

Adapt or perish in real estate bar: Fees tumble: Title insurance changes the landscape

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It was an odd scene in Halifax when the national governing council of the Canadian Bar Association voted overwhelmingly last August to block the First American Title Insurance Company from advertising in any of its publications or sponsoring any of its events.

While some lawyers denounced the move as petty and discriminatory, Garth Manning, a Toronto real estate lawyer, spoke of "threats" to the real estate bar by First American's move to "put residential real property lawyers out of business."

Manitoba Bar Association president John Jones, of Manitou, Man., called title insurance "the most serious attack on the financial viability of my practice in my career." In 1984, he was billing \$600 for a standard mortgage refinancing deal, but now banks are offering him just \$300 for the same service.

"It's not just my lunch money. It's my kids' college fund, my retirement fund, my vacation money. Multiply that by a dozen times within 50 miles of me and then multiply that by thousands of real estate lawyers across this country."

Title insurance threatens lawyers because it covers residential buyers for "defects in title" -- such things as unregistered rights of way, prior mortgages or municipal work orders.

It used to be that a lawyer would certify good title by writing an opinion letter after searching the registry. If title wasn't good, the lawyer (or really the liability insurer) could be sued to compensate the out-of-pocket purchaser or mortgage lender.

Title insurers assume the title is good, and it generally is. If not, they pay off the purchaser or lender. An opinion letter used to cost about \$600, but lawyers are lucky to get \$400 for one nowadays. A title policy sells for about \$200.

Ontario lawyers have been protected by Insurance Act Regulation 666, which forbids the issuing of a title insurance policy unless a lawyer's certificate is first obtained. That means a lawyer must be involved in the transaction. In the rest of Canada, no such prohibition exists, and even in Ontario the title industry is lobbying hard to get rid of the regulation, which also has been criticized by the federal Competition Bureau.

All this matters because real estate practice is the bread and butter for lawyers in smaller towns, where it is not easy to switch to other practice areas.

The Ontario lawyers' governing body, the Law Society of Upper Canada, has fought back by creating its own brand of lawyer-controlled title insurance (called TitlePLUS) through its closely held liability insurer, the Lawyers Professional Indemnity Company.

LPIC is marketing its product, over the complaints of some other title insurers, directly to lawyers using Teranet, the computerized land registry system that is already performing fully automated land title transfers (no more searches at the registry office) in London and Hamilton, Ont. Over the next five years, it will spread across the province.

The increasing computerization of the land titles system -- e-registration, as it's known -- is leaving some older, more conservative, lawyers confused and alienated, but those reluctant to embrace real estate practice technology will doubtless be swept aside.

"One of the most interesting thing about e-registration is it makes us look at conveyancing practices we've accepted for a long time without question," says Susan Elliott, a Kingston, Ont., real estate practitioner who also serves as general

counsel, legal line of business, at Teranet.

Not all lawyers like title insurance even when it is controlled (and delivered electronically) by the legal profession. Donald Desaulniers, a Belleville, Ont., practitioner, complains that if the client pays a TitlePLUS premium of close to \$300, lawyers will have to cut back their fees to remain competitive with other lawyers who are not offering title insurance. Buyers "will go to the next office down the street to save \$25," he says.

This also has real estate lawyers chewing their nails. The increased competition is not just between lawyers, but from a host of paralegal practitioners trying to muscle in. Ontario's independent paralegals have been demanding the right to handle real estate deals. Last May, Peter Cory, a former Supreme Court justice, recommended to Jim Flaherty, the former attorney-general, over the objections of lawyers, that paralegals be allowed to act for vendors in uncomplicated residential sales. There has been no decision yet.

With all these pressures, lawyers are looking for other places to turn a dollar in real estate. Alan G. Silverstein, a Concord, Ont., lawyer and real estate expert, told a recent Canadian Bar Association seminar that for lawyers to compete with paralegals they will have to "act fast" and start selling properties themselves.

This follows the lead of lawyers in other jurisdictions, particularly Scotland, where solicitors dominate property sales and give real estate agents a run for their money.

John Kelly, a law professor at Toronto's Seneca College, says lawyers should get out of certifying title and move on to other areas of the real estate deal where there is real value. They have made a huge mistake by confining themselves to "the tail end of the deal," he says.

"They collect \$299 to certify title on a \$250,000 house, plus they assume all the risk if the transaction goes sour. The real estate agent, who's taken a 90-day real estate course at community college, pockets \$15,000 on a deal and assumes no risk at all. What's wrong with this picture?"

Mr. Silverstein says having lawyers act as real estate agents "offers consumers more safeguards," including a code of ethics, compulsory errors and omissions insurance, a compensation fund and strict licensing and educational requirements.