



*A member  
of the  
Canadian  
Council of Land  
Surveyors*

**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**

**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<sup>2</sup>**

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*<sup>3</sup>, 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.”<sup>6</sup> 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 arguable is 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 an 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 problems was discovered. For example, if an insured puts the property up for sale, discovers that the garage is abutting onto the neighbours 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...<sup>15</sup>

**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 ejection 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 presumed 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 Alberta. 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.

1. *First American Title Insurance Company*, Information Brochure.
2. M.L. Benson and M. Bowden, “*Understanding Property: A Guide to Canada’s Property Law*,” (Toronto: Carswell, 1997), pp. 142-150.
3. *Land Titles Act*, R.S.A. 1980, c.L-5.
4. The Law Society of Alberta, “*The Law Society of Alberta Benchers’ Advisory, June 1998*”, p. 5.
5. D.K. Wall, “*Chicago Title Insurance v. Iowa*”, *Surveying and Land Information Systems*, Vol. 50, No. 1, pp. 37-41.
6. J. Melnitzer, “*The ‘Unholy War’ Over Title Insurance*”, *Canadian Lawyer*, July 1998, pp. 14-23; J. Melnitzer, “*The Fallout From Title Insurance*” *Canadian Lawyer*, August 1998, pp. 27-34.
7. The Association of Ontario Land Surveyors, “*A Survey or Title Insurance: It’s Your Choice*”, 1997, p. 5.
8. See Footnote 6, at p. 15.
9. See Footnote 6, p. 15.
10. See Footnote 6, p. 16.
11. Alberta Real Estate Board, *Mandate for Real Estate Broad Based Committee*, p. 4.
12. J.F. Rowe, J.D., “*Proof of Title Insurance Claims*”, 38 Am Jur Proof of Facts 3d 389 at p. 429.
13. *Chicago Title Insurance Company v. Investiguard, Ltd.* 449 SE2d 681 (Ga.App 1994).
14. *Insurance Act*, R.S.A. 1980, c.I-5.
15. Title Insurance Steering Committee, Canadian Lawyers Insurance Association, “*Residential Real Estate Conveyancing in Canada: Final Report*”, October 1997, at p. 15.
16. *Strauss v. District-Realty Title Ins. Corp.* 87 ALR3d 752 (Md. 1976).
17. *Lawyers Title Ins. Co. v. Synergism One Corp.* 572 So2d 517 (Fla. 1990).
18. *Somerset Sav. Bank v. Chicago Title Ins Co.* 649 NE2d 1123 (Mass. 1995).
19. *Transamerica Title Ins. Co. v. Northwest Bldg. Corp* 773 P2d 431 (Wash. 1989).
20. *Lick Mill Creek Apartments v. Chicago Title Ins. Co.* 231 Cl App 3d 1654 (Cal. 1991), as cited in Am Jur 2d at p. 302.
21. *Allison v. Ticor Title Ins. Co.* 907 F2d 645 (Wis. 1990).
22. *Barthels v. Santa Barbara Title Co.* 28 Cal App 4th 674 (Cal. 1994), as cited in Am Jur 2d Supp. at p. 1566.
23. See Footnote 7, p. 6.