

THE LAW SOCIETY OF UPPER CANADA

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON APRIL 24, 2008

MOVED BY: Larry Banack

SECONDED BY: Bob Aaron
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That Convocation request the Professional Regulation Committee, in consultation with LAWPRO, review the application of the LAWPRO policy precluding every lawyer not discharged from bankruptcy (even where the bankruptcy is unrelated to the practice of law) from purchasing mandatory additional LawPRO coverage intended to protect against the registration of fraudulent instruments under the *Land Titles Act*. The Committee is specifically asked to expeditiously address and report for June Convocation at least in respect of the following:

1. Is there any correlation between the fact that a lawyer may be an undischarged bankrupt (without any prior/outstanding criminal prosecution/conviction or discipline investigation or regulatory sanction) and the risk that that lawyer may thus be more susceptible to mortgage fraud related activity and should thus have their licence to practice law restricted notwithstanding the absence of any individual – specific regulatory breach?
2. Should LawPRO be requested to immediately revise its policy exclusions for the purchase of mandatory real estate registration coverage?

BACKGROUND

1. In September 2007, Convocation accepted the LAWPRO proposed insurance program for 2008 as presented by Ms. Carpenter-Gunn.
2. The changes to the 2008 insurance program included the following:
 - “(vii) Any lawyer intending to practice real estate law in Ontario will be required to purchase coverage that will provide specific protection for the registration of fraudulent instruments under the *Land Titles Act*.
 - (viii) the Law Society would restrict the eligibility to apply for and purchase this coverage to limit the cost of providing this coverage. The following categories will be excluded.

- Persons who are in bankruptcy;
- Persons who have been convicted or disciplined in connection with real estate fraud; and
- Those under investigation, where the Law Society obtains an interlocutory suspension order or a restriction on the lawyer's practice prohibiting the lawyer from practising real estate, or an undertaking not to practise real estate

Any lawyer intending to practise real estate will be required to purchase this coverage”.

3. The term real estate law was defined as follows:

“REAL ESTATE LAW means the practice of the law of Canada, its provinces and territories, that concerns:

- (i) the registration of any instrument under the *Land Titles Act*, and
- (ii) the actual or contemplated transfer, charging, insuring or otherwise affecting, an estate, right or interest in land; and may include, without limitation, anyone or more of the following services by a solicitor: the receipt of instructions, preparation of documents, searches and/or the providing of one or more opinions or certificates with respect to the title, transfer or charge and/or with respect to the issuance of any title insurance policy.”

COMMENTARY

4. The LAWPRO report was responsive in part to the Ontario Government imposing changes to real estate practice arising from passage of Bill 152. One objective was to improve the integrity of the system by tightening the rules governing registration of documents in the Land Titles system.
5. The report does not contain any information indicating a co-relation between the fact that a lawyer may be an undischarged bankrupt (without any prior/outstanding criminal prosecution/conviction or discipline investigation or regulatory sanction) and the risk that that lawyer may thus be more susceptible to mortgage fraud related activity.
6. Further, neither the LAWPRO report nor any discussion in Convocation addressed the effect on a lawyer who might be ineligible to purchase the real estate related insurance resulting in limited licence practice restrictions notwithstanding the absence of any individual-specific regulatory breach.
7. For example, an undischarged bankrupt, litigation lawyer is unable to register and discharge construction liens and Certificates of Pending Litigation. In a particular case a lawyer in practice for over 40 years has advised that he is an undischarged bankrupt as a result of outstanding personal tax arrears which had accumulated arising from his divorce. The bankruptcy was completely and totally unrelated to his practice. Convocation's decision is having a profound impact on his practice including his feelings

of self worth as he does not consider it appropriate that he is being “lumped in” by Convocation with lawyers who have been charged with or are under investigation for real estate fraud and have been suspended from the practice of real estate law.

8. It does not appear from the record that Convocation turned its mind to nor did the LAWPRO report address the unintended consequence which would be visited upon a lawyer with an unblemished discipline record suddenly finding that although entitled to practise in all areas of law, (except real estate) they are precluded from even the most straight forward of registrations arising from construction liens or Certificates of Pending Litigation.