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Not all title insurers are alike

First Canadian Title tried to get law changed

Last week's column was an introduction to title insurance, a relatively new way to protect home buyers against unpredictable and often undetectable issues that could affect the ownership or marketability of their property.

Some of these issues are errors in information provided by a municipality or survey, as well as forgery or fraud.

Title insurance also protects against common problems such as municipal work orders, bylaw violations, access rights and conflicting interests in the property.

For a one-time premium charged at the time of purchase, title to the property is protected during the lifetime of the owners and their heirs, as long as they remain owners.

Often, the premium results in a savings to the purchaser at the time of closing, since premiums can be less than the cost of due diligence searches, which would otherwise be required.

In this column last week, I referred to two "user-friendly" residential title insurers in the local real estate field - TitlePLUS and Stewart Title.

I did not make reference to one of the industry players, First Canadian Title, because they are in a different category and deserve a column of their own.

To understand First Canadian's role in title insurance in Ontario, it is necessary to flash back to 1956 when the Ontario government first became concerned about the role of title insurers in this province.

The government of the day passed Regulation 666 under the Insurance Act. The regulation required that no title insurer could issue a policy of title insurance on a property in Ontario unless an independent lawyer certified the validity of the title to the insurance company.

When First American Title began operations in Ontario in the early 1990s through its Canadian arm, First Canadian Title, it launched a massive lobbying effort to get the government to abolish regulation 666.

Had this happened, I believe lawyers would not have been required in real estate deals. It would have likely sounded a death knell for the real estate bar in Ontario and for the protections and advice the bar offers the public. Without real estate lawyers, the property conveyancing field would have been wide open to First Canadian.

With the Law Society and the real estate bar lined up on one side of the battle, and First Canadian on the other, pressure mounted on the Mike Harris provincial government.

After intense lobbying, and the estimated expenditure of hundreds of thousands of dollars, the government announced that it would leave 666 in place and not change the 40-year-old insurance regulation.

First Canadian then launched a series of "closing centres" in Toronto, Hamilton and Halifax. The centres were designed to handle the paperwork and details of residential purchases and sales.

Banks and real estate agents were encouraged to send their clients directly to the closing centres rather than a lawyer for the processing of their transactions.

First Canadian became public enemy No. 1 for many real estate lawyers, who again perceived that the company was determined to make them, and their role in protecting the public, obsolete.

The growth of virtually lawyerless closing centres would, it was feared, remove from the real estate landscape the protections and quarterbacking the real estate bar offers the public.

Ultimately, the company folded its closing centres and replaced them with a system of home closing services, which try to involve the lawyers in a larger role.

Whether the closure was due to open hostility from the real estate bar, as well as boycott threats in Hamilton, or the fact that the centres were not economically viable, no one is saying.

In the mid-1990s, First Canadian had launched a program to allow banks and trust companies to complete mortgage refinances without encouraging borrowers to obtain any legal advice on what they were signing. Tens of thousands of mortgage transactions are completed annually in this way.

Throughout the past six or so years, the real estate bar in Ontario has been sharply divided between those who use First Canadian and those who don't, or only use them when they absolutely must.

Fast-forward to the Canadian Bar Association's (CBA) annual convention in Halifax in August this year. A fierce 90-minute debate erupted over a motion to prohibit First Canadian Title and First American Title from advertising in CBA publications and sponsoring any association activities.

Ontario CBA president Susan McGrath, an Iroquois Falls lawyer, said she brought her motion because First Canadian's activities conflict with the association's aim of promoting the essential role of the legal profession in our society.

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At the Halifax debate, Toronto lawyer Garth Manning voiced his fears that First Canadian was moving to put residential property lawyers out of business.

CBA past-president Eugene Meehan of Ottawa said, "Doctors don't permit advertising by chiropractors in their publications - why should we do anything different?"

First Canadian's Ed Frackowiak said his company was trying to design a better conveyancing system, but was frustrated trying to get his point across. He asserted that his company wants to work with lawyers, but did not explain why it lobbied so hard to get rid of regulation 666.

The Halifax CBA resolution passed by at least a two-to-one margin. Brampton lawyer Jonathan Spiegel summed up the winning argument neatly by saying, "The other title insurers merely offer their products to the marketplace. First American wants to get rid of lawyers."

In my own practice, I tell clients that I believe First Canadian's corporate policy is inconsistent with the many layers of protection and advice real estate lawyers offer their clients. And that is why I do not use First Canadian Title Insurance in my practice. If your lawyer is using First Canadian, find out why.

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