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A PLACE FOR EVERYTHING AND EVERYTHING IN ITS PLACE

Why title insurance cannot take the place of a survey

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Conduct an internet search for "title insurance in the United States" and you will get tens, if not hundreds, of results for companies offering title insurance throughout the country. Virtually all of these insurance companies stress the importance of making title insurance an integral part of any real estate transaction. Some go so far as to suggest that title insurance eliminates the need for a survey.

Such messages, although not always accurate, are now also being heard north of the border. While the number of title insurers in Canada does not compare with that of our southern neighbour (in Ontario, for example, there are only a handful of title insurers issuing commercial title policies, TitlePLUS, reports indicate that the majority of real estate transactions in certain parts of Canada are title-insured.¹ And internet pages, although in fairness not necessarily from the insurers themselves, abound with the message that where title insurance is obtained, a surveyor of the property is unnecessary.²

If title insurance is here to stay, as appears to be the case, then it is imperative that property owners understand not just what title insurance is, but *what it is not*. In our view, title insurance is not a substitute for a survey prepared by a professional land surveyor.

Title Insurance

Title insurance is a form of insurance that protects a homeowner's interest or title against losses incurred as a result of undetected or unknown title defects for as long as the homeowner owns the home.³ For a one-time premium title insurance insures a homeowner against such things as errors in title registration, encroachments on property, construction liens and lack of vehicular or pedestrian access. It also protects a homeowner against fraud, which is an ever-increasing concern throughout North America.

¹ See "Much Ado About Title Insurance" by Janice and George Mucalov, Vancouver Sun at <http://www.harpergrey.com> where the authors point out that 50% of residential real estate purchases are now title-insured, as opposed to 30% in 2006.

² Canadian insurers of title insurance have actually done fairly well in presenting the pros and cons of title insurance. See, for example, articles on the TitlePLUS website which discuss the limitations on the use of title insurance in real estate transactions at <http://www.titleplus.ca/Lawyers/Art4.asp>

³ See First Canadian Title website at <http://www.firstcanadiantitle.com>

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To be clear, title insurance is an after-the-fact indemnity. It does not purport to guarantee title⁴. Instead, it aims to make good any losses that occur as a result of title defects. In the sameway, title insurance does not reveal any title defects that may exist within a real estate transaction before it is concluded.

Land Survey

In ordinary parlance, the term “survey” is understood to refer to an illustration prepared by a land surveyor that depicts the boundaries of a property. In legal parlance, a “Surveyor’s Real Property Report” consists of not one but two documents: (1) a plan (illustration) showing the physical improvements on the property as well as registered easements in relation to boundary lines and (2) a written report outlining the property’s details. The Surveyor’s Real Property Report is prepared by a qualified land surveyor who actually attends at the property and conducts thorough measurements. He or she also conducts a search of title and registered easements and plans relating to the location of boundaries of the subject property.⁵ If a boundary is unclear, a land surveyor will make inquiries of neighbouring landowners to ascertain the boundary as accurately as possible.

The Surveyor’s Real Property Report is instrumental in advising a would-be purchaser whether a deed accurately reflects the property to be purchased. As one commentator has put it, a survey tells the buyer what he is getting, and more significantly, what he is not getting.⁶ Defects disclosed by an up-to-date survey allow a potential purchaser to consider whether he or she wishes to conclude the transaction. In contrast to title insurance, a land survey is intended to be a before-the-fact investigation designed to prevent future problems.

One author has illustrated the practical differences between title insurance and a Surveyor’s Real Property Report in the following terms: consider the example of a purchaser of a property with a second-floor garage studio. In the course of inquiries, it is discovered that the garage encroaches onto an unopened road allowance. The possibility exists that the municipality may open the roadway and require the encroaching part of the garage to be removed. An insurer may offer “forced removal” coverage. However, this may not be enough for the client whose desire to purchase the property was based largely on the anticipated enjoyment of the studio.⁷

Legal considerations

The fact that title insurance is not a replacement for an up-to-date survey was made abundantly clear by the Ontario Superior Court of Justice in *Syvan Developments Ltd. v. Ontario*⁸. Syvan was a property developer. In 2000 he entered into an agreement of purchase and sale for a commercial property in Oshawa, Ontario. The

4 See Report on Title Insurance in Canada, Miller Thompson at <http://www.alsa.ab.ca/pdf/MemberResources/InternalPolicies/title-insurance.pdf>

5 See “The Surveyor’s Real Property Report” at <http://www.aols.org.ca>

6 “Make land survey part of any deal” by Bob Aaron in the Toronto Star, October 14, 2006 obtainable at <http://www.aaron.ca/columns/2006-10-14.htm>

7 See extract form “Residential Title Insurance” by David R. Currie, at <http://www.titleplus.ca/Lawyers/Art4.asp>

8 [2006] O.J. No. 3765



agreement of purchase and sale described the property as including a right-of-way that provided access over adjoining lands next to the property being purchased. Although the right of way had existed in the past, it had been expropriated by the City of Oshawa in 1972. Unfortunately, when title to the property was converted from the registry system to the Land Titles system, the right of way was inadvertently included in the property description.

The error with respect to the right of way was not discovered until after the purchase transaction had closed. Syvan successfully claimed indemnity for the error under its policy of title insurance from the First American Title Insurance Company. Syvan and First American then applied to the Director of Titles to determine whether First American had a subrogated right to be compensated out of the Land Titles Assurance Fund, a fund set up to compensate parties for certain financial losses arising from, among other things, errors in the land registration system.

The application to the Director of Titles was denied. Syvan and First American then appealed the Director's decision to the Ontario Superior Court of Justice, again unsuccessfully. The court pointed out that 59(1)(c) of the *Land Titles Act* prohibits recovery from the Fund by a party who has "caused or substantially contributed to the loss by the claimant's act, neglect or default..." It was argued that a prudent developer in Syvan's position would have obtained an up-to-date survey prior to the completion of the transaction. The survey would have disclosed that the right of way no longer existed.

The court agreed:

Title insurance may provide financial protection from the consequence's of a purchaser's failure to exercise what would otherwise be due diligence and, looked at from the standpoint of the purchaser – and of the purchaser's solicitor – it may, in some circumstances be a substitute for the acts of diligence that would otherwise be required of a prudent business person, or of a solicitor acting for such a person. It does not follow that the existence of the insurance should be considered to affect the meaning and application of section 59(1)(c) and what would otherwise be requirements of due diligence under the section. In my opinion, an act or omission that would otherwise be a neglect or default within the meaning of the provision will not cease to be so if it has been insured against.

In other words, a defect is a defect is a defect⁹. While title insurance may indemnify a party from defects in title, it does nothing to guarantee title or cure defects that could have been revealed by the work of a qualified land surveyor. Title insurance is not a substitute for due diligence – the kind of diligence reflected in a proper land survey. Since Syvan acquired no right of way when it purchased the property, no subrogated right could be passed on to First American.

⁹ This point was also made in the recent case of *Bertrand v. Trites*, [2006] O.J. No. 4510 (Ont. S.C.J.). The plaintiffs purchased a property from the defendant Trites. Among other things, the garage built on the property infringed local set-back provisions. The court denied the plaintiffs' claim for compensation on this basis on the grounds that the plaintiffs chose to obtain title insurance but not a land survey prior to the closing: "the plaintiffs elected to take title insurance rather than obtaining a survey to inform themselves. By doing so, they undertook the risk, and sequentially the cost, if necessary, of relocating the barn and garage or obtaining a minor variance."



An additional advantage of a land survey is that it adds another layer of insurance to a real estate transaction. In the rare event that a land survey obtained by the purchaser fails to detect hidden title problems, boundary problems or easements affecting the property, the purchaser (and others affected by the error) may have recourse to the land surveyor's errors and omissions insurance. Title insurance and errors and omissions insurance provide very different forms of protection to property owners.

Conclusions

Title insurance and a Surveyor's Real Property Report are both important parts of a real estate transaction. They serve different functions and each has its place, but it is essential to understand that one is not a replacement for the other. Diligent purchasers of real property (and any property owner who enjoys a peaceful night's sleep) may choose to obtain both title insurance and a land survey before proceeding with a purchase.