

TALES FROM THE TRENCHES™

BY BARRY C. MCGUIRE

August 2020

“HOME-BUYER’S DILEMMA”: SHOULD A BUYER ACCEPT TITLE INSURANCE IN LIEU OF A REAL PROPERTY REPORT AND COMPLIANCE?

Seems like I'm always finding examples to write about regarding real property reports (RPR) and how they fit into a real estate transaction in Alberta. Land surveys, as RPRs are also known, should be simpler than they are. The standard AREA/MLS contract says that the seller will provide an RPR showing current improvements on the property along with written evidence of municipal compliance or nonconformance. Pretty straightforward, right?

Regrettably, no. There are an endless number of circumstances and questions surrounding provision of that required RPR.

Today’s case study comes from one of my referring realtors trying to make sense of a particular situation: Title Insurance as a replacement for a current Real Property Report. This blog post works through some of the nuances in this specific case in order to make some broader recommendations. Let’s start with the email from my referring realtor.

Re: Title Insurance Instead of RPR

Hi Barry

I hope you are doing well and enjoying the new digs of Field Law.

I have a question about title insurance, and I want to make sure I understand the nuances of what title insurance actually covers.

My clients are interested in an up/down duplex built in 1977 in Richie. The sellers want to provide an RPR from 2007 with the acknowledgement that they added back stairs to the deck with no permits. They do not want to provide a new RPR.

Would title insurance cover my clients if the seller does not know whether the stairs comply or not?

Thanks for your help.

TALES FROM THE TRENCHES™

BY BARRY C. MCGUIRE

August 2020

My answer comes from the perspective of what is best for the buyers. If it was the seller's realtor asking the question, I would have a different response.

So, if the sellers did what the contract says they should do, or at least what would be best for the buyers, they would apply for permits for the stairs and get a final, approved inspection. Then they would call a surveyor, probably the one who did the original RPR, and have the RPR redone to show the stairs. Next, the seller would send the RPR to the City in an application for a new compliance.

But, if the seller doesn't want to take this course of action and offers to pay for the buyers Title Insurance in lieu, what does this mean for the buyer? Is Title Insurance the same as, or just as protective/good as, the contractually required RPR and compliance?

HOW TITLE INSURANCE WORKS AND WHAT IT COVERS

Ah yes, Title Insurance (TI) is always a puzzle. It covers way less and works in fewer circumstances than most folks realize. Title Insurance, like all insurance products, is a contract that requires absolutely full disclosure.

When a seller says, "I will give you Title Insurance in lieu of an updated RPR," the seller doesn't order the TI policy. The seller's lawyer gives the buyer's lawyer a credit on the statement of adjustments for the cost of the policy. Then it is up to the buyer's lawyer to order the policy. When the policy is ordered, the title insurance company quizzes the buyer's lawyer/secretary, including asking if there are any known defects.

The steps without permit are a known defect that would have to be disclosed and the TI company would then likely exclude the stairs from coverage under the policy. So, if there is any future trouble over the stairs, no TI coverage.

The second thing that not too many folks understand is that TI only comes into effect if there is enforced removal of the offending structure/issue. All in all, TI doesn't cure problems, it just covers them up leaving a tough insurance claim or a buyer having to deal with this situation when they sell somewhere down the road.

Wow, that was pretty negative! But it is the reality of TI.

An Alberta Real Estate Lawyer's Advice When the Seller Doesn't Want to Provide a Proper RPR

Option 1: Perhaps the buyer is in a decent negotiating position and can take a harder line, demanding the seller get permits and a new RPR and compliance. Perhaps the seller's realtor

TALES FROM THE TRENCHES™

BY BARRY C. MCGUIRE

August 2020

thinks TI is an answer to the problem, and, if they understand it isn't, the seller might be a little more cooperative.

Option 2: Assuming that the stairs have at least been properly built and the City would likely issue an, 'as built' set of permits, the buyer could take on the permit application and RPR responsibility. If the seller is prepared to give the usual TI credit of about \$250, maybe they would also add on a further credit for the permits... The permit apps, new RPR, and compliance are, if the stairs are properly constructed, probably in the \$1000–\$1200 range.

The buyer could ask for a credit of \$250 for the TI and then some other sum (at least \$350) for taking on the responsibility of the permits and RPR. With this approach, the buyer and seller are sharing the cost of the problem. Remember, this is based on the premise that the stairs are permit-able and well-built, not requiring any changes.

Option 3: Or, if the seller just won't co-operate but the buyer wants the home, the buyer can take on the problem knowing about the issue. Post closing, the buyer can decide whether they want to fix the issue by getting the permits themselves and updating the RPR and compliance.

If the buyer doesn't want to do that, then when it is time to sell in the future, first and really importantly, the buyer has to remember they have this problem! Once the problem is remembered at the listing stage, but before negotiations to sell get started, the buyer and buyer's realtor have to discuss their approach. Is the problem going to be fixed now as part of getting ready for selling? If so, carry on with the process as set out above. Get the permits, get a new RPR, and submit that for a new compliance.

If the buyer doesn't want to fix the problem, then the buyer has to be hard-headed enough to be able to do the same thing to their buyer in the future that the seller is doing to them now. This approach by a buyer when they turn into a seller usually works as long as the problem is known at the listing stage. The listing realtor and now seller need to be of one mind on how to attack it at that time in the future when the property is being sold.

Right now, for this deal, the buyer plans on getting as much of the credit for TI and anything else that they can on the statement of adjustments. The buyer will just keep the money without taking any action at this time. Then they'll have to negotiate hard in the future when it's their turn to sell.

LESSONS LEARNED:

1. **Always try to get a current Real Property Report:**

As a buyer, your best protection is a new RPR and clean compliance. At the minimum, a buyer needs an RPR that shows the current improvements on the property along with written evidence of municipal compliance or nonconformance. This could be an older RPR that is still current.

TALES FROM THE TRENCHES™

BY BARRY C. MCGUIRE

August 2020

2. **Negotiate with reluctant sellers:**

When a seller does not want to supply what is best for you as a buyer, don't roll over and play dead! Push back, negotiate hard, do your best to get what is best for you. If you can't get the RPR, use its absence to get credits (i.e., price reductions), which will show up on the Statement of Adjustments in your favour.

3. **Know the consequences of not having a current RPR and compliance:**

If, after negotiating, the seller will not supply the contractual RPR and compliance, have a chat with your lawyer and realtor to discuss the subtleties and issues in your particular situation. Make sure you understand what the seller is offering and make your decision from a position of solid knowledge.

**LET US HELP YOU
BUY & SELL REAL ESTATE IN ALBERTA!**

Barry C. McGuire (BA, LLB)
Field Law
Enbridge Centre
2500 – 10175 101 St. NW
Edmonton, AB, Canada

Phone: 1-780-423-9594
Fax: 1-780-428-9329
Toll Free: 1-800-222-6479
bmcguire@fieldlaw.com

*Questions about real estate?
Email me, and I'll get back to you promptly.*