Title Insurance Issues Task Force

Report to the Benchers

July 13, 2007

The Law Society
of British Columbia

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I INTRODUCTION:

The Benchers of the Law Society struck the Task Force following the 2005 Annual General Meeting, at which the Members passed several resolutions bearing on the title insurance industry. The text of these resolutions is reproduced at Appendix 1 to this report.

The Task Force is made up of the following:

Chair: Ralston S. Alexander, Q.C. Life Bencher

Leon Getz, Q.C., Bencher

Dr. Albert McClean, Q.C.

Warren Wilson, Q.C. Life Bencher

Ian Smith – Director and Registrar of Land Titles

Neil Kornfeld, QC

Charlene Loui-Ying, Barrister and Solicitor

The Task Force adopted the following mandate

The mandate of the task force is, with reference to the 2005 AGM member resolutions respecting the activities of title insurance companies, and the Law Society's statutory objects, duties and powers, to:

(a) obtain and examine factual information about the practices of title insurance companies, their affiliates and associated entities in British Columbia, particularly as they relate to the preparation, execution and registration of mortgages and discharges of mortgage; and

(b) report on their findings and make policy recommendations to the Benchers with respect to the concerns articulated in the 2005 AGM member resolutions.

The Task Force set itself an ambitious goal: to explore and "get to the bottom" of the various factual matters regarding the issues identified in the resolutions.

The members' resolutions appear, to a significant extent, to arise from an apprehension that the document preparation and filing services provided through title insurance companies have impacts upon the legal profession that are not widely understood and which the proponents of the resolutions consider generally detrimental to the public. The Task Force set out to separate the rhetoric from the reality so that we could publish a definitive fact-based report dealing with these concerns.

We have only been partially successful. We considered that in order to fully understand the manner in which the title insurance companies provided their document processing services, it would be necessary for us to visit the offices of the lawyers performing those services. We have been unable to do this. The title insurance companies determined, due to client confidentially concerns and certain other matters that they could not permit us to attend at the offices of their respective lawyers. Consequently, we have been forced to draw certain inferences from known facts.

II PROCESS:

The Task Force began its work by seeking input from interested practitioners and the title insurance companies. Twenty-five responses were received from lawyers. All of the title insurance companies providing document preparation services and some that do not provide such services submitted briefs. One submission was received from an interested member of the public. These submissions were provided in February and March of 2006. In addition,

we invited individuals and organizations having an interest in doing so to make oral presentations to the Task Force, in part to provide an opportunity for the Task Force to seek answers to some of its outstanding questions. Several lawyers made oral presentations and both First Canadian Title (FCT) and FNF Canada (FNF) made presentations, either directly or through counsel, to the Task Force. We received oral presentations in June of 2006.

III SUBMISSIONS:

Appendix 2 contains summaries of the submissions received and in some cases the Task Force's comments

IV THE NATURE OF THE ALLEGED PROBLEM:

Title insurance as a product is not a problem. It is enjoying increasing popularity across Canada. Although there are questions that can properly be raised about whether it provides value for money, it is not in our mandate to decide whether title insurance as a product is good or bad for consumers in British Columbia; therefore, we take no position on the question.

Title Insurance comes in two forms, one for the benefit of lenders, and the other for the benefit of homeowners. The protections provided to each class of customers are similar. In both cases, title insurance provides protection from losses occasioned by defects in title, encroachment onto or from the insured property, difficulties caused by off-title defects, such as bylaw infractions, building permit issues and the like, and identity fraud. In all cases the consumer bears the cost of obtaining title insurance.

Title fraud has been very much in the public eye in recent years, but in the view of the Task Force the publicity and attention it has attracted is out of proportion to the true extent of the problem. This is particularly true in British Columbia where, according to the Land Title and Survey Authority, the land title Assurance Fund has had only two claims related to fee simple property ownership in the past 17 years despite processing approximately 13.5 million

transactions in the same period. This contrasts with assertions made by Frank Williams in his paper commissioned by the Consumers Council of Canada (Appendix 2, section 8).

It should also be noted that comparisons with title systems from other Canadian jurisdictions can be misleading. For example, the title system in Ontario is not based historically upon the Torrens model and has some unique weaknesses and deficiencies that can properly be the subject of a title insurance policy consideration. Ontario's land title system and its weaknesses are not relevant to the question of whether title insurance provides value in British Columbia.

First Canadian Title included in its submission a paper written by Dr. Stanley Hamilton entitled "*Private Title Insurance: A role within a Torrens System of Real Property Registration"*, which endeavors to address the criticism that title insurance has little or no value in a Torrens System of land titles. In December 2006, after the Task Force had received submissions, the Law Reform Commissions of Manitoba and Saskatchewan jointly published a more thorough and balanced analysis in their report entitled "*Final Report on Private Title Insurance April 2007*".

The Task Force's view is that a well-informed consumer is best placed to assess the value of title insurance in any particular transaction. Consequently, the marketplace should determine whether and when a consumer can benefit from title insurance and whether buying title insurance is a prudent investment of any component of a purchaser's home acquisition budget. To the extent that lenders mandate title insurance, the consumer will pay the price regardless of whether value is provided to the consumer or the lender for the premium.

Several factors seem to have motivated the passage of the members' resolutions. One of these is that some title insurance companies operating in British Columbia provide lenders with what are loosely described as "document preparation services". It is that facet of the title insurance industry's engagement

in British Columbia that has attracted much attention from lawyers who argue that those insurers are doing work or arranging for work to be done in contravention of the prohibition of unauthorized practice of law contained in the *Legal Profession Act*. We will have more to say on this subject in due course. There are, however, additional factors: the absence of legal advice to consumers and the problems created by the tardy registration of both mortgages and releases of mortgage, which include the possibility of long term harm to the integrity of the public Land Title system in British Columbia.

V ISSUES:

In the following analysis, we consider the two Resolutions and the issues that emerge from them. We note that while section 13 (1) of the *Legal Profession Act* establishes the conditions on which a resolution passed at an Annual General Meeting can become binding upon the Benchers, these resolutions do not presently enjoy that status. At this time the resolutions are precatory only and this Task Force is charged with responsibility to investigate the import of the resolutions and determine what actions, if any, to recommend to the Benchers in respect of them.

RESOLUTION 2: (See Appendix 1 for the text of this resolution)

The preamble to this resolution suggests three propositions as follows:

1. It is the practice of financial institutions to have borrowers sign mortgages without the benefit of legal advice.

2. This "practice" is contrary to the best interests of the public.

3. The "practice" may result in mortgages being found to be unenforceable.

The Task Force is satisfied that in at least some circumstances, financial institutions are not particularly concerned that borrowers obtain legal advice with respect to the possible consequences of the loan documents they are signing. It

also seems to be generally true that when financial institutions arrange loans using title insurance companies the borrower is not encouraged to get legal advice. Borrowers may be advised that they may obtain independent legal advice at their own (additional) expense, but to the extent that such advice is given when the borrower attends at the lender's offices to sign the mortgage documents the chances of such advice being acted on are much reduced.

One of the title insurance companies includes as part of the service package it provides to lenders the services of a lawyer for the purpose of witnessing the signatures of mortgagors as an "Officer" under the *Land Title Act,* as is required for documents to be registered at the Land Title Office. The title insurance company contracts with a number of lawyers in private practice throughout the province to provide this service for a fixed fee per signature, paid by the title insurance company. The lawyers are under strict instruction and contractual obligation to advise the mortgagor that they do not represent the mortgagor and cannot provide him or her with any advice. The lawyers are required to obtain the mortgagor's signature on a form acknowledging that they have been told that they may obtain independent legal advice. The form does not advise or recommend that the borrower get independent legal advice, but confirms that the borrower may do so at his or her expense.

The Task Force notes however that the submissions received verified that there are at least two title insurers that insist on lawyers continuing to be involved in the document preparation and execution stages of mortgage transactions. This may facilitate the provision of independent legal advice to borrowers.

The Task Force agrees that discouraging borrowers from obtaining independent legal advice is contrary to the best interests of the public. Mortgaging the family home is a significant financial transaction. Mortgage transactions can be complex and there is some evidence before the Task Force to demonstrate that some borrowers enter into the legal obligations without a complete appreciation of the consequences of what they are doing.

The Task Force received submissions to the effect that title insurance provides a valuable and cost effective service to consumers and gives better protection than a lawyer's opinion or the Land Title Assurance Fund. The Task Force also received submissions drawing on evidence of low pay-out to revenue ratios to suggest that the cost of title insurance does not reflect its real value. Questions about the extent to which title insurance provides value for money are beyond the scope of this report. In our opinion, those questions are as yet unresolved. The Task Force is not persuaded that it is useful to compare title insurance with a lawyer's opinion or the Assurance Fund in terms of benefits provided because they are not mutually exclusive. In the result, it falls to the market place to regulate the extent to which individual consumers choose to avail themselves of the benefits that are provided by title insurance policies or a lawyer's opinion. For the same reason the Law Society of BC, acting in concert with the Federation of Law Societies of Canada, opposed an initiative by the Canadian Mortgage and Housing Corporation to require title insurance on all its insured mortgage loans.

First Canadian Title's submission to the Task Force criticized the Law Society for not perceiving a conflict between its role in protecting the public interest in the administration of justice and its role in protecting the interests of its members. It is important to make two points in response to this submission. The *Legal Profession Act*, in section 3 addresses this potential for conflict and mandates that the protection of the interests of its members must be subordinate to upholding and protecting the public interest in the administration of justice. Moreover, individual consumer interests are not necessarily the same as the public interest. The individual consumer may be most interested in receiving good value for money, but the public interest must consider additional factors such as the integrity of the land title system. The thrust of the Federation of Law Societies' initiative in this area, and much of the title insurance work of the Law Society of British Columbia has been directed to the public interest and not to the interest of lawyers.

First Canadian Title noted in its submission that there is no requirement for independent legal advice in British Columbia or any other province, and that when a lawyer is permitted to act for both lender and borrower, the borrower does not receive independent advice. However, the Task Force observed that the borrower may receive legal advice as a jointly represented client, but in the execution process used for mortgages insured by First Canadian Title, the lawyer is expressly prohibited from giving advice to the borrower. Several real estate practitioners made the point that, despite compliance with statutory disclosure requirements by lenders, borrowers frequently do not fully understand the nature and effect of mortgage documents; indeed, some do not understand that they are mortgaging their home.

The Task Force agrees that generally the interests of the public would be better served if borrowers choose to obtain legal advice before undertaking obligations of the magnitude usually represented by mortgages. To that extent, we endorse the preamble to Resolution #2. However, the Task Force was not convinced that an absence of independent legal advice creates a likelihood that an appreciable number of mortgages might be found to be unenforceable.

The allegation that some mortgages may be unenforceable appears to refer to the fact that some mortgages have been witnessed by "Commissioners" whose appointments were allegedly made improperly. A number of commissioners for taking affidavits were appointed by Provincial Order-in-Council under the *Evidence Act* at the request of a title insurance company. The commissioners then attended as witness and "Officer" upon the execution of mortgage documents. See Appendix 2 – Section 3.

Some irregularities were noted with respect to the commissioner appointments. In particular, it appeared that the relationship between the commissioners and the title insurance company may have been inaccurately described in the application, with the result that they appeared to fulfill the criteria for appointment when in fact they did not. When the irregularities surrounding

these appointments were discovered, the appointments were rescinded. It has been suggested that mortgages certified by those commissioners may be invalid. We pass no opinion on whether such mortgages are invalid as a matter of law. If such a mortgage were legally invalid, only the financial institution (mortgagee) is at risk, and it has the benefit of a title insurance policy. It follows that the only outcome of the possibly invalid mortgage is the generation of a claim on the title insurance policy. It is difficult to imagine a negative consequence for a borrower of an invalid mortgage where the borrower did not cause the invalidity.

The Task Force notes that the Law Society is not involved in the appointment of commissioners. We recommend that to the extent it has not already done so The Law Society encourage the government to investigate the circumstances of these appointments to determine how they were made, to identify any improprieties in the process and steps taken to prevent a recurrence.

The Resolution proposes two courses of action for the Law Society: one, that it create a rule of practice prohibiting a lawyer from witnessing a mortgage unless satisfied that the borrower has received comprehensive legal advice; and two, that it lobby financial institutions and governments to impress upon them the detrimental impact that the practices described in the preamble are having on the public.

With respect to the first proposition, Task Force's view is that while the objective may be laudable, it is not realistic for the Law Society to use its regulatory authority over lawyers to meddle with the marketplace in the manner suggested. The Task Force acknowledges that in almost every instance where a borrower is signing a mortgage, be it a refinancing of an existing mortgage or a new mortgage in support of an acquisition, the borrower will be well served by having the benefit of advice on the contents of the mortgage from a lawyer. The obligations undertaken in a mortgage are many and varied, and there are many ways in which mortgages may differ one to another. However, the consumer is free to choose to undertake those legal obligations without the benefit of legal

advice. It is not for the Law Society to use its regulatory power over lawyers to effectively impose a general requirement that each borrower on a mortgage have the benefit of legal advice.

The Task Force does believe that the public and lawyers would benefit from a comprehensive initiative aimed at educating the public about the value added by a lawyer's participation in the mortgaging process. The variety of problems that a mortgage can create for borrowers would be demonstrated and over time it is possible that borrowers would come to appreciate the contribution lawyers make by providing advice in the process of arranging a mortgage loan. This would lead the better-informed public to engage the legal profession on these matters for the added value brought to the process.

We recommend that the Law Society undertake an education program designed to familiarize members of the public and of the legal profession about the problems inherent in mortgage transactions and about the contribution that can be made by the legal profession to avoiding those problems.

RESOLUTION 3: (See Appendix 1 for the text of this resolution)

The preamble to this resolution also suggests three propositions or allegations with respect to the practices of title insurance companies as follows:

1. borrowers are signing mortgages without the benefit of legal advice as a result of the practices of title insurance companies and financial institutions.

2. title insurance companies' practices in registering mortgages many weeks after the loan is funded and not filing discharges of mortgage in a timely manner cause uncertainty as to the state of title, cause additional expense to the public and will have negative consequences for the integrity of the Land Title Office Torrens System.

3. The Law Society has determined that drawing mortgages for

registration by two specific title insurers constitutes the unauthorized practice of law.

The first proposition is essentially a repeat of the proposition in Resolution #2, and the Task Force has already commented on it.

The Task Force is satisfied that there are delays in the registration of mortgages and releases of mortgage when a title insurance company or its service provider is preparing and filing these documents. Similarly, we are satisfied that there are defects in the documents submitted for registration by a title insurance company or its service provider. Of course, documents prepared by lawyers and notaries may also have defects or filing delays and, based on information from the Land Title and Survey Authority, the proportion of defective documents is only slightly higher among documents prepared by a title insurance company or its service provider.

The problem appears to be that defects are not corrected in a timely manner or at all. Additionally, the high volume of transactions processed by title insurance companies means that the number of defects from one or a few sources is large and the lawyer resources available to rectify the problems are proportionately small. The result is that the Land Title Office staff must devote considerable additional time and attention to these sources of defective documents. This problem is exacerbated by the way in which the title insurer's service provider deals with defective or otherwise problematic applications. From information from the Land Title and Survey Authority it appears that there is very little follow up on rejection notices issued by the Land Title Office, and because the service provider does not keep copies of the applications on its files, the service provider has difficulty responding to concerns raised about a particular application.

Senior LTSA staff has attempted, in consultation with one service provider, to devise a protocol for responding to the problems caused by the large volume of applications and the errors appearing in them. There was some early

success from these initiatives, but following an initial brief respite the single point of contact established by the service provider to respond to the concerns expressed by the LTSA lost its effectiveness and the non-responsive approach returned to become the more usual outcome.

The LTSA provided examples of documents filed by the service provider where there was a significant time lapse between the date of execution of the document (usually a mortgage) and the date of registration. Numerous examples were provided (22 in all) with delays from execution to registration ranging from 2 months to 52 months. The average delay in the 22 documents was 7.7 months.

The LTSA expressed the concern that failure to ensure timely registration and remedy defective documents leads to a lack of reliability within the system. In some instances the delay in registering a mortgage has been long enough that by the time the mortgage was presented for registration, the registered owner/mortgagor had already transferred his or her interest in the property, with the result that the mortgage was refused registration because the mortgagor was no longer the registered owner. In some instances, these defective mortgages have not been corrected and re-submitted.

A similar problem is created when a mortgage is not registered at all, and the mortgagor sells the mortgaged property. Considerable difficulties then result when the mortgagor tries to establish the details of the mortgage debt so that the unregistered mortgage can be repaid from sale proceeds. More than one practitioner identified this problem to the Task Force when expressing concerns about the effect of delayed registration on the reliability of the register.

The difficulty in correcting defects a long time after documents were first executed may result in inappropriate changes being made. The Land Title and Survey Authority provided examples of this. In one example, variations of which happened a number of times, a transfer of mortgage was changed to a release of mortgage, without the change being acknowledged by the original maker of the document. In another particularly troubling example it appears that an employee

of a title insurance company or its service provider altered a previously signed copy of a mortgage by substituting a new first page changing the mortgagee. Details of the circumstances of that matter are described in Appendix 4. The Task Force concludes that the Law Society ought to investigate the matter and take appropriate steps if it is determined that a lawyer had any involvement in the matter.

A number of lawyers practicing in the real estate field made submissions to the Task Force in which they asserted that the practices of title insurance companies and their services providers in preparing and filing documents in the Land Title Office contributes to erosion in the reliability of the Land Title system. They also indicated that delays in registration of documents can cause significant difficulties for the parties involved in subsequent transactions.

In their submissions to the Task Force title insurance companies generally asserted that they have a shared interest in preserving of the integrity of the land title system because their exposure as insurers will expand if the system loses reliability for some or all of the reasons considered by the Task Force. Accordingly, they said they demanded high standards from their service providers and were assiduous in repairing title defects. However, one of the known defects in title that has historically been "insured over" is an existing mortgage on title that was to be discharged by an earlier title insured transaction. The new mortgage is often registered and funded even though the previous mortgage continues as a charge in priority on title.

The Task Force observed that the *Land Title Act* requires parties to real estate transactions to provide registrable instruments (transfers, mortgages, discharges, etc.) and entitles every person benefited by such an instrument to apply to have it registered, but it does not obligate anyone to register the instrument. However, an instrument that purports to deal with or affect an interest in land is not effective, except as against the person making it, unless it is registered; consequently, the person receiving the benefit of the instrument is

highly motivated by personal interest to ensure that the instrument is properly registered in a timely way. Failure to register the instrument places the person's interest at risk. British Columbia' land title system relies on voluntary registration motivated by the personal interest of parties to a transaction.

This presents a potential weakness in the system when title insurance is introduced. Title insurance brings a commercial third-party risk-taker to the transaction. Some of the risk associated with not registering an instrument is passed to the title insurer, reducing the personal motivation of the parties to register the instrument. Unlike individuals, commercial insurers analyze the risk statistically, raising the prospect that some delay or even complete failure to register instruments becomes commercially acceptable as a cost of doing business. That is very different from the perspective of an individual party to a single purchase or mortgage transaction who cannot spread the risk over a large number of transactions. Thus, the existence of title insurance in British Columbia may increase the likelihood of systemic delay or failure in registration with concomitant erosion of the integrity of the land title system.

The instances of delayed registration and delayed correction of documents that the Task Force examined call into question the Title Insurers' stated level of commitment to the integrity of the land title system. The Task Force's opinion is that lengthy delays in registration, an accumulation of uncorrected defects and unauthorized alteration of documents can threaten the integrity of the land title system in British Columbia. The Task Force concludes that the problem is of sufficient concern that the Law Society and the LTSA, each acting within its sphere of authority, should take steps to ensure that this danger to the integrity of the system is addressed.

The third proposition in the preamble to Resolution #3 is that the Law Society has determined that drawing mortgages for registration by two specific title insurers, First Canadian Title and FNF Canada, constitutes the unauthorized practice of law.

It must be noted that the title insurance companies take issue with that determination, on the grounds that in most cases of residential mortgages drawing the mortgage amounts to no more than filling in blanks on a standard form. Despite their objection, the title insurers in question assert that they changed their practices so that mortgages are drawn under a lawyer's supervision. In FCT's case, the Task Force was informed that FCT contracts with a company called Lender Services Ltd. to perfect title insured mortgages, and Lender Services Ltd. retains Lender Law Corporation to provide legal services. In FNF's case, the Task Force was informed that FNF utilizes the services of a law firm, Anderson Sinclair.

FCT and FNF were not willing to disclose details of their business relationships with Lender Services Ltd. and Lender Services Law Corporation in FCT's case, and Anderson, Sinclair in FNF's case, nor were they willing to disclose information about the internal processes of those services providers. The task force was informed that Lender Law Corporation has a single, part-time lawyer who is also the principal of Lender Services Ltd. Those corporations appear to share office space and some telecommunications service with FCT's "BC Processing Centre", although the task force was informed that there is no financial connection between them. FNF Canada describes itself as originating in Anderson, Sinclair and evolving from a law firm model through a document-processing model, and ultimately into its current form. The main offices of FNF Canada and Anderson Sinclair appear to share business premises in Mississauga Ontario.

Precise figures are not known for how many mortgages those service providers prepare and/or register. The Task Force was informed that the combination of Lender Services Ltd. and Lender Law Corporation prepare and register between 3,000 and 5,000 FCT insured mortgages per month. No information was provided with respect to the number of mortgages processed by Anderson, Sinclair on behalf of FNF.

Resolution #3 directs the Law Society to take all reasonable measures to end these practices and asks for specific action with respect to the allegations of unauthorized practice. More particularly the Law Society is to take steps to prevent lawyers from facilitating the unauthorized practice of law by witnessing mortgages prepared by title insurers or their affiliated service providers. In addition, the Law Society is to take all necessary steps to have the alleged unauthorized practice of law terminated through the *Legal Profession Act* and by lobbying government.

The Task Force has determined that the allegations of unauthorized practice of law are a matter entirely within the Law Society's jurisdiction and responsibility. It is not for the Task Force to draw any conclusions in respect of this matter for there are consequences that follow from such a determination and as has been pointed out, there is a process, involving the courts if necessary, for dealing with such matters. The Task Force concludes, however, that the volume of mortgages being prepared and registered by or on behalf of FCT and possibly FNF and the apparent affiliation between those title insurance companies and their legal service providers raises sufficient concerns to warrant thorough investigation and analysis by the responsible people or committees within the Law Society.

In the course of our work the Task Force has considered the legislative framework within which the unauthorized practice of law issues are to be considered. For the benefit of readers of this report we reproduce in Appendix 3 our analysis of a framework within which these issues can be considered.

We note finally on this issue that the Law Society has no authority to regulate the legal work that a particular lawyer undertakes provided that the work is lawfully undertaken and performed by the lawyer in accordance with the *Legal Profession Act*, the Rules of the Law Society and the Professional Conduct Handbook.

VI THE WESTERN LAW SOCIETIES CONVEYANCING PROTOCOL OPINION:

In a joint initiative undertaken by the Law Societies of the four western Provinces, a closing protocol has been developed to provide to mortgage lenders a method by which real estate transactions involving the advance of mortgage funds can be expedited provided that the lawyers undertake certain due diligence steps to ensure that all reasonable risks involved in the transaction have been identified and dealt with. The beneficiaries of the protocol are both the borrowers and the members of the legal profession adopting it. The opportunity to use the protocol is provided at no cost to either the lender or the borrower, and the liability insurers of the participating Law Societies underwrite the risks that are undertaken with the protocol closing. The protocol closing provides lenders in British Columbia with protection, through the lawyer, from losses that are incurred by them as a result of funding a mortgage without requiring a borrower to provide a surveyor's certificate showing the location of the house and any easements affecting the property.

In the other three western Provinces, the protocol also offers protection against title defects that result from registrations that occur during the "gap" that exists between the time of the application to register the document and the time of final registration. In British Columbia this gap is of less significance since applications, when finalized, are retroactive to the date and time of application. It is also the case in British Columbia, due to the efficiencies in the system supported by the Land Title and Survey Authority, that the time period between application and final registration is usually less than six business days.

The protocol has so far enjoyed only a limited acceptance by the lending community, although the list of participating financial institutions continues to expand. It is only recently that the Royal Bank and Toronto Dominion Bank have joined the Bank of Montreal as leading Canadian financial institutions that support the Protocol and permits their transactions to be concluded using the

Protocol Closing procedure. The reluctance of the financial community to adopt the Protocol, which has been available since 2000, is in part the result of an active campaign against the Protocol undertaken by the title insurance industry.

From the inception of the Protocol, the title insurance industry has regarded it as an inappropriate intrusion into the exclusive entitlement of title insurers to backstop mortgage transactions. The title insurance industry has undertaken a variety of initiatives to prevent the wide spread adoption of the protocol by the leading Canadian financial institutions. Title Insurers have argued that the Law Society insurers are not authorized to provide the protection offered by the Protocol, as to do so would be to provide an insurance product to the general public, an outcome prohibited to Law Society captive insurers. The Law Societies counter that argument with the observation that they are only insuring their members against any negative consequences that follow from the various circumstances for which the Protocol provides protection. A variety of legal opinions have been obtained which describe both arguments in considerable detail but the respective Superintendents of Insurance (or their equivalent) in each of the participating Provinces have indicated that the Protocol protections offered by the Law Societies through its members do not infringe any provisions of the respective Provinces' *Insurance Acts*.

Task Force's view is that the Western Law Societies Protocol should continue to be supported by the Law Society as an alternative that is available to the public in circumstances where appropriate.

VII SUMMARY AND CONCLUSIONS:

The Task Force is satisfied that it has sufficient information to draw the following conclusions and that the following concerns have been verified to an extent sufficient to justify further attention by the Law Society."

1. We recommend that the Law Society specifically investigate through the Law Society's established processes issues of

unauthorized practice or professional misconduct that may arise out of “document preparation”.

2. The extent to which title insurance companies or their service providers make the services of a lawyer available for a fee, contrary to the *Legal Profession Act* should be investigated and, where necessary, acted on by the Law Society.

3. Significant negative consequences to the integrity of the land title system can follow from the manner in which title insurance companies provide document preparation services to the financial institutions. The Law Society should examine, in concert with the LTSA, if there is any additional regulation that can be undertaken by the Law Society to protect against any inappropriate filing practices of title insurance companies and/or their service providers.

4. The Law Society, acting in the public interest, should undertake an education program aimed at educating the public about the value added by a lawyer’s participation in the mortgaging process and at broadening both lawyer and public awareness of the Western Law Societies Closing Protocol

5. To the extent it has not already done so the Law Society should encourage the government to investigate the circumstances of the appointment of unqualified persons as commissioners for the purpose of witnessing mortgage documents to determine how they were made, to identify any improprieties in the process and steps taken to prevent a recurrence

6. It is clear that that it is not within the mandate of the Law Society to make it a rule of practice to require members of the public to obtain comprehensive legal advice before signing mortgages. However, the Task Force recommends that the Law Society include in the Professional Conduct Handbook a requirement that a lawyer witnessing the signature of an unrepresented mortgagor sign and provide the mortgagor a certificate stating that the lawyer has advised the mortgagor that he or she may obtain independent legal advice.

APPENDIX 1 – THE RESOLUTIONS

Resolution 2:

WHEREAS it is increasingly the practice of financial institutions to have borrowers sign mortgage documents without the borrowers having the benefit of legal advice from lawyers or notaries public and this practice is contrary to the best interests of the public and, as well, may result in mortgages being found to be unenforceable in courts of law.

RESOLVED:

1. That the Law Society create a Rule of Practice stating that no lawyer shall be a witness to any mortgage unless that lawyer provides comprehensive legal advice to the borrower or unless that lawyer has confirmation, in writing, from another lawyer or notary public that the borrower has had the benefit of comprehensive legal advice with respect to the mortgage in question before it is signed.

2. That the Law Society lobby all financial institutions, their associations, regulating bodies and the Government of British Columbia to impress upon them the detrimental impact this practice is having on the public and as well the potential for mortgages to be found to be unenforceable.

Resolution 3:

WHEREAS in British Columbia title insurance companies and specifically FCT Insurance Company Ltd. (dba First Canadian Title) and FNF Canada Company a division of Fidelity National Financial Inc., in conjunction with financial institutions have developed practices for drawing, executing and registering residential mortgages without involving a lawyer or notary public acting on behalf of the borrower, resulting in many people, often unsophisticated borrowers, placing

mortgages on their properties without fully understanding the legal implications of what they are doing, which is detrimental to the interests of borrowers and the public;

AND WHEREAS title insurance companies have ignored processes established in British Columbia regarding the timely registration of Form B Mortgages and Form C Release documents at British Columbia Land Title Offices, including their practice of registering mortgages many weeks after financial institutions have provided mortgage funds to borrowers, and including their practice of not obtaining and registering discharges in a timely manner thereby creating uncertainty of the state of legal titles and additional expense to the public when further legal work is made necessary as a result, and these developments have had, and will continue to have significant negative consequences to the public and to the integrity of the Land Title Office Torrens System.

AND WHEREAS the Law Society has determined that drawing mortgages for registration by FCT Insurance Company Ltd. dba First Canadian Title and FNF Canada Company a division of Fidelity National Financial Inc. constitutes the unauthorized practice of law pursuant to the *Legal Profession Act*.

RESOLVED:

1. That the Law Society shall take all reasonable measures to end these practices by title insurance companies, including, but not limited to:

    a. Taking all necessary steps to prevent lawyers from facilitating such unauthorized practice of law and/or practices detrimental to the best interests of the public, when lawyers witness mortgage documents that are prepared by and/or will be registered by FCT Insurance Company Ltd. dba First Canadian Title and/or FNF Canada Company a division of Fidelity National Financial Inc. at the Land Title Office and,

    b. Taking all necessary steps to have such unauthorized practice of law and/or practices detrimental to the best interests of the public

terminated, including, but not limited to, action pursuant to the *Legal Profession Act* and lobbying the Government of British Columbia for legislation to prevent such practices.

APPENDIX 2 -SUBMISSIONS:

Section 1: **Representative sampling of submissions from lawyers involved in the "sign-up" program.**

#1 *"I, like a number of lawyers in BC, make a substantial portion of my income performing execution services in title insured transactions. I take my duties as a signing officer under the Land Title Act, and as a lawyer seriously and believe that I am providing a valuable and appreciated service to financial institutions and their customers. I do not wish to burden you with anecdotal evidence other than to say that my experience is that both the financial institutions and their customers who have taken advantage of title insured closings have found the experience more convenient, less expensive, and on many occasions more informative and easier to understand than the more traditional law office sign-up. Clients are always impressed that there are lawyers who make "house calls".*

My concern with the resolutions that have been passed is that the aim seems to be more about stopping title insurance companies than it is about governing our practice as lawyers. While I do not doubt that many lawyers, law firms and notaries have felt a negative impact from the growing title insurance industry, many others such as myself have found new, fulfilling careers from the same industry.

In conclusion, I would like to reiterate that while there are a number of lawyers that feel threatened by a change in the way many mortgage transactions are now closed by way of the title insurance process in BC, there are many others who welcome the chance to practice law in a non-conventional way. If there are ways to improve this service, and protect the interests of the public and our members we should work together to do so. The aim should not be to kill title insurance in BC. There are a number of benefits to title insurance that other parties are in a much better position than me to explain."

#2 " When I began to take referrals from First Canadian Title (Lender Services Ltd.), I reviewed the execution requirements under the Land Title Act and obligations of a signing officer; the Professional Code of Conduct; and relevant jurisprudence. I have found First Canadian Title (Lender Services Ltd.) to be an efficient and professional organization and their expectation from the outset was that I fully carry out my obligations both as a lawyer and signing officer, when acting on their behalf.

#3 *"I was initially reluctant to participate in the program because I feared it would deprive me of mortgage work that I had been doing for CIBC for many years. I later decided to participate thinking that the program might create efficiencies of benefit to the consumer through reduced legal costs. The proponents of the resolutions have expressed concern that the program is harmful to members of the public who are generally not represented but this has not been my experience.*

…It has been my practice to review the documents with the borrower to make sure that the essential terms (i.e. amount, interest rate, term and prepayment privileges) are brought to their attention. I estimate that I have participated in at least 1,500 title insured mortgage transactions and I am not aware of a single occasion where problems arose because the borrower failed to appreciate the nature or effect of the documents.

The documentation includes a provision advising the borrowers that they are unrepresented and there have been occasions when borrowers elected to take the documents to their own lawyer for execution. I do not recall any occasion where the documents were changed or the borrowers refused to proceed as a result of obtaining independent advice.

Finally, it is unclear to me why the proponents of the resolutions have singled out mortgage transactions when a host of other equally important documents such as bank guarantees, contracts of purchase and sale, personal property security agreements and insurance contracts are signed every day without benefit of legal advice. While legal advice might be of assistance in all of these situations, I do not think it seemly for us lawyers to compel all members of society to utilize and pay for our services when they have chosen to do otherwise."

APPENDIX 2 -SUBMISSIONS:

Section 2: **Representative sampling of submissions of lawyers who had participated in the sign-up of mortgages for First Canadian in the past, but were no longer doing so.**

1. *I had in the past notarized documents prepared by FCT and FNF and have seen borrowers either in one of our offices or in branch at the banks. I eventually discontinued doing these notarizations and no longer do them. However, for the time period that I did do them, I had various concerns regarding the understanding that borrowers actually had in what they were signing. They apparently were to have already met with the bank and gone over and understood the documents they were signing. However, I would often find that the borrowers really appeared to not know much of anything regarding what they were signing. I also was required to express that I was not acting for them and not giving them any legal advice. This then became irritating to them, as they would sometimes comment, "Then why am I seeing a lawyer?" As I believe these are significant legal documents that people just seem to blindly sign, I became uncomfortable with doing these notarizations and as mentioned, no longer do them.*

2. *There were instances that clients sought legal advise from me and I found myself in a very uncomfortable position in which I could offer them no advice even though I felt that they had legitimate questions which should properly be answered.*

   I witnessed approximately a dozen mortgages for First Canadian Title and their subsidiary, Lender Services Ltd. For each client's signature that I witnessed, I was paid $40.00 which included time spent to travel to the financial institution in question and witness the clients' signature. I found the practice of First Canadian Title and Lender Services Ltd. to be absolutely abysmal and totally lacking in terms of meeting the needs of the clients. The clients however, were apparently were advised that there were no fees and disbursements to be charged to them for preparing and registering the mortgages and as you will appreciate, most of the clients were swayed by the idea that the legal fees and disbursements were being absorbed by First Canadian Title or the bank rather than being charged to the clients and that the service to the clients was being provided for free.

> *I subsequently advised First Canadian Title that I was not prepared to attend upon a mortgagor with respect to mortgages prepared by them given the economics of the matter and given the concerns that I had with respect to their practices.*

A second reason lawyers gave for why they were no longer working for title insurers in this capacity was the significant difficulties they encountered with closing transactions where the title was impaired as a result of the failure by title insurers to register either mortgages or discharges of mortgage. It appears that homeowners quite often do not fully appreciate the nature and extent of the documents they have signed so that when a mortgage they have signed does not appear on title, they are often hard pressed to describe where and how they understand the mortgage was to be registered against the property. The lawyers in these circumstances are frustrated in trying to conclude real estate transactions where vital information is not available due to defaults by the title insurers in ensuring that documents are properly filed in a prompt and timely way.

One lawyer provided an extensive summary of the nature of the problems that are caused and the normal procedure that is encountered when dealing with those problems.

> *In 2005, we acted on a few files where we were acting for vendors, sometimes obtaining conveyance instruction reports and contracts at the last minute. We always contact clients to determine from them what existing mortgage they have on title and then we request for payout statements from the lenders according to the information provided. We obviously assume that clients will know to whom they are paying their mortgage payments. On at least three or four occasions, once we received vendor's documents or upon pulling a title search, we would find that there was another mortgage on title and the mortgage the clients were talking about was the second mortgage. We would assume that maybe the clients had a line of credit that they did not realize was registered or something like that. We would then request for a payout on any charges on title. Sometimes we would have difficulty getting information from clients (as it is surprising how many do not really know what is happening with their homes when they sell or buy) until such time as I would meet with them, or days before their appointment with me, and when we would tell them that they had two mortgages on title, they would*

say, no, that they paid out the first one a long time ago. Upon further inquiry to the clients, (ie, I would ask if they had a lawyer or notary acting for them or if they just signed at the bank), if they indicated that they only signed documents at the bank, then this would twig me to realize that I was dealing with a title insurance issue.

Once this was deciphered, then we would go back to their current lender and advise them that the mortgage they apparently paid out was still on title. Then we would be advised that they had done the work through the title insurance companies. We then had to advise them that we needed a discharge for that mortgage prior to the completion date of the sale transaction, as I would not be able to provide an undertaking to the purchaser's solicitor to clear a charge that was already allegedly cleared. Often we were met with non cooperation or indifference to the issues at hand. We would advise further that if the mortgage was unable to be discharged prior to completion, then the Vendors could potentially be a position of breach of contract should we be unable to complete the transaction on time.

Our clients in the meantime were oblivious to what was going on. All they knew was that they changed lenders and the old mortgage was paid out and that the bank told them they would take care of everything. They did not understand how this affected their title. As I explained it to them, they began to understand the issues and why we had to go through this process because I could not provide the necessary undertaking to the purchaser's solicitor. And the title companies were not concerned with clearing title, as they would have insurance coverage if any issues arose.

Needless to say, this put substantial unnecessary snags on the completion process for these sale files. And when it is a busy summer season, it is not a headache one wishes to have. On some occasions we would have to go back to the realtor to get extensions of completion. On some occasions things came through, but at the very last minute and with a huge amount of stress on clients and us.

On some occasions we would actually have to deal with the title company about getting the old discharge. There were a few occasions where because the old lenders were private individuals, and either the title company had never obtained a discharge of mortgage or one was never registered, they would have to try to track down the individual for signature prior to completion. Sometimes they could not get one signed prior to completion and the title company would then try to force on us their "undertaking" to provide the discharge after completion. We advised them that that was totally unacceptable as title companies cannot give undertakings. On a few occasions, the title companies tried to force an alleged agreement on us that agreed for them to provide the discharge after completion. The document was faxed to us, written as an agreement,

with a style of cause showing ourselves and the title company as part of the agreement and then only being signed off by a representative of the title company. We responded to that with complete disgust that they would be trying to force an agreement on us and we called them on it. We believe that they prepared these documents this way hoping that there would be those solicitors who may miss the issue and just accept the agreement.

Needless to say, this happened all too often over the spring and summer months of 2005. It was a hassle to either have to rush to get discharges in; or have realtors get extensions; or have clients having to yell at their lenders; or having our staff having to deal with lenders and title companies in this fashion. And inevitably if we were dealing with either entity, the individuals we were dealing with never understood the full magnitude of what were talking about. And all this completely unnecessary, I believe, if the title company had not been involved in the earlier refinance for the clients.

These same lawyers speak with apprehension that an inevitable consequence of the approach taken by the title insurance companies to the filings in the land title system will be the denigration of the quality of the land title system upon which they rely to conduct the work that is done by them for their real estate clients.

All this being said, I believe this leads to an even bigger issue-our ability as British Columbia lawyers to be able to rely on title to property as we see it on BC Online. I believe our whole Torrens System is in jeopardy. You can imagine that if we found these issues on a half dozen files in our office in Surrey, British Columbia, then how much more is out there where people cannot rely on the status of their title being what it is supposed to be on the day they check it. It is one thing for title companies to protect lenders so that even if they did not discharge an old mortgage, the bank would still be covered for any loss, but what about priority issues with other things on title such as liens, judgments and so on? We as a profession and as the public must be able to have some certainty with respect the status of title to property. It is outrageous that the system succumbs to title companies' sloppiness in not following through to complete a file and get the mortgage discharged, or even get the new mortgage registered. If our duty as a profession and as the Law Society is to protect the public, then it makes sense that we must put title companies in their place and not let them interfere with our practice of law.

APPENDIX 2 -SUBMISSIONS:

Section 3: Submission from the law firm of Kaplan & Waddell.

The submission extended to some 400 pages of material detailing a variety of title insurance related topics. The submission was primarily prepared by Mr. Frank Kaplan of that firm and the submission provided a useful overview of the development of the title insurance industry in British Columbia beginning with the First Canadian refinance mortgage program introduced in 1996. The submission noted that in 1996, the Law Society established a committee to examine the impact of title insurance on real estate practice in British Columbia and its implications for the public. An early review of the program by the Law Society's Ethics Committee resulted in the requirement that lawyers who participated in the mortgage "sign-up" program identify themselves as a lawyer, verify the identity of the borrower in accordance with Section 43 of the *Land Title Act*, and advise the borrower that the lawyer was not protecting the borrower's interests.

The next step in the First Canadian initiative was to introduce the Home Closing Services program. In that program a lawyer was retained to act on behalf of the borrower, the lender, and the title insurance company. The Law Society's Ethics Committee considered that program and ruled that it would be improper for a lawyer to represent all three of the named parties in a single transaction.

The Kaplan & Waddell brief described First Canadian's attempt to streamline the sign-up process of mortgages by using a remote commissioner witnessing the signing through a video link. Once again, the Ethics Committee reviewed this process and determined that a lawyer's participation in that process

could not satisfy the requirements of Section 43 of the *Land Title Act* which requires that the person signing the mortgage "appear before" the officer. The Ethics Committee ruled that the section required a physical appearance before the officer in order for him or her to verify the execution of the document. First Canadian commenced legal proceedings against the Law Society seeking a declaration that the requirements of Section 42 and 43 of the *Land Title Act* could be met through a video link. Following a hearing in the Supreme Court of British Columbia, the determination of the Ethics Committee prevailed and the action of First Canadian was dismissed.

The next initiative undertaken by First Canadian in an attempt to expedite the signing of mortgages in its program was to petition the Attorney General of the Province to change the *Evidence Act* to permit bank employees to sign mortgage documents as "officers". The Law Society resisted that petition and ultimately the Attorney General determined that borrowers' interests would be better protected by having lawyers or notaries public witness the execution of mortgages.

The Kaplan & Waddell brief describes the next initiative by First Canadian which was to have a series of commissioners appointed to act as "contractors" on behalf of First Canadian to sign up mortgages. The circumstances of these appointments were the subject of a lengthy exchange of correspondence between the government and Mr. Kaplan's firm. Ultimately, the Law Society and the Registrar of Land Titles became engaged in the exchange.

Mr. Kaplan speaks to the difficulties that are created when mortgages that have been repaid are not discharged from title. He describes a number of situations, which are echoed in submissions from other lawyers, where difficulties are encountered in closing real property transactions due to the existence of mortgages on title that have previously been repaid but which continue to be registered against the title.

Mr. Kaplan describes his support of and participation in the creation of the Western Law Societies Conveyancing Protocol. He properly notes his own considerable responsibility for introducing the Protocol into the Province of British Columbia and regrets the lack of penetration that the Protocol has achieved. He petitions the Law Society to promote the Protocol to a more prominent position and to have the Law Society lobby financial institutions to accept Protocol Closings in the public interest.

The Kaplan & Waddell brief finally provides a series of recommendations to the Task Force which were taken into consideration in formulating this report.

APPENDIX 2 -SUBMISSIONS:

Section 4: Submission from Messrs. Morin and Shrimpton

The lawyers who moved and seconded the Resolutions that resulted in striking this Task Force made a written submission. Messrs. Morin & Shrimpton described the primary focus of their submission as being First Canadian and noted that it was their view (as expressed in the preamble to the Resolutions) that during the ten years since 1996 when title insurers first appeared in British Columbia, the title insurers have become increasingly engaged in the unauthorized practice of law with essentially no resistance from the Law Society.

The Morin & Shrimpton view of the unauthorized practice of law by First Canadian stems from a note that appeared in the Law Society's 2004 Annual Report where a determination by the Law Society's Unauthorized Practice Committee was reported. The report noted that the "purchase mortgage solution" introduced to British Columbia by First Canadian was seen by the Unauthorized Practice Committee to be the unauthorized practice of law. The cited report also noted that First Canadian had "subsequently decided that it would cease preparing mortgages and restructure its mortgage program." Messrs. Morin & Shrimpton allege that although the report advised that the Unauthorized Practice Committee would continue to monitor the situation the Committee had failed to do so.

Messrs. Morin & Shrimpton argue that both First Canadian and FNF provide legal services in British Columbia and that they do so through "sham" legal firms. They first note that until the Resolutions passed in September 2005, FNF was preparing mortgages from its head office in Ontario securing loans for British Columbia customers of British Columbia branches of CIBC. The passage

of the Resolutions, according to Messrs. Morin & Shrimpton, resulted in the establishment in BC of a branch office of the Law Firm of Anderson Sinclair, a firm previously identified as having a working relationship with FNF. The submission noted that until the passage of the Resolutions, the applicant for registration on the CIBC mortgages prepared in this manner was FNF.

On this same subject Messrs. Morin & Shrimpton note that the work of First Canadian in British Columbia is ostensibly done through the auspices of a law firm known as Lender Services Law Corporation. They suggest that this law firm is not a "real" law firm but instead is an arm of First Canadian where large numbers of legal assistants prepare large numbers of mortgage documents nominally under the supervision of Gordon Alteman, the only lawyer associated with Lender Services Law Corp. They argue that the volumes of mortgage work attributed to First Canadian (+/- 3000 per month) cannot be undertaken by a single lawyer.

Messrs. Morin & Shrimpton note that when one phones the number listed for Lender Services Law Corp on the land title application to register the mortgage, the telephone is answered by First Canadian. In this same vein they note that problems with follow up on mortgages that are in the process of being registered are always referred by the financial institutions to the offices of First Canadian not to Lenders Services Law Corp for attention.

Messrs. Morin & Shrimpton suggest that First Canadian and FNF have embarked on an aggressive program of visiting with senior officers of institutional lenders to convince them that there is a significant exposure to risk from fraud in their mortgage lending activities and that the lenders can avoid the risk of loss by requiring their customers to pay for title insurance. As an additional advantage the lenders can enjoy processing efficiencies by using the title insured mortgage preparation services.

Exaggeration of the fraud problem by title insurers noted by Messrs. Morin & Shrimpton is a common business practice of the industry that the Task Force

has observed in the course of its review of the literature and other submissions. The information provided to the Task Force by the Land Title and Survey Authority suggests that there have been virtually no reports of identity fraud in the BC land title system and that the extent to which mortgage fraud itself has been reported in the popular press is highly overstated.

In their submission Messrs. Morin & Shrimpton repeatedly make the point that the Law Society has been ineffective in responding to the various allegations that have been advanced against the title insurance industry. They suggest that the Law Society has been essentially neutral in its response to suggestions that the title insurers are "invading" British Columbia and are taking over a significant component of the work that has historically been done by lawyers. Messrs. Morin & Shrimpton characterize the response of the Law Society on this issue as acting like Roman Emperor Nero who fiddled while Rome burned. They question whether the Law Society and this Task Force has the will or the ability to respond effectively to the issues arising in respect of the title insurance companies.

They are also clear that the Task Force should not even consider the title insurers' claim that they are acting in the public interest by providing lower cost mortgage services. They say that the answer to that issue requires a public policy consideration and that that is within the purview of the Legislature of the Province and not the Law Society of British Columbia. We think that view is unnecessarily restrictive of the Law Society's role in the development of relevant policy positions.

Messrs. Morin & Shrimpton suggest that FCT and FNF have created a "parallel" land title system that operates to the detriment of the Torrens system operated by the Land Title and Survey Authority. According to Messrs. Morin & Shrimpton, the parallel system is intended to operate with title insurance rather than Torrens providing the assurance of title that lenders seek. They assert that the public Land Title system is rendered less reliable by the often considerable lapses of time between funding and registration of mortgages and users of the system are

driven to the title insurers for the protections they need as those protections are no longer available through the system operated in the public sector. They provide several examples of transactions where there are delays of many months between the signing of the mortgage and its registration. *The Task Force received information from the Land Title and Survey Authority that verified the reality of this delay in registration phenomenon.*

Messrs. Morin & Shrimpton describe the considerable difficulty and frustration that accompanies the failure of either Lender Services Law Corp or First Canadian to register discharges of mortgages. They note that the problems thus created are all the more difficult to redress because they are not dealing with a fellow professional lawyer or notary, but instead they are dealing with a corporation (First Canadian) that is not subject to the same Law Society regulation and that is not obliged to be responsive to members of the legal profession.

The Morin & Shrimpton brief describes a series of characteristics that lead them to the conclusion that the involvement of the title insurers in the document preparation business is specifically not in the public interest for although there may be the appearance of cost savings at the outset, the various troubling characteristics of the manner in which the work is done (or not done) leads to potentially difficult and expensive consequences down the road. They also note with regret the involvement of the title insurers in "tied selling" programs offered by the Banks where borrower is required to buy a title insurance policy in order to qualify for a particular mortgage price program or fee saving program. They see this as reducing choices for the public in their mortgage options.

Messrs. Morin & Shrimpton reiterate that borrowers often do not understand what is happening to their title when a title insured mortgage is registered. The borrowers often do not appreciate that they have signed a mortgage and that there is indeed a mortgage registered against their property, despite their belief that all they have is a "line of credit" and no mortgage.

Messrs. Morin & Shrimpton conclude their submission with recommendations for specific action to be taken by the Law Society and the Task Force has considered these recommendations when formulating our conclusions.

APPENDIX 2 -SUBMISSIONS:

Section 5: Submission from The Canadian Institute of Mortgage Brokers and Lenders.

The British Columbia arm of this organization wrote to oppose the implementation of a requirement for independent legal advice in the witnessing of mortgage documents. The organization noted that

> "B.C. home buyers already have the most extensive consumer rules applying to mortgages in Canada. The proposal for mandatory independent legal advice will not add any significant new protection, while costing mortgage holders more time and money."

APPENDIX 2 -SUBMISSIONS:

Section 6: Submission from The Canadian Bankers Association (CBA):

The CBA provided a response to the resolutions. The response to the general thrust of the resolutions suggests that the focus should be on borrowers, and particularly where those borrowers want value for money. The CBA note that there is no evidence of harm occurring to the general public as a result of the document preparation services provided by the title insurance companies. It notes that the title insurers' current document preparation practices provide benefits to borrowers and that implementing the resolutions would adversely impact the British Columbia marketplace and borrowers. They offer five reasons why the resolutions should not be adopted.

1. Increased administration and costs on lenders, which would have to be passed on to borrowers;
2. Delay in funding turn around time;
3. Restriction on consumer choice;
4. Limitation on competition; and
5. No apparent risks to the public and to the integrity of the Land Title Office.

The CBA believes that consumers should have a choice as to whether they have the benefit of independent legal advice or not. CBA concluded its submission as follows:-

> "We submit that acting upon these resolutions would increase costs and delays with a resulting negative impact on the borrower. We do not believe that there are offsetting consumer protection concerns that would

justify such increased costs and delays. Also, the resolutions would limit choice, both for lenders and borrowers."

APPENDIX 2 -SUBMISSIONS:

Section 7: Submission from Law Pro, the Lawyers Professional Indemnity Company, with head offices in Ontario.

Law Pro operates a title insurance program through the aegis of the Law Society of Upper Canada under the brand name Title Plus. This product is available in British Columbia and requires the involvement of a member of the Law Society of British Columbia to sell the title policy. Law Pro, not surprisingly, takes the position that lawyers should be at the centre of a real estate transaction and that title insurance is a tool that enables lawyers to better serve and protect the public. Law Pro wanted the Task Force to be clear that they were an exception in the title insurance business in that they did not participate in document preparation services. *The Task Force notes that there are other title insurers that do not provide document preparation services.*

APPENDIX 2 -SUBMISSIONS:

Section 8: Submission from The Consumers Council of Canada

In addition to its written submission, the Consumers Council of Canada provided a brief it had commissioned entitled *Real Estate Title Fraud and the Benefits of Insurance for Consumers*. This report was prepared by Frank Williams in May of 2005. Mr. Williams' credentials for preparing the report were not described. The primary thrust of the Consumers Council submission was that it had a responsibility to bring a consumer perspective to the debate in British Columbia. The Council noted that the disclosure requirements of the *Federal Bank Act* together with protective measures in Part 5 of the *B.C. Business Practices and Consumer Protection Act* (which became effective July, 2006) should adequately ensure that consumers are fully informed of the legal implications of what they are doing.

With respect to the allegation that mortgages and discharges of them are registered late or not at all, the Consumers Council suggests a regulation requiring time limits and penalties for violations. It concludes by noting that removing the title insurance choice for consumers is not in the best interests of those consumers.

The Frank Williams report on real estate title fraud begins by noting that incidents of title fraud are dramatically on the rise and cites "title insurance sources" in support of that allegation. It notes that mortgage fraud involves using false identities and/or artificially inflating property values. One form of false identity fraud involves appropriating identity particulars of real people in order to fraudulently sell or mortgage property. Another form involves posing as a lawyer representing fictitious purchaser-borrowers. The other fraudulent device is the

artificial inflation of property values through a flip or misrepresentation of purchase price.

Within the Land Title system, Mr. Williams identifies two types of fraud: a fraud on the Registry and a fraud by breach of undertaking. In the latter regard, Mr. Williams cites the Martin Wirick defalcations.

He notes that "Toronto and Vancouver are the two main hot beds for real estate fraud, for now." Identity fraud in Quebec is not a big concern "as Quebec Notaries have been more diligent in checking i.d. than lawyers in the rest of Canada." He goes on to report that "lawyers in other jurisdictions across Canada confirm that real estate fraud isn't a major problem at the moment, although there are signs that this may change".

Mr. Williams then explores whether title insurance is supported by the legal community and notes that it is both supported by and participated in by the Law Society of Upper Canada. He contrasts that with the British Columbia situation where "local law societies are fighting back with a new protocol and marketing initiatives of their own".

Mr. Williams then provides a brief comparison of land title systems in Canada and discusses remedies available to consumers. These include the Land Titles Assurance Funds, Law Society Defalcation Funds, Lawyers Professional Liability Insurance and Title Insurance. Mr. Williams asserts that only title insurance appears to cover the bulk of the exposure and has a number of other advantages over the other remedies available.

Mr. Williams asserts that

> "Title insurance is likely to complement and strengthen the public system in either a Land Titles or a Registry jurisdiction. Because the Canadian industry has relatively low barriers to entry, we should expect a competitive title insurance market in Canada.

”Title insurers are therefore not likely to be able to exert undue influence on the public title system and it is not in the interest of title insurers to undermine the public system in any event.”

Mr. Williams concludes his report as follows:

“Despite the fact that Land Title Assurance Funds, Law Society Defalcation Funds and Lawyers Professional Liability Insurance do offer some limited protection to consumers and despite the gaps in title insurance, title insurance offers consumers good value for the money. Title insurance is recommended where consumers are purchasing real estate or lending money on a real estate transaction because it is the only insurance that offers protection against a large number of conveyancing risks, and particularly risk from fraud.”

APPENDIX 2 -SUBMISSIONS:

Section 9: Submission from Stewart Title Guaranty Company.

This title insurance company provided a report to the Task Force commenting on the resolutions. The primary thrust of the Stewart Title memorandum was to ensure that readers understand that Stewart Title is not one of the title insurers who are in the document preparation business. It notes that it sees the legal profession as being an integral component of the real estate conveyance and mortgage processes.

APPENDIX 2 -SUBMISSIONS:

Section 10: Submission from FNF Canada.

This title insurer presented a report to the Task Force under the heading "Response to the Task Force on Title Insurance Issues – Protecting the Public Interest by Preserving Consumer Choice."

FNF Canada is one of the title insurance companies that provide document preparation services to the financial community in British Columbia. FNF Canada is the Canadian division of Fidelity National Financial Inc., described as the world's largest title insurance company. FNF Canada offers title insurance policies issued and underwritten by Chicago Title Insurance Company of Canada, a subsidiary of Fidelity National Title Group with the globally largest claims reserves in the industry that backed every CTIC policy issued in Canada. FNF Canada claims a strong Canadian component with a significant number of legally trained representatives in its senior management. The FNF submission describes the benefits of title insurance as "protecting a homeowner's and lender's investment against a wide range of title related matters and imperfections that are beyond a lawyer's control".

Specifically, for the consumer, according to FNF, title insurance "eliminates the need for time consuming and expensive off title searches; eliminates the requirement for an up to date survey or real property report in most circumstances; ensures a fast, less costly closing compared with traditional alternatives; reduces risk of financial loss for all parties involved; simplifies the closing process; reduces the lawyer's time per file saving the client money without additional risk; and insures over the registration "gap" so that transactions

can close on time without confirmation of registration of the new ownership and mortgage."

The FNF submission then addresses nine "common title insurance myths and misperceptions".

Myth 1: "Title insurers have unjustifiably usurped the lawyer's role in the refinancing of mortgages and the marketplace wants this to stay within the domain of the legal profession."

In this regard, FNF suggests that the demand for title insurance is coming from the marketplace and suggests that the title insurance sector in Canada has evolved in response to the needs of lenders who are under increasing pressure from competitors and consumers alike for better, faster and cheaper solutions. It asserts that both lenders and consumers see enormous benefits in title insurance – benefits in terms of quality and scope of risk coverage, speed of service and cost-effectiveness that far exceed those that might be offered by lawyers. FNF acknowledges that"[l]awyers do indeed have a role to play in mortgage refinancing and their legal advice should always be an option available to those consumers or lenders that may want to pay for it, but it is protectionist folly for the legal profession to imagine it should have a larger role than it has already".

Myth 2: "Lawyers and independent legal advice are integral elements in consumers signing legal documents."

The response to this "myth" merely speaks to the fact that the statutory obligation composed by Part 5 of the *Land Title Act* is unique in Canada. The fact that the signatures are required to be certified does not carry with it a requirement for independent legal advice. There is no connection between the requirement for lawyer's certification on the one hand, and independent legal advice on the other.

Myth 3: "Title insurance has no place in a Torrens System."

Under this myth, FNF notes the expanded coverage available under a title insurance policy that protects lenders and consumers against additional risks, including zoning and bylaw violations, encroachments, fraudulent acts and forgeries, statutory liens, failure to obtain independent legal advice and arrears of property taxes. It goes on to suggest that excessive due diligence regarding the title of the property is largely eliminated.

Myth 4: "Title insurance attacks the integrity of British Columbia's Land Title system."

Under this heading, FNF says that they depend on the quality and integrity of the Land Title system in assuming risk for known defects in title. FNF asserts that in Canadian jurisdictions where title insurance has been in use for longer periods, such as Ontario, "there is no evidence suggesting title insurance has had any negative impact on the integrity of the public land management system." FNF submits "it is also important to state that title insurance does not encourage sloppy practices. Title insurers have been operating in every Province and Territory across Canada for more than a decade and, again, there is no statistical evidence that it is having a negative impact on the public Land Registry system, mortgage lending, or land conveyancing systems". "In fact, as defects on the titles register and survey system arise, title insurers are the ones who are most diligent in correcting the records.** When a title insurer receives a claim for a title defect on an insured property, if the defect is not minor, our approach is always to retain counsel to correct the problem."

Myth 5: "Title insurance is an unregulated and unsupervised field."

Under this myth, FNF notes that the title insurance sector is regulated by the officer of Superintendent of Financial Institutions on a federal level, and is subject to supervision by the Financial Institutions Commission of B.C. It is stated that FNF is required to file detailed documentation and maintain significant reserve to ensure that the trust of the public is upheld. It suggests that it is closely supervised and is subject to stringent legal and financial requirements that surpass even those of the legal profession.

Myth 6: "Title insurance has a negative impact on the detection of fraud and lawyers do a better job of preventing fraud and protecting consumers."

FNF suggests that it is the title insurance sector across Canada that is leading the charge against fraudulent acts in real estate transactions. It says there is no industry better positioned or motivated to detect fraud than title insurers and alleges that they have spent millions of dollars to develop systems and technologies to help prevent real estate fraud.

Myth 7: "Title insurers are attempting to foist a U.S. style product and Land Title system on Canadians."

Under this heading, FNF distinguishes itself from its American counterpart. It is noted that in Canada, title insurers rely on the Land Title system for their search information, while in America the title insurers are required to conduct an exhaustive search of title and off title documents. They know the strength and soundness of Canada's Land Title system is what helps title insurers keep losses as low as possible. As a result, Canadian's can expect that title insurers will do everything in their power to ensure the upkeep and maintenance of the land management system.

According to FNF the unfounded fear that title insurance will lead to deterioration in the Land Title systems in Canada likely arises from observations of the U.S. experience where “Title Plants” were created because of the ineffective Land Registry systems in many states.

Myth 8: "Title insurers do not want lawyers involved in real property transactions."

Under this heading, FNF contrasts a home purchase from a refinancing transaction. It notes that in a purchase situation, a lawyer is almost always involved and in a mortgage situation, the consumer has an option to go to a lawyer of their choice.

Myth 9: "Title insurance offers illusory value and lawyers offer a more valuable and comprehensive service."

Under this heading, FNF asserts that "[t]he simple fact is that title insurance is better, faster and cheaper".

** *At the oral presentation to the Task Force Counsel for FNF was questioned about the accuracy of this statement. In a subsequent communication to the Task Force counsel acknowledged that the claim "may be an overstatement".*

APPENDIX 2 -SUBMISSIONS:

Section 11: Submission from First Canadian Title.

The First Canadian submission begins by noting the recognition (in recent newspaper articles) of the value of title insurance for consumers who want to secure the priority of their title. A number of sample newspaper articles were provided.

First Canadian then observes that title insurance provided additional protections that are not provided by a lawyer's opinion on title. The submission notes

> "In particular, title insurance provides additional protections for both homeowners and lenders in the form of:
>
> 1. coverage for losses relating to improvements added without building permits;
> 2. work orders against a property;
> 3. non-compliance with agreements on title;
> 4. real estate fraud;
> 5. condominium special assessments;
> 6. liens from unpaid taxes;
> 7. outstanding property taxes;
> 8. zoning defects; and

9. errors in the public record."

The submission next notes that title insurers provide a broad range of coverages and benefits that "far exceed those available under the Western Law Societies Conveyancing Protocol and the B.C. Land Title Assurance Fund".

With respect to the Western Law Societies Conveyancing Protocol, the submission notes a significantly expanded range of protections that are afforded to both lenders and purchasers.

The title insurers note the ease with which insured claims are processed, and how payment provided under title insurance policies are dramatically more expedited.

First Canadian observes that it is the role of the legal profession in Canada to provide real estate conveyancing services, by which they mean the "transfer of title to land from one person to another." The submission notes that First Canadian does not engage in the practice of transferring properties.

The submission notes that there is always an opportunity for clients who are simply refinancing their mortgages to obtain independent legal advice and that they are, in fact, required to sign an acknowledgment that they have been advised of that opportunity. The acknowledgment provided as an example clearly establishes that the lawyer acting on behalf of the title insurer does not give the borrower any independent legal advice.

First Canadian then notes that, while the Law Society Rules permit a lawyer to represent both parties to a transaction under some circumstances, the approach of First Canadian is to eliminate this potential conflict of interest by restricting the representation provided to the lender only.

The First Canadian submission expresses concern about the Law Society of British Columbia's previous public position on title insurance. It asserts that "previous activities of the staff and executive of the Law Society of British

Columbia suggest that they have a negative pre-disposition towards title insurance." First Canadian observes

> … it is difficult for us to believe any outcome dependent on the LSBC (Law Society of British Columbia) will be neutral or potentially favourable. Despite the extensive lists of prior activities, we are looking to the Task Force to provide us with an open and fair hearing.

First Canadian discusses a letter written by the Law Society of British Columbia to British Columbia Members of the Federal Liberal Caucus, which sought to encourage those Members of Parliament to influence Canada Mortgage and Housing Corporation (CMHC) against adopting a universal title protection policy with its insured mortgage loans.

The First Canadian submission to the Task Force suggests that the submission to the Federal MPs contained a number of inaccuracies and that it cast aspersions on the title insurance industry. First Canadian objects to the suggestion in the letter that the title insurance industry has had a negative impact upon the integrity of Land Title systems across the country.

First Canadian then addresses the land title system in Ontario and notes that, in that jurisdiction, the Provincial Government has recognized the benefits that title insurance provides to consumers in Ontario.

The First Canadian submission further criticizes the correspondence to CMHC and, in particular, the fact that the letter suggests that

> the (British Columbia) Land Title system, together with a solicitor's opinion on title, ensures that a property is purchased, sold or mortgaged, is properly registered and secured. This system has operated in British Columbia for more than a century to provide a high level of security to homeowners, lenders and business interests.

The submission then questions whether those lenders who were involved in the mortgage fraud of Martin Wirick feel that the system has responded to their concerns.

The First Canadian brief then criticizes the Law Society for its failure to perceive a conflict between its role in protecting the public interest in the administration of justice and the role that it has to uphold and protect the interests of its members. The First Canadian submission seeks to align the regulatory reform of the legal profession in Great Britain with what it suggests is a similar need in British Columbia.

The First Canadian submission seeks to provide the Task Force with requested factual information. To respond to the suggestion that borrowers are not independently represented, the First Canadian submission reiterates the fact that independent legal advice is recommended to borrowers. First Canadian refers to the mortgagor's "acknowledgment", which, as noted previously, does not recommend independent legal advice. It notes that mortgage documents are standardized and are prepared by legal counsel. It suggests that legal counsel to the lender drafts the mortgages following "… the professional requirements of the Law Society of B.C."

First Canadian notes there is no requirement for independent legal advice in British Columbia, and that independent legal advice is not required in any other province. First Canadian's submission refers to the limited permission in the *Professional Conduct Handbook* for lawyers in British Columbia to represent both parties to a mortgage transaction. It correctly suggests that this potential conflict prevents the clients from receiving independent legal advice.

First Canadian notes that there is an array of provincial and federal legislation aimed at protecting consumers from financial institutions and requiring those same financial institutions to provide a full disclosure in respect of their loan transactions.

The First Canadian Submission notes that independent legal advice would be costly for borrowers, and, in their experience, consumers do not wish to have it. The report notes that the additional cost for a lawyer or notary to witness each refinance transaction ranges from $60.00 to $100.00. First Canadian submits that the additional sums paid by it to ensure that the mortgage is properly witnessed for Land Title purposes is an additional cost that only consumers in British Columbia are required to pay.

In responding to the second resolution, which deals primarily with allegations of unauthorized practice of law, First Canadian says that allegations with respect to its failure to file documents in a timely way are inaccurate. It asserts that it is not in the interests of either the lender or the title insurer to delay registration of documents.

First Canadian says that allegations that it fails to produce timely discharges of mortgage are confined to isolated instances where it is the exception and not the rule. It notes “First Canadian Title has long recognized the importance of timely discharges”.

First Canadian responds to the allegations that its activities have a perceived negative impact upon the integrity of land title systems. It suggests that they, like all other consumers, rely upon the integrity of the land title system and that it would be counter intuitive to suggest that it would do anything to impair the integrity of the system.

First Canadian suggests that the observation that known title defects are insured over rather than remedied is fallacious. It asserts that it spends significant resources in correcting known defects.

First Canadian says that it does not draw mortgages for registration in B.C. It suggests that it arranges for the necessary legal work and preparation of mortgage documents to be done by B.C. legal counsel. It suggests that if it is in any way breaching *Legal Profession Act* or Law Society Rules in this respect,

that the Law Society ought to consider a lawsuit in the British Columbia Supreme Court to have these issues fairly dealt with. It finally suggests that the Task Force ought not to consider the unauthorized practice of law issues as there are established procedures within the Law Society for dealing with this issue.

First Canadian suggests that the "gap" insurance provided by it is to protect lenders for losses incurred as a result the gap between funding of the mortgage and the registration of the same.

First Canadian concludes its submission by suggesting that the Law Society ought to abandon the Western Canadian Protocol because it is merely the provision by the Law Society of unlicensed title insurance. It suggests that the lawyer providing a protocol opinion does so without any basis for the opinion.

In its conclusion, First Canadian offers the following recommendation:

> The Western Conveyancing Protocol be identified as unlicensed title insurance and appropriately licensed and regulated. We strongly recommend that the Task Force recommend a remedy for this situation, otherwise Members of the Law Society may find themselves responsible for claims coverage that their E & O insurer will not fund and as a result consumers will not be protected.

APPENDIX 3: A FRAMEWORK FOR CONSIDERING THE UNAUTHORIZED PRACTICE ISSUE

The *Legal Profession Act* provides:

Authority to practise law

15 (1) No person, other than a practising lawyer, is permitted to engage in the practice of law, except

(a) a person who is an individual party to a proceeding acting without counsel solely on his or her own behalf,

(b) as permitted by the *Court Agent Act,*

(c) an articled student, to the extent permitted by the benchers,

(d) an individual or articled student referred to in section 12 of the *Legal Services Society Act,* to the extent permitted under that Act,

(e) a lawyer of another jurisdiction permitted to practise law in British Columbia under section 16 (2) (a), to the extent permitted under that section, and

(f) a practitioner of foreign law holding a permit under section 17 (1) (a), to the extent permitted under that section.

(2) A person who is employed by a practising lawyer, a law firm, a law corporation or the government and who acts under the supervision of a practising lawyer does not contravene subsection (1).

(3) A person must not do any act described in paragraphs (a) to (g) of the definition of "practice of law" in section 1 (1), even though the act is not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed, if

(a) the person is a member or former member of the society who is suspended or has been disbarred, or who, as a result of disciplinary proceedings, has resigned from membership in the society or otherwise ceased to be a member as a result of disciplinary proceedings, or

(b) the person is suspended or prohibited for disciplinary reasons from practising law in another jurisdiction.

(4) A person must not falsely represent himself, herself or any other person as being

(a) a lawyer,

(b) an articled student, a student-at-law or a law clerk, or

(c) a person referred to in subsection (1) (e) or (f).

(5) Except as permitted in subsection (1), a person must not commence, prosecute or defend a proceeding in any court, in the person's own name or in the name of another person.

(6) The benchers may make rules prohibiting lawyers from facilitating or participating in the practice of law by persons who are not authorized to practise law

The "practice of law" which is the subject of the prohibition in section 15 of the Legal Profession Act, is defined as follows:

"practice of law" includes

(a) appearing as counsel or advocate,

(b) drawing, revising or settling

(i) a petition, memorandum, notice of articles or articles under the *Business Corporations Act,* or an application, statement, affidavit, minute, resolution, bylaw or other document relating to the incorporation, registration, organization, reorganization, dissolution or winding up of a corporate body,

(ii) a document for use in a proceeding, judicial or extrajudicial,

(iii) a will, deed of settlement, trust deed, power of attorney or a document relating to a probate or letters of administration or the estate of a deceased person,

(iv) a document relating in any way to a proceeding under a statute of Canada or British Columbia, or

(v) an instrument relating to real or personal estate that is intended, permitted or required to be registered, recorded or filed in a registry or other public office,

(c) doing an act or negotiating in any way for the settlement of, or settling, a claim or demand for damages,

(d) agreeing to place at the disposal of another person the services of a lawyer,

(e) giving legal advice,

(f) making an offer to do anything referred to in paragraphs (a) to (e), and

(g) making a representation by a person that he or she is qualified or entitled to do anything referred to in paragraphs (a) to (e),

but does not include

(h) any of those acts if not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed,

(i) the drawing, revising or settling of an instrument by a public officer in the course of the officer's duty,

(j) the lawful practice of a notary public,

(k) the usual business carried on by an insurance adjuster who is licensed under Division 2 of Part 6 of the *Financial Institutions Act,* or

(l) agreeing to do something referred to in paragraph (d), if the agreement is made under a prepaid legal services plan or other liability insurance program;

The Task Force suggests that the framework for considering unauthorized practice issues can be confined to those parts of the definition of the "practice of law" that deal with "drawing, revising or settling an instrument relating to real or personal estate that is intended, permitted or required to be registered, recorded or filed in a registry or other public office," and the component of the definition that relates to "agreeing to place at the disposal of another person the services of a lawyer".

There are two aspects of the issue that need to be considered.

First it must be determined whether completing mortgage documents is the practice of law. On the surface that appears to be the case (see the definition of "Practice of Law" in section 1(b)(v) of the *Legal Profession Act* reproduced herein). However, the Task Force is aware of suggestions that the routine completion of mortgage forms by inserting variable information like the names of parties to the mortgage, loan amounts, interest rates and the like is not the practice of law. This threshold question must be answered.

If the answer to the first question is affirmative, the Law Society must then determine whether the large scale production of mortgage documents by secretaries who are nominally supervised by a lawyer is permitted by either the *Legal Profession Act* or the Professional Conduct Handbook. If it is determined that the activity is not permitted to be done in this manner, the Law Society must then investigate the extent to which this activity is in fact being conducted in this manner.

These are questions of fundamental importance and they demand definitive answers for the benefit of the title insurers, the members of the legal profession engaged in this work and the public who are required to pay for the product at the end of the day, regardless of the manner of its delivery.

The Task Force attempted to get the answer to the question of which entity actually prepares the mortgage documents in the First Canadian mortgage refinance program. The matter is fraught with much confusion and the submission of First Canadian to the Task Force does not shed a great deal of light on the subject. The First Canadian submission notes that:

> "The office with which First Canadian Title conducts business in British Columbia for the administration of the LAD program is a services corporation and a related law corporation controlled by a practicing member of the British Columbia Bar, Gordon Alteman. (It is common practice for a law corporation/law firm to exist in tandem with a services corporation)."

The Task Force has determined that the Law Firm is called Lender Services Law Corporation (the "Law Firm") and that the "services" corporation is called Lender Services Ltd. (the "Services Corp.") There is possibility for confusion between the two by reason of the similarity in names. The Task Force notes that it is not at all common for a law firm in British Columbia to "exist in tandem" with a services corporation that is performing services that may amount to the practice of law.

The First Canadian submission comes very close to suggesting that the mortgage documents in question are prepared by the Services Corp. Elsewhere the First Canadian submission repeatedly makes the point that the mortgage documents are prepared by a lawyer in compliance with the requirements of the *Legal Profession Act*. The suggestion in the submission reproduced above says otherwise.

The Task Force is troubled by either outcome. On the one hand, we know that a single lawyer law firm is not capable of supervising the preparation of anything like the number of mortgage files processed by First Canadian in British Columbia. If more than judicial notice of that fact was required we need only look at the litany of difficulties that are described by the Land Title and Survey Authority in seeking resolution of outstanding defect notices. If the documents are not prepared by the Law Firm, then that is another indication that the

documents are being prepared in a manner that is not permitted by the *Legal Profession Act*.

The Task Force did seek to understand which entity was responsible for the various elements of the work. The answers were difficult to understand and the Task Force is not certain at this time that the nuances of responsibility for particular tasks have been fully comprehended by it. It is the Task Force's view that the confusion in the responsibility for the various aspects of the title insurers mortgage preparation services must be resolved. This uncertainty has consequences for both the unauthorized practice question as well as for the reliability and integrity of the public land title system.

Until these questions have been properly answered, the Task Force will assess the situation on the basis that all documents that are prepared for filing in a Registry are in fact prepared by or under the proper supervision of a member of the Law Society of British Columbia. While there was some considerable confusion with respect to these issues in the oral presentations made to the Task Force, it appears that First Canadian retains a combination of the Law Firm and the Services Corp to prepare the documents necessary to satisfy their document preparation obligations to the various lenders to whom they have contracted these services. Both entities operate under the supervision of Gordon Alteman, a member of the Law Society.

It is a reasonable conclusion to draw that a specified lender seeks the assistance of a title insurance company that is prepared to provide services in respect of a mortgage refinancing transaction. It appears that the lender provides the loan particulars to the title insurance company, which in turn retains the "team" of the Law Firm and the Service Corp. to prepare the documents. The documents are delivered to a branch of the lender where the loan originated, and the borrower attends at that branch to sign the documents.

As mortgages to be registered in the Land Title system in British Columbia require an "officer certification", which can only be provided by a commissioner

for oaths, solicitor or notary public, the title insurance company arranges for a lawyer or notary public to attend at the financial institution to witness the execution of the mortgage by the borrower. In fulfilling the "witnessing/officer certification" function, the lawyer is specifically instructed to provide no legal advice and does not do so. The lawyer/notary confirms the identity of the borrower by reviewing identification which is required to be produced, and signs the document as the "officer" for the purposes of the Land Title Act. The documents thus validated are returned to the Services Corp. for registration in the Land Title system. It is not clear to the Task Force how funds are disbursed in this arrangement, nor is it clear where responsibility for the discharge of existing mortgages rests.

If one assumes that all legal tasks to be performed in this relationship are done by the law firm retained by the title insurance company, do any unauthorized practice issues emerge from the relationships as described in this submission? That is a question for the Law Society's Unauthorized Practice Committee.

It appears to the Task Force that consideration ought to be given to the fact that for the fee paid to the title insurance company, in addition to providing the document preparation services and the title insurance policy, the title insurance company is making available to either the financial institution or the borrower, the services of a lawyer. Without more information it is difficult to form a definitive conclusion in respect of this suggestion but in the view of the Task Force, the question is worthy of further attention. It is clear that neither the borrower nor the financial institution is responsible for retaining the lawyer to attend at the offices of the financial institution to perform the "officer certification" role. We do know that the fee for the attendance is established and paid for by the title insurer from the fees paid to it by the borrower.

The more difficult question with respect the preparation of mortgages in circumstances such as these concerns the manner in which a large volume of

mortgages are prepared at the direction of a title insurance company by a single lawyer or by a small firm of lawyers. The volume of transactions reported to the Task Force as being generated by this process is significant. Mr. Alteman's firm may prepare as many as 4,000 mortgages per month for First Canadian Title.

First Canadian has argued that technically speaking each mortgage in this relationship is prepared by or under the proper supervision of a lawyer. Based on inferences drawn from available information, and the personal experience of Task Force members, the Task Force concludes that no single lawyer, and certainly no single part-time lawyer, can prepare or properly oversee preparation of +/- 4,000 mortgage documents per month.

It is beyond the Task Force's authority to determine issues of professional conduct. However, it is clear to the Task Force that while these mortgages may technically be prepared by a lawyer, it continues to be an issue whether they are prepared in accordance with the supervision requirements of the Law Society's Professional Conduct Handbook. The Handbook requires as follows:

> **Responsibility for all business entrusted to lawyer**
>
> **1.** A lawyer is completely responsible for all business entrusted to the lawyer. The lawyer must maintain personal and actual control and management of each of the lawyer's offices. While tasks and functions may be delegated to staff and assistants such as students, clerks and legal assistants, the lawyer must maintain direct supervision over each non-lawyer staff member.
>
> **Legal assistants**
>
> **4.** There are many tasks that can be performed by a legal assistant working under the supervision of a lawyer. It is in the interests of the profession and the public for the delivery of more efficient, comprehensive and better quality legal services that the training and employment of legal assistants be encouraged.
>
> **5.** Subject to this chapter, a legal assistant may perform any task delegated and supervised by a lawyer, but the lawyer must maintain a direct relationship with the client and has full professional responsibility for the work.
>
> **5.1** A lawyer may delegate tasks or functions to a legal assistant if
>
> (a) the training and experience of the legal assistant is appropriate to protect the interests of the client, and
>
> (b) provision is made for the professional legal judgement of the lawyer to be exercised whenever it is required.

6. Except as permitted under the *Legal Services Society Act*, section 9, a lawyer must not permit a legal assistant to:

(a) perform any function reserved to lawyers, including but not limited to

(i) giving legal advice,

(ii) giving or receiving undertakings, and

(iii) appearing in court or actively participating in legal proceedings on behalf of a client, except in a support role to the lawyer appearing in the proceedings,

(b) do anything that a lawyer is not permitted to do,

(c) act finally and without reference to the lawyer in matters involving professional legal judgement, or

(d) be held out as a lawyer, or be identified other than as a legal assistant when communicating with clients, lawyers, public officials or with the public generally.

7. A lawyer who employs a legal assistant must ensure that the assistant is adequately trained and supervised for the tasks and functions delegated to the assistant.

8. This rule is subject to Rule 5.1. It illustrates, but does not limit, the general effect of that rule.

The following are examples of tasks and functions that legal assistants may perform with proper training and supervision:

(a) attending to all matters of routine administration,

(b) drafting or conducting routine correspondence,

(c) drafting documents, including closing documents and statements of accounts,

(d) drafting documentation and correspondence relating to corporate proceedings and corporate records, security instruments and contracts of all kinds, including closing documents and statements of account,

(e) collecting information and drafting documents, including wills, trust instruments and pleadings,

(f) preparing income tax, succession duty and estate tax returns and calculating such taxes and duties,

(g) drafting statements of account, including executors' accounts,

(h) attending to filings,

(i) researching legal questions,

(j) preparing memoranda,

(k) organizing documents and preparing briefs for litigation,

(l) conducting negotiations of claims and communicating directly to the client, provided that the lawyer reviews proposed terms before the legal assistant offers or accepts a settlement.

9. The following are examples of tasks and functions that a lawyer must attend to personally and that legal assistants must not perform. This list illustrates, but does not limit, the general effect of Rule 6:

(a) attending on the client to advise and taking instructions on all substantive matters,

(b) reviewing title search reports,

(c) conducting all negotiations with third parties or their lawyers, except as permitted in Rule 8,

(d) reviewing documents before signing,

(e) attending on the client to review documents,

(f) reviewing and signing the title opinion and/or reporting letter to the client following registration,

(g) reviewing all written material prepared by the legal assistant before it leaves the lawyer's office, other than documents and correspondence relating to routine administration,

(h) signing all correspondence except as permitted in this chapter,

(i) attending at any hearing before the court, a registrar or an administrative tribunal or at any examination for discovery except in support of a lawyer also in attendance.

It appears to the Task Force that the Handbook requires a significant level of direct and meaningful supervision of the work entrusted to non-lawyer employees. It is also very specific in some prohibited engagements by legal assistants.

We reproduce section 1 of Chapter 12 of the Handbook (Supervision of Employees), with emphasis added:

1. A lawyer is ***completely responsible for all business*** entrusted to the lawyer. The lawyer ***must maintain personal and actual control and management*** of each of the lawyer's offices. While tasks and functions may be delegated to staff and assistants such as students, clerks and legal assistants, the lawyer ***must maintain direct supervision over each non-lawyer staff member.***

Note also, again with emphasis added, the specific prohibitions that are provided as limitations on the scope of work that can be performed by legal assistants.

> (a) ***attending on the client to advise and taking instructions on all substantive matters***,
>
> (b) ***reviewing title search reports,***
>
> (d) ***reviewing documents before signing,***
>
> (e) ***attending on the client to review documents***,
>
> (f) ***reviewing and signing the title opinion and/or reporting letter to the client following registration***,
>
> (g) ***reviewing all written material prepared by the legal assistant before it leaves the lawyer's office***, other than documents and correspondence relating to routine administration.

The Task Force infers that the actual document preparation is done by a large of legal assistants working without benefit of any real supervision from the lawyers who are putatively involved in the preparation of these mortgages. It is the nature of this relationship that leads to a variety of problems described by Land Title officials when they report on difficulties encountered in their dealings with the firms providing services to the title insurance companies. Those reports include incidents of lengthy delay, incidents of mortgage defects being unremedied for such length of time that the mortgage is ultimately de-registered, instances of mortgages not being registered at all, thereby causing borrowers difficulties on closing when they seek to discharge a mortgage which they know should exist but is not on the record at the Land Title Office, and other similar problems which are likely to follow from the essentially unsupervised performance of legal tasks by legal assistants.

It appears to the Task Force that there are real questions to be answered as to whether this practice can be conducted in compliance with the requirements of the Handbook. Of particular concern is the extent to which, in the

volumes suggested, it is possible to conduct this practice while meeting the supervision mandates of the Handbook.

The Task Force concludes that the Law Society should investigate and scrutinize the practice as this approach to document preparation has far ranging consequences.

APPENDIX 4

In 1999 a Notary Public “Mr. L” registered a mortgage in favour of “Mortgage Company A” on the title to the property owned by the Mortgagor.

In November 2004 “Mortgage Company A” mistakenly discharged the mortgage that it intended to assign to “Bank B”.

In July 2005 Lender Services Ltd. tried to register a file copy of the same mortgage in the Kamloops Land Title Office. No change was made in item #1 on the Form B Mortgage (which shows the name and address of the applicant), so it continued to show Mr. L, the notary, as the applicant, although someone else appeared to have signed as Mr. L’s authorized agent without any authority to do so.

The copy of the mortgage was refused registration and the application is subsequently cancelled because Mortgage Company A had ceased to exist.

The Notice Declining to Register was sent to Mr. L because he was shown as the applicant.

Lender Services Ltd. submitted the mortgage a second time, after substituting a new first page for the executed mortgage. The new first page still showed Mr. L as the applicant but changed the mortgagee from Mortgage Company A to Bank C.

Mr. L conducted a search of the title to the subject property and discovered the altered mortgage registered against the title. He contacted the Land Title Office and the Society of Notaries Public.

The Registrar of Land Titles filed a Registrar's Caveat prohibiting further dealings with the mortgage because it appeared to have been fraudulently altered without the mortgagor's consent.

The Land Title Office contacted the mortgagor, who advised that he had been making regular mortgage payments to Bank B since September 2004.

On November 15, 2005 a transfer of the mortgage from Bank C to Bank B was tendered for registration. Registration was refused on the grounds that Bank C could not acquire an interest in the property through the fraudulently amended mortgage and therefore had no interest in the subject property.

Land Title Office staff made inquiries of Lender Services Ltd. to determine who was responsible for substituting the first page of the mortgage. The solicitor and principal of Lender Services Ltd. and a representative of First Canadian Title advised that one of their "title officers" amended the mortgage by substituting the first page in a misguided attempt to help Mortgage Company A. Land Title Office staff asked for written confirmation. The representative of First Canadian Title confirmed in writing that the error had been committed by one of their employees.