The Perfect Storm: Institutional and Organizational Antecedents of Title Fraud in Ontario

by

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A thesis submitted in conformity with the requirements for the degree of Doctor of Philosophy
Department of Sociology
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Abstract

This dissertation contributes to organizational analyses of crime through the study of real estate title fraud. Through interviews with key constituents in the field of real estate conveyancing and lending, and through an analysis of documents produced by these constituents, this study elucidates both the antecedent institutional and organizational conditions giving rise to new opportunities for title fraud and the legal and governmental responses to this crime. Structured through three discrete papers, the data highlight the role of institutional change in the creation of new fraud risks and the ways in which these risks are conceptualized and mitigated. The first paper explores the conflict over professional jurisdiction between the Ontario real estate bar and title insurance companies. It elucidates the institutional shifts in the field of conveyancing and lending that open the legal profession to competition, and it explores the rhetorical strategies used by the real estate bar to adapt to the diffusion of prevailing practices that threaten their legitimacy. The second paper builds from and advances the explication of these field-level changes, demonstrating how institutional changes have eroded organizational guardianship by establishing anonymous systems that create new opportunities for fraud incubated in routine patterns of conveyancing activity. The third paper situates the government’s response to fraud
within the context of these field-level shifts. The violation of sacrosanct institutions of private property and homeownership undermines cultural ideologies of the home and imbues the acquisition of property with uncertainty. The significant public and political attention generated by title fraud compelled immediate and atypical state intervention in the rectification of harm and the restoration of title to victims. Altogether, these three papers elucidate the role of the institutional environment in creating opportunities for crime through the incubation of fraud risks, and for compelling atypical state responses to forms of identity crime like title fraud.
Acknowledgments

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Table of Contents

Abstract ii
Acknowledgements iv
List of Tables vii
List of Figures viii
List of Appendices ix
Introduction 1
   Methodology 7
   References for Introduction 15
Bench Warmers or Quarterbacks: Real Estate Lawyers and Legitimacy in the Age of Title Insurance 19
   The Institutional Context for Professional Competition 22
      Institutional Context and the Legal Profession 22
      Logics and Legitimacy 28
      Rhetorical Strategies 31
   Findings 33
      Conversion to Land Titles 34
      Title Insurance and the “Strange Dynamic” 36
         Growing Rationalization 42
         Emerging Relationships with Lenders 48
         System Risks 52
         Legal Monopolies 56
      Legitimacy and Value 59
   Conclusion 67
   References for Benchwarmers or Quarterbacks 76
Field of Schemes: Advancing Organizational Explanations for Crime and Opportunity 84
   Real Estate Fraud in Ontario 86
   The Situated Nature of Fraud Risks 95
   Findings 104
      Situating Fraud 107
         Institutional and Field-Level Transformations 108
List of Tables

Table 1: Interview Sample 10
Table 2: Document Sample 11
Table 3: Prominent Real Estate Fraud Cases and Indefeasibility Outcomes 173
List of Figures

Figure 1: Stages of Institutional Change 24

Figure 2: Timeline for Key Events in the Conveyancing Field 33

Figure 3: Distribution of Claims by Area of Practice 90

Figure 4: Real Estate Claims by Cost 91

Figure 5: Real Estate Claims by Type of Error 91

Figure 6: Self-reported Identity Crime Victimization by Year 94

Figure 7: Key Features by Levels of Analysis 106

Figure 8: Logic Model for an Organizational Analysis of Title Fraud 107

Figure 9: Homeownership Rates for All Households, Canada, 1971 to 2006 164
List of Appendices

Appendix A: Document List  208
Appendix B: Interview Guides  236
Introduction

Susan Lawrence, a 55-year-old Toronto widow, discovered that the home she had been living in for thirty years had been sold without her knowledge or consent. In October of 2005, identity thieves posing as Lawrence retained a lawyer and, using identity fraud and forgery, sold the home to an accomplice who had arranged a mortgage on the property. The identity thieves fled with the money and Lawrence, now owing $300,000 to a bank, faced eviction from her home. The eviction was later reversed and through litigation Lawrence was able to restore title to her home. However, the courts also ruled that the bank’s interest was valid and that Lawrence was responsible for the fraudulently acquired mortgage.

The Lawrence case, and the many similar cases of title fraud that preceded and followed it, attracted significant media, professional, and public attention for both the insidiousness of the crime and the iniquities of available redress, and further instigated significant and long-term industry and state responses. Bob Aaron, a lawyer and expert in real estate writing for the Toronto Star, observed. “Looking back on 2006, there can be no doubt that the real estate story of the year was title fraud. No other issue in this field seemed to fascinate and horrify the public as the victims' plight.” (Aaron 2006, emphasis added). Indeed, Curt Novy, mortgage analyst for the U.S. Federal Bureau of Investigation observes of title fraud, “It’s the most egregious form of identity theft…It amounts to the most money lost, and is the most devastating to individuals.” (Kolen 2013). Title fraud occurs when fraudsters, using identity theft, assume the identity of the legitimate homeowner and take advantage of automated financial and real estate record systems to fraudulently sell or refinance a property (Criminal Intelligence Services Canada 2007). A lucrative undertaking, criminals engaging in title fraud can net several hundred thousand dollars in less than a week’s illicit work (McWaters and Ford 2007), and the problem continues to
escalate in Ontario (CIMBL 2001; First Canadian Title 2005; LawPRO 2004). Significant industry and state efforts were mounted to combat the rise of mortgage and title fraud, yet despite these efforts it has become more prevalent and sophisticated (Potts and Selznick 2004), and the costs to insurers and, ultimately, the public has continued to escalate (Strom 2004; Wishart 2008).

While title fraud received significant attention from media, government, and professional and occupational constituents, scholars have been ambivalent towards these crimes and existing explanations therefore remain underdeveloped. Where title fraud is discussed, it is often relegated to the analysis of real estate fraud jurisprudence (cf. Bucknall 2008), or is conflated with research on identity theft, identity fraud, and mortgage fraud (Carswell and Bachtel 2009; Criminal Intelligence Services Canada 2007; Morris 2007). The industry literature provides the most comprehensive overview of the title fraud problem. Much of it concentrates on professional prudence in the form of greater regulation, diligence, and audit, and consumer protection through self-discipline, vigilance, and insurance. However, a subset of this literature grapples with the importance of key organizational and process-level antecedents for explaining fraud.

Title fraud is a story about institutional change and the risks and responses it produces. Discretely and respectively, the papers herein examine the influence of institutional and organizational change on professional conflict between a comparatively subaltern segment of the legal profession and American title insurance companies, how these antecedent organizational shifts incubate the risk of fraud in routine patterns of conveyancing and lending activity, and how the state, confronted with the reputational risk of neglecting the violation of vaunted institutions, responds to fraud. Collectively, this research elucidates the role of the institutional environment in creating opportunities for crime through the incubation of fraud risks, and for compelling
atypical state responses to forms of identity crime like title fraud.

Overall, this research seeks to explain two key components of title fraud:

1. Its emergence through field-level processes that create opportunities for crime.
2. The conditions under which state involvement in legal redress and consumer protection is compelled.

The three papers comprising this dissertation elucidate the process-level antecedents of fraud and the role of the state in redressing this crime. This first paper explores the professional conflict over conveyancing and refinancing tasks between the real estate bar in Ontario, Canada, and American-based title insurance companies. This paper examines the precipitating jolts and the subsequent process of deinstitutionalization that decentred the legal profession from its vaunted position in the conveyancing market. It explores both the ways in which professional competition is linked to broader shifts towards market- and insurance-based institutional logics, and the strategies employed by the real estate bar to retain control over workplace tasks and to adapt to the diffusion of prevailing practices that threaten their pragmatic, cognitive, and moral legitimacy (Abbott 1988; Adler and Kwon 2013; Greenwood, Suddaby, and Hinings 2002). This paper contributes to the dissertation by describing the institutional and process-level changes taking place in the field of real estate conveyancing. The story of fraud is also a story of professional conflict, occupational change, fluid logics, and normative shifts in the conveyancing industry, and these features of the conveyancing and lending system form the antecedent conditions that create new opportunities for fraud. In this paper, they are elucidated in the context of broader institutional forces that evoke boundary disputes between professional and non-professional organizations.
The second paper builds upon this framework to underscore the organizational and process-level antecedents that create opportunities for fraud. The study of crime must go beyond individual interactions to encompass the socially organized setting and the broader environment in which action is socially situated (Vaughan 2005). Focusing on the field-level process of real estate conveyancing, a process occurring within the organizational field of conveyancing and lending across many professional and organizational constituents, this paper examines the ways in which changes to the institutional environment have given rise to new opportunities for fraud incubated in routine patterns of conveyancing activity (Vaughan 1996). Institutional shifts emphasizing process efficiency, alacrity, profit, and streamlining have established a lending and conveyancing process that is seemingly more secure, more underwritten, more expeditious, and more efficient. However, such changes have ironically created new fraud risks. Legislative shifts in land titles, technological developments, professional competition, and emerging risk mitigation strategies have altogether generated a state of anonymity and depersonalization that encourages fraud. Removal of the human element from the conveyancing process has reduced guardianship, diminished the effectiveness of interorganizational diligence, and reinforced the lure of easy mortgage money. When combined with volatile real estate markets, consumer demands, the democratization of homeownership, and the concomitant rise in identity theft, these myriad changes have incubated the risk of fraud in routine patterns of activity that are exposed by exogenous threats to the conveyancing process. Such changes have culminated in the escalation in fraud witnessed over the last decade.

The third paper concentrates on the field-level response to fraud by the government. While the first paper explores the professional conflict over conveyancing and refinancing tasks, and the second paper identifies how these changes become the antecedent conditions explaining fraud, the third paper situates the government’s response to fraud within the context of these field-level
shifts replete with new forms of market- and insurance-based fraud protection. Neoliberal relations among individuals, organizations, and industries make identity theft protection and redress the purview of individual citizens who are responsible for managing the risk of identity crime (LoPucki 2001; Monahan 2009; Rose 1999). Consumers are expected to engage in the “care of the virtual self” – to manage their consumer identity and manipulate their environment and behaviour in order to reduce personal and organizational risks from the everyday routines of life that create opportunities for crime (Garland 1996; Whitson and Haggerty 2008). However, the notable disaggregation of forms of identity crime within this literature obscures different understandings of responsibility and crime control. Identity thefts vary in their nature, targets, and harm, and aggregate discussions of identity crime do not adequately disentangle these nuances. The violation of sacrosanct institutions of private property and homeownership undermine cultural ideologies of the home and imbue the acquisition and ownership of property with elements of uncertainty. The catastrophic economic, social, and ideological losses associated with title fraud victimization set it apart from other forms of identity theft and thus invert the dialectics of responsibility outlined in the disaggregated identity theft literature. Rather than a discourse of individual responsibilization, the significant public and political attention generated by insidious stories of title fraud and the iniquity of state and legal redress instead compelled immediate state intervention in the rectification of harm and the restoration of title to victims.

Altogether, these three papers elucidate the role of the institutional environment in creating opportunities for crime through the incubation of fraud risks, and for compelling atypical state responses to forms of identity crime like title fraud. Threading through these papers are themes of situated action and organizational risk. First, situated action draws attention to the importance of the institutional and organizational environment for understanding phenomena. Technological,
legal, and normative shifts alter the institutional landscape of conveyancing and, in doing so, create the organizational antecedents for title fraud. Broader institutional norms, particularly those around property and homeownership, also influence how state actors respond to particular forms of identity crime. Support for political responses to crime derives from culturally conditions sources, and the deeply ingrained institutionalization of land tenure and homeownership provide the cultural conditioning to rally public attention and to generate significant state involvement in crime control and victim reparation.

Second, organizational risk manifests in the experience and management of risk throughout an organizational field. The expansion of distributed risk systems from individuals to aggregates inform how risks associated with real estate conveyancing have shifted from professional relationships to aggregate risk management through insurance. Moreover, such changes combine with broader shifts in the organizational field subsequently producing new fraud risks and opportunities embedded in the routine patterns of conveyancing and lending. How these risks are perceived, particularly the social, cultural, and psychological conditions underpinning private property and homeownership, shape the attribution of responsibility and the politics of crime control. Overall, through the case of title fraud in Ontario these three papers seek to explain crime by understanding how organizational and institutional environments influence both criminal opportunities and the responses to crime risks.

Methodology

This study analyses the phenomena of professional conflict, title fraud, and state responses to fraud in Ontario using qualitative techniques. Qualitative methods are particularly important for studying situated action and for elucidating complex organizational phenomena and the linkages among organizations within a field (Marshall and Rossman 1995; Vaughan 2005). Indeed,
qualitative methods are used widely in organizational and institutional approaches (Scott 2001; Zilber 2002). Organizational environments and processes are cultural and institutional phenomena constructed by individual and organizational constituents (Dezalay and Garth 1996; see Berger and Luckmann, 1966). The functioning of organizations and their environment is revealed in individual action, and people explain and conduct their work in reference to larger structures. The bounded site of such structures and organizations produce institutional memory and paper trails that enable researchers to study organizational history, culture, structure, decisions, and interactions (Vaughan 2005). Qualitative methods can be used to analyse existing organizational and environmental shifts and trends (Gray and Bishop Kendzia 2009), including professional conflict and the emergence of fraud and the responses to it. Thus, studying situated action qualitatively can also reveal how individuals in professions and organizations assess and respond to little understood field-level processes and risks (Berg 2001, Lee 1999), and it is especially adept at capturing unlinked or hidden phenomena, such as those associated with crime (Marshall and Rossman 1995).

Two data inputs are employed: semi-structured interviews with constituents within the Canadian real estate conveyancing field, including law enforcement; and professional and government documents discussing systemic and professional change, fraud, and responses to fraud. The first phase of the research describes the myriad shifts in the field of conveyancing over a 40-year period beginning in 1970. Government documents and historical analysis elucidate the normative and legislative shifts in the conveyancing process, as well as the introduction of electronic land registration technology. In addition, this phase highlights how such changes opened the field to competition from American title insurance companies and, drawing from professional documents and interviews with field constituents, describes the contestation over market control by manipulating or resisting institutional logics. This component of the research also draws from
interviews and professional document data to underscore how the real estate bar employ rhetorical strategies to retain market control over tasks, particularly by strengthening their cognitive legitimacy in the eyes of other powerful field constituents.

The second phase of this research reconstitutes the organizational field around the contentious issue of fraud (Hoffman 1999), and explicates the situated nature of fraud and the various responses to it. Document data and interviews capture the central changes in the conveyancing field that have given rise to new opportunities for fraud. These include broader normative shifts and the emergence of new institutional logics of the market, as well as idiosyncratic shifts such as changes to the role of professional and occupational groups in the conveyancing field, including lawyers, conveyancers, and appraisers. In addition, document data and interviews outline the government’s response to fraud within the context of title fraud case law and the visceral media, public, and political reaction to title fraud.

Table 1 shows the number and type of participants interviewed for this study. The initial sample consisted of conveyancers and title searchers, with a convenience sample of lawyers from small and mid-sized firms. This sample was contacted by letter and telephone to request participation in the research. A purposive sample of insurers, key lawyers in the field, mortgage and title insurance representatives, and law enforcement was later developed, derived from information gleaned from the original sample and a review of documentation. These individuals were contacted by letter, email, and telephone. The initial data collection phase began in 2008, with additional interviews conducted between 2009-2014. The response rate was very high (90%), though there was some difficulty securing participation from other key constituents in the Ontario bar, members of interorganizational fraud committees, a mortgage insurer, and from certain lenders. Each group of respondents represents one of the key constituents in a field
organized around real estate conveyancing and fraud. Each offers insight not only into the changes in conveyancing from their organizational perspectives, but also their interpretation of the nature and scope of the fraud problem. During these 1.5-hour long interviews respondents were asked for a retrospective account of changes to their professional role over time. I asked each of the groups to reflect upon changes to their profession and, more generally, changes within the landscape of the real estate industry. I also asked respondents about their role in real estate conveyancing, how that role has changed and why, and how their role interrelates with and affects (or is affected by) the role of others in the real estate industry. Respondents were asked to comment on the contemporary state of the field of conveyancing, including control over work, professional/occupational challenges, and active relationships with other field constituents. In addition, respondents were asked about the emergence of real estate fraud, the nature and scope of the problem, the ways in which fraud has been perpetrated, and the myriad responses to fraud from industry constituents. Interviews were recorded and transcribed verbatim.
<table>
<thead>
<tr>
<th>Population</th>
<th>Constituents</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appraisers</td>
<td>Representative for Ontario appraisers</td>
<td>1</td>
</tr>
<tr>
<td>Electronic Service Providers</td>
<td>Representatives for technical, legal, and business aspects of the service</td>
<td>4</td>
</tr>
<tr>
<td>Fraud Department (Lender)</td>
<td>Investigator</td>
<td>1</td>
</tr>
<tr>
<td>Government</td>
<td>Ministry responsible for land titles</td>
<td>3</td>
</tr>
<tr>
<td>Industry Committees</td>
<td>Title insurers, lenders, Fraud subcommittee (leader and member)</td>
<td>3</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>Federal, Provincial, Municipal</td>
<td>5</td>
</tr>
<tr>
<td>Lawyers</td>
<td>Real estate lawyers, Professional association representatives, Committee representatives</td>
<td>13</td>
</tr>
<tr>
<td>Lenders and Brokers</td>
<td>Representatives for major lenders, Representative for brokers</td>
<td>4</td>
</tr>
<tr>
<td>Mortgage Insurers</td>
<td>Government mortgage insurers</td>
<td>2</td>
</tr>
<tr>
<td>Real Estate Registrants</td>
<td>Representative for agents</td>
<td>1</td>
</tr>
<tr>
<td>Title Insurers</td>
<td>Private and bar-related insurers</td>
<td>10</td>
</tr>
<tr>
<td>Title Searchers/Conveyancers</td>
<td>Title searchers and paralegals with title searching experience</td>
<td>11</td>
</tr>
</tbody>
</table>

Document data was collected from professional and government sources from 1990, the year title insurers emerged in force in the Ontario market, to 2010 (see Appendix A for a full list of documents). Table 2 outlines the documents used for this study. Professional documents describe changes to the conveyancing process in light of the conversion to land titles, the presence of title insurance, and broader changes to the conveyancing landscape, such as electronic registration. Government sources principally describe changes to the conveyancing system and the advent of electronic land registration. Professional documents also highlight the nature and scope of the conflict between the bar and title insurers, underscoring both perceived and actual professional
changes. These discussions highlight perceptions of the effects of title insurance, jurisdictional conflict, and the future role of the profession in the new conveyancing landscape. Government sources also offer information about competition among title insurers in the province. In addition, media, government and professional sources discuss the nature and scope of fraud as well as its causes and remedies.

Table 2: Document Sample

<table>
<thead>
<tr>
<th>Category</th>
<th>Range</th>
<th>Sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional/Occupational</td>
<td>1990-2010</td>
<td>1. Title insurance annual reports.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. Professional/occupational website information.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. Practitioner essays/articles.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5. Regulatory body reports/edicts (brokers, registrants, appraisers).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6. LSUC resources (continuing learning, reports, articles).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Legislation and legal change (Land Titles Act, Land Registry Act, conversion process, case law).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. Financial and housing sector (OSFI, CMHC).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. Electronic service provider information (including POLARIS).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5. Law enforcement.</td>
</tr>
<tr>
<td>Independent</td>
<td>1990-2010</td>
<td>1. Independent reports on title insurance.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Independent reports on the relationship between title insurance and the real estate bar.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. Independent media on title fraud.</td>
</tr>
<tr>
<td>Consumer</td>
<td>1990-2010</td>
<td>1. Title insurance brochures.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Government information for consumers.</td>
</tr>
</tbody>
</table>

All data was collected in Ontario, Canada. Ontario was selected as the site for this study for several reasons. First, it was the province in which title insurers first made efforts to market their product and thus there exists a rich history of interactions between insurers and other field constituents, including the legal profession, real estate professionals and paraprofessionals, other insurers, and lenders. Second, Ontario was in the midst of implementing widespread changes in
keeping with emerging institutional logics. These include converting their registry system to a land titles system, and implementing electronic land registration. Title insurers in the U.S. have historically had to compete with a Torrens or land titles system, but have had success in states where Torrens had not taken hold, or where they were able to discourage its adoption (Taylor, 2008). Without a history of Torrens title and the assurances it provides, title companies would face less resistance in Ontario or other provinces in the midst of conversion, such as those in eastern Canada, but would face considerably more resistance in jurisdictions with established Torrens systems (Lavelle, 2002). The evidence bears out this contention – title insurers more successfully established themselves in the market, at least initially, in provinces in the midst of conversion, but faced more resistance from provinces with established Torrens systems. Third, Ontario lawyers are unique in having a legally protected jurisdiction over the issuance of title policies not found elsewhere in Canada or the U.S. Professional control over the issuance of title policies provides a unique context for jurisdictional battles, both for the real estate bar and for title companies grappling with regulatory institutions. Fourth, Ontario is the first jurisdiction in the world to implement electronic land registration, which was a key contributor to the changing nature of conveyancing work in the province. Finally, Ontario was experiencing a surging fraud problem that drew significant attention from the industry, the state, and the public. The emerging system of conveyancing was far more secure, underwritten, and expeditious than the previous system, yet ironically it appeared to be more vulnerable to exogenous threats. Concern over the rise of fraud and the level of victimization elicited significant state and industry responses.

A process of constant comparison was used to contrast data and theory throughout the data collection process (Strauss 1987). This evolutionary process draws attention to important theoretical elements in the literature while simultaneously testing the suitability of theoretical frames for explaining the data (see Isabella 1990). Theoretical sampling of lawyers, conveyancers,
and insurers lead to the development of a purposive sample of key field constituents (Table 1) and of important events and issues that form the basis of the data collection and analysis (Strauss 1987). Interview transcriptions were reviewed and open coded into like clusters. These open categories were directed by questions posed to respondents and by similar interrogatives directed at the documents. Both the archival/document data and the interview data were worked through iteratively (Miles and Huberman 1994). The initial interviews with lawyers, conveyancers, and title insurers, triangulated through a review of documents signaled the importance of key themes like the normative, legislative, and technological changes to conveyancing, professional competition, and system risks that create opportunities for fraud. Many of these re-emerged as the data collection and analyses progressed, and were modified and further differentiated as new data and evidence was acquired. Once saturation was achieved the interview and document data were examined for what they revealed about respondents’ understanding of the emerging conveyancing landscape, the importance of securing jurisdictional control by retaining, or usurping, the influence to define, interpret, and apply new institutional norms (cf. Scott, 2008), the situated nature of title fraud (see Vaughan 2005), and responses to the fraud problem. Overall, open coding clusters were subsequently collapsed into final codes that included the main themes addressed in this study. These include the antecedent conditions for fraud (conversion and technology, professional competition, market conditions, and moral hazard), their combined system effects that create new opportunities for fraud through depersonalization and the deterioration of organizational and field-level due diligence, and state responses to fraud where the reputational risk of neglecting the violation of vaunted institutions inverts neoliberal trends in responsibility and crime control.

For the first paper examining professional competition, interview and document data were also examined for the ways in which real estate lawyers and other constituents framed their cognitive legitimacy, and how constituents worked within the field and were perceived by other
organizations in the field. This data was analysed using grounded methodology strategies (Strauss 1987). Grounded methods focus on interpretation by analysing the “actual production of meanings and concepts used by social actors in real settings” (Gephart 2004: 457). It highlights both the day-to-day realities in which field constituents operate as well as their interpretation of these daily realities. This analysis explores the mechanisms driving competition and the construction of rhetorics that form the basis of legitimacy claims. Institutionalized practices are understood to occur across a field of organizations over time and must be studied as they emerge (Gray and Bishop Kendzia 2009). The rhetorics by which constituents framed their legitimacy provide insight into how professions defined their tasks, and how they hoped to define the institutions around them.
References


http://www.identityprotection.com/education/id-theft-101/house-stealing-when-
identity-theft-leads-to-mortgage-fraud.


The legal profession continues to redefine the nature and scope of its work and extend its jurisdiction through persistent boundary pushing and local and global mobility (Powell 1985; Abbott 1988 Dezalay and Garth 1996, 2004; Flood 2011; Liu 2013). At the same time, this movement intersects with a concomitant expansion of distributed risk systems from individuals to aggregates, particularly in the form of insurance (Heimer 2002; Ericson, Doyle, and Barry 2003). The governance of risks, such as those associated with real estate conveyancing, have shifted from professional relationships to aggregate risk management through insurance. Such shifts correspond to the emergence of market-based norms and practices emphasizing rationalization, efficiency, and productivity (Leicht and Fennel 2008).

Situated within this context, this study explores the professional conflict over conveyancing and refinancing tasks between the real estate bar in Ontario, Canada, and American-based title insurance companies. While law expands jurisdictions in some places, in others it competes against prevailing norms and trends that facilitate boundary disputes with non-professional organizations such as insurers. For decades, lawyers played a central role in the process of conveyancing. Long ranging state-initiated changes to the institutions of conveyancing in Ontario established preconditions supporting the rise of new competitors in the conveyancing market. Preceding institutional logics persisted, in part, because of the careful and diligent maintenance of title integrity by the real estate bar, and their role in service to clients and the public. Incremental shifts towards a modernized, efficient, and state-backed system of titles coupled with emerging market- and insurance-based institutional logics destabilized older institutions and opened the field to competition from non-professional occupations like title insurance companies, which were more closely aligned with these emerging logics. Title
insurance companies were able to capitalize upon these changes, and upon the relatively well-maintained system of land registration in the province, to challenge lawyers for control over workplace, public, and legal jurisdiction of conveyancing (Abbott, 1988).

Exploring this dispute through key issues advanced by an institutional sociology of professions, namely the factors that mediate or facilitate change in professional jurisdiction, the link between professional change and broader social change, and the strategies use by professions to develop, maintain, or disrupt institutions (Muzio, Brock, and Suddaby 2013), this paper examines the precipitating jolts and the subsequent process of deinstitutionalization thatcentred the legal profession from its vaunted position in the conveyancing market. In addition, this paper explores both the ways in which changes are linked to broader shifts towards market- and insurance-based institutional logics, and the strategies employed by the real estate bar to retain control over workplace tasks and to adapt to the diffusion of prevailing practices that threaten their pragmatic, cognitive, and moral legitimacy (Abbott 1988; Adler and Kwon 2013; Greenwood, Suddaby, and Hinings 2002).

In response to these jurisdictional challenges, professionals employ rhetorical strategies to reshape dominant ideologies and to maintain market control over field-level conveyancing tasks (Suddaby and Greenwood 2005). Rhetorical strategies are used to manipulate the meaning systems that undergird institutional logics, including the ways in which legitimacy is construed within an organizational field. While the essential characteristics of professions lie soundly in their cognitive core and technical expertise, what Brint (1994) calls expert professionalism, professions also employ strategies drawing from their ethical and services roles, or trustee professionalism. The manipulation of meaning and legitimacy expose the tensions and contradictions between expert and trustee professionalism. This study examines the conditions
under which professional segments employ specific rhetorical strategies to retain field-level legitimacy and, ultimately, control over tasks. The real estate bar employed similar strategies throughout the phase of initial competition with title insurers and throughout the widespread adoption of title insurance in the province. As institutional agents of conveyancing and home ownership, the real estate bar invoked the rhetoric and ideals of trustee professionalism as a strategy to maintain legitimacy and viability in the market (cf. Suddaby and Greenwood 2005), in keeping with long-standing cognitive and normative institutions. Part of this rhetorical strategy was to juxtapose trustee ideals with the market-based approach adopted by title insurers. Careful, diligent, selfless, and thorough were themes contrasted with haste, recklessness, and self-interest. This paper suggests that professional segments with weak subjective jurisdiction (cf. Abbott, 1988) over technical aspects of work will compensate by drawing attention to the trustee roles that have become culturally and publicly synonymous with their service as professionals. By invoking these characterizations, professionals call attention to their legitimacy in the market, particularly by arguing that technical aspects of conveyancing cannot be separated from trustee aspects. Professional segments also adapt to changing institutions by recasting traditional roles through the lens of dominant market-based logics.

This paper makes two contributions: first, it highlights how professionals displaced from a central role in field-level processes attempt to retain legitimacy among field constituents in the face of competition from non-professional occupations; second, it underscores the importance of focusing on professional segments, such as the real estate bar, which often share work activities, interest, values, cultures, associations, and institutions distinct from the wider profession, and which often operate among systems or fields of organizations and occupations not shared with other members of the profession (Bucher and Strauss 1961). Professional segments compete for the power to define and interpret institutions (Scott 2008), and for control over markets that are
idiosyncratic to their practice area (Halpern 1992). In addition, less powerful segments of a profession are more open to competition (Abbott 1988), and exert less control over the diffusion of new norms and practices within the field (Adler and Kwon 2013). Such a focus informs our understanding of the diffusion of norms and ideas and of the ways in which jurisdiction is defended.

The Institutional Context for Professional Competition

The theoretical argument herein traces the intersection of institutional change and professional conflict through an exploration of the construction of legitimacy within organizational fields. First, while some professions, such as law, are characteristically more resistant to deinstitutionalization, segments of the legal profession with distinct institutional and organizational contexts respond quite differently to deinstitutionalization and subsequent professional competition. Second, new logics emerging from deinstitutionalization disrupt field-level consensus and catalyse contests over the definition and legitimacy of these logics. Third, professionals employ rhetorical strategies to manipulate the meaning systems that underlie institutional logics to retain legitimacy in the face of professional competition. Finally professional segments employ rhetorical strategies specific to their unique institutional context.

Institutional Context and the Legal Profession

Recent efforts are underway to consolidate scholarship on the professions that has emerged from the institutionalist sociology of professions literature (Muzio et. al. 2013; Scott 2008; Suddaby and Viale 2011). This literature underscores the association between professionalization and institutionalization by drawing attention to the “relationship between professions and institutions such as markets, organizational forms, and business practices, and specifically with the role of
professional groups and professional organization – broadly defined – in processes of institutional change” (Muzio et. al. 2013: 700). In one stream, institutionalist scholars examine the critical role played by professions in contemporary society as institutional agents, namely as defenders and developers of major institutions. Professionals are apex in their role as institutional agents. Scott (2008: 223) argues, “More so than any other social category, the professions function as institutional agents - as definers, interpreters, and appliers of institutional elements. Professionals are not the only, but are - I believe - the most influential, contemporary crafters of institutions.” Professionals can be leaders in disrupting, maintaining, and creating institutions. They represent powerful constituents within organizational fields capable of driving the social construction of normative, regulative, and cognitive institutions (Berger and Luckmann 1966). Indeed, the professions have featured as carriers of normative, mimetic, and coercive pressures in keeping with a broader focus on agency within neo-institutional theory (Muzio et. al. 2013). They are the primary builders and tenders of social institutions, and these institutions are formulated in part by the complex and abstract theoretical knowledge that is a central defining trait of the professions (Wilensky 1964).

In another stream, professions are conceptualized as institutions themselves that have experienced significant change (Brint 1994; Muzio et. al. 2013; Scott, Ruef, Mendel and Caronna 2000;). Muzio et. al. (2013: 700) observe that professions are the targets of institutional change, acted upon by “a myriad of social, economic, technological, political, and legal forces.” Scholars have identified several key exogenous and endogenous forces, including changes in institutional logics from professional to market- and insurance-based logics and intense competition from non-professional organizations (Leicht and Fennel 2008; Leicht and Lyman 2006; Scott 2008; Scott et. al. 2000), and technological developments, the routinization of services, and the consolidation and formalization of professional knowledge (Powell, Brock, and
Professionals respond to institutional challenges by engaging in institutional work to maintain workplace jurisdictions (Abbott 1988). For example, Scott et. al. (2000) explicate the response from the medical profession to efforts by non-professional organizations to dismantle their long-standing dominance in the field. Such studies have underscored the role of professionals as shapers and creators of institutions, and as institutions responding to exogenous institutional shifts. Scholars have articulated the mechanisms and processes underlying these professional challenges. Greenwood, Suddaby, and Hinings (2002) describe the process of institutional change in the highly institutionalized professional setting of accounting, outlined in Figure 1:

**Figure 1: Stages of Institutional Change**

- **Precipitating Jolts** → **Deinstitutionalization** → **Preinstitutionalization**
- **Theorization** → **Diffusion** → **Reinstitutionalization**

In this six-stage model, precipitating social, regulatory, or technological jolts first destabilize

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1 Adapted from Greenwood, Suddaby, and Hinings (2002:60).
established institutional practices. Second, such jolts allow new actors to enter the field or precipitate the ascendance of existing actors. Third, new ideas are embedded that may disrupt socially constructed field-level consensus. Fourth, theorization occurs where innovations diverging from field-level conventions are presented and justified as solutions, securing moral and/or pragmatic legitimacy in the process. Fifth, innovations diffuse throughout the field by achieving consensus around their pragmatic value. Lastly, innovations become taken-for-granted in a process of reinstitutionalization, in effect persisting over time as uncritically accepted normative standards.

Some professions, such as law, appear resistant to institutional change (Freidson 2001; Greenwood and Hinings 1996). This position can be traced to two key features: its exclusive claim over substantive and procedural rules of law in tandem with experiential practice, and state-granted monopolies over the practice of law (Nelson and Trubek 1992). The legal profession’s collective professional influence upon the state has undergirded its strategy for exclusion and jurisdictional control against interprofessional competition. Taken as a whole, the legal profession exhibits some degree of institutional endurance, though it is certainly not free from the effects of precipitating jolts and the resulting deinstitutionalization delineated by Greenwood et. al. (2002). Evidence suggests that organizational fields are in a state of flux and evolution (Greenwood et. al. 2002; Hoffman 1999), and that the political nature of professional activity makes the boundaries of organizational fields a subject of continuing review and redefinition. Professional jurisdictions are subject to continuous claims and counter claims suggesting that the jurisdictional boundaries are not absolute and are subject to forces of destructuration (Scott et. al. 2000). Precipitating jolts can act as catalysts for deinstitutionalization by destabilizing existing practices. Law, for example, has been subject to various destabilizing forces emanating from within market contexts (Leicht and Fennel 2008).
Some areas or segments of law more so than others are susceptible to the effects of these jolts. Studies of the professions often overlook the distinct context of professional segments, the subgroups or specialists within a profession. Many studies of professional segments have focused on the rise of segmentation in the medical profession (Halpern 1988) and the institutionalization of new medical specialties. As Anleu (1992) observes, lawyers are generalists by training and specialization is absent from legal education. However, most lawyers consider themselves to be specialists in one or more practice areas of law (Heinz and Laumann 1982). The concept of professional segments can be employed to understand jurisdictional disputes concentrated within areas of the bar. Absent is the institutionalization of specialties in legal education, but professional segments often share work activities, interest, values, cultures, associations, and institutions distinct from the wider profession, and they often operate among systems or fields of organizations and occupations not shared with other members of the profession (Bucher and Strauss 1961). The study of segments is particularly important for advancing our understanding of how professional boundaries are contested and negotiated, and the importance of intraprofessional relationships among other members of the profession in deciding the outcome of such contests. In addition, a study of professional segments demonstrates how processes of deinstitutionalization (Greenwood, Suddaby, and Hinings 2002) and the influence of broader shifts in institutional logics affect elements of the profession differently.

Segments in the “household” sector of legal practice (Arthurs, et. al., 1986) - those delivering conventional legal services such as conveyancing to ordinary citizens - occupy a more financially precarious position and are thus more likely to seek direct market control over jurisdiction. Legal services at the low cost end or in slow growth areas like real estate conveyancing have become increasingly routinized over time and thus more vulnerable to
competition especially when alternatives exist for these relatively routine services (Abbott, 1988; Arthurs et. al. 1986; Kritzer, 1999). Emerging technologies empower consumers and clients, and heighten consumer expectations about the professional services they can expect. Together with environmental shifts such as state initiated legislative change or more competitive markets (Powell et. al. 1999; Van Hoy 1993) these changes put pressure on professions and may open them to competition from nonprofessional occupations.

In addition, intraprofessional relationships are central factors shaping the trajectory of professional competition. Any study of professional segments is also a study of how segments relate to the wider profession. Intraprofessional relationships have been neglected in studies of professional conflict and in the role they play in shaping the trajectory of professions (Halpern 1992; Hoff 1998), and this is especially salient for institutional studies of professional segments. Different segments have different economic and professional interests, and vindication of these interests requires that segments gain control or influence in the governing bodies of the profession (Arthurs 1996). The leaders of the profession recognize status within the profession and operate from positions of relative power, while other segments and specialties appear inchoate and lack the ability to sufficiently organize and implement their objectives (Bucher and Strauss 1961). A successful defence of professional jurisdiction requires support from the wider profession typically through professional associations and appeals to the bar’s regulatory body. Disjunction exists, however, between the jurisdictional concerns of those in lower strata segments and those in the upper strata of the profession (Abbott 1988). Lower strata segments of the profession are concerned with the retention of workplace tasks, with jurisdictional issues seldom revolving around theoretical knowledge. In contrast, those in the upper echelons of the profession, particularly those represented in regulatory bodies, concern themselves with the long-range interests of the profession (Shamir 1993). When faced with jurisdictional challenges,
diverging interests among different segments of the bar results in different outcomes, where one segment fights to retain their monopoly over workplace tasks while the other aims to preserve the broader interests of the profession. In some instances, pursuit of these interests is mutually exclusive, usually to the detriment of those with weak representation in intraprofessional decision-making bodies (cf. Abbott, 1981). As Greenwood et. al. (2002) reiterate, rather than reinforcing existing roles and norms, professional associations can also further catalyse and legitimate change within a field.

**Logics and Legitimacy**

A key feature of the institutional context of professional competition is the broader shift in institutional logics. Logics are described as a framework for reasoning that provides social actors with vocabularies of motive, and which link individual agency and cognition with socially constructed institutional practices and rule structures (Friedland and Alford 1991; Thornton and Ocasio 1999). Logics “encode the criteria of legitimacy by which role identities, strategic behaviours, organizational forms, and relationships between organizations are constructed and sustained” (Suddaby and Greenwood 2005: 38). Mature fields, such as law, often appear to have stable and routine logics (Scott 2001).

Leicht and Fennel (2008) argue that the dominant institutional logic confronting professions centres on market-based norms and practices emphasizing management, competition, rationalization, efficiency, technology, and productivity. Leicht and Lyman (2006) trace this shift in logic to the rise in neoliberal economic and political ideologies and the subsequent decline in what they call liberal-technocratic professionalism, where professions control task domains and carry out complex labour in service to the public. Organizational forms that most closely align with market logics are more likely to be legitimated within an organizational field where such
logics are emerging (Ruef 2000). For example, in the field of real estate new forms conforming to new market logics of profit and efficiency are more likely to displace seemingly contradictory norms of trustee service and professional diligence that characterize legal practice like conveyancing. Within this emerging institutional context there is a notable erosion of professional logic and the trustee model characterized by statutory protections and monopolies, collegial organization, ethical standards, and service in the public interest. Indeed, since the 1980’s there has been an erosion of the statutory protections and monopolies enjoyed by professions catalysed in part by economic pressures of the market (Powell et al. 1999). Many professions, including law, have resisted market logics because of the persistent view that profit-driven logics stand in contrast to the service role of professions (Adler and Kwon, 2013).

The legal profession also traverses the concomitant expansion of distributed risk systems from individuals to aggregates, particularly in the form of insurance. Insurance as a technology of risk management displaces and discredits alternative and typically less formal forms of ensurance (Heimer 2002). Powerful organizations drive this shift by refusing to accept less formal forms of ensurance (making outcomes more likely) in favour of formal insurance (indemnifying against losses), ultimately driving forms of ensurance from the market. This process extends to the sphere of professional competition in Ontario where aggregated risk management strategies of formal insurance comes to replace individualized professional relationships predicated on a form of title assurance (McKenna 1999). Assurance is achieved when a lawyer, notary, or conveyancer examines the title and renders an opinion to purchasers and lenders. In providing a title assurance through a solicitor’s opinion, lawyers review the title and any agreements affecting title and carry out a series of searches and enquiries to establish a chain of title to ensure that the title is free of defects and that it is accurate and up-to-date. The solicitor’s opinion not only provides a title report and a strict summary of searches and enquiries, but it also ensures
that the property can be dealt with reasonably in the future (McKenna 1999). While this process is more formalized than the *ensuring* described by Heimer (2002), it too has been largely displaced from the market through the insistence of powerful organizations, such as lenders. Organizations compel such market shifts to formal insurance because they prefer the greater resource base offered by insurers compared to individuals or professionals, because organizations develop routines that come to rely on insurance (for example, insurance is essential for expediting real estate transactions), and because insurance is believed to be more accurate at assessing and addressing risks (Heimer 2002).

Shifts in institutional logics accompany contests for institutional legitimacy. Lawyers and other professionals convey authority through their pragmatic, cognitive, and moral legitimacy (Abbott 1988; Greenwood et. al. 2002; Meyer and Scott 1983; Suchman 1995). Professionals structure normative or pragmatic legitimacy through the generation of standards, principles, and benchmarks to guide behaviour, as well as through their claims to ethical and service standards that are in the interests of society (Brint 1994; Scott 2008). They are also legitimated by legal regulations that guide professional behaviour and grant control over workplace tasks (Abbott 1988; Hoffman 1999). Cognitive aspects of institutions involve cultural rules and frameworks that guide understanding and provide meaning. They supply culturally supported bases for legitimacy, including control over markets exercised through knowledge claims (Abbott 1988, 1991). Control over markets is contingent upon a professions’ ability to advance its knowledge mandate - its capacity “to exert influence in virtue of the substance, form, transmission, efficacy, objects, and legitimacy of its cognitive core” (Halliday 1987:29). Successfully applied knowledge mandates grant professions an “epistemological warrant for public influence.” Thus, the ability of professions to define reality by shaping cognitive institutional pillars is central. Professional legitimacy also arises through the endorsement by constituents, both internal and
external to the field, of the legitimacy of a profession's activities (Deephouse and Suchman 2008; Ruef and Scott 1998). Legitimacy is often tied to a socially constructed set of norms, values, beliefs, and definitions, such as trustee professionalism. As these beliefs, values, and norms become supplanted by new institutional logics, powerful constituents who act as sources of legitimacy may support conversions to new logics. As logics change so too do the underlying criteria by which legitimacy is assessed.

**Rhetorical Strategies**

Rhetorics are the “Deliberate use of persuasive language to legitimate or resist an innovation by constructing congruence or incongruence among attributes of the innovation, dominant institutional logics, and broader templates of institutional change” (Suddaby and Greenwood 2005: 41). Suddaby and Greenwood (2005) focus on the use of rhetorical strategies as tools to manipulate the meaning systems that underlie institutional logics. They identify two elements of these strategies: institutional vocabularies, which amplify contradictions in logics, and theorizations of change, which reconcile contradictions with prevailing institutional myths. Suddaby and Greenwood observe that institutional agency and power are entrenched in the rhetorical strategies used to create, maintain, or alter meaning systems that underlie institutional logics, and that language and meaning are manipulated to alter institutions by exposing contradictory meanings. Institutional change is accompanied by a shift in the dominant institutional logic, but such shifts are highly contested. Because logics are socially constructed abstractions, contestations are often a function of rhetoric in which legitimacy of competing logics is openly debated. Their emphasis on rhetoric and the construction of meaning underscores and reinforces the importance of language in the development of institutions (Berger and Luckmann 1966).
Rhetorical strategies highlight the tension between models of expert and trustee professionalism (Brint 1994). Traditional professions have always balanced an institutional logic of professional practice centred on trustee elements of professional-client relationships, autonomy, collegiality, and professional ethics, and a technical environment stressing market efficiency, technological change, organizational innovation (Leicht and Fennel 2008; Suddaby and Greenwood 2006). Brint (1994) demonstrates that measures of cognitive legitimacy are centred largely on a profession’s technical and theoretical core, rather than their ethical commitment to public interest. He argues that the original fee for service professionals, including lawyers, emphasize applied formal knowledge or expertise and the instrumental effectiveness of specialized, theoretically grounded knowledge towards tasks for which a market demand exists. Maintaining their vaunted position in the market often involves the mobilization of technical claims of instrumental effectiveness that lie at the heart of their cognitive core (Brint 1994). Scholars have also recognized, however, that professionals sometimes resort to claims of public service and ethical standards to protect their privileged positions (cf. Klegon 1978). For example, Brint argues that the essential characteristics of professions have “nothing to do with public service, ethical standards, or collegial control, however, often these ideals and practices may grow up in support of the profession’ claims to distinction.” (1994: 23).

Suddaby and Greenwood (2005) found that professions balance trustee “core values” with expert “commercialism” by internalizing and reconciling them in existing logics. Institutional vocabularies expose expert and trustee logics that underpin institutions, and theorizations of change were used strategically to contain the contradictions between these logics by tying them to broader discourses of tradition and progress, a synthesis of old and new. A key contribution here is to explore the rhetorical strategies employed by professional segments. Competition with occupations over workplace, legal, jurisdiction exposes the underlying tension between expert
and trustee models. Professional segments with weak subjective jurisdiction over technical aspects of work will compensate by drawing attention to the trustee roles that have become culturally and publicly synonymous with their service as professionals.

Findings

Shifts in the institutional context of the legal profession underscore more recent competitions over conveyancing in Ontario. Understanding this context is particularly important for examining the emergence of new institutional logics and the ways in which these logics become central to the competition over workplace jurisdiction. Figure 2 provides a timeline for key events described below.

**Figure 2: Timeline for Key Events in the Conveyancing Field**

<table>
<thead>
<tr>
<th>Year</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1885</td>
<td>Land Titles Act</td>
</tr>
<tr>
<td>1957</td>
<td>Reg 666 (69/07) of the Ontario Insurance Act requires the participation of lawyers in title insurance</td>
</tr>
<tr>
<td>1960</td>
<td>Title insurance licensed to sell policies in Ontario</td>
</tr>
<tr>
<td>1970</td>
<td>Law Reform Commission recommends conversion to Land Titles</td>
</tr>
<tr>
<td>1980</td>
<td>Ontario initiates POLARIS to convert registry to land titles and to automate records</td>
</tr>
<tr>
<td>1990</td>
<td>Land Registration Reform Act makes e-reg mandatory in some jurisdictions</td>
</tr>
<tr>
<td>1991</td>
<td>Title insurance aggressively enters the Ontario market; Teranet created to take over POLARIS automation</td>
</tr>
<tr>
<td>1996</td>
<td>Lawyers Professional Indemnity Company enters the title insurance market</td>
</tr>
<tr>
<td>2003</td>
<td>Most titles online and accessible through electronic land registration</td>
</tr>
</tbody>
</table>

**Conversion to Land Titles**

For many years conveyancing in Ontario was based on the registration-of-deeds system. This
system requires deeds and other documents affecting title to be registered by a government official (Taylor 2008). The registry system also required lawyers to ensure a good root of title by investigating the title’s history. Lawyers researched the 40-year history\(^2\) of the title, including liens, encroachments, discharges, wills, and map descriptions. In addition to reviewing land registration records, lawyers and title searchers would conduct numerous off-title searches, such as sheriff’s or tax certificates and municipal searches.

While the registry system established a public registry that made deeds and other pertinent information easier to find, it did nothing to elevate bad titles to good ones, and overriding interests in the land may affect the new owner’s title and render it worthless or partial (Taylor 2008). In addition, the registry system discourages financial institutions from lending at the lowest available rate due to the risks involved in registry deeds. Legal liability precedent demanding near perfection from real estate lawyers in Ontario offset some of these problems.

Ontario persisted with the registry system until the passage of the Land Titles Act in 1885, which made available a Land Titles system to property owners in Ontario. The shift in legislation and practice in Ontario occurred for four reasons. First, some considered the registry system to be economically wasteful. Each time a property changed hands the entire process of rendering a solicitor’s opinion through a 40-year search of title and off-title records would be repeated. The Land Titles system, however, operated on the principle of indefeasibility, which provides a foundation for the methods used by lawyers in conducting land title searches (Troister 2002). This principle contains three components: the mirror principle, the curtain principle, and the insurance principle. In function, these provide several advantages over the registry system. The

\(^2\) Defects in the title beyond the 40-year period are assured by statute and are therefore considered to be cured.
mirror principle states that the title register perfectly mirrors the state of titles in the province. Unlike the registry system, which records deeds on the public register but does not elevate their marketability, the act of registering title confers good title, cures defects, and certifies the owner’s title. The curtain principle states that the purchaser does not have to look behind the title that appears on PIN summary (property identification number). That is, the PIN summary is regarded as the sole source of information about the land, and any interests not on the PIN can be ignored since it lies behind the metaphorical curtain of the registered title.

Second, the Land Titles system provides state-backed guarantees of title. This is represented by the insurance principle. The insurance principle asserts that the state guarantees the accuracy of the register and provides compensation to those who suffer loses from inaccuracies on the PIN summary. Altogether, the mirror principle assures that the title register discloses title, the curtain principle assures that one need not go behind the disclosures on the register, and the insurance principle assures that the government stands behind the system and the title register, and mandates the establishment of an assurance fund to compensate errors or fraud.

Third, the Land Titles system offers greater efficiency. Land titles records are converted into parcels, which are easier to administer and more amenable to computerization and electronic conversion. This conversion facilitated the province of Ontario’s long-term view of land titles. In anticipation of the efficiency of technological advances, the Ontario Law Reform Commission recommended the wholesale adoption of Torrens title in Ontario to permit the automation of land titles. Since the 1980’s the Province made concerted efforts to convert registry deeds into land titles parcels (Ministry of Consumer and Business Services 2002). A primary impetus for conversion was not only the added security inherent in the state-backed titles of a Torrens land titles system, but also the relative simplicity of the system compared to its alternatives. Torrens
systems deliver more useful and succinct information, and in a format more suitable for modern computer systems and online land registration technology (Taylor 2008). As Taylor (2008: 110-11) states, “the mirror principle works extremely well when the mirror is visible throughout the world because it’s online.” Through the POLARIS program (Province of Ontario Land Registration and Information System), the government of Ontario began automating all land registration records\(^3\). This was achieved through a partnership with Teranet Inc., an electronic services provider once partly owned by the government, who supplied technological software and support for an electronic land registration system (e-reg). By the early 2000’s most properties in Ontario had been automated and converted to the e-reg system\(^4\), making Ontario the first jurisdiction in the world to provide electronic land registration.

**Title Insurance and the “Strange Dynamic”**

Title insurance is a uniquely American product that indemnifies property owners against losses arising from future title problems, and promises to cover legal costs incurred in rectifying title errors. Title insurance emerged in the United States for several important reasons: court decisions absolving conveyancers of liability for providing inaccurate judgments as long as some diligence was exercised; poorly organized registers; privately held and unregistered mortgages; the destruction of deeds during the Civil War; incompatible state licensing systems and regulation protocol; the haphazard method of opening land for settlement; and the custom of completing real estate transactions through escrow companies without the benefit of legal advice (Eaton and Eaton 2007; Lavelle 2002: Taylor 2008; Troister 1997). Today, it is almost

\(^3\) www.teranet.com.

impossible in the U.S. to obtain a mortgage without first purchasing a title policy to protect the lender (Lavelle 2002).

The proliferation of title insurance policies opened title related task areas, once the purview of lawyers and conveyancers in the U.S., to competition from title companies. Title insurance companies affected what Abbott (1988) calls bump chains - in this instance, seizing shares of the conveyancing market through the forceful displacement of competitors. In the workplace, the organizational form of title insurance companies coupled with their use of paraprofessional title agents and title searchers gave them the advantage of providing identical conveyancing services for a fraction of the cost. Title companies were able to offer effective and inexpensive services that undercut the fees charged by lawyers for similar work. Price-cutting conflicts are ubiquitous in competitions for jurisdiction. Invading organizations are successful in seizing central task areas if they provide more effective and more efficient services. Title companies had achieved great economies of scale in searching titles (Abbott 1988), due in part to their use of inexpensive paraprofessional labour, and they had the benefit of insuring over problematic titles, rendering unnecessary extensive and time consuming searches.

In addition, title companies proliferated through reverse competition. Title companies compete for client referrals from lawyers, mortgage agents, realtors, and lenders rather than marketing their product directly to consumers (Eaton and Eaton 2007). Title companies focused their marketing efforts towards lenders in the primary and secondary mortgage market by protecting the lender’s assets by underwriting the risks involved in lending the mortgage, and structured

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5 Not all title insurance companies pursued a business model that would place them in direct competition with the legal profession. While some title companies entering Canada favoured models similar to those employed in the U.S., other title companies espoused models of cooperation with the real estate bar.
their fees so that clients were responsible for both the owners and lenders policy. The provision of additional insurance on mortgages lead to the mandatory provision of title policies for mortgages in the primary and secondary mortgage markets. By securing their product with lenders and undercutting lawyers, title insurers have acquired a significant share of the conveyancing market in the U.S., in some cases working together with real estate brokers and lenders to complete real estate transactions without the involvement of lawyers (Troister and Waters 1996), and in many cases relegating the lawyer’s role to agents of the insurance company (Aaron 1995).

Title companies entered the Canadian market in Ontario in the early 1990’s and over a twenty-year period have spread to many jurisdictions in the country. Title insurance proliferated under dissimilar conditions compared with those in the United States. Title integrity remained sound in Canada due to high standards of care expected from lawyers, and many provinces had Torrens title systems in place for over a century. Whereas the U.S. system contended with myriad problems and inconsistencies, titles in Canada were public, reliable, and well maintained. More importantly, whereas title insurance flourish in the secondary mortgage market in the United States, the development of a secondary market and the role of title companies in that market never materialised to the same degree in Canada. This was because of superior registration regimes, strict laws regarding solicitor negligence, a more fragmented securities market, the presence of national mortgage-lending institutions to raise and allocate mortgage funds, and a 5-year limitation on the terms of mortgages (McKenna 1999).

Observing the distinction between the U.S. and Canadian systems of conveyancing, Bruce McKenna, a lawyer and expert on title insurance notes, “Title insurance is the system by which title to most American properties is confirmed to purchasers and lenders. In Canada, on the other
hand, the traditional system is best described as “title assurance”, and is based on a lawyer, notary, or conveyancer examining the title and giving an opinion to purchasers and lenders.” (1999:2). In providing a title assurance through a solicitor’s opinion, lawyers review the title and any agreements affecting title and carry out a series of searches and enquiries to establish a chain of title and to ensure that the title is free of defects, accurate, and up-to-date. The solicitor’s opinion not only provides a title report and a strict summary of searches and enquiries, but it also ensures that the property can be dealt with reasonably in the future (McKenna 1999). Under the registry system, the solicitor’s opinion would encompass a 40-year search of deed history and related documents (Fromm 2002). Conversion to land titles provides a state-backed guarantee of title, simplifying title certification by eliminating many of these search requirements. Based on the title and off title search results and the lawyer’s training and experience, the lawyer forms an opinion about the marketability of the title, including a list of assumptions, qualifications, and limitations in their legal opinion to clients (Carter 1997; Estey 1990). This opinion acts as a guarantee, certifying that the title is clear of defects and is good and marketable. By assuring title, the lawyer is assuming responsibility should any defects later arise (Troister 1997). If the lawyer’s opinion that the title was good and marketable is wrong, the purchaser could seek financial redress from the lawyer.

Conveyancing is a risky business, particularly in the U.S. where poor registry conditions instigated standardized title insurance policies (Troister 1997). The system in Ontario, and indeed in many Canadian provinces, is more efficient with regards to title registration, certification, and public access to documents (Miceli and Sirmans 1995). Most documents are centralized and public and off-title information, such as taxes or zoning, can be acquired relatively quickly. Titles have been maintained properly for centuries, due in part to the legal and ethical care required of lawyers to verify good title. Indeed, whereas U.S. legal decisions
absolved conveyancing professionals of responsibility for professional errors, Canadian courts have reinforced a high standard of care and responsibility, demanding near perfection from real estate lawyers⁶. Solicitors are required to bring reasonable skill and diligence to their professional duties, and they must be cognizant of general standards of liability that extend beyond what a reasonable peer would expect (McKenna 1999). The standards in Ontario are so high that lawyers have little room for error. Because of this, titles in Ontario have remained free from the inconsistencies and local variations plaguing their U.S. counterparts.

Title insurance companies entered the Canadian market in 1991 during a period of declining property values where lawyers experienced a loss in revenue. The entry of American title insurance companies marked the start of a battle between title insurers and the real estate bar that has spanned two decades (Melnitzer 1998). The result: “Seventeen years later, title insurers make millions of dollars per year selling policies in most Canadian provinces and have forged alliances with the financial institutions that often control the mortgage process. Many lawyers, meanwhile, have seen revenue from residential real estate work plummet, with devastating effects” (Macaulay 2008: 30). Significant resistance arose among lawyers, especially since a third of more of lawyers in Ontario had all or part of their practice in conveyancing and depended on its income (McKenna 1998a). Published articles were leading off with anonymous quotes threatening that title insurers will put lawyers out of business and ending with claims that title insurers would like to eliminate lawyers from real estate transactions (McKenna 1998b). Recalling this state of anxiety and uncertainty, a published real estate lawyer reflects,

If you’d asked me in 1995 about the future of the real estate bar I would have said to you

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we’d be dead in five to ten years….I also firmly believe that if title insurance companies had their druthers we’d be out of the business because there’s so much money to be made in this business and nothing would make them happier than to make our money.

In Ontario, lawyers became the principle agent from whom consumers purchased their title insurance policies. Forecasting this practice, McKenna (1998b: 15) proclaims, “If handled appropriately, I believe that title insurance will come to dominate Canadian conveyancing and lending transactions as we move into the next century.” New rules of professional conduct compelled real estate lawyers to familiarize themselves with title insurance products and to counsel their clients about title policies. This is especially salient since lawyers are responsible for providing title policies to clients, in effect acting as agents for title insurance companies.

Commenting on the irony of this situation, a real estate lawyer who owns a rural firm notes, “Ya, we’re selling title insurance and they’re basically telling people that you don’t need lawyers. It’s a bit of a strange dynamic.”

However, lawyers also contend that title insurance affords advantages to both lawyers and clients:

Title insurance is misunderstood by most lawyers. It’s wonderful protection because title insurance provides protection far beyond title. I’m a big proponent of title insurance, combine with what the lawyers doing in providing legal services. I think it’s great. What’s not great is the title insurance system with no lawyers.

Aside from the protections title insurance affords clients, such as indemnity against known defects and the duty to provide legal representation, it also helped to mitigate many of the risks associated with real estate transactions. As one lawyer and professional leader observes, “…real estate is a very risky business. And the public should pay for it. And if they don’t pay for it in the hourly rates they should pay for it in insurance premiums. So it’s great. It is a great system
now that we’ve gone to title insurance.” In addition, title insurance eliminated the cost of ancillary searches and surveys. This reduced substantially the fees that lawyers disbursed to clients, streamlining the conveyancing process significantly. While many lawyers viewed the oncoming diffusion of title insurance with trepidation (and many continue to today), others acknowledged that title policies, if implemented carefully, might enhance the existing conveyancing system (see Siebrasse 2004).

Title insurers established themselves in the Ontario market and competed directly with the legal profession through four central means: they capitalized on the growing rationalization of conveyancing and the resulting fee pressures; they capitalized on emerging relationships with lenders; they capitalized on existing system risks; and they made efforts to undermine the regulatory legitimacy of the legal profession’s monopoly over title policies.

1. Growing Rationalization

Conversion to Land Titles and the automation of the land registration system combined with the high standard of care exercised by the legal profession over the preceding decades culminated in a system that was relatively secure, sound, and with the capacity for expeditious transactions. Title insurance further streamlined the conveyancing process through the promise of greater process efficiencies, alacrity, cost reduction, and security compared with a traditional solicitor’s opinion. Title insurers argued for an alternative to the traditional lawyer’s opinion, particularly one that offered a greater level of security and streamlining. A title insurance representative comments on the streaming and cost savings:

It’s streamlined the process significantly. It’s provided added protection that clients in the past did not have, and it has reduced costs and time because if you don’t have to get the survey, and you don’t have to have all those ancillary searches done, you don’t have to
wait six weeks to get a survey back and stretch your closing date out. You also don’t have the added costs of those things.

Some title insurance companies sought to capitalize on the routine nature of conveyancing work by separating a lawyers’ technical expertise from the more routine elements of the process. They took advantage of workplace assimilation by seizing the relatively routine conveyancing tasks from lawyers. Largely delegated to paraprofessional staff, much of the work rarely required the intervention of a lawyer, and by demonstrating that conveyancing can be separated from the technical skill and abstract knowledge of lawyers title insurers sought to position themselves in the conveyancing field as a low-cost and efficient alternative. As one lawyer and leader in the real estate bar observes, “It’s just conveyancing. It’s not practicing real estate. It’s just conveyancing. And that’s why companies like [title insurer] who are trying to do it all themselves, they’re making some inroads.”

Title insurers drew from their U.S. experience in selecting successful strategies to compete for shares of the conveyancing market. One strategy was to provide a title agent model consisting of direct-to-client services offered through closing centres. Closing centres are operated by title-company-sponsored lawyers who provide services and assistance directly to clients, or to lawyers retained by a client when title insurance is purchased. The specialized focus of these centres, the use of lower-cost paraprofessional staff, and greater economies of scale allow closing centres to provide conveyancing services more efficiently (McKenna 1999). A lawyer employed by a title insurer underscore this point, “Some work that doesn’t involve the certificate of title and the fact is that some title insurance companies do provide centres where that work can be done instead of being done in a lawyer’s office. There are conveyancers and paralegals who will provide that service.” This process would limit the role of lawyers to handling the signing of closing documents and sending the executed papers back to the closing centre along
with the closing proceeds (Schmitz 2006). A small firm lawyer comments:

I remember years ago that [title insurer] used to have a closing centre, but then they would submit documents to the lawyer just to sign out the client and then you’d send the documents all back to the closing centre. And I don’t know if they still have those closing centres or not. I haven’t seen any in years. But you could only charge like $75 to sign out the client but you didn’t have to do any of the paper work, you just signed them up and sent the papers back.

Another reiterates the delimitation of their role in the process:

I remember one of the discussions I had with [the insurer] when they came in they said ‘will you work for this much money on a transaction’ and gave us a hard sell and we said no, we can’t do it, we won’t do it. But it looked like, and we told them, we send all our work to you and you’re coming in replacing us. It was fairly clear that they saw us as a bit irrelevant.

Lawyers were concerned about competition from closing centres and the possibility of referrals to them directly from third parties such as agents and vendors, which may result in the concentration of conveyancing into the hands of relatively few well-administered closing centres (Eaton and Eaton 2007; McKenna 1999). Insurers entered the Ontario market during a period of conversion for registry to a land titles system. Registry documents were well maintained due to the careful work of the real estate bar, and deeds converted from registry to land titles now had their chain of title guaranteed by the state, which reduced both the time and difficulty of conveyancing by removing many of the title searching requirements (Ministry of Consumer and Business Services 2002). Title companies were able to capitalize on the careful work of the legal profession by having paraprofessional staff carry out much of the routine conveyancing work. Deeds guaranteed by the state and could be processed relatively quickly in closing centres. In addition, Ontario had not yet fully converted to a Torrens title system. Title companies have
historically competed with Torrens title systems by discouraging their adoption in many U.S. states. Torrens title systems offer state-back title guarantees and title assurances that overlap with the insurance coverage offered through title policies. In the midst of conversion, Ontario was a prime candidate for the efficiencies promised by title insurance policies, and unlike in Western Canadian provinces with well-established Torrens systems, Ontario lacked the history of title assurance to compete with the coverage offered through title policies.

Threats to the jurisdictional control over conveyancing were further exacerbated by the economic state of the real estate bar in Ontario. Decisions from the Ontario courts, prompted by challenges from the Competition Bureau, eliminated fixed fee schedules imposed by some lawyers and compelled them to compete with one another for the economic advantage of the public (Goldman 1989). Since then, fees for legal services have stagnated. As fees declined more of the work shifted to paraprofessional staff and some argued that profitability could only be maintained by sacrificing service: “But at some point that’s counterproductive because either the public is not getting the services they should get or else lawyers are driving themselves out of business.” In addition, one of the most significant costs for clients were fees for ancillary searches and surveys. Municipalities saw these fees as a source of additional revenue and such fees added significantly to the cost of real estate transactions. Ironically, while title insurance may have contributed to the routine nature of conveyancing work it also facilitated volume transactions by eliminating the need for these ancillary searches and therefore keeping fees low.

The problems associated with stagnating fees and an increasingly rationalized process was exacerbated through increasing competition from title insurers contending for a share of the conveyancing market. Price cutting is ubiquitous in conflicts over jurisdiction (Abbott 1988), and sophisticated consumers are increasingly more adept at negotiated prices, especially when
alternatives exist for relatively routine services such as real estate conveyancing (Arthurs et. al., 1986; Goldman 1989). Several lawyers contended that the options presented by title insurers, often together with lenders, have trained consumers to focus only on bottom line prices rather than on services rendered or on the thorough exploration of the property. Competitive pricing as a strategy to compete for workplace jurisdiction indirectly undermines public jurisdiction as consumers price-shop for the lowest transaction cost. The inability to compete with lower costs despite efforts to increase volume may drive consumers to choose alternatives to the legal profession, contracting with lenders and insurers while lawyers are relegated only to their legally proscribed role of offering the title opinion. As Eaton and Eaton (2007) observe, if lawyers insist on charging professional prices for what has ultimately become routine work they threaten to price themselves out of the market.

Intraprofessional competition has also applied downward pressure on their fees. The decline in fees coupled with consumer demands has intensified competition among the real estate bar. Hamilton (2006: 4) notes, “Consumers are demanding lower transaction costs, lower servicing costs, instant funding, more time efficient services and greater consumer choice”. The real estate bar competes for clients by accommodating on cost, often through a necessary decline in service. A professional leader and lawyer working for a title insurer observes, “The real estate bar is extremely competitive. It’s competitive on prices. It’s competitive on service. It’s competitive on a number of different fronts…They’ve really accommodated the public in what they wanted on the service side and the cost side.” Part of the accommodation of the public is to lower prices in order to retain clients. The same lawyer illustrates this through a hypothetical example: “…okay, do you want him to walk out the door or do you just lower your price. And of course, as soon as I lower mine, he’s going to lower again. We’re in this spiral downwards.” This point
is reinforced by another lawyer reporting that real estate agents who are trying to find “the cheapest, fastest for their client” are directing them to the lowest priced lawyers.

As the real estate bar concentrates on promoting their role in purchase and sale transactions, they adapt to the price-sensitive market by lowering client costs but intensifying volume and, as a result, commoditizing their role in the transaction. Commenting on the contemporary state of real estate lawyers, one mortgage professional and industry leader observes,

> The lawyers are stuck. It’s very competitive, real estate law is very competitive, so it’s tough for them. They don’t make very much money compared to some other lawyers. It’s tough being a real estate lawyer. You got to push a lot of volume through.

To compete in the real estate market, lawyers concentrate on managing a high volume of transactions where much of the routine work is delegated to paraprofessionals. As a prominent litigation lawyer notes, “[A] real estate deal is not done by lawyers, and the reason for that is that circumstances have turned the transactional aspects of residential real estate into a commodity.”

The result is a limited role for the lawyer, and extensive delegation to paraprofessional staff:

> So the price has been driven down to the point that the only people who can do this are people who have staff set up to handle the entire deal. The lawyer’s involvement in a deal is unbelievably limited and usually only comes in when there is a problem. As a practical matter, transactions are not handled by lawyers. They are supposed to be people under a lawyer’s supervision and such but you’ll find that of recent years the firms that are handling volume residential real estate are mini-factories, in effect, and they can do it because they are doing volume with a large number of staff.

In addition, technological innovation is employed by some lawyers to offset low fees, “Well, I mean, my fees on an average real estate deal have not gone up over the last twenty to twenty-five years. What has allowed me to remain profitable is my ability to be efficient in the processing of
the documents… I won’t tell you how many deals I do on average, right, but it would boggle your mind.” Profitability remains a central concern for the real estate bar. Some law firms remain profitable while others are unable to maintain a requisite level of volume to offset low fees:

I mean [title insurance] has totally changed the landscape of the practice of law, but I suppose the reality is that its reduced fees and made it more competitive. I don’t know if it’s made it any easier to do, but it hasn’t made it more profitable, it’s made it less profitable. And that’s why we in small practices like this are a thing of the past. There are guys that are trying to retire now, can’t find anybody to come in. Nobody wants to take it over, nobody is interested. I mean you were doing deals for $475. If you did enough $475 deals, you’ll go broke.

The challenge of increasing rationalization of the conveyancing process, accelerated largely through the actions of banks and title insurers, has provided the technical infrastructure and institutional logics promoting even further rationalization in the form of third party outsourcing initiatives. Outsourcing companies working with major financial institutions began piloting mortgage processing programs in selected regions in Ontario (Aaron et. al. 2005). Third party intermediaries were placed between the lawyer and client, and the lawyer’s role in the process was given much less emphasis. Financial institutions and title companies continue to look for process efficiencies and cost-effectiveness, and it is often found at the expense of the real estate bar.

2. Emerging Relationships with Lenders

Speaking to perennial challenges faced by the real estate bar, a lawyer and leader in the real estate bar observes, “The other challenge is keeping lawyers in the business. With the title insurers making such inroads and having such influence, particularly with the lenders, lawyers are having a more and more difficult time staying in the business.” Lenders realized the
advantages of title policies and they possessed the power to compel, though not mandate, their implementation. Financial institutions play a significant role in driving the nature and pace of change in the real estate market (Manitoba Law Reform Commission 2006). Since Canada has few major chartered banks, each of which are well integrated with one another across the country, and because financial institutions are able to exercise a great deal of power in the lending process by stipulating a number of conveyancing protocols, they are the “de facto linchpins” of the conveyancing process (Cumming 2004). As such, decisions undertaken by financial institutions significantly influence the real estate bar. A lawyer observes, “There’s a sort of saying in the real estate business that whoever controls the point of entry into the system is the one that controls the system.” In contemporary transactions, lenders and real estate agents control the point of entry of clients, while lawyers are brought into the transaction relatively late. Banks and agents can therefore exercise control over the direction of the transaction, including which lawyer to use.

Initial marketing efforts by title companies focused on loan policy and the secondary market for mortgages and refinancing, mirroring the diffusion of title insurance through the secondary mortgage market in the United States. Title companies relied on reverse competition – marketing their product to lenders, rather than consumers, by demonstrating security for mortgages, redress against uncertainty, and lower costs through streamlining and efficiency. As one lawyer in a mid-sized firm observes, “The banks were the accelerator. If the banks were willing to accept title insurance in lieu of surveys then that really settled the question for most borrowers.”

Robust markets, the democratization of homeownership, and expedited transactions have also contributed to changes in long-standing relationships among consumers and constituents, and
speak to emerging market logics. A period of growth in home sales and property values beginning in the mid-1990’s and continuing to the present signaled the growing demand for homeownership that has driven up the price of residential real estate. For example, house prices in Ontario rose 49% from 2000-2009, and another 17% from 2009-2012, and mortgage interest rates are at an historic low. Moreover, the shift by mortgage insurers to a loan-to-value ratio of 95% means that potential homeowners require only 5% of the purchase price as a down payment for the purchase of a new home, rather than a traditional 20%.

The relationship between lawyers and lenders has undergone dramatic shifts as lenders look for process efficiencies and cost savings. One lawyer and professional leader working for a title company observes about this relationship:

As banks changed their banking system to remove and displace bank managers and remove their authority, that relationship disappeared. So where you had a one-to-one relationship, now all of a sudden you had nothing. You know, they went to the centralized distribution model where they sent out all the mortgage instructions from one place and it just broke down the communication and I think that kind of set up the tension between the profession and the banks.

In addition, the relationship between lenders and consumers has been transformed. The personal relationship that may have at one time existed has been largely replaced by an impersonal and automated system. As a mortgage insurance representative observes,

See http://www.torontorealestateboard.com/market_news/housing_charts/index.htm for trends in the city of Toronto, for example.


0% no money down mortgages became available in 2006 and for competitive rates due to competition among lenders, but these 100% loan-to-value ratios were restricted by the state in 2008.
...once upon a time you had this relationship with your bank where everything was with your bank. You spent a life with your bank...And you got a mortgage because your banker knew you and knew how trustworthy you were. There was no adjudication or no scoring or no nothing. I mean you just knew who it was that was applying. And that was how it was. But now we don’t even check the signatures on cheques. We don’t, everything is automatic and everything is based on efficiencies and based on keeping the process down and maximizing profit.

An electronic service provider representative reiterates: “You used to go to a bank branch and talk to your bank manager who knew you because your kid played baseball with his kid. And now it’s how fast can I get the money on the street because if you can’t do it in 24 hours somebody else is going to get the deal.”

Partnerships with lenders legitimated the pragmatic approach to conveyancing offered by title insurance companies. Title insurers offered a product that could provide security for mortgages while meeting demands for costs cutting and process efficiencies. As chartered banks adopted title insurance, highly capitalized title companies could wield competitive pressure through vast economies of scale and low-cost staff in order to take over the "back office" functions of mortgage refinancing (Cumming 2004). Banks have assumed the in-house preparation of conveyancing documents on refinancing transactions by including title insurance in the process, a role once the sole purview of the legal profession. A title insurance representative outlines this partnership:

Again, so we’re partnering, not officially or legally partnering with lenders, but we are doing the same kind of thing where, getting all the mortgage documents up front, instructing the lawyers on how to impose the mortgage transaction and, I think one of the biggest things is getting all that documentation back and reporting, making sure that the lenders receive the reporting on the completion of the mortgages.
The demand for expedited transaction and reports, now provided rapidly through online platforms run largely by title insurance companies, and the unilateral power of financial institutions to influence the operation of field level transactions, have introduced efficiencies not easily matched by the real estate bar. A lawyer reports, “The title insurers have taken away one whole segment of lawyer’s business...they just went to the banks and said, we can, we’ll take away your per-transaction cost. We’ll do it for next to nothing and nobody needs lawyers to do these things.”

Title insurance, as Eaton and Eaton (2007: 69) observe, “is a convenience preferred by some banks, which in addition to the conventional mortgage fees paid by the borrower require the purchase of an additional cost-cutting service for their benefit.” With title insurance, “The borrower is expected to pay for the bank’s convenience of delegating much of its routine clerical work to the call centre of a commercial title insurance company.” Title insurance for lenders facilitates significant cost-reduction, and allows both lenders and title insurers to seize purchase transactions and refinancing, the “bread-and-butter” work of the legal profession (Gordon 2006). Lenders clearly favoured the streamlined and cost-effective approach of title insurance, in addition to the added mortgage protection title policies offered at no cost. While they could not compel the use of title policies, the increasing rapidity of conveyancing and demands for streamlining and efficiency rendered obsolete opining on title. As one title searcher and paralegal observes,

You don’t have time to do a survey anymore. Before, you’d have 6-8 weeks to close a deal. Now you have to do it in one week, two weeks. It would take weeks just to arrange a plan of survey, and then you have to send out letters for taxes and zoning and stuff and wait for replies. You just don’t have time to do that anymore.

Lenders influence the use of title insurance through the condition of tight closing deadlines and,
in doing so, institutionalize the reliance on insurance to expedite the process and reduce costs. By allying with lenders through reverse competition, and offering cost reductions and process efficiencies, title companies have been successful in taking over the back office aspects of mortgage refinancing. The massive capital resources that title companies possessed gives them a competitive advantage over the real estate bar who lack the resources and scale to challenge them in the market. Financial institutions appear to obviate lawyers from streamlined processes in order to further reduce costs (Arruñada 2001). As one practitioner summarizes, “refinancing is largely gone and it not easily coming back” (cited in Gordon 2006: 26).

3. System Risk

Title certification, particularly through the provision of a solicitor’s opinion, carried significant financial risk to lawyers. This risk is mitigated in part through the acquisition of mandatory professional liability insurance. Provided through the Lawyers Professional Indemnity Company (LawPRO), this form of professional liability insurance was meant to support the professional advice given by lawyers by spreading the risk over the whole of the insured bar (Carter 1997; LawPRO 2003). Drawing from data about lawyers’ practices and practice risks extracted from their nearly 36,000 insured, LawPRO restructured its insurance program to account for the statistically higher risk areas of law, including real estate (LawPRO 2003). Observing a critical accounting error amplifying system risk, a lawyer notes, “The Law Society was having a lot of real estate claims at that time and in fact there was one point the auditors misread the risk, the insurance claims risk, and they were out by hundreds of millions of dollars.” By 1994 the Law Society’s liability insurance was running a $130 million deficit in the errors and omissions program. Much of this deficit, nearly half, was from real estate conveyancing, the direct result of the risks of conveyancing and legal precedents demanding near perfection from real estate
lawyers. A $65.00 surcharge was levied on each transaction completed by real estate and civil lawyers to offset the disproportionate claims made in these areas of law. This measure ensured that premiums paid by lawyers who practice in high-risk areas of law closely match their claims experience. By drawing an additional surcharge from high-risk areas of law the Law Society could replenish and maintain its professional liability fund.

Pressure from the liability insurance fund deficit made the opportunity to shift the financial burden away from the Law Society and onto insurance companies more attractive. In doing so, negligence claims could be offloaded to insurers and the deficit replenished. A title insurer discussing the merits of title insurance for both clients and lawyers dealing with errors and omissions (E&O) insurance problems states,

> From a consumer’s perspective the process is much smoother and they don’t have the cost associated with having put through an E&O-type claim. From a lawyer’s perspective, instead of that title related claim being an E&O claim, it’s now a title insurance claim. So from their perspective that reduces some of their risks because if it was an E&O claim then they have claims experience that’s going to affect their E&O premiums.

Title insurance positioned itself as an effective alternative to liability insurance, with the added benefit of reducing the significant deficit faced by the Law Society. Ameliorating the risk associated with the liability crisis was a key factor in legitimating title insurance in the province. While the profession largely stood in opposition to title insurance throughout the jurisdictional battles with the real estate bar, the profession’s regulating body, the Law Society of Upper Canada, ultimately approved a decision to enter the insurance market itself with a bar-related title insurance product, TitlePLUS, offered through its wholly owned professional liability insurance company, the Lawyer’s Professional Indemnity Company. This manoeuvre not only
legitimated title insurance in the province (McKenna 2002) at a time when title insurance appeared to stand in opposition to the legal profession, but it is widely credited with ensuring a role for lawyers in future conveyancing activities. As one lawyer recalls, “And I thought, and I still believe, those guys who put TitlePlus together are forever to be thanked by everybody who practices in the real estate field because whoever was involved in that committee for Title Plus saved their ass.” A representative from the bar-related title insurer reiterates this point, “Some title insurance companies do some of the conveyancing work in-house. We do not - we want to encourage the public to use lawyers to advise them on their deals…we think the public should have their own independent legal advice on real estate deals.” The bar ultimately approved the bar-related title insurance company to protect lawyers while the regulatory body of the profession promoted bar-related title insurance because it felt it was in the public’s interest to have lawyers involved in the conveyancing business.

Entering the insurance market through a bar-related title insurer was driven by three central rationales. First, the Law Society reasoned that it could manage liability debt in a more fiscally responsible way by shifting liability risks to insurance providers. Second, it could preserve both conveyancing standards and the role of the real estate bar while adapting to emergent institutions in the conveyancing market. In addition to being risky, conveyancing was also time consuming. Since the banks preferred the process efficiencies offered by the acquisition of a title policy, particularly the reductions in cost, time saving, and added security, respondents believed that title insurance would become a permanent facet of conveyancing in the province. Third, bar-related title insurance could simultaneously provide these efficiencies while continuing to promote the role of lawyers in the process. Title insurance from the bar requires a higher standard of conveyancing for a policy, and the insurers actively encouraged the use of legal counsel for conveyancing tasks. These long-term interests superseded many members of the real estate bar’s
concerns over the loss of workplace jurisdiction, and the continuing concerns over new challenges to workplace, legal, and public jurisdiction. Such legitimation of the practice of title insurance helped to accelerate its spread throughout the province. Now, nearly every transaction in Ontario is title insured.

4. Legal Monopolies

A lawyer observed that, “If title insurance companies can, they will make us dinosaurs.” Title insurers may have come to control much of the conveyancing and refinancing work in Ontario if not for a legal provision solidifying the lawyer’s role in the issuance of title policies. Regulation 69/07 (formerly Regulation 666)\(^\text{10}\) of the Ontario Insurance Act requires that a lawyer independent of the insurance company provide the title opinion prior to the issuance of title policy to a consumer. In other words, title companies could not issue policies without a title opinion from an independent lawyer. This regulation is key: unlike their American counterparts who did not benefit from such legal provisions, Ontario lawyers were assured a role in the conveyancing process despite the presence of title companies. This regulation provides a legally anchored and protective market niche securing lawyers’ involvement in the issuance of title policies. By removing Reg. 69/07 title insurers could operate unfettered in the Ontario market.

This legal provision, however, was a relatively recent amendment to the Ontario Insurance Act. Ratified in 1957, Reg. 69/07 was designed to protect the interest of lawyers from the then uncertain threat posed by title insurers. As such, the regulation has never been adequately tested

\(^{10}\) O. Reg. 69/07, s.1 A license issued to an insurer to undertake title insurance in Ontario is subject to the limitation and condition that no policy of title insurance shall be issued unless the insurer has first obtained a concurrent certificate of title to the property to be insured from a solicitor then entitled to practice in Ontario and who is not at that time in the employ of the insurer.
until title companies emerged as viable competitors in the Ontario conveyancing market. Political and legal challenges to the profession’s monopoly were ultimately mounted as title companies lobbied for the regulation to be repealed. A title insurance company representative argued that the regulation interfered with the business they conduct with lenders, and narrates a rationale for repealing the regulation:

So why the push to have that regulation repealed? I think it just streamlines the existing business that they do, that title insurance companies participate in without an individual lawyer acting for a buyer or seller…A jaded view might say, well it’s really just something that the Law Society’s put in in their own economic self-interest. But on the other hand they may say, well the only reason [the title insurer] wants to get rid of it is for their own economic self-interest.

Title companies petitioned the provincial government to repeal the regulation. Not only did the regulation prevent title companies from implementing direct-to-client services and assuming a greater proportion of the conveyancing market but, they argued, the regulation uniquely privileges the legal profession (Chetcutti 2007). Regulation 69/07 precludes insurers from making their own risk assessments by requiring that they obtain a certificate of title from an independent lawyer, even if they were prepared to assume the risks of not obtaining such a certificate (Paton 2007). In addition, it established differential treatment for employed lawyers not previously set out in the profession’s Rules of Professional Conduct. The employment of lawyers outside of law firms is a growing phenomenon in the legal profession (Abel 1985; Nelson and Nielson 2000). Whereas employed lawyers are able to exercise their professional discretion with regards

11 Paton (2007: 23) outlines the possible conflict of interest – regulation 69/07 “links the regulator of the legal profession, the Law Society of Upper Canada, with the activities of title insurance companies, when that regulator also owns a title insurance company with which the other title insurance companies compete in the commercial marketplace.” For a government review of this conflict, see Financial Services Commission of Ontario (2008).
to potential conflict of interests, regulation 69/07 precludes the exercise of professional discretion for lawyers employed by title companies by removing their ability to provide title certificates on behalf of the organization. The requirement of external legal counsel to issue the title certificate is not found in any other province, and such restrictions on the professional exercise of discretion do not apply to any other category of employed lawyer (Paton 2007). Finally, their position was supported by broader socio-economic shifts in which the public increasingly questioned the need for monopolies over professional domains (Goldman 1989). Successfully repealing the legal jurisdiction lawyers possessed over title policies would enable title companies to compete directly for workplace jurisdiction without deference to the lawyer’s legally privileged position.

Elements of the profession, including several professional associations such as the Ontario Bar Association, the Ontario Real Estate Lawyers Association, and the County and District Law Presidents’ Association (CDLPA), worked collectively to uphold Reg. 69/07 and to protect both the bar’s role in conveyancing and, as they argue, the interest of the public. The Law Society formed a Special Committee on Title Insurance that lobbied for the retention of the Reg. 69/07 (McKenna 1998b). As one lawyer and leader recalls, “But what came out of the think tank was a clear fear by many lawyers that we’re about to lose our business and if it weren’t for Reg [69/07] we’re toast, right. And thank god for the Law Society and whoever in the OBA lobby were successful in their lobbying, keeping us involved in the game.” While the regulation remained in place, challenges to the legal jurisdiction of lawyers remains a perennial issue. Subsequent requests were submitted by the Title Insurance Industry Association of Canada (TIIAC) to the Ministry of Finance in 2011 to review Reg. 69/07 “with a view to harmonizing with other
Canadian provinces which do not have such a regulation\(^\text{12}\).” This was viewed as yet another effort to remove lawyers from conveyancing and, following a torrent of backlash, was quickly withdrawn. LawPRO, the bar’s error and omissions insurer, endorsed the continued existence of the regulation “as an important consumer protection/access to justice issue. Ensuring consumers have access to expert legal advice and guidance when they purchase a home (likely their most expensive single investment) is fundamental to effective consumer protection.” (Aaron 2011). In addition, the CDLPA and the Toronto Lawyers Association prepared a joint submission to the Minister of Finance opposing any similar future proposal by title companies (CDLPA 2011).

**Legitimacy and Value**

The legitimization of title insurance in Ontario both preserved the role of lawyers through the advocacy of bar-related insurers, but also came at a cost as lawyers continued to struggle with new adaptations and greater demands for process efficiencies in the conveyancing market. Price-cutting strategies and the erosion of public jurisdiction have commoditized the role of lawyers in the transaction, compelling them in some cases to focus on volume over service. In this new climate of process efficiencies, the real estate bar continues to adapt by demonstrating the value that lawyers add to the transaction. Public jurisdiction is difficult to maintain, however, when few homebuyers will turn to their lawyer for advice on title- or mortgage-related issues (Gordon 2006). Gordon reiterates that the public view of lawyers is limited, and asserts that consumers who do not understand the role lawyers play in the conveyancing transaction are likely to be diverted to competing systems. When asked about these on going challenges, a lawyer and leader in the real estate bar summarizes the general concern expressed by the real estate bar: “What are

some of the major challenges faced by the real estate bar in Ontario today? Well, I don’t know where to start! I don’t know what to tell you….Trying to have real estate not perceived as a commodity so legal services are a valuable protection of the public.”

In response to the myriad changes to conveyancing, lawyers defended their role by asserting that they served three central and inviolable roles in the conveyancing process: as notary, fiduciary, and custodian. In addition to conveyancing technician, a role they were in danger of losing, lawyers characterized themselves as notaries responsible for unlocking information intrinsic to deeds and titles. There was little debate among the bar about the speed, ease, and efficiency that could be obtained by acquiring title insurance policy compared to a solicitor’s opinion. However, lawyers and many title searchers argued that the best interest of clients was served only when they had full disclosure about the property they were purchasing. Real estate represents a significant investment, both in terms of personal finances and in terms of the cultural significance and identity inherent in home ownership (Gurney 1999). For many respondents, it makes little sense to commit to a purchase of this magnitude without obtaining full disclosure about the property. One lawyer from a rural firm explains:

People have choices to make. I think it’s poor economy to spend a substantial amount of money and then not find out fully about the property. I mean, if people want to take that kind of risk they can, that option is there. I would certainly wonder about it. So the best way is to investigate titles in the old fashion way when certificates of title were commonly given, do a thorough investigation, find out about the property you’re buying, and then title insure in addition, so that there’s an additional layer of protection. Title insurance companies dispute that theory. They say you’re spending money without any need to and rely on our policy, but that’s a little bit like saying have faith in us.

Many lawyers felt that by insuring over problems and avoiding costly and time-consuming surveys that consumers would be unable to make intelligent decisions about their purchase.
While lawyers believed that the best of their interests of their clients were served by providing detailed knowledge of the property, title insurance in contrast was characterized as undermining this process, allowing problems to remain hidden, to accrue, and to potentially resurface in the future. For many respondents, it was crucial to provide their clients with full disclosure about the property rather than to presuppose that a third party insurer will assume the risks of future problems.

Aside from notary, members of the real estate bar argued that they also acted in a fiduciary role as general counsellor and advisor to their client (Troister and Waters 1996). As an advisor and fiduciary the lawyer, unlike an insurance company, must consider and promote the best interests of their client and the public. In addition, as independent counsel lawyers were free to serve their clients interests selflessly. A lawyer now working with a title company comments on their obligation to clients in relation to Reg. 69/07,

The whole thrust of the Law Society’s public protection view was, by having the one simple regulation that says you have to have a certificate of title by a lawyer, not an employee of the title insurer, you bring in that whole fiduciary world or you encourage the continuation of that fiduciary world where the lawyer has limitless obligations to the client.

As a general counsellor, lawyers appealed to their theoretical knowledge, arguing that their ability to interpret legislation, understand new legislation, and to predict the future outcome and tenor of legal decisions is irreplaceable. These facets of the lawyer’s role were indissoluble: conveyancing work is inadequate without general professional advice and abstract legal knowledge. As one lawyer observes, commenting on the current state of conveyancing,

And we have a system that’s moving towards people being hung out to dry, not having legal representation and it’s terrible because the agents aren’t your friends in the
transaction. The banks are just trying to do deals. The only people that really are legally required to look after your interest first, to look after you, is the lawyer. They’ve got nothing to gain. So if you think that buying a house doesn’t require any legal protection, I mean, it’s really complicated if it’s to be done properly. You’re entering into a contract where the law has all kinds of complex counterintuitive difficult remedies if you don’t do something properly. It’s the most important investment that most people will make in their life.

Discussing the preservation of system integrity, another lawyer reiterates the fiduciary role of the legal profession in real estate transactions:

I’ve often preached that because of us, because we are in the position we’re in, that’s why we’re valuable and we add value to the transaction. Without us, who really needs lawyers, other than they’re required by the legislation. But outside of the legislation, the fact that we are officers of the court, we are for the huge part honest individuals who do not participate in fraud, we can be the gatekeepers in insuring the integrity of the transaction.

This prevailing position thus aligned economic self-interest with the fiduciary role espoused by professionals. As one lawyer and leader put it, “So it was self interest but the nice thing was that self interest coincided nicely with what we felt was good for the public.”

In addition, lawyers viewed themselves as custodians of the land titles system. As a title searcher describes, speaking of the conveyancing process, “You are trying to purify the piece of property you are working on, to make sure that all the loose ends have been tied up.” The efficiency and accuracy of Torrens and registry titles rested upon the ethical duty of lawyers to ensure good title, and legal requirements demanding near perfection in their work. Part of their ongoing professional duty is to ensure the integrity of the system through meticulous professional diligence when identifying and rectifying title errors, with the aim of securing their client’s right to good title and ensuring the title’s future marketability. One lawyer comments on the future
problems that may accrue by insuring over some procedures;

In the future they may find out that it is costing them a lot more money than it should with the problems that may develop, and if they would have required a survey plus the policy then the risk is that much less, and there’s a lot less being claimed. I think if there is a problem because of a lack of an up to date survey that that’s going to be the most expensive problem.

Many saw title insurance as redundant since so few claims are made against the land titles system, and since assurances in the form of state funds and professional liability already existed. Title insurance, they argue, insures over unknown defects to remove the obstacle from deal closing or to facilitate a settlement by shifting financial risk relating to the title problem from the purchaser and/or mortgagee to the title insurer (Waters 2002). This allows problems to accrue and to compromise title integrity over time (Manitoba Law Reform Commission 2006). Title insurance was viewed an anathema to lawyers’ professional duty to ensure good root of title, which they argued simultaneously produces a secure and efficient title system and renders insurance on those titles obsolete. As one lawyer exclaimed, “The risk in Ontario is so low that title insurers in Ontario are laughing their heads off. Is there a title in Ontario that can’t be fixed? The insurers are feeding off the good job lawyers have done for years” (cited in Lavelle 2002: 49). Lawyers argued that allowing title insurance to operate would undermine the integrity of the land titles system, which has remained secure and accurate only through their care as professionals.

By promoting these trustee roles focusing on notary, fiduciary, and custodian, lawyers have sought to retain control over the conveyancing market by demonstrating the value they add to transactions. Responding to the threat of marginalization, lawyers continue to adapt to the new marketplace by retrenching to purchase and sale transactions and by demonstrating the value
they add in their role as professionals to the conveyancing process (Gordon 2006; Macaulay 2008). Professions demonstrate significant adaptability to adversity (Timmermans 2008) and the professional literature abounds with the bar’s effort to entrench the value of professional contributions to the conveyancing process. Macaulay (2008: 36) notes, “The idea is to demonstrate to financial institutions and clients that lawyers add real value to the process and should remain a fixture within it.” Adaptation is crucial, and lawyers are urged to adjust to market demands while assuring their role as advisor and counsel. One lawyer and leader in the profession argues,

We need to keep educating – both lawyer and consumer – about the value the lawyer adds to a real estate transaction. We say we quarterback – when in reality we're only involved at the tail end. We need to get out in front of the transaction. Can we expand where we're involved? We have to. We are professionals and we cannot forget that: We have to maintain a certain level of professionalism. (Leclair cited in Aaron et. al., 2005: 27)

Moreover, lawyers have argued that they are uniquely positioned to handle with care and expertise complex conveyancing work that is prone to error when carried out by less experienced groups. One lawyer, commenting on the problems faced by banks when they took control over work traditionally performed by lawyers;

And we saw with the banks that there was an effort, they were going to look after mortgages, they didn’t need us. And then they started running into so many problems that we started getting the mortgages again. But it was all this carelessness - what do you need to check this stuff out for anyways? Why do you need to know what you’re talking about? There’s a description on the land titles certificate, and you use that description, and you got people, what do you need a lawyer for? Then all of a sudden they’re hiking it back and we’re fixing up all their problems they overlooked.

Intraprofessional efforts, particularly the development of committees and associations
relating to real estate and title insurance, have further promoted the interests of the real estate bar in Ontario. The Federation of Law Societies of Canada created a National Title Insurance Committee, which joined with the Canadian Bar Association in 1999 to form a joint advisory National Real Estate Committee. The Committee has a mandate which extends beyond issues of title insurance to a number of emerging trends in real estate, including electronic registration, alternative service delivery models, standardized and electronic document preparation, changing financial services by lending institutions, and the potential for a national title certificate (Coughlan 2000; Guly 2008). The Committee is committed to reinforcing trustee professionalism – in protecting the public’s interest, safeguarding the interests of the real estate bar, and preserving the integrity of and reliability of the public land registration systems. Furthermore, the Ontario Bar Association has joined with the Ontario Real Estate Lawyers Association and the County and District Law President’s Association (CDLPA) to raise awareness among lawyers of the issues affecting the real estate bar, and to advocate on their behalf with lenders and title insurers. They released a series of advertisements to promote the role of real estate lawyers in transactions and invited law associations to publish the advertisement as well (CDLPA 2011), and they were also successful in lobbying to prevent further jurisdictional erosion from title insurers and in continuing to pressure lenders using third party outsourcing (Guly 2008).

In addition, the Ontario Bar Association has joined with the Ontario Real Estate Lawyers Association to form the Working Group on Lawyers and Real Estate. Their mandate is to preserve the role of the legal profession within the conveyancing process by drafting new real estate guidelines to demonstrate the value of involving lawyers in real estate transactions. The Ontario real estate bar has also looked to strategies employed by their counterparts in other provinces. Elsewhere, lawyers are developing new networks to procure steady business, employing new title searching and document processing technology, and are forging new
relationships with financial institutions and title companies in order to maintain their viability in
the conveyancing market. While adopting principles of efficiency, cost effectiveness, and
innovation, lawyers continue to demonstrate the value of their role through the indivisibility of
their professional expertise from the conveyancing tasks they carry out. Through joint ventures
with professional associations they have also made efforts to demonstrate the interconnectedness
of professional segments. As one lawyer comments, “Ultimately, the OBA, CDLPA and Law
Society have to come to the conclusion that without the real estate bar, the whole bar is in
trouble”. (Udell cited in Aaron et. al. 2005: 26).

While the real estate bar faces historical and ongoing challenges, it has also demonstrated its
durability. Title insurance companies were able to make inroads in the province because of a
series of exogenous and endogenous shifts in the conveyancing landscape: technological and
legislative changes, the insurance liability crisis, stagnating wages and volume transactions,
competitive markets, and the innovations and partnerships offered by title insurers and other
third party organizations. Dire predictions about the future of the real estate bar abound. As
McKenna (1997: 3) observes, “…it seems that, as real estate lawyers in the age of title
insurance, we are just like insurance brokers ourselves.” A similar prediction emerges elsewhere,
“The American title insurers are flooding the market with low premiums; eventually they won't
need lawyers. They are insulting us by asking us to work as brokers.” (Tchegus cite in Aaron et.
al. 2005: 28). However, as Timmermans (2008) reiterates, professions are adaptable and durable,
and the real estate bar has competed for legitimacy and for jurisdictional control over their work
by emphasizing the importance of their trustee role and by synthesizing these roles with
emerging market conditions. The real estate bar seeks to improve and retake public jurisdiction,
while the profession demonstrates a unified opposition to deleterious competitive strategies by
lobbying collectively against countervailing powers, and by taking steps to preserve the
jurisdiction of a professional segment.

**Conclusion**

The objective of this study was to explore the institutional context facilitating competition between professional and nonprofessional groups, and to understand how professional segments responding to competition attempt to retain legitimacy among field constituents. This research concentrates on the process of deinstitutionalization and reinstitutionalization (Greenwood et. al. 2002) within the field of real estate conveyancing. Greenwood et. al.’s (2002) heuristic underscores the role of precipitating jolts in destabilizing institutions, the ascendance of new actors, the subsequent disruption of logics and meaning systems, the diffusion of innovations, and contests over their legitimacy. This model maps on to the process for institutional change occurring in the field of real estate conveyancing and provides a useful lens for understanding and explicating important changes catalyzing professional competition. The conveyancing work carried out by the real estate bar has undergone significant transformation in the preceding decades. The conversion from registry to Land Titles not only lowered the risk to lenders through the provision of state-backed assurances of title, but it also provided greater system confidence by guaranteeing security of title, reducing in many cases the overall time needed to complete a title search. Further, the conversion to land titles parcels stripped the system of inefficiencies and facilitated the conversion of titles to an electronic system through the Province of Ontario Land Registration Information System. The combined effects of legislative and technological change altered the conveyancing landscape by rationalizing the process, and the stagnating fees of lawyers practicing real estate promoted the commoditization of their role in the transaction by shifting much of the routine work on to paraprofessional staff (Hartmann 1993; Katsh 1996).

Such institutional shifts precipitated the emergence of both new competitors and new
institutional logics that challenged the real estate bar for control over workplace tasks and reconfigured the landscape of legitimacy within the field. While scholars have observed that the legal profession pushes boundaries and expands jurisdictions locally and globally (Powell 1985; Abbott 1988 Dezalay and Garth 1996, 2004; Flood 2011; Liu 2013), the legal profession is also beset by concomitant trends in the expansion of distributed risk systems from individuals to aggregates through insurance. Insurance displaces and discredits alternative assurances because of the preference by powerful constituents for the greater resource base offered by insurers compared to individuals or professionals, because organizations develop routines that come to rely on insurance (for example, insurance is essential for expediting real estate transactions), and because insurance is believed to be more accurate at assessing and addressing risks (Heimer 2002). This process extends to the sphere of professional competition in Ontario where aggregated risk management strategies of formal insurance come to replace individualized professional relationships predicated on title assurance (McKenna 1999). While the legal profession continues to expand, segments of the profession can be halted by competing trends like the expansion of insurance when such trends coincide with emerge logics that provide greater credibility and legitimacy to insurance over assurances offered by professionals.

Title insurers entered a highly rationalized market with incomplete conversion to Land Titles and offered further process efficiencies to key players in the conveyancing and refinancing market. Title insurance protected the lenders asset and expedited the transaction to the benefit of lenders, lowered costs to clients, and offered superior protection compared to the solicitor’s opinion. Within the context of market-based institutional logics emphasizing efficiency, profit, and technology, title insurers were able to capitalize on the routine nature of conveyancing through reverse competition partnerships with lenders. As key constituents in the conveyancing field, lenders have significant power to define and endorse legitimate practices. Title insurance offered
insurances and efficiencies that synchronized with emerging institutional logics: the shift in the mortgage market from a relationship business to a commodity business, and the promise of faster and more secure transactions ultimately lead to the endorsement of title insurance.

The analysis demonstrates that characterizations of the bar’s role in conveyancing and the strategies used to retain legitimacy were associated with rhetorics of trustee professionalism. Lawyers sought to demonstrate the interconnection between their role as technician, notary, fiduciary, and custodian. The fiduciary role emphasized the bar’s duty to uphold client and public interest, emphasizing their position as the sole party obligated to uphold the interest of the client, and the main party involved in maintaining the integrity of the transaction. The fiduciary role also encompasses the role of counselor, where professionals unite their ability to interpret and predict complex legislation with their duty to serve clients effectively. In their custodial role, lawyers argued that they have a professional obligation to maintain the integrity of the land titles system through the purification of titles. As custodians of the land titles system, lawyers were uniquely positioned to carry on the tradition of diligence, thoroughness, and care that have helped to maintain an accurate, secure, and relatively more efficient registry and titles system (Miceli and Sirmans 1995).

Many lawyers argued that title insurance and the subsequent innovations adopted in the conveyancing field undermine these trustee ideals by threatening to displace or remove lawyers from the transaction. Such innovations were constructed by many as an anathema to professional duty. Title insurance in particular was characterized as operating without due obligation to clients, without the incentive to uncover and disclose title information, and without the obligation to uphold the purity of the land titles system. Indeed, insurers were able to reduce costs by assuming risks, minimal in the Ontario titles system, ignoring title defects that might
accrue over time. In contrast, fiduciary and custodial roles emphasized service to clients and service in the public interest, and lawyers argued that the link between conveyancing technician and trustee professionalism was indissoluble. While technician and notary roles make clear reference to the technical skills and abstract knowledge associated with expert professionalism, most of the rhetorical arguments surrounding the legitimacy of the real estate bar in the age of title insurance concentrate on trustee notions of ethical and professional duty rooted in fiduciary and custodial roles in order to justify market control. The bar recognized that title companies could act as efficient conveyancing technicians, but they could not reproduce the trustee roles inherent in professional training, duty, and care. Institutions and public notions of service to clients and service in the public interest prevail in many of the accounts proffered in the analysis, and indeed contemporary efforts to mobilize the profession are characterized still by the admixture of expert and technical roles as well as custodial and service roles.

The landscape of competition in which the value of these professional roles were espoused was not even. The bar enjoyed a monopoly over a key step in the issuance of title policy afforded by Regulation 69/07 of the Ontario Insurance Act. Reg. 69/07 requires that a lawyer independent of the insurance company provide the title opinion prior to the issuance of title policy to a consumer. In other words, title companies cannot issue policies without a title opinion from an independent lawyer, thus ensuring a role for Ontario lawyers in the conveyancing process. Efforts by title companies to repeal the regulation have not been successful, and it appears that for the immediate future the bar will retain its jurisdiction over title policies. Competition between the bar and insurance companies took place within the context of this monopoly. While attempts to repeal the legislation were not successful, due in no small part to the sustained advocacy of the legal profession espousing protection in the best interests of both the state and
the public\textsuperscript{13}, competition occurred in other venues such as mortgage refinancing, direct to client services, and document processing. The legal profession was thus ensured a role in title insured transactions but, in the face of additional innovations consistent with market logics and the expansion of insurance, the legal profession had to recast the value of their role in order to retain field level legitimacy.

As Suddaby and Greenwood (2002) observe, rhetorics can be used to resist innovations by demonstrating incongruence among the innovation, broader institutional logics, and institutional change. Such rhetorical strategies are employed as tools to manipulate meaning systems that underlie institutional logics. In doing so, they underscore the tension between expert and trustee professionalism. The dominant institutional logic confronting professions centres on market-based norms and practices emphasizing management, competition, rationalization, efficiency, technology, and productivity. Organizational forms that most closely align with prevailing logics, or groups who are more successful in manipulating logics, are more likely to be legitimated in the field. Segments of the Ontario bar employ what Suddaby and Greenwood (2002) identify as theorizations of change, strategies to ameliorate contradictions in prevailing institutional logics. Many of the prevailing components of market logics confronting the real estate bar were contested, in keeping with the profession’s broader view that profit-driven logics are mutually exclusive of their service role of professionals (Adler and Kwon 2013). As socially constructed abstractions, the underlying meanings of logics can be manipulated through contestation. Indeed, when confronted with emerging institutional logics of the market closely aligned with innovations and strategies like title insurance and the process efficiencies it could

\textsuperscript{13} http://www.lsuc.on.ca/with.aspx?id=2147486423
offer, the real estate bar synthesized key elements of trustee professionalism under the characterization of the “value” lawyers add to the transaction. In this characterization, the real estate bar simultaneously drew together references to progress and tradition as part of their overall rhetorical strategy. They underscore the importance of their trustee role in the form of fiduciary, custodian, and notary, while embracing emerging market logics by emphasizing the value of their role to clients, the system, and to powerful constituents such as lenders.

Bucher and Strauss (1961) implored researchers to focus on professional segments. Segments are “occupational groupings whose members share common work activities, values, identities, and missions.” (Halpern 1992: 996). They often share interests, cultures, formal associations, and institutions distinct from the wider profession. Professional segments compete for the power to define and interpret institutions and for control over markets that are idiosyncratic to their practice area. Professions rarely act monolithically, but are instead an amalgam of segments in motion whose fates are closely intertwined (Bucher and Strauss 1961). As such, jurisdictional battles differ among professional segments: focal concerns differ, the environmental, organizational and technological context of conflict varies, and their influence within decision-making associations and governing bodies is asymmetrical. This study concentrates on the segment of the bar with all or most of their work in real estate conveyancing. Conveyancing typifies often routine work that falls into what Arthurs et. al. (1986) call the household sector – conventional legal services delivered to ordinary citizens. Title insurance companies, like their counterparts in the U.S. nearly a century ago, were successful in demonstrating that conveyancing tasks can be disengaged from the cognitive claims of professionals. In order to remain viable in the new institutional environment, the real estate bar drew from all available accounts of their legitimacy. Relying solely on their technical capacity and expertise as a competitive strategy was disadvantageous. But by drawing from public and cultural notions of
professional service, as well as trustee ideals cultivated for over a century, and which formed the basis of prior institutional logics of conveyancing, the real estate bar presented a case for their moral legitimacy (Suchman 1995) and for the value their involvement in the conveyancing process can bring.

This research suggests that professional segments respond in unique ways to professional conflict based on the distinctive field in which they operate. Specifically, this research suggests that professional segments with weak subjective jurisdiction (Abbott 1988) over technical aspects of work will compensate by drawing attention to the trustee roles that have become culturally and publicly synonymous with their service as professionals. Less powerful segments of a profession, such as those operating within the household sector who carry out routine legal work, are more open to competition (Abbott 1988), and exert less control over the diffusion of new norms and practices within the field (Adler and Kwon 2013). By invoking trustee characterizations, professionals call attention to their legitimacy in the market, particularly by arguing that technical aspects of conveyancing cannot be separated from trustee aspects.

Studies of segments are also studies of how segments relate to the wider profession. While initial resistance to title insurance was strong, particularly through mobilization against closing centres and the repealing of section 69/07 of the Ontario Insurance Act, title insurance was eventually, perhaps inevitably, legitimated in the province. This was due in part to lender’s preferences for title insurance and in part to intraprofessional activities. Many members of the real estate bar resisted the widespread adoption of title insurance, and associations representing professional segments such as the Ontario Real Estate Lawyers Association lobbied to vindicate the professional and economic interests of the real estate bar. However, after some consideration the regulatory body of the legal profession explicitly endorsed the widespread adoption of title insurance.
insurance, at a time when it seemed that they stood in opposition to it, by entering into the title insurance market with its own bar-related title insurance company. In addition, professional rules of conduct were established requiring lawyers to familiarize themselves with title insurance policies and to counsel their clients about title insurance options. These findings confirm previous research demonstrating that those in central decision-making positions within the profession will pursue the long-range interests of the profession over concerns for workplace jurisdiction, that these long-range interests can shape decisively the trajectory of professional conflict, and that less powerful segments have less control over the diffusion, adoption, and legitimation of innovations in the field (Adler and Kwon 2013; Shamir 1993). The analysis further demonstrates the importance of exogenous factors in shaping intraprofessional actions. In this case, the liability insurance crisis and the momentum of innovations in the field drove some of the decision-making of the regulatory body. Another key finding is the importance of intraprofessional cooperation in preserving the role of the real estate bar in the contemporary conveyancing landscape. The bar-related title insurer was established, in part, to promote the role of lawyers. Law Societies across Canada joined with the federal professional association to form the National Real Estate Committee, which is committed to public interest, protecting lawyers, and preserving the integrity of and reliability of the public land registration systems. In addition, provincial professional associations advocated on behalf of the real estate bar and formed working groups to preserve the role of the profession and to demonstrate the value professionals add to transactions.

This study renews Bucher and Strauss’ (1961) call for the study of professional segments. Professions are often examined monolithically when they are instead an amalgam of interconnected segments. The study underscores the unique institutional context in which segments operate, and it underscores the ways in which this context shapes the strategies used by
segments vying for legitimacy and control over workplace, public, and legal jurisdiction. A study of segments is also a study of intraprofessional relationships. This research confirms the ways in which status divisions in the profession can influence the outcomes of professional conflict, both in the direction taken by professional leadership and in the ways in which intraprofessional activities can influence the legitimacy of new innovations. Thus, concentrating on segments of professions highlights the importance their unique institutional context and the complex interrelationships shared with, and contingent forces acting upon, field constituents and the wider profession.
References


Guly, Christopher. 2008. “A paperless world cuts both ways for real property practitioners.” 


Recently the public in Ontario and other Canadian provinces have been exposed to real estate fraud, one of the fastest growing forms of fraud in Canada (McWaters and Ford 2007). One particular form of real estate fraud, title fraud, attracted significant media, professional, and public attention for the insidiousness of the crime and the iniquities of available redress, and further instigated significant and long-term industry and state responses. Title fraud combines mortgage fraud with identity theft. It occurs when fraudsters, using identity theft, assume the identity of the legitimate homeowner and take advantage of automated financial and real estate record systems to fraudulently sell or refinance a property (Criminal Intelligence Services Canada 2007). Ontario alone appears to have experienced an increase in title fraud over the last decade (CIMBL 2001; LawPRO 2004a), costing Canadians an estimated $1.5 billion each year (First Canadian Title 2005). Significant industry and state efforts were mounted to combat the rise of mortgage and title fraud, yet despite these efforts it has become more prevalent and sophisticated (Potts and Selznick 2004), and the costs to insurers and, ultimately, the public has continued to escalate (Strom 2004; Wishart 2008).

Despite the considerable attention this issue has received from media, government, and professionals, scholars have been ambivalent towards the study of real estate fraud and silent on the study of title fraud. Existing explanations therefore remain underdeveloped. Where title fraud is discussed, it is often relegated to the analysis of real estate fraud jurisprudence (cf. Bucknall 2008), or it is conflated with research on identity theft and fraud (cf. Morris 2007) or mortgage fraud (Carswell and Bachtel 2009; Criminal Intelligence Services Canada 2007). The industry literature provides the most comprehensive overview of the title fraud problem. Much of it concentrates on professional prudence in the form of greater regulation, diligence, and audit,
and consumer protection through self-discipline, vigilance, and insurance. However, a subset of this literature grapples with the importance of key organizational and process-level antecedents for explaining fraud.

Elucidated through a study of title fraud in Ontario, this research seeks to explain the emergence of title fraud through an analysis of the situated nature of field-level processes that create opportunities for fraud. The risk of fraud is situated in routine patterns of day-to-day conveyancing activity. Focusing on the field-level process of real estate conveyancing, this paper situates fraud within broader institutional and environmental shifts that give rise to new opportunities for fraud incubated in routine patterns of activity (Vaughan 1996) that encompass several professional and organizational constituents. Vaughan (2002:120-1) observes that social action is situated, which “links individual, organization, and environment to produce events, circumstances, and activities. Individual action, meaning, and choice is situated within some immediate social setting, which in turn is vulnerable to influences from larger institutional, structural, and cultural arrangements that constitute its social and historical environment.” Using this framework, this study seeks to understand the organizational and process-level antecedents for fraud implied in the professional literature and in interviews with constituents in the real estate industry by examining how opportunities for crime emerge from organizational practices conforming to broader institutional norms, regulations, and cultures.

Normative institutional change and emerging market and insurance logics emphasizing process efficiency, alacrity, profit, and streamlining have established a lending and conveyancing process that is seemingly more secure, more underwritten, more expeditious, and more efficient. However, such changes have ironically created new fraud risks. Legislative shifts in land titles, technological developments, professional competition, and emerging risk mitigation strategies
have altogether generated a state of anonymity and depersonalization that encourages fraud. Removal of the human element from the conveyancing process has reduced guardianship, diminished the effectiveness of interorganizational diligence, and reinforced the lure of easy mortgage money. When combined with volatile real estate markets, consumer demands, the democratization of homeownership, and the concomitant rise in identity theft, these myriad changes have incubated the risk of fraud in routine patterns of activity that are exposed by exogenous threats to the conveyancing process. Such changes have culminated in the escalation in fraud witnessed over the last decade.

This paper contributes to the organizational study of crime by applying elements of Vaughan’s (2002) framework to explain the situated nature of fraud risks. By analyzing how institutional and environmental shifts influence field-level processes which, in turn, influence the behaviour of individuals within organizations, this paper explores how field-level changes in the real estate industry have given rise to new opportunities for fraud incubated in routine patterns of day-to-day field-level activity. Focusing on field-level processes rather than single organizations allows for the analysis of the multi-organizational process of conveyancing and the ways in which environmental and organizational factors can shape these processes and create new interorganizational fraud risks. In addition, rather than examine the emergence of crime as embedded within an organization, this study examines exogenous threats that compromise the integrity of the conveyancing process across organizations and actors by exploiting risks incubating in field-level processes. Title fraud is initiated exogenously when individuals outside of the conveyancing process use identity theft to anonymously thwart detection and manipulate system risks.

Real Estate Fraud in Ontario
Real estate fraud schemes vary significantly in their execution and sophistication. Common elements in these fraud schemes include identity crimes and/or falsifying the property’s value (Criminal Intelligence Service Canada 2007). All forms of real estate fraud involve mortgage fraud – the attempt to procure financing through false pretenses. The Criminal Intelligence Service Canada (2007) classifies mortgage fraud into three general categories: fraud for profit (including title fraud), fraud for shelter, and fraud to further other criminal activity. These categories are not exclusive, and more than one type of fraud scheme may be involved for any criminal enterprise.

This study concentrates on title fraud. Title fraud is a lucrative undertaking, netting an average of $300,000 in what amounts to less than a week’s illicit work (McWaters and Ford 2007). Title fraud occurs when fraudsters, using identity theft and identity fraud, assume the identity of the legitimate homeowner and take advantage of automated financial and real estate record systems to fraudulently sell or refinance the property (Criminal Intelligence Services Canada 2007). Curt Novy, mortgage analyst for the U.S. Federal Bureau of Investigation observes of title fraud, “It’s the most egregious form of identity theft...It amounts to the most money lost, and is the most devastating to individuals.” (Kolen 2013). In many cases this crime creates three innocent victims: the original homeowner, the lender or broker advancing the funds, and an innocent purchaser. The original owner may suffer loss or impairment of their title to the property, and the mortgagee has advanced significant funds that they may not recover (Bucknall 2008). The innocent purchaser, who obtained the property from a fraudster impersonating the true owner, may contend with the original homeowner for title to the property as each believe that they have clear title – one innocently defrauded of title, and the other an innocent (and legitimate) purchaser of title. Sorting the legal quagmire of ownership and responsibility between the three
primary victims is both time consuming and expensive, often taking several years and tens of thousands of dollars to resolve (see Paper 3 for a detailed analysis of this problem).

Mortgage and title fraud have received significant attention from the media (see, for example, Aaron 2008, Freed 2008, Move Smartly 2008, Daw 2007, Levy 2006). The archetypal case for title fraud involves a Toronto widow, Susan Lawrence, who was defrauded of her title and held responsible for a fraudulently acquired $300,000 mortgage. Fraudsters using identity theft and forgery impersonated Lawrence and secured the services of a lawyer to arrange the sale of the property to an accomplice. The sale was financed and the fraudsters absconded with the funds. The lender foreclosed on the property when the accomplice defaulted on the loan. Case law under the Land Titles Act was unclear about whether the newly registered interests in property, including the title transfer and the lender’s mortgage, were valid and enforceable even if it was registered fraudulently. Lawrence was ultimately held responsible for the fraudulently acquired mortgage and lenders had the option to foreclose in order to recoup their losses (Bucknall 2008; McWaters and Ford 2007). While Lawrence had recourse to the Land Title Assurance Fund, a government fund of last resort designed to compensate fraud victims and restore title, it was notoriously difficult to access. Victims must exhaust all other avenues of compensation, including apprehending the fraudsters, applying to their own insurance, if any, or ascertaining the lawyer’s liability in the transaction, and must then apply to the Fund at their own expense and negotiate a cumbersome, lengthy process before receiving a pronouncement.

Determining the full scope of title fraud is a perennial industry challenge. Attention to title fraud was intermittent prior to 2000, and appears to have peaked between 2005 and 2008 (Aaron 2006; McKenna 1999). The Land Titles Assurance Fund has averaged no more than ten claims each year over the preceding 15 years, not all of which are fraud claims (Murray 2007).
(2003) observes that fraud cases in land conveyancing are few, relative to the more than 2 million transactions occurring each year (Murray 2007b), but cause considerable loss and disruption – a low probability, high impact event (Hutter and Power 2005). Title insurance companies possess the most complete claims data, but have not surrendered their claims information to public review in over a century (Eaton and Eaton 2007).

Representatives from TitlePLUS, a bar-related title insurance company, have observed, “Real estate fraud is a significant problem for real estate lawyers and clerks in Ontario that will not go away. In the year 2008, LAWPRO dealt with 136 fraud claims, many of which involved real estate transactions.” (Weinstein and Salmon 2011: 3-11). Similarly, Leclair (2011: 3-11) observes that there has been an “epidemic of frauds targeting lawyers”. LawPRO data indicate that real estate is one of the highest in both the number of claims and their costs (Waters 2011 – see Figure 3). Claims appear to be escalating because of the increasing value of property and because of the complexity of the cases. Fraud itself escalated throughout the 2000’s, peaking around 2008. By 2004, the number of claims escalated by 60%, and the projected cost of those claims increased by 80% to more than $5 million (LawPRO 2004c). Fraud had, overall, constituted about 6% of claims, and TitlePLUS has had to retain high reserves to offset the costs associated with fraud claims (Melnitzer 2011). Despite lower claims percentages, fraud claims are among the most complex and costly (LawPRO 2005). The growing prevalence and sophistication of fraud has lead to unabated increase and steadiness in fraud claims, though with noticeable decline in recent years due to effective screening and lawyer education (Potts and Selznick 2004; Strom 2004; TitlePLUS Program 2012; Wishart 2008).
Figure 3: Distribution of Claims by Area Practice

![Distribution of Claims by Area](image)

Adapted from LawPRO (2014).

Figure 4 demonstrates the trend in real estate claims over time. Figure 5 reveals the claims by cause of loss, with fraud representing about 6% of claims reported to LawPRO by 2010.
Figure 4: Real Estate Claims by Costs

Adapted from Waters (2011).

Figure 5: Real Estate Claims by Type of Error

Adapted from Waters (2011).
Title fraud has been identified as a significant industry problem by several organizations, many of whom have taken significant measures to address it. The Canadian Institute of Mortgage Brokers and Lenders estimated that, by 2001, industry exposure to fraud quadrupled to nearly $300 million from $73 million in 1999 (CIMBL 2001), and one of the leading national title insurance companies estimates that fraud is costing Canadians up to $1.5 billion each year (First Canadian Title 2005). Industry response to this dramatic escalation of fraud has been rapid and extensive. The Lawyers Professional Indemnity Company released a report in 2001 documenting industry-wide increases in fraud (Waters 2002). By mid-decade, First Canadian Title revealed that 28% of all fraud claims since they went into business in 1991 were reported in the month of January 2004 alone (Strom 2004), and in one year saw a 64% rise in fraud claim payouts. First Canadian Title further reports that while fraud claims accounted for only 6% of total dollars in claims paid in 2000, by 2005 that number had reached 33% (First Canadian Title, n.d.). In addition, during the first five months of 2008 more than 50 claims with a fraud component were reported to one insurance company, compared to 35 the year before, with a total loss of $4 million (Wishart 2008). Since 2003, the Law Society of Upper Canada has invested nearly six million dollars to combat fraud, and in both 2003 and 2004 allocated 15% of its $10 million Professional Regulation budget to investigating and prosecuting mortgage fraud (Law Society of Upper Canada 2005). In 2005, the Law Society of Upper Canada allocated an additional $1 million to hire investigators and prosecutors to fight mortgage fraud, and requests for similar funding were anticipated for 2006, 2007, and 2008 (Law Society of Upper Canada 2005). Further, committees staffed by representatives from the real estate industry, including lawyers, government, title insurers, lending organizations, and electronic service providers, were formed to address and prevent fraud by pooling their data and devising industry-wide strategies to tighten perceived organizational weaknesses in real estate transactions exploited by fraudsters
(LawPRO 2004b). These were in addition to extensive legislative changes in Ontario in direct response to the threat of fraud (Murray 2007; see Paper 3).

The escalation of fraud is linked intrinsically with identity theft. Marie Dyck, a fraud manager with the Canadian Mortgage and Housing Corporation, argues that identity theft is one of the fastest growing crimes and one of the most significant challenges to preventing mortgage fraud (Dyck 2004). This position is echoed by Kate Murray, Direct or Titles for the Ministry of Government and Consumer Services: “As real estate fraud is very much linked to identity theft, consumers can take steps to protect themselves and to safeguard their identities.” (Murray 2006a: 10-3). Identity theft occurs when someone “knowingly obtains or possesses another person’s identity information in circumstances giving rise to a reasonable inference that the information is intended to be used to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence.” Identity fraud occurs when some impersonates another to gain advantage, obtain property or interest, cause disadvantage to another, or avoid arrest, prosecution, or otherwise obstruct justice.\footnote{Bill S-4 402.2(1) and 403(1) \url{http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4172408}} Identity crime has been billed as the “quintessential crime of the information age”, a consequence of a free-flowing information-based economic system that encourages instant credit and mass consumerism (Marron 2008). Since 1999, media coverage and public awareness of identity theft rose sharply, by a factor of 10, and nearly tripled that between 2001 and 2003 (Morris 2007). Official data from the United States indicate that identity theft appears to be growing at a rate much faster than other theft-related offences (Allison, Schuck, and Lersh 2005), and the costs associated with identity theft continue to escalate (Javelin 2005). In Canada, since 2000 self-reported identity theft has affected an average
of nearly 9,500 Canadians each year, with an average annual cost of nearly $11,000,000. The self-report figure is eclipsed by official data from the Canadian Council of Better Business Bureaus, who place the overall estimated cost of identity theft in Canada at closer to $2 billion annually (CBC 2009). Figure 6 depicts the escalation of victims by year from The RCMP Anti-Fraud Call Centre. This self-report data reflects previous research underscoring the increase in awareness about identity theft and fraud.

Identity theft is a core feature of title fraud. It signifies the criminal capital (knowledge and technical skills – see Hagan and McCarthy 1998) necessary to appropriate another’s identity and fraudulently impersonate them. While it is important to understand how fraudsters come to acquire falsified identity documents for use in mortgage and title fraud, such inquires must await future research. This study instead takes identity theft, motivation, and criminal capital as given exogenous threats while concentrating on systemic organizational features facilitating fraud,

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15 Personal communication, Criminal Intelligence Analytical Unit, Canadian Anti-Fraud Call Centre, Royal Canadian Mounted Police, 23 July 2009.
such as limited guardianship and the absence of diligence throughout the conveyancing process. It differs from other studies of identity theft that focus upon organizational practices that absorb the losses from identity crimes, or organizational proscriptions for reducing the opportunity for such crimes to occur (Smith 2008; White and Fisher 2008; Gerard, Hillison and Pacini 2004; Lacey and Cuganesan 2004) by instead examining the institutional and field-level antecedents that incubate the risk for fraud in day-to-day activities. Such risks are triggered when there is a meeting in time and space of exogenous threats, suitable targets, and the absence of guardianship.

**The Situated Nature of Fraud Risks**

The theoretical argument herein situates fraud within its environmental, field-level, and organizational setting, underscoring the importance of institutional environments, organizational risk, and opportunity for explaining title fraud. First, opportunities for crime are predicated on the lure or suitability of a target and the absence of capable guardianship or oversight. Second, shifts in the institutional environment of real estate conveyancing give rise to new normative institutions and new institutional logics that coincide with developments in technology and professional competition within the field. These shifts in the conveyancing field have incubated the risk of fraud in routine patterns of day-to-day conveyancing activity. Third, the risk for fraud can be exploited by exogenous threats. Rather than examine deviance or the exploitation of opportunities from within organizations, this study focuses on threats that are exogenous to the conveyancing process, originating from outside of the organizational field and using identity theft to ensure anonymity and to thwart detection as system risks are exploited.

Organizational theories can be used to explicate the causal logic of crime. These tools provide a theoretically developed and empirically grounded framework for understanding the contributions
of different levels of analysis for explaining crime, and it can sensitize researchers to the casual logics explaining crime in social settings (Vaughan 2002). Vaughan (2002: 124) explains, “It is to be treated as a scaffolding, from which a more complicated, elaborated, topic-specific analysis can be erected from the data at hand. The causal logic is revealed in the interconnection between the parts, which combine to affect individual meaning, choice, and action.” These frameworks have been applied, for example, to Vaughan’s (2005) analysis of the Challenger space shuttle disaster where the causal logic explaining the organizational deviance responsible for the disaster explicates the link between political and economic environments, organizational structures, tasks, processes, and the behaviours of individuals within organizations.

Vaughan argues that social action and choice is situated in an immediate setting that is vulnerable to influences from institutions, structures, and cultures (Vaughan 2002). Situated action links individual action to their social contexts, revealing the ways in which individuals, organizations, and environments produce events, circumstances and activities. This approach implores researchers to examine socially organized activities and their larger environments (Vaughan 2005). It systematically draws attention to structures and processes in the organizational setting that are implicated in individual action, the role of the environment as its effects are reproduced within the organizational setting, and the relationship between the environment, the organizational setting, and the individuals within these settings (Vaughan 2002).

This study extrapolates from this framework to advance the study of fraud. It moves away from the analysis of an organization and its environment and toward an analysis of a field-level process involving multiple organizations which, through cumulative institutional, environmental, and organizational changes, have developed fraud risks that are exploited as criminal
opportunities by threats exogenous to the system. Significant shifts in the organizational field have incubated the risk of fraud in routine patterns of conveyancing activity. These risks are otherwise dormant, but create opportunities for fraud through reduced guardianship. This approach supports boundary work: “crossing intellectual boundaries created by intra-disciplinary specialization within sociology that separate sets of literatures, theoretical notions, and empirical work that, if joined, have the potential to expand the possibilities for inquiry and explanation.” (Vaughan 2002: 120). As Vaughan observes, linking theoretical traditions, such as organizational institutionalisms and routine activities, to expound the logic linking environment, organizations, and individual action, can enhance understandings of crime and deviance. This multi-level framework can help to elucidate the dark side of organizations, their unanticipated and suboptimal outcomes (Vaughan 1999). As Vaughan has demonstrated, organizational deviance is a routine by-product of system characteristics involving environments, organizations, and individuals.

Shover and Hochstetler (2006) argue that broader social changes have altered the form and supply of lure. The central aim of this study is to map the social changes that have created new opportunities for title fraud by altering the lure of suitable targets, particularly through the erosion of guardianship. In order to understand the precise changes that have altered the suitability of targets and the absence of guardianship it is imperative to explicate the role of larger institutional forces, particularly effects of institutional environments and organizational processes on individual offending (Vaughan 2007). Institutional theory draws attention to the effects of historical shifts in the character of organizational fields and institutions. It examines the structures and mechanisms of order and cooperation governing the behaviour of individuals and organizations, extending beyond the boundary of organizations and into the realm of social processes (Hoffman 1999). *Institution* is commonly applied to customs, conventions, and
patterns that are considered important to a society, and are invested with purpose and meaning that transcend the lives and intentions of individual actors. They “represent the more enduring features of social life, that they tend to be reproduced and that they serve to structure and organize social action, and hence are the most important constituent components of society.” (Mohr and Friedland 2008: 421). Institutional scholars have demonstrated the importance of understanding the role played by the institutional environment in crime, in particular the active construction of criminogenic markets and structures (Tillman 2009), and the mediating role of organizational structures in decoupling environment from behaviour and facilitating deviant responses (Monahan and Quinn 2006).

This study takes as its unit of analysis the organizational field rather than a discrete organization. This study examines how opportunities for crime emerge from complex interrelationships within field-level processes such as conveyancing. Institutional theorists often take the organizational field as their unit of analysis. An organizational field is "a community of organizations that partakes of a common meaning system and whose participants interact more frequently and fatefully with one another than with actors outside the field" (Scott 1995: 56). Field constituents also impose coercive, normative, or cognitive influence within the field (Scott 1995), and a range of constituents, such as government, financial and exchange partners, professional groups, interest groups, and the general public may inhabit fields. Fields can be formed around a specific industry or sector (Scott 1995), but also around specific contentious issues (Hoffman 1999). Organizational fields developed around contentious or disruptive issues, such as fraud, are particularly likely to exhibit conflict and change. This study examines the field developed around fraud, which includes organizations within the field of real estate conveyancing, government, and law enforcement.
Previous research in Paper 1 has explicated how institutional change altered the field of conveyancing. Briefly, the conversion from registry to Land Titles not only lowered the risk to lenders through the provision of state-backed assurances of title, but it also provided greater system confidence by guaranteeing security of title, reducing in many cases the overall time needed to complete a title search. Further, the conversion to land titles parcels stripped the system of inefficiencies and facilitated the conversion to an electronic system through the Province of Ontario Land Registration Information System. The combined effects of legislative and technological change altered the conveyancing landscape by rationalizing the conveyancing process, and the stagnating fees of some professionals promoted the commoditization of their role in the transaction by shifting much of the routine work to paraprofessional staff. Such institutional shifts precipitated the emergence of both new competitors and new market- and insurance-based institutional logics promoting rationalization, efficiency, and productivity. In addition to precipitating change in the environment, new normative and cultural institutions emerge that influence day-to-day normative activities and routines. Shifts in the institutional and economic environment encompassing normative changes and shifting market conditions also affect organizational structures of remuneration, individual assessments of risk, and day-to-day routines and tacit assumptions about work. These shifts in the institutional environment have altered the nature of conveyancing activities among organizations and professional groups, with the unanticipated outcome of precipitating fraud in Ontario.

These overall changes to the institutional environment influence the situated nature of organizational activity and ultimately lead to new risks for fraud that incubate in routine patterns of conveyancing activity. Vaughan’s (1996) analysis of the Space Shuttle Program contributes significantly to incubation theory by suggesting that catastrophes, rather than occurring suddenly, are embedded in routine patterns of activity that prevent critical risk processing. Most
risks or other harmful outcomes are not sudden, but are instead incubated over time, and mistakes in one part of the organization have repercussions in other parts of the organization, or within a broader constellation of organizations within an organizational field (Klein, Dansereau and Hall 1994).

Vaughan (2007) shows that institutional, organizational, and social psychological factors can normalize deviance within organizations. She asserts, “Deviant actions are viewed as normal because they fit with and conform to cultural mandates of the group to which the actor belongs.” (Vaughan 2007:12). As people come to see their behavior as conforming to cultural imperatives they do not view their decisions as deviant. Negligent patterns of activity become accepted as normal practice, what Vaughan describes as the normalization of deviance, and it is within these patterns of activity that risks, such as fraud, become incubated and ultimately intensified under the right conditions (Turner and Pidgeon 1997). The risk for crime therefore unfolds over a long period of time and is produced from characteristics of the system itself (Vaughan 2005).

Features of the system further contribute to risk of fraud through the failure of organizational interdependencies. Extrapolating Kunreuther and Heal’s (2005) argument that organizational interdependencies can lead to the diffusion of risk management responsibility and thus increase the exposure to risk, inter-organizational reliance upon the due diligence exercised by other organizations has been exploited by fraudsters, particularly where due diligence is poorly defined or ignored altogether. The assumption that gatekeeper organizations and individuals have thoroughly investigated each transaction allows for the establishment of a single fraudulent transaction to corrupt the remaining aspects of the real estate deal. Social networks that engender trust can therefore also generate new opportunities for deceit and deviance where there are vulnerabilities in one part of the process (Vaughan 1999). Moreover, while these same
organizations maintain extensive databases about prospective clients, the data remains inaccessible and unpooled across the industry, with little or no recourse to alert other organizations to the potential fraud.

As risk permeates a system it creates opportunities for disaster and misconduct (Vaughan 1996, 1999). Similarly, risks permeating field-level processes generate opportunities for crime embedded in routine activities and patterns of behaviour. Opportunity emerges from the absence of guardianship, be they individual or structural, in the routines of everyday life (Cohen and Felson 1979). Explicating the ways in which routine activities incubate risk and therefore create opportunities for crime can elaborate the causal logic linking environment, organization, and behavior (Vaughan 2002). In this study, risks that are incubated in routine patterns of conveyancing activity create opportunities for crime through reduced guardianship. These risks do not cause disaster directly, but are instead exploited by threats outside of the system, such as fraudsters using identity theft and system knowledge to exploit opportunities and remain anonymous.

Opportunity is regarded as a key causal element of crime (Felson and Boba 2010; Cressy 1950). Opportunities are situations or arrangements that offer criminal reward with little risk of apprehension or penalty. Opportunities for crime are found throughout the routines of everyday life (Cohen and Felson 1979), and they often cluster in the workplace. Gibbs, Cassidy, and Rivers III (2013) demonstrate how opportunity structures for white-collar crime are located in regular business routines: legitimate business processes and structures can both block or create opportunities for crime and exploitation. For high rates of crime to take place, opportunity must be coupled with a supply of individuals and organizations who are aware of these opportunities and who are prepared to exploit them (Shover and Hochstetler 2006).
According to routine activity theory, crime results from structural shifts that increase the convergence of motivated offenders and suitable targets in space and time in the absence of capable guardians (Cohen and Felson 1979), and the presence of these elements in an ecological space will result in higher crime. Motivated offenders are those who possess the inclination, propensity, and ability to engage in crime. Opportunity, however, comprises the other two elements of routine activity. A suitable target is person or thing that draws the offender to crime. Shover and Hochstetler (2006) describe this feature as “lure”, or the attractiveness of a target and its ability to “turn heads”. One of the central attractions of lure is the ease with which the target can be exploited. Those who are tempted and criminally disposed will recognize attractive criminal opportunities and they may act on them in the absence of credible oversight. Suitable targets can also be situations in which deviant acts are possible and rewarding and removed from the deterrent effect of oversight, surveillance, or guardianship (Osgood, Wilson, O’Malley, and Johnson 1994). Moreover, some products radiate lure and are more suitable to theft. These “hot products” are characteristically Concealable, Removable, Available, Valuable, Enjoyable, and Disposable (CRAVED, Clarke 1999). Newman and Clarke (2003) have noted that information fits the model of hot product when applied to e-commerce crime, and Newman (2010) has demonstrated the link between identity information and the CRAVED model. Identity information is often easy to acquire through low-tech means, it is widely available, it is valuable, and it provides a level of anonymity and concealment for offenders engaging in other crimes. The availability of identity information and its use for identity crime is central for understanding how opportunities for title fraud, itself a form of identity crime, emerge.

The final opportunity element of routine activities is the absence of guardianship. Capable guardian refers to “the presence of a human element which acts – whether intentionally or not – to deter the would-be offender from committing a crime against an available target.” (Hollis,
Felson, and Welsh 2013: 76). Guardians can be handlers who keep potential offenders out of trouble, place managers who keep places secure from intruders, or guardians looking after a particular crime target (Hollis et. al. 2013). The effect of guardians is to block access to targets and to increase the risk to offenders (Benson and Simpson 2015). Guardianship has also been conceptualized as credible oversight (Shover and Hochstetler 2006). Credible oversight may be blocked access or surveillance, but it may also be processes designed to detect misbehavior, such as audits or other forms of organizational checks and balances. Guardianship differs from seemingly related concepts such as social control because, unlike social control, guardianship does not involve intent on the part of the guardian and can include people going about their daily lives who might notice an offender or offence. This distinction is particularly important for crimes that take place within organizations and within the confines of legitimate business activities. For example, business structures create “common places” for crime in a defined setting or within interactions that lack guardianship (Benson and Madensen 2007). Such opportunities in “common places” can be thwarted by the human element to guardianship. As Hollis et. al. (2013:74) observe, “Guardianship…involves the presence of others. Those others are visible or perceptible by the potential offender, and it is this perception of individuals who are present that deters the would-be offender through an increase of the risk of the criminal action.”

The absence of guardianship and the risk it poses to system integrity has been incubated over a long period of time characterized by significant changes in the conveyancing environment. Institutional and environmental shifts influence the organization of field-level processes like conveyancing and these influences have, in turn, created new fraud risks that are exploited by opportunistic offenders external to the conveyancing process. Understanding fraud, therefore, required the explication of broader institutional and environmental factors, inter-organizational
relationships, and daily routines that incubate opportunities for crime. Normative conveyancing routines were altered by a state-initiated conversion from registry to land titles, through advances in land registration and appraising technology, and through the use of insurance to protect mortgages and streamline the conveyancing process. Professional competition and prevailing market conditions promoted new conveyancing norms emphasizing efficiency and streamlining over protection and professional scrutiny. These normative shifts, involving a range of organizations including the provincial Ministry responsible for land titles, lenders, title insurance companies, professional groups, and others, have established the preconditions for the emergence of fraud by removing guardianship from the process. While the risk of fraud remained at one time dormant, the culmination of organizational efforts to manage uncertainty, the normalization of deviance, and market shifts have incubated to the risk for fraud and exposed the conveyancing process to exogenous threats. For fraudsters, great reward comes with great risk (Shover 1996), but the risks associated with title fraud are mitigated through the use of identity theft. It is vital, then, to understand the historical, organizational, and industry changes taking place within the real estate system that inadvertently contribute to the contemporary fraud problem. Individually, changes such as the shift to a Land Titles System, electronic registration, and insurance, have indeed provided elevated levels of certainty and security. Taken together, however, and within the context of present market conditions, these changes have unintentionally fostered an environment conducive to fraud.

Findings

Widespread institutional changes to the conveyancing process coupled with market conditions giving rise to new institutional logics have altered the conveyancing landscape significantly while consequently structuring new opportunities for fraud. The findings outline the importance
of several interrelated events that can be organized into two categories: the antecedent institutional and field-level changes that contribute to the organizational origins of fraud risks, and characteristics of the system that incubate risk in routine patterns of activity, including technology and security, competition and volume, and insurance and moral hazard. Shifts in the overall process of conveyancing have established a system that is efficient, alacritous, secure, and underwritten. Ironically, it is the features of this very system, the legitimate business of conveyancing, that expose it fraud. A municipal law enforcement officer working in a fraud department describes this irony:

The industry has changed over the years. It went from maybe a three, four day, five day process, and people’s words and handshakes were their bond back then. Now it’s down to twenty-four hours. It’s little things like that. Honest and good people, it’s going to work for. But unfortunately these systems also encourage people who may not be honest to get into the game. And that’s where we notice the problem.

The follow sections explore the nature of these system changes that have created greater security and certainty yet have ironically structured new opportunities for fraud. Figure 7 outlines the key features of the various levels of analysis that comprise the situated nature of title fraud. Figure 8 conveys these features into a logic model that connects them to the emerging fraud problem.
Figure 7: Key Features by Level of Analysis

**Organizational Context:**
Due diligence and moral hazard within organizations, incentive structures, normative routines of work

**Field- and Industry-level Context:**
Professional and occupational competition, interorganizational relationships and processes, consumer demands

**Institutional and Environmental Context:**
Market- and insurance-based logics, norms and culture, legislative change, economic environment
Situating Fraud

This section outlined the environmental shifts and changes to field-level processes that have altered the conveyancing landscape and, subsequently, established the field-level conditions for fraud. Discussed herein are the following:

1. Institutional and field-level features of conveyancing, such as systemic, normative, and technological changes.
2. Competition and cost controlling, which includes rationalization and automation, pricing efficiencies, and the decline of personal relationships.
3. The moral hazard of insurance.
4. The culmination of these into an impersonal and anonymous field-level system.
1. Institutional and Field-Level Transformations

Organizational explanations for fraud require the elucidation of its situated nature, specifically the institutional, field-level, and organizational antecedents that combine to incubate risks in routine patterns of activity. Institutional and field-level features of the system have been outlined previously in Paper 1, and these shifts combine with other transformations to incubate the risk of fraud. At the field level, conveyancing work has undergone significant transformations in the preceding decades. The conversion from Registry to Land Titles not only lowered the risk to lenders through the provision of state-backed assurances of title, but it also provided greater system confidence by guaranteeing security of title, reducing in most cases the overall time needed to complete a title search. Further, the conversion to land titles parcels stripped the system of inefficiencies and facilitated the conversion of titles to an electronic system through the Province of Ontario Land Registration Information System (POLARIS). The combined effects of legislative and technological change altered the conveyancing landscape by rationalizing the process and making routine the basic work of conveyancing.

The conversion of records into land titles parcels facilitated the province of Ontario’s long-term agenda to modernize land titles, which included electronic conversion. Through the POLARIS program (Province of Ontario Land Registration and Information System), the government of Ontario began automating all land registration records\(^\text{16}\). This was achieved through a partnership with Teranet Inc., an electronic services provider once partly owned by the government, who supplied technological software and support for an electronic land registration system (e-reg). By the early 2000’s most properties in Ontario had been automated and

\(^{16}\text{www.teranet.com.}\)
converted to the e-reg system\textsuperscript{17}, making Ontario the first jurisdiction in the world to provide electronic land registration. Through e-reg, users can discharge mortgages, register deeds, and alter or transfer titles remotely and electronically. Teranet’s primary concern in its development was the security of online transactions because of the sensitive nature of the information to which e-reg has access\textsuperscript{18}. Teranet operates at a Medium Level of assurance, the second highest level used by the government of Canada. This level of security is maintained through the use of Public Key Infrastructure and Certificate Authority technology. Applicants for Teranet must provide identification, including picture identification such as a passport, which must be validated by a lawyer or provincial representative. Once approved, the applicant must contact Teranet directly and confirm their identity before they are able to activate their account. Upon activation, Teranet users can interface with the system using a diskette containing encrypted identification information which, like bankcards, prompts users for a username and password before access is permitted. Each transaction is therefore traceable, and pattern recognition technology similar to that used by credit card companies enables the system to recognize transaction patterns associated with inappropriate behavior (Atherley 2006). As a representative for an electronic service provider comments, “There is greater security and there are checks and balances on who is doing the work. There is the audit trail on who did the work and it’s far superior.” Further security measures are structured into the training. Designed for professional users, the idiosyncrasies of the system, such as the procedural exactness necessary to alter documents, makes it difficult for untrained users who have gained access to the system to make and submit changes.

\textsuperscript{17} Ministry of Consumer and Business Services, www.gov.on.ca/ MGS/en/News/052952.html.

The changes introduced by Teranet together with the shift towards an automated land titles system allow for more rapid searches of titles and deeds, and allow lawyers to complete much of the work involved in closing real estate deals in-house rather than in-person at local Land Registry Offices. Further, it allowed lawyers to complete much of the work online, phasing out the need for title searchers to review paper documents or for ministry representatives at the Registry Offices to oversee document requisition. This made conveyancing quicker and less expensive, while providing a highly secure medium through which to do so. Ironically, while the system boasts greater security through audit trials, limited access, and other security features, fraud continued to prevail. The e-reg system has never been breached, and the widespread fear that informal practices in law offices, such as lawyers lending their diskettes to office staff to complete transactions on their behalf, have not led to escalating cases of fraud. As one leader in the legal profession notes, “And they require passwords and they have a paper trail to find out who’s screwing with the system. So in some ways they would argue it’s safer and yet fraud is just like through the roof in the last ten years.” While the electronic registration system creates new layers of security and audit, fraud continues to be an industry problem.

The conversion and modernization of land titles in the province both catalyzed and facilitated the emergence of new norms and institutional logics pervading conveyancing and lending. Logics are described as a framework for reasoning that provides social actors with vocabularies of motive, and which link individual agency and cognition with socially constructed institutional practices and rule structures (Friedland and Alford 1991; Thornton and Ocasio 1999). Leicht and Fennel (2008) argue that the dominant institutional logic confronting professions centres on market-based norms and practices emphasizing management, competition, rationalization, efficiency, technology, and productivity. Organizational forms that most closely align with market logics are more likely to be legitimated within an organizational field where such logics
are emerging (Ruef 2000). For example, in the field of real estate new forms conforming to new market logics of profit and efficiency are more likely to displace seemingly contradictory norms of client service and professional diligence that characterize legal practice like conveyancing. Moreover, these logics are in keeping with concomitant trends in the expansion of distributed risk systems from individuals to aggregates through insurance. Insurance displaces alternative forms of assurance because of the preference by powerful constituents for the greater resource base offered by insurers compared to individuals or professionals, because organizations develop routines that come to rely on insurance (for example, insurance is essential for expediting real estate transactions), and because insurance is believed to be more accurate at assessing and addressing risks (Heimer 2002).

2. Competition and Pricing Efficiencies

These changes created sufficient conditions for competition within the conveyancing field. Competition is characterized by professional competition between lawyers and title insurance companies, consumer demand, stagnating fees for professional service, and the commoditization of the lender relationship. Title insurance companies entered a highly rationalized market with incomplete conversion to Land Titles and offered further process efficiencies to key players in the conveyancing and refinancing market. Title insurance protects the lenders assets and expedites conveyancing transactions to the benefit of lenders, lowers costs to clients, and offers superior protection compared to the solicitor’s opinion or title assurance (McKenna 1999). Title insurers were able to capitalize on the routine nature of conveyancing through partnerships with lenders. As key constituents in the conveyancing field, lenders have significant power to define and endorse legitimate practices. Title insurance offered indemnities and efficiencies that synchronized with emerging institutional logics and technological and legislative advancements,
and the shift in the mortgage market from a relationship business to a commodity business together with the promise of faster and more secure transactions ultimately lead to the endorsement of title insurance.

Title insurance is a uniquely American product that indemnifies property owners against losses arising from future unknown title problems, including fraud, and promises to cover legal costs incurred in rectifying title errors. Title insurance companies entered the Canadian market in 1991 and were successful in establishing themselves in the Ontario market for two intersecting reasons: it streamlined the conveyancing and lending process, and it mitigated risks in more effective ways for all parties involved in conveyancing and lending. Conversion to Land Titles and the automation of the land registration system combine with the high standard of care exercised by the legal profession over the preceding decades culminated in a system that was relatively secure, sound, and with the capacity for expeditious transactions (Ministry of Consumer and Business Services 2002). Title insurance further streamlined the conveyancing process through the promise of greater process efficiencies, alacrity, cost reduction, and security compared with a traditional solicitor’s opinion. In addition, title insurance companies have worked with lenders to concentrate mortgage refinancing and transfers in-house and to develop technological solution for mortgage processing. Lenders clearly favoured the streamlined and cost-effective approach of title insurance, in addition to the added mortgage protection title policies offered at no cost. While they could not compel the use of title policies, the increasing rapidity of conveyancing and demands for streamlining and efficiency rendered obsolete opining on title. As one lawyer observes, “The banks were the accelerator. If the banks were willing to accept title insurance in lieu of surveys then that really settled the question for most borrowers.”
Title insurance also mitigates risk for all parties in the transaction, including lawyers, clients, and lenders. Unlike the assurance protections offered through the Land Titles Act, which offers compensation for title problems through a state-operated fund, or the protections afforded by a solicitor’s opinion, which offers a form of title assurance restricted to the lawyer’s conveyancing work, title insurance offers a broader array of protections and indemnifications. Policyholders can make claims directly against the insurer, and they are not responsible for legal costs for either their own defence or for subrogated claims that the insurer might have with those at fault for title problems (Siebrasse 2003). Aside from the protections title insurance affords to clients, such as indemnity against defects and the duty to provide legal representation, it also helped to mitigate many of the risks associated with real estate transactions, particularly by reducing the liability burden of the profession’s errors and omissions insurance (see Paper 1). Overall, title insurance products offer superior protection to policyholders compared to protections that existed in Ontario prior to the spread of title insurance.

Title insurance also reduces the risks associated with fraud by offering superior protection against fraud compared to a solicitor’s opinion. Insurance companies act as an intermediary agency, assuming responsibility for fraud losses and redistributing the risks associated with fraud. Under a solicitor’s opinion, victims of fraud have a legitimate claim against lawyer’s errors and omissions insurance should they prove successfully that the lawyer was negligent in discharging his or her duty, or that the lawyer was culpable in the fraud. If the lawyer acted reasonably and with acceptable due diligence, victims of fraud were left with no recourse besides the Land Titles Assurance Fund, guaranteed under the insurance principle of the Land Titles...
Act. Title insurance not only indemnifies the policyholder against fraud but it also provides a duty to represent clients in court. Its superior protection mitigated the risk of fraud for consumers and lenders while transferring that risk to insurers. Because of these advantages, title insurance is now fully integrated in Ontario and nearly every residential real estate transaction today is title insured. Lenders prefer the additional security and the ability to expedite transactions, the product streamlines the conveyancing process and reduces costs for consumers, and title insurance was able to mitigate the risks in real estate transactions and provide a greater level of certainty.

Various features of the market can also be linked to fraud risks. Central are the emerging market logics emphasizing management, competition, rationalization, efficiency, technology, and productivity. Two key constituents in the conveyancing field, lawyers and lenders, were affected by these shifts in institutional logics. Pressures to reduce costs in order to remain competitive have led to significant changes in conveyancing, including the use of technology to further streamline the process, cost reduction strategies, and an emphasis on volume transactions. Rising property values and growing markets for residential real estate, which have been linked to fraud by national insurers, facilitated the shifts. Professional attention to title fraud corresponded to a period of growth in home sales and property values beginning in the mid-1990’s and continuing to the present. The growing demand for homeownership coupled with market conditions has driven up the price of residential real estate. For example, house prices in Ontario

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19 This fund was, historically, difficult to access. Legislative amendments through Bill 152 have now made the Land Titles Assurance Fund a fund of first resort for victims with a more streamlined, equitable, and expeditious process for resolving title-related problems, including those cause by fraud. A detailed discussion of this can be found in Paper 3.

rose 49% from 2000-2009, and another 17% from 2009-2012, and mortgage interest rates are at an historic low\(^{21}\). High home prices and volatile markets with a higher volume of transactions are more attractive to potential fraudsters. Moreover, the shift by mortgage insurers to a loan-to-value ratio of 95%, where potential homeowners require only 5% of the purchase price as a down payment for the purchase of a new home rather than the traditional 20%\(^{22}\), may have inadvertently encouraged fraud. With less up-front capital required to initiate a purchase, fraudster have and easier time penetrating the transaction. A litigation lawyer explains:

> But this 95% first time homebuyers financing has been part of the market for a while now, and it’s the primary reason why mortgage fraud is prevalent. Historically, a mortgagor would need to get a mortgage for no more than 75% of the purchase price so a fraudster would effectively have to come up with a 25% down payment to pull off getting the 75% balance. Well, that’s a big investment for each fraud not knowing whether you can actually pull it off. So that’s the main reason why we didn’t see it before.

Robust markets, the democratization of homeownership, and expedited transactions have also contributed to changes in long-standing relationships among consumers and constituents, and speak to emerging market logics. For example, the relationship between lawyers and lenders has undergone dramatic shifts as lenders look for process efficiencies and cost savings. One lawyer and professional leader working for a title company observes the following about this relationship:

\(^{21}\) [http://www.globalpropertyguide.com/North-America/Canada/Price-History](http://www.globalpropertyguide.com/North-America/Canada/Price-History)

\(^{22}\) 0% no money down mortgages became available in 2006 and for competitive rates due to competition among lenders, but these 100% loan-to-value ratios were restricted by the state in 2008.
As banks changed their banking system to remove and displace bank managers and remove their authority, that relationship disappeared. So where you had a one-to-one relationship, now all of a sudden you had nothing. You know, they went to the centralized distribution model where they sent out all the mortgage instructions from one place and it just broke down the communication and I think that kind of set up the tension between the profession and the banks.

In addition, the relationship between lenders and consumers has been transformed. Whereas at one time a personal relationship may have existed, this has been largely replaced by an impersonal and automated system. As a mortgage insurance representative observes,

…once upon a time you had this relationship with your bank where everything was with your bank. You spent a life with your bank…And you got a mortgage because your banker knew you and knew how trustworthy you were. There was no adjudication or no scoring or no nothing. I mean you just knew who it was that was applying. And that was how it was. But now we don’t even check the signatures on checks. We don’t, everything is automatic and everything is based on efficiencies and based on keeping the process down and maximizing profit and the whole thing has let the fraudsters in.

An electronic service provider representative reiterates: “You used to go to a bank branch and talk to your bank manager who knew you because your kid played baseball with his kid. And now it’s how fast can I get the money on the street because if you can’t do it in 24 hours somebody else is going to get the deal.”

Both of these shifts in relationships are portents for the system-wide troubles that have incubated the risk for fraud. The emphasis on efficiency and competition, facilitated by broader shifts in technology, insurance, and legislation, has exposed the conveyancing process to fraud. Put succinctly by a representative from an industry fraud committee:
What we found is that with increased competition in Canada, because of this real estate boom we’ve had, increased competition has meant people are scaling back their due diligence requirements. When I say people I’m talking about everybody that’s involved in the transaction - mortgage lenders, lawyers, title insurers, you know, everybody starts to scale back. I think that the market conditions in the real estate boom has really facilitated some of the fraud because of this increased pressure to close deals quickly and cheaply.

More options for mortgage financing and a growing and increasingly competitive lending community has intensified industry competition (CIMBL Mortgage Industry Fraud Task Force 2001). Competition compels cost reduction strategies and lenders have sought to lower costs by removing in-person appraisals from the mortgage process. A lawyer active in fraud litigation notes, “The absence of appraisals is probably the single most important factor as to why this has become popular activity.” Lenders have employed automated valuation systems to fund loans based on estimates of the value of properties rather than send an in-person appraiser to evaluate the property. Reducing this disbursement to clients allows lenders to remain competitive. The same lawyer further observes,

And that’s why most of the mortgage frauds you see are of relatively modest homes because, in Toronto, CMHC won’t send out below some relatively high number like $400,000. If it’s under $400,000 and it’s within metro, for example, they figure, shit, the bus shelter would sell for that so why do we need to send an appraiser. The crooks know what that threshold is, they know exactly what it is and they operate just below the radar screen to make sure that nobody is going to send out an appraiser.

Lenders have also become more selective about the appraisers they ultimately do utilize. As an appraiser representative notes, lenders sometime hand-pick appraisers that will give them the valuations they are looking for: “Often times you might have a lender who’s dealt with several appraisers and now he’s looking for a fresh face, so then they go after another appraiser to give
them the value that they’re looking for. And that’s very, that’s tricky for appraisers.” Lenders can apply pressure to appraisers to achieve certain valuations since they can threaten to bypass them altogether through the use of automatic evaluation.

Competition has also occurred within lending organizations. The strong market attracts a greater number of real estate professionals working in direct competition with one another. This heightened level of competition, in which consumers demand expedited and efficient services, exposes systemic vulnerabilities and deviant patterns of behaviour that facilitates fraud. For example, commissioned employees of lending institutions offer significant incentives to attract home buyers, such as foregoing face-to-face meetings, waiving appraisal fees in favour of property value databases, and providing quick turn around on applications. As one respondent from the legal profession observes,

Banks have been falling over each other in recent years to lend out first mortgage money because they have nothing to put money out onto the street. They’re awash with cash and nowhere to invest it. So, first mortgages, and that’s why they’re so competitive on residential mortgages. Now the banks are advertising, fighting. The mortgage people at the bank have cards that say we come to your house, you never have to come into a branch. They go around at night visiting peoples homes signing up mortgage applications for purchasers because they get paid a commission for every deal they sign. They’re pure commission people, they work out of a car. You walk into any bank lobby where they have their machines and you’ll see their brochures set up ‘need mortgage money, buying a house, just call us we come to your home and everything’. Every branch has people working on that basis. So it’s this overwhelming desire to put out first mortgage money to anything that moves is part of this problem.

Similarly, the ways in which brokers are compensated by lenders can further incubate the risk of fraud. Banks award volume bonuses to business from brokers, but the maximum incentives they provide are often only achievable if all transactions are submitted through one person, typically
the principle broker. A mortgage broker explains “This behavior is encouraged systemically by banks who structure incentives in such a way that only the principle broker submits the business.” However, individual brokers have a strong financial incentive to ensure that the loan closes since their own compensation and bonuses depend on it. A mortgage insurer observes, “And so what the brokers are doing is they’re starting to all submit under one individual, so the main master broker, and so that it kind of aggregates all of the deals and it pushes them up into the higher compensation level and when that happens then we don’t have much control over watching who’s bringing the deals in.” This sentiment has been echoed by other respondents, some of whom assert that most of the fraudulent activity they encounter has come through brokers. Addressing this sentiment, a title insurer explains: “I would say a large part of our mortgage frauds are mortgages that are arranged through mortgage brokers. And it’s no slight to mortgage brokers but obviously the mortgage broker is pretty motivated to make sure that the mortgage loan closes, right, because that’s how the compensation is paid.” In these cases, fraud permeates the system because of the absence of face-to-face encounters with borrowers and because of the lack of verification of identity and financial documents. The financial incentive to process applicants supersedes diligent investigation, and this effect can influence other members of the industry paid on commission or similar incentive structures. A representative for real estate agents could be speaking for other commission-based employees of lenders when he adds, “…agents do get caught up in it you know. It’s a commission driven business so, can they be fooled, absolutely! So we try and educate the agents, too, to be wary.”

Several respondents representing multiple organizations state that the competitive nature of the market compels a high volume of transactions which, in turn, obstructs fraud detection. An appraiser notes, “in some cases we’ve heard stories where lenders were so busy and the underwriters were so busy that they would process the files and wouldn’t pick up on some of that
stuff because they didn’t have the time. They would just sort of zero in on the key things and move it along.” Her explanation for this behavior follows: “It’s about volume of loans, you know, it’s about competition, it’s about a competitive lending environment, it’s about getting the number of loans and volumes in a particular month, or particular year.” A Ministry representative confirms this assessment: “And you know we hear from the financial institutions that it’s a very competitive market out there so in a lot of situations they have to work quickly on approving a loan, an application.” Financial institutions overflowing with capital exploit expedited systems and hot real estate markets in order to invest in first mortgages in competition with other lenders. Intense competition, high volume, and automated systems allow fraud to incubate, and also provide a rationale or logic for endorsing risky decision-making. A representative from an industry fraud committee who works with lenders summarize this point:

You may do some post adjudication and look at some files and look at the documents and go, well this is wrong, but it’s performing so what do I do? Do you renew it? Do you flag it “do not renew”? You know, sales departments will be all over that saying, well it’s performing, why would you turf a performing loan. So that becomes a very difficult situation. So are you helping to perpetuate fraud by doing that or are you just making a good business decision for your company by allowing a loan performing well to proceed? I mean that’s something else that people struggle with. So some institutions will say, this absolutely we will not renew because it’s fraud. They’ll have a zero tolerance. And others will say, as long as it’s performing up unto the date of renewal then we are obliged to renew and we won’t send them a letter saying we won’t renew. It’s very difficult.

Lawyers, too, have experienced significant competitive pressures, including a competitive environment applying downward pressure on their fees. As outlined previously, legal decisions, consumer demands, and pressure from field-level competitors have lower prices and largely driven the need for high-volume transactions performed by para-professional staff. Decisions
from Ontario courts, prompted by challenges from the Competition Bureau, eliminated fixed fee schedules imposed by some lawyers and compelled them to compete with one another to the economic advantage of the public (Goldman 1989). Since then, fees for legal services have stagnated. This is, in part, due to consumer demands and intense competition within the real estate bar. Consumers demanding lower transaction and service costs and more time efficient services have put pressure on the legal profession to accommodate such demands (Hamilton 2006). As a result, many lawyers have opted to lower their prices in order to retain clients, thus devoting less time to each client, relegating the work to staff, and focusing on pushing through a higher volume of transactions in order to remain profitable. In addition, partnerships between title insurers and lenders have undercut the fees charged by lawyers for traditional work such as mortgage refinancing. Title insurers offered a product that could provide security for mortgages while meeting demands for costs cutting and process efficiencies. As chartered banks adopted title insurance, highly capitalized title companies could wield competitive pressure through vast economies of scale and low-cost staff in order to take over mortgage refinancing (Cumming 2004). Banks have assumed the in-house preparation of conveyancing documents on refinancing transactions by including title insurance in the process, a role once the sole purview of the legal profession. The demand for expedited transaction and reports, now provided rapidly through online platforms run largely by title insurance companies, and the unilateral power of financial institutions to influence the operation of field level transactions, have introduced efficiencies not easily matched by the real estate bar.

One key result of these shifts is the reduction in ancillary searches that were once central components of the conveyancing system. Title transfers at one time involved the acquisition of a plan of survey and several municipal searches such as tax certificates, sheriff’s certificates, utilities, and many others. While title insurance may have contributed to the routine nature of
conveyancing work it also facilitated volume transactions by eliminating the need for these ancillary searches, thereby suppressing fees. The cost of these searches were disbursed to clients, but obtaining title insurance policies negated the need for surveys and many searches, lowering the cost of title transfers and accelerating the speed with which a transaction could be completed.

3. Moral Hazard

Insurance provides greater security and risk reduction for policyholders, and it has facilitated more expeditious transactions in the lending and conveyancing market, but systems that are increasingly underwritten are also subject to moral hazard. In conditions of moral hazard, being insured is thought to reduce the insured’s incentive to avoid risky behavior (Ericson, Barry and Doyle 2000). Siebrasse (2003: 15) applies this concept succinctly to real estate transactions:

A party to a transaction may be in a position to take steps to prevent fraud, for example by verifying the identity of the vendor. If that party is fully insured against any loss, they may be less careful in protecting themselves, since they will be insured in the event of loss. The more perfect the insurance—if it pays out immediately for all losses—the less incentive there is for a party to prevent the fraud in the first place.

Moral hazard impedes and discourages adequate diligence among both lenders and lawyers. For lenders, insurance has been attributed to lower levels of diligence and to the perceived lack of responsiveness to fraud. A representative for an electronic service provider speaking to the ways in which lenders have responded to fraud observes, “Fraud is probably in the hundreds of millions but nobody’s going to talk about it because it’s dirty laundry and they don’t want to be exposed because the public will always ask, well what are you doing about it. Well, we’re not. We buy insurance.” A title insurer working closely with lenders adds: “Certainly a lot of the lenders are still doing great underwriting but on some of the claims we see, where the question asked is, well if there were no title insurance on this transaction would you really have made this
loan? Because everything looks really bad in hindsight. When somebody else is taking the risk perhaps you need not be as diligent.” Lenders often have both title and mortgage insurance to protect their assets. If fraudulent information leads to a fraudulent loan, lenders who have shown cursory diligence are indemnified from loss. While insurers may then have a subrogated claim against negligent or criminal parties, the use of identity theft in title fraud makes such claims largely immaterial.

Whereas for lenders the moral hazard of insurance manifests in lower levels of diligence, for lawyers the moral hazard of title insurance reduces previous levels of diligence as a practical and financial matter. Title insurance initially promoted a streamlined and efficient system that no longer required detail title searches, subsearches, or surveys. Once fraud increased, title insurers more closely regulated the behaviour of lawyers. As one lawyer observed,

The title insurance companies have been responsible to some measure in my opinion for carelessness among lawyers because when title insurance was relatively new we were given a pretty hard sell about not doing searches, about not checking out the properties. Now when we talk to the title insurance companies they’re saying well there’s a list of lawyers who cut corners and, boy, they got into some trouble. But they were promoting that.

A ministry representative also comments that because insured transactions no longer required detailed searches lawyers were reducing their title investigations: “But as to the due diligence or the steps that the lawyer has to take, sometimes there’s less or it’s reduced because of the availability that the title insurance has acquired on that property, or on the mortgage transaction.”

As noted above by a lawyer, insurers had originally required only the PIN summary for the title search but, in response to growing cases of fraud, began to require more detailed title searches that included deleted instruments. A representative of a title company explains,
In land titles you looked at everything that was on the page. Now when you were looking at everything that was on the page, you could see all the deleted documents, right. Now on the printout when they put in the options you could have a clean printout, just the actual documents which is wonderful because everybody thought, well I don’t have to look at all the old stuff, which nobody cared about before, because of course there wasn’t the incidents of fraud.

One title searcher states that you must search back to the local date of conversion (from registry to title) to adequately search deleted instruments. Such instruments provide a chain of title and information about mortgages, oil and gas leases, easements, and other documents with unaddressed issues under Registry. This title searcher exclaims, “We are basically doing the exact same searching we used to do under Land Titles before we had title insurance, except now we have to get title insurance in addition to all of that.” Insurers, however, require that lawyers avoid conducting some off-title searches in order to remain eligible for a title insurance policy. Some, such as another Ministry representative, speculate that this has increased the risk for fraud,

I think with taxes, zoning, and looking at boundaries, and with title insurance in place you do not need to check these. I worked for a law office for about 8 years doing most their real estate and real estate transactions. It was standard; we checked for zoning, we checked for taxes, we checked for work orders, if there was a zoning requirement. But through time fees got bigger and increased on getting these types of reports and now with title insurance it’s not necessary. And maybe some of these were checks and balances that raised some flags to and might of prevented fraud.

Interestingly, a title searcher working full-time in a law firm states that some searchers, along with some lawyers, conduct tax and utilities searches in contravention of the insurance policy. These clandestine searches are meant to act as enhanced due diligence on the property but are never disclosed to the title insurer. They are conducted in order to counteract existing problems
and to avoid having to submit a claim to the insurer, which they believe will not likely be honoured by the insurance company. As one title searcher speaking to the claims process states laconically, “Good luck getting your claim through.”

4. Fraud and the Impersonal System

The collection of changes outlined above has created the conditions that embed the risk of fraud in routine patterns of conveyancing activity. One of the central features of the system contributing to fraud is the reduction in human interaction throughout all phases of the process. Judges presiding over fraud cases have spoken out about the “serious mortgage fraud plague”, attributing it to the impersonal nature of lending and borrowing and admonishing lenders to take more care in their diligence (Law Society of Upper Canada 2010; Silverstein 2006; Troister 2004). The impersonal nature of the system, encouraged by expeditious and underwritten transactions, reduces diligence and the human element of guardianship. A title insurer reinforces this point by underscoring the dual nature of systemic efficiencies: “You try to standardize the real estate process and you create efficiencies along the way and then all of a sudden those efficiencies become the double-edged sword, basically people expose those efficiencies to their benefit.” An appraiser makes a similar observation,

I guess what it comes down to, when you take the manpower out of the process, that’s where the process weakens, and so title insurance is one, taking the appraiser out and moving to technology, so once, when you replace manpower for technology and you remove the eyes and the ears of someone to gather the information, that’s when the process weakness.
The reduction in the human guardianship pervades the field at many levels. A Ministry representative comments on lending transactions,

Well one of the things too that I think is, the transactions, I’m going to say are impersonal. You can possibly arrange that whole mortgage financing by way of emails, faxes and phone conversations without physically attending the institution or meeting with the parties. The institutions, depending on how their operation works, may rely on third party information so the mortgage broker might have obtained information as to his clients that he’s given to the financial institution.

Lenders relying on third party document preparation and information collection, and upon the automation of many functions such as valuation, have reduced human scrutiny throughout the process. A litigation lawyer confirms this point forcefully: “…no due diligence is being done by the mortgagees. What passes for due diligence today is ridiculous. Mortgages are approved by call-in centres, the mortgage companies pride themselves on giving quick turnarounds on approvals over the telephone.” The impersonal nature of the system weakens its overall integrity, and the absence of third party validation such as by appraisers, surveyors, or municipal employees has anonymized transactions. A broker observes that while they act as funnels relaying information to lenders, lenders are ultimately responsible for verifying the information:

Banks are in a position to underwrite and they must make the decision to lend the money so it’s their responsibility to ensure that the info is valid. Brokers are more like information funnels who pass information and take a casual look at it but are not scrutinizing it for fraud. Almost all of the information received by brokers is electronic – there is practically no face-to-face.

The human element has been removed from the work carried out by lawyers as well. The conversion to Land Titles obviated the physical act of searching and requesting documents at a local Land Registry Office. A fraud specialist at a lender observes of the Registry System, “The
old days, you wanted to register a mortgage, the lawyers used to have to go to the Registry Office physically. People would say, something doesn’t look right here! This property only sold yesterday for a hundred thousand and now you’re transferring it for five hundred? People caught them in the old days. You don’t have that anymore. It’s all electronic.” Confirming this position, a veteran title searcher who has worked in both the Registry and Land Titles systems observes, “We would know you weren’t one of us. You would stand out. You would be noticed. And we used to check all of the signatures as part of our title search – the person that bought is the person that sold.” In addition, lawyers had less contact with other agencies providing subsearch information. A rural lawyer notes that having less contact with municipalities and other third parties has reduced systemic guardianship: “I mean, in the old days you would write a letter to the Municipalities and I suppose the more letters you write, the more people you make contact with, the more chance you’d have to see something going wrong.”

As the risk for fraud threads its way throughout the increasingly impersonal field, opportunities to prevent and detect it have also become increasingly undermined by the pitfalls of organizational interdependencies. Conveyancing is a complex field-level process that involves multiple actors invoking discrete but interrelated segments of this process. As an appraiser representative notes, “It’s the opportunity to make money quickly within a process that is not regulated. I mean everyone is regulated within their own professions to some extent, some to a larger extent than others, but the whole buying a home process and the players, you know, there’s opportunities there to, I guess, create opportunities for fraud.” One central way this occurs is by relying on the diligence of other agencies while moving a deal forward, or through the lack of communication between agencies. As Dyck (2004) notes, fraud tends to target the weakest link in the process. If one party collects and verifies information with substandard diligence, that information is subsequently legitimized as the transaction advances to other
constituents. As information advances throughout the field, and as technological advances allow for the fabrication of quality identity documents, fraud will remain undetected unless sophisticated methods for detecting fraud are introduced into the process.

Furthermore, for some organizations there is little incentive to implement fraud prevention strategies. While few statistics about the prevalence of fraud or losses associated with fraud are forthcoming from lenders, many in the industry report that the losses associated with fraud for lenders is not significant relative to their annual profits. A litigator states, “All of them are just open to criticism which they deflect by saying we have systems in place, we watch for this, we do this, right, but they don’t really care because the losses, proportionally, are still very small, and that’s what they look at. There aren’t that many of these frauds compared to the business they write every year.” With fraud losses amounting to what has been referred to as a “rounding error” relative to the profits earned from mortgages, there has been little incentive to fortify organizational weakness that lead to fraud. This position further entrenches the pitfalls of organizational interdependence by prioritizing profit over protection.

The ability to detect and obstruct fraud is further eroded by the lack of communication among constituents, which prevents cross-referencing information. A mortgage insurance representative notes,

So, for example, the realtor is only going to speak to the client and the other realtor and possibly the mortgage broker and the lawyer. But the lawyer is going to talk to the realtor and the lender and the lender is only going to talk to the mortgage broker and the lawyer, and so nobody really sees the whole transaction and so that was one of the ways that the fraudsters are getting around us because we don’t talk to everybody and everybody is in play. You know everybody is at risk for being kind of involved in the transaction, whether willingly or unwillingly, knowingly or unknowingly. I mean they
can be led to be involved in a fraud and as one player you have to be able to rely, and that’s the important word, on the other industry professional to be professional, to do what they’re supposed to do.

Even when fraud is suspected there are no mechanisms for communicating that information to others in the field. A lawyer observes, “And there is no control. There is nowhere to report if we’re suspicious about a client. We just turn him away and set him loose on our colleagues. There’s no reporting requirement. The next lawyer has no idea that someone else already reviewed it and had concerns over it. We’ve educated them on how to assuage the next guy.”

Moreover, while some efforts to share information have been designed, they are not widely used by industry groups and are beset by privacy concerns. For example, the REDX database developed by Teranet\(^2\) is a subscription-based risk management service that, among other functions, records the names of industry professionals involved in suspicious transactions. However, constituents in the field do not use it extensively. Overall, pressure has been mounting for constituents involved in real estate transactions to exercise greater care at each stage of the transaction. For example, The Law Society of Upper Canada (2009) entreats constituents to exercise care in deterring and detecting fraud in the early stages of the transaction, particularly when the borrower first makes contact with the lender or lending agent.

Compounding these issues are the perceived inadequacies of real estate training for lawyers, and the deliberate targeting of certain lawyers for fraud. One lawyer comments:

\[\ldots\] the law society has dummied down real estate training in the bar admission course. In order to save money they’ve basically eliminated the bar admission course as we used to know it, where you had to go in and actually do real estate deals, like fill out the

\[^2\] http://www.redx.ca/index.html
forms and spend two weeks talking about how to close a real estate deal. And has that facilitate fraud? Absolutely facilitated the fraud because you’ve got these young people who can be taken advantage of by criminals. It’s the dupes, it’s the lawyers who are dupes that has been the big problem.

Respondents argue that the “dupes” are not only new lawyers venturing into real estate practices, but also older lawyers. Younger lawyers lack experience when attempting to establish themselves in a competitive segment of legal practice. Older lawyers may be targeted because of their lack of familiarity with modern technology and modern conveyancing procedures. A Ministry representative explains,

And it appears that the fraudsters would be targeting a solicitor who may be older, working on their own and/or the younger solicitor who’s just starting out and trying to develop their practice. The older solicitor may not be as familiar with the electronic system and may not do as much due diligence or checking and the same with the younger solicitor because he hasn’t got the experience or background, and he’s trying to develop a business.

Once “easy marks” are identified, fraudsters promulgate this information to accomplices. A fraud committee representative adds: “You know, these things get out in the industry fairly quickly. Yah, I tried this guy, and he’s easy. So, I mean that gets spread. So the fraudsters hear about it and they’ll prey on these people. “

System changes have incubated the risk for fraud by normalizing risky transactions across field constituents. However, the risk for fraud would lie dormant if not for its exposure by exogenous threats. In this study, exogenous threats manifest in the form of fraudsters using identity theft to exploit system weaknesses while remaining anonymous. The Director of Titles, Kate Murray, observes that real estate fraud is intrinsically linked with identity theft and technology (Murray 2006). Another ministry representative confirms this: “To me the real link to all of this, the real
issue for all of this is identity theft. And when we see frauds, other than interfamily ones, its pretty much always some form of identity theft and somebody is duped.” In many cases of fraud, identity theft is central component and one that appears increasingly less difficult to employ in the perpetration of these crimes. One lawyer states, “I mean if he’s committed to doing a real estate fraud for hundreds of thousands of dollars you think a couple pieces of fake ID wouldn’t really be that big a problem.” Facilitating the ease of acquiring false identity documents is the concomitant rise of technology. A fraud specialist with a lender notes,

Well when you look at the fraudulent ones, you can’t tell. You cannot tell by looking at them. Even to a trained eye, you can’t tell. Why is that? There’s programs that, bank statements, notice of assessments, T4 generals, you know, all your income tax documents. It’s so easy to do now, with technology. Why the increase—it is, in a lot of ways, it’s a lot easier

A lawyer reinforces this point about identity documents, “Ten years ago I didn’t [collect ID]. I didn’t have to do it. It’s because the fraudsters have become so sophisticated and computers are so good, that pretty well anything can be forged, in topnotch quality.” While many groups are collecting identification document, few are able to distinguish legitimate from false identification. A fraud committee member explains, “Is it up to them to verify the ID? No. They’re collecting the ID. They are not really attempting to verify it. Fake ID is so good these days.” Moreover, merely requesting and checking identification constitutes adequate diligence since no party has yet been made the guarantor of identity. Altogether, identity theft permits fraudsters to exploit face-paced, impersonal systems with inadequate diligence and interorganizational communication.

The nature of the conveyancing process has been indelibly altered. Legislative change, technological advancements, and shifting logics have catalyzed the decline of personal
relationships and the subsequent commoditization of lending and legal relationships, intense competition, price cutting strategies and high volume transactions, combine with volatile markets, consumer demands, moral hazard, and accessible homeownership to establish key preconditions in which the risk of fraud can incubate. The escalation in fraud results from the exploitation of these risks and opportunities by external threats using identity theft to foil detection and apprehension.

**Conclusion**

The objective of this research was to explore the organizational context incubating the risk of fraud in the field-level process of conveyancing. Following traditions in the crime and opportunity literature, this study provides an extensive account of title fraud in Ontario. Understanding the formation and availability of criminal opportunities for crime often requires detailed accounts of crime typologies. Particular crimes have particular opportunity structures and these structures vary from one crime to another (Benson and Simpson 2015). Indeed, in many discussions of white-collar crime, especially those concentrating on the intersection between crime and opportunity, it is essential to understand how industries work in order to explicate how opportunities for crime emerge. These descriptions provide rich detail about complex industries and the criminal opportunities within them, but they more often than not remain unguided by theory. For this paper, Vaughan’s organizational approach to crime and deviance is extrapolated to link together conceptually the environmental, field-level, and organizational elements contributing to fraud risks.

The conveyancing landscape has undergone significant changes in the preceding decades. The conversion to Land Titles and the introduction electronic land registration provided heightened levels of security through technological advances and state-backed guarantees of title, and
greatly expedited the conveyancing process by rationalizing the work of title searchers and lawyers. Professional competition and the ascendancy and spread of title insurance in the industry further streamlined the process and provided additional security through underwriting and risk reduction. Intense competition and emerging market logics have commoditized the role of lawyers and lenders, perpetuated volume transactions, and catalyzed cost cutting efforts by professional and occupational groups. When combined with robust, volatile real estate markets and demanding consumers, these changes incubate the risk of fraud in routine patterns of conveyancing activity by removing the human element of guardianship and the requisite credible oversight through interorganizational diligence.

This analysis demonstrates that institutional and organizational changes play an important part in creating opportunity structures for fraud, and organizational theory provides a strong theoretical foundation for tracing how opportunities emerge within organizational fields. Institutional shifts in the real estate conveyancing industry, rather than heightening security and certainty, have ironically contributed to fraud through the absence of guardianship and credible oversight (Cohen and Felson 1979; Shover and Hochstetler 2006). The speed of conveyancing has improved considerably through the conversion process, electronic registration, and title insurance. New forms of insurance have also provided a layer of additional security for lenders, consumers, and lawyers, in addition to the security for homeowners afforded through Land Titles indefeasibility. These changes have improved the efficacy and indemnity of the conveyancing process and have generated profits for many honest constituents while offering savings and security for consumers. However, these myriad shifts have create “common places” (Benson and Madensen 2007) for crime within the legitimate process of conveyancing through interactions that lack guardianship and oversight.
The regulatory and technological jolts precipitating institutional change have also contributed to emerging institutional logics of the market through shifts in the normative features of conveyancing. The rise in neoliberal economic and political ideologies (Leicht and Lyman 2006) was helped in part by system changes that rationalized the conveyancing process, and by new innovations like title insurance that both aligned with market logics of competition, rationalization, efficiency, technology, and productivity, and which secured pragmatic legitimacy from powerful field constituents like lenders (Greenwood, Suddaby, and Hinings 2002; Leicht and Fennel 2008). This logic pervades the institutionalized process of conveyancing by altering relationships among constituents and between constituents and consumers, and by transforming relationships into commodities in response to demands for greater efficiency and competitiveness. The growing volatility of the real estate market and easier access to homeownership further intensify these trends.

The risk of fraud is linked centrally to the impersonal nature of the conveyancing system. Several transformations in the system are responsible for this state. First, the aforementioned conversion to Land Title and the introduction of electronic land registration have rationalized the conveyancing process. Coupled with stagnating fees for lawyers, intense competition among the real estate bar, and the ascendency of title insurance in the province, these changes to conveyancing have commoditized the lawyer’s role in the process by necessitating volume transactions limiting the lawyer’s involvement and reducing diligence through the elimination of many forms of title investigation. Second, efforts to reduce costs in the intensely competitive lending market have resulted in a number of modifications to the lending and conveyancing process that have depersonalized it. Emerging market logics and the subsequent technological advances and structural changes in conveyancing allowing deals to close in a fraction of the time have all but eliminated guardianship through the establishment of an impersonal system.
Compounding these problems is the moral hazard of insurance. In conditions of moral hazard, being insured reduces the insured’s incentive to avoid risky behavior (Ericson et. al. 2000). The disincentive among lenders to mitigate the risk of fraud or to enhance due diligence has been attributed in part to the moral hazard of insurance. Among lawyers, moral hazard operates differently. Ericson et. al. (2000: 537) redefine moral hazard as “the ways in which an insurance relationship fosters behaviour by any party in the relationship that immorally increases the risk to others.” Lawyers obtain title insurance polices that protect consumers as well as the lender’s asset. However, title insurance also creates moral hazard by eliminating many title search requirements and instead promising to indemnify policyholders against possible loss. This creates problems for consumers who must submit claims, for insurers who began to suffer fraud-related losses as a result, and for lawyers who were ultimately admonished for their lack of diligence. In addition, the multiple points of contact that were intrinsic to title and off title searching have been substantially reduced through the acquisition of a title insurance policy, further reducing the additional guardianship afforded by the human element of the transaction.

Altogether, these features of conveyancing have produced an impersonal system. Lawyers and title searchers no longer travel physically to a Land Registry Office to obtain, request, or file documents; no longer devote significant personal time to individual clients or files; and no longer undertake detailed title investigations or request many ancillary documents such as those obtained from surveys and off-title searches. Lenders and brokers no longer meet mortgagees face-to-face; no longer employ in-person appraisals for property valuation; and no longer scrutinize in detail mortgagee applications. And no longer are personal relationships a central facet of the conveyancing process. As competition intensifies in the field and the volume of transactions intensifies, so too does the risk of fraud intensify.
The absence of guardianship and oversight among the various groups involved in an increasingly impersonal process has exposed conveyancing to fraud risks. Routine activities theory asserts that crime results from the convergence of motivated offenders and suitable targets in space and time in the absence of capable guardians (Cohen and Felson 1979). Title fraud risks are predicated on the opportunity elements of routine activities, specifically the suitability of targets and the absence of capable guardians. The lure of easy mortgage money and the ease with which identity theft and forgery can be perpetrated in the absence of field-wide oversight makes title fraud an attractive crime, particularly in light of the erosion of guardianship over time. When summarizing the nature of guardianship, Hollis et. al. (2003:74) observes, “Guardianship…involves the presence of others. Those others are visible or perceptible by the potential offender, and it is this perception of individuals who are present that deters the would-be offender through an increase of the risk of the criminal action.” The central element of guardianship, therefore, is a human one. Longstanding institutional change has streamlined the conveyancing process, and emerging logics have prevailed in establishing a rapid, secure, underwritten, but highly competitive system. A central outcome of these institutional processes are changes to the normative institutions around conveyancing work that have removed the human element from much of the process. As the conveyancing process became more impersonal over time, layers of guardianship were stripped away, leaving the conveyancing process exposed to exogenous threats. The risk for fraud was thus incubated in the legitimate day-to-day business structures of conveyancing and lending, which have created “common places” for crime throughout the organizational field (Benson and Madensen 2007). Moreover, credible oversight (Shover and Hochstetler 2006) is further diminished as inter-organizational checks and balances fail to detect or prevent fraud (Kunreuther and Heal 2005). Inter-organizational reliance upon the due diligence exercised by other organizations has been
exploited by fraudsters, particularly where due diligence is poorly defined or ignored altogether. The assumption that gatekeeper organizations and individuals have thoroughly investigated each transaction allows for the establishment of a single fraudulent transaction to corrupt the remaining aspects of the real estate deal. Actors within this institutional context operate within acceptable cognitive institutional frameworks that are shaped by emerging market logics, and they come to accept their decisions as normal practices (Vaughan 2007). This behavior normalizes corrupt or inadequate information, and legitimates it throughout the conveyancing process. This in turn incubates the risk for fraud in the daily activities of field constituents (see Vaughan 1996). The risk for crime therefore unfolds over a long period of time and results from characteristics of the system itself (Vaughan 2005).

Once incubated in the routine activities of conveyancing, the risk for exposure to fraud can be triggered by exogenous threats. Criminals employing identity theft have taken advantage not only of automated systems but also of the absence of guardianship and diligence throughout the conveyancing process to perpetrate fraud. Identity theft is a central element of title fraud and one of the most significant challenges to overcome (Dyck 2004; Murray 2006). The insertion of false identity into the process places all parties involved in the transaction at risk for exposure. Inadequate system-wide diligence and high quality forgeries allow these illegitimate documents to permeate legitimate business transactions by exposing the weak links of an impersonal system. As identity theft and fraud becomes more prevalent (Allison, Schuck, and Lersh 2005), and technological advances make high quality forgeries more accessible, risks incubated in routine conveyancing activities are more likely to be exposed and exploited.

Title fraud is a feature of the organizational field. The changes to conveyancing and lending have established an impersonal system across major professions and organizations in the field. This
 impersonalization spans the complex process of lending and conveyancing and involves multiple organizations and professions in different ways. Changes to conveyancing and intense competition have facilitated escalating volumes of transactions and cost cutting strategies that have reduced diligence, removed personal guardianship, and incentivized risky behaviour. Insurance, while providing additional layers of protection for lenders and consumers, has created moral hazard that both reduces diligence among lenders and alters the thoroughness of the title searching process among lawyers and conveyancers. The risk of fraud incubates in risky transactions that lack diligence, corrupting the conveyancing and lending process by further incubating in a field-level process where the opportunities to discover the fraud have been significantly diminished by legislative, technological, and normative changes to the real estate process. As argued elsewhere in this paper, inter-organizational reliance upon the due diligence exercised by other organizations has been exploited by fraudsters, particularly where due diligence is poorly defined or ignored altogether. Social networks that engender trust can therefore also generate new opportunities for deceit and deviance where there are vulnerabilities in one part of the process. As discussed in Paper 1, this process maps onto the expansion of distributed risk systems from individuals to aggregates, particularly in the form of insurance (Heimer 2002; Ericson, Doyle, and Barry 2003). The governance of risks, such as those associated with real estate fraud, have shifted from professional relationships, proactive problem solving, and underwriting taking place over a longer period of time, to aggregate risk management and indemnification through insurance. Such shifts correspond to the emergence of market-based norms and practices emphasizing rationalization, efficiency, and productivity (Leicht and Fennel 2008).

This study sought to understand how opportunities for fraud were structured within the real estate conveyancing field. The findings underscore the importance of understanding the role of
institutional and environmental shifts, filed-level processes, and day-to-day organizational routines in explaining how fraud risks are incubated over time. Shifts in the institutional environment of real estate conveyancing give rise to new normative institutions and new institutional logics that coincide with developments in technology and professional competition within the field. These shifts in the conveyancing field have incubated the risk of fraud in routine patterns of day-to-day conveyancing activity. Opportunities for crime are predicated on the lure or suitability of a target and the absence of capable guardianship or oversight. Shifts in conveyancing have created opportunities for crime by eliminating guardianship throughout an increasingly impersonal field-level process. When confronted by exogenous threats, the risks for fraud are exposed and exploited. These opportunities for crime are exacerbated by organizational interdependencies where adequate diligence is absent and which therefore normalize risky transactions by legitimating fraudulent identity information and, ultimately, corrupting the transaction. This study applies organizational frameworks for studying crime and deviance to field-level processes involving multiple organizations. It underscores the importance of identifying how opportunities for fraud emerge from the broader institutional environment and field-level processes, how these opportunities are incubated as risks over time, and how these risks are exploited, not from within organizations but by threats external to the process. Theoretically informed analyses of crime typologies and detailed industry cases can help to trace the formation and structure of criminal opportunities, particularly by highlighting the importance of multiple levels of organizational analysis for understanding how criminal opportunities for title fraud develop over time.
References


First Canadian Title. N.d. Real Estate Title Fraud Tool Kit. Retrieved from http://protectyourtitle.com/Word%20documents/FCT%20Fraud%20Awareness%20Tool%20Kit_FINAL.pdf


Murphy, Mary. 2006. “Title Issues and Developments in Real Estate Fraud Cases.” 5th Annual Real Estate for Law Clerks. Law Society of Upper Canada, Continuing Legal Education.


Cheated out of House and Home: State Legitimacy, Certainty, and Identity Crime Responses

The dominant discourse surrounding identity theft is a discourse of individual responsibility for risk reduction. Scholars of identity theft and fraud have established that neoliberal relations among individuals, organizations, and industries compel individuals to take responsibility for police and service functions of the state (Marron 2008; Monahan 2009; Sovern 2004; Whitson and Haggerty 2008). While state agents may proffer information to contain the problem of identity theft and fraud, citizens must engage with and rectify the problem with little assistance (LoPucki 2001). Unlike most other victims of crime, who expect to do little more than contact the police, identity theft victims are positioned as the agent responsible for rectifying their situation (Whitson and Haggerty 2008). As Marron (2008: 28) observes, “…vulnerability to the uncertainty of identity theft resides with and around the individual themselves — as does responsibility for its avoidance”. Consumers are encouraged to manipulate their environment and personal behaviour in order to design out the risks of victimization from the everyday routines of life that create opportunities for crime (Garland 1996), including countering vulnerabilities through regimes of risk management (Monahan 2009). Such regimes include the “care of the virtual self”, the management of consumer identity to reduce personal and organizational risk of identity theft and fraud (Whitson and Haggerty 2008). Failure to act prudentially and to actively mitigate risks is seen a moral failure of the individual (Monahan 2009).

While important for explicating the relationships of responsibility for identity theft and fraud more broadly, this literature is limited by the notable disaggregation of the various types of identity crime. Identity thefts vary in both their nature and in their targets, and aggregate discussions of identity crime do not adequately disentangle these nuances. In addition, aggregate discussions of identity theft and fraud obscure relationships and behaviours that diverge from the
more general observations supporting dominant discourses of individual responsibility for risk management and state divestment of crime control obligations.

This paper concentrates on title fraud, a form of identity crime that combines identity theft and forgery with mortgage fraud. It occurs when fraudsters, using identity theft, assume the identity of the legitimate homeowner and take advantage of automated financial and real estate record systems to fraudulently sell or refinance a property (Criminal Intelligence Services Canada 2007). Title fraud, and indeed most mortgage frauds involving identity theft, are largely ignored in the identity theft literature and, when discussed, are typically aggregated under personal financial fraud (Marron 2008). There is good reason, however, to dissociate it from other forms of financial identity theft. Not only does aggregation obscure the politics of crime control inherent among different iterations of identity theft, but it also obscures the social and cultural conditions that generate both responses to crime and public expectations from the state that diverge from those discussed in the identity theft literature. Curt Novy, mortgage analyst for the U.S. Federal Bureau of Investigation observes of title fraud, “It’s the most egregious form of identity theft…It amounts to the most money lost, and is the most devastating to individuals.” (Kolen 2013, emphasis added). The aggregation of identity crime obscures different understandings of responsibility and protection. Disaggregating this most egregious form of identity theft allows for better theorization of responsibility and crime control.

In Ontario, Canada, several high profile cases of title fraud, where fraudsters impersonating a homeowner sold their home to accomplices or innocent purchasers, brought significant attention to this crime and to the iniquities faced by its victims. Indeed, Bob Aaron, a lawyer and expert in real estate writing for the Toronto Star, observed. “Looking back on 2006, there can be no doubt that the real estate story of the year was title fraud. No other issue in this field seemed to
fascinate and horrify the public as the victims' plight.” (Aaron 2006, emphasis added). Identity theft victim stories abound, yet victims are largely responsible for their own risk reduction and rectification, to care for their “virtual selves” in the face of vast systemic uncertainties that give rise to identity theft (LoPucki 2001; Marron 2008; Monahan 2009; Whitson and Haggerty 2008). With title fraud, however, the state assumed an active role in addressing victims and restoring their losses, including marshaling industry constituents, intervening in title fraud cases, and establishing new fraud legislation and fraud action plans. Focusing on title fraud, and using evidence from state responses to increasingly public cases of title fraud, this paper explores the conditions under which the state positions itself as a principle agent of crime control and principle insurer of victims through involvement in legal redress and consumer protection.

This paper makes two arguments: that strong state responses to identity crime are contingent upon the nature of the perceived threat of identity theft and fraud; and that state responses, while inverting the discourse of responsibilization observed in other forms of identity theft, establish a legal apparatus that both involves state actors in redress and protection and divests the state of its financial obligation by diverting it to civil organizations and market-based options for the protection of assets and identity. Speaking to the first facet of the argument, Garland (2000) suggests that understanding public support for political responses to crime is contingent on our understanding of the ways in which support derives from culturally conditioned sources and how the presence of these sources magnify the probability of political action. For title fraud, the violation of sacrosanct institutions such as private property and homeownership undermines cultural ideologies of the home and imbues the acquisition and ownership of property with elements of risk and uncertainty. The deeply ingrained institutionalization of land tenure and homeownership provide the cultural conditioning to rally public attention and, ultimately, elicit state action in victim redress and consumer protection. Private property is the foundation of
political and legal institutions that promote liberty, economic and political stability, and individual identity and competence (Pipes 2000). Homeownership is a significant form of private property imbued with associated advantages and ideologies. Indeed, the ownership of private property has become the normal tenure of choice (Gurney 1999; Munro 2007) supported by powerful cultural ideologies and institutions involving notions of identity, privacy, economic and political stability, security, control, and status that encompass that preference (Ruonavaara 1996; Ronald 2008). The catastrophic economic, social, and ideological losses associated with title fraud victimization set it apart from other forms of identity theft and thus invert the dialectics of responsibility in neoliberal risk regimes. As the product of specific economic, social, and institutional arrangements, title fraud embodies certain cultural and institutional values like the normalization of homeownership and the acquisition of property, but also cultural and institutional fears that undermine values of security, normalcy, and safety, and which elevate title fraud as a social problem (Douglas 1985; Douglas and Wildavsky 1982). Title fraud generates such attention because it draws upon ingrained fears of insecurity and victimization that accompany the undercutting of the vaunted social institution of private property, particularly when state, civic, and legal apparatuses intended to protect owners from uncertainty appear inadequate or unjust. As such, rather than a discourse of responsibilization, where individual consumers must exercise prudence in the care of their virtual selves, the importance of widespread and normalized institutions of homeownership, and the powerful ideologies of ownership that are threatened by the visceral accounts of title fraud victims, compels immediate government intervention in the rectification of harm and the restoration of title to victims.

Important cases of title fraud underscore the “paradox of certainty”, what Bucknall (2008) refers to the legal battle between homeowners and lenders to decide whose interests prevail in cases of title fraud. Recent legal decisions awarded lenders with valid liens on property and encumbered
innocent homeowners with significant debt and the potential loss of their home. This perceived injustice, and the perceived iniquity of available redress, catalyzed significant public and political reaction and undermined the legitimacy of the state’s position over the security of private property and homeownership. Media amplification of the risk of fraud generated a collective interpretation of the problem imploring organized attention (Jasanoff 2005; Kasperson, Kasperson, Pidgeon, and Slovic 2003; McRobbie and Thornton 1995). In response, the state intervened in ongoing legislation, ostensibly to promote the interests of homeowners, enacted the Real Estate Fraud Action Plan which regulated conveyancing and increased penalties for crime, and passed the Consumer Protection and Service Modernization Act, 2006 (Bill 152). Together, these actions placed the state in a central position to advocate for consumers, rectify the theft of title by identity thieves, and to act as a primary form of insurance operating simultaneously with market-based forms of title insurance. While the state exercised its sovereign authority over this form of identity crime in order to secure greater security and certainty for homeowners, the legal changes noted above would, over time, shift the financial obligation from the state to insurers while responsibilizing lenders and consumers to procure market-based solutions to the legal and systemic uncertainty of title fraud.

Speaking to the second facet of the argument, despite the availability of civil redress against title fraud through the provision of various forms of insurance, the state nonetheless assumes as significant role in re-establishing the certainty of real property ownership for homeowners and in restoring losses incurred as a result of victimization. The amplification of the risk of fraud coupled with the perceived iniquity of systems of government redress against a crime that threatens the institution of homeownership undermined the legitimacy of the state and catalyzed the development of legal apparatuses for restoring financial and phenomenological losses that diverge from responses to identity theft outlined by scholars. At the same time, the state
continues to promote civil responses to crime and uncertainty through market-based solutions such as insurance, and has enacted legislative change that will ultimately reduce state obligations for financial redress in light of these emerging forms of insurance. Ironically, in responding to the public outcry over title fraud and while creating greater financial and legal security for homeowners, the state has created a new paradox of certainty by undermining the reliability of the Land Titles system through legal decisions that erode the mirror and curtain principles of the doctrine of indefeasibility, and by excluding insurers from, and restricting the access of lender to, a state supported assurance fund for fraud victims.

The following sections explore the relationship between identity theft and title fraud and examine the importance of private property and homeownership for catalyzing public reactions and, ultimately, instigating government involvement. This paper then examines the context under which state responses are compelled, including an examination of case law and underlying legal principles, the media attention that such cases evoked, and public discourse. Finally, this paper examines the ways in which the state intervened, including intervention in ongoing litigation and the political momentum that led to the development of Bill 152. Ultimately, this paper shows that, for some forms of identity crime, the necessary social and cultural conditions activate the exercise sovereign power in contrast to discourses of responsibilization espoused by scholars of identity crime, but that this power represents both sovereign and adaptive strategies combining strong state intervention and punitive responses with divestment of financial and social obligation and responsibilization through civil organizations of insurance (Garland 2000).

Identity Theft and Title Fraud
Identity crime is one of the fastest growing crimes in Canada and elsewhere (The Canadian Anti-Fraud Centre 2010; RCMP 2011; CIPPIC 2007; Copes, Kerley, Huff and Kane 2010; Newman and McNally 2005; Stuart, Schuck, Lersch 2005). The Canadian Anti-Fraud Centre (2010) reports yearly increases in both the number of victims and the costs of identity crime, despite estimations that it receives fewer than 5 percent of self-reported fraud victimization complaints nationally. In addition, the McMaster eBusiness Research Centre reports that 6.5% of Canadians (1.7 million people) have been victims of some kind of identity fraud, with an annual loss of nearly two billion dollars. Identity crime has escalated in volume by 15% between 2003-2009 (RCMP 2011). These experiences are echoed in the broader international literature, which reports staggering escalations in the scope and cost of identity crime (CIPPIC 2007; Copes, Kerley, Huff and Kane 2010; Newman and McNally 2005; Stuart, Schuck, Lersch 2005).

Identity crime is the quintessential crime of the information age – a consequence of a free-flowing information-based economic system that encourages instant credit and mass consumerism (Marron 2008). The same processes and information flows that facilitate mass access to credit for consumption are simultaneously responsible for this new type of crime. As Marron (2008: 23) observes, “In consequence, then, the risk of identity theft is conceived of as an incalculable systemic risk stemming from the productiveness of the market itself — a systematic by-product of an advanced, electronically enabled credit system.” The systems, processes, institutions, data flows, and the dissemination and flow of agglomerated identity information establishes the conditions for the generalized risk of identity crime victimization through systemic insecurity and exploitive technologies employed by identity thieves. Penetrating consumer identity through visible tokens of epistemological identity, such as identity cards and identifying numbers, identity theft causes financial loss in addition to employment disruption, reputational damage, frustration, stress and anxiety through the onerous task of
reclaiming financial health, and secondary victimization through the panoply of organizations through which individuals must navigate to rectify their virtual selves (Anderson 2006; Copes et al. 2010; Lawson 2011; Newman and McNally 2005; White and Fisher 2008; Whitson and Haggerty 2008). More deeply, however, identity theft victimization is experienced as the denial of future choice through the diminished capacity to secure credit with which to consume, undermining ontological security and producing significant and negative psychological and physiological effects.

The public, through a prevailing discourse of responsibilization, normalizes the absence of state intervention in the rectification of financial health and the restoration of the virtual self. Neoliberal relations among individuals, institutions, and industries structures relations of social control compelling individuals and nonstate entities to take responsibility for police and service functions of the state (Ericson, Doyle, and Barry 2003; Monahan 2009). Obscured in these relations is the culpability of lenders, credit agencies and other organizations for systemic insecurity through the massive agglomeration and transference of consumer data (Sovern 2004). Instead, individual citizen consumers are compelled to manage the risk of identity crime (LoPucki 2001). Consumers are encouraged to manipulate their environment and personal behaviour to design out the risks of victimization from everyday routines that create opportunities for crime (Garland 1996). Ideal citizens are self-regulating, responsible, and prudent – they respond to threats through consumption of products and services, such as identity theft insurance, in order to regulate their behaviours, properties, and loved ones (Marron 2008; Monahan 2009). Consumers are expected to engage in care of the virtual self to manage their consumer identity in order to reduce personal and organizational risks, and to maximize potentialities (Whitson and Haggerty 2008). Failure to act prudentially and to actively mitigate risks is seen a moral failure of the individual (Monahan 2009).
A quintessential example of the discourse of responsibilization for identity theft is the case of Amy Krebs\textsuperscript{24}. In February of 2013, Krebs discovered that someone had used her identity information to obtain credit and she has, since then, spent years trying to restore her identity. Krebs was responsible for contacting credit bureaus, collection agencies, credit companies, and government agencies in order to restore her financial health. Her interactions with these agencies were beset by distrust and suspicion. Krebs reports that agencies and organizations were apprehensive about her claims, characterizing her not as a victim but as a charlatan attempting to avoid her financial obligations. They subsequently required from her more exacting proof of identity than that which was required of the fraudster who initially perpetrated the crime (the fraudster obtained credit using only Krebs’ maiden name and a decades old address). In addition, she reported that no agencies, government or private, assisted her through the process of reclaiming her identity.

Krebs experienced several setbacks as a result of the identity theft. Her credit reports were overwritten with falsified information and remained inaccessible to her. Segments of her medical records were unavailable to her because the fraudster accessed medical services, which subsequently became protected under privacy law. Account freezes and communication with various agencies, including collection agencies, did not prevent the identity thief from accessing new credit, nor did it prevent debt collection calls from collection agencies and organizations. Few agencies assisted her with her plight. The police report was of little use. Companies, including collection agencies, continued to pursue outstanding debts despite notices that the debts resulted from identity theft and fraud. Krebs experienced great difficulty removing identity

theft flags from her credit reports, and government agencies were no more helpful, often
directing her through a labyrinth of agencies without resolution. She was required to collect and
maintain boxes of evidence and to develop spreadsheets with over two hundred entries in order
to prove her identity to each of the agencies with which she interacted. Her experiences
prompted her to create a blog where she cautions potential victims: “Nobody cares more about
protecting your identity than you. Be aware. Be protective. Be proactive.”25 Her website
provides advice for prudent behavior and itemizes the steps to take, agencies to contact, and
evidence to accrue when victimization occurs. The experience of victimization, and the forms of
risk management and responsibility outlined on the site, mirrors the discourses of prudence and
responsibility, of how to care for one’s virtual self outlined broadly in the identity theft literature.
Her case serves as both an illustration of discourses of individual responsibility for identity theft
victimization, and a contrast to the ways in which responsibility is characterized for cases of title
fraud.

**Title Fraud**

Title fraud is a manifestation of identity theft and fraud that involves the acquisition of land title
and a mortgage. It occurs when fraudsters, using identity theft, assume the identity of the
legitimate homeowner and take advantage of automated financial and real estate record systems
to fraudulently sell or refinance a property (Criminal Intelligence Services Canada 2007). It is
the most egregious form of identity theft and causes the most significant single losses (Kolen
2013). Along with other forms of real estate fraud, it is one of the fastest growing forms of fraud
in Canada (McWaters and Ford 2007), and one of the most costly (see CIMBL 2001, Dyck 2004;

First Canadian Title 2005; LawPRO 2004; Law Society of Upper Canada 2005; Strom 2004; Waters 2002; Wishart 2008). Like other forms of identity theft, the risk of title fraud itself remains abstract and incalculable, a system risk stemming from the productiveness of the market and the advancing pace of lending and conveyancing transactions (see Paper 1 and 2). Systemic, technological, and economic developments that have facilitated the easy theft of personal identity have also enabled identity thieves possessed of the requisite criminal capital and system knowledge to exploit lenders and property owners (see Paper 2).

Prominent cases of title fraud victimization ultimately brought title fraud and the evident iniquities of the legal apparatus to the attention of the public (Aaron 2006). Title fraud, like other forms of identity theft and fraud, destabilizes ontological security by rendering uncertain property ownership and the concomitant notions of stability, privacy, identity, status, and independence that imbue the acquisition of real property. In response, significant and far-reaching shifts in the industry were instituted, characterized by both the responsibilization of consumers and by preventative partnerships with constituents in the real estate field (Garland 2000). Real estate professionals were subjected to new forms of audit and professional regulation, industry-wide committees were formed, and consumers were cautioned to protect themselves against the risk of fraud. A Ministry of Government Services representative, in discussing title fraud prevention, states:

And so we really stress the importance to people if they’re, if we get calls about how can I prevent being a victim of fraud. Well, protecting your identity is really important, and also checking periodically with the credit bureau agencies to see if there’s been credit checks that have been completed against you that weren’t authorized. And also trying to develop a good working relationship with your financial institution to put some flags or concerns that they may have that come in.
In keeping with discourses of responsibilization, consumers are expected to be entrepreneurial, to engage actively in their own risk management in the face of fraud. In particular, consumers are expected to exercise control over their virtual selves by monitoring their credit history and protecting their identity documents and identity information. In addition, market-based forms of insurance are increasingly recommended to consumers and professional groups (Troister 2009). The procurement of insurance signals responsible citizenship by engaging in prudent behavior against the faceless threat of identity crime (see Baker 2002). A release from First Canadian Title, one of the leading title insurance companies in Canada, recently proclaimed, “Since 2009, the fraud-detecting experts in our underwriting department have uncovered indications of potential fraud valued at over $100 million in residential mortgages and real estate transactions.” It continues, “One of the best ways to protect yourself from being a victim of real estate fraud is to purchase a title insurance policy…FCT policy holders have peace of mind, knowing that should their property be subject to fraudulent activity, FCT’s expertise in fraud detection and customer service excellence will ensure they are properly protected.” Insurance becomes a clear choice for prudent consumers, both for its protection and for the peace of mind it purports to offer.

Title insurance is an agreement to indemnify the property owner if a specific title risk causes a loss, exclusive of the source of that loss. Introduced in Canada in 1990, title insurance policies are now ubiquitous in Ontario, having replaced less formal forms of title assurance offered through professional relationships with the real estate bar (see Heimer 2002).


27 Many homes purchased prior to the 1990’s have no such policy.
distributes risks from individuals to aggregates, shifts the financial burden of fraud away from the state and professional associations, improves the perceived quality of mortgage loans through indemnity, and regulates the conveyancing process. Homeowners are encouraged to procure title insurance to protect against the risk of fraud and, indeed, as outlined in Paper 1, title insurance is now a de facto requirement for residential real estate transactions. As one recent victim of title fraud proscribed, “If you've got any equity in [your home] whatsoever, get title insurance because you won't be stuck with legal bills of tens of thousands of dollars in fighting to get your house back” (Lawrence cited in Toneguzzi 2007). Title insurance companies also offer identity theft insurance to consumers of title policies. Another release28 by First Canadian Title states, “First Canadian Title, Canada's leading provider of title insurance, will soon begin offering its title insurance policyholders the option of purchasing protection from the financial and administrative headaches associated with identity theft.” Like identity theft protection services, these insurance polices offer to offset losses and will assist in the restoration of consumer identity (Carter 1997; Marron 2008).

State withdrawal from police and social services prompts citizens to seek alternatives to state assistance through the market (Monahan 2009). However, governments are also the ultimate source of accountability. Their unique capacity to intervene “in order to shift, spread, and reduce the direct impact of risk and uncertainty.” (Ericson and Doyle 2004: 293; Moss 2002) is paramount, particularly where they are an inextricable part of a system defining and enforcing property rights (Anderson and McChesney 2003). For title fraud, both adaptive strategies of prevention and partnership as well as sovereign strategies of direct involvement in crime control

and consumer protection were employed by the state (Garland 2000). The state initiated several far-reaching legislative and regulatory changes, including intervening on behalf of victims of fraud, and the state positioned itself among market alternatives as a primary form of insurance against fraud. These changes ensured both the victim’s title integrity and the integrity of their consumer identity by reducing both the uncertainty and the psychological impact of identity crime.

**Property and Homeownership**

Public expectations for the certainty and security of private property shift responsibility for crime control to the state when both sacrosanct social institutions of homeownership and the associated ideologies of the home invested in the acquisition of real property are violated. State involvement is connected with heightened public awareness of both the title fraud problem and the iniquities faced by victims of fraud, including the legitimate possibility of losing their homes. The undermining of institutions of property and the iniquities faced by victims reconfigure responsibilities for fraud that are otherwise obscured when identity crimes are not disaggregated.

Private property is a precondition for capitalist economies and a central foundation of Western society. Through private property, states develop the legal certainty necessary for exchange and for maximizing social value (Swedberg 2005). Property is also associated with the emergence of political and legal institutions that guarantee liberty. Property promotes stability and constrains state power, legitimates labour, promotes wealth, and enhances an individual’s sense of identity (Carruthers and Ariovich 2004; Pipes 2000). As private property is a precondition for capitalist economies, so too are laws of private property (Swedberg 2005). Law represents a legitimate way to preserve essential elements of capitalist economies, such as conflict resolution and predictability. Government institutions play a important role in defining and enforcing property...
rights, particularly through state legal and social control apparatuses (Anderson and McChesney 2003; North 1990). The state’s role often involves minimizing the risk of property ownership so that markets for the exchange of property can proliferate (Ericson, Doyle, and Barry 2003). Conversely, the attenuation of property rights affects owner’s expectations about asset use and value and, if attenuation remains uncertain or unchecked it can curtail economic performance and limit opportunities (Libecap 2003). Property guarantees are therefore of critical importance for economic growth and social development, and since property is maintained by legal systems it necessarily implicates law and the state. The state specializes in coercion and it is uniquely qualified to ensure compliance with the rules of property.

As a form of private property, residential real estate has become the tenure of choice in contemporary society. The institutionalization of homeownership and the mechanisms and organizations through which to acquire real property have become institutionalized and have been imbued with a range of powerful ideologies. In Canada, nearly 70% of households own their dwelling, the product of a long term trend in rising rates of homeownership (National Household Survey 2011; StatsCan 2007) and one of the highest rates of ownership in Canada in the past century, and worldwide (Marr 2015; Rea, MacKay and LaVasseur 2008). Figure 9 depicts the trajectory of homeownership rates in Canada, which as of 2011 have remained close to 70%.
Figure 9: Homeownership rates for all households, Canada, 1971 to 2006

Sources: Statistics Canada, censuses of population, 1971 to 2006.

This significant evolution of housing tenure during the twentieth century, from predominantly renters to predominantly owners, is due in part to political and economic contexts that catered to the demand for ownership through easier access to insured mortgages. Over time, homeownership has become the normal and preferred tenure of choice in Western society (Gurney 1999; Munro 2007; Ruonavaara 1996). Owner-occupation has become synonymous with homeownership more broadly and is seen to be “natural”, with the corollary that tenures other than ownership do not constitute “homes” (Cowan, O'Mahony, and Cobb 2016). Greater

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29 In Canada, though the development of the Canadian Mortgage and Housing Corporation. “We’re guaranteeing a home for all Canadians in all places”, as one respondent put it.
significance is therefore placed upon ownership, which sits atop the hierarchy of land tenures (Gurney 1999).

Homeownership is one of the most significant investments made by an individual. It leads to the accrual of wealth over time, it affects investments, consumption, and savings decisions, and it is significant for retirement considerations. It is also a key consideration for families with children and, as an alienable asset, can be liquidated later in life for retirement incomes and other needs (Hou 2010). The emphasis on private ownership reflects a market logic of consumer choice, self-reliance, and responsibility (Jarvis 2008). Prudent and responsible citizens engage in asset-based welfare (Ronald and Doling 2012) by investing in the home as a source of equity, substituting private property for collective social security. As an asset and important source of wealth, the home can be used to secure future wellbeing. As some researchers have observed,

“…governments of advanced capitalist countries such as Britain, Australia, Canada and New Zealand have actively promoted the conflation of house, home and family as part of a broader ideological agenda aimed at increasing economic efficiency and growth. These governments have attempted to shift the burden of responsibility for citizens’ welfare away from the state and its institutions on to the home and nuclear family” (Mallett 2004: 66).

Homeowners are thus characterized as active citizens carrying out the expectations of good citizenship through responsible conduct, prudence, and future investment for the uncertainty of retirement or the welfare of children (Cowen et. al. 2016). Homeownership is therefore valorized as a natural or preferred tenure imbued with associated advantages such as notions of independence, autonomy, and financial security (Flint 2003). Ownership tenure is also replete with moral codes imbuing homeownership with qualities of “goodness”, “rightness”, “respect” and “stability”, and associating it with superior types of citizenship (Duncan 1981; Gurney 1999;
King 1996; Ronald 2007). In contrast, those unwilling or unable to participate in normalized acts of consumption are recast as flawed consumers (for comparisons between renters and owners, see Balakrishnan and Wu 1992).

In addition to constructions of responsible citizenship through financial security, stability, autonomy, and moral superiority, the acquisition of real property is imbued with powerful ideologies that have emotional and psychological significance (Cowen et. al. 2016). Housing tenure preferences, and the technical and political manifestation of those preferences, are couched within and reinforced by an ideology of the home (Ruonavaara 1996). Existential, phenomenological, and ontological notions of identity, independence, privacy, stability, security, control, relaxation, and status infuse the acquisition of real property (Ronald 2008). For example, in a survey of renters and homeowners Saunders (1990) found that home ownership (but not renting) provided a sense of independence, autonomy, relaxation, financial stability, and ontological security. Beyond materiality or shelter, “home”, particularly as it is tied to ownership tenure, becomes a concept that is invested with a range of ideas including safety, comfort, belonging, permanence, community, status, and security (Balakrishnan and Wu 1992; Cowen et. al. 2016; Dupuis and Thorns 1998; Gurney 1999; Saunders 1986; Ronald 2007; Parsell 2012; cf. Benjamin and Stea 1995). Understanding the emotional and psychological investment in the concept of home is important for understanding the immediacy of state responses to title fraud.

**The Active State**

Government responses to title fraud are linked intrinsically with public expectations around the certainty and security of private property, and with the violation of both sacrosanct social institutions of homeownership and the associated ideologies of the home invested in the acquisition of real property. The importance of private property and the government’s role in
securing the certainty of property rights had been explicated, and so too has the institutional importance of homeownership and the central ideologies that elevate and reinforce ownership tenure. The importance of home ideologies – security, stability, status, safety, and others – is linked to the social reaction to title fraud through heightened public awareness of the title fraud problem and the iniquities faced by victims of fraud. A growing public awareness about title fraud, more specifically the insidiousness of the crime and the iniquity of state and legal redress, generated significant public concern. Media amplification of the risk of fraud generated a collective interpretation of the problem that implored organized attention (Jasanoff 2005; Kasperson, Kasperson, Pidgeon, and Slovic 2003; McRobbie and Thornton 1995). The risk of title fraud was thus elevated to a position of prominence that outpaced its quantifiable frequency as a crime (see Douglas and Wildavsky 1982). As the product of specific economic, social, and institutional arrangements, title fraud embodies certain cultural and institutional values like the normalization of homeownership and the acquisition of wealth, but also cultural and institutional fears that undermine values of security, normalcy, and safety, and which elevate title fraud to the status of social problem (Douglas 1985; Douglas and Wildavsky 1982). Title fraud generates such attention because it draws upon ingrained fears of insecurity and victimization that accompany the destabilization of a vaunted social institution, particularly where forms of redress appear unjust.

The undercutting of foundational social institutions of private property, the violation of institutions of home ownership, and the destabilization of foundational ideologies of the home, have altogether contributed to state responses to title fraud. The politics of crime control are socially and culturally conditioned, and certain preconditions, if present, will magnify the probability that certain crime control policies will manifest. Garland (2000:353) states that scholars would be mistaken to infer that mass public support for certain crime control policies
“can be conjured up from nothing, or that newspapers and television can create and sustain a mass audience for crime stories without certain social and psychological conditions being already in place.” He asserts that support for and expectations of state involvement require the preexistence of catalyzing social and psychological conditions (Garland 2000).

The foundational importance of institutions of private property and homeownership, and the violation of these institutions through title fraud, produces a visceral emotional public and political response to the crime. Economic growth and political stability rest upon legal and government institutions that provide firm guarantees of property rights (Anderson and McChesney 2003; Pipes 2000). Property guarantees are therefore of critical importance, and states have historically used legal and control elements to enforce these guarantees. Moreover, property law must not only contend with the materiality of the home and guarantees of title, but also the emotion attachments occupants have to their homes and their corresponding psychological, ideological, and institutional significance (Pipes 2000). Outlined here are the conditions for government involvement in the redress of title fraud victimization. While the state has otherwise retreated from its obligation to victims of identity theft more broadly, and while the public may have normalized the absence of state intervention for identity theft (Marron 2008; Monahan 2009; Whitson and Haggerty 2008), identity thefts targeting the certainty of homeownership elicit government involvement. The importance of private property for economic, social, political and psychological development in capitalist societies, the economic value of the home, and the powerful ideologies that imbue homeownership with emotional and psychological value beyond the monetary, describe the necessary social and cultural conditions that compel government involvement in particular forms of identity theft. Public expectations for crime control and certainty of ownership couple with state roles in defining and enforcing property rights to stimulate state intervention. The state cannot appear to withdraw from crime
control in some cases (Garland 1996), and failure to respond adequately to crime will result in
the loss of legitimacy. Both the insidiousness of the crime and the iniquity of state and legal
redress generated significant public concern and altered the dynamics of responsibility.

State involvement is both adaptive and sovereign (Garland 2000). On one hand, responses are
preventative and work through civil society to engender responsible routines, extend crime
consciousness, and eliminate opportunities for crime. Private security arrangements and market-
based solutions such as insurance, nonstate agencies coordinating community safety practices,
and public-private partnerships permit the state to retain its traditional functions while assuming
new coordinating and activating roles among the public and among the organizations involved in
crime prevention and redress. On the other hand, in some cases the state must involve itself in
crime control and public safety in more direct ways. Here, public will is influential and public
sensibilities and expectations for state involvement are expressed through state crime control
strategies. As the following section will demonstrate, the social and psychological conditions
linking title fraud with uncertainty in the institutions of private property and homeownership
compelled the state to assume a prominent role in crime control and public assurance through the
amendment of legislation and government repositioning as a primary form of insurance. At the
same time, the state established the conditions for adaptive strategies involving market-based
forms redress that work through civil society to channel the social and financial obligations for
consumer protection and victim redress away from the state.

**Fraud, Law, and State Responses**

**Title Fraud Litigation and Indefeasibility**
Several key cases (see Table 3) are implicated in the legal and public discourse central to title fraud, and ultimately to the government’s decision to facilitate and guarantee consumer protection. The central principle underlying these cases, and which features indirectly in much of the public discourse about fraud, was the doctrine of indefeasibility. The Land Titles system in Ontario is based on a doctrine of indefeasibility\(^\text{30}\) that is undergirded by the mirror, curtain, and insurance principles. The mirror principle states that the title abstract mirrors the actual state of the title; the curtain principle states that any instruments existing prior to the abstract are not relevant because one does not need to look beyond the metaphorical curtain of the abstract; and the insurance principle states that any problems with title are to be compensated by the state through a Land Titles Assurance Fund. Indefeasibility as a legal principle determines who bears the loss in cases of fraud. Brian Bucknall (2008), a prominent lawyer and expert in real estate, observes that the tension in recent cases of fraud is between the claims of a homeowner and the claims of a lender or purchaser. In what he calls the “paradox of certainty”, Bucknall (2008: 8) interrogates the intention of the law around indefeasibility,

If a statutory regime authorized by the province validates a title that would otherwise be fraudulent and void should the province accept the consequence of that validation and compensate an innocent party who has lost title?...Is the title of the legal owner to be made uncertain in order to give certainty of title to a party innocently taking from a fraudster?

\(^{30}\) Indefeasibility refers to title in property that cannot be defeated or made void. See Korven 2012 for a nuanced discussion of indefeasibility.
Indeed, a litigation lawyer observing the contest between owners and lenders adds: “You are balancing the interest of two innocent\textsuperscript{31} parties who have both been victimized by different aspects of the same fraud.” Siebrasse (2003: 5) further adds, “Fraud on the registry involves a contest between two innocent parties: the original owner of the property, and the innocent party who purchased or lent money in reasonable reliance on the register which showed the fraudster as the owner.” In other words, fraud creates an arena in which occurs a contest between parties possessing no foreknowledge of the fraud: the innocent owner, the innocent lender, and the innocent purchaser. Land titles systems typically award the property to those who relied on the register, usually the bank, while the homeowner is entitled only to financial compensation. As Siebrasse (2003: 5) again notes, “This means that in a land titles system (unlike a document registration system) it is possible for a homeowner to discover one day that she is no longer the legal owner of the house she lives in, even though she was not negligent or careless in any way.”

A lawyer further explains,

So, in theory, it doesn’t matter, you know, as long as you have a proper compensation system. Okay, so they lose their house, they get money. You got to try to protect the title system. You want people to rely on the title system. You’re checking between that innocent purchaser who just bought the home versus the real owner. You can pick and choose. They’re both innocent. You just draw a line and pay one or the other. (emphasis added)

Innocent parties, those without foreknowledge of the fraud, will thus be compensated for their loss through its monetization under an assurance regime provided through the Land Titles Act.

\textsuperscript{31} The term “innocent” is legal parlance describing actors with no foreknowledge of the fraud. This characterization does not, however, denote the absence of responsibility. As we shall see, even “innocent” parties can be made to bear responsibility for fraud.
A solution to fraud is predicated on answering the question of indefeasibility\textsuperscript{32}. Recent case law grappled with the problem of indefeasibility, at the core of which was the allocation of fraud risks through an interpretation of the Land Titles Act, an interpretation that was fraught with contradictions between sections outlining the validity of registered documents compared to fraudulently registered documents. A leader in the legal profession outlines the contradictions,

The Act said if it would have been a fraud before land titles came in, it’s still a fraud. So if you wouldn’t have got title in a registry system, you don’t get title in a land title system. But then there’s another rule that says, documents registered on title are effective in accordance with their terms. So if a fraudster has registered a transfer, then that transfer is effective to give the fraudster title. That should offset the fraud stuff. So there was a battle between these two sections.

Bucknall (2008: 12) summarizes the specific sections of the Land Titles Act that express these problematic contradictions:

How can s. 155 (a document which would be fraudulent and void when unregistered acquires no additional validity through registration) be squared with s. 66 (documents signed by "a registered owner" confer on the grantee a right to be registered as the new owner) and s. 78 (registered documents are to be effective in accordance with their "nature and intent")? Can a forged or fraudulent document, which would be invalid under s. 155, be sufficient to create a new "registered owner" under s. 66 and be treated as valid under s. 78?

\textsuperscript{32} Ross Judge. Real Property, Fraud and the Land Titles Act.  
http://www.weilers.ca/articles/content/blog/article/real-property-fraud-and-the-land-titles-act/c/7
Table 3 summarizes the key cases and outlines the ways in which indefeasibility was interpreted. The following case law is both the legal arena through which courts attempted to establish which doctrine of indefeasibility prevailed in Ontario, and the cases that inflamed public sentiment and catalyzed significant public reaction and government response.

Table 3: Prominent Real Estate Fraud Cases and Indefeasibility Outcomes

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
<th>Ruling</th>
<th>Indefeasibility</th>
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Sells the property, with the assistance of an agent, to the agent’s teenage daughters.  
Mortgage for nearly $90,000 acquired from a lender. | Fraud conveys no title to Augier.  
Agent’s daughters possess no interest in the land.  
Durrani retains freehold, but interest of the bank is upheld and mortgage is valid.  
Deferred to Land Title Assurance Fund. Owner saddled with mortgage and must access the Fund to erase debt. | Deferred |
| **Household Realty v. Chan and Liu**  
**CIBC v. Chan (2005)** | Chan incurred gambling debts while her husband, Liu, worked out of country.  
Chan financed debts by forging a power of attorney and securing $350,000 in mortgages.  
Liu argued that mortgages were unenforceable due to fraud. | Court of Appeal ruled that a fraudulently signed mortgage or deed was valid and enforceable against an innocent homeowner.  
Owner responsible for mortgage debt. | Immediate |
| **Rabi v. Rosu (2006)** | Identity thieves impersonated Rabi and sold the condo to Rosu.  
Rosu secured a mortgage for $250,000. | Fraudulent transfer to Rosu set aside.  
Placed obligation for due diligence on intermediate owner (bank).  
Bank does not acquire interest in the property and absorbs the loss. | Deferred |
| **Lawrence v. Wright (2007)** | Identity thieves pose as Lawrence and use fraud and forgery to sell her house to an accomplice, Wright.  
Wright acquires a $300,000 | Fraudulent transfer to Wright set aside.  
Trial judge rules that mortgage is valid and bank has interest in the property | Double Deferred? (Carter, Holder, and Smiley 2011) |
<table>
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<tr>
<th><strong>Revisedky v. Meleknia (2007)</strong></th>
<th>Fraudsters renting the property used identity theft and forged a power of attorney. Sold the property to Meleknia, an innocent purchaser, for $450,000.</th>
<th>Meleknia concedes claim to the property. Court rules that bank had an opportunity to prevent fraud and did not exercise diligence, therefore loses interest in the property. Interest transfers from owner through two innocent parties (bank and Meleknia) but only owner’s interest is recognized.</th>
</tr>
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<tbody>
<tr>
<td><strong>Deferred Plus? (Silverstein in O’Connor 2009)</strong></td>
<td>Court of Appeal rules that intermediate owner (bank) did not exercise diligence and therefore their interest is set aside. Overturns Chan. Province of Ontario had intervener status in this case, and the court accepted their position.</td>
<td>Double Deferred Plus? (Carter, Holder, and Smiley 2011)</td>
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Two principles attempt to regulate these contradictions outlined by Bucknall and others: immediate indefeasibility and deferred indefeasibility. Under immediate indefeasibility a mortgage or deed is valid once it is registered, even if it was registered through a fraud or forgery. Thus, immediate registration of the mortgage or deed “cures” it of the defect of fraud or forgery and makes it legally enforceable. Immediate indefeasibility protects the land titles system. As the lawyer above stated, “You want people to rely on the title system”, and reliability is secured through the mirror and curtain principles such that titles can be relied upon without having to look beyond them, even if the title was fraudulently transferred. In those cases, the insurance principle is meant to compensate victims for losses associated with their reliance upon the title system. Under deferred indefeasibility, a title is not valid if it is forged, and title is restored to the original owner (Carter, Holder, and Smiley 2011). In other words, the act of
immediate registration does not make the title valid. Instead, it must be deferred by passing through an innocent purchaser before it can be considered valid if it was discovered to be a fraud or forgery. A fraudulent title is invalid if it is registered, but it could form the foundation of a legitimate chain of title if it passes through (deferred through) an innocent purchaser some time in the future. In the case of fraud occurring under immediate indefeasibility, between an innocent owner and an innocent purchaser the purchaser is awarded title to the home while the owner is entitled to financial compensation through the Land Titles Assurance Fund. In a system of deferred indefeasibility, where the innocent owner retains title to their home but the lender’s interest in the land is valid, the innocent owner is still obligated to pay the debt to the lender and must access the Fund to repay that debt (Siebrasse 2004).

**Lawrence and the State**

Public and political outrage was incited by the apparent ease with which the institution of homeownership could be undermined and the inadequate recourse available to victims (Aaron 2006e; Silverstein 2006; Troister 2009), which ultimately lead to a series of far-reaching reforms enacted by the government. Two central responses include the government’s interjection in title fraud litigation to influence legal outcomes, and the implementation of the Real Estate Fraud Action Plan, including the passage of Bill 152. Pressure to undertake corrective action was so powerful that the state intervened in *Lawrence v. Maple Trust* in order to rectify the problems of immediate and deferred indefeasibility. A key Ministry of Government Services representative explains,

…the government intervened on the Lawrence case. Even though there was great hoorah over Lawrence winning her appeal it was actually the governments decision and position that was accepted. Lawrence’s position was not accepted. However, the net effect was
that we were there supporting her, we just have a different view of what the legislation should be interpreted as, which was the traditional view and the court accepted that. So we intervened on that and some other cases, but that was one that got the press profile, we passed the legislation.

In the Court of Appeal Decision for *Lawrence*, Lawrence’s position\(^{33}\) was that only the true owner can grant interest in the property and that any other transactions arising from fraud are void. The bank’s position was based on *Chan*, where the registration of a mortgage without the bank’s knowledge of a fraud made it immediately indefeasible and therefore valid. It was, indeed, a contest between two parties – an innocent but defrauded owner, and a lender with no knowledge of the fraud. The Province of Ontario had intervener status and their position was based on deferred indefeasibility. The government argued that there were three classes of parties: the original owner; the intermediate owner who dealt with the party responsible for fraud; and the deferred owner, an innocent purchaser with no foreknowledge of the fraud who takes interest from the intermediate owner. In this position, only the deferred owner can defeat the original owner’s claim to title. The intermediate owner, often the bank who has an opportunity to investigate the transaction and detect the fraud, cannot defeat the homeowner’s interest in the property.

The government’s position in *Lawrence* achieved several explicit and implicit aims. By establishing a system of double deferred indefeasibility in *Lawrence* (Carter, Holder, and Smiley 2011), the Province could reduce its financial obligation to victims. In a system of immediate indefeasibility a title is valid once it is registered. In double deferred indefeasibility it is deferred.

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two rounds: a fraud needs to pass through two innocent people before the title can be considered valid. A lawyer and leader in the profession explains the law:

In the double deferred there has to be two innocent people. So if you dealt with the crook, whether a forgery or not, you lose. So more innocent people lose. More innocent purchasers lose in a double deferred system. More homeowners win. They get to keep their property, which is what Lawrence and Raviczky were complaining about. “We’re going to lose our house. You can’t let this happen.”

A leading lawyer in the bar clarifies the government’s decision to move away from a system of immediate indefeasibility “Better to have immediate indefeasibility if you want to protect the system. But it’s unpleasant because people can lose their homes. And the government has to pay money.” He adds that the government made this decision for economic and emotional reasons. The economic implications concern state obligations to compensate fraud victims through the LTAF in the event of fraud. He further expounds and reiterates his position:

The government didn’t really like immediate indefeasibility because there’ll be more and more claims against them, right, these forgeries. So what the government said, is that if your title comes from a forgery, okay, if it comes from a forgery, and you didn’t rely on the title as an innocent person. You relied on your forged document and therefore we don’t have to give you title. We can take your title away. And that was called deferred indefeasibility, it’s deferred one round.

A system of double deferred indefeasibility reduces the financial obligations of the Province. Immediate indefeasibility protects the integrity of the titles system but compels the state to pay homeowners for their loss. In double deferred indefeasibility, homeowners retain ownership of their home, though purchasers and lenders will become victims. A leading member of the real estate bar comments on the financial incentives: “[the public is] going to blame us and there’s an election coming up, and it actually saves us money too. The more times the real owner gets to
keep the house, the less we have to compensate people.” While the Province could reduce its financial obligations to fraud victims, it was also important to retain legitimacy and to protect homeowners from iniquity.

The Province made decisions for emotional as well as economic reasons, referring in part to the government’s sensitivity to public agitation regarding the unjust nature of the system and the iniquitous outcomes for victims. Deferred indefeasibility not only reduces the Provinces financial obligations but it also secures the rights of homeowners over lenders in contests over fraud risks and responsibility. The amendments that led to a system of double deferred indefeasibility came about, as a leading lawyer proclaims, because “...the government buckled under that pressure and said, yah, we don’t want people losing their houses because that looks like a dumb system and they’re going to blame us.” Responding to the weight of public anxiety, the government was concerned about its legitimacy should they allow homeowners to lose their homes and to have that loss legitimated in law. A rural lawyer comments on the intuitive nature of a legal position that restores title free and clear to original homeowners: “When you read the law you find that intuitively it makes sense and that it needed a big controversial court case to bring it in line with what intuitively you think has to happen.” In a contest between two parties, the emphasis on deferred indefeasibility provides the government with both a diminished financial obligation while simultaneously restoring title to homeowners. Furthermore, it activates nonstate actors and market-based solutions against this form of identity theft and fraud. Both positions are consistent with the government’s subsequent actions.

Recent legal positions adopted by the Province have the effect of obviating state responses by shifting responsibility for fraud to non-state actors. Decisions in Rabi v Rosu, upheld in Lawrence, require that intermediate actors exercise diligence and investigate transactions more
thoroughly than what was currently practiced if they wish to benefit from protections afforded by
the Land Titles Act. Bucknall (2008: 30) comments, “A person taking an interest in land is under
an obligation to be prudent, cautious and even suspicious. If prudence, caution and suspicion are
not brought into play, the protection of registration under the Land Titles Act will not be
available.” Indeed, recent decisions have made it clear that “It is essential for mortgagees to
prudently examine their prospective borrowers’ circumstances to ensure their priority is not
jeopardized by fraud perpetrated on an earlier mortgagee. Mortgagees must also be diligent in
following up on any information they receive after granting a loan to a borrower, even if secured
by a first charge.” (Pinkus 2015: 1). “Prudence” will come to refer to market-based options for
protecting the lender’s interests. As Bucknall (2008) observes, lender’s title insurance is a
prudent option for dealing with losses when compared to the uncertainty of the Land Titles
Assurance Fund.

A subsequent consequence of double deferred indefeasibility is the uncertainty in the application
of law and, ultimately, in the integrity of the register. Bruce McKenna, a prominent real estate
lawyer, argues that the court’s motivation to protect the homeowner rather than the lender may
create further uncertainty in the application of law. The revisions to the Land Titles Act, some of
which shall be discussed below, have not necessarily been consistent with case law, for instance
in Reviczky. He notes (2008), “The amended Land Titles Act might not always produce the most
equitable result, but any reduction in its certainty would be unfortunate.” Confirming this, an
experienced member of the bar explains how the decision in Reviczky creates uncertainty:

Hey, banks can always avoid frauds, if they do enough investigation. Therefore banks
always lose. So that’s the, now we don’t know if the Reviczky rule will survive a
challenge in the court of appeal, but the Reviczky rule moves it that much further to the
point where you could be five innocent parties down the line, and if the court says you
could have avoided the fraud, according to Reviczky they could take away your title. Now I don’t know if Reviczky will survive a challenge in the court of appeal, but it’s out there and it’s a pretty wild case.

These observations are complicated by outstanding questions over faulty reasoning in *Lawrence* with regard to deferred indefeasibility (Harding and Bryan 2009), or to the uncertainty over which version of deferred indefeasibility will be upheld in law (double deferred or double deferred plus indefeasibility (Carter el. al. 2011); deferred indefeasibility plus (Silverstein in O’Connor 2009)). The corollary of legal uncertainty, according to one respondent, was “really defeating the concept of being a mirror and a curtain” because information on the title abstract could be reversed if a fraud or forgery was discovered that did not meet the test of two rounds deferred. This ultimately creates a new layer of system uncertainty as the title system can no longer be relied upon for its accuracy and integrity (Troister 2009).

**Media, Politics, and the Real Estate Fraud Action Plan**

Accounts of title fraud have received significant public attention because of their ability to both fascinate and horrify the public (Aaron 2006). A litigation lawyer with extensive expertise in title fraud reiterated this observation:

Last summer, as I understand it, they did a survey of what were the top stories and news interests. Number two was mortgage fraud. So that was the Toronto Star story ranking of the interest they had that summer, which was like wild. It just shows you how big it was. It has huge play. As they say in journalism, the story had legs.

The legal decisions outlined in Table 3 underscored the varied interpretations of case law and of the relevant sections of the Land Title Act. More critically, the accompanying narratives of victimization, of widows and immigrants losing their homes, of innocent people saddle with massive debt and the threat of eviction through no fault of their own, elicited significant public
and political reaction. (Aaron 2006, 2006b, 2006c, 2006d, 2006e; Bucknall 2008; Freed 2007; Levy 2006b; Leyden 2006; Makin 2007; Murphy 2007; Powell 2007; Silverstein 2006; Toneguzzi 2007). O’Connor (2009: 211) observes,

The decision [in CIBC v Chan] was received with widespread dismay. There was a barrage of criticism from legal commentators, the media and the provincial government. Its general thrust was that the ruling exposed homeowners to the risk of losing their homes or having them encumbered by forged mortgages at a time when Ontario was experiencing what one judge described as "a serious mortgage-fraud plague". Public concern was heightened by opinion pieces published by the Toronto Star newspaper throughout 2005 and 2006 which highlighted land and mortgage frauds, and demanded legislative reform.

O’Connor (2009) further explains that rulings of immediate indefeasibility, such as Chan, are notable in their inattention to the hardship faced by owners evicted from their homes. One lawyer argues that these decision were not aberrant but were instead a longstanding feature of the law that protects the interests of banks at the expense of homeowners: “It’s just the nature of what our legal system has been about, until it got to be such a public scandal.” Speaking to the significance of the loss of a home, one lawyer exclaimed (Sosnovitch cited in 2006b), “A home, which generally represents the largest monetary investment and always represents the largest emotional item which a person owns, is not comparable to a car or coin collection. The current system by which a buyer can rely on the accuracy of the Land Titles system to know that their deed is valid has to remain intact.” A lawyer and litigator captures the essence of public dismay: “That was the icing on the cake, that not only would you be victimized like this but it would be your problem to correct it, and you would have to go to the land titles assurance fund and hope that you got the money to pay off the mortgage and get your title back.”
Extensive media coverage, in particular of the victims’ stories, had a profound effect on both the scope and shape of the government’s response and also upon legal outcomes. For example, in the case of Susan Lawrence, an investigation by the Toronto Star led the bank to withdraw their claim for possession even though they had a valid and enforceable interest in the property (Aaron 2006e). A lawyer who litigates title fraud cases relates the events:

I mean if you tried to script this for the Star you couldn’t have come up with a better story: widow living in a house for 25 years, gets sold out from under her by somebody impersonating her, how easy it is to do that, how she now has this whopping big mortgage that’s worth what the whole house is worth, and it’s her problem to go and find this out because they’ve got the right to throw her out in the meantime. You know, where could you script a story like that? So, they loved it, and they wrote the shit out of it and then they said are there more cases like this? And I said I’ve got a whole filing cabinet, which one would you like to hear about?

Stories of the victim’s plight amplified the risk of fraud in the eyes of the public and elevated the importance of title fraud to a position of concern and consideration, one that outpaced its quantifiable frequency as a crime (Douglas and Wildavsky 1982; Jasanoff 2005). Stories such as Lawrence, characterized as they are above, embody certain cultural and institutional values like the normalization of homeownership and the acquisition of wealth, but also cultural and institutional fears that undermine values of security, normalcy, and safety, and which elevate title fraud to the status of social problem (Douglas 1985). The same lawyer discusses a similar interaction for title fraud involving condominium owners, making a distinction between ownership tenure and conceptualizations of homeownership (cf. Saunders 1990):

But it’s a condo, they said. Yes, like so what, condo-house. No, no, they said, that’s a whole different constituency of people. People who own condos don’t think of themselves as homeowners, they think of themselves more as glorified tenants, right, like
how could I lose my condo, right? That couldn’t happen to an apartment, right? So, they played that story up and they were right. The people who owned condos were a whole different constituency that got terrified because they thought this only happened to homeowners, and they didn’t think of themselves as homeowners.

Ultimately, he concludes: “If you get a choice between a lawyer and the Star, go for the Star, because it was the publicity that created this case and changed the law. It’s very nice for me to take credit for the legal changes but the substantive changes in the case came about because the editors of the Star just went hysterical with this story.” Indeed, it is was widely acknowledged that the Toronto Star “put real estate fraud, particularly of the Lawrence kind on the front page and in the face of the politicians.” (Troister 2009: 2-2).

Very soon after Lawrence became public the then Minister of Economic Development and Trade, Joseph Cordiano, publically descried the iniquity of a system of redress that further burdens victims with financial hardship while they navigate the fallout from their victimization. Public and political pressure soon compelled similar exclamations from the Minister of Government Services, himself responsible for land titles, and other politicians (Aaron 2006f). From this agitation was launched a private members bill (Bill 136) by opposition MPP Joseph Tascona, the Restore the Deed Act, which proposed a series of amendments to the Land Title system including “no-fraud” indefeasibility that would protect real owners from fraud and from systemic iniquities (Silverstein 2006). More importantly, this proposed Act recommended significant amendments to the Land Titles Assurance Fund, transforming it from a fund of last resort into a fund of first resort and, effectively, turning it into a state-managed insurance fund against fraud (Bucknall 2008).

These initiatives developed rapidly into the Province of Ontario’s Real Estate Fraud Action Plan. A key Ministry representative recalls: “The Ministry introduce the fraud option plan back in the
2006-2007 period where we noticed that there had been an increase in fraudulent activity at that time and a lot of public concern.” Working together with industry stakeholders, including the industry-wide Real Estate Fraud Stakeholder Committee, the government introduced measures to both protect homeowners and combat fraud. As articulated by a Ministry representative, the central impetus of the Plan was to restore victims’ financial health: “We have in place, if you are a victim, processes that are available for you to try to put you back into the position you were before you were victimized.” A key feature of this plan was the passing of the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006* (Bill 152) (Murray 2007b). With its clear emphasis on consumer protection, Bill 152, along with other elements of the Action Plan, instituted a series of wide-ranging changes. First, the government developed new restrictions for accessing the electronic land registration system (Murray 2007, 2008). Access to electronic title transfers was restricted to lawyers, and new criteria were established for licencing, including heightened identification requirements, financial solvency and insurance requirements, and a requirement of “good character.” Second, the government protected homeowners from fraudulent instruments by extending its powers to void them (Murray 2007). Third, the government increased their powers to rectify titles, and to suspend user access to electronic land registration (Murray 2006). This included the ability to “caution” a title, whereby the Province facilitates debt repayment while victims are able to extricate themselves from the proceedings without having to go to court or to await lengthily tribunal decisions or the decisions of other parties involved in the rectification process. A key Ministry representative clarifies:

So, instead of waiting all the time for court cases we can sometimes caution and we try and have a hearing and we’ve going to take this document or that document so that little Mrs. Smith is out of the picture and the rest of us will fight over who’s paying.
Sometimes that works and sometimes we end up in court anyways, but the idea was to speed it up so the victim isn’t left hanging around forever. And that’s worked on a few recently, its’ worked quite well.

Fourth, the government increased the penalty for fraud from a fine of $1,000 to a fine of $50,000 and two years incarceration with the power to impose restitution orders for victims (Murray 2007). Lastly, the Province made the Land Titles Assurance Fund more responsive by transforming it into a fund of first resort and expediting the payment and rectification process for victims (Murray 2007).

Victims of fraud have legal recourse and access to an assurance fund established by the Land Titles Act and controlled by the Province. The Act provides state-backed guarantees of title and, in doing so, also provides a compensatory assurance system guaranteeing the accuracy of titles under the Land Titles system. Under Land Titles, the government of Ontario acts as a guarantor of the state of title as revealed in the title abstract. The compensation fund, the Land Titles Assurance Fund, is provided should any person suffer a loss because the state of the title is incorrect. This Fund provides another measure of security for defects of title and fraud, though the fund was initially limited to one million dollars, can be timely and expensive for victims (Aaron 2006) and, historically, seldom makes payouts (Carter 1997). As established, the Fund was a measure of last resort, to be drawn from after victims have sought compensation from the guilty parties, established that due diligence was exercises by all parties in the transaction, or made claims to private insurance where applicable. It was also difficult to access, and the claims process has been described as “time consuming, expensive, uncertain and tortuous” (Justice Echlin cited in Bucknall 2008: 29). In many of the recent cases, victims of fraud have either been passed over by the Fund or have received inadequate compensation, or the process has taken years to resolve and cost victims tens of thousands of dollars in nonrecoverable legal fees. In
contrast, lenders who financed a forged mortgage have often been fully compensated for their loans and interest (CBC 2002). Furthermore, during this process banks can foreclose at any time, though many refrain from doing so, and with a valid mortgage remaining on title the property is effectively crippled. The owner cannot sell their house, refinance their mortgage, or use their home as equity (Siebrasse 2004).

Recent amendments enacted under Bill 152 have transformed the LTAF into a fund of first resort. Kate Murray, the Director of Titles for the Ministry of Consumer Services, explains the central changes to the Fund: “The LTAF is now a fund of first resort for those innocent individual homeowners not covered under a policy of title insurance. These applicants are no longer required to pursue those responsible for their loss (the fraudsters) through other means prior to being entitled to compensation from the LTAF” (Murray 2012: 2). A Ministry representative comments on the implementation of these changes to the LTAF,

From our perspective we’ve had a huge impact over the last year having to put through legislation and deal with all the issues and we have, because there is a lot of press about it because the title insurers particularly are out speaking to seniors groups, there’s just a whole bunch of other reasons that we have a lot of consumer interest on it. We’ve had a huge spike of interest and we’ve had to staff for that and we’ve obviously had to change our processes so we’ve staffed so that we could meet the demand to get those hearings done within our service standard that’s on our website. So we’ve had an impact.

In opening the Fund the Ontario government has positioned itself as form of insurance against fraud operating in parallel with market-based forms of insurance.

The Action Plan has recast the LTAF into a type of insurance fund operating parallel to market-based forms of insurance such as title insurance. As Bucknall (2008: 41) has commented,
Where residential properties are in question…the Assurance Fund is a fund of first resort. The Assurance Fund has become a type of insurance fund.” Outlined previously in Paper 1, title insurance is ubiquitous in the province and very few titles are conveyed without first obtaining a title insurance policy. While not legally mandated, lenders have made title insurance a de facto requirement for lending mortgages, and they universally obtain lender’s policies for additional protection. When title insurance is in place, individuals will have recourse to their title policy’s indemnity against fraud and its duty to protect and are therefore no longer able to recover from the LTAF. In addition, lenders so protected will also be able to claim against their title insurance policy without traversing the uncertain terrain of case law and the nebulous due diligence requirements of intermediate owners contained within the various models of deferred indefeasibility. As one lawyer observes,

...if it’s a title insured property, the banks will always get paid, because the title insurers cover fraud. And most mortgages now are title insured because of the fraud stuff...so for the government it’s a great thing, right. They don’t have to pay Mr. Reviczky, right. The bank probably has title insurance so the title insurers will have to pay the bank.

However, most homes sold in the early 1990’s or before will not be title insured. LTAF amendments will ensure that, should the individuals owning these homes become victims of fraud, the Fund will be first resort recourse to resolution and compensation. Though, if deferred indefeasibility remains the doctrine supported by case law, the likelihood of a homeowner losing his or her property to fraud will be extremely rare (Bucknall 2008), and with the added layer of protection of title insurance on nearly every contemporary conveyancing transaction, the financial liability for making the LTAF a de facto insurance fund will be minimal for the Province.
Conclusion

This paper set out to explicate two arguments about state responses to identity crime. The first argument asserts that immediate and far-reaching state responses to identity crime are contingent upon the nature of the perceived threat. Scholars of identity theft have argued that a prevailing discourse of responsibilization normalizes the absence of state intervention in the rectification of financial health and the restoration of consumer identity (LoPucki 2001; Marron 2008; Monahan 2009; Whitson and Haggerty 2008). Consumers are expected to engage in care of the virtual self to manage their consumer identity in order to reduce personal and organizational risks while the culpability of lenders, credit agencies, and other organizations for systemic insecurity through the massive agglomeration and transference of consumer data is overlooked (Sovern 2004). This study has demonstrated that broader discourses of responsibilization based on aggregate assessments of identity theft do not adequately disentangle the nuances of the crime, its target, and the relationships between victims, organizations, and the government. While responses to many forms of identity crime, including very serious identity crimes involving medical fraud or tax fraud, remain consistent with the observations of identity theft scholars, title fraud, because of its connection to vaunted social institutions of property and homeownership, provokes very different reactions from the state. The politics of crime control are socially and culturally conditioned (Garland 2000), and support for and expectations of state involvement in title fraud are predicated on the institutional importance of private property and homeownership tenure. The violation of sacrosanct institutions through title fraud, and through iniquities in redress, exposes uncertainties in the acquisition and ownership of property. The catastrophic economic, social, and ideological losses corresponding to title fraud victimization set it apart from other forms of identity theft and thus invert the dialectics of responsibility in neoliberal risk regimes.
Delineated herein are the central theoretical positions on private property, ownership tenure, and ideologies of homeownership that underscore the social and cultural conditions catalysing public reaction and government responses to title fraud. A common theme in the cases of Rabi, Lawrence, Reviczky and others was the ease with which their homes can be taken, the absence of satisfactory recourse, the familiar discourse of responsibilization, and the catastrophic financial and psychological harm caused by fraudulent encumbrances and the subsequent eviction or threat of eviction from the home. These visceral accounts of victimization and injustice resonated with the public in a way not achievable by many other forms of identity crime. That a foundational element of capitalist economies, of liberty and political and economic stability, the crucible of personal wealth and future asset management, and the dwelling place imbued with psychological, ontological, and phenomenological elements of safety, stability, security, identity, and status, could be so easily compromised, and be so impotently veiled in the protections of property and criminal law, resonated significantly with the public and consequently demanded political action.

These cases represent, both in law and in the public realm, what Bucknall (2008) calls the “paradox of certainty”. Is the title of the legal owner made uncertain to protect the certainty of title of an innocent purchaser? Or, does the province accept the consequences of validating fraudulent titles by compensating innocent parties losing title? O’Connor (2009) refers to this problem as bijural inaccuracy. Systems of registered title, such as the Land Titles Act, are bijural - they straddle two bodies of law. One body of law is a positive system in which the state supports the mirror and curtain of title, in effect allowing people to rely on the title and to transact safely under a form of immediate indefeasibility. The other body of law is the ordinary rules of property law. Bijural inaccuracies arise when courts attempt to determine which rules apply to purchasers and lenders when a forgery is registered. The Land Titles Act, with
contradictions between its various sections and the various ruling and new tests introduced through case law, have established uncertainty through bijural inaccuracy. While the public sphere grappled with the problems of uncertainty surrounding title and liens on homeowners, the courts grappled with these uncertainties as they manifested through the principle of indefeasibility.

While other forms of identity theft produce systemic uncertainty in the lives of citizens (Monahan 2009), the economic, social, and psychological problems associated with the paradox of certainty, underscored by the importance of property and homeownership, catalyzed significant government efforts to correct bijural inaccuracies and to similarly satisfy public demands for certainty in conveyancing and ownership. The Province of Ontario assumed an active role in the redress of crime and in consumer protection by intervening in title fraud litigation and by enacting the Real Estate Fraud Action Plan. The Province held intervener status in ongoing legislation and the courts ultimately adopted the Province’s position of what some legal scholars are calling double deferred indefeasibility or deferred indefeasibility plus (Carter et. al. 2011; O’Connor 2009). In addition, through the Action Plan the government not only increased punishments for title fraud and regulated conveyancing activity, but also transformed the Land Titles Assurance Fund into a form of first resort insurance.

Insurance works together with the state to spread the cost of risk and to provide security (Ericson and Doyle 2004). In addition, insurance relieves the state of its obligation to compensate losses it might otherwise be politically compelled to cover (Ericson, Doyle, and Barry 2003). The connection between the state and private insurance forms part of a broader framework promoting discourses of responsibility and self-sufficiency among non-state entities and citizens (Ericson et. al. 2003). In this broader context, at face value, the transformation of the LTAF into a fund of
first resort equal with other forms of insurance protection appears to contradict the trend in responsibilization, as indeed much of the states’ response to title fraud has contradicted the assessment by scholars of the state’s role, or divestment of that role, in regulating and redressing identity theft.

The motivation for the Province, then, was to establish greater legal and social certainty in the laws of property. This risk of crime itself remains abstract and incalculable, a system risk stemming from the productiveness of the market and the advancing pace of lending and conveyancing transactions. In response, case law and assurances were provided that reduced uncertainty for the homeowner, but not for lenders or purchasers. Indeed, public pressure mounting from the violation of sacrosanct institutions of private property and homeownership impelled the state to reduce uncertainty for homeowners and to protect their right to property and ownership. In doing so, the state retained its legitimacy as the provider of the sound legal framework for the institution of property (Ericson et. al. 2003).

This response ironically creates a new paradox of uncertainty. While the state exacts more expressive criminal sanctions, levels of regulation, and more direct access to the LTAF, it will also, over time, divest itself of financial obligation to fraud victims. The establishment of double deferred indefeasibility through the government’s position in Lawrence will result in fewer homeowners losing title to their home and subsequently accessing government compensation. In addition, the tests of due diligence introduced into the law restrict a lender’s access to the LTAF for their interests in the property. In the legal contest between parties - the innocent owner, the innocent lender, and the innocent purchaser - it appears that recent decisions have overwhelmingly favoured the homeowner while restricting the ability of lenders to claim against the Fund. In addition, McKenna (2007) observes that insurers are not permitted to benefit from
the LTAF in the way that other organization and individuals are able. Bill 152 states that claims against the fund cannot be made by title insurance companies or as a subrogated claim by insurers.

Responses to title fraud are both sovereign and adaptive (Garland 2000). The sovereign power of the state is exercised to reinforce its legitimacy as the upholder of institutions of property and homeownership. But the state also activates civil organizations and directs the public to seek market-based solutions to the fraud problem. Altogether, these strategies have established a new paradox of certainty. Recent changes in law beginning with Lawrence, particularly the decisions about indefeasibility, have greatly reduced the reliability and certainty of the Land Title system. As one respondent observed, if the court determines that a fraud could have been avoided then title could potentially be removed even after passing through the hands of multiple owners. Such uncertainty renders land titles unreliable. However, the deleterious effects of this uncertainty can be mitigated partially through the provision of title insurance or through the LTAF. Both the rulings on indefeasibility and the prevalence of title insurance reduce the probability that victims will access that LTAF, especially over time. However, denying insurers the opportunity to access the LTAF increases their exposure to risk, which may ultimately lead to the denial of claims and more extensive governance of professionals and lenders to reduce the risk of fraud (Ericson et. al. 2003; McKenna 2007). As the weight of fraud risks shifts to private insurers they may be increasingly more reluctant to insure against it.

Responsibility for fraud and for consumer protection has been reconfigured through the tribulations of title fraud in Ontario. On the surface, cases like Susan Lawrence exemplify the official indifference to the plight of identity theft victims. Lawrence was ultimately responsible for seeking reparation and for rectifying her plight, and endured years of legal wrangling before
her case was resolved. Below the surface, however, responsibility for fraud was reconfigured through both legal and legislative arenas. Shifts in the meaning of indefeasibility carved out through legal decisions on title fraud coupled with the Province’s intervention in *Lawrence* and the enactment of Bill 152 have shifted responsibility to state and nonstate actors. The concomitant rise of title insurance in the province and legal precedent compelling greater levels of diligence from lenders has realigned responsibility for fraud with the state and, ultimately, with nonstate actors.

Altogether, government responses to identity crime, rather than flowing from a unified discourse of responsibilization, are instead contingent upon the nature of the perceived threat of identity theft and fraud. Understanding the relationship between citizens and states and understanding public expectations for crime control in relation to identity crime must take into account the institutional, social, and cultural context of the crime. These contexts reveal nuances in relationships and responses that problematize the treatment of identity theft as a monolithic phenomenon. The aggregation of identity crimes obscures different understanding of responsibility and protection. Disaggregating this most egregious form of identity theft allows for better theorization of responsibility and crime control. The case of title fraud reveals how the institutional, social, and cultural context can create demands for security and provide the impetus for strong and immediate state responses that are not captured by monolithic accounts of identity theft and fraud. Exploring the contexts of specific forms of identity crime can therefore reveal significant nuances in state crime control policies and help scholars to pinpoint the conditions capable of invoking direct state intervention in crime and redress.
References


Aaron, Bob. 2006e. “House title thieves can wreak havoc: Fraudulently signed mortgage can be valid, court rules.” *Toronto Star*, April 22.


McKenna, Bruce. 2007. Impact of Recent Ontario Changes on Title Insurance


Murphy, Jim. 2007. “Preventing mortgage fraud.” *National Post*,


Society of Upper Canada, Continuing Legal Education.


Powell, Betsy. 2007. “Mortgage fraud victim gets home back.” *Toronto Star,*


Conclusion:

The Case for Expanding Organizational Approaches for the Study of Crime

This study examined the role of institutional and organizational changes to professional conflict between the legal profession and American title insurance companies, how these antecedent organizational shifts incubate the risk of fraud in routine patterns of conveyancing and lending activity, and how the state, confronted with the reputational risk of neglecting the violation of vaunted institutions, responds to fraud. Collectively, this research elucidates the role of the institutional environment in creating opportunities for crime through the incubation of fraud risks, and for compelling atypical state responses to forms of identity crime like title fraud.

This research seeks to explain the emergence of fraud through field-level processes that create opportunities for crime, and the conditions under which state involvement in legal redress and consumer protection is compelled. This effort is undertaken through three interrelated projects. The first project explores the professional conflict over conveyancing and refinancing tasks between the real estate bar in Ontario, Canada, and American-based title insurance companies. This paper analyses the deinstitutionalization process that facilitated competition between the real estate bar and title insurance companies and emphasized the link between professional competition and institutional shifts, in the particular the formation of and contestation over institutional logics set within the context of the expansion of distributed risk systems from professional forms of assurance to aggregates forms of insurance. Title insurers capitalized on normative shifts in conveyancing by offering services that synchronized with emerging institutional logics and appealed to powerful constituents such as lenders. In response, the bar engaged in theorizations of change to ameliorate the contradictions in prevailing institutional logics. The bar employed rhetorical strategies espousing trustee professionalism by
demonstrating the interconnection between their roles as conveyancing technician, notary, fiduciary, and custodian of the land title system. This paper argues that less powerful segments of a profession are more open to competition and exert less control over the diffusion of new norms and practices within the field. Professional segments with weak subjective jurisdiction over technical aspects of work will compensate by drawing attention to the trustee roles that have become culturally and publicly synonymous with their service as professionals. Overall, this paper advanced the study of professional segments in the legal profession. Segments often share work activities, interest, values, cultures, associations, and institutions distinct from the wider profession, and which often operate among systems or fields of organizations and occupations not shared with other members of the profession. They also compete for the power to define and interpret institutions and for control over markets that are idiosyncratic to their practice area.

The second project builds upon this framework of institutional change and the field of organizations and occupations distinct to real estate. This paper argues that the risk of fraud is situated in routine patterns of day-to-day conveyancing and lending activity. Focusing on field-level processes of real estate conveyancing, this paper situates fraud within broader institutional and environmental shifts that give rise to new opportunities for fraud incubated in routine patterns of activity that encompass several professional and organizational constituents. The analysis demonstrates that institutional and organizational changes play an important part in creating opportunity structures for fraud, and organizational theories of institutionalism, situated action, risk incubation, and routine activities provide a foundation for tracing how opportunities emerge and are exploited within organizational fields. The conversion to Land Titles and the introduction of electronic land registration provided heightened levels of security through technological advances and state-backed guarantees of title, and greatly expedited the conveyancing process by rationalizing the work of title searchers and lawyers. Professional
competition and the ascendancy and spread of title insurance in the industry further streamlined the process and provided additional security through underwriting and risk reduction. Intense competition and emerging market logics have commoditized the role of lawyers and lenders, perpetuated volume transactions, and catalyzed cost cutting efforts by professional and occupational groups. These changes incubate the risk of fraud in routine patterns of day-to-day conveyancing activity by removing the human element of guardianship and the requisite credible oversight through interorganizational diligence. Once incubated in the routine activities of conveyancing, the risk for exposure to fraud can be triggered by exogenous threats. Criminals employing identity theft have taken advantage not only of automated systems but also of the absence of guardianship and diligence throughout the conveyancing process to perpetrate fraud. The insertion of false identity into the process places all parties involved in the transaction at risk for exposure. Inadequate system-wide diligence and high quality forgeries allow these illegitimate documents to permeate legitimate business transactions by exposing the weak links of an impersonal system.

The third project continues the focus on the field of real estate, concentrating on field-level responses to fraud by the government. While the first paper explores the professional conflict over conveyancing and refinancing tasks, and the second paper identifies how these changes become the antecedent conditions explaining fraud, the third paper situates the government’s response to fraud within the context of these field-level shifts replete with new forms of market- and insurance-based fraud protection. This paper argues that immediate and far-reaching state responses to identity crime are contingent upon the nature of the perceived threat. Consumers are expected to engage in the “care of the virtual self” – to manage their consumer identity and manipulate their environment and personal behaviour to reduce personal and organizational risks from the everyday routines of life that create opportunities for crime. This study demonstrates
that broader discourses of responsibilization based on aggregate assessments of identity theft do not adequately disentangle the nuances of the crime, its target, and the relationships between victims, organizations, and the government. While responses to many forms of identity crime remain consistent with the observations of identity theft scholars, title fraud, because of its connection to vaunted social institutions of property and homeownership, provokes very different reactions from the state. The politics of crime control are socially and culturally conditioned, and support for and expectations of state involvement in title fraud are predicated on the institutional importance of private property and homeownership tenure. This project also demonstrates the sovereign and adaptive responses to fraud. The sovereign power of the state is exercised to reinforce its legitimacy as the upholder of institutions of property and homeownership. But the state also activates civil organizations and directs the public to seek market-based solutions to the fraud problem. These strategies have established a new paradox of certainty by reducing the long-term reliability and certainty of the Land Title system. Disaggregating title fraud from other forms of identity theft allows for better theorization of responsibility and crime control and the case of title fraud reveals how the institutional, social, and cultural context can create demands for security and provide the impetus for strong and immediate state responses that are not captured by monolithic accounts of identity theft and fraud.

Altogether, these three papers elucidate the role of the institutional environment in creating opportunities for crime through the incubation of fraud risks, and for compelling atypical state responses to forms of identity crime like title fraud. Two central themes of situated action and organizational risk permeate these projects and underscore the importance of organizational theories for explicating the broader shifts, logics, routines, and normative behaviours that create fraud risks within the organizational field of lending and conveyancing. First, situated action
draws attention to the importance of the institutional and organizational environment for understanding phenomena. Technological, legal, and normative shifts alter the institutional landscape of conveyancing and, in doing so, create the organizational antecedents for title fraud. Broader institutional norms, particularly those around property and homeownership, also influence how state actors respond to particular forms of identity crime. Support for political responses to crime derives from culturally conditioned sources, and the deeply ingrained institutionalization of land tenure and homeownership provide the cultural conditioning to rally public attention and to generate significant state involvement in crime control and victim reparation.

Second, organizational risk manifests in the experience and management of risk throughout an organizational field. The expansion of distributed risk systems from individuals to aggregates inform how risks associated with real estate conveyancing have shifted from professional relationships to aggregate risk management through insurance. Moreover, such changes combine with broader shifts in the organizational field subsequently producing new fraud risk and opportunities embedded in the routine patterns of conveyancing and lending. How these risks are perceived, particularly the social, cultural, and psychological conditions underpinning private property and homeownership, shape the attribution of responsibility and the politics of crime control. Overall, through the case of title fraud in Ontario these three papers explain crime and the responses to it through the elucidation of the ways in which organizational and institutional environments influence both criminal opportunities and the responses to crime risks.
Appendices

Appendix A: List of Documents


Aaron, Bob. 2001. “What if your house was sold out from under you?” Toronto Star, January 1.

Aaron, Bob. 2001. “What if Ontario residents don't have proper title to their lands?” Toronto Star, April 21.


Buchmayer, Douglas. 1997. “Title insurance solves a problem we don’t even have.” Ottawa Citizen, April 12, I8.


FinCEN. 2009. *Mortgage Loan Fraud Connections with Other Financial Crime: An Evaluation of Suspicious Activity Reports Files by Money Service Businesses, Securities and Futures Firms, Insurance Companies and Casinos*. Office of Law Enforcement Support:


Leal, James and Maurizio Romanin. 2002. *Interim Report to the Professional Development and Competence Committee*. LSUC and OBA Joint Committee on Electronic Registration of Title Documents.


McKenna, Bruce. 2006. “Real Estate Title Fraud – Is Title Insurance the Answer?” *Real Estate Brief*, August: 1-4. Lang Michener LLP.


Middlemiss, Jim. 2007. “Fighting the centralization tide.”
http://www.canadianlawyermag.com/Fighting-the-centralization-tide


Ministry of Consumer and Business Services. 2002. Land Titles Conversion Qualifies (LTCQ) to Land Titles Absolute Plus (LT+): Client Guide. Registration Division, Title and


Murphy, Jim. 2006.[letter to Hon. Ty Lund, Minister of Government Services, regarding the Final Report of the Advisory Committee on Mortgage Fraud.]February 8.

Murphy, Jim. 2007. [letter to Kate Murray, Director of Titles, regarding Access to Land Title Assurance Fund. Canadian Institute of Mortgage Brokers and Lenders]. February 26.


Ontario Land Surveyors. N.d. Title Insurance – An Information Guide.


Pinkus, Jonathan. 2015. “Ontario subsequent mortgagee loses priority for fraudulent prior
discharge.” http://www.dentons.com/en/insights/articles/2015/february/19/ontario-
subsequent-mortgagee-loses-priority-for-fraudulent-prior-discharge

Pinnington, Dan. 2004. “Communication-related issues account for about 38 per cent of real
estate malpractice claims?” LawPRO Magazine, 3(2): 34

Pinnington, Dan. 2004. “Fraud: a reality for all member of the profession.” Briefly Speaking,
30(3): 6-7


Pinnington, Dan. 2009. “Why be concerned about what is happening with claims?” LawPRO

Potts, Robert J. and Mirilyn R. Selznick. 2004. “Flip Fraud Schemes: When all that glitters is

Powell, Betsy. 2007. “Mortgage fraud victim gets home back.” Toronto Star,


Rappaport, Michael. 2008. “Competition bureau’s study draws tepid reaction from legal


Rappaport, Michael. 2009. “The end of lawyers as we know it.” The Lawyers Weekly,
February 27. Retrieved from lawyersweekly.ca.


Canadian Mortgage and Housing Corporation File #6626-19.


Prepared for the Ontario research Network in Electronic Commerce (ORNEC), Identity Theft Research Program.

Squire, Patrick. 2011. [Letter to Hon. Dwight Duncan, Minister of Finance, regarding the Title Insurance Industry Association of Canada’s intention to withdraw its request for a review of Reg 69/07 of the OIA]. December 8.


Stewart Title. Nd. Real Estate Title Fraud. Stewart Title Guaranty Company.


Appendix B: Interview Guides

Legal professionals and regulatory bodies/associations

1. Could you describe for me how the practice of real estate conveyancing has changed over the past several years? How important a change is the introduction of the land titles system? Electronic land registration? Title insurance?

2. How important are the decisions made by lenders to some of the changes you have noted in the practice of real estate conveyancing?

3. Could you describe for me how the role of the real estate bar has changed over the past several years?

4. Have any of these changes noted previously had an impact upon the day-to-day practice of real estate lawyers? Are there any groups doing work that was previously done by lawyers?

5. How would you characterize the role of the real estate bar within the broader legal profession?

6. What are some of the major challenges faced by the real estate bar in Ontario today?

7. Have Bar Associations played a role in the current position of the real estate bar? Has the Law Society?

8. What would you say are the key differences between the present system using title insurance and the previous system involving the solicitor’s opinion?

9. What are the risks involved (to lawyers, clients, lenders, etc.) in each of the respective systems?

10. Do you think that greater security and efficiency have been achieved under the present system, particularly with regards to land titles, electronic registration and title insurance?

11. Has there been a rise in real estate fraud in Ontario?
12. If so, what do you think has lead to this rise in real estate fraud? Are there features of conveyancing that may facilitate fraud?

13. Have you received any instructions in how to combat real estate fraud (from the Law Society, lenders, insurance companies, etc.)?

14. How have organizations, such as lenders, the Law Society, insurance companies, law enforcement officers, etc., responded to fraud?

15. Has there been an integrated approach among various organizations/institutions to combat fraud?

16. How would you assess the effectiveness of the responses to real estate fraud so far?

17. Can you tell me about the roles played by various groups when a fraud is perpetrated?

18. Who is ultimately responsible for creating the fraud problem? Why? Who is ultimately responsible for controlling the fraud problem? Why?

19. What is the process for determining who is responsible for fraud among the groups involved? What is your responsibility?

20. Which party is currently bearing most of the burden of the fraud problem? Which party should be bearing most of the burden?

Title Insurers – private and bar-related

1. Could you tell me about the introduction and expansion of title insurance companies in Ontario? [Can you tell me about the development and introduction of the bar-related title insurance company? Decision-making, key players, rationales?]

2. In what ways has title insurance changed real estate conveyancing in Ontario?

3. Could you tell about some of the challenges faced by title insurers in Ontario in the past and present?
4. Do you think title insurance has had an impact on the role of the real estate bar? [What is the relationship between a bar-related title insurer and the real estate bar?]

5. What kinds of partnerships have title insurers developed with others in the real estate conveyancing industry? (i.e. lenders, mortgage insurers, etc)

6. What would you say are the key differences between the present system using title insurance and the previous system involving the solicitor’s opinion?

7. What are the risks involved (to lawyers, clients, lenders, etc.) in each of the respective systems? [Can you explain the relationship between the deficit, the transaction levy surcharge, and title insurance with regards to the disproportionate number of claims that resulted from real estate transactions?]

8. Do you think that greater security and efficiency have been achieved under the present system, particularly with regards to land titles, electronic registration and title insurance?

9. Has there been a rise in real estate fraud in Ontario?

10. If so, what do you think has lead to this rise in real estate fraud? Are there features of conveyancing that may facilitate fraud?

11. Can you tell me about some of the fraud trends your company has observed? Prevalence, types, etc.

12. Many organizations are reluctant to release fraud statistics. Is there a reason why they might be reluctant (Privacy Act, privacy issues, proprietary issues, etc)?

13. What do you think the impact of fraud has been or will be on real estate conveyancing?

14. Many title insurance policies protect against fraud. Does your organization have a policy that protects against fraud? Can you briefly explain how your policy protects consumers? What about lenders or others? Are there limitations on fraud coverage?

15. How have organizations, such as lenders, the Law Society, insurance companies, law enforcement, etc., responded to fraud?
16. Has there been an integrated approach among various organizations/institutions to combat fraud?

17. How would you assess the effectiveness of the responses to real estate fraud so far?

18. Do criminal prosecutions play a role in deterring fraud or punishing fraudsters? Does your organization investigate possible fraud and, if so, is that information usually communicated to law enforcement?

19. Is there a significant difference between alleged fraud vs. prosecuted fraud – that is, the number of alleged or suspected frauds and the number of frauds that are actually confirmed and/or prosecuted?

20. Can you tell me about the roles played by various groups when a fraud is perpetrated?

21. Who is ultimately responsible for creating the fraud problem? Why? Who is ultimately responsible for controlling the fraud problem? Why?

22. What is the process for determining who is responsible for fraud among the groups involved? What is your responsibility?

23. Which party is currently bearing most of the burden of the fraud problem? Which party should be bearing most of the burden?

Mortgage Insurers

1. Could you briefly describe the role of mortgage insurers (your company) in the real estate conveyancing process? Has this role changed in the last several years?

2. What kinds of partnerships have mortgage insurers developed with others in the real estate conveyancing industry? (i.e. lenders, title insurers, etc)

3. Has there been a rise in real estate fraud in Ontario?

4. If so, what do you think has lead to this rise in mortgage fraud? Are there features of conveyancing that may facilitate fraud?
5. What are some of the trends you have observed in fraud over the last several (i.e. fraud rates over time, losses over time, etc)?

6. What is the scope of the fraud problem overall?

7. What types of mortgage fraud has your organization encountered? Have there been any changes to the types of frauds that are perpetrated?

8. Do you have any information about who perpetrates these frauds (i.e. organized crime, individuals, groups, etc.)?

9. Many organizations do not release fraud statistics. Is there a reason why they might not?

10. What do you think the impact of fraud has been or will be on real estate conveyancing?

11. Many insurance policies protect against fraud. Can you briefly explain whether your policy protects consumers against fraud? What about lenders or others? Are there limitations on fraud coverage?

12. How does your organization respond to fraud?

13. How have organizations, such as lenders, the Law Society, insurance companies, law enforcement, etc., responded to fraud?

14. Has there been an integrated approach among various organizations/institutions to combat fraud?

15. How would you assess the effectiveness of the responses to real estate fraud so far?

16. Do criminal prosecutions play a role in deterring fraud or punishing fraudsters? Does your organization investigate possible fraud and, if so, is that information usually communicated to law enforcement?

17. Is there a significant difference between alleged fraud vs. prosecuted fraud – that is, the number of alleged or suspected frauds and the number of frauds that are actually confirmed and/or prosecuted?
18. Can you tell me about the roles played by various groups when a fraud is perpetrated?

19. Who is ultimately responsible for creating the fraud problem? Why? Who is ultimately responsible for controlling the fraud problem? Why?

20. What is the process for determining who is responsible for fraud among the groups involved? What is your responsibility?

21. Which party is currently bearing most of the burden of the fraud problem? Which party should be bearing most of the burden?

Lenders/brokers

1. Could you briefly describe the role of lenders in the real estate conveyancing process? Has this role changed in the last several years?

2. What kinds of partnerships have lenders developed with others in the real estate conveyancing industry? (i.e. lawyers, title insurers, etc)

3. Has there been a rise in real estate fraud in Ontario?

4. If so, what do you think has lead to this rise in real estate fraud? Are there features of conveyancing that may facilitate fraud?

5. What are some of the trends you have observed in fraud over the last several (i.e. fraud rates over time, losses over time, etc)?

6. What is the scope of the fraud problem overall?

7. What types of fraud has your institution encountered? Have there been any changes to the types of frauds that are perpetrated?

8. Do you have any information about who perpetrates these frauds (i.e. organized crime, individuals, groups, etc.)?

9. Many organizations are reluctant to release fraud statistics. Is there a reason why they might be reluctant?
10. What do you think the impact of fraud has been or will be on real estate conveyancing?

11. Do lenders have any protections against fraud? Are there limitations on this protection?

12. How does your organization respond to fraud?

13. How have organizations, such as the Law Society, insurance companies, law enforcement, etc., responded to fraud?

14. Has there been an integrated approach among various organizations/institutions to combat fraud?

15. How would you assess the effectiveness of the responses to real estate fraud so far?

16. Do criminal prosecutions play a role in deterring fraud or punishing fraudsters? Does your organization investigate possible fraud and, if so, is that information usually communicated to law enforcement?

17. Is there a significant difference between alleged fraud vs. prosecuted fraud – that is, the number of alleged or suspected frauds and the number of frauds that are actually confirmed and/or prosecuted?

18. Can you tell me about the roles played by various groups when a fraud is perpetrated?

19. Who is ultimately responsible for creating the fraud problem? Why? Who is ultimately responsible for controlling the fraud problem? Why?

20. What is the process for determining who is responsible for fraud among the groups involved? What is your responsibility?

21. Which party is currently bearing most of the burden of the fraud problem? Which party should be bearing most of the burden?

**Law enforcement**

1. Has there been a rise in real estate fraud [identity crime] in Ontario?

2. If so, what do you think has lead to this rise in real estate fraud [identity crime]?
3. What are some of the trends you have observed in real estate fraud [identity crime] over the last several?

4. What is the scope of the fraud problem overall? [Is there a link between identity crime and real estate fraud?]

5. What types of fraud have police encountered? Have there been any changes to the types of frauds that are perpetrated?

6. Do you have any information about who perpetrates these frauds (i.e. organized crime, individuals, groups, etc.)?

7. Many organizations are reluctant to release fraud statistics. Is there a reason why they might be reluctant? Does this limit the extent to which police can intervene?

8. What do you think the impact of fraud [identity crime] has been or will be on real estate conveyancing?

9. How do police respond to fraud [identity crime]?

10. How have organizations, such as lenders, insurance companies, etc., responded to fraud [identity crime]? Do they contact police regularly?

11. Has there been an integrated approach among various organizations/institutions to combat fraud [identity crime]?

12. How would you assess the effectiveness of the responses to real estate fraud [identity crime] so far?

13. Do criminal prosecutions play a role in deterring fraud or punishing fraudsters?

14. Is there a significant difference between alleged fraud vs. prosecuted fraud – that is, the number of alleged or suspected frauds and the number of frauds that are actually confirmed and/or prosecuted?

15. Can you tell me about the roles played by various groups when a fraud is perpetrated?
16. Who is ultimately responsible for creating the fraud [identity crime] problem? Why?
   Who is ultimately responsible for controlling the fraud [identity crime] problem? Why?

17. What is the process for determining who is responsible for fraud among the groups involved? What is your responsibility?

18. Which party is currently bearing most of the burden of the fraud [identity crime] problem? Which party should be bearing most of the burden?

Government

1. Could you describe the role of the Ministry of Government Services in real estate conveyancing?

2. Could you describe for me how the practice of real estate conveyancing has changed over the past several years? How important a change is the introduction of the land titles system? Electronic land registration? Title insurance?

3. How important are the decisions made by lenders to some of the changes you have noted in the practice of real estate conveyancing?

4. What would you say are the key differences between the present system using title insurance and the previous system involving the solicitor’s opinion?

5. What are the risks involved (to lawyers, clients, lenders, etc.) in each of the respective systems?

6. Do you think that greater security and efficiency have been achieved under the present system, particularly with regards to land titles, electronic registration and title insurance?

7. Has there been a rise in real estate fraud in Ontario?

8. If so, what do you think has lead to this rise in real estate fraud? Are there features of conveyancing that may facilitate fraud?

9. How have organizations, such as lenders, the Law Society, insurance companies, law officers, etc., responded to fraud?
10. How has the government responded to fraud? (Land Titles Assurance Fund, legislative changes, Bill 152).

11. Has there been an integrated approach among various organizations/institutions to combat fraud?

12. How would you assess the effectiveness of the responses to real estate fraud so far?

13. Can you tell me about the roles played by various groups when a fraud is perpetrated?

14. Who is ultimately responsible for creating the fraud problem? Why? Who is ultimately responsible for controlling the fraud problem? Why?

15. What is the process for determining who is responsible for fraud among the groups involved? What is your responsibility?

16. Which party is currently bearing most of the burden of the fraud problem? Which party should be bearing most of the burden?

Electronic Service Provider

1. Could you explain the role of Teranet in real estate conveyancing?

2. Could you describe for me how the practice of real estate conveyancing has changed over the past several years? How important a change is the introduction of the land titles system? Electronic land registration? Title insurance?

3. Can you describe the Teranet system (i.e. licensing, security, access, operation, etc)

4. What are the risks involved (to lawyers, clients, lenders, etc.) in each of the respective systems?

5. Do you think that greater security and efficiency have been achieved under the present system, particularly with regards to land titles, electronic registration and title insurance?

6. Has there been a rise in real estate fraud in Ontario?
7. If so, what do you think has lead to this rise in real estate fraud? Are there features of conveyancing that may facilitate fraud?

8. How have organizations, such as lenders, the Law Society, insurance companies, law officers, etc., responded to fraud?

9. How has your organization responded to fraud?

10. Have you received any directives from other organizations (i.e. government) as a result of fraud?

11. Has there been an integrated approach among various organizations/institutions to combat fraud?

12. How would you assess the effectiveness of the responses to real estate fraud so far?

13. Can you tell me about the roles played by various groups when a fraud is perpetrated?

14. Who is ultimately responsible for creating the fraud problem? Why? Who is ultimately responsible for controlling the fraud problem? Why?

15. What is the process for determining who is responsible for fraud among the groups involved? What is your responsibility?

16. Which party is currently bearing most of the burden of the fraud problem? Which party should be bearing most of the burden?

Other occupational groups and regulatory bodies

1. Could you describe the role of [your organization/occupation] in real estate conveyancing?

2. Could you describe for me how the practice of real estate conveyancing has changed over the past several years? Has your role changed and, if so, in what ways?

3. How important a change is the introduction of the land titles system? Electronic land registration? Title insurance? New legislation/regulations?
4. How important are the decisions made by lenders to some of the changes you have noted in the practice of real estate conveyancing? Do other groups/factors drive the nature and pace of your work?

5. What would you say are the key differences between the present system using title insurance and the previous system involving the solicitor’s opinion?

6. What are the risks involved (to lawyers, clients, lenders, etc.) in each of the respective systems?

7. Do you think that greater security and efficiency have been achieved under the present system, particularly with regards to land titles, electronic registration and title insurance?

8. Has there been a rise in real estate fraud in Ontario?

9. If so, what do you think has lead to this rise in real estate fraud? Are there features of conveyancing that may facilitate fraud?

10. How have organizations, such as lenders, the Law Society, insurance companies, law officers, etc., responded to fraud?

11. How has [your organization/occupation] responded to fraud?

12. Has there been an integrated approach among various organizations/institutions to combat fraud?

13. How would you assess the effectiveness of the responses to real estate fraud so far?

14. Can you tell me about the roles played by various groups when a fraud is perpetrated?

15. Who is ultimately responsible for creating the fraud problem? Why? Who is ultimately responsible for controlling the fraud problem? Why?

16. What is the process for determining who is responsible for fraud among the groups involved? What is your responsibility?
17. Which party is currently bearing most of the burden of the fraud problem? Which party should be bearing most of the burden?