

***RESIDENTIAL TITLE INSURANCE
INTRODUCTION***

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RESIDENTIAL TITLE INSURANCE PRIMER

I have been asked to provide a few comments on Residential Title Insurance and to review some of the coverages available and the limitations on coverage. I will speak about the coverages that apply to residential transactions. Finally, I will make some comments on policies available for transactions other than residential transactions. My comments are to be taken as a guide based on the title insurance policy issued by First Canadian Title attached to this paper and my experience working with First Canadian Title. Accept this paper as a guide to what an insurer will typically provide. Most title insurance companies will have similar coverage.

Title insurance protects the Owner's title or rights of ownership and insures that the owners actually own their title free from claims by others. The title insurer will defend the Owner from claims that may impact on the title or marketability of the property.

WHAT ARE THE DIFFERENT TYPES OF TITLE INSURANCE?

Owner Policy - Protects the Property Owner from various title-related losses listed in the insurance policy for as long as the property is owned. An Owner's policy sets out a maximum amount of coverage.

Lender Policy - Protects the lender from losses in the event that the property mortgage is invalid or unenforceable. A lenders policy usually provides coverage in the amount of the mortgage.

When ordering it is important to remember that ordering the Lender policy will not provide any coverage for the Owner. In the past many lawyers ordered lender policies in substitute for a location certificate. The extra policy for the Owner is something that is very cost effective and most insurers only charge an additional nominal fee for the extra policy. It is recommended that both policies be purchased on purchase transactions.

It is also important to recognize when a commercial policy should be ordered rather than residential. I will make a few comments to guide practitioners later in this paper.

A) Home Owner Coverages

Residential Title Insurance policies can insure many different types of structures:

- Houses
- Condominiums
- Cottages
- Rental units
- Vacant land
- Cooperatives
- Leased properties
- Rural properties

I have enclosed a Sample of a Home Owner's Policy issued by First Canadian Title. First Canadian Title has labelled its Home Owner Policy as the "Platinum Policy".

The most common coverages contained in the policy are listed below. I tried to link some of the coverage with the actual clauses in the attached Platinum Policy.

The Covered Risks in this Platinum Policy are:

1. Unmarketable title (s.18)
2. Unknown third party interest to title (s.1)
3. Tax, special assessment or arrears of utilities charges (s.13b)
4. Adverse matters that would have been revealed by an up-to-date survey (s.17b)
5. Document improperly signed, sealed or delivered (s.8)
6. Fraud, forgery, duress, "incompetency," incapacity or impersonation (s.9)
7. After closing, someone claims to have rights affecting your title arising out of fraud or forgery (s.3)
8. Defective registration of document (s.8)
9. No legal right of access to property (s.10)
10. Lien on title because of mortgage (s.13a)
11. Lien on title because of undisclosed condo charges (s.13c)
12. Charges incurred for public utilities supplied to property prior to closing (s.16)
13. Unmarketable lands because of violation of a restriction shown in Schedule B (s.17a)
14. Unmarketable lands because property violates an existing zoning by-law (s.17c)
15. Unmarketable lands because located on conservation area (s.17d)
16. Cannot subsequently sell or refinance lands because lands are unmarketable (s.18)
17. Construction/Mechanics Liens on title for services or material supplied prior to closing (s.19)
18. Others have unregistered rights of possession, contracts under family property laws or dower (s.20)
19. Someone else claims an easement on lands (s.4)
20. Unknown work orders (s.23)
21. Violation of subdivision control legislation (s.21)
22. Owner is forced to fix property (not boundary walls or fences) because violation of restriction shown on Schedule B (s.11)
23. Owner is forced to fix...because violates zoning by-law (s.25a)
24. Owner is forced to fix...because extends onto neighbouring lands (s.25b or s.26 if onto easement)
25. Insured is forced to fix...because lands located on conservation area (s.25c)
26. Insured is forced to fix...because of outstanding violation (s.25d)
27. Insured is forced to fix...because improvement was built without proper

- building permits (s.24)
28. After closing, someone else encroaches onto insured's lands (s.29)
 29. Risks that would have been uncovered prior to closing by a search of property records (s.30)
 30. Any other defect, liens or encumbrances (s.33)

Please note that this is not an exhaustive list but a list of the most common coverages of interest to the real estate bar. Coverages for certain risks may be found in different clauses of the policy.

Other important coverages include:

- Gap Coverage – Insures the home owner for the “gap” between the time the property is purchased and the time the title is filed in the appropriate land registration system;
- Leasehold coverage - (for example if the land is located in a national park, native lands or on Crown land);
- Corporate Authority of Vendor and legal authority of officers to execute deed;
- Encroachments - if after purchase someone builds a structure that encroaches on the homeowners property;
- Tax arrears or betterment charges missed at closing;
- Judgements missed at the time of closing;
- Survey - matters that would have been revealed by an up to date survey at time of closing;
- Zoning by law violations;
- Coverage for a specific known problem or risk that the purchaser is aware of at the time the transaction closes. Typically in this instance the known problem will be excepted from coverage in the Schedule “B” of the policy and then an endorsement is added to provide the specific required coverage. This allows for the coverage to be added in a specified manner. This coverage may also be issued to provide some coverage for matters noted as Textual Qualifications in the parcel register.

Please note that the policy speaks at the time of closing with the exception of a few coverages including Fraud coverage. Fraud coverage will protect the title on residential policies for acts of fraud committed during the time period the client owns the property. Another exception is for encroachments constructed on the insured's property by a neighbour after closing.

The title policy is valid for as long as the Owner owns the property and in the case of a lender policy for as long as there is an amount owing on the loan.

LENDER COVERAGE

The lender coverage can be summarized in that the policy will insure that the lender has a valid first charge on the property in question for as long as there is an amount owing on the mortgage.

Lender coverages are generally broader with few exclusions as from an underwriting perspective the risk is lower.

The lender coverages in the Gold Policy can be summarized as follows:

- Invalidity or unenforceability of the mortgage against title, including fraud and forgery, failure to obtain Independent Legal Advice and defences of Non-Est-Factum;
- Unmarketability of title;
- Defects in title;
- Contravention of subdivision, development and other agreements;
- Violation of registered restriction (both existing at the policy date or after mortgage registration);
- Lack of priority of mortgage;
- Violation of zoning requirements;
- Lack of vehicular or pedestrian access;
- Lack of building permits;
- Defects that would have been revealed by an up-to-date survey/Real Property Report/Building Location Certificate;
- Construction liens;
- Arrears of property taxes;
- Inability to use the property for single family residential purposes;
- Encroachment of improvement built after the Policy date onto mortgaged property;
- Fraudulent discharge of the mortgage;
- Water potability as at the policy date;
- Septic System work orders, lack of use permit (if required), and encroachments of septic system.

MATTERS NOT COVERED BY TITLE INSURANCE:

-Environmental hazard or claims;

- Building structural deficiencies (unless as a result of work being completed without a proper permit);
- Adequacy of the quantity of the well water;
- Sewer system failures (Unless as a result of improvement without permit);
- Native Land Claims;
- Non- title related issues (sewer back up, wear and tear);
- Zoning by law violations from changes, renovations or additions to the property that the home owner is responsible for.

DISTINCTION BETWEEN COMMERCIAL AND RESIDENTIAL TITLE INSURANCE

It is useful to spend a moment to review when a transaction should be treated as commercial or residential in the context of ordering title insurance.

Residential:

- A single family dwelling, condominium or town home. Multi-unit dwelling containing up to six residential units;
- Vacant land provided it is not being developed;
- Vacant land where the intent is to build one single family residence or a multi-unit dwelling containing up to six residential units;
- Income generating land under 2 acres;
- Income generating land provided is has a single family dwelling or multi-unit dwelling containing up to six residential units;
- Residential Group Homes/Student lodging;
- Single family residences with an “at home business” ie. hair dresser, work , etc. shop (these will contain a commercial use exception);

Commercial:

- Multi-unit dwelling with seven or more residential units on the property to be insured;
- Vacant land where the intention is to develop and/or build two or more single family and/or multi-unit dwellings;
- Vacant income generating land over two acres;

-Bed and Breakfast;

-Mixed use property where the lower level is a commercial enterprise and the upper level is a residence;

Please note that there are fewer Standard coverages in commercial policies. Commercial title insurance is very endorsement intensive. While small commercial transactions are very simple, larger deals can be more complex and many of the coverages are provided by endorsement. There are over 100 endorsements available for commercial transactions. Choosing the proper endorsement for your transaction is very important. If the transaction is more complex it is my recommendation that underwriting be contacted so that the nature of the transaction can be reviewed and the proper endorsements assembled to provide the client with the best protection.

GENERAL:

In addition to the coverage issues there are a number of topics that are of interest to Real Estate practitioners. I will discuss a few topics.

Duty to Defend:

All policies are no-fault policies with a duty to defend. In other words, if the problem arose out of solicitors negligence or matter unknown at time of closing the insured is entitled to coverage for the risks covered in the policy. The amount of the legal fees to defend a claim are in addition to the insured amount on the policy. The title insurer will not fail to respond to a claim because there is potentially someone else to blame for the loss.

Waiver of Subrogation:

As an insurer a title insurance company has the right of subrogation. This right arises when a lawyer may have been negligent in the course of a real estate transaction. First Canadian Title waives its right to subrogation against lawyers except in circumstances of wilful misconduct, gross negligence or fraud. This is standard. However, if a law firm requires, a waiver will be supplied.

Policy Amount:

The policy has a face amount of coverage. If at the time of the loss the property has increased in value, FCT will increase the policy based upon an increase in the fair market value up to 200% of the policy amount for the owner. On the

lender side the policy, the amount is as set out in the policy. However, payment for loss or damages, interest accumulated and other costs may be added to the mortgage amount up to 125% of the policy amount.

Please be mindful that if your client purchases vacant land with the intention to build, there is a pending improvement endorsement available for Owners that purchase and immediately commence building a home. In other instances if the purchaser will only build years later the policy may be adjusted to reflect the new value with the improvements on the payment of the additional premium.

Purchasers of vacant lots should be advised to take advantage of this so they are fully protected when they finally do build.

Purchase of Title Insurance on existing Properties

It is possible for a Home Owner to acquire a title policy at any time even after the transaction has closed. Likewise it is also possible to acquire a Lender policy after closing. In the case of a Lender, it will be necessary to do a subsearch since the mortgage was registered and to obtain a letter from the Lender that the mortgage is in good standing and a declaration confirming that there are no outstanding claims. In some instances Lenders have purchased title insurance for their entire loan portfolio in bulk.

Prudence in Managing the Client's Risk:

In my view all prudent lawyers acting in a real estate transactions should at least make clients aware of the coverages available in a title insurance policy. The coverages are in many cases broader than what we as lawyers are able to give to our clients in our certificates or reports on title. When a problem is discovered there is no need to prove negligence for a claim to be paid as long as it falls within the provisions of the policy.

Even if the lawyer is not negligent in the completing of a real estate transaction, the Purchaser may incur significant legal fees post closing to defend a lien or deal with a survey or other issues. If the purchaser could have been insulated from these costs with a title insurance policy, the solicitor may be negligent if the availability of title insurance was not discussed with the client prior to closing. We know clients will say they would have purchased title insurance had it been offered at the time of closing. The Law Society of Upper Canada Real Estate Practice Guide imposes on obligations on the lawyer advising a client in real estate transactions to discuss the options and availability of title insurance with the client. It has become the practice to obtain waivers if the client instructs the lawyer to proceed without title insurance . This is a good practice to follow in NS

as well. Incidentally 95% of property transactions completed in Ontario are title insured.

I will close by providing a few claims examples and how they were resolved.

Claims Examples:

Title insurers have a significant degree of flexibility in resolving a claim. It is interesting to note that more than 50 percent of claims are for matters unknown at the time of closing. More than 40 percent of claims relate to Municipal issues, either permit issues or non-permit issues. The following are recent claims examples from the Atlantic region. This sampling provides some guide on the type of issues that typically arise and how they were resolved.

- On sale the vendor discovered that title and the mortgage was registered against the incorrect property; Action: Legal counsel was retained to correct problem;
- Wife was not included in the mortgage and the mortgage is in default; Action: Legal counsel retained to resolve issue;
- Insured, on selling property, discovered an encroachment of the garage eaves onto the municipal road allowance; Action: Title policy issued to the purchaser;
- Outstanding taxes discovered post closing; Action: Tax account paid;
- Neighbour of insured's property claimed that there was an encroachment onto his lands. Action: Title insurer paid for a survey which revealed no encroachment;
- Insured contacted title insurer in relation to an encroachment discovered at time of sale; Action: retained counsel to prepare boundary agreement with neighbouring land owner to facilitate closing;
- Insured notified that boat house encroaches on Crown Shore Reserve; Action: Crown granted option to purchase land plus survey cost;
- After closing homeowner gets a bill from the municipality for Paving; Action: Bill paid;
- Insured received notice from the municipality that there are no permits recorded for the zoned single family residential property. No approval for basement apartment or deck; Action: Insurer made application for necessary approvals and remediation work necessary for such approvals;
- Insured received notice from neighbour to remove deck encroaching on the neighbours property; Action: Insurer purchased the property and negotiated

directly with neighbour;

-Insured purchased property and location improperly described in deed; Action: Surveyor retained to sort out discrepancy. Insurer paid surveyors account of \$22,000.00 and paid to do rectifying deeds;

-Insured attempted to sell land but property contained a restrictive covenant severely limiting the use of the property to one use; Action: property purchased by insurer;