to conclude that only lawyers may conduct real estate transactions? Perhaps it is time to consider whether some aspects of the transaction might be completed by non-lawyers, subject to appropriate controls to ensure protection of the public.

We are unaware of any Canadian guidelines or regulations that apply to the provision of conveyancing services by third party service providers. In the United States, the provision of conveyancing services in transactions involving a federally regulated mortgage is regulated by the *Real Estate Settlement Procedures Act*, (RESPA) described above. This Act requires mandatory disclosure and prohibits practices that may be misleading or detrimental to the consumer. The benefit of this legislation is in its application to all service providers whereas law society rules and guidelines only apply to lawyers acting for clients; the disadvantage is that it only applies to federally regulated transactions. To be truly comprehensive, such legislation, if adopted in Canada, might also:

- prohibit and/or regulate the tied selling and bundling of title insurance with other services;
- regulate the relationship between service providers, lenders, title insurers and others;
- impose minimum standards and duties on service providers who handle mortgage proceeds including reporting, investment and bonding requirements.

[109] *The Legal Profession Act*, C.C.S.M. s. 20; *The Legal Profession Act*, 1990, S.S.1990-1991, c.L-10.1. s.30

The RESPA provides for extensive and detailed disclosure. At some point, the complexity and breadth of disclosure can obscure rather than clarify the decision-making process. If the provision of additional information about title insurance were to be required by legislation, what type of things should be disclosed, in what manner and by whom? In order to address the concerns raised about the consumer's ability to make an informed choice, the following disclosure might be helpful:

- a clear statement that title insurance is not mandatory and that there is no obligation to purchase the offered product;
- information on existing forms of protection (Land Titles System, Protocol etc.,);
- an explanation of the relationship between the insurer and the lender or the person who is promoting the product, and any direct or indirect benefit provided to that person;
- information about the various means of assuring title including traditional due diligence performed by an independent lawyer;
- an explanation and breakdown of the fee.

Such disclosure may also address concerns about tied selling and bundling of title insurance with other products and services although mere disclosure may not be sufficient to prevent improper practices. Should a positive duty be imposed on title insurers and service providers to minimize or avoid improper tied selling and bundling? What sort of duty would achieve this objective? Who would enforce it?

D. ENSURING ACCESS TO INDEPENDENT LEGAL ADVICE

Should independent legal advice be required for title insured transactions? It is not a requirement for other forms of insurance or for uninsured real estate transactions. In order to make an informed decision about whether to obtain title insurance, the consumer needs to understand the terms and limitations of the policy and the other options available to assure title. Title insurance policies are complex and the average consumer will have difficulty making an informed decision without specialized knowledge or expertise.

It has been suggested that Ontario's Regulation 666 ensures access to independent legal advice by requiring that a title insurer obtain a certificate of title prepared by an independent lawyer before issuing a policy.[110] The regulation was enacted in 1956 to prevent the unauthorized practice of law by title insurers.[111] In the early 1990s, title insurers sought, unsuccessfully, to have the independent solicitor requirement repealed so that they could perform more work in-house. Would the regulation, in its current form, be sufficient to ensure independent advice for consumers?

[110] Insurance Reg. 666, s. 3, *supra* note 88.

[111] S.H. Troister & K.A. Waters, *Real Estate Conveyancing in Ontario: A Nineties Perspective*, (Lawyers Professional Indemnity Company, September 1996) at 99.

The manner in which title insurance is marketed and distributed, and the trend towards direct delivery of conveyancing services to consumers, are potentially problematic. As discussed above, the Insurance Council of Manitoba and the Law Society of Manitoba take the position that lawyers may not arrange title insurance on behalf of a client but instead must arrange such insurance through a licensed insurance agent or broker. Does the addition of the agent or broker to the process protect the consumer or merely add to his or her cost?

Ontario's insurance legislation permits an exception for lawyers acting as brokers while in their professional capacity.[112] This seems to be a sensible option as long as it is combined with companion practice rules designed to minimize conflicts of interest and undue influence.

E. POSSIBILITIES FOR PROTECTING THE REAL PROPERTY SYSTEM

Our study of title insurance has led inevitably to an examination of the perceived deficiencies of the conveyancing system. The Joint Land Titles Committee[113] has produced a comprehensive study as well as model legislation designed to resolve some of the weaknesses of the land titles system identified in this paper. Implementation of the model legislation would improve the integrity and reliability of the land registration system and would close gaps in assurance fund protection. It might be helpful to review some key proposals for reform.

1. Compulsory Registration of Instruments

While most interests are registered to protect their priority, there is no such incentive for the timely registration of discharges of mortgages and other interests. British Columbia has imposed a statutory duty on lenders to provide discharges within a specified time and on lawyers to ensure the timely registration of such discharges.[114]

2. Close the Registration Gap

This would improve certainty and security in the conveyancing process. Possible reforms which could mitigate the negative consequences of registration gap problems include:

- improve land titles procedures to ensure that instruments are processed in the order in which they are received;

[112] *Registered Insurance Brokers Act*, R.S.O. 1990, c. R.19, s. 2(2)(a).

[113] Joint Land Titles Committee, 1990 and 1993, *supra* note 39.

[114] *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 72.

- confer priority on instruments as of the date of their initial entry on the register rather than completion of the registration. This appears to be the effect of the Manitoba procedure but perhaps it should be enshrined in legislation similar to that of England and Wales;[115]
- amend legislation to repeal any special priority given to specific interests such as builders' liens;
- extend the assurance fund coverage to cover loss caused by the registration gap on the grounds that such losses are, at least in part, a result of the registration process chosen by the Registrar;
- encourage care and diligence by imposing appropriate penalties on conveyancing service providers for shoddy practices such as errors and omissions in instruments.

3. Reform the Overriding Interests Exception

Eliminate those which either should be registered or which should not override the register. The Joint Committee suggested retaining the reservations in crown grants, tax liens and short-term leases but deleting the public highways (which are protected elsewhere), expropriation powers (which are not interests in land) and public and private easements which, in their opinion, were not entitled to special protection.[116]

4. Create a Two-tiered Registry System

The Committee also suggested the creation of an interest *recording* system alongside the interest *registration* system. An interest recording system would be similar to the existing caveat recording systems in Manitoba and Saskatchewan and would simply give notice of the interest and establish its priority subject to subsequent validation of the interest. Alternatively, if losses due to the existence of overriding interests are rare and insignificant, perhaps the guarantee should be extended to cover such losses.

5. Expand the Torrens Indemnity

The gaps and weaknesses in the land titles system might be addressed by:

- reducing the barriers to and limits on assurance fund compensation;
- expanding the scope of the indemnity to include loss arising from causes other than the operation of the assurance fund and the error or misfeasance of the Registrar;
- replacing the fund with a government-administered insurance scheme.

The first suggestion may not be sufficient and the second may not be feasible given the present manner of funding the assurance fund. In Alberta, 10% of registration fees are directed to the assurance fund whereas in Manitoba, the fund is supported by application fees to bring land

[115] See *supra* p. 24, note 59.

[116] Joint Land Titles Committee, 1990 at 27, *supra* note 39.

under the operation of *The Real Property Act*. Replacing the compensation fund with an insurance scheme would require more resources, an expanded scope of coverage and higher fees.

6. Institute a Public Insurance Scheme

A public title insurance scheme may provide coverage at a lower cost than a private insurance scheme and may facilitate greater protection of the public interest. There would be significant incentives for a government insurer to implement risk reduction measures, some of which may include protection of the land registration, survey and land management systems. Of course, such an undertaking would involve expansion of the existing land titles system or the creation of a new government entity. Can we extend the rationale underlying the existing auto insurance scheme to a public title insurance scheme?

7. Improve the Response to Fraud

Is the incidence of fraudulent transactions sufficient to justify prevention measures and the attendant costs? Are recent examples such as *Jiang*[117] extraordinary or do they signal the beginning of a disturbing trend? Even if the incidence of fraudulent transactions as a percentage of all transactions continues to be low, the damage caused by even a few transactions is substantial both in terms of dollars and in terms of the loss of public confidence in the land titles system. How do we improve security without impairing facility of transfer?

Fraud by forgery and impersonation could be minimized substantially if there were a foolproof means of confirming identity. Biometric identification technologies,[118] which offer some promise in this regard, are not yet in widespread use, are costly and may not meet with public approval due to the potential for abuse of such technology. Until foolproof identification is possible, what other measures might we employ to avoid fraud?

Should access to the land titles system be restricted to lawyers? One of the goals of the system is to simplify transactions so that landowners can do their own conveyancing.[119] One can easily foresee objections to a lawyer-mediated process in which the public is denied access to the system. Further, there is no guarantee that such a measure will prevent fraud, as a few lawyers have themselves perpetrated frauds, colluded with clients or failed to detect fraud on the part of their clients.

Should the Registrar implement a program to verify signatures and identities, or would the cost and delay of such a requirement outweigh the savings to be achieved? Would a system of random audits be more practical? Another alternative is the detection program implemented in Saskatchewan in which owners are notified of the registration of a transfer, discharge of mortgage or new mortgage and where the Registrar is able to lock the register, preventing further dealing with

[117] *Toronto-Dominion Bank v. Jiang* (2003), 63 O.R. (3d) 764 (Ont. S.C.J.).

[118] Technology that provides for confirmation of identity by biological or physical characteristics such as facial recognition, retina scan, voice recognition and fingerprint.

[119] Manitoba Law Reform Commission, *supra* note 5 at 7.

the land? This solution seems sensible, but is it practical, unduly costly or cumbersome and would it delay transactions?

As funds of last resort, Alberta and Manitoba's assurance funds may provide an inadequate response to consequences of fraud. Requiring claimants to exhaust their remedies against the primary wrongdoer increases their sense of loss because of the cost, delay and uncertainty, particularly in cases where it is clear at the outset that recovery is impossible. Should we therefore structure the assurance fund as a fund of first resort, wherein claimants might receive compensation more quickly, leaving the Registrar to seek reimbursement from the wrongdoer? New Brunswick already has such a system in place. A fund of first resort in Manitoba would result in faster compensation for owners and would, in general, be more efficient since the Registrar would pursue a wrongdoer only in cases where there was a good chance of recovery. Quick reimbursement would also minimize the claimant's mental distress and consequential loss.[120] Configuring the assurance fund as a fund of first resort could result in increased costs to the fund; however, as the amount of loss is relatively low, such costs could be funded by small increases in user fees.

A further improvement would be to give preference to the owner in possession in cases of fraud or error, as discussed above.

8. Protect the Survey Fabric and Land Management System

Undiscovered and uncorrected defects and non-compliance affect not only the owner of land, but the immediate neighbours and broader community. Should greater public resources be devoted to survey monument restoration and to zoning inspection and enforcement? Should sellers be required to identify and correct defects at the time of the purchase? Should buyers be required to obtain a current survey as a condition of registration of a transfer?[121] Would this put an unnecessary burden on home buyers? Would the surveying profession be unable to meet the increased demand for surveys? How should it be enforced and by whom?

Should the land titles system be expanded to incorporate survey and zoning registers? Given that the land titles system, which guarantees ownership within the boundaries of land, the survey infrastructure, which determines boundaries of land, and the land use management system, which regulates activity on land, are closely related, does it not make sense that they should be integrated in some way? The land registration system could offer a guarantee of survey as well as title, as British Columbia's new Land Title and Survey Authority is intended to do.

[120] CMHC, *supra* note 47 at 4.

[121] Florida, Ohio, New Mexico and Texas have this requirement.; See Gosdin, *supra* note 91 at 114, 148 and 154.

9. Impose Greater Obligations Upon the Seller

Should we follow the example of England, Wales, Denmark and New South Wales by dispensing with the doctrines of *caveat emptor* and merger and requiring sellers to supply prospective buyers with an extensive information package including, *inter alia*, a survey, title information, tax information, and the existing warranties or guarantees? If so, should we also adopt England and Wales' enforcement strategy, namely, give buyers a right of action and/or fine the seller?[122] Though there has been some criticism of the system, in general it is broadly supported due to the increased certainty it gives to home buyers.[123]

[122] *Housing Act 2004*, (U.K) 2004, c. 34, Part 5 - Home Information Packs. See also W. Wilson,, The Housing Bill: Bill 11 of 2003-04, (Research Paper 04/02, House of Commons Library, 2004). On-line: U.K. Parliament, House of Commons Library website, http://www.parliament.uk/commons/lib/research/rp2004/rp04-002.pdf [Wilson, Research Paper 04/02]. (Date accessed:June 30, 2005).

[123] Wilson, Research Paper 04/02, at 61.

CONCLUSION

We are anxious to receive comments and advice upon all or any of the issues identified in this Paper. Without prejudice to the generality of this invitation, we feel that the following specific inquiries — and, in some instances, the subsidiary questions which attend them — are particularly in need of response and may serve to focus the reflections of all who read this consultation paper.

1. Should the sale of title insurance be prohibited?

Has a threat to the public welfare or the interests of individual citizens been shown to exist? If so, would abolition be a disproportionate response, having regard to those positive values or functions, served by title insurance, that we have identified in this paper? Does title insurance, by its very existence, encourage sloppy practice on the part of primary parties to real estate transactions and their lawyers? If so, does this phenomenon, and its long-term corrosive effect on the titles register and the survey system, justify legislative interference in the market place?

2. Should title insurance be regulated? If so, how?

This inquiry, like the previous one, obviously tends to anticipate other, more specific concerns raised by other questions below. For instance:

- Would it be appropriate for the prairie provinces to adopt regulations similar to Ontario's Regulation 666, requiring title insurers to obtain a certificate of title prepared by an independent lawyer within the relevant province before issuing a policy?
- Should the market govern the evolution of conveyancing practice?

3. Should we prohibit lenders from mandating title insurance or a particular insurance product?

A subsidiary question, especially pertinent where conveyancing services are "bundled" with title insurance, is to consider whether legislation should mandate some minimum level of disclosure by the lender, service provider or title insurer of options, advantages and disadvantages, and the breakdown and allocation of the fees, charges and premiums involved.

4. Is legislative or regulatory intervention necessary or desirable to preserve and protect the values traditionally secured by independent legal advice?

Again, this question invites consideration of the wisdom of adopting something akin to Ontario's Rule 666. How significantly does the advent of title insurance truly threaten the accessibility and independence of legal advice?

5. Should lawyers be permitted to arrange title insurance?

Is this an illegitimate encroachment upon the professional sphere of insurance agents or brokers?

CONTACT INFORMATION:

Manitoba Law Reform Commission
1210-405 Broadway
Winnipeg, MB R3C 3L6
Lawreform@gov.mb.ca
Tel: (204) 945-2896
Fax: (204) 948-2184
website: www.gov.mb.ca/justice/mlrc

Law Reform Commission of Saskatchewan
205 Avenue G North
Saskatoon, SK S7L 1Y9
chair@lawreformcommission.sk.ca
Tel: (306) 347-2101
Fax: (306) 651-4619
Website: www.lawreformcommission.sk.ca