

Title insurance solves a problem we don't even have

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Byline: Douglas Buchmayer

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There's a new kid on the block who wants to enter the arena of residential real estate. He's called "title insurance." The promotional brochure of First American Title Insurance Company lists the following benefits to the home buyer:

- Provides more comprehensive coverage than a lawyer's opinion;
- Reduces the lawyer's work;
- Saves the customer money;
- Eliminates many funding delays.

With all these benefits, why are lawyers and land surveyors in Ontario strenuously resisting its introduction? Perhaps it's out of fear of losing their livelihood, as some title insurance supporters have suggested. But the concerns are more deeply rooted than that.

"Title" refers to the legal right of ownership of a property as reflected in documents registered in Ontario land registry offices. In an agreement of purchase and sale, title is generally guaranteed to be "good and free" from any interests that could compromise the buyer's enjoyment of the property. The lawyer's role (among others) is to search the registered documents to ensure there are no problems with title to a property.

A buyer must also be concerned with the "extent of title," that is, how well the description of a property as recorded in the title documents matches the actual layout of the property. This is certified through the expert drawings and written reports of Ontario land surveyors with a document called a "real property report," formerly known as a "building location survey."

Armed with these documents, a buyer can compel a seller to correct any problems with the property before the transaction is completed. The tradition in Ontario has always been to remedy problems as we go. As a result, our system revitalizes and purifies itself on an ongoing basis.

Obviously, the strength of the system is only as good as the confidence we place in its parts. Ontario's land titles system, which in the next century will cover all properties, has become a world model of accuracy and efficiency. As to the credentials of Ontario land surveyors, the rules to which they must adhere are among the most stringent in the world.

Lawyers and surveyors carry mandatory errors and omissions insurance in case they make mistakes. If a problem is discovered under the land titles system, it too has its own insurance fund to draw upon. With all this, is there still a need for title insurance?

Title insurance has provided the basis for land transfers in the United States since 1876. Compared to Ontario standards, the system of land titles registration in most parts of the U.S. is disorganized and unreliable. The process of land registration varies, not only from state to state, but in some cases from county to county. Since comprehensive title opinions are virtually impossible to give in all situations, American home purchasers are able to buy insurance against the loss that may result from title problems.

Like all types of insurance, the protection given is a means to an end. Usually, the problems insured against cannot otherwise be avoided. They are accepted; insurance companies consider them risks. But the cause of the problem is not cured.

This is contrary to the system that has developed in Ontario. As a result, the same risks or uncertainties do not exist here.

The absence of a problem needing to be cured is perhaps the most forceful argument against title insurance. Over the last decade, millions of Ontario tax dollars have been poured into the land registry system to make it even more efficient. Is it fair to taxpayers that the benefit of these efforts simply be handed over to title insurance companies?

In a paper prepared by the Association of Ontario Land Surveyors, surveyor J.A. Middleton said: "Title insurance, which was developed in another place for another time, can add little to the protection now enjoyed by owners and lenders in this country."

Cost is perhaps the most persuasive argument for title insurance. Several banks offer "lawyerless" refinancing at costs significantly less than conventional means. Instead of a lawyer's opinion as to title, and in some cases in the absence of a survey, banks can "insure over" possible title problems.

Perhaps this trend will soon extend to transactions of purchase and sale. If so, will the consumer be adequately protected? Will home buyers be required to use lawyers? If the U.S. example is any indication, the answer to this latter question may well be no.

If title can be insured rather than searched, consumers may have the option of completing transactions on their own. This is not a problem for those with the required knowledge. But the average home buyer will probably not be able to identify a problem until it is too late, at which point even title insurance might not cover it.

No doubt many would seize the opportunity to avoid paying the not-insignificant fees of a lawyer or cost of a surveyor. Ignoring the other services lawyers and surveyors provide, the expense of obtaining title insurance would be a fraction of the current cost of guaranteeing title.

But if problems are not properly identified at the appropriate time, the initial savings may prove a costly compromise in the end.

The debate is sure to rage for some time. Some sectors of the real estate industry are prepared to accept title insurance, others are not. The professional indemnity company that insures lawyers in Ontario has introduced its own response to title insurance, TitlePLUS, which it hopes to implement soon.

Title insurance will undoubtedly have a role to play in Ontario real estate, but how much is not certain. Despite what skeptics say, the present system will not collapse as a result. Quite the contrary; it can only improve with the broadening of options.

Besides, a little threat to the turf now and again is not a bad thing. Competition compels deference and responsibility in all the right places. Hopefully, the end solution will be beneficial to the most important player of all -- the consumer.

Douglas Buchmayer is an Ottawa lawyer. Write: Douglas Buchmayer, c/o The Ottawa Citizen, 1101 Baxter Rd., Ottawa K2C 3M4