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## Choose title insurance firm carefully

*Defendants in fence dispute feel abandoned*  
**It's important for buyers to have survey**

A court case wending its way through the judicial system underlines just how important it is for homebuyers to have a current survey and to choose a title insurance company very carefully.

In November, 1998, Susan and David purchased their house at an address, which I will call 2 Auckland Ave., Toronto.

Next door to the north is 4 Auckland, a house bought by Mir and Leda in September, 2001. The backyards of both properties are 5.71 meters (18.73 feet) deep from the house to the rear lot line. Separating the two backyards is a fence, which was built before either neighbour moved in.

One of the issues in the lawsuit brought by Susan and David is whether the fence is in the wrong position, and whose land it is on.

In a statement of claim issued last year, Susan and David claim that the division fence is not on the property line, but rather about 0.57 m (1.87 feet) onto the property owned by Mir and Leda.

(The case has not gone to trial, and none of the allegations of either party has been proved in court.)

The result is a strip of land almost 2 feet wide by almost 19 feet deep to which Mir and Leda have paper title, but which appears to be part of the backyard of their neighbours at 2 Auckland.

Susan and David are asking the court to declare that they have ownership of the strip of land because they and the previous owners of the house have had exclusive possession of the strip for more than 10 years.

Invoking the legal doctrine of possessory title, commonly known as squatter's rights, they claim that Mir and Leda no longer own the disputed strip because it was openly and exclusively occupied by the owners of 2 Auckland for more than 10 years.

Complicating matters is the fact that in 2001, Susan and David constructed a covered porch at the rear of their house, and part of it sits on the disputed strip.

In their defence, Mir and Leda deny that their neighbours have possessory rights to the strip and counterclaimed for trespass.

They say that when they bought 4 Auckland, they received a standard form "declaration of possession" from the previous owners, certifying that there were no known boundary disputes.

They did not get a survey.

On the basis of that declaration, Mir and Leda purchased a title insurance policy from a major title insurance company operating in Ontario.

When they were sued by the owners of 2 Auckland, the title insurer denied coverage and refused to defend them under the terms of the policy.

Mir and Leda commenced what is now a separate court case against their title insurer demanding that the insurance company defend them against their neighbours' lawsuit, and pay whatever damages they suffer if they lose the strip of land.

Again, none of the allegations has yet been tested in court.

The insurer obtained an appraisal of the strip of land stating that its loss would not have any impact on the overall market value of the Mir and Leda's property.

It then terminated its duty to defend the case by exercising its option to negotiate a settlement (which was ultimately unsuccessful).

Whatever the outcome of the fence dispute, the defendants Mir and Leda are bitter that their title insurer has abandoned them.

In documents filed with the Superior Court, Gavin Tighe, lawyer for Mir and Leda, claims that the insurer wrongly denied

coverage, and that it ignored its duty to defend the plaintiffs' case against his clients.

In its court documents, and in an e-mail to me, the insurer's counsel, Lorne Honickman, set out the "comprehensive" steps that his client took to protect the insured and cautioned me not to impugn the reputation of his client.

For property purchasers, the lessons of this ongoing litigation are:

- Not all title insurers are the same. Not all policy wording is the same.
- Make sure that your title insurer cannot arbitrarily terminate coverage after closing.
- Check out the claims payment record of the title insurer you are dealing with.
- Have your lawyer review and explain the survey coverage in the policy.
- Just because the insurer waives the requirement for an up-to-date survey doesn't mean you shouldn't get one. Aside from the deed, a land survey is the most important document in a real estate transaction. Closing a house purchase without a current survey can be very risky.

Just ask Mir and Leda.

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