



CLARITY OVER YOUR TITLE INSURANCE COVERAGE

WILL YOUR TITLE INSURANCE COVER WORK ORDERS FOR DEFECTS NOT REGISTERED ON TITLE

LET'S PAINT A PICTURE:

You and your lovely spouse buy a Toronto multi-story home. Years and years later, you discover that the previous owners of the home had removed a wall during renovation work they undertook on the premises, and that too without a building permit. This makes the entire second floor unsafe and the city immediately issues a remediation order/work order. Who pays? Well, you think to yourself, lucky I purchased that title insurance policy way back when I purchased this home. However, to your utter dismay, your title insurer denies your claim, leaving you responsible for payment of the work order. What do you do? Can they get away with this?

Well, such a scenario did actually take place in a case called *MacDonald v. Chicago Title Insurance Co. of Canada* [2015] ONCA 842 not too long ago. In *MacDonald* a couple purchased a Toronto home only to discover, 7 years later, that the support wall had been illegally removed by the previous owners contrary to the building code and contrary to municipal approval.

Their title insurer denied their claim. The issue came down to one of 'marketability'; was the house still marketable? When they took the matter to court by way of summary judgment, the motion court judge ruled that their policy did not cover the issue, holding that the title of the property remained unaffected by the illegal construction because the house remained marketable.

The couple appealed, and lucky for them, and for the rest of us, the appeal judge disagreed with the motions judge. The appeal judge held that it was incorrect to hold that a work order must be registered on title to affect an owner's interest in property. Work orders are in and of themselves a defect – a defect discoverable only by 'off-title' searches.

LAWPRO chimed in as an intervenor confirming that as it understood it, the definition of title was broader than simply defects registered against title. LAWPRO clarifies that to it, the definition of title also included defects that could only be discovered through off-title searches.

The outcome of this case would have had devastating consequences for LAWPRO. Essentially, if the Court of Appeal had not agreed, LAWPRO's agreement with title insurers would not cover claims that arose off-title, leaving LAWPRO responsible despite it having waived the transaction levy.

Good thing the appeal judge agreed, ultimately holding that:

“the restrictive scope of title insurance contemplated by the motion judge would cause chaos in the real estate bar as, no doubt, purchasers of title insurance throughout the province has instructed their solicitors not to conduct the off-title searches on the understanding that such defects were covered by their title insurance.”

The judge went on to highlight the section of the policy that dealt with “unmarketable title” and ultimately disagreed with the motion judge’s decision that the couples title had not been affected because their house could still be sold. The appeal court judge clarified that the ‘marketability’ provisions under the policy should be read more broadly and that just because a defective house could be sold, does not mean that it is marketable under the policy.

What does this mean? Well, essentially, it means that the defect was the direct result of the previous owners’ failure to get municipal approval for their renovations, and the failure to do so made the property ‘unmarketable’ under the title policy. Simple as that.

This case is very important for homeowners and could have a sweeping impact as there are many properties that are renovated and upgraded. This has become increasingly common. Ultimately, if an issue arises, the question comes down to whether the construction issue amounts to an issue with title.

THE TAKEAWAY YOU ASK?

Well, the decision is pretty much consistent with the understanding of LAWPRO and the entire real estate bar, including yours truly, that title insurance policies do in fact cover risks only discoverable by off-title searches, including work orders to remedy defects that existed prior to closing. So, unless the Supreme Court of Canada gives leave to an appeal, the MacDonald ruling stands firm, and we can all sleep a little easier.

Congratulations homeowners. That title insurance was a smart buy after all. For now...



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