Title Insurance in 1998

January 15, 1998 - Craig R. Carter[1]

INTRODUCTION:

Real estate conveyancing in Canada is at a crossroads. Massive and fundamental changes are upon us. We are in the midst of a revolution. As with any revolution, a certain amount of chaos will occur. But as well, there will be great opportunities for those who have the vision to see the opportunities and the courage to take risks. Those of you who understand and embrace the change will work in an electronic conveyancing environment with access to tremendous amounts of property information and opportunities to organize and utilize your property records never before imagined.

What is this revolution? There are two components. The first is title insurance. The second is electronic registration. Each of these will be discussed in greater detail hereafter.

What is title insurance? Title insurance is an indemnity between the purchaser or mortgagee of land and a title insurer pursuant to which the title insurer will fix a title problem or pay the actual loss suffered because of the title problem. The policy insures against known title risks such as not having marketable title, not having access, having a building built over adjoining lands or undisclosed liens against the property. If loss is suffered because of one of these risks, the insurer pays regardless

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of who was at fault or even if no one was at fault. This is different from our lawyer opinion system where you have to prove a lawyer has made a mistake.

Electronic registration is a system of registering documents electronically. A simple concept but it leads to fundamental changes. It is expected that electronic registration will be fully implemented in Ontario in 2 years and we expect that it will be adopted elsewhere in Canada.

TitlePLUS: The Ontario Experience

A: Introduction

American title insurers have made a concerted effort to penetrate the Ontario market. Their success has led the Lawyers' Professional Indemnity Company ("LPIC") to create a revolutionary new product to give lawyers an opportunity to compete directly with the American title insurers. The same lessons will be played out across Canada and therefore Ontario's experience is instructive of what risks other jurisdictions will face.

B: A History

It was about three years ago that the real estate bar began to be concerned about the initiatives posed by First American Title Insurance Company ("First American"). Until then, title insurance was really an American phenomenon. Occasionally, American clients would require title insurance to be used in Canada at great expense and waste. About three years ago, First American began two initiatives which thrust them onto centre stage in the real estate conveyancing world.

First, First American began to underwrite survey protection in residential purchase and sales in circumstances where a survey did not exist or was too old to be useful. First American was able to secure general acceptance from financial institutions that a First American title insurance policy could be used where a survey did not exist or was too old to be of use. Since the cost of a title insurance policy was in the range of $300.00 and the cost of a new survey was $750.00 or $800.00, this became a cost effective alternative. The surveyor's complained and wrung their hands but their fees were too high they are now on the verge of losing the residential resale business. Unfortunately, the survey protection offered by First American is limited to the lenders' interest only and purchasers receive no survey protection. This has lead to actionable misunderstandings about what protection the purchaser is actually receiving. Herein lies a trap for the unwary or the careless.

The second successful inroad for First American came in the secondary mortgage market. First American was able to offer financial institutions a title protection alternative to lawyers' opinions that was ultimately cheaper than the standard model involving lawyers. In the standard model, a client would sign an application at the bank's office. Once approved, the approval would be sent to a lawyer chosen by the borrower. The lawyer would prepare the documents, meet the client, explain the risks, register the mortgage and report to the client and the lender. In the First American model, financial institutions sign up the customers in the financial institution's office and forward the documents to First American for registration. First American retains a law firm to subsearch, register and provide First American with a very limited title certificate as required by Ontario law. The lender relies on the title policy. The mortgagor gets no legal representation or protection whatsoever. The financial institutions get quick turnaround, a standardized title

insurance product and a chance to meet and sell the client on other financial services. First American gets a low risk transaction and a growing share of what lawyers traditionally did.

As a result, lawyers in Ontario have effectively been cut out of the secondary mortgage market probably to the detriment of the public. The secondary mortgage programme has also provided First American with a substantial war chest in order to pursue the balance of the real estate conveyancing process. In some jurisdictions, lawyers are forming document preparation companies to retain some of this work. The document preparation companies utilize an insurance policy as well to limit their exposure.

It appeared to the Real Property Section of the Canadian Bar Association-Ontario ("CBAO") that First American was taking over the real estate conveyancing business either by design or because of fundamental changes in the marketplace. This became abundantly clear when First American began to lobby the Ontario government to remove Regulation 666 from *The Insurance Act.* Regulation 666 requires title insurers before writing an insurance policy in Ontario to obtain a certificate of title from an independent lawyer (that is a lawyer not employed by the title insurer).

Section 3(3) of Regulation 666, R.R.O. provides as follows:

> "A licence issued to an insurer to undertake title insurance in Ontario is subject to the limitations and conditions that no policy of title insurance shall be issued unless the insurer has first obtained a concurrent certificate of title to the property to

> be insured from a solicitor then entitled to practice in Ontario and who is not at that time in the employ of the insurer."[2]

After looking at First American's success in the secondary mortgage market, and considering the vulnerability of lawyers, the CBAO believed that absent legislative protection, lawyers were ultimately going to lose all residential conveyancing to First American and other American insurers. We concluded however that an opportunity existed for the lawyers in Ontario to join forces with First American to achieve three goals:

1. first, to provide the public with an alternative form of title assurance that we believed after careful consideration could provide slightly better protection to the public;

2. second, to provide a framework within which the public but the public would retain access to a network of lawyers across Ontario providing necessary and essential legal advice to the public. It was our belief that a title insurance model without the backup of a solicitor was counter productive to the public interest. We also believed that lawyers should control the conveyancing process thereby relegating title insurance to a tool utilized by lawyers; and

3. third, to gain control over the conveyancing standards of lawyers through a title insurance model. The CBAO had been frustrated in its attempts to deal with lawyers' standards in real estate transactions. It was clear that the Law Society did not have the authority or the desire to fundamentally control real

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2 Regulation 666 requires provision of a certificate of title not an opinion of title. The Regulation does not regulate the form or the content of the certificate. The protection of the public under Regulation 666 may prove illusory.

estate standards. We believed competitive pressures were eroding standards, increasing claims and punishing the careful lawyers by rewarding cost cutters and corner cutters. Title insurance would give us the ability to set, control and monitor standards.

Representatives of CBAO met with First American over a six month period in order to engineer a win/win situation with First American. We believed that if First American as they publicly stated, wished to work with lawyers that our initiative would be wholly successful. It came as a shock to us when First American rejected our overtures. Did First American hope to replace the real estate bar in Ontario as the cornerstone of conveyancing?

This led us to a very disturbing realization. The real estate bar did not speak with one voice. The considerable efforts of First American were aggressive and focused. Our energies were therefore focused on two fundamentals, lobbying the government to retain Regulation 666 and secondly finding a mechanism for lawyers to compete directly with First American.

It is therefore to the credit of the real estate lawyers in Ontario that through LPIC we have achieved both these fundamental objectives. First of all, the Law Society, LPIC, the CBAO, ORELA (Ontario Real Estate Lawyers Association) and CDLPA (Country and District Law Presidents Association) joined forces in a highly focused lobbying effort to prevent the removal of Regulation 666. The government came to realize that title insurance was virtually un-regulated in Ontario and to destroy our conveyancing system that had operated for hundreds of years and to replace it with un-regulated competition from American insurers would be a huge political

mistake and subject the public to substantial risks. As a result of these initiatives, Regulation 666 remains.

The second alternative is equally astonishing. LPIC with the assistance of the CBAO and ORELA created a new title insurance product called TitlePLUS. TitlePLUS offers a title insurance product which meets or exceeds the coverages offered by the American title insurers. TitlePLUS also includes an errors and omissions product which creates a direct liability between the public and LPIC for solicitors' negligence. No other title insurer offers this additional coverage. TitlePLUS also created an electronic delivery system that is state of the art, simple and effective. TitlePLUS is an initiative that lawyers in Ontario are proud of.

C: The Title Insurance Product Part of TitlePLUS

The TitlePLUS policy is currently limited to residential purchase transactions where the property is going to be owner occupied, is purchased for valuable consideration, contains not more than four residential dwelling units (at least one of which is occupied by the owner) and is not seasonal or recreational. It is anticipated that the kinds of properties covered will be expanded as the TitlePLUS concept is rolled out.

The American title insurers in Ontario had been using a standardize American title insurance product based upon the ATLA policy. TitlePLUS also uses the American title insurance policy model as its basis and then improves on the coverage, the wording and the structure of the policy. LPIC has created a better product than the competition. For instance, the TitlePLUS policy defines more clearly in what circumstances the policy amount will be paid out, what losses are covered and what

losses are not covered. The American policies are more vague and therefore more open to litigation as to what is covered and not covered.

As a result of the improvements in the TitlePLUS insurance product, First American has amended its policy to include additional endorsements in order that its coverage matches that of TitlePLUS. The end result is that both the First American and the TitlePLUS insurance products will eventually provide virtually identical coverages. For real estate lawyers, this is an excellent development since the decision whether to choose one policy over another should not depend on small and technical advantages or disadvantages in the coverage provided by each title insurer.

The TitlePLUS policy also offers an additional coverage which is the "PLUS" in the policy. Effectively, the TitlePLUS policy covers solicitors' negligence. As a result of this coverage, if a solicitor is negligent in the conduct of a real estate transaction, the purchaser/insured can make a claim in contract under the insurance policy directly to LPIC for reimbursement for the clients actual loss. Purchasers need not sue the lawyer and the client is no longer concerned about the impecuniosity of the lawyer, whether the lawyer is still practising law, whether the lawyer has coverage sufficient for the potential loss and whether the lawyer has maintained her errors and omissions coverage. This provides substantial protection in the transaction to a purchaser obtaining a TitlePLUS policy that First American cannot provide.

It should be noted that where a purchaser chooses a First American title policy, the purchaser still can claim against her lawyer for negligence relating to that part of the transaction that is not insured under the title policy (that is the non-title issues) and LPIC's errors and omission insurance will protect the lawyer provided coverage has

not lapsed and the lawyer hasn't breached his policy (provided timely notice; co-operated with LPIC). To the extent that a loss occurs to the purchaser, there will inevitably be circumstances however where First American through its title policy and LPIC through its solicitors' negligence will be fighting over which insurer is liable. For instance, First American is entitled to subrogate to the purchaser in the event of solicitors' negligence and sue the solicitor either for negligence to the purchaser or for negligence directly to First American. This litigation potential will ultimately hurt purchasers to the extend that purchasers will be drawn into a fight between two insurers. An advantage therefore in using TitlePLUS is that the insurer is LPIC in all circumstances and therefore there is no incentive for LPIC to litigate whether the risk falls under the title part of the policy or the errors and omissions part of the policy vis a vis the purchaser. This will make for a smoother claims result for purchaser.

D: Electronic Delivery

The third fundamental component of the TitlePLUS concept is the electronic delivery system used to issue the TitlePLUS policy. TitlePLUS can only be issued by a lawyer approved by LPIC to issue TitlePLUS policies. Approval is open to all lawyers in Ontario who have completed the appropriate training and who have signed an agreement with LPIC to abide by LPIC's delivery standards.

A TitlePLUS lawyer must be a registered user of the Teraview desktop. (This is a computer process developed by Teranet, a joint private/government consortium charged with converting the Ontario registration system to a paperless system.) TitlePLUS can only be issued through the Teraview desktop. The Teraview desktop effectively connects the lawyer electronically to LPIC through what Teranet calls a

TitlePLUS gateway or icon. The TitlePLUS delivery system has been designed in a user friendly way that mirrors a real estate transaction. The system works through a series of questions and basic information gathering through which LPIC creates a policy electronically to match the transaction. The lawyer by answering a series of questions, records what title qualifications should be included and how they are to be dealt with on closing. Before the policy can be issued, the programme requests confirmation that the closing has occurred and that any title issues have been dealt with. Following closing, the lawyer will issue the policy through her computer. The lawyer is informed electronically what if any searches are required to issue the policy. The system also requires the lawyer to ask her client certain key questions about the transaction in order to determine what coverages are required. These questions are asked at an early stage and effectively force the lawyer to communicate early with her client. The programme also generates a closing acknowledgement to be signed by the purchaser built out of the answers given by the lawyer. This document will inform the client and confirm the client's instructions and should eliminate one of the commonest negligence claims against lawyers - failure to ask the right questions and failure to record the client's answers if the right questions are asked. The electronic delivery system is fundamental to the risk assessment made by LPIC. If followed, it will reduce substantially the risk of claims in real estate transactions.

E: Closing Centre

As a result of LPIC's TitlePLUS initiative, First American has launched a new initiation called the First Canadian Closing Centre. The Closing Centre concept works generally as follows:

(i) the lawyer receives an offer to purchase and refers it to First American (through a subsidiary called First Canadian);

(ii) First Canadian orders all searches, prepares all closing documents, makes requisitions, prepares all mortgages, answer clients' questions and deals with the other lawyer;

(iii) just prior to closing, First Canadian forwards all documents to the referring lawyer to sign up her clients;

(iv) signed documents are send back to First Canadian to register; and

(v) First Canadian issues a First American title policy to the purchaser and the lender.

The fee for First Canadian service is about $900.00. The lawyer can then add in his $100.00 or $200.00 and has all the conveyancing services completed for her. It is hard to imagine the system working for lawyers other than part timers or non-real estate lawyers getting the occasional deal. The costs are too high and the risk too high to turn clients over to First American. The real risk however is that real estate agents will refer the clients directly to First American or to lawyers who are on contract with First American.

F: Structure of a Title Insurance Policy

Title insurance policies are generally divided into five basic sections. The first section generally sets out the policy date, the insurance policy number and the

insurer. These details can also be found in some policies in Schedule "A" to the title insurance policy. The second section sets out what risks are covered by the insurance. The third section generally deals with standard exclusions from the risks covered. The fourth section deals with procedural matters such as how claims are made and prosecuted and the rights of the title insurer in the event of a loss. The fifth section deals with specific title exceptions. These are generally contained in a schedule to the policy since these exceptions are different for each property. Theoretically, you can think of the title insurance policy as being broken down as follows:

1. Preliminary;
2. Risks covered;
3. Standard exclusions;
4. Particular exclusions; and
5. Procedure.

In addition, title insurance policies may contain one or more endorsements which are general changes or amendments to the standard policy or additional coverages otherwise excluded by the general exclusions.

Definitions:

The "insurer" is the insurance company issuing the policy. The "insured" is the homeowner buying the insurance policy. The "land" is the land specifically described in the schedule to the policy. The "title" is the insured's ownership or interest in the land.

(i) Standard Form of Policy

Each title insurer has their own standard title insurance policy. The format of each policy is different and the language used in each policy is generally different. While there is broad consensus on the use of concepts, terms and language, there will be distinctions between each insurer's standard form policy.

The differences in language between each of the policies may or may not be material depending upon how the Courts interpret the various insurance contracts. Lawyers who take reasonable steps to make an informed decision on the differences between various competing policies will not be liable in negligence if the Courts ultimately find that differences in language between policies result in different coverages. Until the Courts clarify whether or not language differences are material, lawyers can only make reasoned decisions in light of drafting uncertainties.

(ii) Actual Loss

Title insurance policies use the term actual loss as a basis for recovery. Because title insurance is a contract of indemnity, a claim can only be made for an actual loss. This is true even if the policy uses the words "loss" or "damage" only.

Actual loss is to be distinguished from hypothetical loss, theoretical loss, anticipated loss, future loss and possible loss. In all cases, the title insurance coverage covers a loss that has actually occurred and presumably is quantifiable.

Actual loss would therefore include some or all of the following:

1. A decrease in the market value of the land caused by a title defect;

2. The cost of obtaining a minor variance, rezoning, official plan amendment or other act necessary to bring the land into compliance with local zoning by-laws;

3. The cost of removing any noncompliance such as removing an improvement or changing an improvement so it complies;

4. The value of an improvement if it had to be demolished;

5. Any losses if a sale, mortgage or lease of the property could not be completed as a result of a defect;

6. The cost of acquiring additional lands in order to comply;

7. The cost of removing a restrictive covenant or easement or other title defect;

8. The cost of removing a mortgage, lien or encumbrance that should not have encumbered the property.

Actual loss would not cover:

(i) emotional suffering since this is tortuous head of damage;

(ii) loss of non real property assets;

(iii) loss of lands not described in the policy;

(iv) a mortgagee's loss unless the mortgagee can show non-recovery under the covenant to pay or under collateral security;

(v) a second mortgagee's loss where the first mortgagee forecloses;

(vi) loss where the first mortgagee sold the property or foreclosed and the mortgage recovery was not affected by the title defect; and

(viii) where because of excluded risks such as environmental there is a total loss, a coincidental title defect will not result in any actual loss since the property is already lost.

The heads of actual loss are in fact all encompassing. The critical factor is whether the actual loss is quantifiable, has a financial base to it, whether or not it is too remote and whether it relates to one of the covered risks.

The concept of actual loss is intuitively simple. The insured is only compensated for losses that the insured actually incurs. If there is negligence or a title defect and that defect can be rectified or results in no actual loss to the insured, then no amount is payable under the insurance policy. For instance if there is an old mortgage on title and no person asserts an interest in the property as a result of the old mortgage or makes any claim for payment of the old mortgage and if the purchaser is not in the process of selling, mortgaging or leasing their property, then there may be no actual loss. If the mortgage falls away by reason of the Limitations Act or the 40 year search rule under the Registry Act before the purchaser sells the

property, then there may be no actual loss. If the purchaser has possessory title but paper title is defective, no actual loss occurs. If the property is sold and the new purchaser is prepared to accept additional title insurance coverage with respect to the defect, i.e. that defect will not affect the new purchaser, then the old purchaser will have suffered no actual loss.

(iii) Date of the Policy

Title insurance policies have a date of issue. The date of the policy is the effective date that the indemnity against defects occurs.

The policy date is the moment in time that the policy is issued which is immediately following registration of the transfer of title to the purchaser. The title insurance policy only covers defects of title that exist as of the policy date. Nothing that occurs after the policy date is covered by the policy. If any liens or encumbrances arise after the date of the policy, they are not covered. If any person acquires an interest in the property after the policy date, that person's interest is not insured.[3] The policy should be taken out by the beneficial owner.

In the case of the TitlePLUS policy, the legal services coverage includes any work done by the lawyer in the purchase "transaction" even if it occurs after the policy date. The only question is whether the legal services were part of the "transaction". For instance, if the lawyer is negligent after the policy date in removing a mortgage

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3 Raymond Werner: The Basics of Title Insurance in Title Insurance, The Lawyer's Expanding Role: "Unlike other insurance that covers the future occurrence of a risk, title insurance, with some limited exceptions, insures against risks that have already occurred but are only manifested after the date of policy."

from title, that title defect falls under the title insurance part of the TitlePLUS policy since it is a mortgage or defect on title that is not excluded. If on the other hand the lawyer gives bad advice with respect to an encumbrance that is excluded from the policy pursuant to Schedule "A" and therefore is intended to affect the property, then the negligent advice given will fall under the legal services contract and would be applicable even if the negligent legal advice were given after the closing.

(iv) Title Coverage

Title insurance provides a contract of insurance and indemnity against specifically enumerated risks. The policy sets out those matters that are covered. Generally, the title coverage section of the title insurance policy is broadly drafted in order to pick up all potential title defects. The standard exclusions and the specific exclusions then back away from the broad coverage.

It is important to review the general and specific exclusions to see whether the loss which has occurred arises out of a risk ultimately excluded from the title insurance policy.

One question lawyers will ask themselves is whether the title matters covered under the title insurance policies are broader than the opinions given by lawyers in a traditional transaction.

There are several items in the title coverage that many solicitors are not specifically dealing with in traditional purchase and sale transactions. It is likely however that if the solicitor were conducting a traditional transaction and one of these risks occurred, that the solicitor would be found negligent. For instance title insurance

covers notices of work orders registered as of the policy date. Most lawyers do not update their municipal searches on the closing date but their opinion is not so limited and as a result the lawyer will be negligent if a work order is issued on the closing date. In this respect as well, the solicitor's opinion and title insurance offer the same coverage.

A great deal of U.S. jurisprudence exists on whether defects are title defects falling within the coverage items. For instance an adjoining owner who blocks a drainage easement does not create a title defect since the easement is valid.[4] A title cloud that is ineffective or improper still affects marketability and must be cleared. A right of way that is blocked part of the year by floods or is otherwise temporarily impassable is not a defect.[5]

Access is another area of title coverage. Title policies do not guarantee a particular access point but only that somewhere on the property there is access to a public highway.

The TitlePLUS policy provides legal services protection in addition to title coverage. The legal services coverage contains a basket clause which provides that if an Actual Loss occurs in the "transaction" because the lawyer commits an error or omission in providing legal services for the transaction for which liability is imposed by law, then the title insurance policy will be available to protect the purchaser from his or her Actual Loss.

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4 Dyer Moody Inc. v. Dynamic Constructions Inc. 357 So. 2d 615 (1978)

5 Title & Trust Co. of Florida v. Barris 381 Sa 2d 1088 (1979)

(v) Duty to Defend

The current opinion based system is based upon proving solicitor's negligence. The purchaser must defend her own title against a title defect, lien or encumbrance and if damages result, then a claim can be made against the lawyer and ultimately the lawyer's insurance. LPIC being the insurer of the lawyer has no duty or obligation to defend the purchaser's title against a claim by a third party. As a practical matter however, LPIC generally steps in in order to control the proceedings and limit its exposure.

Title insurance policies however create a direct contractual relationship between the title insurer and the purchaser and obligate the insurer to defend the purchaser's title. In addition, the cost to the insurer of defending the purchaser's title is covered by the title insurance and does not reduce the policy amounts. These expenses or costs are in addition to or over and above the policy amount.

The cost to the purchaser of defending the purchaser's title under a traditional solicitor's negligence program can be ruinous.

Failure to defend by a title insurer is an actionable tort and can lead to greater damages to the insurer than if the title insurer had defended. The tort is framed as a breach of the duty of good faith. The insurer's duty of good faith is independent of the insureds. The insurer's duty to defend is very broad and includes the duty to

defend even if the claim ultimately fails or ultimately does not fall within the title coverage. If it could be covered the insurer must defend.[6]

(vi) Amount of the Policy

In the traditional model where a solicitor gives an opinion and is found negligent, there are no limits on the solicitor's potential liability. The solicitor is liable for the actual loss to the purchaser at the time the claim is adjudicated. For instance, if a solicitor in 1955 made a catastrophic error with respect to a property valued at $10,000.00 which error was not discovered until 1989 when the property had appreciated to $500,000.00, the amount of liability that the solicitor and its insurers would face would be the value of the land at the time the claim was adjudicated (that is $500,000.00).

Title insurance policies however, set a policy amount which is the maximum amount that the title insurer will pay on a claim. The amount of the title insurance policy is limited and is set when the policy is issued.

Title insurance policies provide for two times the policy amount to take into account increases in the property value by reason of inflation. The policy amount will be set at the actual purchase price of the property.

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6 Walters v. Marler 83 Cal. App. 3d 1

(vii) Reductions in Coverage

The insureds under a title insurance policy must notify the insurer of any claim and must co-operate fully with the insurer in resolving any claims. This duty of good faith is fundamental to insurance coverage.

In a negligence based system, the negligence of the lawyer would be offset by any corresponding negligence or willful conduct of the lawyer's client. For instance, if the client withheld information from the lawyer, this would be taken into account in determining whether the lawyer was negligent or whether the purchaser's damages were caused by the purchaser's willful act. In addition, LPIC's insurance coverage for a lawyer is dependent upon the lawyer not voiding the policy by for instance doing anything which would prejudice LPIC's subrogated rights.

Title insurance operates in much the same way. Standard title insurance policies reduce the coverage or eliminate the coverage under the policy if the insured does not co-operate in the processing of a claim, if the insured does not give timely notice of a claim or if the insured prejudices the insurer's right of recovery. In addition, the TitlePLUS policy reduces the coverage under the policy if the insured makes a false statement about a covered risk.

U.S. jurisprudence prevents the insurer from relying on these kinds of clauses unless the insurer can clearly show prejudice.[7]

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7 McLaughlin v. Attorney Title Guarantee Fund Inc. 6 Ill App. 3d 911

(viii) Standard Exclusions to Coverage

Because the coverage sections of the title insurance policy are so comprehensive, title insurance policies contain exclusions to the policy coverage. These exclusions are intended to specifically deal with risks that the title insurer cannot accommodate, anticipate or quantify. The excluded coverages are the most important part of the policy. The exclusions are general in nature and are not deal specific. These are similar to the "standard" exceptions found in solicitor's opinions. Coverages excluded are:

(a) the exercise of government powers and any statutory or government regulation.

Because this exclusion is so broad and excludes some matters that the title insurers intend to cover, this exclusion then adds back specifically covered items.

The provision makes it clear that the government powers exclusion is not intended to cover work orders or zoning matters that appear in the public records and/or breaches of the subdivision control provisions of the Planning Act.

(b) Title risks that are agreed to by the insured or that are known to the insured on the policy date and not revealed to the insurer.

There is significant American jurisprudence in this area. Generally, the insured must have actual knowledge of the defect or lien, must appreciate

that the matter is significant or the lien or defect must have been created by the insured. This is a difficult area and will give rise to claims being denied.

(c) Risks that result in no actual loss to the policy holder and risks that first affect the title to the property after the policy date.

(d) Native land claims.

(e) Environmental losses.

(ix) Continuation of Coverage and Who is Covered by the Policy

An opinion on title given by a lawyer is personal to the party receiving the opinion. It is generally not transferrable or assignable without the consent of a lawyer. However, is it not absolutely clear that a solicitor's opinion cannot be enforced by parties to whom the opinion was not given.

In the case of title insurance, attempts are made in the policy to limit who can claim under the policy. Generally, just the named party in the policy can rely upon the policy. Most title insurance policies however extend the coverage to third parties who are related to the policyholder such as spouses, heirs and family members. One must be careful here about the ability of beneficiaries to claim under a policy if they are not named. One must also be concerned whether a trustee has an insurable interest.

Coverage also continues so long as the insured could continue to suffer a loss even though the insured is no longer the owner of the property. In particular, there are at

least two circumstances where this applies. First, where an insured is deemed to give an implied covenant of title under the Land Registration Reform Act when the insured sells the property. Secondly, if the insured takes back a mortgage, coverage continues.

Generally title insurance is not assignable when the lands are sold. A fresh policy must be paid for. If a corporation owns the property, the policy continues even if the shares are sold. If a partnership holds title, coverage continues even if the partners change. Generally shareholders, officers or directors, tenants, potential purchasers, finance companies any of whom acquire, lease or lend money on the strength of the insured's interest in the land and in reliance on a title policy cannot recover from the insurer under the policy.

(x) Notice of Claim

Title insurance policies contain notice provisions that require the insured to notify the insurer in the event that the insured becomes aware of a claim. This allows the insurer an opportunity to rectify the problem and/or deal with the claim before it gets out of control. Failure of the insured to properly notify the insurer could result in loss of coverage. The title insurance policy sets out mechanisms for making claims and the information required by the insurer as part of the claims process.

(xi) The Rights of the Insurer to Settle a Claim

The title insurance policy gives the insurer a wide arsenal of remedies to deal with a claim. Basically, the insurer can pay the policy amount, pay the actual loss, rectify the problem, repair, replace or relocate any building or structure on the lands,

remove any building or structure on the lands, pay any reduction in the market value of the property, settle any claim made against the title to the property by a third party, prosecute or defend any legal proceeding related to the claim in the name of the insured and take any other action which the insured feels is appropriate in the circumstances. The insurer upon becoming aware of a claim will first attempt to rectify the problem. This may involve an action by the insurer in the Courts to correct a title defect. If the problem cannot be rectified in a cost effective way, then the insurer's second approach is to quantify the actual loss and pay the claimed amount. If there is a total loss the insurer may also acquire the land from the purchaser in exchange for the full policy amount and then proceed to rectify and ultimately sell the property.

The right of the insurer to choose a course of action is very broad since the insurer wants a large arsenal of remedies to resolve a claim. It is possible that the insurer could cause hardship to the insured by its choice of remedy. The Courts can however, use the doctrine of bad faith to alleviate this hardship.

(xii) Subrogation

Title insurance policies generally contain a right of subrogation which allows the insurer to step into the shoes of the insured and prosecute any claim which the insured may have against third parties. This would include claims under the implied covenants in the Land Registration Reform Act against a former vendor and could include claims against professionals such as architect, engineers or lawyers who acted on behalf of the insured.

The right of subrogation is a valuable tool for the insurer and any conduct of the insured which prejudices the insurer's right of subrogation could result in loss of coverage.

(xiii) Non Transferability of an Insurance Policy other than as Specifically Contained in the Policy

As a general rule title insurance policies are not assignable. In the event of a transfer or sale of the property, a new insurance policy must be issued. This can lead to interesting developments where you have corporate reorganizations or inter family transfers.

While not strictly a transferability issue, some insurers will agree to provide insurance to a new purchaser even if a defect has arisen. This allows a vendor to transfer the property without making a claim provided the purchaser will accept title insurance instead of having the defect cleaned up. This could be useful for defects that are difficult to cleanup but result in little risk.

(xiv) Specific Exclusions in Schedule "A"

Most title insurance policies include a Schedule "A" which contains the specific exclusions to the policy coverage. These exclusions would include mortgages being assumed, easements or rights of ways which were assumed in the agreement of purchase of sale, tax liens being assume and new mortgages being used to finance the purchase. It is here that any survey exclusions would be inserted. Registered restrictions being assumed by the insured would also be inserted here. Specific exclusions are generally found in the purchase agreement or through a title search.

(xv) Endorsements

Where the insured and insurer agree that terms and conditions of either coverage or the exclusions are to be amended or deleted in the particular title insurance policy, this is accomplished by endorsements or schedules to the title insurance policy. Because the title insurance policy is a standard form it is generally not amended by the parties. For instance if the insured expects to obtain additional coverage because the property is a condominium unit, seasonal property, a leasehold or some other particular/unusual kind of real property, then additional endorsements can be obtained. Endorsements can also be crafted for construction lien issues, zoning matters and particular title defects. While most insurers have standard endorsements that they can use for particular and recurring situations, an endorsement can be specially drafted for a particular property and a particular fact situation which needs resolving.

CONCLUSION:

Title insurance is a reality in Canada. American Title insurers are working hard to dominate our markets for real estate conveyancing. TitlePLUS is a competitive product that permits lawyers to continue offering legal services to their clients. Unless however the real estate lawyers across Canada position themselves to offer a consistent national policy, lenders may turn to American insurers and drive lawyers out of real estate conveyancing.