PROPERTY PRACTICE IN NEW ENVIRONMENTS
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Speaking Notes
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TITLE INSURANCE

Title insurance protects purchasers and lenders against loss or damage arising from defects in title, unmarketability of title, liens, encumbrances, and other covered title risks existing as of the date of the policy. Title insurance will also pay the legal costs of defending the insured's title in the event that someone else claims an interest in the property.

I. BASIS ELEMENTS

Typically, an owner's policy of title insurance consists of four separate sections together with two attached schedules. These parts can be identified as follows:

- Coverage Statement
- Covered Title Risks
- Exclusion from Coverage
- Conditions
- Schedule "A"
- Schedule "B"

In addition, there may be endorsements attached to the policy to meet the specific needs of a transaction such as a septic, condominium or future use/improvement endorsement.

Coverage Statement

A general statement written in plain language designed to summarize for the insured the coverage being provided under the policy.

Covered Title Risks

Also written in plain language, this section of the policy specifies the title risks that are covered. Briefly, the types of title risks the policy insures include:

- Liens, encumbrances, or defects in the title to the property.
- Defects that would have been revealed by an accurate up to date survey/location certificate or real property report.
- Survey errors or illegibility.
- Forced removal of an existing structure, other than a boundary wall or fence.
- Work orders, zoning and set back non-compliance or deficiencies.
- Another party claiming an interest in the property.
- The land is unmarketable, which allows another person to refuse to perform a contract to purchase, lease or secure a mortgage.
- Fraud, forgery, duress, incompetence, incapacity or impersonation.
- Unregistered easements and rights of way.
- Loss of priority due to matters such as construction liens, agreements registered on title, and other mortgages.
- Lack of pedestrian and vehicular access to the property.
- Specific post-policy event coverage as outlined in the policy.
- The authenticity of registered documents on title.
- Invalidity or unenforceability of the insured mortgage upon the title.

- Someone else builds a structure on the insured's land after the policy date (other than a boundary wall or fence).

In addition to the actual coverage amount, the policies cover the costs, legal fees and expenses associated with defending the insured's title against any litigation arising from covered title risks. There is no maximum dollar amount and it does not reduce the amount of the policy coverage.

Exclusions

Included in each policy of title insurance is a permanent list of title risks that are not covered by title insurance. Included in this list are the following:

- Governmental power with respect to land use, improvements on the land, or environmental protection.
- Expropriation.
- Title risks that are created, allowed or agreed to by the insured.
- Title risks that are known to the insured on the policy date.
- Title risks that result in no loss.
- Title risks that first affect the insured's title after the policy date.
- Failure to pay value.
- Lack of a right to any land outside the area described in Schedule "A" or in any street, lanes, or waterways.
- Reservations, exceptions, limitations, provisos, restrictions and exceptions contained in the letters patent or the original grant from the Crown, unpatented mining claims, environmental concerns or matters of any kind, and any native or aboriginal claim affecting the land.

Conditions

This is the part of the policy where all of the other terms of the contract of insurance are contained which do not relate to covered or excluded title risks. Included in this part of the policy are:

1. Definitions
2. Continuation of coverage
3. How to make a claim
4. The insurer's choices when presented with a claim
5. Handling a claim or court case
6. Limitation of liability
7. Transfer of the insured's rights
8. Arbitration
9. The Policy is the entire contract
10. Inflation coverage

Schedule "A"

Schedule "A" of the policy sets out the details of the transaction. This document lists the name of the Insured (Owner/Lender), the Date of the Policy, the Registration Particulars of the Transfer/Mortgage, the Amount of the Policy, and the Municipal/Legal Descriptions of the Insured Property.

Schedule "B"

Schedule "B" of the policy sets out the standard exceptions to coverage. This document will also contain underwriting specific to the subject transaction in the form of exceptions and affirmative assurances.

II. TITLE INSURANCE DEFINITIONS

Defence of Title - most title insurance policies include a positive duty to defend any challenge to the insured's title, regardless of whether the problem was present or discoverable on closing. Similarly, if someone erroneously or fraudulently registers a document against the insured's title the insurer has a positive obligation to take measures to protect and defend the title, including all legal costs. For example, if the neighbour asserts a prescriptive right over the property (which was not discoverable through the title search) the insurer will have a positive duty to defend the title and ultimately pay any loss incurred as a result. This is protection that goes beyond the scope of a traditional solicitor's opinion.

Policy Date- the date of the policy will be the date of the registration of the Transfer/Deed for the purchaser and the date of registration of the mortgage for the lender. The policy date is fixed for the purchaser, however, with a Construction Endorsement the policy date can be moved forward to the date of the last advance for the loan policy in order to provide full protection to the lender.

Post Policy Coverage - with a couple of exceptions, there is no coverage for any loss or damage sustained by the insured arising from covered title risks that first affect the insured's title after the policy date. Those specific post policy coverages are:

I. Forgery after the policy date of an instrument by which someone else claims to own an interest in or have a lien on the insured's title.

II. Someone else, after the policy date, builds a structure - other than a boundary wall or fence - which encroaches onto the insured's land.

Policy Amount - the amount of the policy is based upon the purchase price for the purchaser and the mortgage amount for the lender. It is possible for the purchaser to latter increase the amount of the policy where improvements have been made to the property. In addition, each policy of title insurance contains an inflation clause that increases the policy amount in the event that the fair market value of the property increases. For purchasers the inflation clause allows for an increase of 200% of the original policy amount. The inflation amount for lenders is set at 125% of the original policy amount.

Forced Removal Coverage- forced removal means that if anyone (a neighbour or the municipality) forces the insured, during the time of their ownership, to remove the improvement (other than a boundary wall or fence), the insurer will cover it, either by making the proper application, buying the necessary land so that it complies, or by moving it.

Marketability- every policy of title insurance provides coverage in the event that the insured's title is unmarketable. In those situations where a known defect exists, such as the lack of marketable title in accordance with the *Marketable Titles Act*, it ***may*** be necessary to limit coverage such that the insured receives protection against the known risk but does not receive coverage in the event a future purchaser refuses to complete a contact of purchase and sale as a result of the defect in title.

Commitment to Insure for Future Purchasers- in those situations where the insurer can not provide marketability for the known title defect it may be appropriate to commit to offering the same coverage for future purchasers. Title insurance does not make title marketable and in those situations where a known title defect exists it **may be** that the best the insurer can do is cover the risk and agree to continue covering the risk into the future.

No Fault- title insurance is a no fault system. With a solicitor's opinion, if it is discovered after closing that the purchaser does not have good title, the purchaser may seek recourse against the lawyer to correct the problem. There is no recourse against the lawyer's negligence insurance if the lawyer acted as a reasonably prudent practitioner would with the information that was available.

Waiver of Rights of Subrogation- the insurer waives any rights of subrogation it may have against the lawyer , except in cases of gross negligence or wilful misconduct. Generally speaking, this waiver is outlined directly in the policy confirmation documents.

III. COVERAGES - What do you need to know?

Title insurance is different from other types of insurance in that it protects the Insured from a loss that may occur from matters or faults that occurred before the date of the policy. Other types of insurance such as auto, life or health cover the insured against losses that may occur in the future. With some exceptions, Title Insurance does not protect against future faults.

Title insurance also differs from other types of insurance in that the insured pays a one time premium with no deductible as opposed to paying ongoing premiums for auto or fire insurance. In addition, a policy of title insurance can only be obtained for a purchaser at the time of acquiring their interest in the property. A policy is available for a lender any time that the property is being mortgaged. The policy insures purchasers of residential property against actual loss or damage sustained from risks covered in the policy, up to the policy amount.

A title insurance policy provides a variety of protections that go beyond the scope of a traditional solicitor's opinion. Briefly summarized, these added protections include the following:

Survey Coverage

The absence of a survey is a common reason that lawyers look to title insurance. The survey coverage provided by a policy of title insurance protects the purchaser against any deficiencies that would have been revealed by an up-to-date survey, even in the absence of any existing survey. This includes coverage in the event that the insured is forced to remove an existing structure or any portion thereof because it extends onto adjoining land or onto an easement, or than a boundary wall or fence.

Title insurance can also provide additional protection where there is a survey in existence. This may be a situation where the old survey is no longer accurate due to improvements having been made to the property subsequent to the date of the survey, or the fact that the survey was not prepared for the transaction at hand. The vendor may represent that there have been no changes to the survey, but the vendor is not able to speak to changes on adjoining properties. For new home construction the survey may be limited to "foundation only". In utilizing old or existing surveys not prepared for the transaction at hand, the purchaser runs a great risk as they do not have formal privity to sue the surveyor for errors. Title insurance coverage includes coverage for errors on surveys as well as future protection against someone else building an encroaching structure on the insured's land.

Survey coverage under a policy of title insurance is also beneficial where a known defect, such as an encroachment, exists. Encroachments of a structure on the insured's land onto neighbouring lands (other than fences and boundary walls) are dealt with by way of forced removal coverage. This applies whether it is an encroachment of the dwelling, garage or other improvement onto adjacent lands, an encroachment of an improvement onto setback requirements, or an encroachment onto an unregistered easement. If the problem stems from an encroachment of an improvement belonging to the neighbouring lands onto the subject lands that is ***known prior to the Policy Date***, this would be something that would not be covered under the insuring provisions of the Policy. The title insurer expects that this matter would be dealt with between the parties prior to closing by way of an abatement, or through other negotiations.

Fraud, Forgery or False Impersonation

Title insurance protects against third party fraud, solicitor fraud and in the case of mortgage policies it extends to fraud committed by the mortgagor(s).

Errors in Public Records

A solicitor's opinion is necessarily qualified by "the accuracy of the searches obtained"; a title insurance policy on the other hand covers errors in the public records. For example, a tax certificate may be incorrect; perhaps the wrong assessment number was referenced , or perhaps the vendor's cheque bounced immediately after the certificate issued. Most municipal replies contain an "Errors and Omissions Excluded" qualifier. The solicitor, having followed prudent practice, cannot be accountable for the outstanding taxes. A title insurance policy, on the other hand, covers the resulting arrears. The same type of coverage would apply to other municipal searches such as building/zoning reports or septic inquiries.

Additional Protection for Lenders

Title insurance has some unique benefits for mortgage lenders. Fraud is a risk that can cause a catastrophic loss to a mortgage lender, not just a shortfall loss. As mentioned a title insurance policy insures the validity, enforceability and priority of the mortgage on title, including defects arising from fraud. Independent legal advice is also covered, the policy affords protection to the lender if the mortgage is declared invalid because one of the parties failed to receive proper independent legal advice. Lender policies can even cover post closing alterations by the mortgagor with respect to mortgage compliance. On construction mortgages, lender policies can extend coverage pertaining to survey defects or building compliance to the date of the last advance. This provides the lender with post construction protection, and relieves the owner from the obligation of providing the lender with a subsequent survey. And finally, unlike an owner's policy, the lender's insurance policy is assignable; it runs with the mortgage in the event that the mortgage is sold or assigned to a third party. From a more global perspective, title insurance offers the lenders the opportunity to trade their mortgage portfolios on the world market with all of the added benefits of a policy of title insurance.

Known Defects

In the event of known title defect, the insurer's underwriting department must be contacted. Before Title insurance many transactions were delayed or fell through altogether due to defects in title. In those cases the purchaser often had to give an abatement in the purchase price or pay a lawyer to "clean up" title, resulting in a delayed closing and increased legal fees. Title insurance has changed that in Canada. Title insurers can often underwrite title and survey defects, providing coverage for loss or damage that may be sustained as a result of a problem.

Where an issue arises that might affect the marketability of title, the title insurance company must be contacted and provided with the following information (preferably in writing):

-Transaction information
-Details of the title or survey defect.
-Supporting documentation and relevant declarations.

The lawyer should then review the coverage that the title insurer is willing to provide to ensure that it provides the protection that the purchaser or lender requires.