

**Ontario Bar Association – Your First Residential Real Estate Transaction**

**TITLE INSURANCE MYTHS**

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## **Introduction**

As a solicitor who has been practicing real estate law for over 10 years, I have noticed a marked shift in the way that real estate practitioners approach their role in residential real estate transactions. Many seasoned practitioners have commented to me that the introduction of title insurance and electronic registration in the Province of Ontario has led to less diligence on the part of many real estate practitioners. Indeed, I have been shocked by some of the comments made to me by junior real estate practitioners at other firms, leading me to agree with my seasoned cohorts.

The purpose of this paper is to highlight and dispel certain myths with respect to title insurance as it pertains to residential real estate transactions in the Province of Ontario. This paper will begin with a discussion of traditional off-title searches and a solicitor's duty to advise clients about title insurance. Some of the benefits of a traditional solicitor's opinion and the benefits of a title insurance policy will be reviewed. Items generally covered by title insurance will be discussed along with items which are typically not covered by title insurance. There will be a section on real estate fraud, and then a discussion of the various myths surrounding title insurance in residential real estate transactions.

This paper is a general overview of title insurance and off-title searching. It is not an exhaustive treatise on the subject matter. Further, the policies

issued by the various title insurers are similar, but have many differences. It is important to review the policy in detail to understand exactly what is, and what is not, covered.

### **Traditional Off-title Searches**

Prior to the advent of title insurance in Ontario, it was the solicitor's duty to, in addition to searching title, conduct searches of certain off-title matters that would affect the client's use and enjoyment of the property. Indeed, it is still a solicitor's duty to address these matters. However, many of the matters that would be disclosed by such searches may now be covered by policies of title insurance.

If an off-title search reveals a deficiency, the appropriate recourse is to advise the Vendor's solicitor of the deficiency within the time permitted in the Agreement of Purchase and Sale, and to require its rectification prior to closing. If the Vendor is unable or unwilling to rectify the deficiency, the purchaser may have the right to have the deposit returned and to terminate the transaction. Note, however, the wording of a portion of Clause 10 in the standard OREA form of Agreement of Purchase and Sale (*emphasis mine*):

If ... any valid objection ... is made in writing to Seller and which Seller is unable or unwilling to remove, remedy or satisfy **or obtain insurance save and except against risk of fire (Title Insurance) in favour of the Buyer and any mortgagee, (with all related costs at the expense of the Seller)**, and which Buyer will not waive, this Agreement ... shall be at an end ...

The reference to "(Title Insurance)" in this clause appears to have confused some real estate practitioners. Essentially what this means, in the writer's opinion, is that the Vendor may choose, rather than correcting the deficiency, to obtain, at his or her own expense, a policy of title insurance in favour of the purchaser and the purchaser's mortgagees. If your client has asked you to review the Agreement of Purchase and Sale prior to execution, you should consider deleting a portion of this clause.

Note that you have a duty to disclose the results of any off-title searches to the title insurer. If a negative report is received, it is likely that the title insurer will exclude the issue from coverage. Hence, the dilemma. If you did not conduct the search, there would be title insurance coverage over the issue. By conducting the search, there may not be title insurance coverage. The appropriate recourse then, is to have the Vendor correct the deficiency or otherwise negotiate a settlement of the matter.

A summary of the more common off-title searches, and a brief description, follows below. Rural or cottage properties have special considerations, such as septic, well, boathouses, legal access to the property, etc. Certain types of properties (ex – condominiums, co-operatives, co-ownerships, etc.) have other special considerations. The below summary is not exhaustive, but merely lists the more common off-title searches that a real estate practitioner in a major centre should consider.

1. Property Taxes – arrears of property taxes may form a lien against the property, and the municipality may conduct a tax sale of the property. The municipality may enforce against the current property owner even though the tax arrears may have been due to non-payment by a prior owner.
2. Water – municipal water arrears do not form a lien against the property. However the municipality may add the water arrears to the property tax account. As above, this could lead to a tax sale of the property by the municipality.
3. Building and Zoning – a search of the records of the Building Department may reveal outstanding permits that have not been closed or outstanding work orders against the property. In certain circumstances, such as where a work order relates to an illegal grow operation, a work order may be registered on title to the property. A search of the records of the Zoning Department may reveal zoning deficiencies, such as non-compliance with setback requirements.
4. Survey – a review of an up-to-date survey will permit the solicitor acting for the purchaser to advise of any discrepancies noted on the survey. A current survey will reveal issues such as encroachments by a neighbour onto the property or by the property owner onto a neighbouring property, and may reveal registered or unregistered easements. The acting solicitor would also be able to review the

survey to confirm property dimensions and compliance with any relevant setback requirements.

5. Fire Department – a search of the records of the Fire Department may reveal outstanding fire department work orders against the property.
6. Conservation Authorities – a search of the records of any relevant Conservation Authorities may reveal restrictions which affect the property. For example, if there is a river passing through or near the property, there may be setback requirements which will affect the owner’s ability to perform construction on the property.
7. Heritage – some municipalities have a heritage register. Properties listed on the register may have certain restrictions with respect to the owner’s ability to perform construction on the property.
8. Compliance with Agreements Registered on Title – it is possible to write to relevant municipal departments to confirm that certain types of agreement, such as subdivision agreements, have been complied with.

As was mentioned in the preamble to this section, there are other off-title searches which may be relevant to the particular property that you are dealing with. The above summary is merely a brief summary of common off-title searches that may be performed.

## **Title Insurance in Ontario**

Title insurance is not mandatory. Although title insurance has been in existence in the United States for over 100 years, it has only been widely used in Ontario for approximately 20 years. However, the writer suggests that 99% or more of residential purchase and mortgage transactions are title insured in Ontario.

Prior to the advent of title insurance in Ontario, the acting solicitor would provide his client with a solicitor's opinion with respect to title and off-title matters. Title insurance provides an alternative means of protecting purchasers and mortgagees. It is not a substitute for conducting title and off-title searches.

A title insurance policy provides certain benefits to the owner of the policy. The insured person under the policy is typically a property owner or mortgage lender. Pursuant to the title insurance policy, the title insurance company generally has a duty to indemnify the insured and also has a duty to defend. Note, however, that if your clients make a valid claim, they may be required to transfer any rights to sue the Vendor to the title insurer.

It is important to note that a title insurer is under no obligation to provide a policy. In any given transaction you should ensure that title insurance has been arranged well in advance of closing. In certain circumstances, a title

insurer may refuse to issue a policy with respect to a transaction. In fact, one of the questions that may be asked in the ordering process is whether another title insurer has refused to ensure the transaction.

### **Lawyer's Duty to Advise Client**

Pursuant to subsections (10) to (13) under Rule 2.02 of the Rules of Professional Conduct, a lawyer is charged with certain responsibilities when advising his or her client with respect to a real estate transaction. Under subsection (10), "A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction."

If not proceeding with title insurance, the solicitor would be providing his or her opinion with respect to title and off-title matters to the client. If a title insurance policy is to be ordered, the title insurance policy will, to a certain extent, take the place of the lawyer's opinion. However, the lawyer will be required to provide an opinion to the title insurer.

### **Benefits of a Solicitor's Opinion**

If a transaction is to proceed without title insurance, the lawyer would be providing his client with an opinion of title and off-title matters. Accordingly, the lawyer would be conducting various title and off-title searches in order to



provide the opinion. The benefit of proceeding in this manner is that any outstanding issues would be discovered, and the Vendor would be required to rectify the matters prior to closing.

Proceeding by way of title insurance typically involves the solicitor not performing all of the searches that otherwise would have been conducted. Accordingly, it is possible, for example, that a transaction would close with outstanding deficiencies that were unknown at the time of closing. If, for example, there was an outstanding work order against the property, the purchaser may not become aware of it until the municipality issues an order to comply. At that time, the owner would then be required to make a title insurance claim in order to deal with the issue. As will be discussed in more detail below, the purchaser may not be content with the overall result.

### **Benefits of Title Insurance**

Obtaining a title insurance policy is typically cheaper than obtaining compliance reports and an up-to-date survey. Although the cost of obtaining compliance reports varies from municipality to municipality, the cost of obtaining all of the reports necessary will be substantial. A new survey will likely cost in the neighbourhood of \$1,000. The cost of a title insurance policy generally depends upon the purchase price, and varies from insurer to insurer. However, in most cases it is cheaper to obtain a title insurance policy than to obtain a new survey and compliance reports.

In certain circumstances, obtaining a title insurance policy may allow you to close the transaction that otherwise would not close. Title insurance companies are able to provide special underwriting to deal with issues that may be revealed as part of your due diligence process. If, for example, there is an issue that the Vendor is unable to rectify prior to closing, you may be able to obtain special underwriting to the satisfaction of your clients to deal with the issue.

In situations where there is a quick closing, there may not be sufficient time to obtain compliance reports. Without title insurance, your clients may be forced to take an unnecessary risk with respect to certain issues, such as property tax arrears and outstanding work orders against the property. Title insurance may be the only suitable option for your clients to cover such matters.

As will be discussed in further detail below, title insurance policies protect a purchaser or mortgagee against fraud. Although a solicitor providing an opinion may take steps to ensure that the current transaction is not fraudulent, the solicitor cannot protect a client against future incidences of real estate fraud. Further, a title insurance policy may provide coverage for lawyer's negligence. In the absence of such coverage, the client wishing to file a grievance against his or her solicitor would need to sue the solicitor and/or make a claim against the solicitor's LawPRO insurance coverage.

## **Title Insurance Coverage**

There are only a few companies which are authorized to provide title insurance in Ontario. The search requirements may differ from company to company. Although the coverage provided by the various title insurance companies is similar, there are slight differences. A full review of the policy is necessary. The following is a general overview of title insurance coverage in Ontario, without delving into specific differences between the policies of the companies providing coverage.

I have grouped the coverage provided by residential title insurance policies into the following 5 general categories. There is certainly some overlap between the categories, and the below grouping is for ease of reference only:

1. Title issues;
2. Off-title issues;
3. Fraud;
4. Lawyer negligence; and
5. Marketability coverage.

### **1. Title Issues**

Some of the title issues that are typically covered under a residential policy are:

- i. unknown title defects;
- ii. liens and encumbrances against the property;
- iii. rights of way or easements over the property;
- iv. someone else having an interest in the lands, such as adverse possession rights;
- v. issues that would have been discovered by a current survey; and
- vi. irregularities in title documents.

If the insured suffers a loss or damages as a result of a covered title issue, he or she may make a claim under the policy. The title insurer would then be required to rectify the situation in accordance with its rights and obligations under the policy.

## 2. Off-title Issues

Some of the off-title issues that are typically covered under a residential policy are:

- i. liens arising from tax or other arrears;
- ii. pedestrian and vehicular access to the property;
- iii. zoning infractions;
- iv. outstanding building permits or work orders;
- v. issues related to septic systems and wells; and
- vi. non-compliance with restrictions or agreements registered on title.

If the insured suffers a loss or damages as a result of a covered off-title issue, he or she may make a claim under the policy. The title insurer would then be required to rectify the situation in accordance with its rights and obligations under the policy.

### 3. Fraud

Title insurance policies provide coverage for loss or damages suffered as a result of fraud or forgery. For residential policies this includes the current transaction and any future dealings with the property. The policy will generally provide that the title insurer will be responsible for rectifying any title issues that arise as a result of the fraud or forgery, including the payment of court costs and legal fees.

### 4. Lawyer Negligence

If a title insurance policy is not being obtained and a client suffers damages as a result of negligence on the part of his or her lawyer, the remedy for the client is to sue the lawyer and/or make a claim through LawPRO. This, of course, may lead to an increase in the lawyer's future premiums.

Some of the title insurers in Ontario offer coverage for loss or damages suffered by a client due to a lawyer's negligence. Although the general title insurance coverage offered by title insurers in Ontario is similar, this is one area where the coverage is vastly different. Depending on which title insurer you are dealing with, you may find that lawyer negligence coverage is contained within the policy, may be purchased as an add-on to the particular policy being ordered at the time, may be purchased by the lawyer generally

to cover all transactions where policies are ordered through the insurer, or may not be available at all.

### 5. Marketability Coverage

Title insurance policies generally provide marketability coverage. If an insured party is unable to sell the property or obtain a mortgage due to a covered issue, the title insurer will be required to rectify the situation in accordance with its rights and obligations under the policy.

### **What Is Not Covered**

As was mentioned above, coverage varies from insurer to insurer. The following is not an exhaustive list of exclusions or exceptions from coverage, but is a summary of issues that are generally not covered by title insurance policies:

1. Known title defects – if a purchaser or mortgagee was aware of a title defect at the time of closing and closed the transaction notwithstanding the defect, that party will not be able to make a successful claim to have the issue rectified by the title insurer.
2. Environmental issues – issues such as soil contamination by hazardous substances are generally not covered by title insurance.
3. Native land claims – aboriginal or native land claims against the property are generally not covered by title insurance. Note, however,

that it may be possible to obtain special underwriting from a title insurer to deal with properties located on reserves.

4. Tenancy issues – issues such as the adequacy of the rent, legality of basement apartments, compliance with retrofit requirements, etc. are generally not covered by title insurance. Further, additional searches may be necessary in order to provide an owner with coverage if the residential property has several units.
5. Septic systems – although it is possible to obtain limited coverage with respect to septic systems, title insurance generally doesn't provide coverage for the functionality of the system.
6. Water potability – title insurance policies may provide coverage to a mortgage lender with respect to water potability if the property is serviced by a well. However, an owner will generally not receive such coverage.
7. Personal Property Security Act (PPSA) – title insurance covers title to land, not chattels. Accordingly, there is no coverage with respect to personal property registrations.
8. Claims which result in no loss or damage to the insured – in order to make a valid claim under a title insurance policy, the insured must suffer loss or damages.
9. Certain obligations that run with the land – in a typical Agreement of Purchase and Sale, the purchaser agrees to accept title subject to

certain "usual" registrations against title. These may include restrictions that run with the land, subdivision agreements and development agreements. These will generally appear as exclusions under the policy, such that the insured may not make a claim requesting that the title insurer have the instrument removed from title. However, the title insurance policy will generally provide coverage for compliance with the terms of the instrument up to closing.

10. Violations or deficiencies that would not be disclosed in the records of the relevant government office – title insurance generally provides coverage for issues that would have been discovered if a compliance search had been requested. For example, if there is a zoning violation with respect to the property, but the municipality does not have any records of such violation, there may not be coverage under the policy.
11. Matters disclosed in a home inspection report – if a home inspector's report to the purchaser discloses certain deficiencies, the purchaser may be precluded from making a claim related to such deficiencies under the title insurance policy .



### **Your Client's Remedy Under a Title Insurance Claim**

Your client may be surprised to learn that the appropriate remedy, where a valid title insurance claim has been established, is at the discretion of the title insurer. This may not be much of an issue where the claim is for property tax arrears – the title insurance company will likely pay the outstanding tax arrears that arose prior to closing, and then decide whether to go after the Vendor. However, in other cases, the remedy may not be as straight forward. As is mentioned above, the owner may be required to transfer any rights to sue the Vendor to the title insurer. In that case, the owner would no longer have the right to sue the Vendor, and may be dissatisfied with the remedy proposed by the title insurer.

If you are aware at the time of purchase that your clients intend to perform renovations on the property in the near future, it may be advisable to use a hybrid approach, whereby a title insurance policy is obtained and some off-title compliance reports are requested. By obtaining reports from the building department, zoning department, relevant Conservation Authorities and other government offices, you may be able to provide your clients with assurance that there will be no foreseeable issues when they apply for future building permits. If issues are discovered that would inhibit your clients' future plans, they may be dealt with now, rather than later.

### **Title Insurance Benefits to a Vendor**

Title insurance, in certain circumstances, may be beneficial to a Vendor. If the Vendor obtained a title insurance policy when he or she initially purchased the property, and the purchaser has requisitioned an item that is covered under the policy, the title insurer will typically act quickly to handle the claim. In such circumstances, it is likely that the closing date is fast approaching. This may limit the ways in which the Vendor or title insurer may rectify the matter. Depending on the situation, the title insurer may offer the purchaser special underwriting in a title insurance policy in order to deal with the issue.

As was mentioned previously, a typical Agreement of Purchase and Sale will contain a clause permitting the Vendor to obtain a policy of title insurance for the purchaser if there is an issue which the Vendor is unable to rectify prior to closing. This may allow the Vendor to close a transaction that may otherwise have been jeopardized.

### **Real Estate Fraud**

One of the main benefits of obtaining a title insurance policy for your client is the fraud coverage provided therein. Residential title insurance policies generally provide coverage for, not only the current transaction, but future incidents of fraud that result in a loss to the insured.

Title insurance policies typically cover all costs associated with defending an owner's title in the case of fraud or forgery. Similar coverage is also available to mortgage lenders.

As real estate solicitors, we have a duty to investigate suspicious circumstances which may indicate that the current transaction is fraudulent. The Law Society of Upper Canada has many materials available to assist us. Title insurance companies also have certain questions that they ask of us in the policy ordering process so that the title insurer may determine if there are any signs of fraud. If you have any suspicions that the current transaction may be fraudulent, you have a duty to report to your clients (including the mortgage lender) and title insurer prior to closing transaction.

Attached to this paper are 3 helpful articles that are available on the Law Society website.<sup>1</sup>

### **Title Insurance Myths**

As former underwriting counsel at one of the title insurance companies and through my practice over the years, it has become apparent to me that several real estate practitioners are operating under certain misapprehensions. The purpose of this portion of the paper is to hopefully dispel some of the myths with respect to title insurance in Ontario.

Myth # 1: There Is No Need to Review Documents Registered on Title

It appears that some practitioners do not believe that it is necessary to review registered documents in a purchase transaction. Although we have a duty to disclose to the title insurer that certain documents are registered on title, we also have a duty to advise our clients what is registered on their title.

It is not uncommon for a utility company to have an easement that runs the entire length of a property. For example, the hydro company may have a 3 foot easement along the entire rear 3 feet of the property. We certainly would need to disclose this to the title insurer, and the title insurer would ensure that appropriate language is inserted in the policy. It is likely that the registration number of the easement would be mentioned in the policy. However, the specific location of the easement may not be referred to in the policy. If you have not advised your clients about the location of the easement, either in your final report or otherwise, you may find yourself the subject of a LawPRO claim. The clients would not be aware of their obligation not to construct anything on the easement, and may build a shed that may interfere with the hydro company's ability to access wiring. The hydro company may then require that your clients remove the structure. A title insurance claim over this issue would be unsuccessful, as the problem was created by your clients after closing. Your clients may take the position, and

they would be correct in doing so, that you should have advised them of the location and extent of the easement.

### Myth # 2: Title Insurance Covers Everything

Title insurance does NOT cover everything! As was mentioned above, there are many standard exclusions under title insurance policies. In addition to the above, a title insurance company may not provide coverage for the forced removal of an encroaching fence or boundary wall. Although these matters are typically not included under the "Exclusions" portion of the policy, an in-depth review of the policy provisions will reveal that certain matters such as these are excluded in the positive coverage section of the policy. It is important to become familiar with the terms of the entire policy in order to properly advise your clients with respect to what is and what is not covered.

### Myth # 3: A Title Insurance Policy Will Prevent Fraud

Having a title insurance policy will not prevent fraudsters from performing a fraudulent transaction. A title insurance policy will cover the costs of dealing with the fraudulent transaction after the fact, including court costs and legal fees. A fraudster will not know if your client has a title insurance policy, nor will a fraudster care if your client has a title insurance policy covering the

property. Having a title insurance policy will not deter a fraudster from committing a fraud on the property.

#### Myth # 4: A Title Insurance Policy Is a Replacement for Conducting Off-title Searches

Obtaining title insurance coverage may be an alternative to conducting certain off-title searches. It is an alternative, not a replacement. Insuring over an unknown problem may lead to a title insurance claim in the future. Depending on how the claim is handled by the title insurer, your clients may be extremely happy or extremely disappointed.

As was mentioned above, it may be advisable to conduct some off-title searches that would otherwise not be necessary when ordering a title insurance policy. For example, if your clients have advised you that they have plans to construct an addition in the near future, it may be advisable to perform a building and zoning search rather than relying on the related title insurance coverage. Title insurance claims for big ticket items, such as outstanding work orders or building permits, may prove problematic for your clients. Your clients may find themselves in a lengthy claim period while they try to settle the matter with the title insurer. This could be avoided by conducting a building and zoning search in advance, and requisitioning the rectification of any outstanding issues. Even if the Vendor is unable to rectify the issue prior to closing, your clients may be able to negotiate a reduction

in purchase price or other satisfactory result. They would certainly appreciate your advice and guidance with respect to this matter.

Myth # 5: There Is No Need to Search Abutting Lands

Notwithstanding the fact that a title insurance policy may be providing coverage, it is a real estate solicitor's duty to conduct an abutting land search in appropriate circumstances to ensure compliance with the Planning Act. Section 50 of the Planning Act must be complied with. This is one of the basic duties of a real estate solicitor. Your clients will not be pleased with you if they later discover that the Transfer or Mortgage that you registered is invalid due to a violation of the Planning Act. Even if your clients are able to make a successful claim under their title insurance policy, you may very well have lost your clients. Further, your title insurer may be more reluctant to provide you with policies, as it may deem that you pose too high a risk due to a lack of knowledge or diligence.

Myth # 6: Title Insurance Will Provide a Satisfactory Remedy to Your Clients

Even in situations where your clients have a valid claim under their title insurance policy, it is important to note that the title insurer is the party who gets to choose the remedy. The title insurance policy gives the insurer several choices in dealing with a claim.

For example, suppose your clients purchased a property with a detached garage which was constructed without a permit. Rather than conducting a building and zoning search, you obtained a title insurance policy in lieu of obtaining a compliance report. After closing, the municipality issues an Order to Comply which stipulates that the owners must obtain a building permit or remove the structure. Assume that the title insurer confirms that coverage is available and it is a valid claim. The title insurance company may opt to pay for the garage to be demolished, and to provide your clients with a cheque for the value of the lost garage. Your clients may be very disappointed with the proposed resolution. This may sour your future relationship with your clients, as your clients are looking to you to provide them with satisfactory advice at the time of purchase.

#### Myth # 7: There Is No Need to Look Behind the PIN

There is a reason that title insurance companies require you to obtain a copy of the parcel register which includes deleted instruments. Reviewing deleted instruments listed on a parcel register may reveal evidence of past fraud involving the property. For example, there may be a court order registered on title with a reference to a mortgage discharge registration number. Reviewing some of the underlying documents, even though they appear as "Deleted Instruments", may reveal that the current owner had fraudulently discharged a mortgage in the past.



If you are acting on a re-finance transaction, your lender client would certainly wish to know that the borrower had fraudulently discharged a mortgage on his or her property in the past. Similarly, your title insurer would be interested to know that the borrower had fraudulently discharged a mortgage in the past. In such circumstances, I suspect that the lender and title insurer would both refuse complete the transaction.

### **Conclusion**

As rewarding as a residential real estate practice may be, it is often one of the areas of law which generates a considerable amount of LawPRO claims. As real estate solicitors, we need to take our obligations with respect to advising our clients about title insurance very seriously. Otherwise, not only may we find ourselves subject to a LawPRO claim, or claim for lawyer's negligence under a policy of title insurance, we may end up with disappointed clients and may end up losing some clients as a result.

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<sup>1</sup> (1) Practice Tips: Recognizing Fraud in Real Estate Transactions, accessed September 26, 2014 online from [http://rc.lsuc.on.ca/pdf/fightingRealEstate/july2304\\_fraud\\_indicators.pdf](http://rc.lsuc.on.ca/pdf/fightingRealEstate/july2304_fraud_indicators.pdf), (2) Red Flags that Should Prompt Questions and Due Diligence when Dealing with Real Estate Transactions, accessed September 26, 2014 online from <http://rc.lsuc.on.ca/pdf/fightingRealEstate/fraudRedFlagsInvestigations.pdf>, and (3) Sample Fact Scenarios, accessed September 26, 2014 online from [http://rc.lsuc.on.ca/pdf/fightingRealEstate/july2304\\_fraud\\_scenarios.pdf](http://rc.lsuc.on.ca/pdf/fightingRealEstate/july2304_fraud_scenarios.pdf).