

Title Insurance: What it is and what you should know

by Tim Hyde

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What does it mean to “Own” land - and the home built on that land?

When you buy a can of corn you likely never think about who else might still have some rights to ‘your’ corn. If you thought about it, you might assume that a farmer grew the corn on a mortgaged farm. A canning company likely bought the corn and may have given a mortgage on the canning plant to a Bank. A trucking company may have leased the truck that brought the corn to your store and the store likely has a lease that may have given the landlord some rights to the groceries on its shelves. We never think about this ‘chain of title’ to the can of corn when we buy it and take it home. We assume the store has the absolute right to sell us the corn and that when we put it in our pantry, we ‘own’ it, and can do what we like with it.

Houses and Corn are different.

It is easy to ‘possess’ corn and ‘possession’ is an important element of legal ownership. But how do you possess land? The corn we buy has (hopefully!) only been in the can for a year or two. Land has been here forever – a long ‘chain of title’ with many ‘owners’ and mortgage holders. There may be regulations over how we dispose of the can but generally we are free to do what we want with the corn.

So how can we own ‘land’, and use the house built on that land? How can Lenders be so certain of our ownership that they will lend us money in return for the right to sell ‘our’ house if we don’t pay them back? To get sufficient certainty every modern commercial society has developed its own version of conventions, practices and the law of real property.

In Canada prior to the 1990’s lawyers/notaries would give us certainty by performing the ‘due diligence’ their regulator (typically a ‘Law Society’ or ‘Chamber of Notaries’) mandated before lawyers/notaries could send us a letter containing their ‘title opinion’ that we owned, or ‘had good title to’, the land. They’d send a second opinion letter to the Lender opining it had a valid mortgage enforceable against our title to the land. If it later turned out the lawyer or notary was wrong, we, or our Lender if we had defaulted, could sue the lawyer/notary and if we proved he/she was negligent we could recover from the lawyer or notary’s professional ‘Errors & Omissions’ insurer.

For the last 25 years lawyers/notaries have (largely) stopped issuing title *opinions*. Title opinions have been replaced by title insurance *policies*. Lawyers/notaries no longer perform the due diligence required by their regulator to issue title opinions. They conduct the due diligence required by the title insurer to issue title policies. (This is typically less due diligence which has important implications for construction defects discussed in more detail below.)

For both Owners and Lenders, the single largest benefit of title policies over title opinions is that Owners, in the Owner’s Policy and Lenders, in the Lender’s Policy are named as the “Insured” in the policy. In insurance law insurers have a duty to treat you, its insured, with utmost good faith. The insurer also has a ‘duty to defend’ you if – for example – a neighbour sues you to remove the part of your house that may encroach onto their land. If

you have a title opinion 'E&O' insurance covers the lawyer or notary, but only after you have gone to court and proven they were negligent.

A second important benefit is that most residential Owner policies continue in favour of family members that may inherit the home. Title Opinions are addressed solely to the lawyer/notary's client(s) and may be of no use to their spouse or children.

What does Title Insurance typically cover?

There are four basic types of policies. One each for Commercial Owners and Lenders and one each for Residential Owners and Lenders. Regrettably, title insurance is essentially unregulated in Canada and the four licensed insurers issue policies with some slight, but potentially consequential, differences. The policies badly need to be standardized. That said here is a list of some of the risks covered in the residential Owner's Policy:

- Unknown title defects that impact your ownership of the property
- Existing liens against the property's title, such as unpaid debts secured against the property by a previous owner, including utility bills, mortgages, property taxes, condominium fees
- Encroachment issues (e.g. a structure on your property that encroaches on your neighbour's property)
- Errors in surveys and public records
- Other title-related issues that may affect your ability to sell, mortgage, or lease your property in the future
- Title fraud (e.g. the people that sold you the house impersonated the true owners)

<https://www.fsrao.ca/consumers/how-fsra-protects-consumers/property-and-other-insurance/understanding-title-insurance>

The links to all provincial/territorial Financial Services Regulatory Authorities that provide information about title insurance in your area are available at:

<https://www.canada.ca/en/financial-consumer-agency/corporate/federal-oversight-bodies-regulators.html#toc4> .

For new home owners it is important to note (absent endorsement) that there is no difference between the form and coverages in the Residential Owner policies issued for a re-sale home and a newly built home. Premiums for a new home can be less as the assumption is made that there is less title risk involved when the property is part of a new registered subdivision.

The Lender policies cover the same risks as the Owner policies because the Lender may have to become an owner to recover its money if there is a mortgage default. Lender policies also cover risks associated with the enforceability of the Lender's mortgage against the title (e.g. fraud, forgery, priority, identity theft...)

How much does Title Insurance cost?

Premiums are calculated based on the Purchase Price of your house. The premium only has to be paid once and the Owner policy continues in force for as long as you or your heirs have an interest in the home. The average house in Canada in 2023 cost approximately \$700,000. The Title Insurers have Premium Quote calculators on their websites. You can access these but typically your lawyer will order the Policy as part of their work in closing your purchase. The quote calculators I have reviewed showed the premium for a \$700,000 home to be roughly \$450.00. Your lender will require you to buy a Lender Policy for them. It

is likely to cost an extra \$50.00. Here are links to the quote calculators on the sites of the four companies licensed to issue title insurance policies in Canada.

<https://fct.ca/legal-professionals/residential-title-insurance/>

<https://www.stewart.ca/quote>

<https://chicagotitle.ca/get-a-quote/>

<https://titleplus.ca/premium-calculator/>

How do I buy Title Insurance?

If you bought your house in the last 10 years in BC, Ontario or Atlantic Canada you likely have title insurance. Lawyers on the Prairie Provinces, and Notaries in Quebec, have been slower to embrace title insurance but there remains a good chance you have it. Look for the package of Closing Documents your lawyer/notary sent to you after your closing. Your policy should be one of those documents. If you can't find your policy, call your lawyer/notary and ask which of the four title insurers they would have used. Then you can call that insurer and (after some ID Verification questions) they will likely be able to tell you if you are insured and send you a copy of your policy. If your Closing package includes a letter in which your lawyer/notary includes a statement like: *"... subject to the above referenced qualifications and exceptions and based on the above referenced assumptions I am of the opinion that you have good and marketable title to..."* then you have a title opinion and don't likely have a title policy.

If you don't have a policy, and own your house, some companies offer what is called an Existing Homeowner's Policy, an "EHOP". A main reason to purchase an EHOP is the risk of fraud. If, without your knowledge, a fraudster was to impersonate you and either sell or mortgage your house (for example when you were away on holiday) the Title Opinion already in your file would be of no use. It opined you obtained 'good title' on the day you purchased your home. Post-Closing fraud is not covered by a lawyer/notary opinion. Title insurers however are in the business of taking calculated risks in exchange for premium. They have decided to cover fraud that takes place after you purchased your home. This is actually one of the best reasons to have an Owner policy.

Is Title Insurance mandatory?

Title Insurance is not mandatory in Canada, but most lawyers and notaries will recommend that you buy an Owner policy. Lenders will regularly require that you buy them a Lender policy if you want their loan. In fact, the fee quotes you receive from most lawyers/notaries assume you will be buying title insurance. This means that the lawyer/notary has structured his/her quote for legal services (Fees and Disbursements) around the due diligence searches that the Underwriters at the title insurer will require from the lawyer. The searches (typically for tax arrears; Sherriff's executions against prior owners; title records; Building Dept. for Work Orders/Building Permits and other compliance; ...) all cost money (between \$15.00 and \$150.00 for each search) so the less searching the lawyer/notary needs to do to satisfy the title insurer the lower the quote the lawyer/notary can advertise while trying to grow their law practice.

If I buy Title Insurance, does my lawyer still consult the municipality to ensure that the Building Permit was opened and closed, that inspections were completed and that an Occupancy Permit has been issued, or can I request this service?

No, and yes you should. This is a huge problem. The Underwriters at most of the title insurers have told the lawyers that sell their policies that they do not need to write to Municipal Building Departments to ensure these things. In most jurisdictions this avoids a \$150 Building Dept. search fee and some of the law office's time. This is folly and another thing that has been crying out for regulation for over 25 years.

The justification for avoiding the \$150 cost of the Building Dept. search letter is that 'you're covered' by title insurance. I'm not at all comfortable with this practice. It might keep lawyer quotes down, and help sell more title insurance, but consider the actual language of the policies. The following two coverages are in most of the Owner Policies sold in Canada today.

The first Covered Risk is: *"any adverse circumstance that would have been revealed if your lawyer had written to the Building Dept. [at the time you bought the house]"*

Let's think about what could go wrong here. What is an 'adverse circumstance'? One could argue that the absence of a final inspection; the failure to close an opened permit; or the absence of an occupancy permit is each an 'adverse circumstance'. The claims departments at the title insurers don't necessarily agree that these are all adverse circumstances. They certainly don't agree that the mould or other moisture related issue caused by the incomplete inspection is an 'adverse circumstance'. There was also a case where a fire at the Municipal Records Office made it impossible to know what "would have been revealed" at the time the house was purchased.

The second Covered Risk relevant to construction defects is: *"you are forced by a Governmental Authority to remove – or remedy – any part of your structure because any part was built without obtaining a required building permit"*.

What could go wrong here? One Title insurer's policy (at one time) did not include 'or remedy' and when the City required the insured to shore up a supporting wall removed by a prior owner without a permit the insurer denied coverage on the basis their policy only covered 'removal', not remedy, and too much had already been removed. What does 'forced' mean? Suppose you apply for a Building Permit to renovate your kitchen. The City won't grant you the permit until you fix an issue with your deck (unrelated to the kitchen) built by a previous owner without a permit but they stop short of issuing a Work Order. Are you being 'forced'? I think you are but don't think all the title insurers will necessarily agree. They could argue you can always change your mind about renovating the kitchen. What does "obtaining" mean? Does it mean *applying* for the permit or does it mean obtaining a *closed* permit? To be of use to consumers it must mean the latter. What use is a permit that has simply been 'opened'.

Have I mentioned this industry is unregulated?

Leaving potential defects – even defects that could be structural – to the vagaries of the way the Claims Dept. at the title insurer will interpret your future situation is a potentially grave mistake. I hope someone does not need to be seriously injured before our insurance regulators get involved and regulate this industry.

I recommend therefore that you purchase title insurance but that you also instruct your lawyer to spend the \$100-\$150 to search the records of the Municipal Building Dept. to confirm that a Building Permit was issued; it was for the home you bought; it has been

finally inspected and closed; that an Occupancy Permit has issued; and that there are no outstanding work orders.

In the event any 'adverse circumstances' are discovered it is always possible to negotiate some sort of endorsement to deal with the discovered risk and allow your transaction to close.

Think of applying for any insurance. It is always better to know, disclose what you know to the insurer, and possibly tailor an endorsement that amends the policy to deal with the known risk. Every title insurer will agree with me on that. Tell your lawyer/notary to send the Search letter (ASAP), spend the \$150 – and then ask to see the reply letter he/she gets from the Municipality's Building Dept. You're paying for it.

If you have discovered construction defects in your home, I recommend you speak with your lawyer about writing immediately to the Building Dept. of your local Municipality to determine both the current state of their records and what was in those records on the day you purchased your home.

Where can I learn more about title insurance? How can I determine whether I have a valid claim?

Regrettably these are both very difficult questions. As mentioned above even though title insurance has been used widely in Canada for 25 years it is essentially an "unknown quantity" to most of Canada's Federal and Provincial financial services regulators. There is some information on the websites referenced above but it is not that helpful. Insurance agents, brokers and the P&C industry generally have shown no interest in the product. Three US based companies enjoy 95% market share in Canada but the policies sold across Canada differ from the standardized forms they sell in the US.

Title insurance is distributed by lawyers but the policies are not taught in law school and nor are they taught in the Provincial Bar Admissions courses. Regrettably (and also in need of regulation) the lawyer/notary that acted on your purchase may not be able to be helpful. The title insurers require that many of the lawyers that sell policies agree that they won't act for you in the event of a conflict with, or a claim against, the title insurer. As a result, your lawyer may seem evasive if you ask him or her about a potential claim.

I recommend you go on the (free) website of the Canadian Legal Information Institute (<https://www.canlii.org/en/>), choose your Province, and type 'Title Insurance' into the 'Document text' box. Look at the cases if you like (though some of the early ones are wrong – it has taken the Courts and the lawyers appearing before them some time to get familiar with the policies) but then look for the names of the lawyers that acted for Insureds making claims against the Insurers. They are the lawyers that should have the best sense of whether you have a good claim.

Here are two cases that you may find of interest:

Breen v. Lake of Bays (Township), 2022 ONCA 626 (CanLII), <https://canlii.ca/t/jrq7j> and an article about Breen - <https://canliiconnects.org/en/commentaries/89611>

Gemeinhardt v Babic, 2016 ONSC 4707 (CanLII), <<https://canlii.ca/t/gsmhbb>>

Tim Hyde is a retired Ontario lawyer and title insurance executive. Formerly the Chief Title Underwriter at one insurer, then the President at another, he helped draft most of the title insurance policies and endorsements issued in Canada today. His consulting company advises law firms on claims and he continues to advocate for consumer-friendly regulation of the title insurance industry in Canada.