LESA WESTERN TORRENS PROTOCOL WEBCAST

QUESTIONS & ANSWERS

A. PROTOCOL AVAILABILITY

1. Agricultural Property

A number of questions raised the issue of when a house on an acreage becomes an agricultural transaction such that the Protocol is not available. The current Protocol provisions do not set a specific number of acres over which a property is deemed to be an agricultural transaction. Accordingly, the definition of what is an agricultural transaction is a grey area. While this may be something that could be instituted in the future, we are hoping to include home quarter-section transactions in the Protocol in the near future, so in the interim, the only suggestion we can offer is that the lawyer will have to make a determination of whether or not the transaction is predominantly an agricultural transaction or predominantly a residential transaction. There is little question that the Protocol was intended to apply to small acreage holdings with a house on it where no commercial activity was being conducted. One test that can be used where a mortgage is involved is whether or not the mortgage instructions come from the residential mortgage division of the lender or from the commercial or agricultural division. One of the other useful tests might be whether or not the sale by the seller of the property is GST exempt or not. If it is GST exempt (i.e. the seller is an individual and does not carry on a commercial activity from the property), then it is likely safe to categorize this as a residential as opposed to an agricultural transaction.

2. Commercial Transactions

Similarly, a number of questions related to the issue of when a transaction can be categorized as a commercial transaction. For example, is the sale of a lot which is ready for construction of a single-family dwelling house a commercial transaction or a residential transaction? Again, the line between a residential transaction and a commercial transaction can be grey in certain circumstances. We would suggest that the example of a lot capable of construction of one single family dwelling house thereon would be considered to be a residential transaction, notwithstanding that there is no residence then built. But the sale of a raw land parcel which is capable of construction of more than four dwelling units should be considered to be commercial in nature. We are once again going to request that our insurers look at insuring transactions involving raw land only, regardless of size as if there are no improvements constructed on the property, the risk of claims should be minimal. Accordingly, we would suggest that in circumstances where it is not crystal clear as to whether the Protocol is available or not depending on the categorization of the transaction as residential versus commercial or agricultural, the lawyer would make a reasoned decision and could proceed accordingly. So long as the decision was made on a reasonable basis, ALIA coverage would be available.

3. Sale of Condominium by Developer

As indicated in the webcast, we do not believe that it is open to use Protocol on a sale of a condominium unit by a developer, and this would include not only the sale of a newly constructed condominium, but the first time sale of a condominium unit (for example, as a result of conversion), or a first time sale of a bare land unit. The reason for this Section 14(3) of *The Condominium Property Act* which requires that the developer insure that all of the purchase price remain in trust until such time as title issues in the name of the purchaser. Because of this statutory provision, we do not believe that the gap coverage offered by the Protocol would be available. Arguably, the purchaser could agree to release money on closing on a Protocol basis since it is the developer that is governed by Section 14(3), but from a practical perspective, we are simply suggesting that until the legislation is changed (and there may not be any change in this section in the foreseeable future), sales of condominium units by developers cannot be concluded as a Protocol transaction. Similarly, the gap coverage offered by title insurance should not be available to such a transaction either.

4. Rental and Vacation Properties

There is no prohibition against using the Protocol in these types of transactions (even where the seller or buyer is a corporation) other than the maximum number of units that can be covered (the maximum number is four units in one transaction as is equivalent to the CMHC restriction).

5. New Home Construction

A number of questions related to the issue of a "turnkey" new home sale. We used this phrase in the presentation to differentiate a sale of a completed new home from the situation where the purchaser acquires the lot, pays the builder in stages as the house is being built and will sometimes obtain a construction-draw mortgage to finance the course of construction payments. In the latter circumstance, it may be that the acquisition of the lot itself by the purchaser from the builder can be closed on a Protocol basis (see above), but it was determined that the risk was too high to allow Protocol to be used to secure a lender who was advancing on a construction-draw basis, by reason of the numerous advances over a lengthy period of time and the incidences of difficulties such as additional encumbrances and builder's liens could be significant. There seemed to be some confusion with respect to some previous literature on the Protocol which suggests that it may not be available for completion mortgages. If that phrase means that the mortgage is advanced only upon substantial completion of the home, then the Protocol would be available in those circumstances. In a completion or turnkey situation, seasonal holdbacks and builder's lien holdbacks can still be accommodated, but we would suggest only in the circumstance where the full purchase price (including mortgage advances) is in fact tendered at closing but the seasonal and lien holdbacks are simply held in trust pending completion of the work or the expiry of the builder's lien, as the case may be.

6. High Ratio Mortgages

There were a couple of questions regarding the ability to use Protocol on high ratio mortgages. There is no differentiation between a conventional mortgage and a high-ratio

mortgage for Protocol purposes. Where the lender approves the Protocol in completing the transaction, the lawyer is safe in assuming that, where the mortgage happens to be high ratio, the mortgage insurer is on side, and all that the lawyer needs is instructions from the actual lender.

7. Refinancings

There is certainly no issue in using the Protocol for a refinancing, and this is the one circumstance where the waiver of survey evidence in favour of the lender can be especially advantageous. Since the current owner is presumably happy or naive as to the status of the location of their improvements and CLIA is prepared to backstop the lawyer's opinion that there are no survey defects which impair the validity of the lender's security, then Protocol is especially efficient in refinancings. Some questions were directed at whether or not the Protocol would be available for collateral mortgages securing home equity lines of credit mortgage which revolve (presumably on the theory that they are similar to construction draw mortgages). There is no issue in using the Protocol for a collateral mortgage which secures a revolving facility. In this circumstance where the borrower may or may not take advantage of having additional draws, the lawyer's opinion as to title and priority should always be qualified to the extent that subsequent advances may not have priority over prior registered builder's liens or Section 49 PPSA notices (just as would be the case in a non-Protocol situation).

8. Use of Protocol by In-House Counsel

So long as the solicitor has ALIA insurance, then a lawyer is entitled to use the Protocol, regardless of where they may practise.

9. Unrepresented Party

Protocol will only work where there are lawyers representing all parties to the transaction. Inability to use the Protocol as a result of a party refusing to engage legal counsel may be a good reason to convince that party that it is in their interest to do so.

10. List of Protocol Lenders

A number of people were looking for a copy of the list of lenders that have indicated that they are prepared to allow their lending transactions to be completed on a Protocol basis. As this list is kept by Susan Billington, project co-ordinator for the Law Society of Alberta who is currently on vacation, and as we would wish to make sure that any list distributed is current and accurate, we will have to defer the provision of such list until Susan is back and can determine that we are in a position to distribute the list in it's current form. It should be remembered that, as indicated in the webcast, the lawyer must look at the specific instructions on each file to determine if in fact they are directed to complete on a Protocol basis. If that is not contained in the lawyer's instructions, we would suggest that the lawyer should contact the lender to see if special instructions can be provided. We continue to attempt to get more lenders on side and have been speaking with a number of lenders in recent months. It is fair to say that we thought that once one major chartered bank got on board, that the rest would follow and we still believe that that will be the case but based on our experience with Bank of Montreal, even after the interest is expressed, it will take some time to reach a formal decision and then proceed with implementation.

11. Status of Credit Unions

Credit Union Central for the Province of Alberta has confirmed that it is in order for their credit union members to use the Protocol if they so desire. The result is that each individual credit union is given the authority to determine whether or not they wish to use Protocol. While, we are aware of a number of Alberta Credit Unions that have adopted the Protocol, there are also some that have not, and this is a bit of a moving target. At the present time, we are reluctant to attach a list for fear that it would shortly be outdated or that people will assume that those not on the list will never adopt the Protocol. We would therefore strongly encourage all lawyers to contact their local credit union to determine if they are on the Protocol, and if not, to see if you can assist in them becoming comfortable in the adoption of the Protocol.

12. Leasehold Titles in National Parks

As indicated on the webcast, CLIA has confirmed that, effective August 16, 2004, the Protocol is now available for use in residential transactions involving leasehold titles within National Parks. The Law Society website on Protocol will be updated shortly to confirm this, but the approval is effective August 16, 2004 and all transactions being completed thereafter may now be completed on a Protocol basis. Please remember that the normal procedures would still have to be followed and accordingly, in the case of a National Parks lease, then Parks Canada's consent to the assignment of the lease must be in hand by the completion date so that the assignment of the lease and Parks Canada's consent can thereafter be submitted to Land Titles.

B. INSTRUCTION ISSUES

1. AREA Form of Purchase Contract

The AREA Purchase Contract in Clause 4.12 indicates that notwithstanding the closing provisions set forth in the contract, the parties authorize their lawyers to follow, if appropriate, the Law Society of Alberta conveyancing Protocol in the closing of the transaction. Accordingly, no specific instructions are required from the client to proceed with a Protocol closing as that authorization is already included in the purchase contract. Only if there were special circumstances which resulted in the lawyer concluding that the Protocol may not be appropriate, would the lawyer, in our view, have the ethical ability to advise their client that the transaction should not proceed on a Protocol basis.

2. What if the Contract is Not on the AREA Form?

In this case, then instructions from the lawyer's client to use a Protocol closing would have to be sought. We do not believe that a client would refuse to accept a Protocol transaction where it has been properly explained to them (but of course that is possible).

3. What if the other Lawyer says, "No"?

As indicated above, where the AREA form is used, and there are no special circumstances to suggest that the Protocol would not be appropriate to the subject transaction, it

is our view that the lawyer would be acting contrary to their client's instructions by saying, "No". Where a lawyer simply says that their office will not use a Protocol closing, it is our practise to advise the lawyer that that is contrary to the instructions contained in the Real Estate Purchase Contract and for the benefit of our client, we request the lawyer advise in writing that they have instructions from their client not to use the Protocol (so that this is not simply a decision of the lawyer).

4. What if the Realtor says, "No"

We were surprised that there were three people who asked this question. Frankly, the realtor should have no input into how the transaction is closed, and unless the authorization is crossed out in the standard form contract, the realtor is no position to be influencing this matter. Even if Section 4.12 is crossed out of the AREA form, if in fact the transaction is available to be closed on a Protocol basis, then the lawyer is obviously free to obtain the client's instructions prior to closing to use the Protocol, without the input of the realtor.

5. Mixed Signals from Financial Institutions

A number of questions related to frustration that lawyers were having in getting clear instructions from lending institutions. We would hope that this will disappear over time as lenders specifically include the Protocol wording in their standard documentation (such as is the case with ATB and now BMO). If the instructions do not specifically allow a Protocol closing, then the question must be asked and those instructions must be received (and we would obviously suggest they be received in writing by someone with apparent authority to make that decision). Conversely, where the lenders instructions specifically authorize the use of a Protocol closing, then our view is that the lender's counsel does not have the ability to refuse to use the Protocol unless, as indicated above, there is something unusual about the transaction where the solicitor honestly believes that the Protocol would not be appropriate in that particular case (and not on the basis that they have a general dislike for Protocol closings). In the case of the Bank of Montreal, they went to a great deal of trouble and expense to obtain opinions from pre-eminent counsel in Toronto and across the western provinces to get comfortable with the Protocol program and accordingly, with respect to the views of individual lawyers, they really should have no business in questioning the Bank of Montreal's decision.

6. ATB Instructions

We understand that at least in some circumstances, ATB has included an unsigned letter on its letterhead together with its mortgage instructions indicating that it is satisfactory to proceed with the Protocol closing. Although this may not be the most satisfactory procedure, we believe that if an acknowledgement is sent back to Treasury Branch confirming that the transaction will be proceeding on a Protocol closing, then this would be sufficient to confirm instructions.

7. What if there is a Change in Instructions

If a client, be it a purchaser, seller or lender, determines part way through the transaction that they have changed their mind and do not wish to proceed with the Protocol closing, then the client would be free to make this decision, subject to the transaction not having proceeded to the

point where it is too late to reverse the process. It is always possible for the lawyer, in unusual circumstances, to determine that the transaction should not close on a Protocol basis. An example of this might be where the lawyer discovers that the purchaser has filed for bankruptcy shortly before closing.

8. Multiple Representation

A number of questions revolved around multiple representations and covered the gambit of acting for buyer and seller; buyer and lender; buyer, seller and lender; and buyer, seller and lender in a new home construction scenario. There is nothing in the Protocol which prohibits the lawyer from acting in a multiple representation situation but this answer must of course be qualified by the fact that the lawyer must comply with the minimum practise standards when acting for each of the lawyer's respective clients on the same transaction and is always subject to the Code of Professional Conduct. The Code suggests that it is dangerous to act for buyer and seller and even more dangerous when acting for all parties to a new home construction transaction. We would suggest that a lawyer acting for multiple clients (other than the normal buyer/lender scenario) must, having knowledge of all sides to the transaction, specifically conclude that there is nothing unusual in the transaction such that a Protocol closing would not be appropriate, even if it would be extremely beneficial to one of the lawyer's clients.

C. EFFECT OF PROTOCOL ON OTHER PARTS OF THE TRANSACTION

1. Lawyer's Due Diligence

Some questions related to the lawyer's obligations on preclosing matters. As indicated, the lawyer must meet the minimum practise standards outlined in the Protocol materials which essentially means that the lawyer must perform all of the normal searches and due diligence as the lawyer would do on a non-Protocol transaction, except for the steps which are obviated by the Protocol such as unpaid vendor's lien caveats, transfers back, etc.

2. Compliance with Lenders' Requirements

A number of questions related to what the lender needed to see in order to proceed on a Protocol closing. If the lender specifically authorizes the transaction to close on a Protocol basis and says nothing further about what is required in order to release funds, then the lawyer is free to release the mortgage proceeds on the issuance of the short form opinion to the lender and is not required to confirm that the funds have been advanced or to confirm submission for registration unless the lender specifically so requests. After release of funds, the Protocol does not deal with what the lawyer must supply to the lender in terms of a final reporting and the normal instructions from the lender would have to be complied with in this regard. We know that some lenders have decided that they are prepared to rely solely on the lawyer's short form opinion and do not wish to have to review or store things like real property reports, tax certificates, etc. Other lenders, however, still wish to see a full reporting package, and accordingly, lender's instructions must specifically be reviewed to determine what must be provided in order to complete the file.

3. The effect on Covenant Pay/Guarantor

Where there is an action on a covenant to pay contained in a mortgage or there is a third party guarantee of the mortgagor's obligations, the only potential effect that a Protocol closing may have on the covenant to pay or guarantee is that the covenant to pay and the guarantee would be enforceable the moment that the funds are released and to the extent that there was a problem with the lender's security, the covenant to pay or the guarantor's covenant would be enforceable whereas in a non-Protocol transaction, the funds may never have been released and the covenant to pay and the mortgage or the guarantee may never have been triggered. However, our response to that is the same response that would be given to the lender or the purchaser directly, namely that where there is a problem, then the ALIA claims procedures are such that an expedient solution will be forthcoming and there should be no impact on the covenant to pay or a personal guarantee.

4. Unpaid Vendor's Lien Caveats

We would suggest that there is no benefit to registering an unpaid vendor's lien caveat in a Protocol transaction because funds will be released on the completion date. Some lawyers are of the belief that an unpaid vendor's lien caveat should always be filed to ensure that a defalcating lawyer does not use the transfer and run off with the money. We would suggest that if that situation occurred, then ALIA would respond on an expedited basis, and that accordingly, there will never be a reason to file an unpaid vendor's lien caveat on a Protocol closing.

5. Questions Related to Purchaser's Caveats

Some questions related to Purchaser's caveats and suggested that it might be appropriate for a purchaser to file a caveat as that would assist in the event there was an intervening encumbrance. Our view is that the lawyer should be determining, as with any other transaction, whether a caveat protecting the purchaser's right to complete the purchase or a caveat for a purchaser's lien in respect of the deposit monies should be filed in any event. The fact that a Protocol closing is being used should not really impact the determination of whether a purchaser's caveat should be filed.

6. GST

Unfortunately, the two questions we have on GST simply asked what effect the Protocol had on GST, and we don’t really understand the nature of the question. A Protocol closing should have no impact on any GST issues that would otherwise be applicable to a transaction.

7. Transfers Back and Tenancy at Will Agreements

Since funds are released on the completion date, we do not believe there is any circumstance where a transfer back would be required. Even if there is a problem with title, that would become a claim under the Protocol program and should not involve a requirement of the lawyers to attend to the registration of a transfer back. Similarly, there should be only rare circumstances where a tenancy at will agreement may be required since funds are capable of being released on the completion date. We would suggest that only in circumstances where the

keys are being released prior to the actual receipt of funds by the seller's lawyer due to couriering or wiring issues, would there ever be a necessity for a tenancy at will agreement.

8. Real Property Reports

(a) Lender Coverage versus Purchaser Coverage - The Protocol allows a lawyer to give an opinion to a lender that in a residential transaction, there are no survey defects which would impair the lender's security. The lawyer is able to provide this opinion on the strength of the insurance coverage provided by CLIA. CLIA has determined that this coverage can be provided as the instances of a lender not recovering their mortgage monies as a result of a survey defect are very minimal. In circumstances where there is such an issue, the lender is not concerned about fixing the survey issue, they simply wish to be repaid, and accordingly, this is a matter that is easily fixed by CLIA by the payment of a shortfall amount. On the other hand, the Protocol takes the position that a buyer of property should be concerned with the physical status of the property and that to the extent that there is a survey defect, this may not be something that can be simply solved by the payment of money to the buyer. We are of the view that a buyer should be entitled to review a real property report and determine whether or not there are any survey defects, and if so, what impact those defects may have on the purchaser's decision to proceed with the acquisition of the subject property. Accordingly, the Protocol will not cover survey defects in favour of the buyer. This philosophical position is strengthened by the current provisions of the AREA Real Estate Purchase Contract which requires the seller to deliver a real property report with Certificate of Compliance to the buyer at least ten business days prior to the closing date and by requiring the seller to warrant that there are no survey defects. We believe that these provisions in the AREA contract are consistent with the expectations that an informed consumer would have, and accordingly, we do not believe that they should be deleted or amended.

(b) Can a Purchase ever Close Without a Real Property Report on a Protocol Transaction - If a buyer insists on receiving an actual real property report with a certificate of compliance as is required by the current AREA form of Real Estate Purchase Contract, then, notwithstanding the protections provided by the Protocol to a lender, the transaction cannot close if the real property report is not in hand on the completion date. However, there may be circumstances where the buyer is prepared to rely on certain undertakings of the seller or holdbacks to allow the transaction to complete on time, and subject to disclosure of known defects to the lender, the lender's funds may be capable of being advanced on the completion date, thus allowing for a completion to occur subject to the seller's covenants or the undertakings of the seller's lawyer regarding survey issues.

(c) Known Defects at time of Closing - Although the Protocol does not require the issuance of survey evidence to lenders, it does require that the lender's lawyer advise the lender if there are known survey defects at the time the funds are requisitioned. In this regard, the current practise of advising lender clients as to minor survey issues would be unaffected and specific instructions would have to

be obtained from the lender to have funds advanced in the face of a known survey defect.

(d) Defects Discovered After Closing - There were a number of questions regarding what happens if a survey defect is discovered after closing. To the extent that the defect was not known at the time of closing but was subsequently discovered and the transaction completed on a Protocol basis, then ALIA should be alerted to the problem and they would then deal with lender in respect of any claim that the lender might ultimately have with respect to the discovered survey defect.

(e) Purchaser's Waiver – As indicated above, there may be circumstances where the buyer is willing to proceed with closing without a real property report and certificate of compliance in circumstances where the buyer is prepared to rely on the seller's covenants contained in the purchase contract or on the seller's lawyer's undertakings regarding survey deficiencies. In such circumstances, it would then be possible to complete the transaction, subject to any arrangements made between the seller and the buyer or their respective solicitors, but it is recommended that the buyer's lawyer get a specific waiver from the buyer confirming that they have elected to proceed on this basis notwithstanding their contractual rights under the Real Estate Purchase Contract. This is especially the case where the buyer is agreeing to complete the transaction without having seen any survey evidence at all. Based on the Real Property Subsection – Canadian Bar Association Protocol on Real Property Reports, a buyer would not have an obligation to proceed with registration until the survey evidence is at least available and accordingly a waiver by the buyer in these circumstances may be a significant waiver of rights. As indicated in the webcast, a form of waiver is appended to the Protocol materials if the buyer desires to grant such a waiver after being duly informed of their rights.

(f) Zoning Issues - A couple of questions raised to the issue of whether or not the Protocol covered breaches of the municipal land use by-laws other than survey issues which only involve the location of improvements on the property. The Protocol does not provide any protection in respect of breach of any municipal zoning by-laws and to the extent that the lender's instructions require due diligence in respect of any other zoning issues, then these would have to be complied with in the ordinary course.

9. Estoppel Certificate in a Condominium Transaction

There is no provision in a Protocol transaction which avoids obtaining an estoppel certificate for a buyer or a lender and accordingly, this would be a due diligence matter that would be required to be completed in order to proceed with the Protocol closing. One question noted that title insurance was available on a condominium transaction for $100 and in the view of the person asking the question, was an attractive proposition. Similar to our position regarding real property reports, while the insurance provided by title insurance in this circumstance may be sufficient to deal with condominium fee arrears, the information provided on a typical estoppel certificate is much broader than simply condominium fee arrears and

accordingly we would suggest that it is in the buyer's interest to have an estoppel certificate on closing to confirm all of the matters that a typical estoppel certificate will deal with (some of which may not be capable of being rectified by a simple monetary payment).

D. PROCEDURAL MATTERS

1. Submission prior to the completion date.

The steps to be taken in a Protocol closing are set out in the materials and on the Law Society of Alberta's website. These steps do not provide for submission prior to the completion date and we would question why you would submit early. On the morning of closing, you would ensure that you had received the cash difference from your buyer client and arrange to receive the mortgage proceeds from your lender client; search the title to confirm that there were no new encumbrances registered, issue your short form of opinion to the lender, and release funds to the seller's lawyer. You would then submit the documentation to the Land Titles Office for registration. If, for whatever reason, the cash difference is in place a day or two in advance of the completion date, there is certainly no problem in submitting early, provided all the required steps for a Protocol closing have been taken before submitting for registration. We would remind you, though, that one of the advantages to closing on Protocol is that you do not require the cash difference from your client earlier than the completion date.

2. Conversion to Protocol after submission for registration

As indicated in the Webcast, it is our hope that lawyers will use the Protocol whenever it is appropriate. A number of people asked the question as to whether it would be possible, after submission for registration on a non-Protocol basis, to switch in mid-stream to a Protocol closing. This issue was prevalent last summer when the Land Titles turnaround times slowed dramatically and lawyers who thought they had enough time to register on a non-Protocol basis discovered that they weren't going to have registration by their closing date. If the transaction is available for a Protocol closing, it is in the buyer's interest not to have to have their cash difference in place in sufficient time to cover the registration gap and we would hope that this issue will not be an issue in the future. Having said that, we would not wish to absolutely prohibit the practice and accordingly, we would advise that there is nothing wrong with converting to a Protocol closing after documentation has already been submitted provided that the normal Protocol steps are subsequently taken. This would require amendments to the trust conditions (likely a replacement of them to be consistent with a Protocol closing) and the buyer's lawyer must still complete the closing procedures on the completion date for a Protocol closing. As can be seen, all this really does is add more work for the lawyer or their assistant, presumably for no additional fees.

3. Buyer does not come up with the cash difference on the completion date

It is the responsibility of the lawyer to ensure that the buyer client knows that the cash difference must be provided on or before the completion date and that the transaction cannot be

completed without that cash difference and therefore possession would not be granted. From a practical perspective, it might be prudent for the lawyer to request the cash difference from the buyer client the day before completion to allow some time for the lawyer to deal with the situation when the client is delinquent in providing the cash difference. In the event that the client does not provide the cash difference on the closing date, it will be necessary for the buyer's lawyer to notify the seller's lawyer of the delay and the seller would then be entitled to the usual remedies under the Real Estate Purchase Contract.

4. Closing date release issues:

(a) What if money can't be couriered to the seller's lawyer in time? This becomes a practical issue rather than one which relates only to Protocol closings. It is unusual that funds could not be direct deposited or telephoned wired to a solicitor's trust account on the same day of issue. There may have to be some provision for some interest to be paid if funds were to be delivered late. There is nothing in the Protocol procedure which prohibits interest from being charged, pursuant to the Real Estate Purchase Contract, if funds are received late.

(b) Back to back deals - Again, this becomes a practical issue and a balancing act for the lawyers involved. If the buyer's lawyer is relying on receiving funds from the buyer's sale which is scheduled to close the same day, there may have to be some provision for interest to be paid if funds on the purchase cannot be delivered on or before noon. Possession may be delayed until receipt of funds by the seller's lawyer. It might be prudent for the Buyer's lawyer to recommend to their client that they might wish to arrange to have interim financing in place for those cases where the purchase and sale are scheduled to be completed the same day. Although the client may have to pay for interim financing administration charges, interest would be at a minimum since the interim financing funds could be obtained in the morning, and hopefully paid out later that day or the next day. The cost of obtaining interim financing for a very short term may outweigh the risk of a delayed possession.

(c) Weekend closings - As is the standard practice, when the contract calls for a Completion Date which falls on a weekend, the transaction is completed as between the buyer's lawyer and seller's lawyer on the business day immediately preceding the Completion Date. This is no different for a Protocol closing. The AREA contract was recently amended so that there is no longer a requirement for the transaction to close on the immediately preceding business day and therefore the transaction could close on the business day following the completion date. The Seller's lawyer would, however, want to ensure that the cash to close or the cash difference was in place before giving the keys out.

5. Form and Content of trust letters

We would refer you to the Reference Materials provided which sets out the form of trust letter to be used on a Protocol closing. This form of trust letter can also be found on the Law

Society of Alberta's website. This trust letter was developed by the Committee which helped develop the Protocol across the four Western Provinces and sets out the trust conditions under which a Protocol closing must proceed. Any deviation from this trust letter puts you at risk that you have not followed the Protocol properly and may jeopardize your claim to your insurers.

The Protocol trust letter differs from the standard form of trust letter in the following ways:

- it requires the buyer's lawyer to release the entire cash to close on the completion date once the title search is completed and there are no additional adverse encumbrances

- there is no reference to an unpaid vendor's lien caveat

- there is no reference to either a transfer back or tenancy at will agreement

- there is no reference to late interest, unless there exists the potential of a cut-off time that cannot be met

- the seller's lawyer undertakes to use their best efforts to rectify any conveyancing documents are deficient.

6. Form and Content of short form opinion to lenders

The short form opinion letter to the lenders is also contained in the Reference Materials and on the Law Society of Alberta's website. You must, however, check the instructions from the lender to ensure that the lender is prepared to accept this standard form of short form opinion letter or if the lender has a slightly different form which they wish to be used. If your lender's instructions are simply that Protocol closings are authorized, then it is safe to use the standard short form opinion. If, however, the lender, such as the Bank of Montreal, requires specific language in the short-form opinion, you must use that language. Again, it is the responsibility of the lawyer to check carefully the instructions from the lender to ensure that the lender's procedures and requirements are followed.

A question was asked as to what goes under "qualifications" on the solicitor's short form opinion. You would note any registrations which would remain on title, such as utility rights of way, easements, restrictive covenants, as well as registrations which will be discharged (such as the seller's mortgages).

7. Timing of Release of Funds

The Protocol provides that on the Closing Date, once the buyer's lawyer has the cash difference, he searches title, issues the short form of opinion to the lender, releases funds to the seller's lawyer (either immediately if funds are on hand or once received from the lender if the lender requires the short form of opinion before releasing funds) and then submits for registration. It is the lawyer's responsibility to know and follow the lender's requirements with respect to release of funds. Even with a non-Protocol closing there are some lenders who provide funds "up front" but require a report to be forwarded to the lender prior to those funds being releasable.

8. Timing of submission for registration

Once funds are released to the seller's lawyer, the buyer's lawyer must immediately forward documents to the Land Titles Office. For those in the rural locations, a window of two (2) business days has been allowed to submit. When submitting for registration, we recommend that you submit on the basis that your registration will be subject to all existing registrations rather than requiring registration to occur only if the latest encumbrance is as listed on your Document Registration Request Form.

There has also been some questions about the two business day window and whether that window also applied to release of funds and why it was there. From the perspective of claims, the earlier the documents are submitted to the Land Titles Office, the better. The two day window does not apply to the release of funds and the buyer's lawyer should make every effort to get the funds to the seller's lawyer as quickly as possible.

E. CLAIMS ISSUES

1. Claim Procedures

The question has been raised about the claim procedure itself. If a registration is rejected by the Land Titles Office, you do not have to report yourself immediately to your insurer. You would attempt to resolve the problem with the registration as you would now normally do and resubmit the documents. However, if you feel that the problem is one that is unlikely to be resolved quickly or not at all, or required some negotiation with the other side, then the Alberta Lawyers Insurance Association should be notified. As with any other potential claim, when in doubt, report the matter to ALIA and let them make the decision as to whether a file needs to be opened.

You would contact ALIA at (403) 229-4716 or 1-800-661-1694.

Both ALIA and CLIA have committed to an expeditious claims process for Protocol transactions. Just like any other report to ALIA, a claims examiner would be appointed to the file, the examiner would determine whether the matter would be dealt with “in house” or whether counsel would need to be appointed. ALIA has committed to repair and resolve Protocol claims and, if necessary, to pay for actual loss to have the problem resolved.

2. Cost to client

There would be no cost to the client for the actual claims process. *There may, however, be situations where there could be a subrogated claim against the client in cases where it could be proven that the client acted in a fraudulent manner or the claim was as a result of an intervening registration for which the client was responsible (i.e. a maintenance enforcement order)*

3. Cost to lawyer

As mentioned in the webcast, the Protocol claim process is essentially no-fault insurance. The lawyer has to report the matter to the insurer but there is no deductible involved and no adverse claims record. At the initial stages, when the Protocol was being developed, the insurer did actuarial studies and concluded that the risk of loss is so slight, there is no additional premium to lawyers and therefore nothing we must pass on to our clients. The Protocol program is a benefit to our clients at no cost.

4. Will the system be abused by lawyers?

Unfortunately, there will be lawyers who will undoubtedly attempt to abuse the Protocol system, as there are now lawyers who attempt to abuse the old system. Nothing in the Protocol process however prevents a lawyer from being subject to complaints process or disciplinary action by the Law Society as the disciplinary process now applies. Any transaction which was not completed as a result of the abuse of the system by the lawyer would be reported to ALIA as well as to the Law Society of Alberta.

5. Will the system be abused by clients, i.e. perpetration of fraud?

Again, there probably will be some attempts to abuse the Protocol process by the consumer. Again, the insurer considers that risk so slight that they were willing to proceed. There is, however, no protection now from the rogue client who wishes to perpetrate a fraud. As we know, there seems to be an abundance of mortgage fraud now and the present system has not alleviated that.

F. INTERACTION WITH TITLE INSURANCE

1. Difference between Protocol and title insurance

The Protocol streamlines the residential real estate conveyancing process, as does title insurance. The Protocol, however, is at no extra cost to the consumer. In order to obtain title insurance, there is a premium which must be paid. The client continues to receive legal advice on the biggest investment of their lives and the protection of dealing with a lawyer whose liability insurer stands behind them. The Protocol is not an insurance program since the lawyer is providing opinions to buyer and lender clients. The only insurance aspect of the Protocol at all is that that is how the lawyer is able to provide the relevant opinions. As far as the client is concerned, however, it is the lawyer's opinion that they are relying upon and not an insurance product.

2. Can you have a hybrid deal that uses both Protocol and title insurance?

There is no reason why you cannot close a deal using Protocol and also obtain title insurance for other issues. Generally, title insurance has been obtained to cover the registration gap and problems with the availability of the Real Property Report. It would seem, however, that obtaining title insurance is only an additional cost to the client. The Protocol covers the

registration gap and the Real Estate Purchase Contract provides that a Real Property Report must be provided. Although you could use both, we would query why you would incur the additional expense for your client.

3. Coverage for fraud and forgery

Lenders today seem paranoid about fraud and forgery. The title insurers have played on this paranoia by offering title insurance as the absolute solution to this. We received questions relating to the benefits of title insurance versus the Protocol with the implication that title insurance was worth the premium payment by reason of its coverage for fraud and forgery in the lender context. One question even went so far as to suggest that the Protocol could be manipulated by a fraud artist and the use of a Protocol closing could in fact increase the incidences of fraud. While fraud and forgery certainly is in the minds of lenders, we know of no statistics which would suggest that fraud or forgery is on the rise, although intuitively, one might surmise that this is correct. In our view, there are two reasons for this. The first is that the manner in which people get mortgages today can mean virtually no contact with a live person in the mortgage process or even if there is such contact, it is oftentimes with representatives of the lender that the consumer may have never met before (in other words, it's not like the old days where most people got a mortgage through their local bank branch). The second reason is that there is no requirement in Ontario for anything other than the signature of the borrower on the mortgage. This is why lenders are requiring identification when mortgage documents are being signed and those requirements don't seem to take into account the requirements in Alberta of an affidavit of execution by a witness who must swear that they actually know the mortgagor or have been provided with identification.

Notwithstanding the foregoing, we acknowledge that no system will eliminate fraud and forgery. We are strongly of the view that the use of a lawyer in the transaction will reduce those incidences. At some point, the losses from fraud or forgery becomes very manageable. When Ontario went to the signature of the mortgagor only on their mortgage documentation, the lenders did not object because, at the time, they were not concerned with fraud or forgery. There is also a misconception that because fraud and forgery are exceptions to absolute indefeasibility under our *Land Titles Act*, the Land Titles Assurance Fund will never respond to a fraud or forgery claim. In certain circumstances, the Fund will respond to such a claim, and in fact, about two months ago, the Assurance Fund paid out a fraud claim of over $500,000. We continue to be of the belief that the involvement of a lawyer who must comply with minimum practice standards under the Protocol and with the protections afforded by our Land Titles execution requirements and the Assurance Fund minimizes the risk of fraud and forgery to an acceptable level. We would think that consumers would not be happy to hear that they are being required to pay for an insurance premium to protect lenders from potential fraud when the altered practices of lenders may have contributed to increased incidences of fraud.

4. Estoppel certificates and Real Property Reports

We have discussed at some length under question 8 in Section C the matter of Real Property Reports. We would again emphasize that the Real Estate Purchase Contract provides that the Seller must provide a Real Property Report prior to closing and nothing about the Protocol process changes that. It is also a requirement of the Seller to provide an estoppel

certificate on a condominium transaction. Again, there is nothing about the Protocol process that changes that requirement. Issues relating to Real Property Reports and estoppel certificates must be addressed before closing as they would be on a standard transaction before submitting for registration, whether by negotiating a holdback or delay in closing or some other arrangement which protects the buyer.

5. Does title insurance solve the developer/condo sale gap problem?

No, title insurance does not solve the problem. Section 14(3) of the *Condominium Property Act* requires the developer ensure that all of the purchase price remains in title until such time as title issues in the name of the purchaser. This is a statutory provision and we do not believe that title insurance should be available to cover this gap.

G. CONTACT INFORMATION FOR THE WESTERN LAW SOCIETIES CONVEYANCING PROJECT:

Steve Raby, QC
Chair, Alberta Conveyancing Advisory Committee
(403) 267-8226
steve.raby@macleoddixon.com

Susan V.R. Billington, Project Director
Western Torrens Project
The Law Society of Alberta
(403) 229-4705 FAX: (403) 228-1728
susan.billington@lawsocietyalberta.com