

Focus REAL PROPERTY

Do you really need a survey?



Raymond Leclair

When I'm asked if a real property survey is still required, I answer it depends, but do you and I agree on what it depends?

Traditionally, real estate lawyers undertook a series of investigations—title and off-title—to provide the purchaser and lender clients with an opinion on whether the title was good and marketable.

Lawyers generally opined as to the quality of title because without a survey, they offered no opinion as to the extent of title (boundaries, on-site dimensions, setbacks, location of improvements, etc.).

A survey lays out the physical attributes of the land, including a confirmation that the house being purchased is located within the boundaries of the legal description of the title.

With the advent of title insurance, many perceive the title insurance policy as a substitute for an up-to-date survey. As beneficial as title insurance is, this is a misguided view.

When purchasers are told that their lender requires a new survey or a title insurance policy, most will choose a title insurance policy on the basis of cost alone.

A title insurance policy costs much less than a survey and offers other important coverage that makes it beneficial even if a survey is available.

Title insurance provides some indemnification for some issues but is not an equivalent to getting an up-to-date survey. Most policies offer protection for a violation, variation or adverse circumstance that would have been disclosed by an up-to-date survey.

Also, any encroachment or setback deficiency which the purchaser is being forced to remedy by a court or other authority after the policy date, except for those relating to a fence or boundary wall, may be included.

However, title insurance policies have a number of terms and conditions that might temper coverage, including any title risk created, allowed, accepted or otherwise agreed to by the insured; or known by the insured but not by its lawyer handling the transaction and not disclosed by registered title.

In addition, title insurers, like any insurer, may respond to a claim under the policy in a myriad of ways, some of which may not perfectly align with the interest of the purchaser.

Lenders are typically fully satis-



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LAWPRO

fied by the protection offered by a title insurance policy because they receive money to reimburse their loan. Purchasers, however, have more at stake, in that they likely live on the property or have purchased it for a specific purpose or attribute and if that purpose or attribute is compromised or denied (e.g., removal of a garage which encroaches onto the neighbour's land), the purchaser will not be satisfied with the outcome.

That is why I say that getting a survey depends on what the purchaser wants and needs.

A purchaser may want to confirm a future use (e.g., building an addition, garage or swimming pool) and needs to know the size of the lot, setback requirements and location of the existing improvements in order to ensure the future plans are feasible.

A purchaser needs to know that he/she gets what was contracted for in the agreement of purchase and sale and that there are no future issues to deal with (e.g., deficient setbacks requiring getting a

minor variance). The policy might provide coverage in the event of an issue arising but the purchaser may perceive or be told by others that the lawyer did not do the conveyancing work properly.

The question to ask is, do you really want your reputation to hinge upon whether an insurance policy will fully address an issue to your client's satisfaction when there is an easy solution?

The lawyer acting for the purchaser should ensure that the availability of a survey question and the client's intended use or plans for the property are addressed plainly and early in the transaction. This can be done in the retainer letter, a preliminary communication (e.g., email) to the purchaser, or best in a conversation between the lawyer and purchaser, evidenced by a signed direction to the lawyer to proceed with or without an up-to-date survey or any survey.

Clients are not aware that a lawyer cannot glean any information about the physical layout of the lands being acquired from the sources of information available to the lawyer and that only a survey provides this information.

Clients should be informed that the location of the boundaries and any improvement on the land, encroachments, easements and right of ways and other information is only reflected on a survey and without this document, the information is limited and may impact on their use and future plans.

The lawyer needs to have an open and frank conversation with the purchaser about the value and importance of a survey and, depending on the purchaser's wants and needs, only the purchaser can decide to proceed with the transaction with or without an up-to-date survey.

Raymond Leclair is vice-president, public affairs, LAWPRO (ray.leclair@lawpro.ca).

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