



## Do You Need Title Insurance?

*By Brian Madigan*

That's a good question. Prior to 1997, there was no commonly available title insurance in Ontario and yet it was the norm in the United States.

### *Solicitor's Opinion*

Traditionally, purchasers sought a title opinion from a solicitor who undertook a search of the title to the property. This included checking the chain of title as well as completing searches to determine if there were any liens or whether the property complied with zoning and building by-laws. The solicitor would express an opinion as to whether the title was "good and marketable". A mortgagee in receipt of this opinion would advance the funds so that the purchase could be completed.

If problems arose in the future with the title, liens, zoning or other matters, it would be necessary for the purchasers to sue their lawyer. First of all, most people are reluctant to sue their lawyers. While they may not like other people's lawyers, they usually like their own. So, if the claim is small, they are unlikely to pursue the matter.

Let's assume that it is a large enough claim to pursue. They will need to retain another lawyer. The second lawyer (a specialist in litigation) will have to establish that the first lawyer was negligent in completing the transaction. This is much easier said than done. The first lawyer will be very reluctant to admit "negligence", after all, one's legal reputation is at stake. So, you will probably find that the matter of negligence is denied and that the claim is being vigorously defended. This time, the solicitors will be retained by the insurers for the Law Society (which provides malpractice insurance coverage). They will have a great deal of expertise in the field. So, the second lawyer will also have to retain a third lawyer as an expert witness, this time one who is a specialist in real estate. This case is not going to be simple!

You may indeed have an excellent case, but unless your case is the legal equivalent of being rear-ended in a car accident, you're fighting an uphill battle. And, you're financing all the costs in the meantime. Further, while all this litigation is going on, the title problem is still unresolved.

For example, if your house is too close to the lot line, you will still have to make application to the Committee of Adjustment for a minor variance. If your eavestrough overhangs your neighbour's property, then you will either have to remove it, or obtain an encroachment agreement from your neighbour. This may cost some money.

Ultimately, you will have to prove that your lawyer's conduct in your case, fell below the proper and acceptable level of service. What if these problems were mentioned by your lawyer, but no one thought that anything would really ever go wrong? The municipality and the neighbour just won't notice. In this case, you've probably accepted the risk. Or, perhaps the lawyer properly explained it, but failed to really talk you into solving the problem at the time. If that "explanation" was the same explanation that is customary, then you are out of luck. There is a problem, the lawyer met the appropriate standard of care, and unfortunately for you, the risk materialized.

### *Title Insurance*

There is another entirely different approach to this same matter. It falls under the discipline of "risk management". Just buy insurance! Whatever the problem, just figure out how likely it is, and pay the appropriate premium. Insurance will take care of the rest.

The first issue is that it doesn't matter whether your lawyer was negligent or not. So, please feel free to call, and both you and your lawyer will sigh in relief when it is determined that you purchased "title insurance".

The next step is to report the claim. You can either do this directly or your lawyer will do so on your behalf. The insurer is looking to find a cost effective solution. If the setback was not sufficient, then they will retain your lawyer or another lawyer to proceed with an application for a minor variance. If it is an encroachment agreement that is required, they will negotiate with your neighbour, pay a sum necessary to secure your neighbour's consent and attend to the payment of your neighbour's legal fees. Another solution may simply be to replace the eavestrough.

You have to remember that your neighbour doesn't have to agree, and the Courts will not force him. But, the insurer will have to offer sufficient funds as an inducement to make it worth his while. Possibly, in some cases, where there is no real solution available, you will be entitled to the difference in value between your property with the problem and your property without it.

Unlike the reaction of your solicitor to an accusation of professional negligence, the title insurer really needs some claims to pay. If nothing ever

went wrong, who would buy insurance? So, they really do want to establish a reasonable track record of claims payments so that everyone will say “you should always buy title insurance”.

Most of the time, nothing goes wrong, but in that less than 1% when it does, you are much better off with the insurance.

### *What’s Covered*

Most title insurance policies cover:

- 1) title problems that could affect the marketability of the title, and
- 2) legal services provided by your lawyer in the transaction.

The policy is issued in the names of the purchasers and the mortgagees. They are all covered as their interests appear. The policy is issued for a one-time premium and affords protection not only to the original purchasers but also their heirs. New purchasers will have to obtain their own policy.

In addition, certain title related issues that are beyond the scope of the usual solicitor’s title opinion are also included, for example fraud, forgery, survey errors and errors made by municipalities and utilities in providing information to lawyers. Further, it covers work orders, access rights and conflicting interests in property.

Another very important feature is that the policy continues in effect. It is not a one-time opinion. If something goes wrong afterwards, you are still covered. What if your neighbour erects a fence over your property line, two years after you buy the property? You don’t have to look for your solicitor’s opinion! Of course, there was nothing there, but, you’re still covered under the title insurance policy. So, post closing events like fraud and new encroachments are covered. So too, are some construction liens. If you simply don’t pay one of your contractors and the contractor registers a lien, then that will not be covered, but if you pay the general contractor and he fails to pay one of his sub-contractors, then that lien will be covered.

The specific “title issues” that are covered would include the following:

- 1) defects in title,
- 2) conflicting interests or ownership of the land,
- 3) mortgages or other encumbrances affecting title,
- 4) the un-marketability of title,
- 5) lack of compliance with restrictive covenants,

- 6) the existence of work orders,
- 7) major encroachments,
- 8) access-related problems,
- 9) absence of a legal right of access,
- 10) errors in rights of way or easements, and
- 11) defects due to tenancies.

There are, of course, other title related matters that are not mentioned. In all cases, you should see the particular wording in the relevant policy.

Aside from the “title issues”, the matter of “legal services” is also covered. This would include errors, omissions or negligence by your lawyer in respect to the following:

- 1) the manner of taking title,
- 2) the implications of taking title in the name of a particular person,
- 3) financial implications of the purchase,
- 4) financial implications of the mortgage,
- 5) Land Transfer tax implications (both its application and calculation),
- 6) Income Tax implications,
- 7) advice regarding the Agreement of Purchase and Sale,
- 8) advice regarding chattels with liens,
- 9) errors and omissions in the statement of adjustments, and
- 10) advice with respect to risks and proposed remedies.

So, just about everything that a lawyer could do wrong is covered. In fact, if there is legal liability at law, then you are covered. You don't need to sue your own lawyer, you just present the claim to the insurer.

The insurer will, in the event of a claim:

- 1) pay all the costs necessary to rectify the problem,
- 2) compensate the purchaser by paying up to the full amount of the insurance policy, and

- 3) pay all of the associated legal costs of defending the matter in Court.

### *What Is Not Covered*

It would be reasonable to assume that some things are not covered. The standard exclusions would mention environmental risks, the purchaser's right to change the use of the property, make certain renovations to the property, native land claims and the risks or problems that the purchaser agreed to assume in the agreement.

These exclusions are reasonable. In fact, for an additional premium the insurer might be persuaded to underwrite some of these additional risks. The point here, is that they will not be covered under the standard policy that it issued to everyone. That would be too expensive! So, delete those risks, and the particular purchasers who might face these specific issues will have to deal with them, either in the agreement, through a solicitor's opinion or through a rider to the title policy.

### *Land Titles Assurance Fund*

This is a fund underwritten by the Province to guarantee the titles to certain properties registered in the Land Titles system. There is a very narrow definition of title. At this moment, most properties are still registered under the Registry system (where no insurance program is in effect), but eventually that will change.

The advantage of the title insurance policy is that it provides an immediate solution and deals with all the associated costs. If at some point in the future, you are reimbursed through the Land Titles Assurance fund, then you would have to remit these funds to your title insurer. They paid you first, and waited months perhaps years for payment.

### *Premium*

Generally, the premiums have been relatively low for the various coverages that are provided. In truth, most of the time nothing goes wrong. Almost all

conveyances go through without a problem. But, the ones that have a problem, usually have a very expensive problem.

The title insurers are professional title underwriters. They know how often things go wrong. Even if there is an identified risk, only rarely does that risk materialize. How often have you seen someone driving very carelessly, but they didn't hit anybody. This basic insurance principle allows the underwriters to ascribe a relatively low premium to the transaction. Also, the acquisition of a policy may eliminate the need to incur certain disbursements, including a new survey. These savings can easily exceed the policy premium.

*Recommendation*

Buy it, it's worth it! Even your lawyer will be happy. Now they know that you won't ever sue them.

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