

The Law Society *of British Columbia*



Report of the Conveyancing Practices Task Force For: the Benchers

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Purpose of Report:

Information

Prepared on behalf of:

Conveyancing Practices Task Force:

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Introduction and Background

The Conveyancing Practices Task Force (CPTF), established by the Benchers following the discovery of the Martin Wirick fiasco, was mandated to explore the circumstances of the Wirick problem and report on changes thought necessary to protect the public and the profession from another such event.

The Task Force published two reports containing recommendations and seeking feedback from the profession. The reports and the subsequent consideration of the subject by the Benchers resulted in some changes in the way real estate lawyers practice their craft.

The most significant change that emerged was the “30/30 Rule” (Law Society Rules 3-88 and 3-89) which was established to allow the Law Society to track the progress of mortgage discharges and to react when an inordinate delay in processing discharges was seen to be developing. The primary expectation from the implementation of the 30/30 Rule was to react more quickly to any accumulation of un-discharged mortgages by a single practitioner – one of the more evident characteristics of the Martin Wirick frauds.

The CPTF reports also encouraged the adoption of greater transparency around the payment out of Vendor's financial charges by suggesting that copies of letters and cheques evidencing repayment of a Vendor's mortgage be provided to the lawyer for the Purchaser. This recommendation was ultimately incorporated into the standard undertakings adopted by the Canadian Bar Association BC Branch Real Property Section and those undertakings became embedded in the Standard Form Real Estate Contract adopted by the Real Estate Boards of Greater Vancouver and Victoria.

As an aside the Task Force notes that there are lawyers who take the position that they are not bound to observe the requirements of the contract to the extent that those provisions purport to impose a particular closing regime on the lawyers to the parties. In the view of the Task Force (and the Benchers) this position is not supportable in law and members are advised to observe the requirements of contracts signed by their clients.

The Task Force is about to disband, having accomplished the primary objective of creating a regime where a repeat of the Wirick circumstances is almost impossible to imagine if the requirements of the 30/30 Rule and the transparency requirements of the Standard Undertakings are observed by all.

As a final initiative the Task Force considered whether there is merit in establishing some minimum standards of practice for real estate lawyers. This inquiry was undertaken in response to concerns expressed from members of the profession that the

push to preserve profitability in this area of work is causing lawyers to cut corners and omit important steps in completing transactions for their clients.

The Scope of Inquiry

The primary focus of this final inquiry is an examination of the extent to which lawyers are no longer obtaining copies of the non-financial documents on title and reviewing those charges with their clients. The discussion ultimately focused on Statutory Building Schemes as being representative of the type of charge that can be most problematic to an uninformed purchaser.

We investigated the question from a number of directions. We sought input from the Society of Notaries Public, we consulted with a group of large volume practitioners and we examined the claims experience of the LSBC Captive insurer as it related to these issues. We also considered the extent to which minimum standards have been tried in other jurisdictions.

Other Jurisdictions

The experience of other jurisdictions is not very helpful. In Ontario, an elaborate scheme of practice directives has been adopted, but the directives are not mandatory and only describe best practices. The Ontario experience is also not particularly helpful because in that jurisdiction there is a connection between the practice directives and the growing burden of insurance claims. The directives were developed and promulgated in an attempt to reduce the insurance costs suffered by the insurer to the Law Society of Upper Canada. As noted later in this report, no such connection is apparent in British Columbia.

In New Brunswick the Law Society developed a series of mandatory practice directives. Some of the directives responded to the conversion of New Brunswick's land titles from a registry system to a Torrens system. As part of the conversion rules were designed to ensure compliance with what was perceived to be some important safeguards to the integrity of the new regime. Other New Brunswick directives were mandatory and were directed to the manner in which a title opinion could be provided. Significant differences between the pre-Torrens New Brunswick title system and the title system in British Columbia make comparisons between the two less helpful.

A similar situation exists in Nova Scotia where conversion to a Torrens-like title system is also under way. Nova Scotia has had mandatory practice directives since 1994. Those directives primarily directed the profession in how to conduct a title search. The conversion to Torrens required amendments and those were promulgated in late 2002. The requirements of the practice directives are very specific and very complete. They are probably the best Canadian example of the kinds of directives that the CPTF was contemplating for adoption in British Columbia. We have no explanation for why these rules were adopted.

The British Columbia Society of Notaries Public produces a "best practices" handbook but has stopped short of mandating a particular approach to practice on this issue (and others). The view of the Notaries is that establishing mandatory minimum standards of practice may cause problems and the triennial audit of the practices of the individual notaries that is measured against the best practices handbook is considered to be sufficient at this time. It is instructive that the Notaries' best practices manual suggests that notaries obtain copies of non-financial encumbrances and explain them to clients.

British Columbia Practices

It seems to be the case that many of the large volume practitioners do not obtain copies of non-financial encumbrances as a matter of course. With some of those practitioners, the "no copies" issue is explained in a written memorandum to the client and the option of obtaining and explaining existing non-financial charges is offered at an additional cost. It appears that in some firms, the "no copies" approach is adopted without instructions.

We have determined that this practice has arisen as a result of the narrow margins that are present in the "all inclusive fixed fee" approach often adopted by large volume practitioners as a marketing device – indeed the fixed all inclusive fee is an integral component of the marketing strategy of this segment of our members.

The cost of obtaining copies of the non-financial charges is unpredictable and in some cases amounts to a significant investment. This cost is in addition to the professional time required to review and explain the impact of such charges to the client.

It has long been argued that the failure of lawyers to obtain and explain non-financial charges to purchasers will lead to increased insurance claims from purchasers harmed by non disclosure. The Task Force has determined that this argument is not borne out by insurance claim statistics. Although real estate files represent approximately 10% of the E&O claims, the causes of those claims that are paid do not stem from a failure to obtain copies of non-financial encumbrances.

Our insurers tell us that the losses do not arise as a result of an absence of minimum standards but instead that claims arise from a failure to adhere to the standards that now exist and of which experienced practitioners are presently aware.

A collateral issue was raised by the large volume practitioners we spoke to. They argued that the majority of difficulties they experience in their work are caused by those lawyers who "dabble" in real estate matters as an adjunct to other areas of law in which they regularly practice. Examples given include real property matters that spring from a matrimonial file or from an estate file. In each of these instances, lawyers who were associated with the real estate aspect of the file created problems by failing to appreciate the requirements of the file and by seeking to extract inappropriate undertakings or refusing to accept regular and appropriate undertakings. The volume practitioners urged the Task Force to encourage "dabblers" to stay away from the files in which they have a limited ability to provide appropriate services.

This tendency to dabble is founded upon the mistaken belief that real estate matters are straightforward and require no particular expertise or experience. This view is incorrect and the Task Force reminds members of the prohibition contained in the Professional Conduct Handbook (Chapter 3, Sections 1 & 2) that provides that one ought not practice in an area where one has insufficient knowledge and skill. The Task Force shares the concern regarding the casual practice of real estate and encourages members to seek the assistance of experienced members when engaged in this work.

Analysis and Recommendations

The Task Force considered the arguments in favour of requiring lawyers to obtain copies of non-financial documents in all conveyance and mortgage files when there does not appear to be a compelling insurance argument for doing so. There are a number of such arguments.

A member of the Task Force argued that the low number of insurance claims may be misleading. He suggested that the public is often not prepared to take on the legal profession where the damages suffered may be modest and the costs to pursue a claim will likely be out of proportion to the possibility of recovery. By that reasoning says the Task Force member, the number of paid claims will be reduced.

An argument exists that if we do not do this work properly (professionally) we will be overtaken by others who will accomplish the same ends in a different way. Title insurers are knocking on the door. We have yet to see our first "conveyancing store" – that absence is likely the result of the existing unauthorized practice provisions of the *Legal Profession Act*. Despite the absence of a public presence in that way, we do know that some Title Insurers are involved in conveyances incidental to their mortgage preparation work. It would be a simple matter for the title insurance industry to make a blanket policy available to home buyers to protect against the consequences of a missed covenant or building scheme. We do not need title insurance in British Columbia but it may be that our reluctance to adopt a sufficiently rigorous title searching regime may produce that unintended consequence.

We next considered the issue from the perspective of value added by our profession to the real estate purchase experience. The proponents for "no copies" suggest that the client should have an opportunity to choose and to assess the extent to which they want to pay for the additional information. This position has been advanced from the proposition that the client should have the opportunity of giving "informed consent" on the subject. The Task Force has taken no determinative stand on the subject but leans to the view that informed consent on this issue is either not possible or alternatively is possible but the cost of properly informing the client would far exceed any cost associated with obtaining and explaining non-financial charges.

The "professional" aspect of our involvement suggests that these documents be obtained and explained. A purchaser that is prevented from using their property in the

way they planned due to a restrictive condition in a statutory building scheme or restrictive covenant could properly ask – for what did I pay you? Disclosure of these types of charges is surely the least that the public expects of the lawyer handling the transaction.

The Task Force was encouraged by the large volume practitioners to leave this issue alone on the basis that it is not broken and therefore does not need to be fixed. At the end of the day we were unable to agree on a final recommendation to the Benchers on the issue of mandatory minimum standards.

The difficulty arises in part from the reluctance of the Law Society to provide directives to its members on how to practice. Historically the regulatory function has been confined to issues of suitability for membership, ethics and financial accountability. In theory, membership in the Law Society should connote an ability to perform the required tasks in a professional manner. Therein lies the explanation for the handbook provision requiring members to practice only in areas where they have the required knowledge and ability. As a result of the foregoing, the Benchers have been loath to establish practice directives in this or any other practice area.

The Benchers have adopted practice checklists prepared mostly by others (e.g. CLE). There are mixed reviews on the conveyancing and mortgaging checklists with the suggestion that they describe a standard of perfection rather than a standard of competence. It has been suggested that no purchaser, properly informed, would agree to pay their lawyer to perform all tasks in the checklist on the basis that many of the required tasks have no relevance to the particular transaction but there is no easy way to know which is which; it is a matter of professional judgment.

Publication of this final report is the compromise resolution. We are encouraging all lawyers involved in real property conveyancing to adopt the following as best practices, rather than as a mandatory minimum standard. Like all compromises it is not perfect but it does represent an improvement on the *status quo*.

- In all cases obtain copies of and explain to your clients the consequences of the non-financial charges on the title to the property they are purchasing.
- Establish a fee structure that allows you to conduct this additional search at no marginal cost to your client – that is - include this service in the "basic package" fee.
- Where you seek to avoid this additional cost by providing the client with an option, provide a comprehensive written report to each client detailing the nature of the searches that are not being done and advising, with examples, of the kinds of restrictions on use of the land that may be missed in this process.