



Bob Aaron bob@aaron.ca

January 2, 2010

Title insurer not obligated to cover all risks

The problems caused by the strike of civic workers in Toronto last summer are now coming home to roost. Last June, John purchased a newly constructed \$600,000 freehold townhouse in downtown Toronto.

When the transaction closed, city building inspectors were on strike and it was impossible for purchasers or their lawyers to determine whether or not occupancy had been granted by the city for newly built homes.

John closed his purchase in the belief that any outstanding issues would eventually be resolved by the city and the builder; but that in any event he would be fully protected by the title insurance policy his lawyer arranged with Stewart Title.

In October, John decided to downsize and sold the townhouse with closing scheduled for mid-December. I was retained to represent him on the sale of the property.

When the lawyer for the purchasers checked with the city building department prior to closing, she discovered that five building permits were still outstanding, and that final occupancy had never been authorized.

Even though the original closing had taken place and title transferred, the builder had never contacted the city to finalize the permits for construction of several new townhouses and their fire, plumbing and electrical systems.

Understandably, the new buyers of John's home refused to close with the permits outstanding.

Efforts to resolve the matter with the city prior to closing were unsuccessful since final inspections required considerable coordination among the owner, the city and the builder.

I contacted the lawyer for the builder, who contacted his client. The reply I received from the lawyer was not encouraging: "It is our clients' position that they are not responsible for the signing off of the active permits."

I was told the builder would not provide an undertaking to sign off the permits, and that it was not obligated to do so, but that it would follow through with the building department to see whether it could assist.

When I filed notice of a claim with Stewart Title, the response I received was even more discouraging.

Stephen Piper, a customer service representative with Stewart, wrote to advise that the policy John had purchased on closing provided coverage for any adverse circumstance affecting the land, which would have been disclosed by a search with the city building department before closing.

However, Piper pointed out there was no coverage for "risks" that were "agreed to" by the buyers.

Stewart's position was that according to the terms of the agreement of purchase and sale with the builder, John was obligated to complete the purchase of the home, even if open permits existed on closing.

As a result, Stewart advised that "we do not believe the claim inquiry falls within the... policy coverage."

Despite this, the company offered to provide coverage for the new purchaser if I personally accepted part of the risk involved. Needless to say, I was not prepared to accept Stewart's onerous conditions.

(Full disclosure: I am an elected director of the Law Society of Upper Canada, which owns TitlePLUS, a competing title insurer. I have no role in its operation except to vote on approval of its parent company's annual reports.)

At the very last minute on the day of closing, with the moving vans loaded and the engines idling, and despite the builder's lack of cooperation and the denial of title insurance coverage to my client, some sort of agreement must have been arrived at among the buyers, the builder and Stewart Title (I was not involved in those negotiations), and the transaction closed.

The lesson that emerges from this true story is an important one for buyers of all homes whether new or resale: if a purchaser closes a transaction and is aware of a title defect, an encroachment, tax arrears or any other adverse circumstance, the title insurer is not obligated to provide coverage for any resulting losses.