

# Regulation intact, association pulls back

What were they thinking?

That was my first reaction when the Title Insurance Industry Association of Canada (TIIAC) lobbied the Ontario government to repeal Regulation 69/07 (formerly Regulation 666) under the *Insurance Act*.

It is hard to believe that there could have been a marketing decision made to rank with the ill-fated attempt by Coca Cola Co. to replace the hugely popular taste of "Original Coke" with that of a "New Coke." However, this may be it and in fact TIIAC's reversal of its position was even more abrupt than that of Coca-Cola's.

Regulation 69/07 requires title insurers in the province of Ontario to use a lawyer not in their employ to certify title before they issue a title insurance policy in every case. The regulation has been viewed as a key piece of consumer protection legislation because the purchase of a residence is one of the largest financial transactions that a person will make in a lifetime. The regulation ensures that members of the public will have independent legal advice available to them each time a purchase of this nature is made.

Since the mid-1990s, when U.S.-based title insurers first entered the Ontario market, there has been a certain tension between those title insurers and real estate lawyers. At least one of those title insurers attempted to repeal what was then Regulation 666 and set up direct closing centres for residential transactions. Many in the industry felt this evidenced an intention by the title insurers to take over the role of lawyers in real estate transactions, with the potential for a resulting loss of protection for the public.

Those attempts failed in the face of significant opposition both from lawyers' groups and other stakeholders, and in recent years the tension level between the parties appears to have quieted down. In fact, it seemed to me title insurers had become more supportive of the independent lawyer's role in real estate transactions and made attempts to publicize what they stated as their "change of attitude" on this issue.

So is was surprising to me that, last October, TIIAC wrote to the Minister of Finance and proposed, among other submissions, that as part of the new minister's review of the *Insurance Act*, Regulation 69/07 be repealed or amended so that the requirement to use an independent lawyer when issu-



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ing title insurance policies be discontinued.

TIIAC pointed out that this regulation was unique to Ontario and not a requirement in regard to issuing title insurance policies anywhere else in Canada. However, TIIAC's submission to the minister specifically referenced "the conflict of interest of the Law Society of Upper Canada as a regulator and operator of title insurance and their ability to audit and investigate lawyers hired by title insurers to comply with this regulation" and expressly advised the minister that "at a minimum, we are seeking the ability to use our own in-house lawyers." Presumably, although not expressly stated, this implied that the title insurers would no longer be using an independent lawyer to certify title when issuing title insurance policies.

Not all title insurers in Ontario are members of TIIAC. As far as I am aware, the three principal members are FCT Title Company Limited ("First Canadian"), Chicago Title Insurance Company and St. Paul Guarantee Insurance Company. The other two title insurers in the province are not members of TIIAC — TitlePlus/LawPro was denied membership and Stewart Title Guaranty Company ("Stewart Title") refused to join TIIAC because its model of full participation of independent lawyers in conveying transactions was not consistent with TIIAC's principles.

On Dec. 7, 2011, Stewart Title issued a letter to all of its



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clients confirming that they opposed TIIAC's request to change Regulation 69/07 and confirming their support for the role of the legal profession in real estate transactions. Stewart Title's letter resulted in a virtual torrent of letters and emails from lawyers, title insurers, LawPro and other stakeholders.

Within hours of Stewart Title sending the letter, each of First Canadian and Chicago Title sent letters to their customers advising that because of concerns raised by their customers they would be withdrawing their support for TIIAC's initiative. Interestingly, both of these title insurers expressly noted that their original purpose in supporting TIIAC's initiatives was to standardize regulations across the country and that they support the role that lawyers play in real estate transactions.

TIIAC issued a press release the next day advising that it would be withdrawing its request that the Ministry of Finance review Regulation 69/07 and further stating that "TIIAC remains committed to the lawyer's role in the real estate transaction and regrets the unintended concern regarding the association's purpose in making this request."

After all the dust has settled it seems that Regulation 69/07 will remain intact.

I am not so naïve as to think any one side on this issue is absolutely innocent or absolutely wrong. However, I do think it would be just as naïve not to be aware of what is happening and to keep this in mind in the practice of real estate law. ■

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