

## **ARE SURVEYS OBSOLETE OR THE MOST IMPORTANT DOCUMENT IN THE TRANSACTION?**

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Real estate agent's breach of duty for overlooking a survey - two case studies  
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## HOW TO GET A SURVEY IF THE VENDOR SAYS THERE ISN'T ONE

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Schedules:

**Schedule A** - *John and Mary Pilarczyk v. Masolin & Borean*, [1988] O.J. No. 2627. "The Vendor agrees to supply a survey of the property on or before closing."

**Schedule B** - Statutory Framework of the Surveyor's Real Property Report

**Schedule C** - Title Insurance - *The Position of the Alberta Land Surveyors' Association, June 30, 2005*; and *Report on Title Insurance in Canada*, Prepared for the Alberta Land Surveyors Association by Michael D. Aasen and Sean F. Collins of Miller Thomson, Calgary

**Schedule D** - "*A Place For Everything and Everything in Its Place - Why title insurance cannot take the place of a survey*" by William O'Hara and Anna Husa of Gardiner Roberts LLP



### **Analysis of residential boundary issues in the Greater Toronto Area**

There are 1.2 million freehold residential properties in the GTA and 90,000 property sales a year. A 2014 study concluded that 49 per cent of them have one or more hidden boundary issues. 88.5 per cent of these, or 43 per cent of the total GTA properties have boundary issues that are typically excluded from title insurance coverage, as they involve fences, hedges and other structures used to enclose a property.

**Protect Your Boundaries Inc. is a Toronto firm of land surveyors.** In July of 2014 Protect Your Boundaries Inc. (PYB) embarked upon a study to determine the prevalence of property boundary issues in the Greater Toronto Area. This study followed two years of anecdotal evidence that suggested a sharp increase in the number of boundary disputes between neighbours in the region, many of which were escalating to full legal action.

PYB sought to quantify and qualify the boundary issue phenomenon and attempt to understand its implications on our communities and the real estate, surveying, legal and insurance industries.

**Definition of a boundary issue:** A boundary issue exists when a fence, hedge or wall (property delineation features) is displaced from the property boundary by a margin significant enough to potentially provoke a dispute between neighbours. A boundary issue also exists when a physical feature (such as an addition, garage, shed, deck or pool) on one property encroaches on the boundary of the neighbour's property.

**PYB commissioned a study of 415 randomly selected residential properties in the Greater Toronto Area to determine the prevalence and nature of boundary and title issues.** To achieve this the research team selected and studied existing land survey plans of these properties.

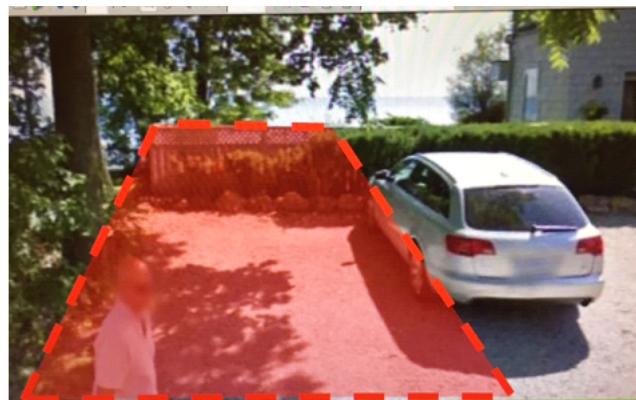
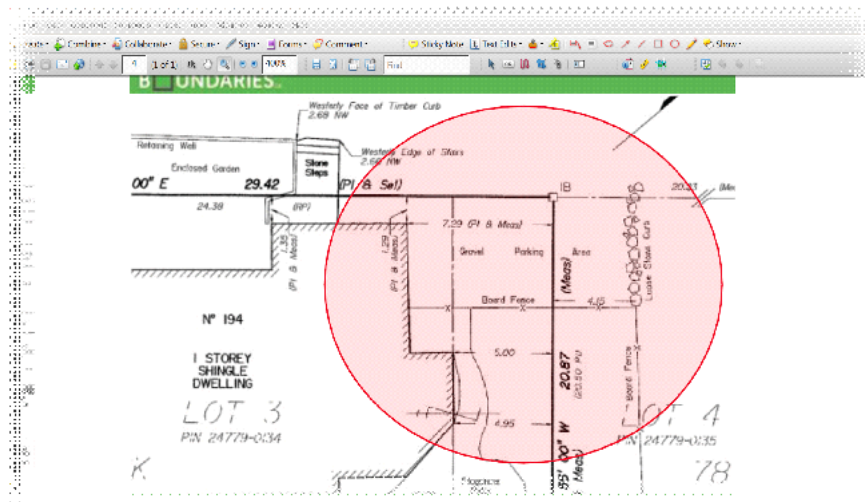
A land survey plan, prepared by an Ontario Land Surveyor, offers the single most

comprehensive view of a property at the time of the plan's creation. Crucially it shows all physical features (buildings, fences, sheds, decks, pools and other structures) within and immediately adjacent to the property boundary. As such it can be considered the "gold standard" of evidence of boundary for the purpose of the study.

**The study found that 49% of residential properties in the GTA have one or more Boundary Issues.** Boundary issues were most prevalent in Halton (63%) followed by Toronto (58%), Durham (49%), Peel (42%) and York (34%). A segmentation of the types of boundary issue suggests that the majority of these boundary issues, **88.5%, would likely not be covered by a title insurance policy.**

The findings are significant to all stakeholders in real estate - the homebuyer and seller, lender, real estate agent, broker, lawyer, title insurance company and surveyor – because it indicates that almost half of the approximately 90,000 residential properties sold in the GTA each year carry with them one or more boundary issues that have gone undetected or been ignored since the introduction of title insurance in the mid-1990's. These boundary issues are most likely to flare into disputes upon the change of ownership of a subject or neighbouring property, initiating a sequence of actions that, in an increasing number of cases, result in costly outcomes for all stakeholders.

Here's an example of a survey problem where the owner only owns half of his double parking space, and what it looks like on the ground.



## **Introduction - What is a Survey?**

A professional surveyor's opinion on the extent of title, colloquially known as a "survey," is technically an "SRPR" - a Surveyor's Real Property Report. There is no such 'thing' in law in Ontario as 'a survey' when referring to a surveyor's professional opinion.<sup>2</sup> For the sake of brevity, however, the terms SRPR and survey will be used interchangeably in this paper.

What is an SRPR? In everyday terms, a survey or SRPR is a surveyor's opinion on the extent of title. It is a two-dimensional drawing looking like an overhead view of a piece of real property. It shows the surveyor's opinions of the measurements and boundaries of the subject land. It can only be prepared by an Ontario Land Surveyor using measurements taken on the ground and compared with the paper title of the subject parcel and the surrounding lands on file at the Land Registry Office.

Other sources of boundary-related information, such as the Crown Patent, exist in law but are not necessarily registered on title. They may also be shown on the survey.

The SRPR reveals the location of the 'man made' structures on and adjacent to the subject land in relation to the parcel's boundaries. A current SRPR will usually show visible improvements such as fences, hedges, pools, overhead wires, easements and rights-of-way in favour of neighbouring owners or utility companies. SRPRs also show the location of survey monumentation which can be iron bars, concrete monuments or cut crosses marking or witnessing the distance and bearing to the parcel's corners.

## **What is Not a Survey?**

If the document is not legible, signed, sealed and dated by an Ontario Land Surveyor, it's not a survey. It should also be current to the time of the transaction. As well, SRPRs should not be confused with appraisals, which determine only the value of the property, and not the size of the lot or location of the buildings and improvements.

## **A Surveyor's Real Property Report (SRPR)**

The term "Surveyor's Real Property Report" was adopted by the Canadian Council of Land Surveyors, and most of the Provincial Associations in Canada, in order to standardize the product prepared for mortgage lenders and participants in the real estate transaction.

A Surveyor's Real Property Report:

- is a codified standard deliverable adopted by the Association of Ontario Land Surveyors (AOLS) to replace the survey document formerly known as the building location survey and, prior to the building location survey, the mortgage survey.
- is designed to meet the needs of the public, lawyers, and lending institutions.
- contains the following pertinent information required for use by the above individuals:
  1. The municipal address and information regarding the Land Titles or Registry Office designations.
  2. The dimensions and bearings of all the property boundaries, as determined by a field survey, in accordance with the Standards for Surveys of the A.O.L.S.
  3. The location of adjacent properties, roads, lands, etc.

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<sup>2</sup> With thanks to the Association of Ontario Land Surveyors for some of its educational materials reproduced in this paper, and to Derek Graham, O.L.S., for his valuable assistance, continuous lobbying and educational efforts on behalf of the surveying profession.

4. The location and description of all pertinent improvements located on the property, along with the setbacks to the property boundaries. The projections of overhangs and eaves are also noted.
5. The location of any easements which may affect the property.
6. The location and dimensions of any visible objects that the courts may deem to be encroachments onto or off of the property.
7. The location of survey monuments found and placed.
8. A note indicating for whom the plan is prepared.
9. Certification by an Ontario Land Surveyor.

### **Components of the SRPR**

The Surveyor's Real Property Report consists of two parts - Part 1 or Part A and Part 2 or Part B. These two parts may be on the face of the survey document known as the plan or may be contained in two separate documents.

The Surveyor's Real Property Report is very similar to the Building Location Survey prepared in the past. Since 1983 it has been mandatory that all surveys include a written report from the surveyor. The Surveyor's Real Property Report, therefore, consists of both the plan document and the written report. If the surveyor chooses to have these in two separate documents, that fact must be shown on the face of the plan in order that the user of the plan will understand that there is a separate report.

If the report actually appears on the face of the plan, it will be clearly indicated on the document.

If, as a lawyer for the purchaser, only one part of the Surveyor's Real Property Report is received from the vendor's solicitor, it would be in your interest to obtain a copy of the other half of the documentation, being the written report.

Any and all SRPR opinions should be current or "up-to-date."

Aside from condominium plans, other types of surveys which are beyond the scope of this paper are: Plans of township lots, registered plans of subdivision, compiled plans or Registrar's compiled plans, Reference Plans, highway plans, building location surveys, mortgage surveys, building location surveys, and written certificates.

### **The Benefits of the Surveyor's Real Property Report**

- You will be in possession of a report that contains complete, precise, and up-to-date information.
- You can ensure your client is buying the correct property, and can verify the shape and dimensions of the land.
- It will assist you in verifying the current state of title and, therefore, protect both the interests of your client, as well as your own interest.
- It will show you where the improvements are located in relation to the property boundaries, as well as encroachments, and other features of the property
- It will advise you if there are problems with potential encroachments, prescriptive uses, easements, etc., that may have occurred prior to conversion to the Land Titles system.

- It can be used for municipal zoning by-law compliance and setback verification.
- The Surveyor's Real Property Report is prepared in accordance with specific standards which will ensure the protection of the buyer, the seller, the lending institution, and the conveyancing solicitor.

## **Standards**

In order to prepare a Surveyor's Real Property Report, an O.L.S. (Ontario Land Surveyor) is required to perform, among other things, the following services:

1. A title search of the subject property and adjacent property.
2. A search of documentary survey evidence relating to the establishment of not only the subject property but adjacent properties.
3. A field search of physical occupation, survey evidence, etc.
4. A field survey to determine the dimensions of the property, any improvements, and note any items which may affect the use of the property.

The SRPR is a compilation and assessment of the information obtained by the professional surveyor leading to the preparation of a plan, reflecting results of the field survey and title search, and the preparation of a report.

See the attached Schedule B for the statutory framework of the SRPR.

## **Does Title Insurance Replace the Need for a Survey?<sup>3</sup>**

With the growing popularity of title insurance in recent years, there seems to be a widespread misconception that it is no longer necessary to have a survey for a residential property purchase. Even though title insurance will, in some circumstances, avoid the need for a survey by an Ontario Land Surveyor, the fact is that aside from the deed, the survey is probably the most important document in a real estate transaction.

Why get a survey if a title insurance policy protects you from not having one? Typically title insurance ensures the state of the property as of the closing date. Title insurance ensures that the purchaser legally obtains what he or she sees physically on the land at the time of the purchase, or will be compensated for its loss. Anything that a survey done on the date of closing would have revealed is covered by a title insurance policy. But title insurance does not tell you how far the house is from the lot lines, or where to install fences. It does not cover the ability to install a swimming pool, garage or hot tub in the future. Nor does title insurance protect the owner from damages resulting from misplaced border fences, party walls, or retaining walls.

Nothing can truly replace a survey or provide as much information to the property owner about the extent of the title. Although it costs only a tiny fraction of the purchase price, an up-to-date survey could save thousands of dollars of trouble down the road - title insurance or not. And, the SRPR translates your deed/transfer into a document that will illustrate what you are really buying (WYSIWYG ~ What You See Is What You Get. )

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In this paper, the term "survey" will be used interchangeably with the term "Surveyor's Real Property Report," which is the correct terminology.

In 2005, Michael Aasen and Sean Collins of the law firm of Thomson in Calgary prepared a Report on Title Insurance in Canada for the Alberta Land Surveyors' Association.<sup>4</sup>

The Miller Thomson report concluded:

Using title insurance as a replacement for an RPR would be like purchasing theft insurance and then leaving the car door unlocked with the keys under the floor mat - your car may not be stolen, but you increase the likelihood by acting in a careless manner. It does not seem to make sense for a purchaser of property to willingly not investigate the risks inherent to the property simply because there is title insurance. Having title insurance replace, as opposed to augment, existing safeguards already in place in land conveyancing practice in Alberta, seems likely to create further problems in the future.

The Alberta Land Surveyors' Association provided a position paper when it released the Miller Thomson report. The ALSA paper concluded:

The Alberta Land Surveyors' Association takes the position that complete and full disclosure in the real estate transaction is of paramount importance for all parties involved. Through full disclosure, the public will be protected. The Real Property Report and compliance certificate with every transaction informs the prospective purchaser about any potential problems with the property or the title. Further, municipalities are able to recognize and remedy any violations of land use bylaws at the time of purchase.

The Alberta Land Surveyors' Real Property Report is a valuable and necessary service. The full disclosure that it provides ensures the integrity of Alberta's land tenure system.

Full disclosure is in the best interest of the consumer, municipalities, the land titles system and the general public.

The Real Property Report benefits property owners:

- Property owners need to know the status of their property and improvements. Inappropriate location of improvements can cause major difficulty and cost.
- Property owners need to know the location of easements and rights-of-way
- One homeowner found that he had built a garage over a high-pressure gas line. Because of the shape of the lot the garage could not be relocated. It cost him over \$30,000 to have the gas line relocated.

The Real Property Report benefits property purchasers by showing:

- The boundary and improvement locations on the property
- Any identified problems relating to property boundaries

The Real Property Report benefits property sellers (vendors) by providing:

- Protection from future legal liabilities resulting from problems relating to property boundaries and improvements

The Real Property Report benefits the legal community by ensuring:

- Their clients do not face boundary problems after purchasing a property

The Real Property Report benefits municipalities by assisting them:

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<sup>4</sup> Both reports are attached as Schedule C.

- In determining compliance with bylaws and fire codes
- In the planning and development process

The Real Property Report benefits realtors by:

- Providing a visual representation of the property for sale
- Meeting requirements of the real estate listing/purchasing contract
- Having information to avoid delays in completing property transactions when an RPR is arranged early in the sales process

Title insurance duplicates the insurance protection provided by our existing land title system and its use will eventually negatively impact the integrity of the survey fabric and that public land title system. By allowing problems to exist and compound without correction, the entire system may be compromised.

The Alberta Land Surveyors' Association supports a public land titles system and the full disclosure provided by the Real Property Report.

Returning now to Ontario, William O'Hara and Anna Husa are lawyers at Gardiner Roberts LLP in Toronto. A while ago they published an article entitled "A Place For Everything and Everything in Its Place - Why title insurance cannot take the place of a survey." It essentially agrees with the Alberta position. Their paper is reproduced on Schedule D to this paper and on the firm's website, [www.grllp.com](http://www.grllp.com), at ([http://www.grllp.com/documents/articles/A\\_place\\_for\\_Everything\\_-\\_Article\\_-\\_O\\_Hara\\_Husa.PDF](http://www.grllp.com/documents/articles/A_place_for_Everything_-_Article_-_O_Hara_Husa.PDF)). The authors conclude, "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 chose to obtain both title insurance and a land survey before proceeding with a purchase."

## **WHY YOU NEED A SURVEY AND WHAT CAN HAPPEN IF YOU DON'T HAVE ONE**

### **Broumas v. Royal Trust Corp. of Canada<sup>5</sup> - Building on the wrong lot**

One of my all-time favourite court cases deals with the Edmonton family who were well into building their dream home when they discovered that they didn't own the lot where their new house was under construction.

The story began back in 1981, when Tom Broumas told his real estate agent, Al Batik, that he wanted to buy a lot to build a new house for his family.

Batik checked the listings on the local multiple listing service and decided to show Broumas and his wife lot 37 which was incorrectly described as the only vacant lot on south side of street.

On the day Broumas physically inspected the lot, his agent directed him to lot 27 on 10th Ave. instead of lot 37. The two lots were separated by nine completed houses. Lot 27 was owned by the city of Edmonton and lot 37 by private owners.

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<sup>5</sup> [1987] A.J. No. 316, 51 Alta. L.R. (2d) 334, 79 A.R. 186, 5 A.C.W.S. (3d) 156



Without ever being shown a survey or the subdivision plan by the agent, Broumas eventually signed an agreement to buy lot 37 and the deal closed successfully. Unfortunately, he was under the impression that he had purchased lot 27.

About a year later, Broumas hired an architect who designed a 3,700-square-foot house. Construction began on Sept. 20, 1982 and completion was estimated for Dec. 1 the same year.

Despite a local bylaw requiring anyone building a home to apply for a development permit before work started, the owner's architect did not file the paperwork until one month after construction began. By this time, the house being constructed on the wrong lot was well into the framing stage, with part of the roughed-in plumbing and electrical work already completed.

Broumas did not discover that he was building a house on a lot he didn't own until he received a phone call from a developer asking if he wanted to sell his vacant lot, number 37. When Broumas told him that he was well into construction, the developer replied that he must be building on the wrong lot.

Construction of the house continued even after the mistake was discovered, but there were significant delays due to the inability to place mortgage financing on the lot Broumas didn't own.

Eventually, an agreement was reached with the City of Edmonton to exchange titles of the two lots for an administrative fee of only \$250. Three months later, Broumas owned both the house and the lot underneath it.

Broumas sued his real estate agent and the agent's brokerage, Royal Trust, for damages for delay in the construction of the house, inconvenience, embarrassment, pain and suffering, and out-of-pocket expenses resulting from extra fees and the construction delay.

Strangely, he did not sue his lawyer, who could have discovered the error before closing by showing his client the plan of subdivision.

In the end, Justice Ernest Hutchinson ruled that the real estate agent had a duty to verify the information published in the multiple listing service. As a result, he was held liable for not ensuring that the proper lot was examined by the buyers in the first place.

Total damages, in 1982 dollars, were set at \$3,135.34, plus costs.

Ontario landowners who might find themselves caught in a similar situation can resort to a remedy found in the Conveyancing and Law of Property Act. Section 37 of the law says that where a person makes lasting improvements on land under the belief that he or she owns it, that person is entitled to a lien on the land for the value of the improvements.

In addition, the lawful owner may be forced to accept compensation for the land and transfer ownership if a judge is of the opinion that this alternative is appropriate. Alberta has a similar provision in its laws.

Of course, situations like this could be avoided altogether if landowners always referred to a land survey or plan of subdivision, or both, before building any house, garage, fence or retaining wall.

**Ontario v. Syvan Developments Ltd.**<sup>6</sup> - The missing \$129,000 right of way

Excerpted from the Gardiner Roberts report at Schedule D to this paper:

“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*. Syvan was a property developer. In 2000 he entered into an agreement of purchase and sale for a commercial property in Oshawa, Ontario. The 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 defect. 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.

“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

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<sup>6</sup>2006 CanLII 32430, [2006] O.J. No. 3765, 49 R.P.R. (4th) 161, 152 A.C.W.S. (3d) 165, 2006 CarswellOnt 5733

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."

#### **Nielsen v. Watson et al**<sup>7</sup> - Another Missing Driveway case

The purchasers' solicitor in this 1981 case received a plan of survey from a surveyor in 1981 but he failed to show it or explain it to his clients. The survey showed that a garage and laneway that were supposed to be part of the property being purchased were not within the limits of the property and that there was no driveway access to the property. The purchaser thought he was buying a three-car garage and adjoining laneway but the survey showed they were not covered by the owner's deed.

Hughes, J., concluded his assessment of liability by writing, "I am of the opinion that a reasonably competent solicitor exercising the required duty of care towards his client in the circumstances of the case at bar would have questioned the client or the surveyor or both about the anomaly disclosed by the plan of survey reproduced above, and if he had, the plaintiff would have been saved the expense of acquiring the laneway and garage site as he ultimately did and more besides. I find that there has been a breach of contract on the part of the solicitor Watson embracing, as is conceded, the members of his firm and that judgment must go against them."

#### **Thompson v. Nanaimo Realty Co. Ltd.**<sup>8</sup> - Building on the neighbour's lot

Back in 1973, a purchaser was told that the lot he was buying was 10 feet wider than its actual measurements. The purchaser closed without a survey and started construction of a house encroaching five feet onto the adjoining land. The British Columbia court awarded damages to the property owner against the real estate agent who advertised the wrong lot size.

#### **Holmes v. Walker**<sup>9</sup> - The cottage built almost entirely on the road allowance

In 1989, the plaintiff Holmes purchased a cottage property on Georgian Bay from the defendant Walker for \$170,000. At the time of the purchase, Holmes did not obtain a survey, and neither she nor Walker knew that 95 per cent to 99 per cent of the four-bedroom cottage was located on the road allowance owned by the township. The actual location of the cottage was discovered when Holmes obtained a survey four years later.

The township refused to sell Holmes the land underneath her cottage but agreed to let her use the cottage for an occupation rent of \$25.00 a year. Holmes sued for rescission, and moved for a judgment rescinding her 1989 purchase. Her case was advanced entirely on the basis that the location of the cottage on the road allowance constituted an error in substantialibus.

The Ontario Court of Appeal agreed with the trial decision which dismissed the case. The owner failed to get a survey when he purchased the property and she was out of luck.

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<sup>7</sup> 33 O.R. (2d) 515, 125 D.L.R. (3d) 326

<sup>8</sup> [1973] B.C.J. No. 852, 44 D.L.R. (3d) 254

<sup>9</sup> 41 O.R. (3d) 160, [1998] O.J. No. 4725

## **Strutt v Franko<sup>10</sup>** - Septic bed on the neighbour's property

A court decision released in November, 2013 by a small claims court in Welland, Ont. again illustrates the commonly held but incorrect belief that title insurance replaces the need for a land survey.

In November, 2008, Jonathan Strutt wanted to buy a house on Stonehaven Rd., in Dunnville, Ont.

Strutt had never previously owned a rural house and was unfamiliar with septic systems. After some negotiation, the agreement of purchase and sale was amended to include the seller's statement that, to the best of her belief, the septic system was installed according to all relevant regulations at the time, and continued to operate satisfactorily.

Two years after closing, Strutt was informed by Chad Plath, his next-door neighbour, that part of Strutt's septic system encroached onto the Plath property. Wisely, Plath had obtained a land survey prior to his own closing. That 2010 survey disclosed the encroachment, but Platt did not view the issue as a deal-breaker when he bought his new house.

Fortunately, Strutt's lawyer had arranged a title insurance policy with Chicago Title. So that future sale would not be jeopardized, Chicago Title arranged to have the septic bed relocated back onto the Strutt property at a cost of several thousand dollars.

In 2011, Strutt sued the prior owner of the house for negligent misrepresentation. The real plaintiff was Chicago Title, which sued Franko using Strutt's name in what is known as a subrogated claim.

At trial, Strutt conceded that on all prior home purchases he had obtained a survey first. He had wanted one for the Dunnville property, but his agent told him — wrongly as it turned out — it was unnecessary and to take title insurance instead.

Fortunately for Strutt, Chicago Title took care of all the costs of moving the septic bed. Of course, had a proper land survey been obtained prior to closing, the issue of the encroaching bed could and would have been resolved years before. As well, there would have been no inconvenience or disruption when the septic bed and two holding tanks had to be moved. Title insurance does not compensate for that.

In his written decision in 2013, deputy judge Terry Marshall acknowledged that it was his task to separate “the wheat from the chaff” and decide whether Franko's written statement in the offer that the septic system “continues to operate satisfactorily” amounted to negligent misrepresentation.

After a detailed analysis based on a misrepresentation case in the Supreme Court of Canada, Marshall wrote, “The septic system worked fine when Franko was the property owner. It continued to work fine after Strutt became the property owner.” Even though the case was a “hotly contested matter,” the judge ruled in favour of Franko and dismissed the claim.

For both urban and rural homeowners, the Strutt case provides important lessons when buying houses:

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<sup>10</sup> 2013 CanLII 71368

As stated elsewhere in this paper, title insurance is not a substitute for a land survey . It may pay to rectify a problem but not for the inconvenience involved, or the aggravation of a lawsuit.

It's far better to have a survey before closing (so that encroachment issues can be resolved in advance) than to have to deal with them later — even if the title insurer pays for the costs.

### **Oyelese v. Sorensen**<sup>11</sup> - Swimming pool on the neighbour's property

When a judge ordered Kenneth Sorensen to move his in-ground swimming pool, I can only imagine it spoiled his whole day.

The story began sometime before Sorensen bought 288 Raven Dr., in Kelowna, B.C., in 2007, and his neighbours, Olutoyese and Denise Oyelese, bought number 282 next door in 2009.

A prior owner of the Sorensen property constructed an in-ground swimming pool on the lot behind their house. A patio and landscaping surrounded the pool, and a cedar hedge was planted along the line of an old chain link fence. A new fence was constructed beside the original one.

When Sorensen purchased his house, the sellers gave him a copy of a 1998 survey showing what was described as the “current status of the property.” Someone, possibly the prior owner, had incorrectly sketched the pool in on the survey by hand to show its approximate location within the lot lines.

Shortly after the Oyeleses moved in, they began to put in their own pool, and discovered that the fence which both neighbours thought marked the boundary line encroached significantly into their lot. The long pie-shaped encroachment is narrow near the street line and widens out near the back of the lot. The total area of the encroachment is 1,636 square feet, or 152 square metres.

Part of the Sorensen pool sits on the disputed piece of land, along with a fence, patio, retaining wall and hedges. Eventually, the neighbours wound up in British Columbia Supreme Court where the Oleyeses demanded that Sorensen move the pool off their property.

In response, Sorensen cited a section of the B.C. Property Law Act which states that where a building or fence encroaches onto adjoining land, the court may order the land in dispute sold to the encroaching owner at fair market value, or it may allow an easement permitting the encroachment to remain. It also has the option to order the removal of the offending fence and any construction.

Ontario has a similar provision in section 37 of its Conveyancing and Law of Property Act.

At the hearing before Justice Shelley Fitzpatrick, the evidence showed that the cost of filling in the old pool and constructing a new one would be more than \$58,000 including taxes, and a similar amount to remove and relocate the chain link fence, retaining wall and cedar hedges.

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<sup>11</sup> 2013 BCSC 940 (CanLII)

The appraised value of the disputed sliver of land, if the court ordered it sold to Sorensen, was slightly more than \$7,000. The Oyeleses told the judge that they just wanted the pool moved, and offered to absorb the cost of removing the other items.

In her written reasons, Justice Fitzpatrick found that the “balance of convenience” favoured the Oyeleses, and ordered the pool moved within 75 days. The judge reasoned that landowners should not be forced to transfer part of their land in order to relieve a neighbour of a problem arising from the conduct of a prior owner of his house.

Although I agree with the result, I do not agree with the judge’s conclusion that neither party was at fault. The simple fact is that both properties were purchased without a current land survey, which is always the most important document in any real estate transaction. Had either party obtained an up-to-date land survey prior to closing, the litigation would have been avoided and the matters resolved before closing.

The purpose of a survey is to show where the building and improvements are in relation to the lot lines, and more importantly, where they are not.

There is no mention of title insurance in the court ruling, but the fact is that while title insurance is never a substitute for a land survey, it might - repeat, might - pay for some of the costs involved in forced removal of a structure – but not the aggravation.

Closing a purchase transaction without a current land survey is like diving into a pool without knowing where the deep end is.

### **Cantera v. Eller<sup>12 13</sup> - Boundary disputes and adverse possession**

A 2007 decision of the Ontario Superior Court emphasizes how risky it is to take the law into your own hands when it comes to boundary disputes, and how important it is to review a land survey of the property prior to closing to determine where the boundaries are.

The case involved what is commonly known as squatter's rights to a narrow strip of land between two neighbouring properties in the Sheppard and Yonge area of Toronto. The lots are typically about 50 feet by 130 feet and the original post-war houses are increasingly being replaced by what I call row mansions.

Laura Cantera purchased her property on Johnson St. in August 1997. Wendy Eller and Paul Wright bought the house next door in February 2004. It was their intention to demolish the house and build a new one, which they have since done.

The boundary between the Cantera house and the Eller and Wright property was marked by an old post and wire fence that is shown on a survey done in 1952. The fence is clearly not on the lot line. The prior owner of the Cantera property, who lived there from 1962 to 1997, was not aware that the fence extended across the lot line into the Eller and Wright property.

A 1994 survey showed that the south point of the disputed fence was 2.5 feet west of the real lot line, and the north point was 0.8 feet west of the line. On reviewing the 1994 survey just before closing, Paul Wright became concerned that if his lot was only 48 feet wide instead of 50

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<sup>12</sup> 2007 CanLII 17024 (ON SC)

<sup>13</sup> 2008 ONCA 876 (CanLII)

feet, it would affect the size of the house he could build on the lot. Density bylaws dictate that the buildable size of a house is directly related to the size of the lot on which a house is built.

Wright made some inquiries prior to closing and he later said that "everybody" he spoke to told him that the fence should not be a problem. The only person who was not asked for advice was Wright's own real estate lawyer. He ignored what the survey disclosed at his own risk.

As construction of the Eller-Wright house was about to take place, the neighbours had what turned into a heated discussion about where the replacement fence would be built on the deeded property line, or on the 1952 fence line.

In April 2004, Cantera and her husband delivered a letter to their neighbours claiming adverse possession (squatter's rights) to the strip between the lot line and the fence line because of continued and exclusive possession of the land by the current and former owners since 1952. The letter warned that if the fence was removed without permission, it would be considered an act of trespass.

A few days later, when Cantera and her husband were away from home, Wright removed the fence and replaced it with an orange construction fence on the lot line. Two months later, Cantera sued her neighbours for a declaration that she owned the disputed strip, and for damages for trespass.

The case came up for trial in March 2007, and Justice Alison Harvison Young released her decision in May. She carefully analyzed the law of adverse possession and ruled that the prior owners of the Cantera property had acquired possessory title to the disputed land by 1972 after living there for 10 years. That title passed to the current and future owners.

She ruled that Eller and Wright had to deliver possession of the disputed strip to Cantera and her husband. As well, the judge found that removal of the old fence and erection of the construction fence in the face of the plaintiff's objections were acts of trespass. The defendants were ordered to pay \$1,000 in nominal damages and \$5,000 for punitive damages.

Early into the proceedings, Cantera had made a formal offer to settle the case for \$1 in damages and the return of the disputed property. Since the offer was not accepted, the defendants were ultimately ordered to pay the plaintiff's full legal fees from that point forward. Eller and Wright eventually had to pay Cantera a total of about \$34,000 in interest, damages and costs.

But that didn't end the dispute. Eller and Wright appealed to the Court of Appeal. A three-judge panel did not even bother to hear from Alistair Riswick, counsel for Cantera, before dismissing the appeal in a four-line decision, and ordering Eller and Wright to pay a further \$12,500 in costs. Combined with the total of \$46,500 Eller and Wright were ordered to pay Cantera, and the costs of their own lawyer, my estimate is that they were into this little fence dispute to the tune of close to \$100,000.

Clearly, landowners who move fences without the consent of their neighbours or without a court order do so at their own risk. The case further emphasizes the need for reviewing a current survey prior to closing. The case also provides an important lesson to homeowners who are tempted to take the law into their own hands over a fence dispute.

**Andriet v. County of Strathcona No. 20<sup>14</sup>** - Where is the shoreline and who owns it?

"Buy land," wrote Mark Twain. "They're not making it any more."

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<sup>14</sup> 2008 ABCA 27 (CanLII)

I hate to be the bearer of bad news, but it's quite possible that the famous author was wrong and that they are making more land.

My guess is that Twain never heard of the legal term accretion, which is the gradual increase in size of a parcel of land bordering on a body of water. The increase may be due to the silting up of soil, sand or other substance, or by the permanent lowering of the water level.

In order to qualify as accretion, the increase in the size of a parcel of land must almost be imperceptible and cannot happen suddenly as the result of a storm or human activity in dumping fill at a waterfront.

When acting on the purchase of waterfront land lawyers should always compare the current high water mark with the original high water mark on plans dating back to the 19th or 20th century. If there is a difference between the original location of the waterfront and the current waterfront line, the land between the two lines may belong to the property owner or the Crown.

Technically in Ontario, there is no such term as the "high water mark." The line where the water ends and the land begins has been called the Normal Water's Edge since the Walker case in 1975. See *Attorney General of Ontario v. Walker*, [1975] 1 SCR 78, 1974 CanLII 3 (SCC), <<http://canlii.ca/t/1twx7>>. The Ontario and Alberta rules about water boundaries may differ.

Accretion of land was the subject of an interesting decision of the Alberta Court of Appeal released in 2008. The dispute arose between the province and a group of property owners on Grandview Bay in Cooking Lake, Alta.

Like many shallow prairie lakes, the Cooking Lake shoreline is about 305 metres lakeward from where it was according to the Dominion Land Surveyor in 1902. As a result, the new shoreline is about half the length of the original shoreline and the "accreted" lands form a substantial area. Seeking to maintain their access to the lake, the abutting registered owners sued to claim the accreted lands.

Since the horseshoe-shaped bay is almost entirely composed of land now, the claims of the neighbouring property owners overlapped significantly. When the case went to trial, the judge ruled that the property owners had no rights to access the water, and that the 305 metres of land between the cottages and the new shoreline belonged to the Crown.

In 2005, the government of Alberta, the county government and several property owners appealed the trial decision. On appeal, the parties all agreed that the trial judge was wrong and that all of the property owners had access to the water. The appeal court also agreed, and based its decision on the wording of the original Crown grant in 1907.

That deed gave the original settler various parcels of land "not covered by any waters of Cooking Lake." The appeal court ruled that the lakefront boundaries of the lots "were not as fixed by any survey at a given point in time, but rather changed as the lake receded over the years."

The big challenge for the appeal court, however, was to resolve the overlapping claims to the "new" lands and find the fairest way of dividing it.

After reviewing the evidence of various land surveyors, the court decided that the accreted lands were to be shared by the waterfront owners. The new shoreline is to be divided up in the same proportions that the owners had in the 1907 shoreline.

For anyone interested in buying cottage or waterfront property in Ontario, the lesson in the case of *Andriet vs. County of Strathcona* is that it is vitally important to know exactly where



the current shoreline is and how that relates to the shoreline shown in the original Crown deed. The only way to be certain is to insist on an up-to-date survey report from an Ontario Land Surveyor.

**Taggart v. No. 236 Seabright Holdings Ltd.**<sup>15</sup> - The retaining wall is not the lot boundary

Christopher and Lindsay Taggart were dismayed to discover that the lot underneath their newly constructed home was 1,000 square feet smaller than it was represented to be. The home is located in a new subdivision in Maple Ridge, B.C.

Behind their lot was a parcel of undeveloped land that was to become a later phase of the subdivision. The adjacent lot was at a lower elevation, and a retaining wall had been constructed across the full width of the rear of the Taggart lot.

The wall had been built before the Taggarts viewed the property. When they inspected the house and lot with the builder's sales agent, they were told that the retaining wall marked the back boundary of the lot they wanted to buy.

The size of the backyard was an important factor for the Taggarts. They needed a yard that was large enough to accommodate their household, which included "the world's largest dog" (a Mastiff), two active sons, and future plans to install a swimming pool.

During the purchase negotiations, the Taggarts were told that the lot size was about 6,000 square feet. Based on the agent's representations, the Taggarts were satisfied that the yard was big enough to meet their needs.

About a year after closing, the Taggarts discovered to their surprise that the location of the retaining wall did not actually mark the back boundary of their property but was erected well into the lot behind them. In fact, the actual size of their backyard was about 1,000 square feet smaller than the land enclosed by the wall.

The agreement of purchase and sale, which the parties originally signed, contained the actual, correct dimensions of the land as they were set out in the plan of the subdivision. At the time of closing, the builder provided the buyers with a survey plan which either party examined it carefully would have disclosed that the back boundary of the lot was not in the same place as the retaining wall.

After closing, in preparation for building a new house behind the Taggart home, the builder fenced in the Taggart yard with the new fence extending out to the retaining wall, which was beyond the actual boundary of their property.

When the lot for the new house was being surveyed, the builder realized that the actual rear boundary line was 10 feet closer to the Taggart house on the east side and 21 feet closer on the west side. Following the discovery, the builder reconstructed the fence and retaining wall on the true boundary line. Faced with a much smaller lot, the Taggarts sued for negligent misrepresentation.

After a four-day trial, Justice Janet Sinclair Prowse released her 39-page judgment, finding that the builder's agent had made specific representations to the buyers that the retaining wall marked the property boundary. She also found that the Taggarts relied on those representations and would not have bought the house without them. In the end, the plaintiffs were awarded damages of \$75,254 plus interest and costs.

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<sup>15</sup> 2008 BCSC 1412

The retaining wall in this case was specifically represented to be the rear boundary of the lot. The shortage in the lot size was found to be critical to the purchase decision, and the builder was held responsible for the misrepresentation.

Two lessons emerge from the case of *Taggart v. Epic Homes*:

- Whether your client is buying a new or resale home, always insert the lot size in the offer.
- Always examine the survey plan carefully with your client. It's the most important document in every real estate transaction.
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### **Smith v. Wilf Vezeau Real Estate Ltd.**<sup>16</sup>

This case discussed the liability of the vendors, agent and solicitor in a purchase of the wrong lot. It also discusses the meaning of the term “current survey.”

### **Always plot the metes and bounds if there is no survey**

#### *Buying the wrong house*

A real estate lawyer can practise for decades without this nightmare happening, but it crossed my desk three times within just a few days.

Michael and Karen were hoping to buy a house on Dundas St. E. When they came into my office, we carefully reviewed an up-to-date survey prepared one year ago. The survey, properly called a surveyor's real property report, shows three houses one in the middle, and one on each side. I'll call them L, M and R.

The lawyer for the seller to Michael and Karen had prepared a deed to L, the house on the left side, and that was the title I had searched. The survey report showed it to be a house with a mutual driveway.

Sitting in my office, Michael and Karen told me that the L house was not the one they were buying. They had purchased R, the right-side house with a private driveway, but the title search of that one showed the property was not owned by their vendor but by someone else who bought it a year ago.

The mixup occurred after the death in 2003 of the woman who owned both properties, and the houses were sold by her estate trustees. Despite the fact that a new survey was created in 2004, nobody actually bothered checking which one was being sold to whom, and the two deeds were switched.

When the new owners of L got a deed to R instead and placed a \$463,000 mortgage on it, they moved into it and substantially renovated a house they don't own. The vendors to my clients also have a deed to the wrong house, which they bought from the estate in 2003. Neither the purchasers of each property nor their lawyers checked the surveyor's real property report or the subdivision plan to verify which house they were buying.

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<sup>16</sup> [1991] O.J. 2532

Although title insurance if it was purchased might eventually pay for the costs of straightening out the mess, Michael and Karen couldn't close the deal until the titles were exchanged and the mortgages re-registered. Two weeks after the scheduled closing, we're still waiting for the titles to be switched. To say the least, my clients were not happy.

#### *The house is on the wrong side of the street*

My client Brendan was buying a house on Percy St., a tiny laneway near King St. E. and Sumach. Since there was no survey for Brendan's property, I had to plot out the deed description on a huge subdivision map dating from 1855. It was clear to me when I did this that title to the house Brendan was buying was on the east side of the street. But Brendan's house has an even number, so it had to be on the west side of the street.

Years ago, one person had owned both houses, and in selling the first one, the deeds got reversed. Fortunately, everybody involved was alive and cooperative and there was no mortgage on the house owned by the "wrong" purchaser.

My colleague Mitchell Weisberg, who was not the lawyer who had created the problem in the first place, managed to register correcting deeds and Brendan got the right deed and keys on the scheduled closing date. Had there been a proper survey, the problem might never have arisen, or at least it could have been detected and corrected much earlier.

#### *Buying half of a house*

The third case involved a house in west central Toronto. Two semi-detached houses were owned by the same person. The owner had obtained permission from the City of Toronto to sever the combined title and sell each house separately.

When the first house sold, the deed inadvertently contained a description of all of one house and half of the adjacent house being purchased by my clients. All that was left to sell to my clients was the west half of their house, with a frontage of just over nine feet!

If anyone had bothered to check the old survey when the other house was sold, they would have discovered that the deed transferred 1 1/2 houses.

Lawyer Graham Tobe acted for the vendor, although he had not created the initial problem. Tobe immediately recognized what had to be done, and moved into high gear to get the mess corrected. He arranged for the neighbours to transfer back to his client the half-house that shouldn't have been in their deed. The neighbour's bank also had to discharge their mortgage and re-register it on only one house.

Through Tobe's efforts, the transaction was able to close within a week of the scheduled date.

The lesson from these three tales is that although title insurance may eventually pay to straighten out errors in ownership, it won't compensate for the embarrassment in owning the wrong house, for the risk that a purchaser could back out at the last moment if good title is lacking, or for the inconvenience of not closing on time. There is simply no substitute for having, and reviewing, an up-to-date surveyor's real property report. Whoever said there was such a thing as a simple real estate deal was wrong.

#### *The pie-shaped lot*

Early on in my career, I was closing a transaction where the listing and the offer showed the frontage as 40 feet. On closing, I showed my client the survey which he had not previously

seen. The survey showed the frontage as 20 feet and the rear width as 60 feet. I called the agent for an explanation as to why she had shown the frontage as 40 feet. Her reply was, “I averaged the front and the back.”

That little caper cost her the commission she would have earned on the transaction.

### **When your house belongs to your neighbour - Always check the R-Plan**

Imagine waking up one morning to find out that the house you are living in and have listed for sale belongs to your next-door neighbours, and their house belongs to you.

That’s what happened after clients of mine asked me to review an agreement to buy a home while the offer was still conditional. The property is an attractive house in the Caledonia-Fairbanks area built in 2005-6.

Attached to the offer was a copy of the published listing and a 2005 surveyor’s registered reference plan of survey showing a pair of semi-detached houses built on what had been one 35-foot lot. One of them was described on the plan as Part 1 and the other as Part 2.

I checked the title and responded to my clients and their real estate agents that the offer was fine, assuming that the house being purchased was Part 2, the one on the right side of the two semis as seen from the street.

Everything fell apart when the agent replied that the house her clients thought they were buying was actually Part 1, the one on the left side of the two semis.

My title searches revealed that both sides of the lot had been in common ownership until September, 2006, when the lot was subdivided into two separate ownerships with the consent of the City of Toronto Committee of Adjustment, and one of the two new houses was sold.

When the first of the two houses was sold, the lawyer who handled the transaction inadvertently switched the descriptions. Unfortunately, nobody compared the registered title with the surveyor’s reference plan to ensure that ownership of the proper house was being transferred.

As a result, the purchasers received and accepted title to the wrong house. That property was re-sold to the current owners in 2012, and again, the second owner’s lawyer missed the fact that his clients were buying the wrong home — Part 2 instead of Part 1.

In 2012, the original owners still owned the second of the two houses — the one they were not living in and want to sell. The Toronto-Dominion Bank had refinanced it and the title insurance company handling the transaction registered the mortgage on the wrong house.

The lawyer for the sellers of the house my clients thought they were buying did not represent them when the mistake was made. In a detailed email, I explained the mistake to him and the two previous lawyers who had made the mistakes in 2006. Fortunately, the neighbour’s lawyer had purchased title insurance for them and I assume the insurer picked up the cost of the title switch.

I never found out whether the sellers to my clients have title insurance. The mistake could have been rectified in one of two ways. The owners could have exchanged deeds to correct the description, and in that case the mortgages on title would have to be discharged and re-registered on the correct lot. Another possibility would be to obtain a court order retroactively reversing the numbers on the surveyor’s reference plan.

Unfortunately, my clients were unable to obtain assurances from the sellers that the titles would be corrected by their projected closing date, and they terminated the transaction.

The lessons from this sad case are:

- The most important document in a real estate transaction is the survey plan. Without one, there is no way to know with certainty whether the purchaser is getting the correct house. Title insurance may pay to correct a problem but it is never a substitute for a surveyor's real property plan.
- Buying a house without obtaining title insurance is very risky.
- Buying a house without first comparing it to a survey plan is even riskier.

### **Don't try this at home - Never use a tape measure to gauge lot size**

*The Nightmare on Burgess Avenue - Always plot out the lot size if there is no survey*

Another true story from my real estate practice. Kia was looking forward to moving into his house on a corner lot on Burgess Ave in the Beach neighbourhood. Near Kingston Rd. and Woodbine Ave., the home has two kitchens, three washrooms and four bedrooms.

Described as a "great fixer upper," the house went on the market with a listing price of \$469,000. It sold to my client, Kia, for \$481,500 in a multiple-offer scenario in 2007.

On the day before closing, Kia came into my office to sign the final documents. The first thing I did, as I do with all my purchaser clients, was to review the size and location of the parcel of land he was buying.

Since there was no land survey, I pulled out a copy of the 1886 plan of subdivision and began to sketch the size and location of the lot his house was sitting on. As I pencilled in the lot frontage of 24 feet, Kia said, "Uh oh," in a tone which meant we had a serious problem.

He then showed me a copy of the advertised property listing, which indicated lot dimensions of 36 feet by 96 feet, or a total of 3,456 square feet. However, according to the seller's deed, which I had printed out with my title search, the lot size was only 24 feet by 90 feet, or 2,160 square feet.

The difference was a not insignificant 1,296 square feet, or 37.5 per cent of the promised lot size. From my office, Kia called his own real estate agent who told him that the price he paid was still a "good deal" in the current market, and if he liked the house he should buy it despite the discrepancy.

In the end, after much soul searching, my client realized that when he eventually sold the house, he would have to advertise the correct and smaller lot size. He decided he did not want the house at the full contract price, and the seller refused to lower it. Kia instructed me to terminate the transaction and get his deposit back.

I explained that the contract he signed described the lot dimensions as "more or less." Under Ontario law, this typically allows for a minor discrepancy sometimes said to be in the vicinity of 10 per cent. But based on a Court of Appeal decision dating back to 1910, a court will only interfere to void a contract if the difference in lot size is so great as to raise the presumption of "gross mistake."

Ultimately the seller's lawyer was very co-operative and agreed with our position. The sellers approved the return of Kia's deposit and agreed to compensate him for his losses and legal costs in the aborted transaction. The sellers and buyer signed releases and the property was relisted on the market with the correct dimensions.

When the smoke had cleared, I called the salesperson who had assisted the listing agent and was responsible for publishing the erroneous description. I asked him how the lot size came to be shown as 36 feet by 96 feet. "I think my client measured it with a tape measure," he told me. "I didn't know I was supposed to verify it with MPAC (the Municipal Property Assessment Corp.)."

I'm sure it was an expensive and embarrassing lesson, and that he now knows that property sizes must always be verified by reviewing the seller's title deed, or preferably, by examining an up-to-date land survey. Using MPAC records is risky because they are often wrong.

Unfortunately, in this case, there was no land survey for the parties to use in verifying the lot size. Kia's aborted purchase on Burgess Ave. is a textbook example of why surveys are so important and why title insurance, as valuable as it is, is never a substitute for a proper land survey.

**Pilarczyk v. Maslin and Borean - [1988] O.J. No. 2627<sup>17</sup>**

### **What are the minimum requirements for a sketch to qualify as a survey?**

Agreements of purchase and sale often contain clauses such as:

"The vendor agrees to supply a survey of the subject property, on or before closing."

What is frequently delivered, however, is a partial sketch, the result of frequent faxing and photocopying, on which the title, address, lot and plan, date, and name of the surveyor have long since been deleted.

According to the case of *Pilarczyk v. Masolin & Borean*, appended as a schedule to this paper, a "survey" in the context of a formal Agreement of Purchase and Sale means a survey prepared and signed by a qualified Ontario Land Surveyor registered under The Surveyors Act.

Without a surveyor's signature, an identifying title and a date, it's not a survey.

### **Real estate agent's breach of duty for overlooking a survey - two case studies**

#### **1. Richard Lowes - RECO discipline hearing**

"Why bother with a survey?" agents often ask me. "You're getting title insurance aren't you?" This attitude has become so prevalent that property sellers often do not bother checking their files to look up the survey they received when purchasing property.

Agents who say this risk running afoul of RECO regulations. A discipline panel of the Real Estate Council of Ontario, the licensing body of real estate agents was published in July, 2003.

The real estate agent was acting for the buyers and sellers of a property. In the transaction, he was a dual agent, which means that he owed a very high duty and responsibility to both parties.

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<sup>17</sup> Attached to this paper as Schedule A.

On June 15, 2001, his buyer clients submitted an offer for the property. Unfortunately, the agent failed to disclose in writing to the buyers the significance of his role as dual agent before the preparation and signing of the offer.

Acting as listing agent for the sellers, he had prepared a listing showing the lot size of the property as 50 feet by 147 feet, with a private driveway. He knew that the driveway portion of the lot had been expropriated by the Ontario Ministry of Transportation and that a highway was likely to be cut into the property. This information was not disclosed on the listing and not mentioned on the offer the agent had prepared. According to the real estate council's decision, the agent failed to advise the buyers to seek outside professional advice from a lawyer or a surveyor before signing.

The buyers asked to examine the survey that was available according to the listing. It was provided to them before they submitted their offer but it was not explained that the driveway belonged to the transportation ministry. The agreement of purchase and sale was not made conditional on approval of the survey. In fact, the survey was not mentioned at all in the offer.

After closing, the transportation ministry blocked the driveway and began to park vehicles on it. A ministry employee informed the surprised new owners that the ministry had purchased the driveway from the previous owners. Unfortunately, it appears that the buyer's lawyer also failed to explain to them the difference between the land they were getting in their deed and what the survey showed. He or she also failed to tell them that part of the land had been expropriated.

Eventually, the title insurance company paid to rebuild the driveway on the opposite side of the property. To do so, it was necessary to remove a number of trees that had provided shade and privacy. It is not clear whether the insurer provided compensation for the reduction in the lot size due to the loss of the driveway land.

The buyers complained to the Real Estate Council of Ontario, and charges were brought against the agent. At the hearing, the agent acknowledged that he acted in an unprofessional manner. Among other things, he admitted to: failing to explain dual agency; failing to obtain a signed acknowledgement; failing to make the offer conditional on approval of the survey and; failing to advise the buyers to have an expert review the survey if he was not able to do so.

The real estate council ordered the agent to pay \$4,350 for an administrative penalty and costs. In its decision in this case, the real estate council's discipline panel has stated loudly and clearly that it may well be misconduct for an agent to fail to provide a survey to the purchasers before the offer is prepared. It may also be misconduct for an agent to fail to allow the purchasers to have a survey explained to them if the agent is not capable of doing so.

The decision is available on the real estate council's website at [http://www.reco.on.ca/publicdocs/20030729\\_3779.pdf](http://www.reco.on.ca/publicdocs/20030729_3779.pdf)

## **2. Agent fails to check lot dimensions, loses deal and commission**

Is a real estate agent responsible for accurately advertising the lot size? What happens if he or she gets it wrong? Those were the questions which faced clients of mine some time ago. Regina and Leon signed an agreement to buy a house in Vaughan for \$730,000. Located between Bathurst and Dufferin Sts. north of Major Mackenzie Dr., the luxury five-bedroom house is 4,200 square feet in size.

It was listed in July 2008 by an agent with a large brokerage in Woodbridge at an asking price of \$759,900. The house was purchased from the builder two months earlier for \$726,977

plus GST, so even if it had sold for its full asking price, the seller would have lost money. Unfortunately, the listing agent advertised the lot size as 55 by 110 feet, and those measurements were included in the agreement of purchase and sale. In fact, the frontage as shown on the subdivision plan is only 13.72 metres, or 45 feet. The discrepancy exceeds 18 per cent.

During the period that the offer was conditional on inspection, Regina and Leon were handed what they were told was a survey of the property. In fact, it was a pre-construction siting and grading plan, which shows the lot and proposed location for the house. It contains dozens of measurements of the lot elevations above sea level. Obscured in the small print was an indication of the correct lot frontage.

When the lot size problem was discovered by my clients' real estate lawyer, he referred Regina and Leon to me to see if I could help resolve the problem. I met with the clients and provided them with a detailed explanation of the law on breach of contract, agent negligence and misrepresentation, as well as the costs and risks of litigation if they didn't close and decided to sue for return of their \$20,000 deposit.

Despite my assurances that the law was on their side, Regina and Leon decided to terminate the transaction when we could not negotiate a price reduction to reflect the smaller lot size. The seller and his lawyer were adamant that my clients were in default, and that the seller was not, because the grading plan had been given to them while the offer was conditional.

My clients reluctantly agreed to forfeit their deposit and sign a release with the seller. This process took several weeks because the seller's lawyer and agent would not agree to a release unless the selling agent and brokerage were also released from liability. Eventually, the parties agreed directly with each other and against the adamant advice of the seller's lawyer to release each other but not the agent.

The house, which could have been sold to my clients, was relisted with another agent and another brokerage at \$729,900, \$30,000 less than the previous asking price. Meantime, the owner was carrying the costs of taxes, utilities and a mortgage of \$616,000.

The real estate commission on the original transaction was about 5 per cent, or \$36,500, half of which would have gone to the listing agent and brokerage. During the negotiations over the lot size, the seller refused to lower the price and the agent refused to budge on the issue of whether he would contribute part of his commission to compensate for the mistake in the listing.

The agent lost the commission, the client and the listing and the seller received my clients' \$20,000 deposit.

The listing agent faced the possibility of litigation for my client's losses, as well as a complaint to the Real Estate Council of Ontario, the licensing body for Ontario real estate agents. Regina and Leon's story is a classic example of why purchasers should review a survey before signing an agreement to buy a house.

### **Zeitel v. Ellscheid**<sup>18</sup> - How to lose your ownership due to lack of a survey

My own favourite tale about errors in municipal tax rolls and the consequences of not having a survey went all the way to the Supreme Court of Canada in 1994. The case involved two

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<sup>18</sup> [1994] 2 SCR 142, 1994 CanLII 82 (SCC)



islands in Georgian Bay. Island 99B is described as Rock Island because it consists of bare rock and Island 99D is described as Cottage Island because it has a cottage on it.

Years ago, the same person owned both islands. She confused them, and referred to Rock Island as 99D instead of 99B. Similarly, she referred to Cottage Island as 99B instead of 99D.

The islands changed hands over a period of 40 years after the first sale in 1954, with succeeding owners unaware that they had title to the "other" island. Although the tax records of the Municipality of Georgian Bay properly identified the location and owner of each island, they showed the undeveloped property assessed at a higher rate than the developed property. As a result, the owners of Rock Island were taxed as though they had a cottage on it, and the owner of Cottage Island was taxed as if the island was unimproved.

In 1964, Jean Strain bought Cottage Island without a survey but believed she owned Rock Island. In the 1990s, she stopped paying taxes on it, presumably in belief that it was undeveloped and without much value. In response, the municipality conducted a tax sale of Island 99D, Cottage Island. Strain received notice of the sale, but the Zeitel and Henning families, who were actually occupying the island in the belief they owned it, were never notified of the sale.

Had the error been pointed out to the municipality before the sale was concluded, there is no doubt they would have rectified it and not proceeded with selling Cottage Island. But that's not what happened. Susan Ellscheid and Donald Simmons placed a successful bid for \$999 on the island, and bought it sight unseen, thinking they were the proud new owners of a piece of rock in Georgian Bay. In fact, they became the registered owners of Cottage Island.

When Ellscheid and Simmons arrived to take possession of their island, the mistake came to light and the parties headed off to court. The trial judge declared the sale was void, but in 1991 a split decision of the Ontario Court of Appeal upheld the sale.

The case reached the Supreme Court of Canada in 1994. In a 3-2 decision, the court ruled the sale was valid. The court refused to interfere in a tax sale where the municipal records mistakenly confused the property sold with a property occupied by other taxpaying citizens. The court noted that the legislation provides that a tax deed, once issued, is final and binding.

As well, the court said that a survey certificate of the islands would have removed the possibility of a mistake. The *Zeitel v. Ellscheid* case makes clear that it is risky to rely on municipal tax and assessment records to verify land size or location. The Supreme Court has spoken. Make sure you know which property you are buying. Get a land survey.

## **HOW TO GET A SURVEY IF THE VENDOR SAYS THERE ISN'T ONE**

Quite often a vendor says there isn't an existing survey of the property when there really is one.

There are other possible solutions which often result in the production of a survey.

First, when this occurs, I download the transfers which appear on the title abstract and send faxes to the lawyers involved asking them to check their files for a survey. Most lawyers, I find, will do this without charge, and in some cases a survey is located.

There are also two public databases for obtaining existing surveys.

1. <http://www.protectyourboundaries.ca/> and

2. <http://www.landsurveyrecords.com/>

Both of these websites contain extensive databases of existing surveys, largely in the Toronto area, which can be downloaded for a fraction of the cost of a new survey, typically \$300 more or less. They may not be current, but they are better than nothing. ■

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SCHEDULE A

**John and Mary Pilarczyk v. Masolin & Borean**

[1988] O.J. No. 2627

Action No. 16160/86

Ontario Provincial Court - Civil Division

Etobicoke Small Claims Court

**Lamb Prov. Ct. J.**

January 21, 1988.

C. Weiler, for the Plaintiffs.

Erika Borean, for the Defendants.

**LAMB PROV. CT. J.:**-- The Plaintiffs in this action, are claiming reimbursement from the Defendants for the cost of a plan of survey, of property which the plaintiffs had purchased from the Defendants.

An Agreement of Purchase and Sale dated April 12th, 1986 had been accepted by the Defendant vendors on the 14th of April, 1986 and was produced and admitted as "Exhibit No.1".

This Agreement was in the standard form and its contents are not in dispute. The Agreement had been initially prepared by the vendors' agent. The defendant, Erika Borean, who gave most of the evidence on behalf of the defendants admitted that they had all studied the Agreement thoroughly and had gone over its terms with their agent very carefully. The Agreement itself indicates that a number of changes were made to the Agreement prior to it being acceptable to all the parties.

The Agreement was subject to two conditions which are not, however, relevant to this dispute. In that area of the standard agreement reserved for what might be called "special provisions" the following clause appeared:

"The vendor agrees to supply a survey of the subject property, on or before closing."

The words "indicating the location of the dwelling at his own expense" had been struck out and initialled by the parties. Since the property was not built on, the deletion of the reference to a dwelling was understandable.

There might be some question whether the deletion of the words "at his own expense" evinced some thought on the part of the vendors that they were not to be responsible for any costs in connection with a survey, but there was no evidence that survey costs were discussed or even mentioned. This could have been because the defendants were under the impression, erroneously as I find, that the sketch later produced was in fact a survey.

The Court was however left to consider the words indicated as part of the agreement between the parties. The question to be determined was "what is the meaning to be accorded to the words:

'to supply a survey of the subject property'?"

The Court did not have the benefit of any evidence from either the agent or the solicitor for the vendors as to any discussion concerning the vendors' understanding as to their obligations in this regard.

The vendors argued that they had in their possession a photostatic copy of a "sketch" which was produced at trial and admitted as "Exhibit No.2". This sketch which was turned over to their (the vendors) lawyer after the Agreement had been signed was, in their submission, their only obligation under the terms of the Agreement.

Paragraph 10 of the Agreement provides that:

· "The purchaser shall not call for the production of any deed, abstract, survey or other evidence of title to the property except such as are in the possession or control of the vendor. Vendor agrees that if requested by the purchaser, he will deliver any sketch or survey of the property in his possession or within his control to the purchaser as soon as possible and prior to the last day allowed for examining title."

This provision clearly obligated the vendors to deliver to the purchaser the "sketch" separate and apart from the obligation "to supply a survey", on or before closing, which was a special clause inserted on the front page of the Agreement. The vendors at trial also seemed to be under the impression that, because some use may have been made of the sketch by the surveyor in preparing the survey made after the closing, the sketch was something more than it was. The evidence of the surveyor clearly demonstrated that any survey involves the examination and assessment of all documents, agreements or sketches etc. which, however imperfect or incomplete, might possibly have some bearing on the extent of title to the property to which the survey has reference.

The court did have benefit of the oral evidence of Mr. R.E. Clipsham, a consulting engineer and a qualified Ontario Land Surveyor, whose firm and under whose supervision what he described as a "Plan of Survey" was prepared and produced as "Exhibit #6". Mr. Clipsham's testimony was that under no circumstances could the "sketch" produced by the defendants be considered a "survey" by the survey profession. He gave a number of reasons for this opinion among which were, no indication of the originator of the "sketch", no references to the location or municipality, no date, and completely lacking in the kind of important and necessary information which a survey must contain. Mr. Clipsham was asked for his opinion as to what the sketch was or where it had come from. He ventured the opinion that the sketch might be photocopy of a segment of a document which had been filed in the Registry Office in connection with the severing of a larger piece of property in accordance with the requirements of the Planning Act since a number of component pieces depicted indicated that they were approximately 10 acres in area. The main point of Mr. Clipsham's evidence was that a "plan of survey" or simply "a survey" is what visually represents, as far as possible, the results of a complete investigation of a subject property with respect to matters such as "deed" as opposed to "measured" distances, easements, topographical features etc. I concluded that if the Plaintiffs had, at any time, agreed to accept, or acknowledged that the sketch produced and forwarded by the Defendants' lawyer with his letter dated May 16, 1986 was a survey, evidence would have been called to this effect. There was no evidence of where the defendants had obtained the sketch or that they had received any competent advice as to what they had. It might, for instance, have been of interest to the Court as to what reference, if any, had been made to this "sketch" by the defendants' lawyers in their reporting letter when the

Defendants purchased the property originally. Again, in the absence of any such evidence, the Court has to rely on the Agreement itself.

In addition to the evidence of Mr. Clipsham, I had the assistance of a number of special lectures which were delivered under the auspices of the committee on continuing education of The Canadian Bar Association, and printed and released for the assistance of the legal profession. [Footnote: "Surveys..the ticking time bombs." Special Lectures Canadian Bar Association May, 1987.]

While one should be reluctant to impart what might, in certain circumstance, be considered "technical definitions" to contractual language in an effort to determine what the parties meant, an Agreement of this kind is by its very nature a document which deals with matters of a technical or legalistic nature. It has been observed, on a number of instances, that almost every provision of the standard Agreement has been derived over the years from much judicial honing, as well as statutory enlightenment. There have been many instances, from time to time, of concerted efforts by the real estate industry and the Bar to ensure, as far as possible, the fairness of the standard terms of the agreement for both sides. The purchase or sale of real property is, for the vast majority of the public, among the most important transactions of their lives. It would seem only reasonable that, any doubt as to the meaning of any of the terms of such an agreement in the minds of either party, has to be resolved by resort to the advice and opinion of their lawyer at the time.

In this instance, since the obligations was clearly that of the vendors, if there was any doubt in their minds as to what was meant by the word "survey" they had a clear duty to obtain the advice and opinion of their legal advisor prior to the Agreement being signed.

The Surveys Act R.S.O. 1980 chap. 493 provides that:

1. "No survey of land for the purpose of finding, locating or describing any line, boundary or corner of a parcel of land is valid, unless made by a surveyor or under the personal supervision of a surveyor."

A "surveyor" is defined as a person who is an Ontario Land Surveyor registered under the Surveyors Act.

The tracing or photocopying of sketches or the compilation of parts of documents, which might appear to have been prepared by persons with some knowledge of drafting techniques, whether such documents have been attached to registered or other legal appearing documents, cannot be considered "surveys" in circumstances such as were present in this case. The essence of a survey is that it must bear the "imprimatur" of a registered surveyor, in all respects, to indicate to the observer that he can assume ascertainable principles have been followed in the survey's preparation with reference to the specific property investigated. Any given survey may contain information which may have implications for adjacent property and yet, cannot by any stretch of the imagination, be considered "a survey" of such adjacent property. Since in effect a survey is, as has been said, "a slice of time" the date the survey was made is of the utmost importance. There was some evidence in this action that the "sketch" was an excerpt from a document which may have been produced over 20 years ago.

The failure of the "sketch" provided by the Defendants to be considered a survey was drawn to the attention of the Defendants' solicitor prior to closing. The Plaintiffs did not give up their right to obtain a survey from the Defendants but elected to proceed with the closing of the transaction. The letter delivered by the purchasers' lawyer, on closing, made his position

abundantly clear. (Exhibit No.5). While it might be argued, that the Plaintiffs gave up any right to sue for specific performance with an abatement of the purchase price owing to any deficiencies that the survey obtained might have revealed, they did not give up their right to receive a survey or reimbursement for the cost of the survey which was obtained after the closing.

The possible consequences of closing a real estate purchase under the circumstances as they existed here, could have been exceedingly serious had the survey obtained after closing revealed, for example, that the subject property had been previously transferred without compliance with the Planning Act insofar as area requirements were concerned.

There was some question raised by the Defendants as to the fee which was paid for the survey by the Plaintiffs. Considering the quantity of land involved, its location etc. and the evidence of Mr. Clipsham, I have no reason to believe that the fee itself was in any way unreasonable. The Defendants did question the disbursements which could be attributable, in part, to that part of the survey relating to the locating of a foundation built on the property subsequent to the purchase. Apportioning the disbursements on a pro rata basis would reduce the Plaintiff's claim by \$12.25.

In giving judgment for the Plaintiffs I summarize my reasons for so doing as follows:-

1. The Agreement between the parties obligated the Defendants to supply a "survey."
2. A "survey" in the context of a formal Agreement of Purchase and Sale means a survey prepared and signed by a qualified Ontario Land Surveyor registered under The Surveyors Act.
3. The obligation to supply a survey did not merge with the closing of the transaction.
4. At no time did the purchasers waive their right to be provided with a survey by the vendors. If there was any doubt of this, the letter delivered by the purchasers' lawyer on closing, clearly set out the purchasers' position.
5. Since the purchasers were entitled to receive a survey, which the vendors refused to supply, the purchasers were entitled to have a survey prepared at the vendors' expense.
6. The steps taken to obtain the survey and the cost incurred were reasonable.

There will be judgment therefore for the Plaintiffs for the sum of \$1,173.45 plus Court costs plus counsel, preparation and witness fees of \$288.00.

## SCHEDULE B

### **The Statutory Framework for the Surveyor's Real Property Report**

#### Surveyors Act - ONTARIO REGULATION 216/10 PERFORMANCE STANDARDS FOR THE PRACTICE OF PROFESSIONAL LAND SURVEYING

##### **Surveyor's Real Property Report**

###### **Definition**

28. In sections 29 and 30,

"surveyor's real property report" means a survey that locates a building or structure in relation to the boundaries of a unit of land. O. Reg. 216/10, s. 28.

###### **Required documentation**

29. (1) The documentation for a surveyor's real property report shall consist of a plan and a written report. O. Reg. 216/10, s. 29 (1).

(2) If the plan and the written report are separate documents, the plan shall include a note indicating that the written report is to be read in conjunction with the plan. O. Reg. 216/10, s. 29 (2).

(3) The plan shall include a note specifying the name of the client for whom the surveyor's real property report was prepared. O. Reg. 216/10, s. 29 (3).

###### **Contents of report**

30. In addition to the other requirements of this Part, the surveyor's real property report shall show,

(a) all buildings and structures and the foundations of all buildings and structures under construction on the lands and their distances from the boundaries of the lands;

(b) the number of storeys of all buildings and their external construction materials; and

(c) the municipal address of the property, if any. O. Reg. 216/10, s. 30.

### **Surveyors Act**

#### ONTARIO REGULATION 525/91 formerly under Surveys Act

##### MONUMENTS

###### **Surveyor's Real Property Report**

8. (1) For the purpose of this section, a surveyor's real property report is a survey that locates a building or structure in relation to the boundaries of a unit of land which is not occupied by apartment or condominium buildings, townhouses or industrial or commercial buildings. O. Reg. 525/91, s. 8 (1).

(2) In a surveyor's real property report that locates a completed building or structure, the surveyor shall plant a monument described in subsection 2 (1) at every corner and angle at the front of the unit of land. O. Reg. 525/91, s. 8 (2).

(3) In a surveyor's real property report that locates the foundation of a building or structure under construction, the surveyor shall plant a monument described under subsection 2 (1) at least one corner or angle at the front of the unit of land. O. Reg. 525/91, s. 8 (3).



(4) The surveyor shall designate the monuments on the surveyor's real property report in the manner described in subsection 3 (1). O. Reg. 525/91, s. 8 (4).

## SCHEDULE C

Title Insurance - The Position of the Alberta Land Surveyors' Association, June 30, 2005 -  
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### **Alberta Land Surveyors' Association**

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## **Title Insurance: The Position of the Alberta Land Surveyors' Association June 30, 2005**

### **Background**

The Report on Title Insurance in Canada, prepared for the ALSA by Miller Thomson, is included with this paper. The Report provides an overview of the subject of title insurance as it compares to the Real Property Report (RPR) within the real estate transaction.

### **The Survey Fabric in Alberta**

The Alberta Land Surveyors' Association, established in 1910, is a self-governing professional association legislated under the Land Surveyors Act. The legislation charges the Alberta Land Surveyor with a number of mandates. The primary mandate however is the responsibility of the members and the association to maintain and preserve the survey fabric of Alberta. At the same time, the protection of the public and the public interest as it relates to property boundaries is another essential responsibility.

In Alberta, there are very few problems associated with boundaries because of the foresight of our forefathers when they chose to survey western Canada and register land titles under the Torrens System. The situation is much different in eastern Canada and the United States.

While the legal profession provides advice about the integrity of title, the Alberta Land Surveyor shows the extent of title by showing physical improvements relative to property boundaries.

### **The Evolution of the Real Property Report**

Some people can look back to the days when agreements were settled by hand-shakes and discussion. The complex legal issues that we deal with today were not an issue until the massive changes in mortgage lending began to occur after the Second World War.

After the war thousands of Canadians wanted to own their own property. Our society began to change from rural to largely urban. People had to borrow money to finance their purchases.

Lenders realized they needed more than verbal assurance that the property they were financing indeed did have a house on it. The response was a "sketch" that showed the location of the foundation of the home on the property relative to the property boundaries.

These general "sketches" were satisfactory for the time. A "Surveyor's Certificate" was very basic and showed only the house and the property lines. The Survey Certificates used before 1987 were not prepared according to any universal standard.

The "Surveyor's Certificate" was sufficient until 1987 when the mortgage lenders determined that they may have been providing mortgages for properties that did not meet municipal bylaws. They recognized that municipalities were putting more and more restrictions on development. They



wanted to reduce their risk and accordingly asked for a document that was standardized and approved by the municipality.

A stakeholders group involving municipalities, real estate practitioners, lawyers, mortgage lenders, and surveyors got together to develop the standards.

The fundamental standards developed by the stakeholder groups still form the basis for the Real Property Report:

1. Buildings include houses, garages, sheds, swimming pools, barns, etc.
2. Landscaping improvements would include: fences, sidewalks, retaining walls, decks.
3. Property lines of the property and easement or rights-of-way boundaries that affect the property
4. Encroachments of improvements onto adjacent properties or rights-of-way or encroachments of visible improvements on other properties onto the subject property.
5. An actual survey is conducted to measure the boundaries, to determine their location, and to measure the location of improvements.
6. All of the information is recorded on a document and is certified correct as the date of survey.

In Alberta, there are relatively few boundary problems and many people take the property lines for granted. Landowners might assume that the fence is on the property line when, in fact, it might not be. Therefore, the Real Property Report might not be obtained until just before the closing of the real estate transaction and, if the Real Property Report or municipal compliance reveals an issue, it might delay the deal.

The Real Property Report is a unique product because so many other stakeholders (lawyers, realtors, mortgage lenders, municipalities, purchasers) use and interpret the survey in addition to the surveyor's client (usually the vendor or the vendor's representative). Each of these parties may have different interpretations of what they would like the Real Property Report to show and what the value is to them.

The Alberta Land Surveyor is simply the messenger who certifies the location of the boundaries and improvements relative to the boundaries.

### **The Introduction of Title Insurance**

In the 1990s, several American insurance companies introduced the concept of title insurance to Canada. Title insurance has been used in the United States as a way of guaranteeing the security of title on a piece of property. In Alberta, we use the Torrens System in which security of title is already guaranteed by the Alberta government through the Land Titles Assurance Fund.

Title insurance companies have modified their title insurance policies for Alberta to apply to other parts of the real estate transaction. Essentially, early title insurance policies in Alberta were designed to insure a financial institution's mortgage liability while at the same time removing the need for a Real Property Report and a municipal bylaw compliance certificate. An additional policy is required to protect the landowner.

More recently, title insurance companies have added “title fraud” protection to their policies. First Canadian Title is promoting it as “by ensuring you have good title, your lawyer makes certain that title to your property is accurately registered and is free from unknown claims. What your lawyer can't protect you from is the possibility that you will become a victim of title fraud. Until now! Home owners who did not obtain a title insurance policy when they bought their home can now benefit from the protection title insurance provides.”

### **Impact of Title Insurance**

In Alberta, section 9 of the residential real estate listing contract states that the seller is responsible for providing a current RPR along with municipal compliance. However, title insurance has made huge inroads into the Canadian real estate transaction. In Ontario, title insurance is almost exclusively used in the conveyance of land. Lawyers and financial institutions have set up title insurance companies to compete with American firms selling it in Eastern Canada. The executive director of the Association of Ontario Land Surveyors in October of 2004 indicated that they now only produce a hand-full of Real Property Reports each.

While firm statistics on how prevalent the use of title insurance has become in Alberta are difficult to obtain, we can determine from the ALSA's own research that there is growing use within the province. For example, the ALSA's RPR Ad Hoc Committee compared the figures of house sales to compliance applications and can see a downward trend in compliance requests. Through the results of the Association's October 2004 polling, 62% of all lawyers have recommended title insurance at some time. This factor was negligible in the last poll ten years earlier.

In Alberta, some lending institutions, not only accept title insurance instead of the RPR and compliance, but they actively promote, market and sell title insurance.

### **Response to Title Insurance**

The law societies of Alberta, British Columbia, Saskatchewan, and Manitoba developed the Western Torrens Project as “a joint response to the changes in the residential real estate conveyancing marketplace.”

In Manitoba, the Manitoba Law Reform Commission is conducting a review of private title insurance to consider if legal reform is required to protect the consumer as well as the integrity of the public land titles system. The ALSA has been asked by the Alberta Law Reform Institute to participate in a focus group to determine the impact of insurance upon the Torrens System on the prairies.

One municipality's development department has contemplated not issuing compliance letters at all. Their position is that the availability of title insurance makes the use of compliance a waste of time. Other municipalities want extraneous information shown on Real Property Reports or demand so much for encroachment agreements making title insurance appear more attractive to landowners.

The Alberta Land Surveyors' Association has spoken with many stakeholders about title insurance in Alberta, reviewed the standards for Real Property Reports and introduced the RPR Index, a website that allows realtors, lawyers, and the general public to determine which Alberta Land Surveyor previously prepared an RPR on the property.

Finally, the Real Estate Transaction Committee (RETC) was struck by stakeholders to monitor the land transaction process in Alberta. The initiative was supported by the provincial government although government does not control of fund these meetings. **What's Next?**

Through the Real Estate Transaction Committee, (RETC), the ALSA has contact with title insurance representatives. A title insurance representative, in January 2004, made a presentation on title insurance to a subcommittee of the RETC, and was of the opinion that it is only a matter of time before title insurance takes over the roles of both lawyers and surveyors. To quote the chairman of the RETC in a letter to the ALSA's RPR Ad Hoc Committee: "Title insurance is here in a big way with ever expanding services to entice the lenders to 'one stop shopping.'"

Another issue raised at the RETC is the time delays caused by the survey, obtaining compliance and the processing of documents through the Land Titles Office. The biggest advantage of title insurance may be that it can expedite the process of land conveyance by eliminating time delays.

Finally, there appears to have been discussion amongst some in the industry to privatize the Land Titles Office "with a potential takeover by an American-based title insurance company" (as quoted in a letter from Syd Loeppky, ALS, Chairman of the Real Estate Transaction Committee to David Hagen, ALS, Chairman of the ALSA Real Property Report Committee, citing a legal representative at a January 2004 RETC meeting).

### **Position**

Title insurance is here to stay for the foreseeable future and its use appears to be growing in the real estate transaction but title insurance can be unclear and ambiguous on what is or what is not covered. While the process of obtaining compliance, which includes the preparation of a Real Property Report is more costly than title insurance (30% to 50% more), that cost is small compared to the protection of that investment.

The Alberta Land Surveyors' Association takes the position that complete and full disclosure in the real estate transaction is of paramount importance for all parties involved. Through full disclosure, the public will be protected. The Real Property Report and compliance certificate with every transaction informs the prospective purchaser about any potential problems with the property or the title. Further, municipalities are able to recognize and remedy any violations of land use bylaws at the time of purchase.

The Alberta Land Surveyors' Real Property Report is a valuable and necessary service. The full disclosure that it provides ensures the integrity of Alberta's land tenure system.

Full disclosure is in the best interest of the consumer, municipalities, the land titles system and the general public. The Real Property Report benefits property owners:

- Property owners need to know the status of their property and improvements.
- Inappropriate location of improvements can cause major difficulty and cost.
- Property owners need to know the location of easements and rights-of-way
- One homeowner found that he had built a garage over a high-pressure gas line. Because of the shape of the lot the garage could not be relocated. It cost him over \$30,000 to have the gas line relocated.

The Real Property Report benefits property purchasers by showing:

- The boundary and improvement locations on the property
- Any identified problems relating to property boundaries

The Real Property Report benefits property sellers (vendors) by providing:

- Protection from future legal liabilities resulting from problems relating to property boundaries and improvements

The Real Property Report benefits the legal community by ensuring:

- Their clients do not face boundary problems after purchasing a property

The Real Property Report benefits municipalities by assisting them:

- In determining compliance with bylaws and fire codes
- In the planning and development process

The Real Property Report benefits realtors by:

- Providing a visual representation of the property for sale
- Meeting requirements of the real estate listing/purchasing contract
- Having information to avoid delays in completing property transactions when an RPR is arranged early in the sales process.

Title insurance duplicates the insurance protection provided by our existing land title system and its use will eventually negatively impact the integrity of the survey fabric and that public land title system. By allowing problems to exist and compound without correction, the entire system may be compromised.

The Alberta Land Surveyors' Association supports a public land titles system and the full disclosure provided by the Real Property Report.

# **REPORT ON TITLE INSURANCE IN CANADA PREPARED FOR THE ALBERTA LAND SURVEYORS ASSOCIATION BY MICHAEL D. AASEN, SEAN F. COLLINS of MILLER THOMSON, CALGARY**

By Michael D. Aasen and Sean F. Collins, Associates with the Calgary office of Miller Thomson.

The contents of this paper do not necessarily reflect the views of Miller Thomson.

## **THE REAL PROPERTY REPORT VS. TITLE INSURANCE**

### **1. TITLE INSURANCE - AN OVERVIEW**

Title insurance is a concept born in the United States of America over 100 years ago. It was created to promote public reliance on abstracting companies which were involved in all real property transactions of the day. Over the years, title insurance policies (“TIPs”) became the preferred method of securing title. Title insurance insures against loss sustained by an insured due to a defect in title that affects the marketability of that title. The beneficiaries of TIPs generally are private real estate buyers and mortgage lenders. A single, one-time premium provides the insured indemnification against loss or damage suffered through title defects or unknown encumbrances. Title insurance only provides compensation for actual loss or damages arising from a covered peril that affects marketability of title, and it does not purport to guarantee title.

A model American TIP<sup>1</sup> insures against future unmarketability of title arising from, among other things, municipal zoning changes, by-law infractions, defects which could not be revealed by an up-to-date property survey, fraud, forgery, undisclosed or missing heirs, and errors or omissions made by a solicitor (or by a third party on which the solicitor relied for information with respect to the closing of the transaction). In the event of a challenge that calls into question the title to the property held by the insured, the title insurer is to provide legal defence for the insured and defend against all non-exempt claims and pay all valid claims or losses up to the policy limit. Coverage remains in effect until the property is sold or refinanced. An insured and his or her heirs should the property be transferred through a will, are covered as long as the property is not sold.

Most title insurance companies issue three types of policies: the loan policy, the plain language policy and the owner’s policy. The loan policy is designed to protect a mortgage lender’s interest; the plain language policy provides coverage for residential purchases and the owner’s policy is designed to cover any other owner’s interests (including fee simple and leasehold interests) on any other type of property, including industrial, commercial and multiple unit residential properties.

In its most basic form, title insurance protects the insured from losses as the result of claims against one’s ownership of land.

### **2. THE REAL PROPERTY REPORT**

A surveyor’s Real Property Report (“RPR”) is a legal report of all visible public and private improvements relevant to property boundaries. This report is comprised of a plan of survey and written report

based on an actual survey of the property and research into the title records for the existence of any easements, rights of way or restrictions that might affect the property. The survey plan shows the position of the buildings on the property, the limits of occupation such as fences and hedges and any encroachments such as driveways, decks and retaining walls. The written report draws attention to

any issues or potential problems discovered during the survey. The integrity of the RPR is assured through the mandatory professional liability insurance carried by the surveyor.

The RPR is a snapshot in time which reveals whether buildings and improvements on the lands are in accordance with municipal by-laws, or indeed contained on the lands at all. In combination with a lawyer's opinion of title, the RPR can be used to satisfy the lender that the property is marketable and suitable for mortgaging. If the RPR reveals problems with the property or with the positioning of improvements, a purchaser could require the vendor to resolve the problems before closing the deal or might be able to negotiate a reduction in the purchase price to provide for the potential costs of fixing the problem. Although historically produced for one person under copyright, all parties to a real estate transaction including the purchaser, the vendor, and the lending institution, rely on the RPR as an accurate representation of the property.

### **3. THE TORRENS REGISTRY SYSTEM<sub>2</sub>**

In Alberta, the land registry system currently in place is based on the Torrens Land Registry System. The key advantage of the Torrens System is that it provides certainty of title. In short, subject to some limited exceptions, what is not contained on the current Certificate of Title is ineffective against the title holder.

Briefly, the Torrens System employs three principles to ensure certainty of title. First, the province guarantees that registered documents "mirror" the status of the title, and thus, only those interests endorsed on the Certificate of Title bind subsequent interest holders. Moreover, only transactions that have been registered create an interest in the land. Second, a *bona fide* arms-length purchaser of land need look no further than the Certificate of Title for existing interests in land, even if previous interests may have existed at the time of the purchase. Finally, should a mistake occur in the Certificate of Title, the province provides compensation through an assurance fund. The Torrens System provides, to a purchaser, title which is indefeasible, or cannot be taken away, as long as the purchaser bought the property *bona fide* and for value. This indefeasibility, like any legal rule, has its exceptions, but they are limited. If the purchaser contributed to a fraud with respect to the property, such as tricking a third party into not registering an interest in the property before it was sold, then the title is not indefeasible. Fraud that does not involve the purchaser does not affect the purchaser's title; the person tricked must look to the assurance fund for relief. Similarly, if a purchaser did not receive the property for value, such as through a gift or an inheritance, the purchaser does not enjoy indefeasible title.

Another exception is if the land titles office erroneously issues two valid Certificates of Title at one time. In this instance, the holder of the prior certificate prevails and the purchaser must look to the assurance fund for compensation. The third class of exception is the statutory exceptions contained in section 65 of the Alberta *Land Titles Act*<sub>3</sub>, which relate predominately to government legislation or other actions.

The Torrens System does not provide any remedy for errors in a RPR or any other problem unrelated to the Certificate of Title.

### **4. USE OF TITLE INSURANCE IN REAL ESTATE CONVEYANCING**

The standard practice in an Alberta real estate transaction is for the vendor to obtain and provide to the purchaser a valid RPR containing a stamp of compliance granted by the city or relevant municipal government within which the property is found. The standard real estate contract contained a clause which codified this obligation. As of January, 1998, a revised standard form real estate contract was in circulation. This contract modified the vendor's obligation to obtain a RPR and provided a choice:

At least 5 Business Days prior to the Completion Day, the Seller will provide the Buyer, regarding the matters described in 4.2, either a real property report with written evidence of municipal compliance or a valid policy of title insurance.<sup>4</sup>

This alteration clearly presents title insurance as an alternative to a RPR. A review of the American experience suggests that this was not the original intent nor justification for allowing title insurance.

As stated above, title insurance was created to promote public reliance on abstracting companies which were involved in all real property transactions. This reliance was necessary because of the inefficient and inaccurate land registration and transfer system in place in much of the United States at that time. In its simplest terms, some U.S. systems would require a lawyer to research the title of the property being purchased back to its origins to ensure that there were no hidden interests in the property which could arise and affect the title of the new purchaser. This required a review of all historical records concerning the property, including deeds, civil and probate records, tax records, etc. in order to verify the vendor's right to transfer ownership. Examples of what could affect the vendor's right include incorrect information on deeds and other public records and liens or other claims against the property which ostensibly would become the purchaser's responsibility. The majority of the American TIPs, however, require the purchaser to obtain a survey of the property made by a registered surveyor certifying to the location of all improvements and encroachments on the property.

Title insurance was created not to replace RPRs, but to compliment them. Title insurance was to protect against unknown, or not easily discoverable, title defects, not problems with property that were readily ascertainable. For this reason, some U.S. jurisdictions, most notably Iowa, have banned title insurance because, in the eyes of some, it serves no viable purpose. As was stated by a representative of the Iowa Bar while testifying in a case brought by title insurance companies challenging Iowa legislation banning in-state sales of title insurance [*Chicago Title Insurance Co. v. Huff* 1977 NW2d (Iowa 1977)]:

A: . . . [W]e concluded that the system of land conveyancing in Iowa was far superior to the system in any other state that had title insurance. . . . We found, and we actually made a diligent search for cases in which persons might have sustained a loss because of a title failure or resulting out of the system of abstract examination, and we didn't find a solitary loss that any buyer or seller has sustained under the system.

Q: Do you consider the Iowa title, as you did then, today to be stable?

A: Yes I do. The Iowa titles are regarded by many legal scholars throughout the country as being the finest there is in any state in the Union.<sup>5</sup>

Title insurance was not created for, nor adopted in, every state, but was only necessary in states "where unreliable and fragmented land registration systems, coupled with voluntary errors and omissions requirements (along with dubious professional practice and qualification standards) created unacceptable delay, risk and cost for lending institutions and purchasers." In these jurisdictions, title insurance was introduced to eliminate uncertainty in real property holdings and to secure real estate transactions in a free enterprise system.

## **5. BENEFITS OF TITLE INSURANCE**

What then are the benefits of purchasing title insurance? TIPs are generally designed to either cover risks or defects in the title to the property that are unknown after a detailed review of all

documentation by a lawyer, or alternatively (or conjunctively), to cover risks or defects that are known. The advantage of title insurance is that it allows parties to complete transactions which otherwise may not have proceeded due to long-term liability exposure for the purchaser: the title insurer assumes the risk normally borne by the purchaser. Others argue that another advantage is the requirement for a detailed review of the documentation is no longer necessary as all a purchaser needs to do is obtain a TIP to cover off any unknown defect. This arguably eliminates some costs associated with the transaction, such as a lawyers opinion or the requirement of providing an RPR, and also may streamline and expedite the process. Whether these are in fact advantages is arguable.

A further advantage is that the insurer will handle and conduct all litigation over the title to the property. If there is a claim, no matter whom against, the title insurer is obligated to defend and, if unsuccessful, pay out any loss to the insured. Although seemingly an advantage on its face, this duty to defend is potentially problematic and will be discussed below.

## **6. CRITICISMS OF TITLE INSURANCE**

### **(a) wilful blindness**

Perhaps the biggest criticism of title insurance is the flip side of one of the advantages noted above: the purchaser enters into a contract for the sale of land without fully knowing what she is actually receiving. The purchase puts her trust in the TIP to indemnify her for a risk that arises later, without ascertaining at the time of the purchase what those risks may be. Some of these risks may be acceptable, but others, such as finding out that in order to comply with a caveat put on the property the entire nature of the property has to be changed (such as removing an addition to a house or removing a garage entirely because it is not allowed), may not be acceptable. In short, indemnification under the TIP is only monetary, and intrinsic value may be lost due to an unknown title defect.<sup>7</sup>

### **(b) it may be unnecessary**

A second criticism is simply that title insurance is unnecessary. In other words, if it ain't broke, don't fix it. As was the experience in Iowa, the government and interested parties there determined that due to the highly effective land registry system in place, title insurance was unnecessary. As one Ontario observer noted, "The risk in Ontario is so low that title insurers in Ontario are laughing their heads off.

Is there title in Ontario that can't be fixed? The insurers are feeding off the good job lawyers have done for years."<sup>8</sup> The same could be said for the job done by surveyors: it is only because of the Torrens System and the requirement of an RPR that the vast majority of property buyers never have to be concerned with a previously unknown claim against title.

### **(c) duplication**

A corollary argument of "if it ain't broke, don't fix it" is that title insurance, in Alberta at least, really is not insuring much not already covered. Title insurance has been described as insuring consumers against "matters that are not on the public record and arise after closing, like forgery, fraud, concealed marriages, survey errors, disputed boundaries, missing heirs, unregistered easements and adverse possession."

<sup>9</sup> In reality, the Torrens System, and the Alberta *Land Titles Act*, provide protection against most claims of prior unregistered interests in land - for free. Forgery, fraud, concealed marriages, missing heirs, and unregistered easements are all mentioned in the *Act*, and expressly cannot affect title, unless the purchaser was involved in the fraud or forgery. The remedy for the claimant is against the vendor or the assurance fund. Similarly, survey errors would be covered by the land surveyors'



mandatory assurance fund, as would disputed boundaries if they should have been caught by the RPR.

As for adverse possession, this too would likely be caught by an RPR, or at least by a wary purchaser who investigated his purchase prior to completion of the contract.

What then could title insurance protect against that the Torrens System does not? The *Land Titles Act* does contain exceptions which allow unregistered interests to attach to land, such as existing Crown reservations, unpaid taxes, public highways, leases for less than three years where there is actual occupation of the land, decrees, orders or executions, rights of expropriation, and rights-of-way or easements acquired through an Act or law. A review of a TIP shows that similar exceptions are contained there as well, and although the lists may not be identical, it seems unlikely that an exception under the *Act* would not also be an exception under a TIP.

#### **(d) it may create long-term harm**

There is also the suggestion that the widespread use of title insurance could muddy the waters and make the process less effective over the long-term. As was stated by the executive director of the Iowa State Bar Association, “Consumers are better off using abstracts and attorneys’ opinions. Title Insurance destroys abstracts. They insure over defects. Iowa lawyers clean up title defects and record everything done in the course of that cleanup.”<sup>10</sup> This sentiment was concurred with by the Alberta Real Estate Board’s Broad Based Committee: the Real Property Report is a check and measure system for municipalities.

Without the Real Property report landowners, developers and builders will have little incentive to comply with land use bylaws thereby undermining the planning system that is responsible for orderly development in Alberta.<sup>11</sup>

Title insurance may be a low-cost, low risk alternative to obtaining an RPR now, but after several generations of purchases, there is no guarantee that the risk will remain low, nor that the premiums charged will as well. The American system which created the need for title insurance may be an example of what Canada’s land alienation system will evolve into if title insurance replaces the due diligence currently performed through RPRs and lawyer’s opinions. For example, in most U.S. TIPs, there is a requirement that the applicant for insurance obtain an RPR before coverage will be extended. This is not currently required in Alberta TIPs, perhaps because of the historic conveyancing procedures which were fairly detailed, and perhaps because in order to be an attractive product, title insurance must be marketed as replacing something within the conveyancing procedure and the obvious option is an RPR. However, over several transactions, the assumptions that title insurers currently rely on may disappear, and thus, once title insurance becomes embedded into Albertan conveyancing procedure, the requirement for a current RPR may be resurrected.

#### **(e) duty to defend**

The next criticism of title insurance is based on the duty to defend title. As stated above, the land registry and land surveyors assurance funds, as well as lawyers professional insurance, all provide funds to protect purchaser, but it is up to the purchaser to pursue this himself. Title insurers present themselves as parties who will assume that obligation and remove this concern. In some cases that may be the case, but it does not conclusively remove the possibility of a property owner having to resort to litigation to obtain relief. Title insurance, like all insurance, requires the insured to prove, and the insurer to accept, that the loss suffered is a covered peril. Law schools offer an entire class based on insurance law, and a large number of the cases studied in that class deal with insurance companies

denying coverage and an insured having to go to court to enforce his rights. Because there are exceptions under a TIP, there will necessarily be disagreement about whether a peril is covered. Further, there may be issues with respect to whether there has been any loss. For example, an insured generally obtains title insurance to ensure that her title will be protected, but what if there is a defect on the title that the title insurer considers irrelevant or decides that the defect is not affecting the “marketability” of the property. Most TIPs leave it up to the insurer’s discretion whether to commence an action to “quiet title”, or remove the defect. If the insurer decides not to prosecute a quiet title action because there is as of yet no loss, the insured may be left with less certain title than she originally believed.<sup>12</sup>

A further example is the possibility that an original purchaser may choose to go the title insurance route on her transaction and not obtain an RPR, but the subsequent purchaser does not. An RPR then becomes necessary and it may show a fundamental defect that the new purchaser will not assume and wants remedied or else he will not buy the property. The question arises as to whether the TIP will cover this. There is no obligation, to a government or neighbour for example, for the insured to remedy the problem, but the insured may want the problem remedied in order to sell the property. If the property is not sold, there is arguable no damage. Further, title insurance only covers perils that affect the marketability of title, not necessarily the market value. So, as stated in a recent decision of the Georgia Court of Appeal, a difference exists between economic lack of marketability, which relates to the physical conditions affecting the use of the property, and title marketability, which relates to defects affecting legally recognized rights and incidents of ownership . . . One can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable.<sup>13</sup>

This coverage issue will be more fully explored below.

The question also arises whether an TIP holder would understand the difference between a defect discovered subsequent to purchasing the property that an RPR may have uncovered which, although not affecting title, made the property worthless, and a defect which once discovered affects the marketability of title. As title insurance in Alberta, and Canada, is relatively new, there is little case law contemplating litigation under TIPs, and thus a purchaser may not only be blind to the risk being insured against, but also the limitations and consequences of making a claim under the policy.

#### **(f) length of litigation**

Any decision to employ title insurance to deal with subsequently discovered defects in title creates the possibility for the insured that he or she may have to wait months, if not years, for resolution of the dispute. A title insurer does have the obligations to commence legal proceedings to defend title from covered defects, but like all litigation, the process will be slow and the ultimate resolution for the insured may not occur for years after the problem was discovered. For example, if an insured puts the property up for sale, discovers that the garage is abutting onto the neighbour’s yard, and the neighbour does not agree to an encroachment agreement, litigation against the neighbour, the previous owner of the house or the builder of the garage may result. This litigation could be protracted, and in the end, may result in the garage having to be moved, removed or rebuilt, which also takes time. An insured must understand that the decision to sell the property could be delayed for years while the litigation runs its course.

#### **(g) lack of legislative regulation**

Currently, the Alberta *Insurance Act*<sup>14</sup> regulates and provides standards for various types of insurance. This type of regulation is absent for title insurance, with only one mention in the *Insurance Act*, that being section 222 which requires a TIP to be in writing, to conform with the

basic principles of the Act, and that a liability limit for the insurer be contained in the policy. This lack of consumer protection was critically commented on by the Title Insurance Steering Committee of the Canadian Lawyers Insurance Association:

It should be noted that there is no specific legislation regulating the activities of title insurers in Canada. They are, of course, subject to the insurance laws and regulations, however, there is no specific focus on consumer protection in terms of a real estate transaction involving title insurance...

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## **7. ISSUES FOR INSURED IN THE UNITED STATES**

Although the relevance of United States law on this issue is not directly applicable due to the fundamentally different land registry systems there, as well as the difference in the exceptions contained in those U.S. policies, a brief survey of U.S. cases illustrates some issues that insureds may face in attempting to collect on title insurance policies. Perhaps the most instructive areas concern coverage issues and valuation issues.

### **(a) coverage issues**

It is arguable that most insureds under a TIP assume that they have protection from any attack to their title and against loss or damages arising from those attacks, win or lose. This is not the case. U.S. law shows that what is covered is a question of fact which often means going to trial and getting an unexpected result. Several U.S. cases provide examples of insured's bringing suit, and losing, in an attempt to enforce the terms of a TIP:

- a TIP did not cover unknown tax assessments pending against the property of the insured as the City had the option whether to levy the assessments and accordingly the potential assessments were neither liens nor encumbrances when the TIP was issued: a title insurer is not liable for a prospective or contingent encroachment or lien;<sup>16</sup>
- a TIP did not cover 2.5 years of consequential and lost profit damages caused by construction delays arising from ejectment litigation against an abutting landowner;<sup>17</sup>
- a TIP was found not to apply to a statutory restriction on the use of property, as although the restriction affected the market value and halted construction, it did not affect the marketability of title only the market value, and did not create a defect, lien or encumbrance;<sup>18</sup>
- A TIP was found not to cover an insured's existing [and presumably valid] encroachments onto a neighbour's land;<sup>19</sup>
- a TIP did not cover hazardous waste found on the property as the waste affected the market value of the property, not the marketability of title, and as the waste was not an encumbrance, even though the government could impose liens on the property for violating environmental laws.<sup>20</sup>

### **(b) valuation issues**

A separate issue once coverage has been established is to value the loss of the insured. As the above cases indicated, consequential and loss of profit damages are likely not covered. What is covered for a property owner is the loss of market value of the title. The issue then arises of when should the loss be valued. In the United States, four dates for determining the value of the loss have emerged:

[1] when the insured discovered the title defect;

[2] when the insured bought the defective title;

[3] when the trial which identified the insured's loss occurred; or

[4] the effective date of the TIP.

The insured will carry more risk for loss of market value depending on the date chosen. An example can be found in *Allison v. Ticor Title Ins. Co.*,<sup>21</sup> where the court determined that the actual loss to the insured was to be assessed from the date of the loss and not from the date of purchase. As the property had substantially depreciated, the loss was greatly lessened by employing this method of valuation.

Similarly, the value of the loss is determined by the market value of the property, and not by its economic value. For example if property is bought for an economic purpose, and that purpose is defeated due to a restriction on the property title, the market value of the property has not changed and thus there is no loss. The loss to the insured, that of lost economic value, is not compensable under a TIP.<sup>22</sup> An insured must also be aware that the loss will not be paid until it has been determined to the satisfaction of the title insurer, or determined by a court of law. A policyholder could therefore be waiting a substantial amount of time before being able to realize on the policy.

## 8. CONCLUSION

Is title insurance an alternative to a RPR? It was not created as such, and, as the above suggests, in the long-term it likely should not be in . Title insurance was successful in the United States because it to some degree eliminated, or at least reduced, uncertainty in real estate conveyancing. By trying to market title insurance in Alberta as an alternative to a RPR, an invaluable document in a conveyancing system which already provides substantial certainty as long as all the procedures are followed (including obtaining a RPR), it is arguable that title insurance companies are attempting to eliminate in Alberta what was their *raison d'etre*, or reason for being, in the United States.

This does not mean that title insurance cannot play a role in conveyancing in Alberta.<sup>23</sup> An informed purchaser, aware of all the defects, may choose to obtain title insurance as opposed to having the defect fixed or not entering into the contract. Some risks may be so unlikely that having title insurance is a safe and effective safeguard against the unlikely coming true. The principal of *caveat emptor*, or buyer beware, generally does not include an uninformed decision when buying property. Title insurance would seemingly make this so, and therefore title insurance should not be looked at as a replacement for anything, but additional protection for unusual circumstances.

Using title insurance as a replacement for an RPR would be like purchasing theft insurance and then leaving the car door unlocked with the keys under the floor mat - your car may not be stolen, but you increase the likelihood by acting in a careless manner. It does not seem to make sense for a purchaser of property to willingly not investigate the risks inherent to the property simply because there is title insurance. Having title insurance replace, as opposed to augment, existing safeguards already in place in land conveyancing practice in Alberta, seems likely to create further problems in the future.

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21. Allison v. Ticor Title Ins. Co. 907 F2d 645 (Wis. 1990).
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23. See Footnote 7, p. 6.

## SCHEDULE D

"A Place For Everything and Everything in Its Place - Why title insurance cannot take the place of a survey" by William O'Hara and Anna Husa of Gardiner Roberts LLP- Reproduced with permission

### **A PLACE FOR EVERYTHING AND EVERYTHING IN ITS PLACE**

#### **Why title insurance cannot take the place of a survey**

**by William O'Hara and Anna Husa - Gardiner Roberts LLP**

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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 neighbor. 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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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.

To be clear, title insurance is an after-the-fact indemnity. It does not purport to guarantee title<sup>4</sup>. Instead, it aims to make good any losses that occur as a result of title defects. In the same way, 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

### **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*<sup>8</sup>. Syvan was a property developer. In 2000 he entered into an agreement of purchase and sale for a commercial property in Oshawa, Ontario. The 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 defect<sup>9</sup>. 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.

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 chose to obtain both title insurance and a land survey before proceeding with a purchase.

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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>



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

5 See “The Surveyor’s Real Property Report” at [http://www.aols.org/sites/default/files/SurveyorsRealPropertyReport\\_0.pdf](http://www.aols.org/sites/default/files/SurveyorsRealPropertyReport_0.pdf)

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 from “Residential Title Insurance” by David R. Currie, at <http://www.titleplus.ca/Lawyers/Art4.asp> [Ed. Note: This link is no longer valid.]

8 [2006] O.J. No. 3765

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.”