The Boundary Point
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Case Commentaries on Property Title and Boundary Law

*The Boundary Point* is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

In this issue we consider several recent cases which specifically respond to claims made under title insurance policies and the manner in which policies are sold. These cases are direct responses to the scope of the insurance that is available to cover certain risks, but also respond to developments in the progress of title insurance as an embedded reality of conveyancing and mortgage practice. Lawyers, land surveyors and mortgage brokers will want to take note of the broader implications of these cases. They could signal a shift in practice, if not a change in the way title insurance is marketed in combination with other products.

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# Title Insurance: Recent Developments in Claims and a Class Action

**Key Words**: *title insurance, risk, marketability, title, land*

It could hardly be said to qualify as a halt in the inexorable march of title insurance in entrenching itself in the culture of transacting in land in the many jurisdictions across Canada. Yet, one could conclude that some recent developments have given the movement some recent reasons to pause. Two significant developments in the final quarter of 2014 have forced lawyers to reconsider the role of title insurance in the context of what is meant by "marketability of title" as opposed to "marketability of land". The distinction will be discussed below in the context of two cases in Ontario which have wrestled with the meaning of a "claim" under a title insurance policy. Likewise, the certification of a class action claim by certain property owners against their mortgage company in British Columbia bodes further reflection: the sale of a title insurance product by lenders has triggered a class action claim arising out of alleged misinformation about what was in fact being sold.

These are serious matters. As will be noted below, these developments have the potential to change how we think about title insurance as a tool in managing risk – as well as how title insurance products have the potential to redefine what a professional service entails.

***Title Insurance is not Homeowner Insurance***

In *Fischer v. Stewart Title Guaranty Company*[1], the Court of Appeal for Ontario considered a lower court decision that had ruled on a homeowner's claim against his title insurer. The title insurance policy covered title risks and in the policy, title was defined as "the ownership of your interest in the land" and was described as "fee simple vested in Frederick Fischer"[2]. Coverage under this policy included the risk that the ***land*** was unmarketable for a number of reasons (none of which were relevant), and the risk that the ***title*** was unmarketable. The risk referred to as unmarketable title needed to be of such an egregious degree so as to allow another person to "refuse to perform a contract to purchase, to lease or to make a mortgage loan".[3]

This analysis by the appellate court led to a dismissal of the appeal. It stated,

> The motion judge found the previous use of the property as a marijuana "grow op" was not a title defect. That conclusion is unassailable. Even assuming the land was unmarketable, the title was marketable and was unencumbered by defects that would permit a purchaser to refuse to perform a contract of sale.[4]

In reaching this conclusion, the court stated that this result was consistent with an earlier decision in California in which a similar distinction had been made about the true nature and purpose of title insurance. The court quoted from *Lickmill Creek Apartments v. Chicago Title Insurance Company*[5] in which the decision noted that:

> The purpose of title insurance is not to protect the insured against loss arising from physical damage to property; rather, it is to protect the insured against defects in the title.

*Lickmill* was an interesting decision because the claim arose from environmental clean-up costs associated with contaminants found on the site. The purchaser had commissioned a survey plan and also had noted the presence of pipes and storage tanks on the site. *Lickmill* involved a claim for indemnity for the clean-up costs which were argued to have been incurred as a result of a title defect. The court in *Lickmill* disagreed. In discussing the purpose and type of title insurance products available, the court noted,

> Title insurance is an exclusively American invention. It involves the issuance of an insurance policy promising that if the state of the title is other than as represented on the face of the policy, and if

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[1] *Fischer v. Stewart Title Guaranty Company*, 2014 ONCA 798 (CanLII), http://canlii.ca/t/gf7rw

[2] *Ibid.*, at para. 2

[3] *Ibid.*, at para. 3

[4] *Ibid.*, at para. 4

[5] *Lickmill Creek Apartments v. Chicago Title Insurance Company* (1991), 231 Cal. App. 3rd 1654. Also accessible at: http://law.justia.com/cases/california/court-of-appeal/3d/231/1654.html

the insured suffers loss as a result of the difference, the insurer will reimburse the insured for that loss and any related legal expenses, up to the face amount of the policy.

Pursuant to Insurance Code section 12340.1, '[t]itle insurance' means insuring, guaranteeing or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein against loss or damage suffered by reason of:

a) Liens or encumbrances on, or defects in title to said property;

b) Invalidity or unenforceability of any liens or encumbrances thereon; or

c) Incorrectness of searches relating to the title to real or personal property.

Thus, under both the traditional concept and the statutory definition, title insurance covers matters affecting title.

Essentially two types of title insurance policies are available to owners of real property interests in California: California Land Title Association standard coverage (CLTA) policies and American Land Title Association (ALTA) policies. CLTA insures primarily against defects in title which are discoverable through an examination of the public record. Thus, a CLTA policy insures against loss incurred if the insured interest is not vested as shown in the policy; loss from defects in or liens or encumbrances on the title; unmarketability of title; and loss due to lack of access to an open street or highway under certain circumstances. A CLTA policy also covers a limited number of off-record risks. The ALTA policy, such as those purchased by plaintiffs here, provides greater coverage than the CLTA policy. Generally, it additionally insures against "off-record defects, liens, encumbrances, easements, and encroachments; rights of parties in possession or rights discoverable by inquiry of parties in possession, and not shown on the public records; water rights, mining claims, and patent reservations; and discrepancies or conflicts in boundary lines and shortages in areas that are not reflected in the public records." Since an ALTA policy covers many off-record defects in title, the insurer will typically survey the property to be insured.[6]

The notion that the risk of unmarketable title is different from the risk of unmarketable land is not surprising to lawyers, but laypersons may have difficulty appreciating the distinction. This point, as well as the different choices of language used by different title insurance companies was brought home in *King Lofts Toronto I Ltd. v. Emmons*.[7] Commenting on that decision in a lawyers' malpractice insurance bulletin, the author wrote,

> In this case, a city-owned laneway ran through a lot being purchased and underneath a long-standing (86 years) building. The lawyer indicated to the client that it was a minor issue, quickly resolvable after closing and that title insurance could cover it.

[6] *Ibid.*; references omitted

[7] *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215 (CanLII), http://canlii.ca/t/g67xn

> The title insurer provided a policy on a "forced removal basis" only. This required the title insurer to respond only in the event the city requested the building removed. Instead, the city wanted to be paid fair market value for the lane, an additional cost that diminished the property's value. This was not covered by the policy the lawyer obtained, but might have been taken care of by a full coverage policy. The lesson? Not all title policies are created equal.[8]

A more recent decision from last December brought the question of title insurance and the need to interpret the language of an insurance policy before the courts again. In *MacDonald v. Chicago Title Insurance Company of Canada*[9], one of the issues was a question of coverage and whether, on a summary judgment motion[10], the question could be answered. In *MacDonald* the applicants had bought a home in Toronto which had been renovated prior to purchase. Seven years later they realized that load bearing walls had been removed and this had made the second floor unsafe. The City of Toronto issued an order to remedy this, and required that shoring be installed to "temporarily support the floor structure". That work was done and a claim was then made under the title insurance policy for financial compensation.

In rejecting this claim, the court looked carefully at the language of the policy in order to identify what was a covered risk and what was excluded. In explaining this determination, the court stated,

> There is a clear conceptual distinction in the policy wording between the amount or limit of coverage, being the purchase price of the property subject to the inflation clause, and the risks for which coverage is provided. The risks are those listed in Covered Title Risks. There is also a clear distinction in the policy wording between the applicants' ownership of the lands and premises and the market value of what they own. Their ownership is what the policy defines as "title". Insurance is provided for the covered risks as described, but only if they affect the applicants' title. The applicants own the entire right, title and interest in the lands and premises just as they did before they knew of the deficient and dangerous nature of what they purchased. Their title is as marketable now as it always was, although it is marketable now subject to any duty to disclose the nature of the home, and thus for an amount less than they paid for it. Nothing in the language of the policy gives the applicants coverage for diminution in value of the property unless it comes within one of the covered risks and affects their ownership of the property.[11]

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[8] Lemieux, T., *Title insurance policies are like a box of chocolates – No two policies are the same*, PracticePro, October 16, 2014, at: http://avoidaclaim.com/2014/title-insurance-policies-are-like-a-box-of-chocolates-no-two-policies-are-the-same/

[9] *MacDonald v. Chicago Title Insurance Company of Canada*, 2014 ONSC 7457 (CanLII), http://canlii.ca/t/gfrq8

[10] A summary judgment motion is a procedure in which a party in a civil action can ask the court for a determination of all or just some of the issues in the lawsuit based on the evidence which, if taken at face value, can lead to key findings and an ultimate disposition.

[11] *MacDonald v. Chicago Title Insurance Company of Canada, supra*, footnote 9, at para. 30

This makes sense. If the language of the policy (really – a contract) does not provide indemnity or compensation for certain bad things which may happen, the insurer ought not to be found liable. However, what remains troublesome is the complexity of these concepts and the challenge for lawyers in explaining to lay clients the distinction between the risk of unmarketable title as being different from the risk of unmarketable land.

As a consequence, we can now re-visit our understanding of the role and purpose of a plan of survey. Much of the success in title insurance in Canadian markets has been attributed to the benefits of insuring over the risks of *not* getting an up to date plan of survey. Despite the growing exclusions from coverage which a survey plan might otherwise have disclosed, the time may be here to again revisit the features of a plan of survey. If the coverage distinction between unmarketable title and unmarketable land is supported in the decisions noted above, *what exactly is it about "unmarketability" that a plan of survey can answer*?

In Figure 1 this distinction is highlighted graphically and used to simplistically illustrate the groups of different items to which title insurance may or may not respond.

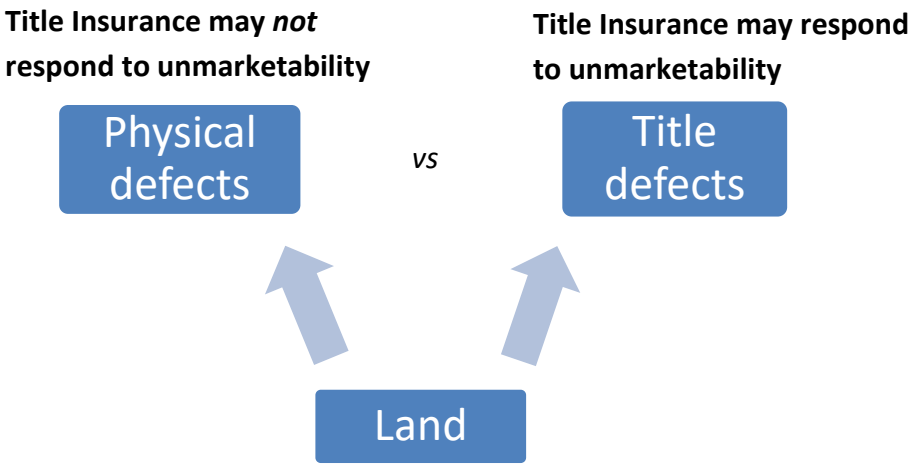


*Figure 1:* Distinguishing between types of "unmarketability"

***Problems Arising from the Sale of Title Insurance When Bundled with a Mortgage***

Since this issue of *The Boundary Point* is already dealing with recent developments in Title Insurance, mention should also be made of the determination made in British Columbia in certifying a claim as a class proceeding. In *Sandhu v. HSBC Finance Mortgages Inc.*[12] the Plaintiffs were members of a class which was defined as:

[12] *Sandhu v. HSBC Finance Mortgages Inc.*, 2014 BCSC 2041 (CanLII), http://canlii.ca/t/gf4j7

> All persons resident in British Columbia with whom the Defendants engaged in the Mortgage Business (as defined in the Amended Notice of Civil Claim) and who paid a fee from their mortgage proceeds or other funds for title insurance.

Needless to say, the role of Title Insurance in mortgage refinancing is different from the role of Title Insurance for a homebuyer in the purchase of title to real estate. Likewise, these differences are also highlighted across Canada in respect of each provincial jurisdiction. One therefore needs to be cautious about generalizing the issues in *Sandhu* as applicable across Canada since this may not be correct. However, this proceeding appears to be a direct result of the alleged relationship which had been allowed to develop between certain mortgage lenders and First Canadian Title Insurance. The decision in *Sandhu* described the agreement on which the relationship which contemplated First Canadian as providing Title Insurance for the lender mortgage companies in the context of mortgage transactions between these lenders and their customers. In addition, the court noted that,

> First Canadian also provided legal services, including the preparation of mortgage documents, the witnessing of the execution of the mortgage documents by customers of the Defendants, and the registration of those documents in the Land Titles Office.[13]

What appears to be described as the foundation of this class proceeding is the description of the complaints as they were characterized by the Court:

> The Plaintiffs submit that, at all material times, First Canadian charged a premium for title insurance of $115 and fees for legal services of $242. Additionally, the Plaintiffs submit that First Canadian would, upon request for an additional fee as part of the legal services provided, arrange for execution of mortgage documents remotely other than in the personal presence of an officer authorized to witness the execution of mortgage documents by the Plaintiffs and the proposed Class Members. The Plaintiffs also submit that the Defendants required the Plaintiffs and the proposed Class Members to obtain title insurance in order to obtain a residential mortgage.
>
> The Plaintiffs submit that, if the customers of the Defendants decided to take advantage of the title insurance program and the legal services available through First Canadian, the charges for the title insurance premium and the legal services were to be paid by the Plaintiffs and the proposed Class Members and were collected from them by the Defendants. All dealings with respect to the acquisition of title insurance by the Plaintiffs and the proposed Class Members were conducted by employees of the Defendants.
>
> The Plaintiffs also submit that the Defendants are prohibited from disclosing to the proposed Class Members the details of the FATIC Agreement or its pricing, including the price of the title insurance and the price of the legal services provided."[14]

[13] *Ibid.* at para. 5

Much of *Sandhu* dealt with the test to be met in order to have a legal claim certified as a class proceeding under the *Rules* which apply in British Columbia. However, in determining that the claim would be certified as a class proceeding, the court noted the elements of the claim which involved alleged breaches of British Columbia's *Business Practices and Consumer Protection Act*, *Financial Institutions Act*, *Trust and Loan Companies Act* and the *Mortgage Brokers Act*. Generally speaking, many of these statutory provisions are in the nature of consumer protection laws and they mandate a full and detailed disclosure of fees that are incurred by customers when borrowing money in the form of a mortgage from the Defendant lenders. This proceeding was certified despite the suggestion that members of the plaintiff class were given a choice: the cost of the title insurance policy could have been shunted to the purchase of other insurance policies. The relationship between the title insurer and the Defendant mortgage lending companies had been in existence for about a decade and the amount of Title Insurance premiums, related fees, in respect of each transaction amounted to hundreds of dollars. This decision represents a significant exposure to financial risk and liability on the part of the Defendants.

While the reported decision and the issues characterized by the Court in determining that the claim would be certified as a class proceeding are interesting in themselves, there is also a larger consideration which flows from this development. In the delivery of "retail" professional services to the public, consumer protection legislation is in place to ensure transparency and disclosure as to what consumers are charged for these services. The Agreement described in the Decision as dating from 2005 between the title insurer and the Defendant mortgage lenders reads very much like an interesting effort to "bundle" different services and financial products together in order to create advantages for the parties to that new mode of retail service delivery. However, in this example the class of individuals which these class Plaintiffs are meant to represent, were not parties to the original 2005 Agreement. The class members were the target of the marketing of this retail product; they have now asserted a claim that their rights to transparency and full disclosure of fees and costs were not disclosed. This may present itself as an example of the kind of potential risk whenever professional services or financial products are bundled, reconfigured, or aligned in such a manner as to trigger a proceeding of this type.

From the point of view of the professional services as provided by land surveyors to the public, this may serve as further room for thought. If the idea of a survey plan is to graphically portray information about land, is that information of a type that will be redundant (insured over by title insurance anyway), or is it potentially significant and holds value? This time, the distinction can be illustrated in Figure 2.

[14] *Ibid.* at paras 15 to 17

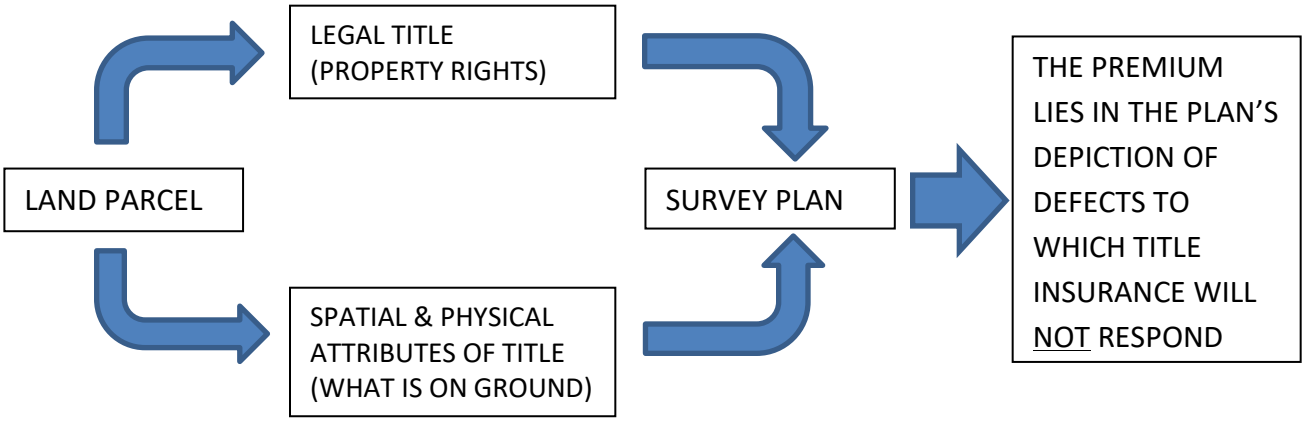


*Figure 2*: Revisiting the purpose of a Survey Plan

The claim which was certified in *Sandhu* as a class proceeding is attributable, in part, to the bundling of mortgage lending services to title insurance as a combined product for retail clientele. There might be a temptation for land surveyors to consider services which are offered by home inspectors or the opinions of value which may be available from appraisers as a comingled service product to the public. As a strategic alliance or as an approach to re-inventing how we think about professional surveying services, *Sandhu* suggests that creativity and innovation may come with risks.

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# FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[15] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

## *The Boundary Point* issues on CanLII Connects

*The Boundary Point* issues are now linked to CanLII Connects. CanLII is a non-profit organization managed by the Federation of Law Societies of Canada. Its website provides unrestricted access

[15] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

to court judgments, tribunal decisions, statutes and regulations from all Canadian jurisdictions. *CanLII Connects* is CanLII's commentary service on the court decisions which appear on its open access site and is free to everyone.

## Second Annual Boundary Law Conference — Online Version

For the convenience of professionals who reside in northern Ontario or otherwise were unable to attend in person, this online version of the conference *Linking Parcel Title and Parcel Boundary: Improving Title Certainty*[16] held November 2014 includes the presentations, papers and slide decks from presenters as well as a forum for discussing ethical issues in the delivery of professional services. The purpose of the conference was to explore new paradigms in bringing certainty and predictability in the location of parcel boundaries on the ground.

## First Annual Boundary Case Law Conference — Online Version

This online version of the conference *Parcel Title and Parcel Boundary: Where Lawyers and Surveyors Meet*[17] held November 2013 includes the presentations, papers and slide decks from most of the presenters. The purpose of the conference was to review – in a shared lawyer / land surveyor context – recent developments in boundary law.

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[16] The conference qualifies for 12 *Formal Activity* AOLS CPD credits.

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