

[On lawyer's Letterhead]

[The following letter is intended to be a sample letter to clients explaining in general terms what title insurance is, how it works, and some of the relative strengths and weaknesses of title insurance. It is meant to be essentially for information purposes and is not meant to be a comprehensive review of all of the issues related to title insurance generally or any particular title insurance policy; as you will note, the letter prompts the reader to make further inquiries if the reader identifies particular questions or concerns.]

Dear • :

**Re: Title Insurance**

We are providing you with this letter to inform you of the option of purchasing a title insurance policy in connection with your upcoming real estate purchase. As explained in more detail below, title insurance may be purchased as an alternative or supplement to some of the services typically provided by a lawyer in a real estate purchase transaction.

While title insurance can be of significant value in some circumstances, there may be situations in which a title insurance policy may not be an appropriate response or solution to the problems that may be encountered in a real estate transaction. This letter is intended to provide you with a general overview of the services your lawyer would typically provide, a general description of the risks that title insurance policies usually insure against and the risks not covered by title insurance, and a discussion of the potential limitations of a title insurance policy. This letter is not intended to provide specific legal advice regarding the purchase of title insurance, and should you have any questions about the applicability of title insurance to this transaction, or should you have particular questions about title insurance policies, you should discuss those matters in further detail with me or other legal counsel.

**What is the Role of a Lawyer in a Real Estate transaction?**

When acting for a purchaser in a real estate transaction, lawyers in Nova Scotia provide most, if not all, of the following services:

- (a) Advising their clients on the terms of the agreement of purchase and sale;
- (b) Conducting a title search, identifying title concerns, and providing an opinion that the purchaser is obtaining good and marketable title to the property;
- (c) Reviewing surveys or location certificates;
- (d) Conducting off-title searches pertaining to matters like zoning and permitted uses, tax liens and other statutory obligations, and advising on compliance with various government regulations;
- (e) Preparing mortgage documentation, if any, and explaining the rights and obligations of the lender and borrower; and
- (f) Reviewing statements of adjustments and attending to the closing of the transaction.

In particular, the purchaser's lawyer will certify to the purchaser (and the purchaser's lender, if there is a mortgage) that upon closing, the purchaser will have good and marketable title to the property. This opinion and certification is based upon a review of the documents registered at the local Registry of Deeds and does not speak to the physical boundaries of the property, the accuracy of the metes and bounds description of the property, or any interest in the property that might arise by statute, possession or other unregistered means. Legal services provided by Nova Scotia lawyers are insured by the Nova Scotia Barristers' Society Liability Claims Funds. Accordingly, in the event that the purchaser incurred a loss because he or she did not in fact have good and marketable title, the purchaser would have recourse to the Liability Claims Fund, provided the loss was caused by the lawyer's negligence.

### **What is Title Insurance?**

Title insurance is a policy of insurance whereby a title insurer, in return for payment of a premium, agrees to indemnify the policy holder up to a specified maximum dollar value in the event of a loss incurred as a result of an event or circumstance which is covered by the policy. Title insurance policies also include a "duty to defend" which requires the insurer to pay legal expenses in the event a claim is made against the policy holder's interest in the property. It should be noted that title insurance only responds to an actual loss suffered by the insured, which means that a quantifiable monetary loss must be incurred before the insurer will indemnify the policyholder.

There are a number of title insurance providers operating in Nova Scotia. Each title insurer has various plans with various options for coverage. This letter does not provide a comprehensive review of all of the provisions of a typical title insurance policy, nor is it intended to compare and contrast the coverages offered by competing title insurers. With that in mind, the following paragraphs set out a brief description of the kinds of coverage offered in most title insurance policies, along with the exclusions from and exceptions to that coverage.

Title insurance normally provides coverage for losses arising from:

- (a) Title to the estate or interest of the policyholder being other than as stated in the policy;
- (b) Any defect in, charge, lien, or encumbrance on title;
- (c) Unmarketability of the title; and
- (d) Lack of right of access to and from the property.

Most of the covered items noted above are matters that would be the subject of inquiry by the purchaser's lawyer if the purchaser's lawyer were retained to undertake a title search. The title insurance policy goes farther than the Certificate of Title provided by the purchaser's lawyer, in that the loss suffered by the purchaser need not be occasioned by the lawyer's negligence (i.e. the lawyer's professional liability insurance would only compensate the purchaser in the event that the loss was a result of negligence on part of the lawyer and not the result of deliberate misconduct). The title insurance coverage also insures against circumstances which would not be certified by the purchaser's lawyer, including loss from forgery, fraud, duress, incompetence, incapacity or impersonation. Unlike a lawyer's legal services which are provided only to the person who retains the lawyer, title insurance coverage usually covers not only the policyholder but the spouse and children of the policyholder and anyone who inherits the insured property.

Depending on the title insurer and the type of coverage chosen, title insurance may offer an alternative to performing certain of the searches and inquiries which a purchaser's lawyer would undertake in the normal course of a real estate purchase transaction. For example, if the policy contains coverage for losses that would have been disclosed by obtaining an up-to-date survey of the property, the purchaser could rely on the title insurance policy in lieu of retaining a land surveyor to prepare a location certificate showing the boundaries of the property and the location of any building thereon. Likewise, if the policy contains coverage for losses occasioned by the presence of any

outstanding tax bills, the purchaser may decline to have the lawyer obtain a tax certificate from the relevant municipality. It should be noted that not all title insurance policies will automatically provide coverage for these matters, so care must be taken to review the policy to determine if the coverage is obtained automatically or must be specifically negotiated with the insurer.

In addition to circumstances where a purchaser of real estate may wish to obtain a title insurance policy in order to supplement or replace certain of the lawyer's investigations, a title insurance policy may be appropriate in specific circumstances where a lawyer is unable to certify that the purchaser will have good and marketable title to the property. For example, in circumstances where an heir who has an interest in the property could not be located, the purchaser's lawyer would not be able to certify good and marketable title. In that case, by obtaining title insurance and agreeing to pay a premium to cover the possibility of the missing heir coming forward, the purchaser may be afforded the security required to go forward and complete the purchase of the property. In such circumstances, title insurance can act as a means of facilitating a closing where the purchaser's lawyer is not able to provide a certificate of title.

### **Exclusions and Exceptions from Coverage**

As with other insurance contracts, title insurance policies contain various exclusions and exceptions from the coverage obtained - these are losses not covered by the policy and for which the title insurer does not accept any obligation to indemnify. Each title insurer's standard policy will have different exclusions, and in-depth analysis of all of the risks not covered by these policies is beyond the scope of this letter. As a general comment, the following exclusions are typical to most title insurance policies:

- a) Coverage for environmental contamination;
- b) Coverage for future uses of the property (for example, a restriction on the ability of a Purchaser to put a structure on a piece of land that was vacant at the time the title insurance policy was purchased); and
- c) Coverage for any matter known to or acquiesced in by the policy holder.

Again, the foregoing examples are not an exhaustive list of the kinds of items excluded from coverage. Prior to purchasing a title insurance policy, you should review in detail with legal counsel the excluded items in the policy.

### **Limitations of Title Insurance**

While title insurance can provide many worthwhile benefits to purchasers of real estate in certain circumstances, title insurance may not be appropriate to respond to every issue that arises in a real estate transaction. The appropriateness of title insurance requires an understanding of the kinds of remedies offered when a claim is made under a policy.

Every title insurer's policy gives the title insurer the discretion to respond to a claim against the policy in the manner it sees fit. Accordingly, even though you make a claim against the policy, the kind of compensation or remedy offered by the title insurer may not necessarily be satisfactory to you, for a variety of reasons discussed below.

As noted, the title insurer is obligated to respond once you have incurred an actual loss caused by an insured event. Depending on what the problem is, the insurer may decide simply to offer to you a monetary settlement of your claim. Since many problems covered by title insurance will arise only after you have purchased the property, title insurance may only be able to compensate you for your loss, as opposed to solve the problem that arises. Consider as an example a decision to forego obtaining an up-to-date survey in favour or obtaining title insurance. In the event that, for example, your garage or driveway encroaches onto your neighbour's property, the title insurer may decide that it will respond to your claim by offering you an amount of money that would compensate you for not having a garage or access to the property over the driveway. If the matter had become apparent prior to closing (as it would if you had obtained a surveyor's location certificate) then you would have had the opportunity to decide whether to proceed with the purchase of the property, terminate the agreement, or seek to re-negotiate the terms of the agreement based on the value to you of the garage or access to the property.

As well, the title insurer has a duty to defend you in the event you sell a property for which you purchased a title insurance property and a requisition is made in respect of an apparent title defect which was insured under the policy. As with other insurance coverage, the title insurer will have control of how you deal with the title objection and carriage of any legal proceedings and you will be required to cooperate with the insurer in its defence of the claim. In the meantime, however, your sale may not be able to be closed while the title insurer attempts to resolve the title objection through litigation. While the title

insurer might propose that the prospective purchaser accept a "free" title insurance policy from the title insurer which provides coverage for the same problem as a means of expediting closing of the transaction, there is no obligation on the purchaser to accept such a resolution. In the case of the driveway access problem mentioned above, the purchaser may not want to purchase the property without guaranteed access over the existing driveway.

Identifying such problems in advance enables a purchaser to decide, on his or her own terms, how to deal with the problem; title insurance is often a useful option to consider in such circumstances. Insuring over unidentified problems, especially those which may not be adequately dealt with by a cash payment when the problems subsequently become evident, may not always be an appropriate course of action.

### **Conclusion**

I hope that the foregoing has been of some help to you in introducing the basic principles of title insurance to you. As you can see, there are many issues to think about when considering purchasing a title insurance policy. Please contact me at your convenience to discuss any questions you may have arising out of the matters discussed in this letter.