



National Library
of Canada

Canadian Theses Service

Ottawa, Canada
K1A 0N4

Bibliothèque nationale
du Canada

Services des thèses canadiennes

CANADIAN THESES

NOTICE

The quality of this microfiche is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Previously copyrighted materials (journal articles, published tests, etc.) are not filmed.

Reproduction in full or in part of this film is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30.

THIS DISSERTATION
HAS BEEN MICROFILMED
EXACTLY AS RECEIVED

THÈSES CANADIENNES

AVIS

La qualité de cette microfiche dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

Les documents qui font déjà l'objet d'un droit d'auteur (articles de revue, examens publiés, etc.) ne sont pas microfilmés.

La reproduction, même partielle, de ce microfilm est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30.

LA THÈSE A ÉTÉ
MICROFILMÉE TELLE QUE
NOUS L'AVONS REÇUE

Canada

PROFESSIONAL LIABILITY IN CONVEYANCING

with

SPECIAL REFERENCE TO NEW BRUNSWICK

by

ANDRÉA BOUDREAU-OUELLET

Thesis submitted to the University of Ottawa
in compliance with the requirements of the program
leading to a Masters Degree in Law

MONCTON, N.B.

APRIL 1985



Andréa Boudreau-Ouellet, Ottawa, Canada, 1985.

Permission has been granted to the National Library of Canada to microfilm this thesis and to lend or sell copies of the film.

The author (copyright owner) has reserved other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without his/her written permission.

L'autorisation a été accordée à la Bibliothèque nationale du Canada de microfilmer cette thèse et de prêter ou de vendre des exemplaires du film.

L'auteur (titulaire du droit d'auteur) se réserve les autres droits de publication; ni la thèse ni de longs extraits de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation écrite.

ISBN 0-315-30993-8

TABLE OF CONTENTS

GENERAL INTRODUCTION	1
CHAPTER I - CONVEYANCING AND THE LEGAL PROFESSION - HISTORICAL BACKGROUND	5
A. Introduction	5
B. The Registry System	6
1. Its English Origin	6
2. The Origin of Registration in Canada	11
C. Modern Registration Systems	17
D. The Legal Profession	23
1. Its History	23
2. Legislation Governing the Profession	26
3. The Ethical Guidelines	30
E. Conclusion	44
CHAPTER II - THE VARIOUS DUTIES IN CERTIFYING TITLE UNDER THE REGISTRY SYSTEM	46
A. Introduction	46
B. The Technical Aspect	47
C. The Legal Aspect	50
1. Defining Marketable Title	52
2. Special Claims to Verify	57
D. The Chain of Title	61
1. Length of Search	62
2. Root of Title	65
E. Statutory Restrictions	68
1. Planning Legislation	69
2. Municipal Zoning By-Laws	71
F. The Significance of the Lawyer's Certificate	73
1. Is this Certificate the Equivalent of a Guarantee?	73
2. Error: Not Always Identified as Professional Misconduct	75
3. Special Duties	77
a) Duties to Third Parties	77
b) Transactions Between a Solicitor and his Client	78
G. Conclusion	79

CHAPTER III - THE CONSEQUENCES OF ERROR	81
A. Introduction	81
B. The Basis for Liability	82
1. The Traditional View	82
2. The Position of the Supreme Court of Canada	84
3. A Different Approach	90
4. The Approach Adopted in New Brunswick	99
5. Analysis from other Professions	104
6. The Significance of Founding Liability in Tort	105
C. The Standards of Care and Competence	112
1. In General	112
2. The Test of General and Recognized Practice	116
3. Specialists	117
4. Undecided Matters	119
5. The Relation Between the Duty of Care and the Scope of the Contract of Retainer	120
D. The Standards in Conveyancing	122
E. Conclusion	126
CHAPTER IV - SUGGESTIONS FOR REFORM	128
A. Introduction	128
B. Practical Solutions	130
1. Defining the Clientele of a Registry Office	130
2. The Registry Office	131
3. The Indices	132
4. Parcel Identification	134
5. Standard Forms	135
6. Sharing the Workload	138
7. Sharing Responsibility - Title Insurance	140
8. Registering a Complete Abstract	145
C. The Legal Profession's Role in Reform	147
1. Defining the Standards	147
2. Continuing Legal Education	149
3. Limiting Liability by Contract	151
D. Legal Reform	155
1. Making Land a Commodity	155
2. A New Registration System	157
3. Investigation of Title	163
4. Certification of Title	166
5. Reform Resulting from a Uniform Law	168

E. Mechanization	169
F. Conclusion	170
GENERAL CONCLUSION	171
BIBLIOGRAPHY	(i)

Land is the source of all material wealth. From it we get everything that we use or value, whether it be food, clothing, fuel, shelter, metal or precious stones. We live on the land and from the land, and to the land our bodies or our ashes are committed when we die. The availability of land is the key to human existence and its distribution and use are of vital importance. Land records, therefore, are of great concern to all governments. The framing of land policy, and its execution, may in large measure depend on the effectiveness of "land registration", as we can conveniently call the making and keeping of these records.⁽¹⁾

1) S. Rowton Simpson, Land Law and Registration, Cambridge University Press, Cambridge, 1976, p. 3.

GENERAL INTRODUCTION

The legal profession deals with questions involving all the many different aspects of law. Some questions are very complex; some more routine. Yet, few cause as many lawsuits against solicitors as those essential in real estate transactions. One reason is that real property law is a complex area of law, one in which intricate and traditional concepts still weigh heavily.

For the inexperienced lawyer, representing a client in a real estate transaction can be particularly hazardous. He must deal not only with certain complicated matters, but often with some still unsettled points of law. As well, his lack of experience compounds the problem as he will require more time to execute tasks which are by their nature time-consuming, such as the investigation of the title. The experienced lawyer however can rely on his previous experience; he will have acquired a certain notion of what others in the profession generally do in relation to certain problems and he, generally, has a better grasp of the guidelines to which he must adhere. Nevertheless, even the experienced solicitor must face certain problems. The time-consuming and tedious nature of doing a title search may well result in his overlooking details, or even tempt him to rely too heavily on an employee. He may not be abreast of new developments in the case law or recently adopted legislation.

These are factors which apply to almost every jurisdiction but particularly to those still operating under a registry of deeds system. Much has been written, not only on the difficulties inherent in these different systems, but also on the varying duties of the lawyer under each. Unfortunately for the members of the legal profession practising in the province of New Brunswick, these studies and articles have had little effect on the legislation in New Brunswick, and the Registry system in this province continues very much as it started in the nineteenth century with very little in the way of guidelines for the legal profession.

The unfortunate result, as shall be seen, is that certifying a title in New Brunswick is a hazardous task, from ~~the practising lawyer's view point.~~ Another result of this lack of guidelines, of both a legal and professional nature, is that lawyers tend to rely on certain "customs", or certain practices, which are neither sufficiently defined, nor well-founded.

One such practise, concerns the time-period necessary for an acceptable title search in this province. Some individual lawyers believe that a period of twenty years is sufficient, relying apparently on the Quieting of Titles Act.² Another such "rule" on which some lawyers strongly rely concerns the length of time during which they remain liable for proven negligence. Few realize the possibility that the statutory

2) 1973 R.S.N.B., c. Q-4, Section 1.

limitation period of six years might be held inapplicable by a court refusing to allow a negligent lawyer to successfully plead the Statute of Limitations.^{2(b)}

This thesis will attempt to fully analyze the lawyer's role and consequent duties when acting in a real estate transaction. Greater importance will be accorded to the role of the purchaser's solicitor since, naturally, the important task of examining the title falls within his responsibilities. As well, special attention will be given to the registry situation which presently exists in New Brunswick, using other jurisdictions, especially Ontario, for comparison purposes and for inspiration when suggesting needed reforms. Our particular interest in New Brunswick stems not only from first-hand knowledge of the situation which prevails in this province, but more importantly from the fact that relatively little has been done to bring about desperately needed reform in this area.

While we will be describing briefly the Registry System, our primary objective is not to define the Registration System in this province,³ but to point out the effects of its perceived shortcomings on the conveyancing lawyer who must use it and on

2(b) See *infra*, note 273.

3) This has been done extensively in other articles: see for example: T.G. Feeney, Registration and Land Titles in the Common Law (1964), 2 Col. J. Dr. Comp., 19-33; G. Laforest, Community Planning Law in New Brunswick, (1966) 16 U.N.B.L.J., 16-33; and, in Ontario, M. Neave, Conveyancing Under the Registry Act, (1977) 55 Can. Bar. Rev., 501-548.

the legal profession in general. Consequently, the general rules of professional conduct shall also be examined to determine if they might possibly provide sufficient guidelines for a lawyer to rely on in his real estate practice. We will also attempt an analysis of the case law regarding the recent trend of bringing law suits against lawyers in torts as well as contract. This trend will in our opinion be a very important motivating factor for both legislators and lawyers to find solutions to existing problems and to bring about the reform called for by such solutions.

The last chapter enumerates and briefly evaluates some possible suggestions for reform which we think could help bring about desirable changes in New Brunswick. We have not necessarily attempted to look for the most ideal plans, but rather the most feasible; some proposals are suggested as intermediate steps leading to other, better solutions. Many suggestions refer to very practical matters which seem relatively minor, dealing as they do with many of the most mundane problems which have not as yet been remedied nor, it seems, even directly ever before addressed in the province.

in searching and certifying a title, other actions may be hampered, as for example, actions by third parties, such as beneficiaries to a will.⁹

Therefore, in reading sections of this thesis dealing specifically with the Limitation Acts (pages 106 to 108) the reader must keep in mind the recent Consumer's Glass case, delivered in June, two months after the completion of this thesis. However, it is submitted that this case does not render irrelevant the discussion in favor of founding actions against lawyers concurrently in tort as well as in contract.

9) Whittingham v. Crease & Co. (1978) 88 D.L.R. (3d) 353; Gartside v. Sheffield, Young and Ellis [1983] N.Z.L.R. 37; Tracy et al. v. Atkins (1977) 83 D.L.R. (3d) 46, discussed at pages 95 and 106 of this thesis. See also comments made by Laforest, J.A. (as he was) in Caisse d'Inkerman Ltée v. Doiron, (1985) 61 N.B.R. (2d) 123 (N.B.C.A.), concerning the relationship between the lawyer representing a purchaser and the mortgagee.

the lawyer's involvement with real estate. This involvement is one of very long standing, as the legal profession's development was very closely associated with the development of the principles of land law. The more complex the latter became, the more adept the professional conveyancers had to be.⁴

Finally, before embarking on a review of the more specific duties which must be discharged by a solicitor ~~when~~ involved in a land transaction, we will attempt to summarize the more general duties imposed on a member of the legal profession and set out the principal guidelines in existence which may help to establish certain principles in relation to his duty and responsibility in conveyancing.

B) The Registry System

1. Its English Origin

While it is beyond the scope of this paper to research the history of real property in general, it does however seem necessary to examine briefly the origin and development of the Registry System since it is often identified as the culprit giving rise to many of the legal profession's woes.

4) S.J. Bailey, Thirteenth-Century Conveyancing from the Charter Rolls, 1961, Cambr. L.J. 211-218. The author gives several examples of means used by ingenious lawyers even before the thirteenth century for conveying land.

It seems ironic that a system first created to insure a degree of certainty and protection in the transfer of land is now in fact the source of so much insecurity for lawyers who resort to it for the protection of their clients and themselves. To gain a better understanding of some difficulties which may hamper a smooth land transaction today, it is often helpful to consider some real estate principles which have been around for centuries.

To find the origins of the practice of conveyancing, authors generally return to a period following the Norman Conquest, which is a time when many of the customs in use evolved into recognized and applicable principles of the Common Law.

Registration of documents appears, however, to have originated much later. At least one author⁵ seems to pinpoint its origin at a time in the thirteenth century when conveyancing was done by charters, which could be presented to the King in view of obtaining "royal confirmation" or as one author describes it:

... these confirmations were regarded as a method of strengthening the title of a purchase. At the least they would appear to preclude the confirming party from questioning the existence and validity of the conveyance...⁶

5) S.J. Bailey, *op. cit.*, no. 4, p. 208.

6) *Id.*, p. 207..

The similarity of this method of conveyancing to a system of registration is further evidenced when many successive transfers of the same land were made:

... the confirmation might cover a long string of title - deeds relating to a single piece of land. (...) In fact it would seem that they obtained the then equivalent of a modern registered title...⁷

However, it must be remembered that this custom fell short of an organized "system" of registration. This can best be understood by recalling that "title" was at that time not yet seen as being conceptually different from possession. It seems in fact that the importance attached to the "possession" of land precluded the need for any major development regarding the transfer of land on paper, or without livery of seisin until the fourteenth and fifteenth centuries.

It was only from the sixteenth century and later that the "deed", came of age, and the law then concerned itself with the form of the document rather than the formalities surrounding "livery".⁸ During this period, it is readily observable that the feudal system, while hampering the evolution of "title" as a concept for many centuries, had, at the same time deeply entrenched the importance of land "ownership" in English Common

7) Id., p. 209.

8) I.T.T. Plucknett, A Concise History of the Common Law, 5th ed., London, Butterworths, 1956, p. 612.

Law. It was with the Statute of Uses,⁹ that ownership, in relation to title seemed finally to come of age. In fact, some attribute the origin of a certain form of registration to the English Statute of Enrolments passed in 1536.¹⁰ It was, however, only with the passing of the Statute of Frauds, in 1677, that the written document, with description and signature, became the conventional method of transfer. Hence, the true origin of a "registration" system before the seventeenth century and even later are inexistent. The fact that not all transfers were witnessed by a written paper barred a development of any actual system of registration.

By 1845, the "document" had finally evolved into the form of instrument we now know as a deed and was recognized as the principal method of conveyancing by the Real Property Act.¹¹ The advent of registration did not, however, follow smoothly from this development.¹² Nevertheless, eventually the idea of

-
- 9) 27 Hen. VII, c.10 (1536); W.S. Holdsworth, The Political Causes that Shaped the Statute of Uses, (1912-13) 26 Harv. L.R., 108-127.
- 10) 27 Hen. VII, c.16 (1536). See G.L. Haskin, The Beginnings of the Recording System in Massachusetts, (1941), 21 B.U.L.R. 291-292; and S.R. Simpson, op. cit., no. 1, p. 38.
- 11) R. Megarry and H.W.R. Wade, The Law of Real Property, London, Stevens & Sons, 1975, p. 167.
- 12) Land transfers did not cause the same kind of difficulties in England in the nineteenth century as it does here and now. Land was viewed with reverence and its sale was never presumed to be as easy as a sale of chattels. See R.C. Risk, The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century, (1971), 21 U.T.L.J., p. 207.

registration became identified as a solution to many problems caused by the "new" methods of conveyancing by deed. The fact that transfer of ownership could occur without "livery" and the accompanying public ceremony resulted in unpublicized transfers, which in turn gave way to many possibilities of fraud.¹³ It had grown increasingly difficult to verify who was the true "owner" of a parcel of land. One way was to ask the vendor to provide the purchaser with all the instruments dealing with the particular parcel of land to be transferred. As can well be imagined, this was not without difficulty. One must recall that real estate, in the English system, was not seen as a commodity which changed hands frequently or easily.¹⁴ The deeds therefore relating to land were for the most part either very old, or even nonexistent especially where land had remained in the same family for many generations, which was a common occurrence. Eventually, the custom of keeping land in the same family began to hamper the development of the economy, and a different way of thinking about land which would make it more readily transferable was necessarily being sought.¹⁵

13) Since the beginning of the feudal system, transfer of rightful possession, and later on, of ownership, had traditionally been effected by a "livery" of possession, that is a physical transfer of some object from the grantor to the grantee in presence of witnesses. While the land itself was immovable, a symbolic object, such as a shovel of sod, or even a fence post, could be used.

14) R.C. Risk, op. cit., no. 12, p. 208.

15) S.W.B. Simpson, An Introduction to the History of Land Law, Cambridge, Cambridge University Press, 1961, p. 11.

Legislators came to be of the opinion that a system which would permit the registration and the keeping of deeds would add a certain measure of certainty to conveyancing by offering to the purchaser a method of examining the worth of the title held by the vendor. It would at least provide the owners with a secure place to store these important documents. However, for many reasons, the idea of a public register of deeds did not meet with enthusiasm from everyone. Nevertheless, in spite of dissident views, three acts of Parliament were adopted during the nineteenth century with the express view of implementing at least for some parts of England the first true system of registration of deeds in England.¹⁶

2. The Origin of Registration in Canada

In order, perhaps to prevent the difficulties and lack of enthusiasm encountered at home in trying to implement a late-arriving system of registration,¹⁷ English legislators saw

16) The Conveyancing Acts of 1881 and 1882 and the Settled Lands Act of 1882. For a discussion of the lack of enthusiasm towards a freer system of conveyancing, see A. Offer, The Origins of the Law of Property Acts 1910-1925, (1977) 40 Mod. L.R., 502-522, and E. Spring, Landowners and Land Law Reform in Nineteenth Century England, (1977) 21 Amer. J. of Leg. Hist., 40-59. It must be noted, however, that earlier statutes had dealt with registration in certain counties (Yorkshire and Middlesex) as early as 1703 (see 2 & 3 Anne, c. 4, and 27 Hen. VIII, c.16 (1536)); G.L. Haskins, The Beginning of the Recording System in Massachusetts (1941), 21 B.U.L.R., p. 295.

17) According to one author "...registration was almost a total failure in England..." S. Rowton Simpson, op. cit., no. 1, chapter III.

to it that registration would be an essential requirement of conveyancing in its colony, Upper Canada, and this was ensured from the very beginning in 1795.¹⁸

This early system was concerned with registration of "memorials", the original deeds being kept by the owners of the real property. However, even registration of these memorials provided a method of giving public notice of any exchange of land.¹⁹

The beginning of registration in New Brunswick preceded such a development in Ontario and seems more certainly attributed to the influence of some American states. According to well-documented research, it would seem our first legislation concerning registration was adopted at the request of the American loyalists who had immigrated to what was then part of the larger province of Nova Scotia.²⁰ Indeed, Massachusetts had been using

18) 35 Geo III, c.5. This act was based on the Yorkshire and Middlesex Registry Acts. The English Statute, the Statute of Enrolments (27 Hen. VIII, c.16) applied to the colonies, and required "enrolment" within six months after the conveyance; See A.T. Hunter, Real Property Statutes of Ontario, Toronto, Carswell Co., 1894, p. 54. However, some authors attribute the origin of the Canadian acts to the American loyalists' influence; c.f. T.G. Feeney, op. cit., no. 3, 19-20.

19) Registration of the original documents was made compulsory in 1865 in Ontario (29 Vict., c.24, s.65); c.f. M. Neave, op. cit., no. 3, p. 509.

20) T.G. Feeney, op. cit. no. 3, p. 18.

a Registry System as early as 1640,²¹ and when the loyalists arrived in Nova Scotia, they insisted on the institution of the better elements of the legal and political system from which they had fled. Thus, in 1752, by Imperial Ordinance, a registration system was adopted in Nova Scotia. At the first meeting of the New Brunswick legislative assembly in 1786,²² a statute containing identical provisions was adopted.

To insure the efficiency of the system, registration was then made compulsory.

In New Brunswick, a deed of bargain and sale not enrolled according to 27 Hen. VIII, c.16 or 26 Geo. III, c.3, does not pass any estate.²³

It seems, therefore, that New Brunswick was among the first provinces to implement a registration system, and had quite probably preceded Ontario (Upper Canada) in this matter. Unfortunately, as we shall see, apart from a few minor amendments, the eighteenth century act has remained essentially

-
- 21) G.L. Haskins, op. cit., no. 16, 283-287. Other colonies had registration even before then. The author gives the following examples: Virginia (1626), Plymouth (1636), Rhode Island (1638), Connecticut (1639), p. 284.
- 22) 26 Geo. III, c.3, sections X and XX; see T.G. Feeney, op. cit., no. 3, p. 19, note 3.
- 23) A.T. Hunter, op. cit., note 18, p. 54, note m, referring to Haddington v. McFadden, Bert. 153 (1836), (1835-39) 2 N.B.R. 260. This provision is more reminiscent of English Statutes than the American ones; see G.L. Haskins, op. cit., no. 16, p. 288. Compulsory registration has been repealed; see *infra*, note 36.

unchanged to date, whereas Ontario continued to find methods to give the antiquated system a more contemporary appearance.²⁴

Because of differences in origin, and the fact that New Brunswick left its system very much in its original state, there exists a number of important differences between the Registry Acts of the two provinces. Even a summary comparison identifies the greater difficulties in searching a title in New Brunswick than exist in Ontario,²⁵ since lawyers in this smaller province face an even more archaic system. One has only to mention such practical changes as the provision for a geographical index,²⁶ the reduction of the required search period to forty years, from the generally recognized period of sixty years, and the shortening and standardizing of common documents for one to see that Ontario has at least been moving forward, even if slowly.²⁷

-
- 24) See for example a modification made in 1836 (s.36), where an "abstract index" was then made an essential part of the system in Ontario; A.T. Hunter, op. cit., no. 18, p. 559.
- 25) For an analysis of a number of problems still hampering conveyancing in Ontario, c.f. M. Neave, Conveyancing Under the Ontario Registry Act: An Analysis of the Priority Provisions and Some Suggestions for Reform, (1977), 55 Can. Bar. Rev., p. 500.
- 26) (1861) 24 Vict., c.41, s.7(b).
- 27) 29 V., c.24 and 29-30 V., c.43. Report of the Land Registration Management Committee (L.R.M.C.), Ontario, An Improved Land Registration System for Ontario, Design Concepts and Recommendations, vol. 2, 1979, p. 8. Emphasis will be placed on the importance of The Investigation of Titles Act of 1929 (19 Geo. V, c.41), in later sections.

In addition to finding practical solutions to commonly occurring problems, Ontario has gone ahead with modest legislative reform in order to offer what seems like useful statutory solutions to problems which, when dealt with by the courts, resulted in great uncertainty. The Certification of Titles Act of 1958,²⁸ and the Boundaries Act of 1959²⁹ are two examples of complementary legislation different from the Registry Act and which deal with difficult problems in a more efficient manner.³⁰

In 1964, Ontario passed legislation and regulations were adopted to remedy the great lack of survey information, something which hampers title searchers everywhere. When one must depend on descriptions that refer only to physical boundaries which have long disappeared³¹ to identify a parcel of land, the task becomes extremely difficult.

28) 6-7 Eliz. II; 1958 S.O., c.9: It may be of interest to note that this "new" act is said to have been inspired by Massachusetts legislation; c.f. T.G. Feeney, op. cit. no. 3, p. 22.

29) 7-8 Eliz. II; 1959, S.O., c.8.

30) These will be discussed in relation to New Brunswick in Chapter IV of this paper. Other examples of statutory changes which occurred in Ontario are: provisions for a fire-proof vault (14-15 Eliz. II; 1966 S.O., c.136); provisions for giving full effect to discharges of mortgages registered for ten years or more; and, discharges of lis pendens and mechanics liens, registered for a period of two or more years (1970, S.O., c.409; 1980 R.S.O., c.445, s.62(1) and (2)).

31) 12-13 Eliz. 1964, c.90 (Planning Act) and 1964 S.O., c.102, (amendments to the Registry Act, s.22 and 23).

Today, the Registry System in Ontario seems much more adequate than that which is still in use in New Brunswick. For example, lawyers in Ontario can have an abstract prepared by a registrar if they wish.³² They know that the indices will be in "good repair" because this is provided for in the Registry Act³³ and they can consult abstract indices if the old alphabetical ones prove too complicated.³⁴ Furthermore, they can rely on a forty-year search period, something which is also provided for.³⁵ In other words, their system may be far from perfect, but it has not remained static and fairly regular efforts have been made to modify the system and make it more efficient.

Unfortunately, very little influence of these changes have reached New Brunswick or the Maritimes generally, where the Registry Acts seem almost suspended in time since Confederation. In New Brunswick, except for abolishing the necessity of registering a deed in 1902 in order to affect a transfer, the Registry Act has been the object of no major renovations.³⁶ The result is that our present

32) Registry Act, R.S.O. 1980, c.445, s.15.

33) Id., s.19.

34) Id., s.20.

35) Id., s.111.

36) This is established by a perusal of the following Registry Acts found in the Revised Statutes, together with the amendments adopted in between: a) Geo. III, c.3 (1812); b) R.S.N.B., 1854, c.112; c) Consolidated Statutes of N.B., 1877, c.74; d) 57 Vict. 1894, c.20; e) 58 Vict. 1895, c.23 (amendments); f) 5-9 Vict. 1896, c.37 (amendment); g) 62 Vict. 1899, c.30 (amendment); h) R.S.N.B. 1902, c.151; i) R.S.N.B. 1927, c.167; j) R.S.N.B. 1952, c.195; k) R.S.N.B. 1973, c.R-6.

Registry Act³⁷ has much the same form and content as the Act of 1902. Another consequence of our lack of progress is that our Registry Act has, in certain areas, little in common with today's Ontario Act³⁸ even if the basic principles are similar.³⁹ This in turn takes on more importance as we now look at the system from the New Brunswick lawyer's point of view in the larger Canadian context.

C) "MODERN" REGISTRATION SYSTEMS

In addition to the many changes made to the Registry System in Ontario, that province has also adopted legislation for the whole province accepting what might be called the "modern" system of recording title. The Land Titles Act⁴⁰ of Ontario is founded on the principles of Australia's Torrens System⁴¹ and is now used almost exclusively in most of Northern Ontario.⁴²

37) R.S.N.B. 1973, c.R-6.

38) R.S.O. 1980, c.409.

39) Both systems recognize priority of registration in the absence of notice; c.f. C.W. Johnson, Purpose and Scope of Recording Statutes (1962), 47 Iowa L.R., pp. 231 and 232.

40) R.S.O. 1980, c.230.

41) For the history of this system, see S.R. Simpson, op. cit., no. 1. The author notes that England had contemplated such a system as early as 1830, (p. 40).

42) P.H.G. Walker, Real Estate and Landlord and Tenant, Law Society of Upper Canada Bar Admission Course Materials, Toronto, Carswell Legal Publications, 1984, p. 1.

Unfortunately, however, for its proponents, this new system has not taken over very quickly in Southern Ontario.

Although the first Land Titles Act was adopted in that province in 1885,⁴³ it seems today that more than half of the parcels of land in Southern Ontario are still recorded under the Registry System.⁴⁴

The Torrens system does introduce a much greater certainty in dealing with land. This has been recognized without much hesitation in Western Canada, where it is being used exclusively in Alberta, British Columbia and Saskatchewan.⁴⁵

Without giving a detailed analysis of the Land Titles System of Ontario, we can consider it briefly. It is important to note, for example, that this system has many theoretical advantages, perhaps the most important of which is the "more comprehensive basis of compensations" it contains.⁴⁶ Theoretically, at least, title is guaranteed to the purchaser,

43) S. Smith, Registration of Titles in Ontario and the Prairie Provinces; A Few of the Salient Points of Difference (1965), 30 Sask. B.R., p. 275.

44) Land Registration Management Committee's Report, op. cit., no. 27, p. 5.

45) Land Titles Act, R.S.A. 1980, c.L-5; R.S.B.C. 1979, c.219; R.S.S. 1978, c.L-5. Manitoba has left both systems in operation, The Real Property Act, R.S.M. 1970, c.R-30 and The Registry Act, R.S.M. 1970, c.R-50.

46) Ministry of Consumer and Commercial Relations, Ontario, An Improved Land Registration System for Ontario, vol. I, 1979, p. 32.

and should anyone suffer a loss as a result of the guarantee, that person is compensated from a fund provided for that purpose out of the collection of fees from the operation of the system as a whole. However, even in a Torrens system, one must not conclude that conveyancing is a routine matter and that because of the guaranteed title and the compensation fund that no problems of disputed title or lawyer's liability ever arise.

This is not so, the system does not eliminate the disputed title and consequently the possible responsibility of the lawyer in case of negligence.⁴⁷ It is practically impossible for any registration system to give an unconditional guarantee of title,⁴⁸ therefore, it seems there are always exceptions which must be recognized. The certainty and efficacy of a land titles system is proportionally and relatively dependent on the number of these admitted exceptions or "overriding interests" as they are called in England:

overriding interests are a blemish on the principle that the register should be complete, and they should be kept to a minimum. Though some ... are inevitable in any system, others are debatable.⁴⁹

But perhaps the most surprising source of uncertainty which remains in many jurisdictions which have adopted the Torrens system is the interpretation given to the relevant

47) V.T. Di Casti, The Real Property Statutes, (1978), 36 The Advocate, 405-423.

48) S.R. Simpson, op. cit., no. 1, p. 18.

49) Id., p. 19.

statutes by the courts. This is particularly true concerning the doctrine of notice.⁵⁰ The courts seem extremely reluctant to give up common law principles, unless the statutes purporting to deal with these concepts are extremely clear.⁵¹ Ontario seems to be particularly susceptible to this "traditional approach", although other jurisdictions are not without examples of the same problem.⁵²

However, the difficulties which continue to thrive in the different land titles systems are by no means limited to ones relating to the doctrine of notice. As some authors have concluded, notice is but one illustration of the difficulties inherent in the task of finding the perfect system:

Probably of more importance is the fact that quite apart from the effect of the doctrine of notice, it is readily apparent that the register is by no means everything. As a conclusive and exclusive record and guarantee of title it suffers both from anomalies within its own confines and from the enactment from time to time of inconsistent statutes.

50) D.C. Jackson, Security of Title, (1978), 94 L.Q.R., 239-254.

51) For example, see the majority decision in United Trust v. Dominion Stores et al. [1977] 2 S.C.R. 915.

52) The Western provinces are said to have adopted a "purser" Torrens system, providing for a more certain guarantee of title, and following more closely the basic principles commonly called the "mirror" principle and the "curtain" principle. However, certain decisions have still brought up the problem of notice, sometimes disguised as a question of "good faith"; Midland Bank Trust Co. Ltd v. Green [1979] 3 W.L.R. 167. See also Commentary by R.J. Smith, Land Charges and Actual Notice: Justice More or Less Fanciful? (1980) 96 L.Q.R., pp. 8-10, and by the same author: The Priority of Competing Minor Interests in Registered Land, (1977) 93 L.Q.R. 541-560; where the same problem is discussed but in relation to the English system.

[...] ... because the ideal is already unattainable, it does no great harm to allow the doctrine of notice albeit in a modified form, to further detract from security of title in the interests of morality and fairness.⁵³

In New Brunswick, a Land Titles Act has been adopted since 1981,⁵⁴ however, it has yet to be put into operation. Although the spirit of the New Brunswick Act seems to follow more closely the basic principles of a "pure" Torrens system,⁵⁵ until it is put into force, one cannot predict its purity. However, considering all the difficulties encountered in implementing such a system in other jurisdictions with an existing and workable registration system, one must seriously question whether the Land Titles Act can resolve the various problems encountered by lawyers in New Brunswick under the existing Registry System.

Furthermore, even if the Torrens system is theoretically viewed as the perfect solution, one can only wonder about the practical aspect of actually putting the system to work in a province such as New Brunswick. At least one question which

53) G.J. Davies, Equity, Notice and Fraud in the Torrens System, (1972) 10 Alta L.R., p. 122.

54) 1981, S.N.B., c.L-1.1.

55) For example, the New Brunswick Act contains a more elaborate section abolishing notice.

arises is the financial aspect.⁵⁶ If Ontario finds it financially burdensome to have two systems, neither of which is considered perfect, one can only wonder how the more limited budget of New Brunswick can suffice?⁵⁷

There are many more unanswered questions concerning the Torrens system, some of which will be seen in the last chapter where different possible reforms will be evaluated, proposed or rejected. Suffice it to say here that the problems we propose to discuss in this paper in relation to the legal profession are problems found within the Registry System, which is the only recording scheme in operation in New Brunswick today. A step by step comparison of the different systems and their many variations would constitute a major task in itself and has already been done.⁵⁸

56) Although it has been said that "cheapness is relative and can be assessed only comparatively", it is a factor to be considered, particularly in a small jurisdiction. R.S. Simpson, op. cit., no. 1, p. 17.

57) Perhaps a financial study has been made of the cost factor of implementing the Torrens system in New Brunswick; however, the author could not find any. It may be of some significance that a pilot project concerning Albert County has been put off since January 1983. It is a well known fact that the provincial government has embarked on a restraint program, and the moment seems ill-advised to begin a new and seemingly expensive program which in fact seems relevant to a relatively small part of the population.

58) Risk, R.C., The Records of Title to Land - A Plea for Reform, (1971) 21 U. of T.L.J., p. 465. See also Magwood M., The Systems of Land Registration and Guarantee of Title in the Province of Ontario, (1959-60) 13 U. of T.L.J., p. 93.

D) The Legal Profession

1. Its History

Like the principles of real property law, the foundation of the legal profession came after the Norman Conquest in England, principally after the thirteenth century.⁵⁹ Court proceedings were no doubt the principal factor in the creation of the profession. Barristers or advocates emerged first as good "narrators" who could be hired to tell the client's side of the story before the court.⁶⁰

Real property owners did much to encourage the development of experts in real property law who soon appeared in the profession at the Bar.

The attorney was a great convenience to wealthy land owners who were constantly involved in litigation and found it troublesome to appear personally, as also to ecclesiastical bodies and others, but law was becoming so complicated that the public needed further assistance of a different kind.⁶¹

It was not long before these landowners realized that these lawyers could be used to find methods of conveying their lands, or devising family settlements, when the owner desired to keep the land in his family.

59) Mark M. Orkin, Legal Ethics - A Study of Professional Conduct, Cartwright & Sons Ltd, Toronto, 1957, p. 4.

60) I.T.T. Plucknett, op. cit., no. 8, p. 216.

61) Ibid.

The important public aspect of the profession, as well as the private aspect was recognized and it was realized that measures had to be taken to preserve the integrity of this highly important profession. These measures were twofold, they gave a monopoly to the individuals who were "educated" to the law, and they prevented any impostors from taking on any task described as the practice of law.⁶²

By the end of the thirteenth century, certain regulations were imposed upon the members of the legal profession which was being divided into branches. Because of the more public aspect of litigation, the history of the barristers seems easier to follow historically. However, it is quite clear that conveyancers, or scriveners, as they were called, later became part of the profession of solicitors which came into its own by the eighteenth century, and was considered to be on an equal footing with barristers at that time and during the nineteenth century.⁶³ These two branches of the legal profession grew to become the most important ones, and came to encompass the whole profession. This division is still recognized in England today.

62) By the Writ of 1292 (Rot. Parl. i.84), c.f. Plucknett, op. cit., no. 8, p. 218. The tasks included any "practice of law for reward".

63) Id., p. 226.

Throughout its development, the legal profession grew under the ever watchful eyes of the courts in England. The solicitors were subject to direct supervision by the courts,⁶⁴ while the barristers were under the control of the Inns of Court.⁶⁵ Yet, both branches of the legal profession were guided by similar standards of conduct. These rules of conduct could be enforced against a solicitor by a court striking him from the roll of solicitors,⁶⁶ or in the case of a barrister by disbarment from his particular Inn.⁶⁷

For many reasons, the legal profession has traditionally governed itself without many official "rules". The situation has been the same in the colonies as it was in England. In the United States, for example, a formal code of professional ethics was introduced as early as 1887, but was approved by the American Bar Association only in 1908.⁶⁸ In Canada, a similar code was adopted in 1920.⁶⁹

A principle which is steadfastly reinforced by the courts as well as by legislation, is the "monopoly" of lawyers

64) This was provided by legislation, 1605; 3 Fac. 1, c.7, See Orkin, op. cit., no. 59, p. 8.

65) Id., p. 7.

66) Id., p. 9.

67) Id., p. 7.

68) Ibid.

69) Ibid.

in legal practice.⁷⁰ This basic rule is of course still recognized by the proper statutes today in all of our provinces.⁷¹ It naturally includes conveyancing practice, which is judged to be a lawyer's right and responsibility solely.⁷²

2. Legislation Governing the Profession

In New Brunswick, the legal profession was legally incorporated in 1846.⁷³ Today, the legislation governing the Barristers Society,⁷⁴ while perhaps being more complete, still follows the same traditional principles established a long time ago.

70) For examples, R. v. James [1946] O.W.N. 340; R. v. V. Ballet [1967] 1 O.R. 696.

71) The statutes are as follows: The Barristers' Society Act, R.S.N.B. 1973, c.80, s.15; The Law Society Act, R.S. Nfld 1970, c.51; The Legal Profession Act, R.S. Sask. 1965, c.301, s.5; Barristers and Solicitors Act, R.S.N.S. 1967, c.18, s.4; Law Society Act, R.S. Man. 1970, c.L-100, s.48; The Legal Profession Act, R.S. Alta 1970, c.203, s.92; The Law Society and Legal Profession Act, R.S.P.E.I. 1974, c.L-9, ss. 19 to 21; Legal Profession Act, R.S.B.C. 1960, c.214, ss. 1, 72, 76; Legal Profession Ordinance, R.O.N.W.T. 1974, c.L-3, ss. 11-12. In Ontario, see The Solicitors Act, R.S.O. 1970, c.441, s.1 and The Law Society Act, R.S.O. 1970, c.238, s.50.

72) R. ex. rel. Smith v. Mitchell [1952] O.R. 896; the question of competence was not relevant.

73) S.N.B., 1846, c.48.

74) S.N.B., 1982, c.80.

The basic principles of self regulation and self-government are still recognized:

s. 41(1) ... the Council may make Regulations for the government of the Society, the administration of its affairs and all matters connected therewith, including but without limiting the generality of the foregoing;

... provisions with respect to ethics and standards of professional conduct, including the adoption and amendment of a code of ethics and the designation of conduct or types of conduct which are considered unbecoming a barrister or solicitor.⁷⁵

The Society is also given the power of self-discipline and for this purpose a "Professional Conduct Committee" is created to investigate complaints of "professional misconduct".⁷⁶

However, the powers given are not limited to remedial measures; preventive programs, in the form of practical training and legal education are included in the obligations which are attributed to the New Brunswick Law Foundation established under the Act.

75) Barristers' Society Act, S.N.B. 1973, c.80, s. 41.

76) Id., s. 16.

s. 44(1) The objects of the Foundation are

a) to receive moneys and property and to maintain and manage funds, the interest and capital of which are to be used from time to time as the Board sees fit for

- i) legal aid
- ii) legal research
- iii) legal education
- iv) law reform ...⁷⁷

The Society has chosen to adopt The Code of Professional Conduct promulgated in 1974 by the Canadian Bar Association as a basic code of ethics.⁷⁸ However, it has exercised its power of regulation by also producing a supplementary handbook,⁷⁹ containing rules which are qualified as "complementary", but which seem however as general as the Canadian Bar Association Code.

In Ontario, legislation was adopted very early, not only to incorporate the legal profession, but to provide some basis for its regulation.⁸⁰ Today, two statutes are the most

77) Id., s. 44.

78) Id., s. 61. The Canadian Bar Association Code was approved by the Canadian Bar Association on the 24th August, 1974.

79) Id.; The Professional Conduct Handbook was adopted by the New Brunswick Society in 1971. These codes of ethics will be discussed further on in this section.

80) An Act for Better Regulating the Practice of the Law, Stat. Upper Canada, 1797, c.13; see also 1843, 6 & 7 Vict., c.73.

relevant to the practice of law; first, The Law Society Act,⁸¹ deals principally with the admission and the regulation of practice in general; secondly, The Solicitors Act,⁸² which deals more specifically with costs, and agreements between solicitor and client.⁸³

As in New Brunswick, the principle of self-regulation and self-discipline seems well recognized in Ontario. However, the legislation is wider in Ontario providing, for example, a restriction on limiting responsibility in a solicitor-client agreement.⁸⁴

In both provinces, statutes provide very general definitions of what should be considered a breach of the necessary standard of conduct demanded of a lawyer. However, there are no specific provisions as to just what qualifications a competent lawyer should possess, and certainly nothing pointing directly to a competent professional conduct in relation to conveyancing. One must then turn to the accepted "codes" to see if the profession has imposed on itself any necessary guidelines as to what "competence" should be deemed to include generally, and then more specifically with regard⁷ to real estate practice.

81) R.S.O., 1970, c.238.

82) R.S.O. 1970; c.441.

83) S.O. 1970, c.20 (amendment). See Report on the Solicitors Act, Ontario Law Reform, Ministry of the Attorney General 1973.

84) Ibid.

3. The Ethical Guidelines

As we have seen, a solicitor in New Brunswick can turn to certain sources for guidelines; namely, the relevant statute, which we have reviewed briefly, the Canadian Bar Association Code of Professional Conduct, and the Professional Handbook, approved by the provincial Barristers' Society. Both the Code and the Handbook follow generally recognized basic principles. Because of the diversity of practice in this small province, these guidelines do not prescribe what the lawyer's conduct should be in each particular circumstance but aim, rather, to regulate practice in general and are designed to be flexible, allowing adaptable bounds within which one can act largely according to his own judgment of what constitutes being beyond reproach in the particular circumstances.

In this section of this paper, we will first examine briefly each of the basic principles which are accepted as undisputed and we shall later attempt to evaluate the application of these to real estate practice.

Two basic principles have always been viewed as essential qualities for any individual who hopes to become a member of the legal profession; they are integrity and competence. Integrity is the basic element of the different "codes" laid down as guidelines for the practising lawyer:

Integrity is the fundamental quality,
whose absence vitiates all others.⁸⁵

85) Op. cit., no. 78, p. 2, note 2.

As for competence, it is subdivided into two parts in the Code of Professional Conduct and is expressed as follows:

(a) The lawyer owes a duty to his client to be competent to perform the legal services which the lawyer undertakes on his behalf.

(b) The lawyer should serve his client in a conscientious, diligent and efficient manner and he should provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.⁸⁶

The second part of this rule regarding competence has been used by courts to test the standard of conduct required of a solicitor in some negligence cases.⁸⁷ However, the rule in itself is not given with ~~any objective of~~ providing a precise standard but rather only as a guideline to be considered by every lawyer when he takes on a legal job. In other words, the rule itself, as well as the commentaries on it are so broad as almost to seem intentionally vague. While the authors want competence to

(go) beyond formal qualification of the lawyer to practice law⁸⁸

they go on to say:

it will be noted that the Rule does not provide a standard of perfection.⁸⁹

⁸⁶) Id., p. 4.

⁸⁷) For example, see Aaroe & Aaroe v. Seymour (1957) 6 D.L.R. (2d) 100.

⁸⁸) Canadian Bar Association Code, op. cit., no. 78, p. 5.

⁸⁹) Ibid.

Negligence is distinguished from incompetence, and so far as disciplinary action is concerned, may well go unpunished, unless it amounts to gross negligence:

A mistake even though it might be actionable for damages in negligence would not necessarily constitute a failure to maintain the standard set by the Rule, but evidence of gross neglect in a particular matter or a pattern of neglect or mistake in different matters may be evidence of such a failure regardless of tort liability. In the result, where both negligence and incompetence are established damages may be awarded for the former and the latter can give rise to the additional sanction of disciplinary action.⁹⁰

The practical consequence of this commentary on this important canon of ethics is to make only "incompetence" susceptible to disciplinary action. Simple negligence must be judged by the courts. The emphasis is placed on the effect of one lawyer's action (or inaction) in relation to the reputation of the profession in general. This may be justifiable, since the Canadian Bar Association Code is written with the main object of protecting the profession and its reputation. But one of the objectives of the Code is also the protection of the public and of any individual dealing with a member of the legal profession.⁹¹

90) Id., p. 6. That negligence gives a right to damages in a case involving professional negligence by a solicitor is less certain than this paragraph supposes; see cases referred to in Chapter III.

91) Their views of this canon were endorsed by Mr. Paul LeBreton, Secretary, New Brunswick Barristers' Society; in conversation on April 22nd, 1983. C.f. also a published memo to the members of the Society dated December 1982, in which it is stated that sixty-six per cent (66%) of problems dealt with by the disciplinary committee concern conveyancing problems.

One can only wonder about the overall effect on the reputation of the profession when some lawyers consistently make "mistakes" (albeit not considered gross negligence) in a real estate transaction, a matter which must in the public's view appear relatively simple.

It is hoped to be able to show that the profession would do well to provide itself with a much more definite standard of conduct, and should perhaps determine the degree of competence required according to the degree of difficulty characteristic of the various areas of law. Mistakes caused, not from lack of a particular skill, but from not taking the necessary time, or, exceptionally simple laziness, should be reprimanded, whether such lack of diligence be qualified as negligence or misconduct. For example, it is difficult to believe lawyers do not have the skill to do a correct title search; yet, more than half of the problems brought before the disciplinary committee in this province are related to conveyancing.

Of course, it must be conceded that most lawyers have a very diversified practice, and their tasks are certainly not limited to conveyancing. Therefore, many of the rules, or guidelines applicable to practice must actually reflect this reality, and indeed they do. Some guidelines refer to various

legal tasks from giving expert opinions, to the different phases of litigation... For example, the Canadian Bar Association Code has a chapter on "advising clients", on keeping confidential information, on the preservation of clients' property (documents, records, etc...), on advocacy, and on fees...

However, the Code still seems permeated by an approach which seems to favour isolated aspects over a more balanced view of general practice. While efforts have been made by the commentators to reflect a mandate to consider the more general questions of professional standards and obligations,⁹² their final comments do not usually reflect the wider perspective of general practice, but seem to focus principally on problems originating in the conduct of litigation.

True, litigation can be a source of many difficult situations concerning a lawyer's duties to his client and to the court. However, we think it unfortunate that more particular attention has not been paid to conveyancing and its many different aspects. Surely, real estate is as common in a lawyer's practice as the holding of public office, a subject which receives some attention in the Code.⁹³ In fact, in a province like New Brunswick, real estate forms a large part

92) Canadian Bar Association Special Committee on Legal Ethics, Preliminary Report Code of Professional Conduct, 1973.

93) One finds in the Canadian Bar Association Code, op. cit., no. 78, a chapter entitled "The Lawyer in Public Office", at p. 36.

of a lawyer's practice in most law offices, since it is a recognized fact that it is difficult to specialize in lesser-known fields when client population is relatively small.

However, a perusal of the Canadian Bar Association Code yields no important findings as to rules, or guidelines which could be applicable specifically to real estate practice, or in particular, conveyancing. One must determine what conduct is tolerated and which is not by reading between the lines, by analogy or by applying indirect allusions to conveyancing practice.

For example, although one would think that the cardinal rule of integrity is especially important in conveyancing, one finds only an indirect reference to it in the Canadian Bar Association Code by way of an illustration of a breach of the Rule:

3(1) failing, when dealing with a person not legally represented, to disclose material facts, e.g., the existence of a mortgage on a property being sold, or by supplying false information, whether he is professionally representing a client or is concerned personally.⁹⁴

Again, when the Canadian Bar Association Code discusses the principle of competence, which is so essential to any lawyer purporting to certify a title for a client, one finds no specific

94) Canadian Bar Association Code, op. cit., no. 78, p. 2.

mention of real estate practice, unless one of several examples of breaches of that principle could be said to be applicable because of its allusion to documents:

slipshod work, such as mistakes or omissions in statements or documents prepared on behalf of the client...⁹⁵

When searching for guidelines in the practice of conveyancing, one invariably comes up with rules on "impartiality and conflict of interest". The Canadian Bar Association Code devotes a whole chapter to the subject and it is dealt with quite exhaustively in the other sources of the rules of conduct. This appears to be one principle on which there is consensus. No lawyer should represent both parties in a real estate transaction. This is understandable as such a situation can give rise to innumerable difficulties, some predictable, some not, depending on the particular circumstances.⁹⁶ Despite this consensus the practice has not been completely condemned. However, the Canadian Bar Association does seem to view it negatively.

95) Canadian Bar Association Code, op. cit., no. 78, p. 5. One example of an "omission" in a document which resulted in a case going all the way to the Supreme Court can be found in Hashman v. Anjulip Farms Ltd [1973] S.C.R. 268, where a restrictive covenant (applicable to the whole parcel of land transferred) was omitted from the deed.

96) Some examples are found in the Canadian Bar Association Code, id., pp. 19 and 20 (footnotes). The practice of acting for two opposing parties in litigation, however, has always been condemned, beginning in England in relation to non-litigious matters. See M.M. Orkin, op. cit., no. 59, p. 100. ✓

(8) In such a case, when the lawyer is asked to act, he must, before accepting the employment, disclose and explain the nature of his conflicting interest to the client, or in the case of a potential conflict, how and why it might develop later. If the lawyer does not choose to make such disclosure or cannot do so without breaching a confidence, he must decline the employment. If, following such disclosure, the client requests him to act, he should obtain the client's written consent or record such consent in a letter to the client. However, the client's decision that he wants the lawyer to act in such circumstances should not be accepted uncritically by the lawyer. He should bear in mind that, if he accepts the employment, his first duty will be to his client, and if he has any misgivings about his ability to place his client's interests first, he should decline the employment.⁹⁷

In addition, it is important to note that the Canadian Bar Association Code attributes to the lawyer the additional burden:

of showing good faith and that adequate disclosure was made in the matter and the client's consent obtained.⁹⁸

It seems fair to conclude that although not barred altogether, the practice of representing both parties in conveyancing can be said to be looked upon critically by the Canadian Bar Association.

97) Canadian Bar Association Code, id., p. 18.

98) Canadian Bar Association Code, id., p. 19, note 13. Lack of proper disclosure is viewed even more strictly in cases where the lawyer himself has a personal interest in a property: c.f. Cornell v. Jaeger (1968) 63 W.W.R. 747, quoted in the Code, ibid.

In adopting the Canadian Bar Association Code, the New Brunswick Society has also espoused these same principles.⁹⁹ Furthermore, it is relevant to observe that the complementary rules contained in a Handbook also mention specifically the practice of acting for two different parties. There the practice is condemned in any "non-contentious matters such as the purchase and sale of property."¹⁰⁰ However, it is also provided that the practice will be exceptionally permitted if written consent is given by both sides. By making the written consent an essential element, the New Brunswick Society may be said to take an even stricter view of the practice of acting for two parties in the same transaction than the Canadian Bar Association Code. It should be carefully noted that the Handbook allows the practice with written consent only in an "arms-length" transaction and the consent referred to must be in a prescribed form, as the Handbook speaks of:

forms of consent to be used by members acting for both the vendor and purchaser in an arms-length real estate transaction.¹⁰¹

99) The Barristers' Society Act, S.N.B., 1973, s. 3.

100) Professional Conduct Handbook, approved by the Barristers' Society of New Brunswick pursuant to the Barristers' Society Act, op. cit., no. 99, s. 3 (Resolution 61) see number 9 of Part C.

101) Ibid. One should note reference to "arms-length... transaction". It seems that a transaction between members of a family is not considered a situation where the lawyer should even consider acting for the two parties, notwithstanding consent. C.f. also Powell v. Powell [1900] 1 Ch. 243, referred to by M.M. Orkin, op. cit., no. 59, p. 104.

As with the Canadian Bar Association Code, any real estate transaction between a lawyer and his client definitely calls for independent legal advice for the client:

Lawyers should avoid purchases of property or other similar transactions with a client. The lawyer must insist that the client obtain independent advice where the lawyer enters into a transaction with his client.¹⁰²

Therefore, the practice is frowned upon by every authority; yet, surprisingly it still goes on, at least to a certain degree... In fact, the prescribed consent form may even act as an incentive to ignore the rule. Because of the consent exception, a solicitor may feel protected and may conclude that acting for two parties is condoned with consent in any circumstances. Clearly this conclusion is wrong; the form of consent has been prescribed for use only in exceptional circumstances. As was pointed out previously, generally the practice is condemned. Moreover, to get a signed consent form from the parties may not sufficiently protect the lawyer even when the transaction is at arm's length; much depends on the way it is acquired by the lawyer. For example, if it is said to be only a "formality", a party may not realize all the implications in which case the signed consent would be worthless. Again, despite explanations, one of the parties may lack the sophistication necessary to comprehend all that is involved.

¹⁰²⁾ Professional Conduct Handbook, op. cit., no. 100, number 3, Part E, p. 21.

On this point, solicitors should remember one more implication of the requirement which may be sometimes forgotten. The practice should be exceptional and it is the lawyer who must prove his good faith. He cannot do this unless he has explained the consequences very clearly to both parties,

nor will he be excused by pleading that if he does not act somebody else will.¹⁰³

These are the only guidelines found in the Canadian Bar Association Code which could be considered more commonly applicable to conveyancing. Also, they are found only by a careful reading of the Code, as they are not prominently displayed. In some examples given we find that a lawyer cannot act as solicitor and concurrently as a real estate agent;¹⁰⁴ that is, he may not collect a solicitor's fee plus a commission for the sale of the same parcel of land.¹⁰⁵ Also, financial arrangements in relation to sharing a commission between a lawyer and a real estate agent are barred.¹⁰⁶

Finally, the Canadian Bar Association Code touches upon what might be known as business efficacy under the heading

103) Ludwig (1902) 29, C.L. Times 253, quoted by M.M. Orkin, op. cit., no. 59, p. 102.

104) Canadian Bar Association Code, op. cit., no. 78, p. 42, number 7.

105) This is found in a different section of the Canadian Bar Association Code, op. cit., no. 78, p. 23.

106) Id., p. 42, note 7.

"Responsibility to lawyers individually".¹⁰⁷ Although, once again, conveyancing problems are not specifically referred to, most guidelines contained in this chapter concern situations which commonly exist in real estate practice, for example, communications between the solicitors of both parties:

5. The lawyer should answer with reasonable promptness all professional letters and communications from other lawyers which require an answer and he should be punctual in fulfilling all commitments.¹⁰⁸

When one thinks of the importance of following the time limits provided for in agreements of sale concerning objections, for example, the relevance of this rule seems quite clear.

Another element commonly found in transactions are undertakings given to another solicitor. This is a routine practice; however, the Canadian Bar Association Code warns of many possible problems arising from this practice.

6. The lawyer should give no undertaking he cannot fulfill and he should fulfill every undertaking he gives. Undertakings should be written or confirmed in writing and they should be absolutely unambiguous in their terms. If the lawyer giving an undertaking does not intend to accept personal responsibility, he should state this quite clearly in the undertaking itself. In the absence of such a

107) Id., chapter XVI, p. 61.

108) Id., p. 62.

statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally.¹⁰⁹

Such undertakings should be given very carefully and only exceptionally:

A breach of an undertaking given to the Barristers' Society of New Brunswick or to fellow counsel constitutes professional misconduct.¹¹⁰

The practice may have important consequences, and sometimes is necessary for the sake of efficiency. More precise rules may have to be provided for, especially in relation to a real estate transaction. This could be done by amending the existing Code in order to make it more exhaustive, at least on this important question.

As we have attempted to show throughout this section, there are few rules defining precisely what conduct will be considered ethically acceptable in conveyancing. Guidelines contained in professional codes such as the one published by the Canadian Bar Association, as well as those given by the various Barristers' Societies are intentionally written in a

109) Id., The manual notes however, that the Ontario Bar will take the undertaking to be a personal one, notwithstanding the words "on behalf of my client" unless the circumstances are exceptional, at p. 63, note 7.

110) New Brunswick's Professional Conduct Handbook, op. cit., no. 100, p. 18. See also Knox v. Gregory, (1881) 21 N.B.R. 196.

general, almost vague style. They follow certain basic general principles which are felt to be adaptable not only to the profession in general, but also to any of the widely-differing groups practising law in the various regions of the country. The lack of precision and paucity of detail seem intentional in order to make these codes or canons of ethics more palatable to the many different individuals who practice all the divergent aspects of law.

However, in view of the inordinate number of disciplinary problems reported in relation to conveyancing, one cannot help but wonder if the governing bodies of the different bar associations should not question this generality and think about approaching directly at least certain problematical areas recognized as commonly giving rise to ethical questions in real estate practice and conveyancing. As shall be seen later, a procedural guide may be difficult to compose if one guide must cover the whole of the practising profession in Canada; however, it should be easier for the different groups of practitioners in a province to meet and reach a certain consensus on certain guidelines which could reflect the acceptable general norm in a certain area of practice.¹¹¹ This should be quite possible with relation to real estate practice and conveyancing. At any rate, we submit that the existing

111) Perhaps the concept of one code for everybody should be abandoned in favor of more specialized manuals.

codes, statutes and regulations are much too general and are actually inadequate in relation to specific ethical questions that arise in the whole real estate field.

E) Conclusion

In this chapter, we have attempted to show the basic difficulties which confront the lawyer who practices in a province in which the Registry System is still functioning, at least as the main, if not the sole system, as in New Brunswick. Traditionally, parting with land has been difficult business in common law and has always been considered as requiring special procedures; and, few jurisdictions have preserved more of the strict traditional concepts of real property law than ours in New Brunswick. The Registry System which should have made conveyancing an easier and more certain task has become outdated and itself the source of many problems. Finally, lawyers in the conduct of their practice concerning land must rely on general guidelines that provide very little guidance especially as to the complex task in every transaction involving the transfer of land.

Practices which seemingly should be simply condemned are tolerated. For example, one can seriously question ever allowing the situation where one lawyer acts for both parties in a sale of land, but this continues to go on. As a result, the novice is left without much guidance, the experienced lawyer

is left to rely on his experience and his memory. In fact, most law offices simply have "checklists", which are often those provided student lawyers in their bar admission course. These enumerate the different steps which should be followed in ordinary transactions, and are valuable, but in a limited way. One of the important steps in conveyancing is for the purchaser's lawyer to search and certify the title. It is this rather limited but very important aspect of the lawyer's role which we propose to examine in more detail in chapter II.

CHAPTER TWO - THE VARIOUS DUTIES INVOLVED IN CERTIFYING TITLE
UNDER THE REGISTRY SYSTEM

A) Introduction

Because of the difficulties inherent in the Registry of Deeds System found in New Brunswick, and in the eastern common law provinces generally, including a large part of Ontario, and because of the vagueness and uncertainty of the ethical guidelines available to the individual lawyer, a lawyer will often find himself on shaky ground when asked to verify and certify a title to land.

Being retained to represent a purchaser of real property can have various consequences for the lawyer; though it is interesting work and a good source of income, it can also be a frustrating source of difficulties, both practical and legal. Whether the latter outweighs the former, or vice versa may depend on a variety of factors, including the lawyer's skills, competence and experience, and sometimes pure chance.

In the Ontario Registry System, as well as under our present system in New Brunswick and elsewhere, the solicitor acting for the purchaser must first ascertain for himself, and then advise his client of the marketability of the vendor's

title. Because of the common law and the operation of these registry systems, ownership often depends on the law of priorities. The accepted method of verifying priority and marketability is by drawing up an abstract which in turn reflects a chronological search of the state of title over the years under the vendor's predecessors-in-title. It is this search, and the certifying of the title which account for many, if not most of the opportunities for error, omission, and, occasionally negligence.

In this chapter, we hope to elucidate the various practical and legal duties imposed on the lawyer whose role it is to certify the title. We will also discuss some difficulties, both legal and practical which accompany his necessary visits to the Registry Office. Finally, we will discuss, briefly, the extent of the guarantee found in the certificate given by a lawyer to his client.

B) The Technical Aspect

In searching the title to a parcel of land, it is, of course, obvious that one needs some method of identification of the parcel in question. While this may not be a common problem in Ontario because of geographical indices, the simple task of identifying a parcel from a given description can sometimes seem an impossible task in New Brunswick. Because of our still very primitive method of indexing in this province, lawyers are forced

to read every conveyance made by every predecessor of the owner to verify the chain of title.¹¹²

Another common problem concerning descriptions, and which is also found in Ontario and elsewhere under a Registry System, relates to the imprecise description of the quantity of land to be transferred. While this generally is not considered to affect title,¹¹³ it will probably affect the bargain, at least the price; it usually has grave consequences for the buyer. Thus, the lawyer should at least verify that the description given in the agreement of sale matches the one found in the vendor's deed. In fact, it is strongly suggested that the lawyer go further than this and advise his client to have the property properly surveyed.¹¹⁴

As a practical matter, it is submitted, a solicitor should advise his client of the wisdom of a survey. If the client insists on going forward without retaining a surveyor, then, the responsibilities are obvious.¹¹⁵

112) Because of the fact that one owner may have been the registered owner of many different parcels of land, and because of the very unscientific method of writing descriptions which were widely used, some parcels of land are practically untraceable to the Crown grant.

113) Wilson Lumber v. Simpson (1910), 22 O.R. 592; Re Assessment Equalization Act; Re L. & K., (N. Shore) Ltd (1968), 65 W.W.R. 142.

114) Kolan v. Solicitor [1970] 1 O.R. 41. Certainly he should do so in every case where for any reason his client asks his advice about quantity of land, its description, or the location of a building.

115) Marwood v. Charter Credit Corporation (1971), 2 N.S.R. (2d) 743, 20 D.L.R. (3d) 563; see also V. DiCastrì, Law of Vendor and Purchaser, 2nd ed., Carswell Company Ltd, Toronto, 1976, par. 265.

The chronological search must be done in the Registry Office of the county where the parcel of land is situated. Most of these offices in New Brunswick can only be described as overcrowded, disorganized and dusty places where the order of the volumes of bound documents seems to follow best the laws of some labyrinth.¹¹⁶ Without first knowing the floor plans of these places, one can waste precious time searching the mysterious spots reserved for the registered plans, or again to hunt down a particular missing page which has not been replaced.

In Ontario, reports on the Registry System have yielded strong criticism concerning the "low level of mechanization" and the "considerable autonomy" of each office.¹¹⁷ In New Brunswick, automation, or computerized equipment are totally unknown and, one suspects, still unthinkable for its registry offices.¹¹⁸ Everything seems to be painstakingly done by hand, including indices. Perhaps we should be grateful that these are at least in alphabetical order.¹¹⁹

116) The situation in Ontario has not been described much more favorably. For example, see An Improved Land Registration System for Ontario, vol. 2, Ministry of Consumer and Commercial Relations, Ontario, 1979, pp. 90 and 91.

117) Id., p. 5.

118) This does not apply to the Land Titles System for which preparations are still being done.

119) In indices of years before the 1950's only the last name was written in alphabetical order.

In addition there is but one copy of each precious annual index. Obviously, lost index books, or pages would be difficult to replace,¹²⁰ yet despite this obvious fact, some index books are allowed to remain in pitiful condition in certain offices, some even with their pages loose or partly torn. Because of the fact that some indices are handwritten, and therefore in one unique copy, the serious consequences of a possible loss of these pages certainly requires some action for their preservation. This deplorable state of affairs also greatly augments the potential for illegal alterations and other fraudulent actions.¹²¹

C) The Legal Aspect

The practical difficulties, although frustrating, are the ones which are more easily surmountable. Those which are harder to cure are problems having a legal aspect. Some basic questions are still answered only in a more or less precise manner. For example, why does the buyer have to be assured by his solicitor that the title to the land he is acquiring is a "marketable title", and what does this mean, legally to the client?

In contradistinction to the many reforms made to the law governing the buying and selling of personal property, the

120) See An Improved Land Registration System for Ontario, op. cit., no. 116, p. 5.

121) Ibid.

law relating to real property, especially in New Brunswick, has remained quite static. One of the traditional common law rules which still applies in the case of sale of real property is the old maxim "caveat emptor". Therefore, it is up to the buyer to beware of any problems affecting the property which he is acquiring, as well as the quantity of land he will be receiving, and finally, the doctrine of "caveat emptor" has also been applied to the quality of title which the purchaser seeks to acquire.¹²²

Of course, the buyer can do his own investigating of title if he so chooses presuming he has the proper knowledge and ability. However, the majority of lay people most sensibly prefer to rely on the competence of a lawyer who must be able to locate, read and interpret all the relevant documents which are registered and which could affect the parcel of land which the client expects to acquire.¹²³ No document referring to the particular parcel of land in question can be ignored, due to the very nature of the Registry System itself, which has been described as follows:

The Registry system provides only an historical record of dealings with the land. No attempt is made to rule on the validity of documents and plans that appear to supersede others. As a result, prior documents and plans cannot be ignored. ¹²³

122) V. Dicastri, op. cit., no. 115, par. 270. See also Trust and Loan v. Shaw, 16 Gr. 446 (1869).

123) An Improved Land Registration System for Ontario, op. cit., no. 116, p. 3.

This necessity of examining each and every document is itself very time-consuming and a great source of frustration and has been repeatedly criticized,¹²⁴ yet no complete solution has been found, although partial remedies have been adopted in Ontario.¹²⁵

1. Defining Marketable Title

Of all the concerns of the solicitor acting for the purchaser, his most important task is to verify the quality of the vendor's title:

Any purchaser of real estate, even if he does not intend to purchase the land for investment or speculative purposes, should be able to sell it at his own volition without the handicap of a purchaser calling into question the validity of his title. One of the primary duties of the real estate solicitor is to obtain for his client a marketable title.¹²⁶

A clear title has been defined as one which could be forced upon a buyer;¹²⁷ as one which could give rise to no

124) Id., pp. 31 and 32. See also B.E. Lynch, Smoothing the Route to Registration, (1970), Lect. L.S.U.C. 101-123.

125) See as examples "... the forty-year search limitation period established in Part III of the Registry Act; and the barring of certain claims against land after a discharge has been registered for a given number of years". An Improved Land Registration System for Ontario, op. cit., no. 116, p. 32.

126) Clements et al. v. Wyatt et al. (1979), 9 R.P.R. 1, (pp. 32 and 33).

127) Pyrke v. Waddingham (1852) 68 E.R. 813.

possible action;¹²⁸ and, as one on which there can be cast no reasonable doubt.¹²⁹ Any valid objection can give to the buyer the right to ask for rescission and recovery of his deposit.¹³⁰ While the objecting purchaser need not absolutely prove that the title will necessarily be held invalid, he must raise a serious doubt, and he must show that it would be reasonable to raise the question in litigation. The important moment when the title must be clear is at the date shown for closing;¹³¹ it seems irrelevant, for example, that the land may be subject to a future expropriation.¹³²

Authors generally equate "clear" title to a "marketable title":

The doctrine of marketable title is far from being an obscure legal construct. The average practitioner encounters that doctrine daily:

1. in deciding whether to object to a "defective" title,

128) Logan v. Stein, [1958] O.W.N. 343.

129) Yandle & Sons v. Sutton [1922] (2 Ch.) 199.

130) B. Laskin, Defects of Title and Quality (1960), Lect L.S.U.C., p. 389; Stykolt v. Magnard [1942] 3 D.L.R. 654; V. DiCastrì, op. cit., no. 108, par. 308.

131) Kolan v. Solicitor [1970] 1 O.R. 41, 7 D.L.R. (3d) 481; aff'd [1970] 2 O.R. 686, 11 D.L.R. (3d) 372.

132) Hartt v. Wishard - Langan Co. (1908) 9 W.L.R. 519; 18 Man. R. 376; see V. DiCastrì, op. cit., no. 115, par. 315. However, for an authority who seems to hold a contrary view on the particular question of future expropriation, see B. Laskin, op. cit., no. 130, p. 400.

2. in deciding whether the vendor has made a proper tender upon closing a transaction.

3. in certifying for the purchaser or mortgagee that the title is marketable.¹³³

Of course, it could be said that familiarity with a concept may not by itself equate to knowledge of its true meaning. For example, lawyers have objected, unsuccessfully, to the "marketability" of the title of land which was affected by planning legislation.¹³⁴

It may be possible, in fact, to draw a fine line between a "clear" title, and a "marketable" one, depending on the definition one gives to "marketable". If one takes an example where a vendor subdivides without regard to the planning legislation, such a vendor may be able to transfer a clear title, but it is doubtful that this title even if not invalidated by the legislation¹³⁵ would be considered

133) W.I. Innes, The Doctrine of Marketable Title in Canada, (1976), 25 U.N.B.L.J., p. 97. The author attributes the origin of this doctrine not to American influence but to the English courts of Equity, (p. 98).

134) For examples, see Albert v. Legere (1977) 19 N.B.R. 44; Capital Quality Homes Ltd v. Colwyn (1975), 9 O.R. (2d) 617; 61 D.L.R. (3d) 385. (This case was decided on the frustration of the contract of sale which had not been executed).

135) In New Brunswick, such a deed may be valid, however it cannot be registered; c.f. Registry Act, R.S.N.B. 1973, c.R-6, s. 46. One should note that the situation is radically different in Ontario where failure to respect the provisions of the Planning Act, R.S.O. 1980, c.379, prevents any transfer of interest; c.f. s. 29(18) of the Ontario Act.

of "marketable value" by the buyer.¹³⁶ The distinction may be further explained by the view taken of "encumbrances". While some may see these simply as anything which may in any way affect enjoyment of the fee simple absolute,¹³⁷ authorities usually distinguish between some burdens and those interests in land which affect not only the use of the land but the title itself and confine "encumbrances" to the latter.¹³⁸ This distinction is not clearly understood by the layperson, who generally thinks a good title will give him the right to do as he pleases with the land.

It must, however, be pointed out that a "clear" or marketable title as it is legally understood does not necessarily mean a "perfect" title:

...the showing of a technically perfect record is not necessary to establish good title.

...

The test in title searches is "reasonable doubt". That is, does the alleged defect make title unmerchantable beyond a reasonable doubt?¹³⁹

136) See Albert v. Legere, (1977) 19 N.B.R. 44. No objection to the vendor's title could be made. The buyer had become the rightful owner of a parcel of real estate on which he could not build anything, and of which he could not register the deed...

137) W.I. Innes, op. cit., no. 133, p. 102.

138) V. DiCastrì, op. cit., no. 115, par. 284, quoting Porter v. Ridge (1945) 17 N.W. (2d) 230, 310 Mich. 425.

139) A. De Sha Malone, Title Searches: The Potential for Liabilities (1978) 49 Miss. L.J., p. 692.

While many attempts have been made to define the essence of a marketable title, most authors seem to fall back on a method of listing what must be absent, rather than the qualities which should be present.¹⁴⁰ Distinctions are made between encumbrances, restrictions, charges and liens;¹⁴¹ between matters of conveyance,¹⁴² between "patent" and "latent" defects.¹⁴³

All these notions are ones which entail difficult concepts of real property law. To be properly understood, one must know their historical background and it is often necessary to sift through multiple decisions in order to discover the many variations of meaning which have been recognized by the courts over the centuries.

There is no consensus on whether all burdens should be verified, and if not, much less consensus on which ones should

140) For example, see W.I. Innes, op. cit., no. 133, p. 102; the author suggests a test as follows: "is this title 1) of good source, 2) clear and free of all burdens which could affect the quality of the title?"

141) For a study of the possible meaning of these and similar terms and their French equivalents, see Y. Brunet, Le danger des clauses employées machinalement, (1966), 1 R. J. Themis, p. 303.

142) W.I. Innes, op. cit., no. 133, p. 102; B. Laskin, op. cit., no. 130, p. 390.

143) But Laskin rejects this distinction; id., pp. 391 and 392.

be eliminated.¹⁴⁴ Moreover the burdens, or claims are of different kinds.¹⁴⁵

2. Special Claims to Verify

There are about as many methods of classifying claims as there are types of claims. These have been enumerated and explained in many basic works on the Registry system.¹⁴⁶ We propose therefore only to name the most important and common

144) The solicitor has the difficult task of deciding the extent to which his search will include possible burdens which he cannot verify at the registry office. With regard to these he may be faced with the question, is the land in question worth the price of such a thorough search?

145) Such burdens may originate from the common law, as the dowry, for example, or from ~~statutory~~ provisions. They may in turn be of a financial nature, or tend to limit the use which can be made of the land. In New Brunswick, there are over fifty statutes which can affect, directly or indirectly, a land deal. Their relevance depends on many factors, such the nature of the parcel of land, its location and generally, the use which can be made of the particular lot, whether it be commercial or residential. For a list of relevant statutes which exist in New Brunswick, see C.W. MacIntosh and M.L. Gavin, Overriding Interests to Real Property in New Brunswick, L.R.I.S., 1975.

146) V. DiCastrì, op. cit., no. 115; D. Lamont, Real Estate Conveyancing, Lect. L.S.U.C., Dept. of Continuing Education, Toronto, 1976, Chapters 7, 8, 19 and 20; M. Neave, Conveyancing Under Ontario's Registry Act (1977) 55 Can. Bar. Rev. 501-548. In New Brunswick, a survey of the statutes which contain dispositions capable of affecting either title or the use of land can be found in Overriding Interests to Real Property in New Brunswick, by C.W. MacIntosh and M.L. Gavin, a report prepared for the Land Registration Information Service in 1975. It is unfortunate that it has not been revised since then as it is quickly becoming outdated.

ones here. The situation is similar in Ontario and in New Brunswick in this respect.

A title searcher will generally not fail to obtain the usual certificates relevant to ancillary claims that give or might give rise to a lien against the land. These are meant to exclude possible financial claims by the municipality for property taxes¹⁴⁷ and ordinary services.¹⁴⁸ Other possible financial claims which should be verified as a matter of course include any claims resulting from a court decision which may or may not be registered,¹⁴⁹ ones stemming from unpaid contractors under the Mechanic Liens Act,¹⁵⁰ and ones for unpaid arrears in relation to special taxes imposed for local improvements.¹⁵¹ While searching the title, the lawyer will note any registered liens or judgments, as well as mortgages of course, which may be outstanding against the parcel of land which he is searching.

Other matters not likely to be shown on the registry but which should be verified, especially if one of the parties is a corporation, are claims that might arise from the employment

147) Property Tax Act, R.S.N.B. 1973, c.R-2.

148) Municipalities Act, R.S.N.B. 1973, c.M-22, s. 189.

149) Memorial of Judgment Act, R.S.N.B. 1973, c.M-9, s. 6.

150) R.S.N.B. 1973, c.M-6, s. 9.

151) Municipalities Act, R.S.N.B. 1973, c.M-22, ss. 119 and 120.

of persons,¹⁵² from unpaid sales taxes,¹⁵³ and the solicitor should also check the legal,¹⁵⁴ as well as the financial status of any company.¹⁵⁵

There are other possible unregistered burdens which may affect real estate, even its title, and which are not financial in nature, and which usually but not necessarily originate from statutes. Some of these, such as squatter's rights directly affect title;¹⁵⁶ others, such as easements,¹⁵⁷ create a right in the land. Certain leases of three year terms or less are binding on a purchaser without registration.¹⁵⁸

152) Workmen's Compensation Act, R.S.N.B. 1973, c.W-13, s. 72.

153) Special Services and Education Tax Act, R.S.N.B. 1973, c.S-10.

154) Canada Business Corporations Act, 1974-75-76, c.33, s.1; 1978-79, c.9, s.1; or Corporations Act, R.S.N.B. 1973, c.C-13.

155) For example under Corporate Securities Registration Act, R.S.N.B. 1973, c.25; or The Bankruptcy Act, R.S.C., 1970, c.B-3.

156) Limitation of Actions Act, R.S.N.B. 1973, c.L-8, s. 29.

157) In New Brunswick, see the Easement Act, R.S.N.B. 1973, c.E-1. An easement can be considered to affect the title: Joydon Dev. Ltd v. Hilite H. Ltd (1927) 1 O.R. 482. For the essential characteristics of an easement, see J.F. Garner, The Nature of an Easement (1955), J. of Plan. and Prop. Law, 427-430. Even an unregistered easement may affect the title, Israel v. Leith (1890) 2 O.R. 367. However a registered easement cannot be modified by simple possession; see Doucett v. Comeau (1976) 15 N.B.R. (2d) 432.

158) The Registry Act, R.S.N.B. 1973, c.R-6, s. 19(3). In Ontario leases of a term of seven years or more only need be registered; Registry Act, R.S.O. 1980, c.409, s. 62(2). However, the solicitor should see the leases of any tenant in order to verify the possibility of an option to renew, or an option to buy, which could be contained in a lease.

Also, the statutes relating to matrimonial property may create a right in a spouse affecting the sale of the property, if not an interest in the property itself.¹⁵⁹ The fact that all these burdens are not required to be registered means that the solicitor acting for a purchaser must always make a wider investigation than just searching the registry. He must obtain all the necessary certificates and take certain other precautions against unregistered burdens on the land.¹⁶⁰

Squatter's rights or adverse possession has been mentioned in enumerating the possible claims which can arise against a parcel of land. This doctrine has been the source of much litigation; it is difficult to verify and it has a very dramatic effect. In fact, adverse possession may not only affect title to land, it may eliminate it completely.¹⁶¹

While our purpose is not to provide a complete list of matters to be checked before certifying title the above examples should serve as illustrations to show, not only the tediousness

159) The relatively new Marital Property Act, S.N.B. 1980, c.M-1.1, provides for different kinds of rights for a spouse at s. 18. According to s. 19, both spouses must join in any transaction which involve the family home.

160) With regard to some of these, the matter can often be cleared up by taking an appropriate affidavit from the vendor.

161) In New Brunswick, see The Limitation Act, R.S.N.B., 1973, c.L-8. For a description of what constitutes "adverse possession", see McConoghy v. Denmark (1880), 4 S.C.R. 609.

of title searching, but also its complexity. Many of the burdens which need to be checked necessitate a verification outside the Registry Office, and some although not all, have to be confirmed in writing by the proper authorities. Unless a practitioner follows a very complete and detailed checklist and an extraordinarily efficient method of verification, mistakes and omissions seem inevitable.

D) The Chain of Titles

It is not exaggerating to say that a lawyer, especially an inexperienced one, may have many difficult decisions to make while perusing all the documents pertaining to the title of any single parcel of land, including of course the principal instruments such as deeds and mortgages.¹⁶²

In this matter, the situation under the Registry System in Ontario is not very much different from that found in New Brunswick. In verifying the "source", or root of the vendor's title, it is necessary to start at a precise point, at what is called a "good root of title". This entails two questions: 1) how far back should one search, 2) what constitutes a good root of title.

¹⁶²⁾ The difficulties in establishing a verifiable title seem common to all jurisdictions which have similar systems in operation where the buyer relies on his lawyer to certify his title; see A. De Sha Malone, Title Searches: The Potential for Liability, (1978) 49 Miss. L.J., p. 689.

1. Length of Search

In England, a practice has been established to limit the history of the title to sixty years by contract, or to a point where a good root of title can be found.¹⁶³

Unless we accept that a kind of commercial custom amounting to a custom of the trade from the English practice was adopted in Nova Scotia (and later in New Brunswick), as a colony, then nothing indicates how far back the search here should go, short of going all the way back to the Crown grant; however, some practitioners rely on the English custom to go back no more than sixty years.¹⁶⁴ To some, searching a title to the Crown grant seems unthinkable. Admittedly, it does seem a futile exercise at times. However, without any recognized statutory guideline, it is submitted that logically this is what should be done in New Brunswick.

In Ontario, conveyancers have been a little more fortunate since that province has amended its statutes to limit the necessary search to forty years.¹⁶⁵ This can have a twofold

163) V. DiCastrì, op. cit., no. 115, par. 269.

164) In fact, in England legislation has modified the period several times to forty years, then thirty, and now fifteen years; The Vendor and Purchaser Act 1874, 37 & 38 Vict., c.78, s. 2; The Law of Property Act, 1925, 15 & 16 Geo. 5, c.20, s. 44; The Law of Property Act, 1969, 17 & 18 Eliz. II, c.59, s. 23.

165) These provisions are now part of the Registry Act, R.S.O. 1980, c.409, s. 111.

effect. First, it gives much more security to the conveyancer, and shortens the conscientious lawyer's task a great deal. Second, it also has the effect of strongly motivating every lawyer not to do a title search for less than that period. In other words, the precisely defined period discourages and prevents negligence from hiding behind vagueness.

In New Brunswick, the absence of a statutory provision in the Registry Act regarding the necessary length of search has had another effect; conveyancers have turned to other statutes in the hope of finding guidelines and have followed some periods which are really not applicable, or which do not permit a sufficient protection against ancient claims. The commonest example of a statutory provision which was used by some practitioners in the province is the twenty year limitation period found in the Limitation of Actions Act.¹⁶⁶ However, this practice was refuted in New Brunswick's Court of Appeal in the case of Re Tri-Development Ltd et al.,¹⁶⁷ now quoted as authority for the necessity of doing an extensive search, covering at the very least a period of sixty years in the case of vacant lands.¹⁶⁸

166) R.S.N.B. 1973, c.L-8, s. 9, ss. 29-32.

167) (1978) 23 N.B.R. (2d) 44 A.P.R. 439.

168) J.T. Robertson, Real Property - Conveyancing - Certifying Title to Vacant Lands, (1980), 29 U.N.B.L.J., p. 254. The author suggested legislative intervention. Nothing has yet been done.

In this case, Tri-Development Ltd had purchased vacant land and was making application under the Quieting of Titles Act,¹⁶⁹ which was, until recently, the only procedure in this province which could reassure the owner that his title was clear.¹⁷⁰ However, the company was unsuccessful because of claims of certain heirs-at-law of a woman who had inherited a part of the land in 1904 under a residuary clause in a will. This decision has left the question of the necessary search period as uncertain as it ever was. - Not every practitioner will accept its possible application to anything but vacant lands, and some consider the decision extreme. While it is a fact that the case concerned wild land, the underlying principle of the decision may apply to wider circumstances and the possible consequences should serve to emphasize the importance of determining a precise period once and for all.

The Tri-Development case and the reactions to it also serve to show the degree of uncertainty which still exists today in New Brunswick concerning questions as fundamental as the extent of the search of title. The fact that nothing has been done, even five years after this decision is hardly to our credit. Since no statutory guidelines exist, one can only

169) R.S.N.B. 1973, c.Q-4.

170) New Brunswick has no legislation equivalent to The Certification of Titles Act, R.S.O. 1980, c. 61. The procedure under the Quieting of Titles Act therefore remained in this province, the only one to permit a Court of law to recognize a possessory title, outside of contentious litigation such as an action for trespass. However, the situation has been modified with the adoption of the "new" Rules of Court of New Brunswick; see *infra*, note 386.

conclude that a search should go back to the Crown grant, to be absolutely sure, at least in the case of vacant lands, and quite probably in all cases, unless one can sufficiently prove and demonstrate the reliability as a matter of law of a general practice of limiting one's search to sixty years.¹⁷¹

2. Root of Title

Unless he always begins at the Crown grant, the practitioner must also decide which document will serve as the first, or the "root" of his title search. Later documents than the Crown grant have been accepted for a long time in England:

The concept of the root of title originated centuries ago as the description of that instrument which for any particular reason, title conveyancers came to accept as the starting point of the documentary evidence which a vendor had to produce to satisfy a purchaser that any risk of the vendor not being able to pass the interest in question into the ownership of the purchaser was so negligible as to be safely ignored.¹⁷²

In special circumstances, the common law has developed certain principles as to what kind of documents may serve as a "basis" for a title search. Such a document has been described as follows:

¹⁷¹) This may be possible by showing the existing practice in the province, or perhaps, as some seem to think, by arguing the "reception" of this custom as part of the adopted English Common Law.

¹⁷²) A.M. Prichard, Roots of Title Today (1975) 28 Curr. L. Prob., p. 125.

... an instrument of disposition dealing with or proving on the face of it (without the aid of extrinsic evidence) the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified and showing nothing to cast any doubt on the title of the disposing parties.¹⁷³

Certain deeds, described by statutes, seem to offer a good root of title, or an acceptable starting point despite the fact that they are very recent. The classic example of this is the tax deed.¹⁷⁴ While it has been said that a tax deed may be considered as creating a new root of title,¹⁷⁵ questions concerning the validity of the tax sale, or of the assessment itself could be brought up and even result in litigation later on.¹⁷⁶ Practitioners, therefore, are encouraged to search the chain of titles notwithstanding the tax deed.

-
- 173) Re Lemon and Davies Contract [1919] V.L.R. 481 (483) quoted in T.C. Williams, On Vendor and Purchaser, 4th Ed., London, England, Sweet & Maxwell Ltd, 1936, Vol. 1, p. 124.
- 174) Real Property Tax Act, R.S.N.B. 1973, c.R-2, ss. 13 and 14(1).
- 175) Soper v. Windsor (1914) 32 O.L.R. 352, at p. 360: "the (tax) deed creates a new commencement of title, freed from any... (previous) possession".
- 176) Re Kirton and Frolak [1973] 2 O.R. 185, at p. 187: "... it has been repeatedly held by the Courts that if an assessment is invalid then a tax sale based upon that assessment is also invalid". Furthermore, a tax deed does not destroy all previous claims. This is very clear in the Ontario Municipal Act, R.S.O. 1980, c.302, s. 471, which protects existing easements, restrictive covenants and any interest which the Crown may have in the land. While the New Brunswick

Another statute which would seem to provide a "sure" starting point is the Veteran's Land Act which states:

All Conveyances from The Director constitute new titles to the land conveyed and have the same, and as full effect as grants from the Crown of previously ungranted Crown lands.¹⁷⁷

It has been relied upon in Ontario.¹⁷⁸ However, despite the apparent clear wording of the statute, again, the situation remains uncertain in New Brunswick, where many practitioners still favor a complete title search.¹⁷⁹

176) continued:

statute seems much less explicit, one might refer to section 14(4) which protects any rights the Crown may have as to arrears in unpaid taxes. However, any protection concerning other claims is doubtful in view of s. 14(3) which reads:

14(3) Subject to subsection (4) the deed or bill of sale vests in the grantee the fee simple absolute or absolute ownership to such real property freed of all claims and encumbrances whatsoever, including all claims of dower, arising prior to the delivery of the deed or bill of sale. 1980, c.46, s.3.

177) R.S.C. 1970, c.V-4, s. 5(3).

178) Re Armstrong and Van Der Weyden [1965] 1 O.R. 68; and D. Lamont, op. cit., no. 146, p. 147.

179) Cf. Recommendations of the Property Standards Committee, Barristers' Society of New Brunswick, in an unpublished report dated May 1983, 9 p., where it is said:

Despite the wording of the Veteran's Land Act, Revised Statutes of Canada, these (V.L.A.) Deeds have the same significance as any other Deed and cannot be accepted or used as a root of title.

Such added uncertainty is but another illustration of the many difficulties existing in this province in relation to land titles. It also points to the need for extreme clarity and explicitness in any statute which aims to deal with real property and certain customs regarding its transfer which have been around for centuries.

E) Statutory Restrictions

Property rights have traditionally been considered among the most precious and untouchable:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, to total conclusion of the right of any other individual in the universe.¹⁸⁰

Anybody or any legislative body who plan to affect in any way the sacred right of property must therefore be aware that it treads on emotional, and therefore, treacherous ground.¹⁸¹

179) continued:

One can presume the reason would be a possible constitutional problem where the federal statutory provision could be seen as infringing on a provincial area of competence.

180) Blackstone, Commentaries on the Laws of England, (1766), Book II, Chapter I, quoted by Risk, R.C.B., The Last Golden Age, Property and Allocation of Losses in Ontario in the Nineteenth Century, (1977) 27 U. Toronto L.J., p. 200.

181) Di Castri, op. cit., no. 115, par. 397, who gives three prerequisites for the interfering to be valid. i.e., "a) a clear intent..." "b) that council has proceeded in good faith, and c) that council has proceeded with dispatch." See also City of Ottawa & al. v. Boyd Builders Ltd [1965] S.C.R. 408.

1. Planning Legislation

Notwithstanding the long traditions, the Industrial Revolution in England brought new and urgent problems which could not be ignored, nor could they be satisfactorily dealt with by applying the general law of nuisance to restrict property rights:

In England, the industrialization of the nineteenth and late eighteenth centuries had created a much more blighted landscape than Toronto's but the law of nuisance had not become a substantial comprehensive limitation to growth. The general terms of the doctrine did not change, but particular elements were elaborated and applied in a way that permitted industrialization to continue. Location became a significant factor in determining what degree of interference was a nuisance, and conduct that was a nuisance in a residential area might not be a nuisance in an industrial area...¹⁸²

It thus became clear, in England, that an industry which may be acceptable in one location, could be considered a "nuisance", and therefore undesirable in another location. From this came the basis for a new philosophy, which consisted of "planning", beforehand, where an industry, or other related buildings could be erected, and which areas could be considered, and so declared, as exclusively "residential areas". However, although the approach has changed, and despite the fact that zoning, and planning regulations are now the rule, and not the

¹⁸²) R.C.B. Risk, op. cit., no. 180, p. 206.

exception, clients, and their lawyers still often ignore these regulations, and many property lawyers seem to find it hard to accept that they must always check out the local planning laws.

It is natural for lawyers to have viewed planning, in its formative stages, as essentially a restriction on the free exercise of individual property rights. Today, although it is more widely recognized that planning seeks ideally to achieve harmonious community developments though selective individual restraints, the idea persists that individual rights and the collective interest, as seen by a planning authority, necessarily conflict.¹⁸³

This persistent attitude is probably reflected by the fact that New Brunswick did not have its first general planning legislation until 1936¹⁸⁴ and the effect of ignoring the provisions of such a statute had to be decided by a court case in 1976, when it was finally held that "a marketable title implies no contravention of relevant subdivision legislation".¹⁸⁵

This should not be taken to mean that a real estate transaction in New Brunswick which is done in contravention to the Planning Act is abortive, as such a transfer has been held

183) P. Kenniff, Development Control in Canada: Evolution and Prospects, (1974), Journ. of Plan. Env. L., p. 392.

184) Town Planning Act, replaced by the Community Planning Act, (1960-61) 9 et 10, Eliz. II, c.6. Although there was a statute called the Town Planning Act in 1912 (2 Geo V., c.19) this had in practice been limited in its application to the city of Saint John; see G. LaForest, Community Planning Law in New Brunswick, (1966) 16 U.N.B.L.J., pp. 16 to 33 (p. 16).

185) Albert v. Legere (1977) 19 N.B.R. 44.

to be valid.¹⁸⁶ However, such a contravention does hamper any plans which the purchaser may have concerning the parcel of land.¹⁸⁷ Thus, title searchers must always be mindful to verify that subdivision is not effected by the proposed sale.¹⁸⁸

2. Municipal Zoning By-Laws

Any such regulations pose an additional problem for the title searcher, because usually, they cannot be discovered except by going to the municipal office and making a search.¹⁸⁹ Indeed, even after such a search, doubt may still persist, in which case the lawyer would do well to ask the relevant authority in writing about the questions troubling him.¹⁹⁰

Another cause for some difficulties associated with zoning by-laws may be the attitude of tradition-oriented land owners who still feel that "a man's home is his castle", and refuse to accept the modern legal trend towards restricting

186) Ibid.; See also B.D. Stapleton, Land Use Control in New Brunswick, Some Observations, (1973) 22 U.N.B.L.J., p. 95. For a comparison with the situation in Ontario in relation to this question, see note 135 of this thesis.

187) Indeed, the new owner may not even register his deed; The Registry Act, s. 51, as amended in S.N.B. 1972, c.61.

188) In fact most practitioners do verify this and the practice seems to require an affidavit from the vendor to the effect that the sale does not constitute a subdivision.

189) V. Di Castri, op. cit., no. 115, par. 307.

190) J.R. Robertson, Should I Close This Transaction?, 1974, Lect. L. S.U.C., p. 54. Responsibility then lies on the municipal authorities in case of incorrect information; Gadutses et al. v. Milne et al. [1973] 2 O.R. 503.

individual rights in favor of collective ones.¹⁹¹ This traditional attitude has in fact been preserved partially by legislation regulations permitting the continuation of "non conforming long use".¹⁹² While these may be recognized as the valid subject of a requisition, the requisition should be made within the time for closing prescribed in the agreement of sale.¹⁹³ Practitioners must be made aware, therefore, that the zoning should be verified quite early in the period preceeding the transfer and not at the last moment, and they should be ready to make the necessary requisition, or objection, within the given time, in order that the purchaser may obtain the necessary permits to use the land as planned.

-
- 191) That restrictions are growing in numbers seems undisputable; see for example, D. Wayland, Owner Beware: Themes and Variations in Property Laws, (1979) 28 U.N.B.L.J. 155-174, where the author discusses the latest responsibility being imposed on the land owner, the occupant's liability; see also, R.D. Schwenke, Environmental and Land Use Laws, Regulations and Permits: How They Affect Real Estate Transactions, Financing and Lawyers and What To Do About It, (1979), 14 Real Prop. and Trust Journ. 851-863. At p. 853, the author discusses how these new restrictions affect the lawyer's role when asked to advise his client...
- 192) Community Planning Act, R.S.N.B. 1973, c.C-12, s. 40.
- 193) Innes v. Van de Weerdhof [1970] 2 O.R. 334. However it has been held that the solicitor need not verify zoning when the agreement of purchase and sale is signed before he has been retained, and in which no reference is made to zoning; Hauck v. Dixon [1975] 10 O.R. (2) 605 (see also infra, no. 194).

Whether or not the solicitor must invariably verify zoning and other municipal matters in any transaction can depend on particular circumstances. Certainly, he should do so when the client has expressly asked about the matter,¹⁹⁴ and even where the client has merely indicated his proposed use of a certain piece of land.¹⁹⁵ In such cases, the lawyer must be prepared to advise knowingly concerning what use may be made of a certain piece of land, or at least be ready to look into the question thoroughly.

Indeed, depending on the client's wishes, or the circumstances, the lawyer may not only have to check for zoning but also such other matters outside the registry as demolition orders,¹⁹⁶ work orders,¹⁹⁷ and for the kinds of services available to the land being sold.¹⁹⁸

F) The Significance of the Lawyer's Certificate

1. Is this Certificate the Equivalent of a "Guarantee"?

No matter how numerous and complicated the duties of a solicitor are in relation to a land deal, it still must be

194) Forhenkamm v. Planton [1973] 2 O.R. 518; 34 D.L.R. (3d) 470.

195) Kolan v. A Solicitor [1970] 1 O.R. 41; 7 D.L.R. (3d) 481; aff'd [1970] 2 O.R. 686, 11 D.L.R. (3d) 672.

196) cf. Kolan v. A Solicitor (supra).

197) Table State Const. Ltd v. Jones (1977) 2 R.P.R. 208.

198) Richeview Const. Co. Ltd v. Raspa (1975) 11 O.R. 377; 66 D.L.R. (3d) 193.

understood that the lawyer is not an "insurer". When he "certifies" a title he is not promising that nothing can go wrong. The "guarantee" given by a lawyer is, therefore, relative, and not equal to those given by a title insurance company or by the director of a land titles system, which are usually quite absolute in nature.¹⁹⁹

Nevertheless, regarding a desirable purchase which has gone sour, the client often has difficulty understanding that the lawyer's certificate does not give an absolute guarantee. It does not often help much to explain that the problem is not strictly one of title and therefore not the lawyer's responsibility. Even a sophisticated client may not have a very open mind on learning that he has just paid a high price for a parcel of land on which he will never be able to build according to his plans, because, to his mind, his lawyer has "forgotten" to verify something or other.

In addition to the client's belief that the lawyer's certificate is legally infallible, or at least, guarantees him against any loss in respect to the transaction, there is the matter of the lawyer's professional insurance, the very existence of which may reinforce this belief. The fact that every lawyer is known to carry "insurance" may be interpreted by lay people as a guarantee that this insurance will cover any "mistake" their lawyer may make.

199) D. Lamont, op. cit., no. 146, p. 305.

2. Error: Not Always Identified as Professional Misconduct

Clients may further believe that their lawyer will not dare be negligent even in any small way as they believe that any negligence whatever is reprimanded by the lawyer's professional association. It may be somewhat difficult to explain to a frustrated purchaser that negligence has little, if any "ethical" implication in the eyes of the barristers' society. In fact, while negligence may give a right to pursue the matter in court, only proof of "misconduct" will actually bring action by the disciplinary committee of the lawyer's peers,²⁰⁰ the traditional view being that:

Conduct amounting to negligence, even gross, ... is not misconduct. It must be shown that the conduct is dishonourable to the solicitor as a man and dishonourable in his profession.²⁰¹

(Therefore) ...mere delay or negligence ... will not constitute professional misconduct...²⁰²

To show misconduct, it seems there must therefore be an element of dishonour, something akin to bad faith, and simple "misfeasance"²⁰³ would not seem sufficient. Examples of

200) M.M. Orkin, op. cit., no. 59, pp. 120-123.

201) Re Solicitor (1916) 37 O.L.R. 310, cf also M.M. Orkin, ib.

202) M.M. Orkin, op. cit., no. 59, p. 123, quoting from Re Cooke (1889) 5 T.L.R. 407.

203) The improper performance of some lawful act as opposed to nonfeasance, the omission of any act which one may be obliged by law to do.

misconduct which will be dealt with by professional associations include forging documents, forging affidavits, and some breaches of duty to the client²⁰⁴ such as neglect in paying over money, misappropriating funds, and failing to complete a purchase.²⁰⁵

While proof of the type of misconduct which is deemed unethical may not be materially beneficial to the client since there is no financial compensation, it may be the most satisfying in the sense that the reproachful conduct is "dealt" with by other lawyers. Disciplinary action conveys the message that such conduct is not the accepted norm, and therefore the client's faith in the profession is apt to be less affected. For the lawyer, it may also be the most efficacious, since his peers will hopefully not simply condemn him but try to assist him. Ideally, yet not untypically, they will offer the remedial training necessary to counterbalance any lack of training or experience which may have been entailed in the unacceptable conduct.²⁰⁶

204) Ibid.

205) M.M. Orkin, op. cit., no. 59, see pp. 205, 207 and 210 to 212 for these and other examples.

206) The Barrister's Society may temporarily exclude a solicitor from the practice of law; however, only a court may strike off the roll permanently; cf 1875-76, 39 Vict., c.31 (Ont.); 1931, N.B.S., c.50, s. 28 (New Brunswick); M.M. Orkin, id., pp. 217-218.

But in the case of simple negligence, the client has no recourse but to sue in court.²⁰⁷ The client who sues will have to show a breach of duty on the lawyer's part. As we shall see, the basis of this duty is twofold: 1) contractual, or in accordance with what the client could expect to get for the fee paid, 2) professional, that is a duty based on a recognized, if difficult to define, standard of competence and care. This latter duty also includes the obligation generally to disclose relevant information to his client as well as reveal any special problems he comes across and to advise his client accordingly in a competent manner.²⁰⁸ All of these general and more specific duties may be the basis for an alleged breach and consequent actionable negligence. However, as we shall see, the client's task in suing his solicitor is by no means an easy one.

3. Special Duties

a) Duties to Third Parties

While the most important duties are owing the client, a lawyer may nevertheless find himself owing a duty to a third party, for example, in special circumstances, a duty to the

207) It is principally with this type of remedy and when it can be used against a solicitor that we will concern ourselves in the following chapter.

208) See the earlier perusal in Chapter I of the ethical guidelines.

other party in a sale.²⁰⁹ Those special circumstances may arise, for example, if the other party is illiterate, in which case the Supreme Court of Canada has held:

... it is the duty of a notary to explain to an illiterate grantor the legal and equitable obligations imposed by a deed, if he has reason to believe that the grantor does not understand them.²¹⁰

b) Transactions Between a Solicitor and his Client

Any type of transactions where the solicitor has a personal interest and the client has not received independent legal advice is frowned upon by the profession as well as by the courts. The main reason for this view is the idea that "the relation between solicitor and client being a confidential and fiduciary one",²¹¹ the solicitor should never place himself in a situation of conflict.

While not completely prohibited without independent legal advice, such transactions require that the solicitor take special measures for the protection of the client thus adding to the normal lawyer's duties seen in ordinary transactions. The solicitor will in such cases have a duty of:

209) M.M. Orkin, op. cit., no. 59, p. 125. But not to the public in general, same author, referring to Saunders v. Seyd and Kelly's Credit Index Co. (1896) 75 L.J. 193.

210) Ayotte v. Boucher (1883) 9 S.C.R. 460; Ex p. Philip (1887) 26 N.B.R. 178; cf M.M. Orkin, op. cit., no. 59, p. 128.

211) M.M. Orkin, op. cit., no. 59, p. 162.

- 1) disclosure of all facts within his knowledge;
- 2) advising the client properly, and
- 3) discharging the onus of showing that the transaction is a fair and reasonable one.²¹²

Failure to take these necessary precautions will probably result not only in the transaction being set aside but also in the lawyer being disciplined, at least by a reprimand, from the barristers' society.

G) Conclusion

In this chapter, we have attempted to enumerate and define the principal technical obligations and legal duties of the solicitor who undertakes to carry through a real estate transaction. In doing this, our goal was to draw certain legal boundaries within which a solicitor may work and know his actions are above reproach. However, as we have tried to point out, each real estate transaction can be the source of unusual and even unique problems to which the solicitor must sometimes find an original solution. In New Brunswick, very little guides the the solicitor, even on such a basic issue as the required length

212) Ibid., Mr. Orkin also suggests other special precautions which should be taken such as having the: "...client's acknowledgment... done in writing and kept in file..." (p. 163). These duties and precautions in this situation, added to the already numerous tasks, would seem to be adequate reasons why this type of situation should be avoided altogether.

of a title search. The legal profession provides only general principles of ethics. In other words, the tasks are numerous, and ridden with opportunities for error, particularly for the unskilled, let alone the careless solicitor.

As we have also seen, not every error will have the same consequences. While misconduct is dealt with by peers, negligence is usually seen as a matter for a civil suit, to be remedied by the Court in the form of damages. The next chapter will be devoted to studying the legal consequences for the lawyer who has been negligent in fulfilling one or more of the duties we have enumerated in this chapter.

CHAPTER THREE - THE CONSEQUENCES OF ERROR

A) Introduction

A member of the legal profession is always susceptible to a civil suit by a discontented client. Any question as to the law maintaining any vestige of the immunity traditionally accorded to a barrister in England was laid to rest in the case of Demarco v. Ungaro.²¹³

Although the question of possible immunity can no longer arise, there remains two important queries which have not yet been answered in any definite manner. The first concerns the basis of a lawyer's liability, which, while traditionally limited to contract, seems today to be the object of a much wider discussion. The second aspect which seems to present some difficulty in a civil suit against a lawyer concerns the standard of care and competence which should be the required test to determine whether or not there was a failure amounting to negligence on the part of the lawyer. These are very important questions in relation

213) (1979) 21 O.R. (2d) 673, 95 D.L.R. (3d) 385. This case in fact confirmed the possible liability of a lawyer conducting litigation, but there seems to be little doubt the profession has always been answerable to a civil suit in the matter which interests us here, that is conveyancing.

to the practice of conveyancing, which as we have seen, presents many opportunities for errors or omissions that, in turn can have serious and frustrating consequences for the client.

B) The Basis for Liability

1. The Traditional View

Up to a few years ago, it was considered unquestionable that the basis of a lawyer's liability lay in an action for breach of the contract between him and his client, as was said in 1976:

It is trite law that when a solicitor is found negligent his liability to his client flows from breach of contract.²¹⁴

This view applied to all types of breach of duty. However, the lawyer's failure had to be proven to amount to negligence; error per se was not necessarily condemnable as a breach of contract.²¹⁵

The rule that liability rested in contract applied to all areas of legal practice, therefore it naturally applied to lawyer's work done in relation to conveyancing.²¹⁶ It was

214) Messineo v. Beale (1976) 71 D.L.R. (3d) 31 (34); Kolan v. Solicitor [1970] 1 O.R. 41; aff'd [1970] 2 O.R. 686 these decisions relied principally on English cases such as Groom v. Crocker [1938] 2 All E.R. 194 and Kirby-Smith [1964] Ch. 506, [1964] 2 All E.R. 835.

215) Quevillon et al. v. Lamoureux (1975) 52 D.L.R. (3d) 476.

216) A. De Sha Malone, Title Searches: The Potential for Liabilities, (1978) 49 Miss. L.J., p. 697.

recognized in a well known case that the lawyer who fails to find a defect affecting the title to a parcel of land which his client was purchasing is liable.²¹⁷ In this case, as in others sounding in contract, the court examined the "content" of the contract to determine the extent of the duty which the solicitor owed to his client in the particular circumstances.

This approach has sometimes given very harsh results for the client but it has been more or less followed even in the last decade. As we shall see, some provincial courts have become rather adept at distinguishing the cases, thus creating case law difficult to reconcile.

Apart from the possibility of limiting one's responsibility by the contract, the founding of liability exclusively in contract afforded an important defence for the lawyer, allowing him to invoke the shorter and stricter limitation periods which apply to actions based solely in contract.²¹⁸ The fact that the error may not even be

217) Messineo v. Beale (1976) 71 D.L.R. (3d) 31; see also Schwebel v. Telekes [1967] 1 O.R. 541; 61 D.L.R. (2d) 470 which is also quoted as authority for this principle.

218) For example, in New Brunswick, the Limitation of Actions Act, R.S.N.B. 1973, c.L-8, s. 9. However, founding an action in contract also excludes other defences such as contributory negligence on the part of the client; see O'Kanagan Mainline Real Estate Board v. Can-Indemnity Co and al. (1970) 70 D.L.R. (2d) 516. But, see Smith et al. v. McInnis [1978] 2 S.C.R. 1357 (1379), where the Supreme Court considered "apportionment of liability".

discovered before the expiry of the normal six-year limitation period drew occasional criticism from certain members of the judiciary,²¹⁹ nevertheless judges felt bound by the cases applying that limitation period.

2. The Position of the Supreme Court of Canada

As with all controversial points of law, the provincial courts have looked to the Supreme Court for guidance concerning the proper basis or bases for founding an action in negligence against a solicitor. A decision on the question seemed essential in view of the growing trend to ignore the traditional contract view. In 1978, the Supreme Court of Canada had the opportunity to review the question in a factual situation which seemed to involve professional negligence.²²⁰ The main question in this case included another concerning the applicability of contributory negligence to the facts of the cases, as provided by The Negligence Act of Ontario. In order to answer whether The Negligence Act was applicable, the Court of Appeal of Ontario had first to decide whether the action, which was one against architects and engineers, was one in contract only or whether the case could be seen as one sounding in tort as well.

²¹⁹) Melanson and Melanson v. Leger, Creahan and Savoie (1978) 24 N.B.R. 632 (per J. Barry, par. 7).

²²⁰) Dominion Chain Co. Ltd v. Eastern Construction Co. Ltd (1976) 12 O.R. (2d) 201; 68 D.L.R. (3d) 385. The decision of the Supreme Court is reported at 19 N.R. 298.

Jessup, J. A. considered himself "unfettered by any Canadian authority",²²¹ and went on to hold that tort law was applicable:

I conclude that ... the defendant engineers and architects were tortfeasors and incurred liabilities as such to the respective plaintiffs, whether or not they also incurred contractual liabilities for breach of contractual obligations to take care solely to be implied from their relation to their clients as members of professions professing skills.²²²

Mr. Justice of Appeal Jessup limited his decision to the professionals in the case, but made it clear that his opinion would include solicitors:

I confine myself to the nature of the liabilities of those who do profess skills in a calling which a reasonable man would rely on and leave the case of unskilled employments to another day. However, I can find no justification in principle, authority or policy for the modern English trend, noted by some of the law authors, to close the categories of callings to whom the principal stated by Winfield applies [those callings referred to in Winfield]: e.g., Millner, Negligence in Modern Law (1967), at 131 et seq. The anachronistic exemption of solicitors from concurrent tort liability has been ended in England by Esso Petroleum Co. Ltd v. Mardon, where the modern authorities referred to in Schwebel are overruled.²²³

221) The Ontario's Court of Appeal decision is reported in [1976] 68 D.L.R. (3d) 385. See p. 391.

222) Id., p. 394.

223) Id., pp. 392-93.

Accordingly, the defendants in this case were held jointly responsible as tort feassors by the Court of Appeal. When the case was brought to the Supreme Court of Canada, that tribunal unfortunately refrained from answering directly the point which concerns us, namely whether tort liability applied to the facts of the case and logically applies also to the law profession. The emphasis placed on the contractual clauses by the Supreme Court seems to make the contract the most important, if not the sole element for determining liability:

... Even assuming that a tort claim in negligence was open to the plaintiff against Giffels and Eastern in the present case and I need not come to a determination on this issue here - there are two considerations which are preclusive against Gieffels right to contribution under s. 2(1). They are, first, the giving of the final certificate under article 28 of Eastern's contract and, second, the finding by the trial judge that the guarantee period fixed by article 17 of that contract has run in Eastern's favour.

....

It is however, open to any contractor (unless precluded by law) to protect itself from liability under its contract by a term thereof, and it does not then lie in the mouth of the other to claim contribution in such a case. The contractor which has so protected itself cannot be said to have contributed to any actionable loss by the plaintiff. This result must follow whether the claim for contribution is based on a liability to the plaintiff in tort for negligence or on contractual liability.²²⁴

224) See the decision of the Supreme Court, per Laskin, C.J.C. at 19 N.R. 298, (306-307). The six other Honourable Justices concurred with the Chief Justice.

It may be significant that the decision does not refute tort liability altogether, it merely refuses to endorse it officially. Realistically, however, the Supreme Court has left the state of Canadian law far from clear and as a result, the weight of the Court of Appeal decision in Dominion Chain may be doubtful.²²⁵

A second case pertaining to professional liability came before the Supreme Court in the same year. This case concerned a lawyer who had failed to initiate an action within the limitation period applicable to insurance claims.²²⁶ Partly because of the legal questions involved and partly to give the court a chance to decide the question once and for all, the parties again asked the Supreme Court to decide whether a lawyer's liability could be founded in an action in tort as well as in contract. The Chief Justice in writing the decision of the majority, once again refused to take a position on that

225) In the Court of Appeal, Madame Justice Wilson wrote a strongly dissenting judgment, defending the status quo quite strongly. (See [1976] 8 D.L.R. (3d) 385 (407-414)). Her assent to the Supreme Court is not likely to assist the plaintiff who wishes to found his action in tort, unless Justice Wilson's views have changed, or perhaps unless a patently unjust result would be the consequence of a rigid application of the categorizing which she seemed to favor in Dominion Chain. Madame Justice Wilson's judgment is still favored by some; for example, see H.B. Radowski, Actions Against Solicitors - Contracts or Tort? (1980), 2 Advocate Quarterly, 160-183. It should be noted, however, that the author did not have the benefit of the many recent decisions which seems to agree much more strongly with the idea of founding professional liability on a tort basis.

226) Smith et al. v. McInnis et al. [1978] 2 S.C.R. 135.

particular point of law, confining his judgment to the question whether there had been a breach of contract, and to the defining of the scope of the retainer in this case:

In the circumstances, it is unnecessary to canvass other questions raised on the motion for leave and also raised here as to whether a solicitor's liability to his client lies in tort or only in contract...²²⁷

However, this time, Pigeon J., writing for himself and Beetz, J., did not limit his opinion as strictly as the Chief Justice. It is important that he refused to consider generally that a solicitor's duty depends only on the scope of his retainer when he said:

This is not a case in which definite questions were put in writing and advice could reasonably be limited to what was being explicitly asked for...²²⁸

On the face of this, it would seem that Mr. Justice Pigeon was ready to accept a more general duty on a lawyer to advise his client on whatever matters were pertinent to the facts of the case. However, in considering the "apportionment of liability" and the possible application of the Contributory Negligence Act of Nova Scotia,²²⁹ Pigeon, J. refused to accept the possibility of founding the action in tort and actually followed again the traditional view:

²²⁷) Id., p. 1369.

²²⁸) Smith et al. v. McInnis et al. (supra), p. 1375.

²²⁹) R.S.N.S. 1967, c.54.

I have to agree that the liability of a solicitor to his client for negligence, in his duty to give advice or otherwise, is in contract only, not in tort. I adhere to the view I have previously expressed in other cases, that a breach of duty may constitute a tort only if it is a breach of a duty owed independently of any contract with the claimant, "an independent tort" ~~as~~. I said in Nunes Diamonds v. Dominion Electric Protection, at p. 777. In the case of a solicitor retained to give advice, his duty to advise properly arises only under contract and I do not see how liability can arise otherwise than on a contractual basis.²³⁰

In view of the unjust results to a client which can flow from the strict maintenance of the rule that a solicitor's liability lies only in contract, and in view of the modern trend against compartmentalizing the law in other areas, it is submitted that Mr. Justice Pigeon's obiter dicta to the effect that the action sounds in contract only does not settle anything. It is really quite disappointing for those who depend on the Supreme Court for the broader and modern approach. However, the fact that only one judge of the seven sitting on this case spoke out on the question may be interpreted as a clue that the Supreme Court is open to the broader approach, if and when the question arises directly. Thus, while not yet embracing the wider theory, which still appears to some

230) Smith et al. (supra), p. 1377; Nunes Diamonds v. Dominion Electric Protection [1972] S.C.R. 769.

as contrary to well recognized authority,²³¹ the Supreme Court seems to leave the door open for the fact situation which would clearly justify overruling the more traditional view.

3. A Different Approach

Despite the fact that the Supreme Court has left the matter unsettled, the possibility of founding an action against a careless solicitor for the tort of negligence should not be discounted.

The main impetus, if not the origin of the controversy, stems from England's Court of Appeal decision in Hedley Byrne and Co. Ltd v. Hillier and Partners Ltd.²³² The crux of the rationale applied in this decision seems particularly applicable to cases concerning errors or omissions in certifying title, since by the act of certifying, the lawyer can be taken as giving advice, which he expressly knows or should know will be acted upon by the client. The circumstances seem to parallel those which form the basis for the ratio decidendi of the Hedley Byrne case:

231) The fact that not everybody is ready to reject the traditional approach is well demonstrated by the article of H.B. Radomski, op. cit., no. 225.

232) [1964] A.C. 415. One author has found authority dating much further back than this; see H. David, "Solicitors' Liability for Negligent Misrepresentation", (1976)
24 Chitty's L.J., 273 who quotes Donaldson v. Haldane (1840) 7 Cl. & F. 762, 7 E.R. 1258.

... that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment.²³³

In England, another decision which, like the Hedley Byrne case, has been considered a landmark is Esso Petroleum Co. Ltd v. Mardon.²³⁴ This much discussed case held a defendant responsible for negligent advice given in a pre-contractual situation. Although Lord Denning relied on the decision in Hedley Byrne & Co. Ltd v. Heller & Partners Ltd, he went even further by providing a remedy in tort between parties who had eventually entered in a contract, saying that at least in the case of professionals, liability is imposed by the law of tort:

... in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract, and is therefore actionable in tort. It is comparable to the duty of reasonable care which is owed by a master to his servant, or vice versa. It can be put either in contract or in tort...²³⁵

233) Headnote from Hedley Byrne as quoted in Whittingham v. Crease & Co. (1978) 88 D.L.R. (3d) 353 (369); per Aitkins, J. who noted that the headnote "seems ... to accurately reflect the ratio".

234) [1976] 2 All E.R. 5 (C.A.).

235) Ibid., p. 15; in saying this, Lord Denning referred to cases as far back as 1844 and 1842 as authority.

Much has been made of the fact that this case concerned a pre-contractual relationship and that is pointed to as a possible limit for the wide proposition enunciated by Lord Denning in the Court of Appeal, namely, that responsibility can be founded in tortious negligence.²³⁶ However, Lord Denning's own words point to no such limit; he expressed himself in very wide terms:

A professional man may give advice under a contract for reward; or without a contract, in pursuance of a voluntary assumption of responsibility, gratuitously without reward. In either case he is under one and the same duty to use reasonable care...²³⁷

Clearly the judgment of Ormrod, L.J., is in agreement with Lord Denning. He also refused to adopt an approach which might curtail the precedent established by the Hedley Byrne case.²³⁸

A final point about Esso Petroleum which pertains to Hedley Byrne and which may well be worth mentioning here is the statement made by Lord Denning which indicates that it is his impression that the rule in Hedley Byrne had by that time been already accepted in Canada:

236) This view may be justified by a reading of the third judgment, the one given by Shaw, L.J., who does seem to insist on the pre-contractual aspect in this case. See note 234 supra at p. 26.

237) See note 234 supra at p. 15.

238) See note 234, per Ormrod, J., p. 22.

... the judges of the Commonwealth have shown themselves quite ready to apply Hedley Byrne between contracting parties: see, in Canada, Sealand of the Pacific Ltd v. Ocean Cement Ltd...²³⁹

Whether the English cases discussed above apply to Canadian lawyers, and, if so, to what extent they do apply is not easily ascertained. As we have seen, the Supreme Court of Canada seems to have refused to adopt, at least for now, the rule in Hedley Byrne where there is a contractual relationship between the parties.²⁴⁰ However, in the case at least of a professional giving advice, some Canadian courts seem quite hesitant to accept the old view that the existence of a contract between the parties will afford a defence to alleged negligent conduct in giving advice more than six years after the incident. This in turn may occasion, if not a total reversal of the old rule, at least a fairly consistent eroding of it which may eventually cause the whole rule to topple for lack of support.

The British Columbia Supreme Court can be regarded as having implicitly adopted tort law as a basis for an action against a solicitor. This was first done in a case where the

239) [1976] 2 All E.R. 5, at p. 16; the case referred to by Lord Denning is reported at (1973) 33 D.L.R. (3d) 625.

240) Numes Diamonds v. Dominion Electric Protection [1972] S.C.R. 769.

plaintiff had no contractual relationship with the solicitor-defendant. In that case, Whittingham v. Crease & Co.,²⁴¹ the plaintiff was a sole beneficiary under a will found invalid because of the negligence of the solicitor who had prepared it. The defence had pleaded the lack of contractual relationship, in which, it submitted must lie any action against a solicitor. The court, however, found a duty, based on the ratio given in the Hedley Byrne case. As to the question whether the Hedley Byrne case could be considered authority in Canada, the judge had this to say:

Nevertheless, Hedley Byrne has been followed in Canada, ... , and I treat it as authoritative. For the purposes of the present case, the most important feature of Hedley Byrne is that the House of Lords concluded that in the circumstances of that case there was an implied duty of care, apart from contract or fiduciary relationship.²⁴²

However, in analyzing the facts of the Whittingham case, one can appreciate that it will be easier for a Canadian court to apply Hedley Byrne where there is no contract and no

241) (1978) 88 D.L.R. (3d) 353; as early as 1968, the British Columbia Supreme Court had indicated a reluctance to limit professional negligence to contractual actions and had already begun to evade the question when possible; cf Okanagan Mainline Real Estate Board v. Canadian Ind. Co. et al., [1968] 70 D.L.R. (2d) 516 (522).

242) (1978) 88 D.L.R. (3d) 353, at p. 369, (my emphasis).

other relevant relationship on which it might be said that the action should be founded.²⁴³ In such circumstances, at least, a provincial court cannot be faulted for not following the dicta of the Supreme Court in the matter.²⁴⁴

The situation becomes more delicate when there is a clear contractual relationship between the parties on which the plaintiff could have based an action in contract, but where, usually because of the limitation period, the plaintiff is driven to sue in tort.

The problem has been discussed in a second decision in the British Columbia Supreme Court, and the court seems again to have adopted the more "avant-garde" approach. After having considered the decision in Nunes Diamond Ltd.,²⁴⁵ Kirke Smith, J., pointed out that the English authorities on which Nunes rested

243) The duty then depends on proximity and foreseeability, see McAlister v. Stevenson [1932] A.C. 562 and more recently, Dutton v. Bognor Regis Urban District Council, [1972] 1 Q.B., 373; [1972] 1 All E.R. 462; also Tracy et al. v. Atkins (1977) 83 D.L.R. (3d) 46, where the plaintiff vendor had no relation with the defendant-solicitor who was representing the purchaser. Reliance does not seem an essential element; see Ross v. Caunters (a firm), [1979] 3 All E.R. 580; and Cartside v. Sheffield, Young and Ellis, [1983] N.Z.L.R. 37, where the plaintiff-beneficiary succeeds in an action against defendant-solicitors despite the fact that reliance was not proven.

244) Beside the Dominion Chain case discussed above, see also Nunes Diamonds v. Dominion Electric Protection [1972] S.C.R. 769.

245) (1972) 26 D.L.R. (3d) 699; [1972] S.C.R. 769.

have been overruled by Esso Petroleum Co. Ltd v. Mardon,²⁴⁶ at least in situations involving professionals, and he decided, in an unfortunately short judgment, that an action against a solicitor, as a professional, lies in tort, as well as in contract:

In the result, I conclude that, in the case of a professional man such as the defendant, a plaintiff client can claim either in contract or in tort, basing that claim "on whichever foundation gives him the more favourable position under the statute..."²⁴⁷

The Ontario Court of Appeal in 1976 had quite clearly made known its position in its decision in Dominion Chain Co. Ltd v. Eastern Constr. Ltd.²⁴⁸ Two of the three judges at that time accepted that liability could be founded in tort, if there was negligence, even if a contract existed between

246) [1976] 2 All E.R. 5. In that decision, the English Court of Appeal held that the plaintiff could rely on the principle of Hedley Byrne despite the existence of a contract between himself and Esso Petroleum Co. Ltd. Lord Denning referred to professionals who gave advice. The precedents seemed to have been distinguished rather than expressly overruled.

247) Cf p. 15. Jacobson Ford-Mercury Sales Ltd v. Sivertz (1979) 103 D.L.R. (3d) 480 (484).

248) (1976) 68 D.L.R. (3d) 385, discussed supra, note 220.

the parties.²⁴⁹ This case has been quoted by many advocates arguing for a wider basis for the plaintiff's action.²⁵⁰

The Court of Appeal in Dominion Chain appears to have served as a guide in a Newfoundland Trial Division case in 1978 which had to decide on the effect of the contractual limitation on an action brought against a solicitor for alleged negligence in:

- (a) failing to make adequate search at the Registry of Deeds,
- (b) failing to make reasonable enquiries as to title,
- (c) failing to advise the plaintiff that the land had been previously conveyed.²⁵¹

After a rather extensive perusal of the then recent case law, Mifflin, C.J.T.D. held as follows:

the claim of the plaintiff can be said to be equally founded on contract and on tort, and he can rely on whichever foundation gives him the more favourable position under the statute (of limitation).²⁵²

-
- 249) (1976) 68 D.L.R. (3d) 385, at pp. 392 and 393, per Jessup, J.A. As pointed out above, although an appeal was dismissed on other grounds in the Supreme Court of Canada, the Supreme Court did not accept nor refute this part of judgment of Jessup, J.A.
- 250) For example, see Jacobson Ford-Mercury Sales Ltd v. Sivertz (1979) 103 D.L.R. (3d) 480; Power v. Halley (1978) 88 D.L.R. (3d) 381; Gorieu v. Simonot (1982) 19 Sask. R. 74 and other cases discussed in this section.
- 251) Power v. Halley (1978) 88 D.L.R. (3d) 381 (382).
- 252) Id., p. 388. The judge cited as authority the case of Esso Petroleum Co. Ltd and considered that it has overruled "the line of cases which hold that in the case of a professional man he could only be sued in contract...". Cf. p. 387.

While some judges in some provinces seem to have come to a conclusion in their own minds in favour of allowing an action to be based in tort, others seem to have become experts in avoiding the question altogether. For the latter, responsibility is either found to exist on a contractual basis or not at all, yet very rarely denied solely because of the limitation period associated with contract actions. Despite the many times counsel have raised the question in different provincial courts at trial, the answer quite consistently is as follows:

Having decided the basic issue, it is not necessary for me to determine if the plaintiff's claim is statute barred.²⁵³

However, the provincial courts in general have not expressed any firm belief that the law allows only contractual actions against lawyers, as the following obiter dicta shows:

I have written my decision assuming that solicitors, being professionals, could be found liable in tort as well as contract. I am, however, not making a specific finding that a lawyer can be liable in tort as well as contract. Much has been written on both sides of this issue and it would only be relevant had I found the defendant's conduct did not measure up to the required standard.²⁵⁴

253) Central and Eastern Trust Co. v. Rafuse (1982) 53 N.S.R. (2d) 62; 109 A.P.R. 62, (83) (Hallett, J.). In all fairness to this trial judge, he is but adopting the same attitude as the Supreme Court of Canada in Smith et al. [1978] 2 S.C.R. 1357.

254) Central and Eastern Trust Co. v. Rafuse, supra, note 253, p. 83.

As this passage indicates, there probably is no important substantive difference between the two different causes of action. What is most important is that the test as to the standard of care would appear to be the same; also both types of action are in fact based on the proof of serious error or omission on the part of the solicitor.²⁵⁵

Although they do so in a very indirect way, many courts have indicated that they in fact welcome the newer approach and like the greater flexibility afforded to them by actions framed simply in negligence against solicitors.²⁵⁶ This attitude is certainly preferable to a rigid adherence to stricter, and outdated categorization reminiscent of the old writs. When they put this question behind them, the courts can then concentrate on the more important issue, which is to define a standard of care and decide the merit of the case.

4. The Approach Adopted in New Brunswick

In the face of this unmistakable trend, the approach in New Brunswick remains to be considered, since this province

255) Id., p. 72, par. 5.

256) Gorieu v. Simonot (1982) 19 Sask. R. 74. The topical part of the headnote to this case succinctly refers to "torts, professional negligence" as one topic dealt within the case. However, the decision does not contain any allusion to the question whether the action should lie in tort or in contract, or both. Whether this can be taken to simplify all research on professional negligence in Saskatchewan, would be to go too far, yet it is some indication that the question may be settled in that province in favour of the new and broad approach.

is the one which concerns us primarily. New Brunswick courts had the opportunity to give their opinion in the matter in 1978, about the time when some other provincial courts seemed to have been reaching a turning point on the question. In the first case which was finally decided by the Court of Appeal, Royal Bank of Canada v. Clark and Watters,²⁵⁷ Chief Justice Hughes concluded that an action against a lawyer could be founded only on a contractual basis. At the time, the Chief Justice relied strongly on the case of Schwebel v. Telekes,²⁵⁸ a decision written by Mr. Justice Laskin of the Ontario Court of Appeal, as he then was. What is significant about these two cases is the fact that both decisions were written without considering the effect of the decision in Esso Petroleum Company Ltd v. Mardon.²⁵⁹ In the Schwebel case, it is understandable that the new approach was not considered, since Schwebel was decided before Esso Petroleum. And, in the Royal Bank case, the court had no reason to question the contractual approach, since liability could, and was imposed on a contractual basis. No question of limitations arose in this case, and the court's remarks concerning the basis for liability are merely a restatement of the old legal position about such a case without any analysis of its merit:

257) (1978) 22 N.B.R. (2d) 693; 39 A.P.R. 693.

258) (1967) 1 O.R. 541; 61 D.L.R. (2d) 470.

259) [1976] 2 All E.R. 5.

A solicitor's liability to his client for professional negligence is based on breach of the terms of his engagement, the liability being contractual in nature; see Schewel v. Telekes, [1967] 1 O.R. 541, per Laskin, J.A., at p. 543; Rowswell v. Pettit et al. (1968) 68 D.L.R. (2d) 202.²⁶⁰

That same year, 1978, the question once again came before the Queen's Bench Division.²⁶¹ Not surprisingly, Mr. Justice Barry declined to accept the argument that the action could be founded in tort and applied the principle as stated in the Royal Bank decision. This judgment must have come as a great relief to the firm of defendants, who had not argued the case on its merits, but simply pleaded the Limitation of Actions Act. On the other hand, if it was not a clear-cut case, as the judge seems to have felt, and though it may be some satisfaction for a plaintiff to be assured that had the case been decided on its merits, it would have been decided the same way,²⁶² such comments, it is submitted, do little to justify what is actually a technical decision taking no account of what is surely the more enlightened approach.

260) Royal Bank case, op. cit., note 257, p. 700.

261) Melanson and Melanson v. Leger, Creaghan and Savoie, (1978) 24 N.B.R. (2d) 48, A.P.R. 632.

262) Id., p. 636.

However, as pointed out, Mr. Justice Barry did not have the benefit of the many decisions which have been reported since 1978 and he based his reasoning on authority²⁶³ which has been, if not overruled, at least seriously questioned.²⁶⁴

Also other comments made by Barry J. in the case are interesting and indicative of the new attitude of many members of the judiciary referred to earlier. Mr. Justice Barry also

~~said~~:

It does, ... , strike me that there are situations in which the strict application of the law could result in grave injustices, although I do not express the opinion that this is necessarily one of those cases. ...

The last legal work done by the defendant was July, 1970, and the writ was not issued until December 19, 1977, and it is on the basis of those three facts that I have dismissed the action. In my opinion, it will be only a matter of time until the reasoning of Jessup, J. in the Dominion Chain case and of Lord Denning in the Esso Petroleum case will be adopted, either by case law or statute.²⁶⁵

263) For example, Schwebel v. Telekes, [1967] 1 O.R. 541; 61 D.L.R. (2d) 470.

264) For examples of this, see comments made by Zuber, J.A., in Pharmacie Belisle Pharmacy Ltd v. Mineau et al, (1977) 17 O.R. (2d) 295 (296), and Jessup, J.A., in Dominion Chain Co. Ltd v. Eastern Construction Co. Ltd, 68 D.L.R. (3d) 385 (391).

265) Melanson v. Leger, Creaghan and Savoie (1978) 24 N.B.R. (2d) 632, pp. 636 and 637.

These latter comments seem quite encouraging for future plaintiffs, if perhaps a little unnerving for some members of the legal profession. A recent case which came before the Court of Appeal in July 1982 can be considered a definite warning. The case, Vienneau v. Arsenault,²⁶⁶ while not concerning a conveyancing problem, did relate to professional negligence. Mr. Justice of Appeal Laforest found it unnecessary to deal with the specific question of "tort or contract" and relied simply on the equitable jurisdiction of the court to prevent "unconscionable conduct", even in the absence of fraud:

It may well be that generally concealment must be deliberate to bring the doctrine of fraudulent concealment into operation. However, it is well known that the concealment need not be fraudulent in the ordinary sense of that word; what courts in the exercise of their equitable jurisdiction seek to do by this doctrine is to prevent a person from being able to take advantage of the Statute of Limitations, as a result of his unconscionable conduct.²⁶⁷

By relying on what could be characterized as a fiduciary duty²⁶⁸ of good faith which a lawyer owes to his client, it was unnecessary for Mr. Justice of Appeal Laforest to find the action founded in tort. The final result here is the same, however.

266) Reported in (1982) 41 N.B.R. (2d) 82, 107 A.P.R. 82.

267) Id., p. 84; for similar reasoning see also Nocton v. Lord Ashburton [1914] A.C. 939, [1914-15] All E.R. 45.

268) The relationship between a lawyer and his client was interpreted as being of a fiduciary nature in Spector v. Ageda [1971] 3 All E.R. 417 (430). See also Spence v. Bell (1982) 39 A.R. 238 (262).

In an obiter dictum, Mr. Justice of Appeal Laforest sounded what seems to amount to a short, but rather efficacious warning to the profession:

Under these circumstances, it becomes unnecessary, as both parties conceded, to say anything about the question whether this action sounds in tort or contract, a question about which there has been considerable development since the decision of this court in Royal Bank of Canada v. Clark and Watters (1978), 22 N.B.R. (2d) 693, 39 A.P.R. 693.269

5. Analysis from other Professions

If we are to recognize any relevance at all with suits against professionals other than lawyers, such as doctors, architects, accountants, one might conclude by analogy with the law regarding other professionals that a careless title search should haunt the conveyancer for far more than the contractual six year limitation period. Several English,²⁷⁰ as well as Canadian cases²⁷¹ have found that various professionals are responsible in tort for their negligent work, or advice, and cannot escape liability by pleading the Statute of Limitations as relating to actions founded in contract.

269) Vienneau v. Arsenault, (1982) 41 N.B.R. (2d) 82 (84).

270) Sutcliffe v. Thackrah [1974] A.C. 727 (architects);
Arenson v. Arenson [1977] A.C. 405 (accountants).

271) Burnstein v. Crisp Devine Ltd [1973] 3 O.R. 342 (real estate agent); cf also Hauck v. Dixon (1975) 10 O.R. (2d) 605.

Although the following comment was made in a case where total immunity was being argued, it can stand for the proposition that the days when lawyers were considered different from other professionals are almost, if not completely gone:

It has not been, is not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in court work an immunity possessed by no other professional person. Public policy and the public interest do not exist in a vacuum. They must be examined against the background of a host of sociological facts, of the society concerned. Nor are they lawyers' values as opposed to the values shared by the rest of the community. In the light of recent developments in the law of professional negligence and the rising incidence of "malpractice" actions against physicians (and especially surgeons who may be thought to be to physicians what barristers are to solicitors), I do not believe that enlightened, non-legally-trained members of the community would agree with me if I were to hold that the public interest requires that litigation lawyers be immune from actions for negligence.²⁷²

6. The Significance of Founding Liability in Tort

Evidently, the new trend towards founding an action in tort rather than contract can have some important consequences for any lawyer. The most important ones concern the limited defences which are available when the actions are in tort, and the measure of damages in cases where liability is established.

272) Demarco v. Ungaro et al. (1979) 95 D.L.R. (3d) 385, per Krever, J., at p. 405.

The first and most important result of permitting the newer basis for liability may well be one of the principal reasons for its acceptance, and that is of course that the limitation period is not the six years from the moment which the breach occurred as is usually found when the action is one in contract.²⁷³

It is not so much the length of the period itself in contract as the precise moment at which that period of limitation starts to run, which often seems to work an injustice to the plaintiff-client:

It appears most inequitable to me that a person who suffers damages by reason of the negligence of a professional person, whether such breach of duty be in tort or contract, should find that he has no recourse against such professional person, even when he did not become aware of the damage or defect until after the passage of the time set forth in the Limitation of Actions Act.

273) See Hall v. Meyrick [1957] 2 All E.R. 722 (727), where it is clearly stated that the limitation period applicable in a case against a solicitor is the same as in any action for breach of contract. In New Brunswick, the Limitation of Actions Act, R.S.N.B. 1973, c.L-8, s. 9: Another element which will not have to be proven, in a tort action is "privity"; as pointed out in the decision in Whittingham v. Crease & Co. (1978) 88 D.L.R. (3d) 353, where a beneficiary, despite the lack of privity, was able to recover loss caused by an invalid will prepared by his father's solicitor. In Canada, there was at least one former decision on a similar fact situation which had adhered to the "contract" theory in Re Fitzpatrick (1923) 54 O.L.R. 3. However, in England, a solicitor was held liable in tort to a beneficiary in Ross v. Caunters (a firm), [1979] 3 All E.R. 580. This later case, plus the Whittingham case "does indicate a trend whereby Canadian law may one day impose liability on a solicitor to the beneficiary of a will on the ground of negligence in the preparation of will regardless of any relationship between the solicitor and the beneficiary". See T.G. Feeney, The Canadian Law of Wills, Butterworth and Co. Ltd, Toronto, 1982, Vol. I, p. 87.

He really does not have a cause of action, in some instances, until a judgment goes against him which could well be six years after the breach.²⁷⁴

Cases dealing with a certificate of title are particularly susceptible to this problem with regard to the limitation period in contract. The client has no way of verifying the lawyer's work and may discover a problem only when he tries to sell, or mortgage his property, many years later. The patent injustice of these cases should eventually convince a court that is at all inclined to recognize the tort basis to allow recovery despite the fact that the action is statute barred in contract.²⁷⁵

With the lawyer liable in tort, as well as in contract, a plaintiff could then have his case decided on its merits and not thrown out on a technicality. It will be said that while this may give the public the appearance of better justice, it has obvious disadvantages for lawyers that may result in injustice to them. However, it is submitted that the final result may be

274) Melanson v. Leger, Creaghan and Savoie (1978) 24 N.B.R. (2d), 48 A.P.R. 632 (637). See also comments in Vienneau v. Arsenault (supra) op. cit., note 269 and A. De Sha-Malone, op. cit., note 216, p. 698; "...for a negligence cause of action, recovery would be available to foreseeable plaintiffs who file their actions within the statutory time period which runs from the time injury is or should have been discovered."

275) W.L. Hoyt, Professional Negligence, (1973), Spec. Lect. L.S.U.C. 134.

much better for lawyers if not for the careless individual, then to the legal profession in general. It cannot be considered good policy to leave the lay public with the impression that lawyers can get away with being negligent on a technical defence. It would do much more for the profession's image to show its members' readiness to defend their practices on the merits, instead of hiding behind the statutory limitation periods. It has advantages both for the client and the profession:

Allowing a tort action now enables a client to recover for his actual injuries when they reasonably manifest themselves without engaging a succession of experts to check each other's work. Furthermore, permitting tort actions protects the profession by allowing the client to rely on the services which he reasonably expected the attorney to perform.²⁷⁶

So the founding of professional negligence in tort may not be all bad for practitioners. It may even afford them another defence, that of contributory negligence. This aspect of the question was discussed in Smith et al. v. McInnis et al.²⁷⁷

276) A. De Sha Malone, op. cit., note 216, p. 699.

277) (1978) 2 S.C.R. 1357, per Pigeon, J. For a brief allusion to the moral aspect when a client stands by and permits his lawyer to act on a mistaken notion, see Quevillon et al. v. Lamoureux (1975) 52 D.L.R. (3d) 476 (479): "...the (plaintiffs) were well aware not only of the true date of the accident, but also of the fact that appellant was proceeding under a misapprehension. Of course, they had no legal obligation to correct this, but what of the morality?"

where the defendants pleaded the application of the Contributory Negligence Act, of Nova Scotia²⁷⁸ as a way of limiting the damages they might have to pay. It seems reasonable that negligence and its financial compensation, should be divided in cases where the defendant lawyer is only partially at fault. Applying contributory responsibility where the title search is faulty, could bring interesting results. What if the purchaser's lawyer had been given wrong information by the vendor's lawyer as to the description, or the identification of the land, or even the name of the vendor. Is the vendor's lawyer subject to third-party liability in the purchaser's action against his lawyer?²⁷⁹

One final point, the measure of damages may be thought to be more advantageous to the client when they are considered calculable on a tort basis rather than on a contractual basis.²⁸⁰ However, a better view may be that the final damages are similar. Some examples may help to illustrate this point.

In a case which involved the failure of finding and disclosing a defect in the title which the defendant-lawyer was

278) R.S.N.S. 1967, c.54.

279) Would the Hedley Byrne rationale apply against the vendor's lawyer? See the discussion, supra at note 273, re the Whittingham v. Crease application of Hedley Byrne.

280) J.G. Bastedo, A Note on Lawyer's Malpractice: Legal Boundaries and Judicial Regulations, (1969) 7 Osgoode Hall L.J., 317. See also J.G. Fleming, The Law of Torts, The Law Book Company Ltd, 6th Edition, Sydney, 1983, pp. 167-169.

searching, the court quoted the following guideline for measuring the amount of damages payable on a contract basis:

The measure of damages for breach of contract is that the plaintiff be placed in the same position, so far as it can be done by money, as he would have been in had the contract been performed, subject to the rule against recovering damages which are too remote or not reasonably foreseeable; 12 Hals. 4th ed.; p. 430, para. 1129; Wertheim v. Chicoutimi Pulp Co., [1911] A.C. 301; Hadley et al. v. Baxendale et al. (1854) 9 Ex. 341, 156 E.R. 145; Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd; Coulson & Co. Ltd (Third Parties), (1949), 2 K.B. 528; British Westinghouse Electric and Mfg. Co. Ltd v. Underground Electric Rs. Co. of London, Ltd, [1912] A.C. 673.²⁸¹

In the case therefore of a lawyer who certifies a defective title, the court should limit the amount of damages to the "actual" loss caused by the breach of contract. It has been put as follows:

Where a solicitor negligently fails, in breach of his contract with a client who is a purchaser of land, to discover and report a defect in the vendor's title, the measure of the client's damages is the difference between the contract price and the actual value of the land with the defective title. Thus, if the land with the defect in the title is worth more than the price paid for it, the client is entitled only to nominal damages against the solicitor.²⁸²

281) Messineo v. Beale (1976) 71 D.L.R. (3d) 31.

282) Messineo v. Beale, ibid., see headnote; damages were assessed at a nominal \$500.00.

However, this does not mean that the solicitor's liability will always be limited to small amounts. For one thing, the difference in price and in value of the property may be quite large. But what is more important is that there may be other expenses involved which will increase the amount of the recovery to a more significant sum. For example, where a lawyer omitted to obtain a release of a mortgage given by the purchaser's predecessors,²⁸³ the damages allowed included all the extra expenses "incurred and to be incurred in future, with respect to the refinancing of the purchase of the property in question".²⁸⁴

On a tort basis, damages are to be calculated so as to place the petitioner in the same position he would be if no tort had been committed. The measure is one of foreseeability and may seem harsher from the solicitor's point of view. But in the final analysis, the whole sum allocated will probably be much the same, remaining within what is considered a "reasonable" range, if calculated on a tort basis.

In the last analysis, the client should not be the one to suffer from inefficient rules. To continue to cut off the actionable period at six years from the moment the wrong

283) Caldwell et al. v. Fitzgerald et al. (1977) 26 N.S.R. (2d), 40 A.P.R. 140.

284) Id. p. 148. Also included were the extra legal fees and \$3,000.00 in "general damages for inconvenience and disruption".

has been done, and to limit damages too strictly will do more harm than good to the legal profession. Defences like these should not be allowed to shield a practitioner from reasonable liability to his client. It is largely because of these archaic rules that serious problems remain and continue to multiply in New Brunswick and elsewhere in Canada.

C) The Standard of Care and Competence

1. In General

In the brief review made earlier in this paper of the ethical guidelines by which a lawyer is obliged to conduct his practice, one can conclude that the standard demanded of members of the legal profession in general is both very high and very vague. In trying to define the specific standard of care and competence which one must exercise in a particular area of law practice, such as conveyancing, one must, first of all, resort to general principles which, though they do not answer every problem encountered in searching titles for example, nevertheless have the great advantage of being flexible and provide a starting point for an analysis of the particular problems which so often surround land transfers.

This section attempts, first of all, to give a general view of the standard of care one must adhere to in every area of legal practice; and, secondly, to look at some different

factual situations where a lawyer seems to have failed the proper standard. After that, attention will be focused on actual court decisions in a number of cases.

It should be noted that the standard does not seem to vary, whether the action is founded in tort or in contract.²⁸⁵ Negligence is equally condemnable whatever the form of action:

Regardless of the pleadings, the substance of the cause of action is negligence.²⁸⁶

The standard of competence required of a lawyer has received many definitions, with variations sometimes stemming from particular circumstances, sometimes from an attitude in the profession prevailing at a certain time. Apart from being answerable for misconduct and fraudulent behavior, the lawyer will have to defend his carelessness in handling many matters.²⁸⁷ This, however, does not make the practitioner liable for all errors of judgment on his part; the accepted test is to ask if an "ordinarily competent solicitor" would have acted in the same way:

285) Central and Eastern Trust Co. v. Rafuse (1982) 53 N.S.R. (2d) 62.

286) A. De Sha Malone, op. cit., note 216, p. 698, note 55 and p. 699.

287) Aaroe & Aaroe v. Seymour et al. [1956] O.R. 736 (737). In New Brunswick, reference has been made to a "responsible solicitor"; cf Comeau & Comeau v. Canada Permanent Trust Company and Arsenault (1979) 27 N.B.R. (2d), 60 A.P.R. 126 (131).

In an action against the solicitor for negligence it is not enough to say that he has made an error of judgment or shown ignorance of some particular part of the law, but he will be liable in damages if his error or ignorance was such that an ordinarily competent solicitor would not have made or shown it...²⁸⁸

A more specific definition is given in another case in the form of a list of obligations:

The obligations of a lawyer are, I think, the following:

- (1) to be skillful and carefull
- (2) to advise his client on all matters relevant to his retainer, so far as may be reasonably necessary
- (3) to protect the interests of his client
- (4) to carry out his instructions by all proper means
- (5) to consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
- (6) to keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.²⁸⁹

288) Brenner et al. v. Gregory et al. [1973] 1 O.R. 252; 30 D.L.R. (3d) 672 (677); cf also Karpenko v. Paroian, Courey, Cohen and Houston [1980] 117 D.L.R. (3d) 383 (387); cf also M. Orkin, op. cit., note 59, p. 121.

289) Tiffin Holdings Ltd v. Millican et al. (1964) 49 D.L.R. (2d) 216 (219), reversed by the Supreme Court; [1967] S.C.R. 183, which also recognized that if a lawyer has specific knowledge of a pertinent fact, he should advise his client.

The duty imposed is not lessened, it seems, by the fact that a lawyer has agreed to undertake a task without pay, for, as one author writes:

(an) attorney is bound to use reasonable care and skill even where title search might be a gratuitous undertaking, because reliance was foreseen.²⁹⁰

All the definitions to be found show that simple proof of an error, or an omission on the lawyer's part is not sufficient to render him liable;²⁹¹ it must be proven that such error or omission amounts to negligence in law. In the context of legal services, negligence often depends on many factors which include general and recognized practice, the degree of difficulty of the matter which occasioned the alleged negligence, and generally, the facts and circumstances²⁹² surrounding the case.

290) A. De Sha Malone, op. cit., 216, p. 698. A lawyer will also be liable for doing negligently a task which, although not usually his responsibility, he undertakes to do; see Aaroe v. Seymour (1956) O.R. 73.

291) D. Lamont, op. cit., note 146, p. 302, referring to English authority. See also for a more recent statement of the proposition, Maillet et al. v. Haliburton et al. (1983), 55 N.S.R. (2d), 114 A.P.R. 311.

292) Grima et al. v. MacMillan (1972) 3 O.R. 214. It should be noted that a solicitor will be "presumed to have knowledge of the more important provisions of public statutes", cf Panamoroff v. Reid & Besk (1962) 32 D.L.R. (2d) 126.,

2. The Test of General and Recognized Practice

Recognized practice is often one of the first elements studied by a court in deciding whether a particular individual has been negligent:

A better test of what the standard of care was at the time is to look at what other solicitors actually did when faced with the problem.²⁹³

Apart from recognizing the test of "general practice", some cases show that "regional" practice, which is more limited, may prescribe the standards which the lawyer should have adopted in a particular set of circumstances. This narrower approach seems to have arisen to "protect" lawyers practising in rural areas largely because they do not usually have access to the large libraries available to lawyers practising in urban centers.²⁹⁴ Whatever may be the merit of such an approach, it has generally been accepted by courts.²⁹⁵

It may be criticized as resulting in a "lower" standard for certain communities, but it does recognize the realities of daily practice in a given community and a certain give and take.

293) Spence v. Bell [1982] 39 A.R. 239 (255); cf also Vancouver General Hospital v. McDaniel et al. (1934) 4 D.L.R. 593 (597).

294) The approach seems to stem from American influence.

295) Hauck v. Dixon [1976] 10 O.R. (2d) 605; Abbey Discount Corp. Ltd v. Nicel et al. [1972] 3 O.R. 360.

between lawyers, and in this way, it probably encourages a now definitely recognized ethical conduct between members of the profession in smaller communities.²⁹⁶

Another factor which might eventually be taken into consideration in Canada and which has had an effect in the United States, is what is called the duty to "recognize obvious legal trends" in a particular jurisdiction. This might oblige a practitioner to keep abreast of changes in legislation, as well as in case law:

Presently, there is no liability for failure to notice obvious trends in the law. An attorney is not held to a "crystal ball" standard. A client, however, is not adequately informed unless he is given the option of proceeding on a novel theory where applicable.²⁹⁷

3. Specialists (Higher Degree of Care)

▲ In imposing responsibility in the case of some other professionals, for example doctors, the courts have taken into consideration the fact that certain members of a profession are recognized as a "specialist" in a particular field and seem to

296) In one case, for example, the court recognized the local practice of accepting an extension by telephone call instead of written agreement; cf D. Lamont, op. cit., note 146, p. 299, referring to Roman v. Visnechic et al. [1975] 3 O.R. (2d) 734.

297) J.A. Millman, "Counselor Beware: Failure to Recognize Obvious Legal Trends May Be Malpractice" (1979) 27 Chitty's L.J., 279-288. The author supports his thesis by referring to American case law.

impose a higher degree or standard of competence for such an individual. While the practice of "specializing" in legal practice is as yet almost unheard of in New Brunswick, larger provinces, such as Ontario, recognize specialization or at least seem ready to make it a viable possibility. Certainly the idea is catching on with the legal profession because legal work is getting more complicated, not less, and fields such as taxation, criminal law etc... would benefit from individuals specializing in these fields. With conveyancing continuing to be such a complex matter, it seems that in each province individuals are developing and will continue to develop, with experience and study, a higher degree of skill in this field. This, in turn, probably means that the courts will recognize the fact and ask more of a person who is thought to have more competence or expertise in the field than is usual with a general practitioner.

Up to now, the recognition by a court of a distinction between a "specialist" and a "general practitioner" has been a rare occurrence; however, it has happened.²⁹⁸

298) See, for example, Central & Eastern Trust Co. v. Rafuse (1982) 53 N.S.R. (2d) 62; comments as to witnesses at pp. 74 and 82; see also D. Lamont, op. cit., note 146 who concludes that a specialist in law, as well as in other fields, should provide "a higher degree of care and ability".

4. Undecided Matters

If the matter is a very complex one, a lawyer is not expected to be infallible, or to have the ability to predict how a court decision will go in an undecided issue:

... those who practice (law) can hardly be held liable in negligence simply because their prediction was fulfilled only in one of three appellate judgments.²⁹⁹

It is, however, possible that a lawyer may have a duty to warn his client of the possible risk of following his opinion on an uncertain matter.³⁰⁰ But this will be true only if the risk is not known to the client, and an experienced business man hoping to profit from an unproved legal loop-hole cannot be said not to know of the existence of any risk.³⁰¹

Also, if the questions of law are very complex ones, the court will take this into consideration and then seem willing to forgive more easily than if the matter can be viewed as fairly routine.³⁰²

299) Ormindale Holdings Ltd v. Ray [1980] 116 D.L.R. (3d) 346 (352).

300) The duty of the lawyer is not only to inform but also to advise: Major v. Buchanan et al. [1975] 9 O.R. (2d) 491.

301) "... cases in which the risks were of consequences which were unknown to the client" are the ones which carry the duty to inform: cf Ormindale Holdings Ltd v. Roy [1980] 116 D.L.R. (3d) 346 (355).

302) Whittingham v. Crease & Co., 88 D.L.R. (3d) 353.

5. The Relation Between the Duty of Care and the Scope of the Contract of Retainer

Whatever variations there may be in the degree of care deemed acceptable or unacceptable according to the different definitions, certain general principles are indisputable. For example, no case has made a lawyer an insurer.³⁰³ That is a lawyer is never considered to guarantee that nothing can go wrong, whether it be in litigation, or in certifying a title.³⁰⁴

However, the duty of care required in a particular case may vary, depending on the scope of the retainer.³⁰⁵ This has been especially apparent where the court relies exclusively on the contract theory to impose liability as, for instance, the following comment from one decision illustrates:

I have identified the real issue as being the terms of the contract between the parties. In other words the issue is to determine the scope of the respondent's retainer.³⁰⁶

This reliance on the content of the agreement between the client and his lawyer seems to presuppose that the former knows exactly what he can and should expect his legal counsel

303) Winrob v. Street (1959) 28 W.W.R. 118.

304) Ormindale Holdings Ltd et al. v. Ray Wolfe Counsel et al. [1980] 116 D.L.R. (3d) 346; cf also Karpenko v. Paroian, Cohen & Houston [1981] D.L.R. (3d) 383, 30 O.R. (2d) 776, and Banks et al. v. Reid [1975] 6 O.R. 380.

305) Spence v. Bell [1982] 39 A.R. 239.

306) Id., p. 245.

to do. This is obviously not always the case. While certain special duties may be imposed, the actual contract should have little influence on the basic requirements of care and competence. One need only imagine, for example, a relatively ignorant and naive client who wishes to buy a farm in a rural area in order to realize that the retainer given by many a client should not be taken to define all their solicitor's duties. In fact, most clients would be at a loss to state exactly what they expect of their lawyer.³⁰⁷

Another difficulty which comes to mind concerning the scope-of-the retainer approach is the possibility that it unduly enlarges a lawyer's duties so as eventually transform a certificate of title into a "guarantee" of title, which it is not and should not, be in many circumstances; also it would prove much too expensive for the solicitor to be a guarantor of every title he certifies. On the other hand, for the client's

307) A. De Sha Malone condemns the approach: "Most clients simply cannot judge the quality of a title search any better than they can judge the quality of title for themselves. The client is therefore entitled to more than a mere abstract from his attorney: he is entitled to advice." (My emphasis), op. cit., note 216, p. 695.

sake, a lawyer should never be able to contract out of the duty of being reasonably competent according to the "standards imposed by the legal profession".³⁰⁸

D) The Standards in Conveyancing

How do the criteria defined by the courts apply in relation to conveyancing? For the majority at least, the standards are applied with considerable care by the courts in light of the general practice followed in conveyancing. In fact, many of the cases discussed in this section were cases involving questions of alleged negligence in relation to real estate practice.

Therefore, generally speaking, the individual must act and take the precautions that a reasonably competent lawyer would take in the circumstances. While one cannot guarantee that nothing can go wrong during a transaction, especially a very complex one, a lawyer's duty to foresee and advise seems particularly applicable in real estate practice. There is no question here of the matter being out of the lawyer's realm of knowledge, as some business matters are. Certifying title seems to fit in squarely with a lawyer's duties in general practice.

308) A. De Sha Malone, op. cit., note 216, p. 691: "By professing to be a competent attorney, the title examiner accepts a certain minimum standard of performance as well as special responsibilities".

For the conveyancer, therefore the general standards imply that he do his title search in the same manner and with as much care as would be expected of any competent lawyer.³⁰⁹ He must look into each possible claim which is routinely checked, as well as all others which might be pertinent to the transaction he is working on. He must also bring to this client's attention any problem which he finds, and advise his client on the right course of action.

Any prudent solicitor will also keep up to date with the developing case law and particularly any decisions which provide examples of what might be considered negligent conveyancing. Case law often dictates the parameters, or the extent of the search required in a given transaction.

While it seems probable that there exists a recognized duty to make an adequate search, no decision has been found to define precisely and extensively the meaning of this expression.³¹⁰ However, many examples found in court decisions

309) In other words, he must do the usual search; cf A.R. Mellows, Conveyancing Searches, Oyez Publishing Ltd, London, 1975.

310) In Kolan v. Solicitor (1969) 7 D.L.R. (3d) 481, Lacourcière, J., comments on the different defects of title which a lawyer must keep in mind while searching the title as follows: "I am of opinion that anything preventing the vendor from giving a good and valid covenant for quiet enjoyment is a valid objection which would entitle the purchaser to refuse completion. The obligation of the vendor was to give a marketable title in fee simple, free and clear of encumbrances. The solicitor [purchaser's solicitor], in my opinion, should consider the purchaser's total legal position as to the acquired property." (p. 487).

can serve as guidelines to help define what would be considered an adequate search. From case law, one easily concludes as the courts have, that failure to discover that a parcel of land which his clients wants has already been sold is to be considered negligent failure on the part of a conveyancer.³¹¹ Likewise, failure to discover a registered easement also constitutes an actionable omission.³¹²

However, not only will these failures be negligence, but so will failure to register a document which might have established or secured the client's interest.³¹³

What constitutes an "adequate" title search may be wider in certain circumstances than in others, for example, its extent may depend on whether or not the solicitor knows that a particular question is of special concern to his client. Accordingly, the duty of the solicitor may be enlarged.³¹⁴ If the lawyer has personal knowledge, or actual notice of a particular problem affecting the parcel of land which his client

311) Power v. Halley [1978] 88 D.L.R. (3d) 381; see also Caldwell & Caldwell v. Fitzgerald et al. (1977) 26 N.S.R. (2d) 40 A.P.R., 140 - failure to obtain a release of mortgage from predecessor in title.

312) Panamoroff & Panamoroff v. Reid & Beck [1962] 32 D.L.R. (2d) 126.

313) Aaroe & Aaroe v. Seymour et al. [1956] O.R. 736.

314) Kolan v. Solicitor (1969) 7 D.L.R. (3d) 481 - lawyer not checking against outstanding demolition order.

is interested in, his duty to advise will probably oblige him to inform the client.³¹⁵

Statutory restrictions on the use of land should be verified, as part of an "adequate search".³¹⁶ Although such restrictions may not be considered a defect of title, their effect is probably sufficiently serious as to cause clients to blame somebody. Often the client will end up suing his lawyer. More specifically, it seems that a solicitor should be able to recognize a subdivision plan which may affect the client, and he certainly should be able to advise his client as to the necessity of conforming to the Planning Act.³¹⁷

Cases questioning the practice of conveyancing in New Brunswick have been relatively rare. One might think that conveyancers in this province are either extremely careful or their clients are not yet influenced by the increasing trend of questioning professional responsibility in conveyancing, which is more prevalent in larger provinces and especially in the United States.

315) By analogy: Tiffin Holdings Ltd v. Millican, Snowden and Cook (1967) S.C.R. 183 per Martland, J.

316) Fohrenkamm v. Planton [1973] 2 O.R. 518. It is submitted that the "trend" points to this, notwithstanding some decisions which have not held the solicitor negligent for failing to verify zoning. See for example Clements et al. v. Wyatt et al. [1979] 9 R.P.R. 1 (annotation, pp. 3 to 5).

317) Spence v. Bell [1982] 39 A.R. 239.

It has been the practice however, in New Brunswick, to look generally to Ontario case law as a guideline and the Ontario cases can more or less be regarded as New Brunswick law. Improper practices will not be any more tolerated in this province than in other jurisdictions. Certain New Brunswick decisions have indicated, if not decided, that it is New Brunswick law for example, that the making out of blank affidavits as well as false ones, of course, will be condemned,³¹⁸ as will failure to search, or to register a document needed to protect the client's interests, such as a mortgage.³¹⁹ Errors such as these are not acceptable, and if in the past, our courts have allowed liability to be restricted by the application of the limitation period attached to contractual actions, it is submitted that this attitude is subject to change now, especially in these blatant cases.

E) Conclusion

The purpose of this paper is not to unearth even more complications than presently exist in searching title, but rather to emphasize the many reasons why this task is a hazardous one for the lawyer both as to his reputation and financial position. As a result of this naturally perilous undertaking,

318) Nova Scotia v. Leger [1982] 39 N.B.R. (2d), 103 A.P.R. 304.

319) Royal Bank of Canada v. Clark & Watters [1978] 22 N.B.R. (2d) 693.

the legal profession in New Brunswick should welcome changes in the law which would simplify, and help define the parameters of their duties in conveyancing, without unduly enlarging the present scope of liability. Certain changes or reforms which will serve these purposes best will be outlined now in the final chapter of this paper.

CHAPTER FOUR - SUGGESTIONS FOR REFORM

A) Introduction

In the preceding chapters, an attempt has been made to enumerate and explain some problems related to conveyancing, with emphasis particularly on the problems found in New Brunswick. These include the inherent difficulties of the Registry of Deeds System which exists in New Brunswick as well as in a large part of Ontario. The ethical problems which can compound a solicitor's situation are also reviewed briefly. The ethical guidelines, while stating broad principles, do not seem sufficiently precise or to resolve all the questions of ethics which arise in many particular areas of law, especially conveyancing. The brief review made of the different verifications which must be done in relation to certifying the "marketability" of title to a particular piece of land should serve to illustrate the complexity of the conveyancer's task. Finally, the analysis which has been made of case law relating to professional liability generally and to the legal profession's liability in particular brings one inevitably to the conclusion that certifying title is, at best, a "hazardous" business. All this, added to the fact that the "standards" imposed on an

attorney are in fact difficult to define in an objective manner should be sufficient evidence that some solutions are desperately needed in New Brunswick. To do nothing may jeopardize the reputation not only of individuals, but of the legal profession as a whole in this province. Without change we are setting the stage for a growing number of lawsuits against New Brunswick lawyers as clients become more aware of just how haphazard the whole system really is and how little security it actually provides them in so many instances.

In this chapter, as many solutions as possible will be suggested, involving both practical and legal reform. Solicitors themselves should be aware of a wide range of needed reforms and should be the ones to promote at least some desirable changes; at least those which could make their work more efficient and somewhat easier. However, it is not suggested that solicitors are entirely to blame nor that they can cure the whole situation; by and large they are in fact doing a very good job of working in difficult circumstances.³²⁰ In the first place, solicitors are not the ones who organize or plan the Registry Offices, although they compose its most regular clientele. Yet, lawyers are not totally powerless, and their likely influence as a group should not be discounted in any plan to bring about change, in this as in any area of the law.

320) R.C.B. Risk, The Records of Title to Land: A Plea for Reform, (1971) U.T.L.J., p. 466.

B) Practical Solutions

Some difficulties which have plagued solicitors may be eliminated by relatively minor and inexpensive changes. In addition to the attraction of not being costly, a few minor changes would have the added advantage of being less controversial. Since solutions of a practical nature, and procedural modifications do not, as a rule, affect substantive law, they usually are not objects of debate like those usually conducted over matters of principle. Therefore, the proposals made in this section are simple modifications, some technical, all of which should make the solicitor's task easier and simpler and which do not threaten in any way the continuing major role the solicitor must play in conveyancing.

1. Defining the Clientele of a Registry Office

The first step in implementing procedural, or practical changes should be to define the regular "clientele" of the Registry Office. In Ontario, as might be expected, lawyers were found to be its principal patrons:

Although land registration system records are in the public domain, few private individuals are aware of this. Fewer have the expertise necessary to deal with the system.³²¹

321) An Improved Land Registration System for Ontario, op. cit., note 116, p. 24.

The same can also be truthfully said of the offices in New Brunswick. On any number of visits to the Registry Office, one finds solicitors, articling students, "professional searchers" or paralegal persons,³²² surveyors and sometimes evaluators from the tax department, usually in that order of decreasing numbers. It would seem that most people found there have common basic needs which no doubt often include a desire for a more efficient physical milieu in which to do a simple or short search.

2. The Registry Office

Most Registry Offices in New Brunswick have different and rather confusing floor plans. It is difficult to imagine how the province can be seriously thinking of changing over from one entire system to another and continuing to function in such a haphazard way.

It does not seem necessary to signal out specific offices, since most seem to lack even the basic physical amenities such as a logical floor plan, tables to work on, more than one antiquated photocopier and so forth. Adequate and trained staff should be the first priority. While most of the staff in offices visited were ready to provide help, few were able to do so because of a lack of training. In addition, most of the staff are occupied adding to the "day-books" and

³²²) These will be dealt with later on in this section (infra).

taking in new documents for registration often in the middle of heavy traffic areas, such as the aisles between the plan indices and the registered plans. Such congestion cannot but add to the possibility of error in indexing.

It is submitted that the physical organization of the offices should be studied and modified to permit a natural flow of traffic and more efficient work area. At the same time, it would be advantageous if each office of each county was planned to operate in a similar fashion.

3. The Indices

Perhaps the single most important change which would help lawyers in New Brunswick immensely is one which has been adopted in Ontario now for many years, and that is the "tract index", where a searcher can follow a parcel of land through an index made for each tract of land. Speaking of Ontario, one author wrote in 1974:

There are no such records today
as the grantor-grantee index.³²³

Unfortunately, such records still exist today in New Brunswick, as solicitors here are painfully aware. Actually, one of the most frustrating aspects of searching a title in New Brunswick

323) H.W. Silverman, Real Estate Practice: Its Shrinking Scope, (1974) 22 Chitty's L.J., p. 112. Professor Silverman was referring only to Ontario in making this comment.

is determining which larger piece of land one particular parcel comes from, as the land itself cannot be identified other than by searching the whole line of grantors and grantees, and because of the continuous subdivision of land which has occurred. This can be a difficult task. This problem has been recognized in Ontario in studies made by different agencies of the province,³²⁴ however, no such study has been done in New Brunswick.

A simpler matter concerns indices, which are often a source of frustration in doing a title search. It is the fact that there exists only one original copy of each "yearly index". The physical state of some of these range from fair to damaged, to illegible. Some pages are worn, dirty and partly or totally torn, yet everybody must go on handling them since they are the only copy. Although justifiable perhaps in earlier years, it must be realized today that photocopying could produce at least two copies of these precious indices. Another possibility would be to put them on micro-fiche, or at least to arrange some way that these original copies be treated with more respect. This is one suggestion which we think should be adopted immediately as it is so obviously justified.

324) See for example An Improved Land Registration System for Ontario, Design Concepts and Recommendations, vol. 2, Ministry of Consumer and Commercial Relations, Ontario, 1979, p. 30.

4. Parcel Identification

While measures are presently underway to map and survey the province of New Brunswick, the Land Registration Information System is not yet officially operative in any part of the province. Once the implementation of the new method of surveying and the mapping are completed, it will be possible to identify a parcel of land by a number corresponding to its location.

While this method of identifying land seems essential in any system, it is also necessary for the new "Land Titles" System if it is to function properly.³²⁵ It is unfortunate, considering the delays which now seem certain before the "new" system is adopted province-wide, that an intermediate solution has not have been adopted in the form of new indices, based on individual parcel identification. Apart from making life more tolerable in the present Registry offices of the province, it would make the transfer from one system to the other so much more smoothly.

Surveying and parcel identification are necessary steps to help provide more information more easily. These are measures, which are extremely important in themselves and could

325) This will be discussed in a later section of this chapter. However, the system has been alluded to in chapter I.

improve drastically even a manual system. In addition, they are essential if we are to consider any kind of mechanical help eventually.³²⁶

For now, these innovations will give us an opportunity for more efficient storage and retrieval of information and will also make a larger use of microfilm and microfiche possible, which is simpler and less expensive than computers, and so much more efficient than manipulating large books of documents. Microfilm and microfiche have been recommended in Ontario and deserve to be considered carefully in New Brunswick:

Introduction of microfilm is recommended to improve the document and plan records management systems for land registration. Indexed cartridge microfilm should be used for document storage. Aperture cards or microfiche should be used for plan storage. Original documents and plans should be removed from the local office and replaced with microfilm records.³²⁷

5. Standard Forms

One difficulty which lawyers in New Brunswick have had to deal with is the absence of standard forms used in buying, selling, leasing and mortgaging real property. Most experienced solicitors in the larger firms have developed their own precedents and usually pass them on to newer members of the

326) Mechanization will be discussed more fully later in this Chapter.

327) An Improved Land Registration System for Ontario, op. cit., note 116, p. 8.

profession. But while documents originating from different law offices all comprise the same essential clauses, some, nevertheless, do have differences. These differences are especially noticeable when one compares forms that have certain more traditional language, which is generally harder to read, with the language of the newer precedents, which usually contain less unnecessary "legalese".

Several disadvantages have resulted from this lack of standardization of forms; and, one of the most important is the seeming necessity of making each document as complete as possible and no "short forms" have been adopted. Another difficulty which has been increasingly felt in the last ten years has come from the registration of documents written in the French language. Besides the possibility of different translations of the English forms, there continues to exist the insecurity inherent in translating expressions relating to transfer of interests in real property, expressions which have been interpreted by many centuries of cases using varying expressions peculiar to English.

In addition to the many existing problems stemming from the use of different forms, the province realized that this situation could not operate with the proposed Torrens

system. Therefore, in 1982, New Brunswick adopted a Standard Forms of Conveyance Act³²⁸ providing that instruments dealing with the transfer of real property, leasing and mortgaging each be in a prescribed form. Unfortunately, the solicitors of this province do not yet have the full benefit of these standard forms, since they are still in the process of being written, translated and corrected.³²⁹

This step in the standardization of documents is advantageous in many aspects. Standard forms will not only be easier to use under the Torrens System, but they also make registration easier under the Registry Act, since documents will be shorter, and less complex, and therefore easier to assess by the Registry Office staff, and shorter for researchers to read. Documents in both official languages will be accepted for registration with the certainty so long needed of knowing that their interpretation will be the same as their intended counterparts in the English version. Besides the questions relating to translation, these new documents should contain less error, and be easier to read and comprehend. Standardization may also facilitate a larger use of para-legal assistance both in searching and also in preparing documents relating to conveyancing.

328) S.N.B. 1982, c.s-12.2.

329) These forms are now being phased into operation with the first standard form, which is the Deed, officially implemented on July 9, 1984.

6. Sharing the Work Load

As it has been noted throughout but particularly in Chapter II of this paper, title searching is often tedious and always time-consuming. The busy solicitor has to be absent from his office for many hours and even days at a time. This is obviously impractical and the larger legal firms have often managed to avoid it by hiring people referred to as "paralegals". While such persons are often articling students, many offices employ at least one "searcher" who is not a lawyer,³³⁰ but who has been trained, often by the legal partners themselves, to do the title searches and compile an abstract. Of course the work is brought to one of the lawyers for study, and approval, and if there are any problems then naturally the lawyer must look into them himself.

While no statistics are available in New Brunswick, it would seem probable to conclude that paralegals are more often employed in matters of real estate than in other areas of legal practice.³³¹

330) In some larger firms, a junior law graduate, or a lawyer who is not interested in litigation, may be affected to the task of title searching.

331) This would be true at least in New Brunswick, although paralegals are being used in more varied areas of the legal practice elsewhere.

The use of paralegals in our province has not yet been the object of any specific study, but many of the busier offices employ them either permanently, or on an ad hoc basis. It should be remembered that this is a method of dividing the work, but not necessarily the responsibility, since it is the lawyer who must certify the title to the client. However, the paralegal, although not having any legal background should have a workable knowledge of the Registration System and sufficient competence to do as adequate a title search as the solicitor might have done himself:

Presumably, in the work ... as legal assistants and conveyancing secretaries... should exhibit the degree of skill and knowledge that a solicitor doing that same work...³³²

Based on the premise that paralegals should be trained adequately to accomplish what they are asked to do in a responsible way, it is recommended that they be employed in searching title and in compiling abstracts where the volume of work warrants it. Again, it must be emphasized that the solicitor is the one who accepts responsibility, and he should exercise conscientious supervision over all steps in the transaction. A certificate of title should never be signed

332) Continuing Legal Education Society of British Columbia, Center for continuing education, Advanced Real Estate, U.B.C., 1978. Cf also 36 Halsbury's, 3rd ed., p. 104.

without first going over the abstract of title very carefully, in consultation with the person who did the search, noting and discussing each description, and all problems encountered.³³³

7. Sharing Responsibility - Title Insurance

From the legal profession's point of view, one of the greatest disadvantages of the system which is now operating in New Brunswick is the high degree of risk which follows the certificate of title given by a lawyer to his client. In addition to falling prey to many pitfalls which have been pointed out throughout this paper, even the most conscientious and meticulous lawyer cannot predict or avoid some errors which can, for example, result from an incomplete index. Even though the lawyer is not legally considered an insurer of the marketability of the title, clients may unconsciously view the lawyer as such.³³⁴ This adds to the insecurity which a lawyer feels when signing a certificate of title. Consequently, the lawyer himself may try to compensate and to avoid error by verifying everything he can, whether it is truly necessary in a particular transaction or not. This over-zealousness may result in wasted time and wasted money:

333) At least one authority does not seem to favour the use of paralegals, at least not if unsupervised: see D.H. Lamont, Letter to the Editor, (1974) 22 Chitty's L.J., p. 237.

334) A. De Sha Malone, op. cit., note 216, p. 689.

Since the client orders a title search to protect himself from loss, the attorney becomes the logical choice to assume the loss should that protection fail. Additionally, the interests of the client and the attorney will sometimes clash over the technical perfection to be demanded in the examination of titles. Whereas the client may mean only an estimate of the risk he would incur by taking title, the cautious attorney appreciates the potential for error in a title search and eschews estimation in favor of detailed analysis. The attorney attempts to protect his own interests by providing the client with a thorough and accurate title search, but the client may often press for a speedy determination of title. Regardless of such pressures, the attorney must perform a professionally adequate title search.³³⁵

Indeed, the lawyer may personally come to see himself as an insurer, taking this view of his role especially because of the vague descriptions as to what is meant by an "adequate" search.

Many American states have adopted a mode of functioning which relieves altogether the lawyer from certifying a title, and they have done so without changing either the substantive laws or their registration systems.³³⁶ This has been accomplished by allowing private insurance companies to offer "title insurance" which has been defined as follows:

335) Id., p. 690.

336) The first legislation passed to allow the creation of title insurance was passed in 1876 in Philadelphia: see E.T. Urban, "Future Advances and Title Insurance Coverage", (1979), 15 Wake Forest L.R., p. 331.

A contract or policy of insurance by which the insuring company, for a valuable consideration, agrees to indemnify the insured in a specific amount against any loss which may arise by reason of defects of title to a piece of real estate in which the insured has an interest as a purchaser, mortgagee, or otherwise.³³⁷

The insurance coverage includes most encumbrances and other burdens and difficulties concerning title which can arise against land, even including overlooked charges for taxes. The protection offered is the traditional one and covers only past risks, not future ones.³³⁸ In addition to indemnity for loss to the court, the insurer will also pay for the defence "against any lawsuits that may arise from those defects or infirmities of title that are covered by the policy".³³⁹

The cost of providing title insurance is not incurred by the government from the fees paid as under a Torrens System, but is borne directly by the purchaser of the real estate.³⁴⁰

337) Arnold Encyclopedia of Real Estate, Warren, Gorham and Lamont Inc., Boston, Mass., 1978, p. 840.

338) However, a certain trend has been found to indicate the likelihood of a larger coverage being offered which could include some future risks, especially "for certain liens and encumbrances attaching after the recording of an instrument securing future advances"; see E.T. Urban, op. cit., note 336, p. 330.

339) Ibid.

340) A mortgagee (lender's policy) and a lessee can also benefit from title insurance. Ibid.

Though expensive for a purchaser, even where more than one title insurance company operates in a given jurisdiction, costs are inclined to become competitive with a Torrens System and this consideration should make the possibility of adopting title insurance in New Brunswick quite attractive.

Title insurance seems to be well accepted by American practitioners who now often refuse to enter into the risky business of giving opinions regarding title, if possible:

I think that an opinion regarding title to and liens on real estate should not usually be given by counsel but rather by a real estate title company if the latter service is available.³⁴¹

The existence of title insurance is bound to take some fees away from solicitors, but it does not do away with the need for a solicitor at all, because a solicitor is still required to advise the purchaser and of course, still must draw all the necessary documents. Actually, he is more likely to be seen by his client as an adviser, because he must act always in the client's favor with the other party, as well as with the insurance company. If something goes wrong with the title, the client turns to the company for indemnity, not his lawyer. From the legal profession's viewpoint, the system certainly has at least that important advantage.

341) J.J. Fuld, Legal Opinions in Business Transactions, (1973) 28 The Bus. Law, p. 936.

Title insurance seems to have grown on its own in the United States and does not seem to have been the object of any careful study or choice. Whether for good or bad it is a fact there now and no doubt will continue to be accepted.³⁴² Some authors have attempted to point out that the existence of title insurance has been a factor in hampering other changes which may have been more beneficial in the long run.³⁴² If this is so, a careful study of the title insurance option should be made wherever in Canada it might happen to be proposed. Before deciding on the advisability of having title insurance in New Brunswick, including the financial feasibility of such a venture, studies should be begun now. Title insurance companies have operated, but not prospered elsewhere in Canada, perhaps because the number of transactions is much smaller here than in the States. However, it does exist elsewhere in Canada in a limited way, even in jurisdictions where the Torrens System is in operation.³⁴³

Whether found to be acceptable in New Brunswick or not, a study of the functioning of title insurance could still be profitable in this province, if only to discover the very

342) H.W. Silverman, "Real Estate Practice: Its Shrinking Scope", (1974) 22 Chitty's L.J., pp. 109 and 116.

343) R. Steacy, Canadian Real Estate - How to Make it Pay, MacClean-Hunter Ltd Univ. Av., Toronto, 3rd printing 1970, p. 244.

efficient indexing method which the insurance companies use.³⁴⁴ Another point is that with title insurance there is no doubt that the "guarantee" concerning the title is a contractual agreement. It is worth noting too, that the exceptions found in these contracts might be usefully considered in attempting to define precisely the meaning and extent of a certificate of title given by a solicitor under the Registry System. If a title insurance company, with all its facilities and many experts, finds it necessary to exclude certain possible liabilities and thus provides in its contract certain conditions as a basis for indemnity,³⁴⁵ it is certainly arguable that to expect more from an individual solicitor is to expect too much.

8. Registering a Complete Abstract

Once a more precise standard has been defined in this province as to what constitutes an "adequate search", and once it is possible to give a more definite meaning to what is called a "marketable title", the registry system might perhaps be revised by a slight change that would permit registration of whole searches, or "abstracts", at least in specific cases.

344) Risk, op. cit., note 320, p. 469.

345) J.M. Pedowitz, "Title Insurance - What Every New York Lawyer Should Know", (1980) 52 N.Y.S.B.J., pp. 1 to 8. For examples of limitations which might be placed on a certificate of title, see E.T. Urban, op. cit., note 336, p. 329, note 3.

A similar suggestion has previously been made in Ontario,³⁴⁶ and it seems too interesting to ignore here. For example, in the case of a proposed subdivision, if the solicitor could register a search for the whole parcel, purchasers of separate lots would only have to search or check from the moment of subdivision forward. This would eliminate that illogical and tedious situation which exists presently where two or more lawyers find themselves at the Registry Office searching, for different purchasers, the same original parcel of land down to the Crown grant time after time, with the same objections having to be dealt with many times over.

This proposal may present some practical and legal difficulties, not the least of which is the extent of the original searcher's responsibility. Of course, he should not be made liable to every possible purchaser out of that sub-division. Under the Quieting of Titles Act,³⁴⁷ a lawyer must deposit the title abstract with the Registrar. This process of deposit could perhaps be utilized to introduce the change. It seems a reasonable compromise between the Quieting of Titles procedure and the certainty of the Certifications of Titles Act found in Ontario.³⁴⁸

346) An Improved Land Registration for Ontario, op. cit., note 116, pp. 35-36. The study suggests in fact that the title be certified under the Certification of Titles Act with each application for subdivision.

347) R.S.N.B. 1973, c.Q-4.

348) R.S.O. 1980, c.61. See section 4 of this Chapter (infra pp. 166 and 167).

The simple registration of a search does not provide any guarantee as such, but the original search could at least be consulted by subsequent searchers who would be free to rely on it or not, because they would still have to remain liable to their individual clients. While the first search would no doubt be a very complete one, the costs of it could be absorbed by the developer as part of his development scheme. The cost of ~~all~~ subsequent searches would be much less and this would make the land all the more attractive to purchasers.

Abstract registration is not favored as the only permanent solution, but it could be used as a step toward a better and wider change, such as a Certification of Titles Act which will be discussed in a later section.

C) The Legal Profession's Role in Reform

1. Defining the Standards

The legal profession has every reason to promote any modifications which might help its members in the conveyancing practice with their difficulties, provided of course that at the same time the profession's reputation is safeguarded. What better way to accomplish this than to begin by defining the standards by which every practising lawyer should be tested, what might be called the "general practice" standard?

Apart from the general ethical guidelines, it is almost impossible to find a consensus on what is the general and acceptable standard of practice in this province. In New Brunswick, as elsewhere,³⁴⁹ without a study made to expressly define what this general standard is that every practitioner should adhere to, the individual lawyer, and especially the inexperienced one is at the great disadvantage of having to continually decide whether he is acting within acceptable bounds or not.³⁵⁰

It is essential for the members of the profession in New Brunswick to keep informed of these problems and the Barrister's Society should undertake a comprehensive study with a view to defining a general standard which could be followed by all the practitioners undertaking conveyancing. If this were done, not only would a lawyer have a better idea of what are his duties but, in case of litigation, he would be judged by established standards and in this way the court's decision would seem more objective and therefore more just.

349) See R.B. McKay, "Competence and the Professionally Responsible Lawyer", [1980] 29 Emory L.J., pp. 971 to 995, where the author discusses the need for study in order to better define the general standards required of lawyers. This has been recognized in the USA; same author, p. 985.

350) The professional codes, as we have pointed out, are very much centered on ethical problems dealing with conduct of litigation. This whole approach may have to change, if it is found that litigation takes on less importance and the role of the lawyer moves more towards that of an "adviser, negotiator, mediator, and evaluator." cf R.J. Kutak, "The Rules of Professional Conduct" (1980) 29 Emory L.J., p. 897.

2. Continuing Legal Education

It has been said that a lawyer must know the law relating to ordinary matters likely to arise in his practice. He should be sufficiently up-to-date to know any recent decisions which have settled previously unsettled questions of law. It has further been suggested that a solicitor should be able to recognize "legal trends".³⁵¹

In view of the many statutory changes which have occurred in New Brunswick, particularly in the last five years,³⁵² the general practitioner needs assistance to help him keep abreast of this new legislation. In addition, case law has not stood still either, and as we have seen in the earlier parts of this paper, there seems to be a trend developing concerning lawyers themselves and the basis or bases on which they may be found liable to a client.

One way of providing a good deal of the necessary assistance to lawyers is now being put in place in New Brunswick: it is a Continuing Legal Education Program run by the provincial legal association,³⁵³ the New Brunswick Barristers' Society.

351) J.A. Millman, op. cit., note 297.

352) For example, The Matrimonial Property Act, R.S.N.B. 1981, c.M-1.1, the new Rules of Court, adopted in June 1982 and the new Probate Court Act in effect since May 1984.

353) A director for the C.L.E. has been hired in June 1983, and the first programs have been well received.

Continuing legal education is a very important means of providing the necessary information on new laws, and it also provides a forum of communication and a good means of gathering information on what individual lawyers think the standards should be.³⁵⁴

While continuing legal education is an indisputably excellent preventive measure, the American Bar Association, with the help of its Continuing Legal Education Committee has also suggested a "Model Peer Review System" which could be an interesting corrective measure for lawyers who have been negligent or who seek advice about that very possibility:

Referral Peer Review, provides for third party referral of individual attorneys to review authority and the establishment of voluntary programs of remedial training if the review authority determines that referred attorneys require assistance to meet standards of adequate practice.³⁵⁵

Once the standards are better defined, referral to a review authority would seem to be one way by which the profession might help its members to individually attain the acceptable degree of competence. While referral may create some problems of delicacy in handling each situation, a committee of seniors would seem appropriate. Such a committee would have a more

354) Continuing Legal Education could also play a very important role in the forecasting of future "legal trends" and of the changing nature of the legal practice, cf R.J. Kutak, "The Rules of Professional Conduct in an Era of Change", (1980) 29 Emory L.J., pp. 890-891.

355) R.B. McKay, op. cit., note 328, p. 994.

positive task than the Disciplinary Committee, which would, however, have to continue to exist should disciplinary action such as suspension, as well as the advice of the referral committee, be necessary.

In conclusion, what is more important is that we define what is "acceptable practice" and find mechanisms which will help members of the profession to attain it as well as to maintain it. All this must be accomplished even while many changes in real estate law are likely to take place in New Brunswick over the next decade.³⁵⁶

3. Limiting Liability by Contract

It has been noted in Chapter Three that New Brunswick seems to hold firmly to the view that a lawyer can only be sued on a contractual basis; and this, despite a growing "trend" to the contrary in most other provinces.

So long as this remains true, the question arises in thinking of possible ways to help solve the difficulties faced by conveyancing lawyers, namely, can a solicitor limit his liability by contract? Presently, many practitioners limit their opinion of the title so as to exclude any difficulty which might not be found because of an omission in the index of the Registry Office. Often they will also exclude any encumbrances or burdens which they might have found such as

356) R.J. Kutak, op. cit., note 354, p. 891.

easements for services, rights of way and other rights in land, particularly any of these that might have arisen by prescription.

This practice may be acceptable in the case where the client is made well aware of the risk behind such a limited assurance of title. However, it seems doubtful, if the client relies on the lawyer to advise him completely, that such limitations are very effective, at least not without the lawyer having explained the possible consequences to the client in a very clear manner.³⁵⁷ Indeed, one could almost conclude from some cases that the "guarantee" given by a lawyer is substantively of the same value whether he provides a "certificate" to his client or not, as long as the relationship of solicitor-client is proven to exist.³⁵⁸ Therefore, it may matter little what is written in the so-called guarantee. By legislation in Ontario a solicitor may not, by contract, exclude himself totally from responsibility for negligent acts.³⁵⁹ This provision is not included in the Barristers' Association Act of New Brunswick. However, it seems doubtful that a court would uphold such a contractual exclusion of total liability, if only because it would reflect so badly on the legal profession.

357) A. De Sha Malone, op. cit., note 216, p. 692.

358) By inference Messineo v. Beal (1976) 71 D.L.R. (3d) 31 (32); Clements v. Wyatt, 9 R.P.R. 1 (annotation, p. 3); Aaroe v. Aaroe [1956] O.R. 736 (738), report arriving after closing.

359) Solicitor's Act, R.S.O. 1980, c.478, s.24.

Can a lawyer limit the dollar amount of his liability by contract? Again one does not find any statutory answer to answer this question. However, judging from the spirit of the relevant legislation and the different codes of ethic, it seems one can conclude that such a practice, if accepted at all, would be accepted with hesitation. Certainly, the amount limiting liability would most definitely have to be reasonable,³⁶⁰ otherwise it would, at least in Ontario, be interpreted as excluding any responsibility.³⁶¹

While the contractual aspect of a solicitor-client relationship offers many advantages for the solicitor, it should not be forgotten that some clients insist on asking for more than the usual title opinion. In dealing with a mortgage company, for example, most lawyers are very careful to follow the far-ranging and detailed instructions routinely given out. If the lawyer omits to cover any of the many verifications requested, it will very likely amount to a breach of his contract. The contractual aspect, therefore, has its advantages, but also its disadvantages.

As has been seen, certain safeguards for the solicitor were found in possible defences, such as of privity of contract,

360) A. De Sha Malone, op. cit., note 216, pp. 693 and 718.

361) See supra note 359.

and the statutory limitation periods. But, as we have also seen, these are being by-passed more and more frequently:

Some defences, such as lack of privity or the Statute of Limitations, have been dependable skills against liability.

(But) The modern trend attempts to avoid such harsh results by extending recovery to those parties whose reliance is foreseen by the title searcher.³⁶²

Under the modern or tort-based view of liability, then, the possibility of limiting responsibility or liability by contract is likely to have a very limited effect on the solicitor's liability in the future. Unless the proverbial "adequate" search is done the solicitor will have to be very careful to explain to the client the possible risks of his limited opinion and should probably do this in writing. In a lawsuit today the solicitor will probably have to show that the limits he has included are reasonable in order to escape liability. In other words, the whole question may be academic in view of the modern trend towards founding actions in negligence, notwithstanding the fact that there is a contract between the parties.

In this province, there appears to be no existing practice of limiting the amount of liability to a fixed amount, and the question has not been studied in any reported cases

362) A. De Sha Malone, op. cit., note 216, p. 714.

concerning New Brunswick lawyers. However, the question is not without interest, particularly in certain situations; for example, certifying a title to land which is to be subdivided according to a development plan. In a clear case of a lawyer's negligence, should he be liable for damages based on the value of the land in its natural state, or should the client be compensated for the loss caused by the impossibility of going ahead with his development plan? It is submitted that the solicitor might, in such cases be able to limit his possible liability to the value of the land at the time his client bought it.³⁶³ Looking at the rapid growth of land development in this still widely undeveloped part of Canada, New Brunswick, this possibility merits some thought from solicitors.

D) Legal Reform

1. Making Land A Commodity

It may be possible in the distant future to view land as just another commodity, and to be able to buy and sell it as one does a car, or a television set, with very little formality and complication. Indeed, some suggested reforms already point

363) In the case of Ormindale Holdings Ltd v. Ray (1980) 116 D.L.R. (3d) 346 (357), the court indicated that businessmen must be ready to assume the risk of loss when starting out on business ventures. However, it must be pointed out that the lawyer's error in this case concerned a novel question of law. In cases where the error might entail settled law, a court may well be ready to consider the client's real loss.

in that direction.³⁶⁴ However, before a piece of land can be seen as no different from an ordinary chattel, many changes will have had to occur in our attitude towards real property in our system of law. As pointed out in the introduction, land in the Common Law system has traditionally been considered something very special and the right to property, especially land, is one of our most fundamental rights. Such concepts are not easily abandoned or put aside.

To be able to deal with land as any other object, the large number of different interests or estates and tenures possible in land would have to be diminished, if not abandoned to one simple concept. Such things as adverse possession would have to be forgotten as would much of the old law of future interests in land.³⁶⁵ Such changes seem very unlikely to occur in the near future and it seems wiser to look at more attainable reforms.³⁶⁶

Meanwhile, realistic reforms, some major, could have a great deal of ameliorating effect on the complexity surrounding the sale of land, while still not affecting in any basic way

364) The Land Titles System when put into operation in the Maritimes will greatly simplify land sales, as will the computerized system of information being implemented in Ontario (Polaris). In New Brunswick, see a study by Professor A. Sinclair, The Law of Real Property of New Brunswick: Some Proposals, (1968), 18 U.N.B.L.J. 1.

365) H.W. Silverman, op. cit., note 342, p. 112.

366) Indeed, it is quite likely that such a major change would touch the core of our legal system and should be tackled only after widespread and exhaustive studies.

land law concepts. In the second part of this final chapter of this paper a brief description and evaluation of some possible legal reform for New Brunswick will be suggested.³⁶⁷

2. A New Registration System

Without changing the existing substantive property law, and while still preserving most of the traditional interests in land under the title of "overriding interests", many jurisdictions, including England, some American States, the Western Provinces, and parts of Ontario at this time, have changed the practice of conveyancing by adopting exclusively a more or less modified "Torrens System". This system, as we have seen,³⁶⁸ differs quite significantly from the Registry System now operating in New Brunswick, and the change from one to the other is a very important and complex one:

The most difficult and controversial general change is from a registry system to a Torrens system, but this change cannot be planned and assessed simply as the change. The major elements of the Torrens system must be considered independently. The

367) In Ontario, there have been several very exhaustive studies made by the Law Reform Commission as well as the Ministry of Consumer Affairs. One report in particular published in 1979 has summarized many of the other reports' recommendations and the writer has found it very useful in evaluating the different possibilities for New Brunswick.

368) Chapter One of this paper.

major problem and cost for each, is the determination of the existing interests, which is necessary to enable the initial affirmations to be made. Mistakes cannot be entirely avoided.³⁶⁹

The question which we in New Brunswick must now ask ourselves is, should we switch exclusively to the "new" system? As already pointed out, it is strangely interesting to note that no feasibility study seems to be available on the question. It was simply conceded that changes were required and plans were elaborated to change the system of registration, blamed for many abuses. In other words, the question "should we?" seems not yet to have been asked, only "how?". People in charge of implementing the system refer to a "pilot program" which will, supposedly, give everybody the chance to evaluate the new system and its advantages.³⁷⁰ It will be too late to start asking such questions, once the legislation has been adopted. Already several people have been working at the project for at least five years and quite important sums of money have been spent. It is hoped that a continuing study will be undertaken in New Brunswick before implementing the new system. We could, and should, benefit from the experiences of other provinces, particularly Ontario.

369) R.C.B. Risk, op. cit., note 320, p. 489.

370) A meeting of some members of the Barristers' Association was held at the Université de Moncton, October 1982. The principle speaker for the Land Registration Information System, and, it seems, the person primarily responsible for implementing Land Titles in the Maritimes Provinces, was Ms. Mary McKillar, then of Halifax.

It is particularly noteworthy that studies made in Ontario do not recommend scrapping the Registry System and starting completely anew with a different system. Instead, the recommendations made include one, that:

Both the registry and land titles systems should be retained; at least in the short term ... (and) ... both systems should be improved to the extent possible...³⁷¹

The different studies all conclude that changes should be made but they seem to agree that the changes should be brought about at a moderate pace:

The Ontario Law Reform Commission in its report on land registration acknowledges that "existing systems have given reasonable security for the ownership of interests in land, and reasonable scope and security for creation and transfer of these interests. However, the report also states that comprehensive reform of the arrangements for land registration in Ontario is urgently needed. The Commission felt that the existing arrangements have worked only because they have been made to work by the continuous care of lawyers, surveyors and civil servants, at considerable cumulative costs."³⁷²

371) An Improved Land Registration for Ontario, op. cit., note 116, p. 7. See also M. Neave, op. cit., note 3, who seems to believe that a completely new system, which may be the ideal solution, is probably not the most feasible or probable one in Ontario.

372) An Improved Land Registration for Ontario, op. cit., note 116, p. 23.

And what should be very important to us, in New Brunswick, who are about to embark on a major change-over to Land Titles, is that the Ontario studies do not appear to conclude that the Torrens System as it exists in Ontario is yet the "ideal" system.³⁷³ Ontario has experienced this newer system for many years but the province is finding that it has its own inherent difficulties, not the least of which is the recording or filing of the documents under it:

Land titles system searches are generally uncomplicated. However, registration may be a lengthy and frustrating process. Users may face long delays in large offices during peak periods. Registry system registration requirements are less stringent and are well understood. In the land titles system, registration requirements are more complex. Often, the acceptability of a document presented for registration is at the discretion of the land registrar. This creates an air of uncertainty and can lead to conflicts between system users and office staff. These basic differences in the two land registration systems are significant. They must be recognized. They must be considered in the analysis and selection of land registration system improvements.³⁷⁴

373) Nor have a number of American States, who have abandoned the system after trying it; see R.C.B. Risk, op. cit., note 320, p. 470. However, the author blames "strong opposition from lawyers and title insurance companies", for the abandonment in these states. See also H.W. Silverman, op. cit., note 342, p. 116: "The Torrens system is generally agreed to be the finest developed for registration of land, but this does not mean that it is perfect."

374) An Improved Land Registration System, op. cit., note 116, p. 34.

In the United States, at least some authors seem to have come to similar conclusions:

To completely abandon present land records systems and start anew is impractical, if not impossible.³⁷⁵

While the Land Titles System proposed for New Brunswick is not identical to the one in operation in Ontario, and may not entail all of the problems met with by conveyancers in that province, it seems New Brunswick would do well to profit from its sister province's experience. This does not necessarily mean that we should abandon the whole plan of Land Titles for New Brunswick. It is simply suggested that it should be advantageous to first look carefully at how the system has really operated in Ontario so far, instead of considering it only theoretically and concluding it to be the answer to all our woes.

Once again, Ontario is showing the way and the more recent studies there have suggested a yet "newer" and more "perfect" system, this time combined with computerization.³⁷⁶

375) Bayse, A Uniform Land Parcel Identifier, its Potential for All Our Land Records, (1973) 22 Am. U.L. Rev., p. 251, quoted by H.W. Silverman, "Real Estate Practice: Its Shrinking Scope", (1974) 22 Chitty's L.J., p. 109; cf also R.C.B. Risk, op. cit., note 320, p. 472.

376) In the Maritimes, this is the ultimate objective also, and has motivated the creation of the Land Registration Information Service. This system originated as a joint project of the Maritime Council of Premiers. It is primarily a complete land information bank. Parcel

The recommended process supposes automated filing and mapping; therefore, computers would have to be installed in every local office.³⁷⁷ In other words, this reform, while laudible, has to be seen as expensive and complex to implement. But it would be efficient, and implementation is perceived as "gradual":

This ideal system would provide absolute security of land ownership. It would work well, quickly and cheaply. Information would be complete and readily available. There would be no delays and little paperwork.

It would also be a third land registration system in the Province (Ontario). The land titles and registry system exist now. The ideal system if substantially different from the other two, would undoubtedly cause major confusion during the conversion period.

If improvements are made to both of the existing systems, transition will be gradual.

. . .

Both systems would eventually come to look very much like the ideal system just described.³⁷⁸

376) continued:

information such as identification number, location and name of owner can be stored in a computerized system but the registration of land itself will not immediately be in a computerized bank, although a future change to computerization is possible. As we shall see later in another section, computerization is very expensive and seems impractical for some jurisdictions.

377) An Improved Land Registration System, op. cit., note 116, p. 9.

378) An Improved Land Registration System in Ontario, Design Concepts and Recommendations, vol. 2, op. cit., note 324, p. 100.

Therefore, while change is suggested, it is seen as being implemented gradually, instead of any radical imposition. And the studies do not appear to envision any great difficulty in having more than one system operating side by side, as long as both are gradually modified so as to be as efficient as possible.

If we in New Brunswick are to take a lesson from Ontario's experience, we should recognize that Land Titles will not automatically cure all the problems, nor can its implementation be made very quickly.³⁷⁹ In view of this, perhaps we should be considering adopting a combination of the two systems, taking the best elements of each and later adding computerization to make it even more efficient.³⁸⁰ This seems to be the trend developing in Ontario.

3. Investigation of Title

As mentioned in Chapter Two, Ontario by statute has shortened the search period for the purpose of a certificate of title to forty years. However, in New Brunswick, the question remains open, at least no legislation has been adopted.

379) In Ontario, a report estimates a period of fifteen years would be necessary to implement a new system in Ontario; op. cit., note 377.

380) R. Simpson writes that "registration of deeds" and registration of title "... is composed of different alternatives, and the combined alternatives form a continuum; op. cit., note 1, p. 19.

Unlike some other suggestions made in this paper, this change would be the least difficult and certainly the least controversial of reforms. The fact that nothing has been done up to now to at least define the normal length of search that should be made in New Brunswick can only be attributed to an oversight. Solicitors are surely aware of the advantages of being able to rely on simple legislation in this matter:

The length of the period through which the search must be made affects not only the time taken to make the search but the time taken to resolve problems, because fewer problems will arise and because the older a problem is, the more likely it is that difficulty will be encountered in collecting evidence for a solution.³⁸¹

Here, too, New Brunswick should look to other jurisdictions, where it is often considered that a reduction of the time period for a search:

has not produced any increase in the number of titles accepted on purchase proving ill-founded in subsequent litigation.³⁸²

Of course, in suggesting we look to other jurisdictions, this does not mean that amendments should be adopted without study and without deciding what is right in New Brunswick. In shortening the search period to a definite number of years,

381) R.C.B. Risk, op. cit., note 320, p. 473.

382) A.M. Prichard, Roots of Title Today, (1975) 28 Curr. L. Prob., p. 126. See also M. Neave, op. cit., note 3, who advises even more shortening of the period of search in Ontario.

certain questions concerning prescription will have to be answered, such as, for example, will the limit be "acquisitive" or "liberative"?³⁸³ It seems that the limit should be peremptory or final if we want it to be effective in all cases.³⁸⁴

Notwithstanding any questions which will have to be satisfactorily answered, we wish to make a strong recommendation in this paper, that the Registry Act be amended to provide for a definitive search period in this province. It becomes even more important that we do so in view of our plans to adopt a land titles system in New Brunswick. A definite, and hopefully shorter, search period would encourage and ease the transition from one system to another.³⁸⁵

383) This is a distinction found in the State of Louisiana's Civil Code, article 3457. Whereas an acquisitive prescription permits the acquiring of ownership, a liberative prescription results only in the discharging of outstanding debts or charges. Both these types of prescriptions are subject to interruption or suspension of the running of time necessary for the prescription to take effect. These distinctions are discussed by J.L. Montgomery, Prescription: For the Title Examiner, (1978) 25 La. G.J., 276-282.

384) This is the case when searchers can rely not only on Limitation Statutes but on express provisions governing the title search period. With peremption, the time limit is fixed and conclusive. The principles of interruption and suspension both remain irrelevant; see J.L. Montgomery, op. cit., note 383, p. 276. See also Professor J.F. Robertson, Real Property - Conveyancing - Certifying Title to Vacant Lands, (1980) 29 U.N.B. L.J. 255-256; Professor Robertson makes a strong argument in favor of a prescribed search period which would be final, or peremptory, and admit of no exceptions.

385) Land Titles Act, S.N.B. 1982, c.L, s.11. The purchaser's lawyer must search and certify the title before a parcel of land is initially admitted under the system. This procedure is time-consuming and expensive to the client. A shorter search would diminish these problems.

4. Certification of Title

In New Brunswick, if a purchaser's solicitor is unable to establish an acceptable chain of title from the usual search at the Registry Office, and if the vendor is unable to answer the objections in a satisfactory manner, the only procedure available until recently, and the one still commonly used is an application under the Quieting of Titles Act,³⁸⁶ a procedure involving time and money. Ontario has had a Certification of Titles Act since 1958. This legislation offers a simpler, less formal procedure to establish a good title.

386) R.S.N.B. 1973, c.Q-4; since there is no Certification of Titles Act in New Brunswick and all questions concerning ownership were brought to the Court by proceedings under the Quieting of Titles Act, at least until recently. However, the new Rules of Court of New Brunswick offer two new possibilities. Under Rule 66, it is provided that a party to a contract for the sale of real property may apply by Notice of Application to determine, for example, the validity of an objection to title. Secondly, Rule 70.05, in its own formulation provides an "Alternative Proceeding by Notice of Action or Notice of Application" to proceedings under the Quieting of Titles Act. The scope of this rule is a little difficult to determine. A similar provision is found in the Ontario Rules of Civil Procedure adopted in January 1985 (rule 14.05). However, decisions on applications under an identical provision in the previous Rules of Civil Procedure of Ontario seemed to indicate that such an alternative to the Quieting of Titles Act would not be used to determine disputed questions of possessory title; see Re Gordon and Muxlow (1930) 38 O.W.N. 199 and Re Edwards [1957] O.W.N. 562.

The procedure suggested, under such an act, would be administrative, rather than judicial, yet it would offer the same advantages as those obtained under the Quieting of Titles Act. In the many years the certification procedure has been available in Ontario, very few problems, it would seem, have come up because of such "certified" titles.³⁸⁷ This procedure, like the adoption of a definitive search period, would also be a useful intermediate step between the Registry System and the Land Titles System.³⁸⁸ Studies have pointed out that there are many advantages to certifying title in this manner:

Certification in the registry system under the Certification of Titles Act provides an assured statement of ownership and encumbrances at a stated point in time. It eliminates the need for users to search beyond the point of certification. It can dramatically shorten and simplify searching. Certification of subdivision plans also eliminates the need to search in the unparcelized index. This further reduces search time and system workload. All new plans of subdivision entering the registry system should be certified. A retroactive certification program should be undertaken for previously registered plans.³⁸⁹

387) N. Neave, op. cit., note 3, p. 545. The author also describes briefly the simplicity of the procedure involved.

388) An Improved Land Registration System, op. cit., note 116; p. 28. In Ontario, land used for condominiums and all new subdivisions must be certified in those areas where the land titles system is not available.

389) Id., p. 9.

Of course, a Certification of Titles Act does not provide the same guarantee as found in a Torrens Systems. It can, however, be just as efficient for the buyer, at least, when the certificate is final. In this way, no government funds need be available to compensate recognized "overriding interest". While this may appear harsh towards parties holding possible forgotten interests in the land, such finality is, after all, one of the basic principles on which a true Torrens system is founded.

With the number of yet undeveloped parcels of real estate in New Brunswick, a Certification of Titles Act would make a solicitor's task in the future land development of this province a very much surer and simpler one.³⁹⁰

5. Reform Resulting From a Uniform Law

The different common law provinces in Canada seem to be moving towards adopting basically similar registration of titles systems, ones which are based on the Torrens system. In the future, this may help develop a uniform, standard definition of basic notions such as a "marketable title".

390) Especially in relation to "vacant land"; see J. Robertson, op. cit., note 384, p. 254.

As we have previously seen, this important concept has, up until now, eluded a precise definition. However, in the United States, efforts have been made to write and adopt the necessary legislation containing a uniform definition of what is to be considered a good, marketable title.³⁹¹

Of course, before this is possible in Canada, each common law province including New Brunswick will have to have developed or studied its own notion of what is a marketable title. For example, such basic notions as the necessary length of the search will have to be decided, unless all provinces decide to rely exclusively on a Torrens system.

The idea of defining marketable title by a model statute in each province is one that should be carefully studied, considering the obvious advantages of it. Meanwhile, where the situation is as confused as it is in New Brunswick, it would seem that a statutory definition as soon as possible would be an important guideline to the many solicitors who must continue to give opinions in spite of the confusion.

E) Mechanization

Under the heading of reforms to be made in view of the utility and general efficiency of mechanization, many aspects, both practical and legal must be considered. Information

391-) H.W. Silverman, op. cit., note 375, p. 111.

relating to land would undoubtedly be more easily registered and conveyed through the use of computer and mechanized indices than under a system which works entirely by hand. Furthermore, when such technical aids are well utilized, the chances for error are likely to be diminished. In the long run, taking into account the smaller number of errors, and the time-saving realized both by staff and lawyers, such a system, once in operation may well also be financially advantageous.

However, the expense of totally implementing such a system in New Brunswick in the near future seems prohibitive at this moment.

The conclusion that a system can be improved or that one system is better than another can not alone justify making a change. The costs of making the change must be determined, and compared to the advantages.³⁹²

The problems relating to cost, while perhaps slowing down the implementation of computerization for now should not, however, cancel all plans towards this modernization. While still maintaining manual indices and filing, the province could be adopting a computer-compatible system of storage and retrieval which would make the ultimate transition easier and which would allow the users to familiarize themselves with these new tools.³⁹³

392) R.C.B. Risk, op. cit., note 320, p. 488.

393) It seems in fact that "a technological revolution for the records of title will occur, and the questions are when this revolution will come and what its form will be."
See R.C.B. Risk, op. cit., note 320, p. 480.

F) Conclusion

What is important is to plan, not while seeking only to improve what served us yesterday, nor even at what may be adequate for today, but this province can and must look to the future, to see the newer trends and the economic changes, as well as the legal ones. The fact that our budget may be more restrictive than the larger provinces should motivate us even more towards the future and towards long-range planning, because we simply cannot afford to adopt short-range modifications which will likely have to be abandoned in the next decade.

GENERAL CONCLUSION

This paper has attempted to demonstrate many of the difficulties and pitfalls that await a solicitor who represents a client in a real estate transaction. Furthermore, it has been attempted to analyze the current legal trends which would tend to result in more lawsuits against solicitors for defects of title while leaving them with fewer defences. Finally, we have attempted to enumerate, then evaluate, the possible changes in relation to real estate practice in New Brunswick. In doing the latter, we have looked nearly always to Ontario for guidance. That province, while being larger, has a Registry System which is similar to New Brunswick's, but it has moved ahead trying many changes, while, as has been remarked earlier, we seem to have remained almost static.

It seems we have more than reached the time to try our hand at reforming quite drastically the area of law touching the sale of real estate. We are overdue for change; indeed, we are pleased to report that some major reforms seem to be well on the way and the need for further reform seems beyond discussion. In all fairness, it has to be said that the prognosis is good. The steps that have been taken in New Brunswick toward reform auger

well for the future. One example of these steps can be seen in the adoption of a new surveying system which permits the drawing of precise maps,³⁹⁴ which in turn aids immensely in identifying a parcel of land without the need of recourse to the grantor-grantee index. This new system of parcel identification will be officially in force when the Land Titles Act is put into operation.³⁹⁵

This new system of registration under the Land Titles Act is one major reform which seems certain. The Act has been adopted and we are now waiting for a pilot project to evaluate the impact it will have. Unfortunate delays seem to have occurred, however, and with the provincial financial budget proposed in May 1983, restraints appear necessary in all areas, including law reform. The note of caution, which has already been stated, may deserve repeating at this point: one must not expect the new land titles system to be a cure-all. Even once in place, it will be many years before every parcel of land in New Brunswick can be brought under it. Even before that time, other solutions may appear even more desirable and, therefore, progress should not be halted while waiting for any "perfect" solution under land titles. Progress is never completed and we should continue to improve both systems working under both

394) The Surveyors Act, R.S.N.B. 1973, c.6-17.

395) See also the Standard Forms of Conveyances Act, S.N.E. 1982, c.S-12.2, which represents another step in the right direction.

of them towards the ultimate solution to all our difficulties concerning the sale of land.

It is sincerely hoped that solicitors in New Brunswick will make themselves more aware of the legal and ethical problems of practice in general, not simply those related to their own practice or those existing in their own locality but throughout the profession in the whole province, and indeed, all of Canada. Ideally this will bring about a more active bar with members wanting to become more involved in law reform generally. Surely this is the way to erase any perception of lawyers as narrow and reactionary. It is hoped that this paper will provide some impetus towards that end among the real estate practitioners in New Brunswick.

It has been said:

... Today even the most conservative among us must admit the need to contemplate how changes in our profession and in the law will influence our concepts of professional duty and our system of self-regulation.

Anticipating change and anticipating its effects are not simple tasks. But the attendant difficulties cannot deter us from attempting to explore the implications of the immediate past and the present. Though it is true that the future lies always somewhat below the horizon and beyond our immediate vision, it is not entirely beyond our control. The work we do today to anticipate the future will certainly shape its course, if not detail its contours.³⁹⁶

.396) R.J. Kutak, Rules of Professional Conduct in an Era of Change, (1980) 29 Emory L.J., p. 891.

BIBLIOGRAPHY

MONOGRAPHS

ARMOUR, E.D., A Treatise on the Law of Real Property, Toronto, Canada Law Books, 1901, 532p.

ARMOUR, E.D., Investigation of Titles, 3rd ed., Toronto, The Canada Law Book Company, 1903, 483p.

ARNOLD Encyclopedia of Real Estate, Boston, Mass., Warren, Gorham & Lamont Inc., 1978, Vol. 1, 901p.

BIRKS, M., Gentlemen of the Law, London, Stevens and Sons, 1960, 304p.

BISSETT-JOHNSON, Holland (Editor), Matrimonial Property Law in Canada, Carswell Co., 1980, N.B.-1 to N.E.-23.

CARTWRIGHT, J., Glossary of Real Estate Law, Rochester, N.Y., Lawyers Cooperative Publishing Co., 1972, 1027p.

CODE of Professional Conduct approved by the Canadian Bar Association, 25th August, Ottawa, 1974, 75p.

DAVIS, J., Real Property Law and Cases, Toronto Best Printer Co. Ltd, 1977, 629p.

DI CASTRI, V., The Law of Vendor and Purchaser, 2nd ed., Toronto, Carswell, 1976, 834p.

DONAHUE, D.J., QUINN, P.D., Conveyancer's Guide to Real Estate Practice in Ontario, 2nd ed., Toronto, Butterworths, 1976, 265p.

FEENEY, T.G., The Canadian Law of Wills, Toronto, Butterworths and Co. Ltd, University of Toronto, 1982, 270p.

FLEMING, J.G., The Law of Torts, 6th ed., Sydney, The Law Book Company Ltd, 1983, 702p.

HALSBURY'S Laws of England, 4th ed., London, Butterworths, 1973:

HAYTON, D.J., Registered Land, 2nd ed., London, Sweet & Maxwell, 1977, 214p.

HOGG, J.E., Registration of Title to Land Throughout the Empire, London, Carswell Co. Ltd, 1920, 773p.

HOLDSWORTH, W.S., A History of English Law, Vol. 13 and 15, 7th ed., London, Methuen, 1956, 803 and 577p.

HUNTER, A.J., Real Property Statutes of Ontario, Toronto, Carswell, 1894, 744p.

LAMONT, D., Real Estate Conveyancing, Toronto, Law Society of Upper Canada, Dept. of Continuing Education, 1976, 689p.

LASKIN, B., Cases and Notes on Land Law, Toronto, University of Toronto Press, 1969, 675p.

MAGWOOD, W.M., The Systems of Land Registration, Toronto, Carswell, 1954, 305p.

MEGARRY, R., WADE, H.W.R., The Law of Real Property, 4th ed., London, Stevens & Sons Ltd, 1975, 1206p.

MELLOWS, A.R., Conveyancing Searches, London, Oyez Publishing, 1975, 285p.

ORKIN, M.M., Legal Ethics - A Study of Professional Conduct, Toronto, Cartwright & Sons Ltd, 1957, 330p.

PLUCKNETT, I.T.T., A Concise History of the Common Law, 5th ed., London, Butterworths, 1956, 740p.

PROFESSIONAL Conduct Handbook, adopted pursuant to the Barristers Society Act, S.N.B. 1971, s. 3, 144p.

REITER, B.J., RISK, R.C.B., and MCLELLAN, B.N., Real Estate Law, Toronto, Edmond-Montgomery Ltd, 1982, 1194p.

RUOFF, T.B.F., and ROPER, R.B., The Law and Practice of Registered Conveyancing, 3rd ed., London, Stevens & Sons Ltd, 1972, 1176p.

SHICK, B.C. and PLOTKIN, I.H., Torrens in the United States, Lexington, Massachusetts and Toronto, Lexington Books, D.C. Heath & Company, 1979, 161p.

SIMPSON, S.W.B., An Introduction to the History of Land Law, Cambridge, Cambridge University Press, 1961, 276p.

SIMPSON, S.R., Land Law and Registration, Cambridge, Cambridge University Press, 1976, 726p.

STEACY, R., Canadian Real Estate (How to Make It Pay), 4th ed., Willowdale, Ontario, Real Estate Press, 1979, 303p.

TAYLOR, W.T., Investigation of Titles to Estates, 2nd ed., Toronto, Willing & Williamson, 1873, 210p.

WALKER, P.H.G., Real Estate and Landlord and Tenant, Law Society of Upper Canada, Bar Admission Course Materials, Toronto, Carswell Legal Publications, 1984, 796p.

WILLIAMS, T.C., A Treatise on the Law of Vendor and Purchaser, Vol. I, 4th ed., London, England, Sweet and Maxwell Ltd, 1936, 744p.

ARTICLES

- AIGLER, R.W., The Operation of the Registry Act, (1924) 22 Mich. Law Review, 405-420.
- ARTHURS, H.W., Authority, Accountability and Democracy in the Government of the Ontario Legal Profession, (1971), 49 Can. Bar Rev., 1-23.
- BAILEY, S.J., Thirteenth-Century Conveyancing From the Charter Roll, 1961, Camb. L.J., 211-218.
- BARNES, R.E. and NATHAN, H.R., Abortive Real Estate Transactions, Causes and Remedies, 1975, Lect. L.S.U.C., 143-178.
- BASTEDO, T.G., A Note on Lawyers' Malpractice: Legal Boundaries and Judicial Regulations, (1969), 7 Osgoode Hall L.J., 311-321.
- BASYE, P.E., A Uniform Land Parcel Identifier, its Potential for all our Land Records, (1973), 22 Am. U.L. Rev., 251-273.
- BETTS, P.V., Recent Trends in Land Use Control with Particular Reference to 1976 Ontario Legislation, 1974, Lect. L.S.U.C., 83-120.
- BLYTH, E.K., Land Transfer and Land Registry, (1896), 12 L.Q.R., 354-367.
- BOUCK, J.C., Introducing English Statute Law into the Provinces: Time for a Change?, (1979), 57 Can. Bar. Rev., 74-87.
- BOWLES, R., and PHILLIPS, J., Solicitors' Remuneration: A Critique of Recent Developments in Conveyancing, (1977), 40 Mod. L.R., 639-650.
- BRAZIER, M., The Innocent Purchaser and His Professional Advisers, (1976), 40 The Conv. & Prop. Lawyer, 179-195.
- BROWN, L.M., DAVER, E.A., Professional Responsibility in Non Adversarial Lawyering: A Review of the Model Rules (1982), 2 Am. Bar Found. Res. Journ., 519-535.
- BRUNET, Y., Le danger des clauses employées machinalement, (1966), 1 R.J.T., 303-337.
- BUCKLEY, M., Equity Deserts the Wife, (1967), 20 Curr. Leg. Probl., 144-169.

CARTER, R., Some Reflections on the Land Titles Act of Saskatchewan, 30 Sask. Bar Rev., 315-324.

CASTEL, J.-G., The Law and the Legal Profession in the Twenty First Century, (1973), 51 Can. Bar Rev., 1-5.

COHEN, H., The Origins of the English Bar, (1914), 30 L.Q.R., 464-480.

COMTOIS, R., Le système Torrens - pas une garantie, (1978), 80 R. du N., 496-498.

DAVID, H., Solicitors Liability for Negligent Misrepresentation, (1976), 24 Chitty's L.J., 276-280.

DAVIES, G.J., Equity, Notice and Fraud in the Torrens System, (1972), 10 Alta L. Rev., 116-125.

DELAGE, J.F., L'obligation du notaire de faire des recherches, (1976), C.P. du N., 39-95.

DERASPE, R., Contenu de la déclaration de transmission immédiate dans l'optique de l'examen des titres de propriété, (1980), 82 R. du N., 481-485.

DE SHA MALONE, A., Title Searches: The Potential for Liabilities, (1978), 49 Miss. L.J. 689-723.

DI CASTRI, V.T., The Real Property Statutes, 1978: Land Titles Act, Conveyancing and Law of Property Act and the Execution Amendment Act, (1978), 36 The Advocate, 405-423.

FEENEY, T.G., Registration and Land Titles in the Common Law, (1964), 2 Col. J. Dr. Comp., 19-33.

FIFLIS, T.J., Security and Economy in Land Transactions: Some Suggestions from Scotland and England, (1968), 20 The Hastings L.J., 171-216.

FITZGERALD, R.G., Title to Land, 1953, Amer. L. Probl., 106-107.

FREEMAN, J.P., Opinion Letters and Professionalism, 1973, Duke L. J., 371-439.

FULD, J.J., Lawyers' Standards and Responsibilities in Rendering Opinions, (1978), 33 The Bus. Lawyer (Spec. Issue), 1295-1327.

FULD, J.J., Legal Opinions in Business Transactions, (1972-73), 28 Bus. Lawyer, 915-945.

- GALOWITZ, S.W., Selling the Flawed Property, (1979), 9 Real Estate Rev., 25-30.
- GARNER, J.G., The Nature of an Easement, 1955, Journ. of Plan. and Prop. Law, 427-430.
- GELIORN, W., Abuse of Occupational Licensing, (1976), 44 Univ. of Chicago L. Rev., 6-27.
- GOLDNER, B., The Torrens System of Title Registration, A New Proposal for Effective Implementation, (1982), 29 U.C.L.A.L. Rev., 661-710.
- GOSSE, R., Some Recent Developments in the Law of Real Property, 1966, Lect. L.S.U.C., 259-289.
- HASKINS, G.L., The Beginnings of the Recording Systems in Massachusetts, (1941), 21 B.U.L.R., 286-304.
- HAYTON, D.J., Land Law: Getting Priorities Right, (1976), 29 Curr. L. Probl., 26-59.
- HOLDSWORTH, W.S., The Political Causes that Shaped the Statute of Uses, (1912-13), 26 Harv. L.R., 108-127.
- HOWLAND, W.G.C., Objections to Titles, 1960, Spec. Lect. L.S.U.C., 221-236.
- HOYT, W.L., Professional Negligence, 1973, Spec. Lect. L.S.U.C., 125-135.
- INNES, W.I., The Doctrine of Marketable Title in Canada, (1976), 25 U.N.B.L.J., 97-114.
- IRVINE, J., Contract or Tort: Troubles Along the Border, (1979), 10 C.C.L.T., 281-305, and 12 C.C.L.T. 44-47.
- JACKSON, D.C., Registration of Land Interests, (1972), 88 L.Q.R., 93-137.
- JACKSON, D.C., Securiti of Title, (1978), 94 L.Q.R., 239-254.
- JANCZYCK, J.T., Land Title Systems, Scale of Operations, and Operating and Conversion Costs, (1978), 8 J. Leg. Studies, 569-583.
- JOHNSON, C.W., Purpose and Scope of Recording Statutes, (1962), 47 Iowa L.R., 231-244.

KENNIFF, P., Development Control in Canada: Evolution and Prospects, 1974, Journ. of Plan. Envir. Law, 385-398.

KUTAK, R.J., Rules of Professional Conduct, (1980), 29 Emory L.J., 889-908.

LAFOREST, G., Community Planning Law in New Brunswick, (1966), 16 U.N.B.L.J., 16-33.

LAFOREST, G., History and Place of the Registry Act in New Brunswick Land Law, (1979), 20 U.N.B.L.J., 1-11.

LAMONT, D.H., Letter to the Editor, (1974), 22 Chitty's L.J., 237.

LAMONT, D.H., Matters Pertaining to the Completion of the Sale, 1960, Lect. L.S.U.C., 371-388.

LASKIN, B., Defects of Title and Quality, 1960, Lect. L.S.U.C., 389-411.

LAWSON, R.G., Professional Liability - Contract or Contract and Tort?, (1977), 27 New L.J., 108-109.

LEAKE, R.E., History of Lawyer's Liability Law, (1978), 13 Law Forum, 800-807.

LYNCH, B.E., Smoothing the Route to Registration, 1970, Spec. Lect. L.S.U.C., 101-123.

MACFARLANE, R.D., Legal Profession in Canada - Research Perspective, (1980), 28 Chitty's L.J., 50-59.

MAGWOOD, M., The System of Land Registration and Guarantee of Title in the Province of Ontario, (1959-60), 13 U.T.L.J., 93-106.

MANDSLEY, R.H., Bona Fide Purchases of Registered Land, (1973), 36 Modern L. Rev., 25-41.

MATLOW, P.T., Beware the Standard Form! Comments on the Careful Drafting of Agreements of Purchase and Sale of Real Estate, 6 R.P.R., 93-109.

MEGARRY, R.E., Problems of the Legal Profession, (1971), 5 Gazette, 240-242.

- MESHER, J.I., How to Get Sued Without Really Trying, (1971), 34 Modern L. Rev., 317-323.
- MILLMAN, J.A., Counselor Beware: Failure to Recognize Obvious Legal Trends May Be Malpractice, (1979), 27 Chitty's L.J., 279-288.
- MONTGOMERY, J.L., Prescription: For the Title Examiner, (1978), 25 La. B.J., 176-82.
- MCCLEAN, A.J., The Nature of an Easement, (1966), 5 West Ont. L. Rev., 32-61.
- MCDEVITT, P.J., Stories the Real Estate Professionals Tell, (1980), 9 Real Estate Rev., 52-56.
- MCKAY, R.B., Competence and the Professionally Responsible Lawyer, (1980), 29 Emory L.J., 971-995.
- NEAVE, M., Conveyancing Under the Registry Act: An Analysis of the Priority Provisions and Some Suggestions for Reform, (1977), 55 Can. Bar Rev., 501-548.
- NEAVE, M., Indefeasibility of Titles in the Canadian Content, (1976), 26 U.T.L.J., 173-192.
- NELSON, R.M., The Source of Professional Liability - Tort or Contract?, 1975, Lect. L.S.U.C., 323-353.
- NEWMAN, J.F., Reaction and Change: A Study of the Ontario Bar 1880-1920, (1974), 32 U.T.F. of L., 51-74.
- OFFER, A., The Origins of the Law of Property Acts, 1910-25, (1977), 40 Modern L. Rev., 505-522.
- PEDOWITZ, J.M., Title Insurance - What Every New York Lawyer Should Know, (1980), 52 N.Y.S.B.J., 394-400.
- PETERSON, J.S., Remedies After Conveyancing Completed, (1966), 9 C.B.J., 95-107.
- PRICHARD, A.M., Roots of Title Today, (1975), 28 Curr. L. Prob., 125-149.
- PRIDDLE, R.E., New Requirements and Procedures in Land Titles and Registry Offices, 1970, Lect. L.S.U.C., 353-381.

RADOWSKI, H.B., Actions Against Solicitors - Contract or Tort?, (1980), 2 Advocates Quarterly, 160-183.

RIDDELL, W.R., Early Provincial Legislative Interference With Private Property, (1933), 11 Can. Bar Rev., 176-180.

RISK, R.C.B., The Last Golden Age, Property and Allocations of Losses in Ontario in the Nineteenth Century, (1977), 27 U. of T. L.J., 199-239.

RISK, R.C.B., The Records of Title to Land - A Plea for Reform, (1971), 21 U. of T. L.J., 465-497.

ROBERTSON, J.R., Real Estate Implications in Materials on Marital Property, Can. Bar Ass., N.B. Branch, 1980, E-1 to E-35.

ROBERTSON, J.R., Real Property - Conveyancing - Certifying Title to Vacant Lands (1980), 29 U.N.B.L.J., 254-256.

ROBERTSON, J.R., Should I Close This Transaction?, 1974, Lect. L.S.U.C., 41-62.

RYDER, E.C., Registration of Title and Law Reform (1966), 19 Curr. Leg. Probl., 26-42.

SCHWENKE, R., Environmental and Land Use Laws, Regulations and Permits: How They Affect Real Estate ... And What To Do About It, (1979), 14 Real Prop. Prob. & Trust Journ., 851-872.

SILVERMAN, H.W., Real Estate Practice: Its Shrinking Scope, (1974), 22 Chitty's L.J., 109-130.

SINCLAIR, A.M., Real Property, (1968), 3 Ott. L. Rev., 219-290.

SINCLAIR, A.M., The Real Property of New Brunswick: Some Proposals, (1968), 18 U.N.B.L.J., 1-15.

SMITH, R.J., Land Charges and Actual Notice: Justice More or Less Fanciful?, (1980), 96 L.Q.R., 8-12.

SMITH, R.J., The Priority of Competing Minor Interests in Registered Land, (1977), 93 L.Q.R., 541-560.

SMITH, S., Registration of Titles in Ontario and the Prairie Provinces: A Few of the Salient Points of Differences, (1965), 30 Sask. Bar Rev., 275-288.

(x)

- SPRING, E., Landowners, Lawyers and Land Law Reform in Nineteenth-Century England, (1977), 21 Amer. J. Leg. Hist., 40-59.
- STAPLETON, B., Land Use Control in New Brunswick: Some Observations, (1973), 22 U.N.B.L.J., 89-98.
- STEIN, R.L., Some Aspects of Title by Registration in the Maritime Provinces of Canada, (1976), 2 Dal. L.J., 633-657.
- STOEBUCK, W.B., Reception of English Common Law in the American Colonies, (1968), 10 Will. & Mary L. Rev., 393-426.
- SWAN, J., and REITER, B.J., Solicitors' Responsibilities in Real Estate Transactions, (1980), 8 R.P.R. 159-177.
- THEBERGE, B.M., Attorney Negligence in Real Estate Title Examination and Will Drafting: Elimination of the Priority Requirement as a Bar to Recovery by Foreseeable Third Parties, (1981-82), 17 New Engl. L. Rev., 955-998.
- TURNER, N.J., Confusion in English Family Property Law - Enlightenment From Australia?, (1975), 38 Modern L. Rev., 397-412.
- URBAN, E.T., Future Advances and Title Insurance Coverage, (1979), 15 Wake Forest L. Rev., 329-356.
- WAYAND, D., Owner Beware: Themes and Variations in Property Laws, (1979), 28 U.N.B.L.J., 155-174.
- WEIR, J.F., Remedies With Respect to Contracts of Purchase and Sale, 1960, Spec. Lect. L.S.U.C., 427-442.
- WILLIAMSON, J.R., Executions Against Land in New Brunswick, (1981), 30 U.N.B.L.J., 131-165.
- ZANDER, M., The Report of the Royal Commission on Legal Services, (1980), Curr. L. Probl., 35-55.

REPORTS, COLLECTION OF SPEECHES ETC...

BARRISTERS' SOCIETY OF NEW BRUNSWICK, Report of the Property Standards Committee, May 1983, 9p.

CANADIAN BAR ASSOCIATION, Special Committee on Legal Ethics, Preliminary Report, Code of Professional Conduct, June 1973, 111p.

CANADIAN BAR ASSOCIATION, Ontario Branch, Real Property, What's New and Wonderful or Old and Ghastly, 5th Annual Institute on Continuing Legal Education, April, 1980, 226p.

CONTINUING LEGAL-EDUCATION SOCIETY OF BRITISH COLUMBIA, Advanced Real Estate, Center for Continuing Education, U.B.C., 1978, Vol. 1, Part I, 111p.

LAW SOCIETY OF UPPER CANADA, Dept. of Continuing Education, Real Property - What Now?, Edited lectures from a program held at Osgoode Hall, Toronto, May and June 1978, 151p.

MACINTOSH, C.W., GAUVIN, M.L., Overriding Interests to Real Property in New Brunswick, Land Registration Information System, Fredericton, 1975, 73p.

MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS, Ontario, An Improved Land Registration System for Ontario, Vol. I, Property Rights Division Polaris Project, 1977-79, 112p.

MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS, Ontario, An Improved Land Registration System for Ontario, Vol. II, Design Concepts and Recommendations, L.R.M.C., August, 1979, 347p.

ONTARIO LAW REFORM COMMISSION, Report on Land Registration, Toronto, The Queen's Printer and Publisher, 1971, 176p.

ONTARIO LAW REFORM COMMISSION, Report on the Solicitors' Act, Ministry of the Attorney General, 1973, 94p.

SINCLAIR, A.M., Survey of the Law of Real Property, Law Reform Division, Dept. of Justice, Fredericton, New Brunswick, 1976, 382p.

CASES

Aaroe and Aaroe v. Seymour, (1956), O.R. 736; (1957) 6 D.L.R. (2d) 100.

Abbey Discount Corp. Ltd v. Nicel et al., [1972] 3 O.R. 360.

Albert v. Leger, [1977] 19 N.B.R. 44.

Arenson v. Arenson, [1977] A.C. 405.

Armstrong and Van Der Weyden, Re, [1965] 1 O.R. 68.

Assessment Equalization Act, Re, (1968) 65 W.W.R. 142.

Avalon v. McNamara, [1975] 1 L.R.I. 649.

Ayotte v. Boucher, (1883), 9 S.C.R. 460.

Banks et al. v. Reid, [1975] 6 O.R. (2d) 380.

Brenner et al. v. Gregory et al. [1973] 1 O.R. 252, 30 D.L.R. (3d) 672.

Burnstein v. Crisp Devine Ltd, [1973] 3 O.R. 342.

Caldwell et al. v. Fitzgerald et al., (1977), 26 N.S.R. (2d), 40 A.P.R. 140.

Capital Quality Homes Ltd v. Colwyn, (1975), 9 O.R. (2d) 617; 61 D.L.R. (3d) 385.

Central and Eastern Trust Co. v. Rafuse, (1982), 53 N.S.R. (2d) 62, 109 A.P.R. 62.

City of Ottawa et al. v. Boyd Builders Ltd, [1965] S.C.R. 408.

Clements et al. v. Wyatt et al., [1979] 9 R.P.R. 1.

Comeau et al. v. Canada Permanent Trust et al., (1979), 27 N.B.R. (2d), 60 A.P.R. 126.

Cooke, Re, (1889), 5 T.L.R. 407.

Cornell v. Jaeger, (1968), 63 W.W.R. 747.

Delta Sound Inc., Re, (1980) 34 C.B.R. (N.S.) 319.

Demarco v. Ungaro et al., (1979), 21 O.R. (2d) 693, 95 D.L.R. (3d) 385.

Dominion Chain Co. Ltd v. Eastern Construction Co. Ltd, (1976), 12 O.R. 201; 68 D.L.R. (3d) 385; 19 N.R. 298 (S.C.).

Doucette v. Comeau (1976), 15 N.B.R. (2d) 432.

Dutton v. Bognor Regis Urban District Council, [1972] 1 Q.B. 373; [1972] 1 All E.R. 462.

Edwards, Re, [1957] O.W.N. 562.

Esso Petroleum Co. Ltd v. Mardon [1976] 2 All E.R. 5.

Fitzpatrick, Re, (1923) 54 O.L.R. 3.

Forkenkamm v. Planton [1973] 2 O.R. 518; 34 D.L.R. (3d) 470.

Gadutses et al. v. Milne et al. [1973] 2 O.R. 503.

Gartside v. Sheffield [1983] N.Z.L.R. 37.

Gordon and Muxlow, Re, (1930) 38 O.W.N. 562.

Gorieu v. Simonot (1982) 19 Sask. R. 74.

Grima et al. v. MacMillan (1972) 3 O.R. 214.

Groom v. Crocker [1938] 2 All E.R. 194.

Haddington v. McFadden, Bert. 153 (1836), (1835-39) 2 N.B.R. 260.

Hall v. Meyrick [1957] 2 Q.B. 455; [1957] 2 All E.R. 722.

Hartt v. Wishard-Langan Co., (1908), 9 W.L.R. 519, 18 Man. R. 376.

Hashman v. Anjulin Farms Ltd, [1973] S.C.R. 268.

Hauck v. Dixon, (1975), 10 O.R. (2d) 605.

Hedley Byrne et Co. Ltd v. Hillier & Partners Ltd, [1964] A.C. 415.

Hodgins v. Hydro Electric Commission of the Township of Nepean, (1975) 60 D.L.R. (3d) 1.

Innes v. Van de Weerdhof [1970] 2 O.R. 334.

Israel v. Leith (1890) 20 O.R. 367.

Jacobson Ford - Mercury Sales Ltd v. Sivertz (1979) 103 D.L.R. (3d) 480.

James, Re, [1946] O.W.N. 340.

Joydon Dev. Ltd v. Hilite H. Ltd (1927), 1 O.R. 482.

Karpenko v. Paroian et al. [1981] 117 D.L.R. (3d) 383, 30 O.R. (2d) 776.

Kerby-Smith, Re, [1964] Ch. 506, [1964] 2 All E.R. 835.

Kolan v. A Solicitor (1969) 7 D.L.R. (3d) 481; [1970] 1 O.R. 41; aff'd [1970] 2 O.R. 686, 11 D.L.R. (3d) 372.

Knox v. Gregory (1881), 21 N.B.R. 196.

Kirton and Frolak, Re, [1973] 2 O.R. 185.

Lemon and Davies Contract, Re, [1919] O.L.R. 481.

Logan v. Stein [1958] O.W.N. 343.

Maillet et al. v. Haliburton et al. (1983) 55 N.S.R. (2d), 114 A.P.R. 311.

Major v. Buchanan et al. [1975] 9 O.R. (2d) 491.

Marwood v. Charter Credit Corp. (1971) 2 N.S.R. (2d) 743, 20 D.L.R. (3d) 563.

Melanson v. Leger, Creaghan & Savoie, (1979) 24 N.B.R. (2d) 633.

Messineo v. Beale, (1976), 71 D.L.R. (3d) 31; (1978) 86 D.L.R. (3d) 713.

Midland Bank Trust Co. Ltd v. Green [1979] 3 W.L.R. 167.

McAlister v. Stevenson [1932] A.C. 562.

McCauley v. McVey (1980) 9 R.P.R. 36.

McConoghy v. Denmark (1880) 4 S.C.R. 609.

Nocton v. Lord Ashburton [1914] A.C. 939, [1914-15] All E.R. 45.

Nova Scotia v. Leger, (1982) 39 N.B.R. (2d), 103 A.P.R. 304.

Numes Diamonds v. Dominion Electric Protection, [1972] S.C.R. 769.

(xv)

O'Kanagan Mainline Real Estate Board v. Can. Indemnity Co. et al.
(1970) 70 D.L.R. (2d) 516.

Ormindale Holdings Ltd v. Ray [1980] 116 D.L.R. (3d) 346.

Panamoff v. Reid and Besk (1962) 32 D.L.R. (2d) 126.

Pharmacie Belisle Pharmacy Ltd v. Mineau et al., (1977) 17 O.R.
(2d) 295.

Philips, Ex. p. (1887) 26 N.B.R. 178.

Porter v. Ridge (1945) 17 N.W. (2d) 230; 310 Mich. 425.

Powell v. Powell [1900] 1 Ch. 243.

Power v. Halley (1978) 88 D.L.R. (3d) 381.

Pyrke v. Waddingham (1852) 68 E.R. 813.

Quevillon et al. v. Lamoureux (1975) 52 D.L.R. (3d) 476, aff'd
[1970] 2 O.R. 686.

R. v. Ballet (1967) 1 O.R. 696.

R. v. James [1946] O.W.N. 340.

R. ex rel. Smith v. Mitchell [1952] O.R. 896.

Re Assessment Equalization Act, (1968) W.W.R. 142.

Richview Const. Co. Ltd v. Raspa (1975) 11 O.R. 377; 66 D.L.R.
(3d) 193.

Roman v. Visnechic et al. [1975] 3 O.R. (2d) 734.

Ross v. Caunters [1979] 3 W.L.R. 605; [1979] 3 All E.R. 580.

Royal Bank of Canada v. Clark and Watters (1978) 22 N.B.R. (2d)
693, 39 A.P.R. 693.

Saunders v. Seyd et al. (1896) 75 L.J. 193.

Savoie v. Savoie (1979) 25 N.B.R. (2d) 541.

Schwebel v. Telekes [1967] 1 O.R. 571, 61 D.L.R. (2d) 470.

Sealand of the Pacific Ocean v. Ocean Cement Ltd (1973)
33 D.L.R. (3d) 625.

Smith et al. v. McInnis [1978] 2 S.C.R. 1357.

Solicitor, Re, (1916) 37 O.L.R. 310.

Solicitors, Re, 32 D.L.R. 387.

Soper v. Windsor (1914) 32 O.L.R. 352.

Spector v. Ageda [1971] 3 All E.R. 417.

Spence v. Bell [1982] 39 A.R. 238.

Styhoff v. Magnard [1942] 3 D.L.R. 654.

Sutcliffe v. Thackrah [1974] A.C. 727.

Table Slate Constr. Ltd v. Jones (1977) 2 R.P.R. 208.

Tiffin Holdings Ltd v. Millican et al. (1964) 49 D.L.R. (2d) 216;
inf'd [1967] S.C.R. 183.

Tominski v. Headway Builders (Sault) Ltd, (1980), 12 R.P.R. 290.

Tracy et al. v. Atkins, (1977) 83 D.L.R. (3d) 46.

Tri-Development Ltd et al. Re, (1978) 23 N.B.R. (2d) 44 A.P.R.
439.

Trust & Loan v. Shaw, 16 Gr. 446 (1869).

Tubsurface Surveys Ltd et al. v. John Burrow Ltd (1967)
62 D.L.R. (2d) 700.

United Trust v. Dominion Stores et al. [1977] 2 S.C.R. 915.

Vancouver General Hospital v. McDaniel et al. (1934) 4 D.L.R.
593.

Vienneau v. Arsenault (1982) 41 N.B.R. (2d), 107 A.P.R. 82.

Whittingham v. Crease & Co. (1978) 88 D.L.R. (3d) 353.

Wilson Lumber v. Simpson (1910) 22 O.R. 592.

Winrob v. Street (1959) 28 W.W.R. 118, 19 D.L.R. (2d) 172.

Yandle & Sons v. Sutton [1922] 2 Ch. 199.

STATUTES

FEDERAL

Bankruptcy Act, 1970, R.S.C., c.B-3.

Canada Business Corporations Act, 1974-75-76 S.C., c.33; 1978-79
c.9.

Veteran's Land Act, 1970, R.S.C., c.V-4.

PROVINCIAL

ALBERTA

Land Titles Act, R.S.A. 1980, c.L-5.

Legal Profession Act, R.S.A. 1970, c.203.

BRITISH COLUMBIA

Land Titles Act, R.S.B.C. 1979, c.219.

Legal Profession Act, R.S.B.C. 1960, c.214.

MANITOBA

Law Society Act, R.S.M. 1970, c.L-100.

Real Property Act, R.S.M. 1970, c.R-30.

Registry Act, R.S.M. 1970, c.R-50.

NEW BRUNSWICK

Barristers and Solicitors Act, R.S.N.B. 1967, c.18; 1973, c.80;
S.N.B. 1982, c.80.

Community Planning Act, R.S.N.B. 1973, c.C-12.

Corporate Securities Registration Act, R.S.N.B. 1973, c.25.

Corporations Act, R.S.N.B. 1973, c.C-13.

Easement Act, R.S.N.B. 1973, c.E-1.

Land Titles, S.N.B. 1981, c.L-1.1.

Limitation of Actions Act, R.S.N.B. 1973, c.L-8.

Matrimonial Property Act, S.N.B. 1980, c.M-1.1.

Mechanic Liens Act, R.S.N.B. 1973, c.M-6.

Memorial of Judgment Act, R.S.N.B. 1973, c.M-9.

Municipalities Act, R.S.N.B. 1973, c.M-22.

Probate Court Act, S.N.B. 1983, c.P-17.1.

Property Tax Act, R.S.N.B. 1973, c.R-2.

Quieting of Titles Act, R.S.N.B. 1973, c.Q-4.

Real Property Tax Act, R.S.N.B. 1973, c.R-2.

Registry Act, Geo III c.3 (1812); R.S.N.B. 1854, c.112; Cons.
Stat. of N.B. 1877, c.74; 57 Vict. 1894, c.20; R.S.N.B.
1902, c.151; R.S.N.B. 1927, c.167; R.S.N.B. 1952, c.195;
R.S.N.B. 1973, c.R-6.

Rules of Court of New Brunswick 1982, Reg. 82-73.

Special Services and Education Tax Act, R.S.N.B. 1973, c.S-12.2.

Standard Forms of Conveyance Act, S.N.B. 1982, c.S-12.2.

Surveyors' Act, R.S.N.B. 1973, c.S-17.

Workmen's Compensation Act, R.S.N.B. 1973, c.W-13.

NEWFOUNDLAND

Law Society Act, R.S.Nfld 1979, c.-51.

NOVA SCOTIA

Barristers and Solicitors Act, R.S.N.S 1967, c.18.

Registry Act, R.S.N.S., 1967, c.265.

ONTARIO

Boundaries Act, 7-8 Eliz. II; 1959, S.O., c.8.

Certification of Titles Act, 6-7 Eliz. II, 1958, S.O., c.9;
R.S.O. 1980, c.61.

Community Planning Act (1960-61), 9 & 10 Eliz. II, c.6.

Investigation of Titles Act, 19 Geo. II; 1929, S.O., c.41.

Land Titles Act, R.S.O. 1980, c.230.

Law Society Act, R.S.O. 1970, c.238.

Planning Act, 12-13 Eliz.; 1964, S.O., c.90.

Quieting of Titles Act, R.S.O. 1980, c.427.

Registry Act, 14-15 Eliz. II; 1964, S.O., c.102; 1966 S.O.,
c.136; 1970 S.O., c.409; R.S.O. 1980, c.445.

Rules of Civil Procedure, O. Reg. 560, 1984 (Gaz. 22/9/84).

Solicitors' Act, R.S.O. 1970, c.441; R.S.O. 1980, c.478.

PRINCE EDWARD ISLAND

Land Titles Act, R.S.P.E.I. 1974, c.L-6.

Law Society and Legal Profession Act, R.S.P.E.I. 1974, c.L-9.

SASKATCHEWAN

Land Titles Act, R.S.S. 1978, c.L-5.

Legal Profession Act, R.S.S. 1965, c.301.

TERRITORIES

Legal Profession Ordinance; R.O.N.W.T. 1974, c.L-3.

ADDENDUM

Since my thesis was submitted, the Ontario Court of Appeal has rendered a decision in the case of Consumers Glass Company v. Foundation Company of Canada Ltd., which seems relevant to certain questions discussed in Chapter III, Section B (pp. 106 to 109).¹

In Chapter III of this thesis, it is submitted that the founding of an action in tort, rather than in contract, prevents a defendant from relying on the technical defence that the action is barred, in cases where a lawyer's negligent Act has occurred more than six years before any action is brought against him. It had been generally accepted that since actions against lawyers could only be founded in contract, the limitation periods ran from the moment the breach occurred, whether the plaintiff had discovered the error or not. As discussed in Chapter III, this situation seemed unfair to plaintiffs who often had no way of discovering the existence of a cause of action until several years later.² The only solution to this dilemma seemed to be to allow a concurrent liability in tort as well as in contract in cases based on professional negligence.

1) As yet unreported. Released on June 3, 1985. O.L.W. Full Text 509-018, 29 pages.

2) Examples of this can be found in the following cases which were discussed in Chapter III: Vienneau v. Arsenault (1982) 41 N.B.R. (2d) 82; Royal Bank of Canada v. Clark and Waters (1978) 22 N.B.R. (2d) 693; Schwebel v. Telekes [1967] 1 O.R. 541.

In the recent case of Consumers Glass Company³ the Ontario Court of Appeal recognized concurrent liability of the defendant in tort and in contract, then decided that in the case before the court, the limitation period would be computed as running from the moment the cause of action was discovered, or could reasonably have been discovered. Quoting extensively from the New Brunswick case John Maryon International Ltd et al. v. New Brunswick Telephone Co. Ltd, 24 C.C.L.J. 146 and the Supreme Court of Canada decision in Kamloops v. Nielsen, Hughes and Hughes [1984] 5 W.W.R. 1, Dubin, J.A. held that this more flexible approach applied to actions based on a breach of duty which could have a concurrent basis in contract or in tort:

Given the right to sue concurrently in tort and in contract, it must follow, in my respectful opinion, that the respondent cannot be deprived of such a right by holding its action in negligence to be statute-barred before damage occurred and therefore before the respondent had a right to sue in negligence.

[...]

I am respectfully of the opinion that the case of Schwebel v. Telekes ... is no longer authoritative in this province. In my opinion, in cases which are based on a breach of duty to take care, a cause of action does not arise, and time does not begin to run for the purposes of the Limitations Act, until such time as the plaintiff discovers or ought reasonably to have discovered the facts with respect to which the remedy is being sought, whether the issue arises in contract or in tort."⁴
(My emphasis)

3) Op. cit. note 1. At page 18 of the decision, per Dubin, J.A.

4) Consumers Glass Company v. Foundation Company of Canada Ltd, op. cit. note 1, pp. 18 and 25.

While none of the most recent cases (i.e. the Maryon case, the Kamloops case or the Consumers Glass case) pertain to professional negligence by lawyers, they are nevertheless relevant in underlining the general principles applicable in professional negligence cases. These principles will undoubtedly also apply in cases involving lawyers. The courts seem to be moving towards a more uniform law of responsibility and legal obligations.⁵ The most recent Ontario decision seems to be a good example of this newer trend. While the main purpose of this thesis is not to study the distinctions between contract law and tort law in general, it is essential to realize this trend, which seems to erode many of the more important distinctions motivating the strong arguments for and against the founding of certain actions in tort.

Whether the decision in Consumers Glass Company provides a final solution to the problem remains to be seen. At first glance, the judgment may appear quite liberal, as may be seen by the following words of Dubin, J.A.:

"As I read the judgment of the Supreme Court of Canada in Kamloops, supra, the underlying policy consideration was 'the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence.' That principle, in my opinion, is equally applicable where the issue arises in cases sounding in contract or in tort.⁶ (My emphasis).

-
- 5) Consumers Glass Company v. The Foundation Company of Canada Ltd, op. cit. note 1, p. 18. See also: John Maryon International v. N.B. Telephone Co., 24 C.C.L.J. 146, at p. 232.
- 6) Consumers Glass Company v. The Foundation Company of Canada Ltd, see op. cit. note 1, at p. 25.

The question has already been raised as to whether this decision would apply to any and every action for breach of contract.⁷ If so the impact on contract law would be great. This author, however, feels that the judgment should apply only to "cases which are based on a breach of duty to take care."⁸ Cases on which Mr. Justice Dubin based his decision do not in fact support a wider proposition that the running of the limitation period is the same, whether a case is founded in contract or tort. It is submitted that the better view is that this recent case confirms that a limitation period will begin to run only from the moment the fault is discovered, or should reasonably have been discovered in actions founded in tort, whether the parties have entered into a contractual relationship or not. The plaintiff will benefit from this flexibility only when he benefits from the possibility of founding his case on the concurrent basis of tort or contract.

Cases against professionals include many different aspects which go beyond the problem of calculating the limitation period. If limited to founding an action in contract, the plaintiff would still be hampered by technical rules such as having to show privity of contract. While this is generally possible in actions by clients involving negligence

7) See comments made by the lawyers representing the parties; O.L.W., June 21, 1985, Vol. 5, no. 8, p. 14.

8) Id., p. 25.

in searching and certifying a title, other actions may be hampered, as for example, actions by third parties, such as beneficiaries to a will.⁹

Therefore, in reading sections of this thesis dealing specifically with the Limitation Acts (pages 106 to 108) the reader must keep in mind the recent Consumers Glass case, delivered in June, two months after the completion of this thesis. However, it is submitted that this case does not render irrelevant the discussion in favor of founding actions against lawyers concurrently in tort as well as in contract.

9) Whittingham v. Crease & Co. (1978) 88 D.L.R. (3d) 353; Gartside v. Sheffield, Young and Ellis [1983] N.Z.L.R. 37; Tracy et al. v. Atkins (1977) 83 D.L.R. (3d) 46, discussed at pages 95 and 106 of this thesis. See also comments made by Laforest, J.A. (as he was) in Caisse d'Inkerman Ltée v. Doiron, N.B.C.A., March 13, 1985 (not yet reported), concerning the relationship between the lawyer representing a purchaser and the mortgagee.