

# KEEPING CURRENT

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## Title insurance dispute over appraisal of “actual loss” for defects relating to municipal work order

By James R.G. Cook

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Residential title insurance policies are typically purchased to address potentially issues regarding title to a property. Title insurance policies may also cover “off title” issues such as compliance with municipal work orders that were not registered on title. In cases where such defects are discovered after closing, issues may arise between the title insurer and policyholder over the appropriate way to remedy the matter, particularly if there are substantial cost differences in their preferred approaches.

The Ontario Superior Court of Justice decision of *Segal v. Chicago Title Insurance Company*, [2022 ONSC 2866 \(CanLII\)](#) addressed a dispute between the policyholders and their title insurer over the cost of complying with a municipal work order.

In July 2021, shortly after purchasing a residential property in the Town of Whitchurch-Stouffville, the applicant policyholders received notice of a municipal work order requiring them to remediate the existing swimming pool, rear deck, and cabana, which had been previously constructed without the

necessary permits and the appropriate construction methods.

The applicants made a claim under their title insurance policy and worked with their title insurer to obtain the necessary permits and directions from the municipality and the local conservation authority.

The municipality determined that the swimming pool would not have to be reconstructed and that it could be remediated by simply obtaining the necessary approvals and permits. However, the deck and the cabana had to be demolished and rebuilt to code.

This was not a cheap fix—the deck and cabana were very large structures built on a hill in an environmentally sensitive area. According to quotations obtained by the policyholders, the cost of demolishing and rebuilding the deck and cabana was estimated to be in the range of approximately \$290,000 to \$350,000.

Litigation ensued between the applicants and the title insurer over the title insurer’s proposed resolution of the claim.

The title insurance policy purchased by the applicants contained the following “Covered Risk” #23, concerning government orders to remove or remedy structures built without necessary permits:

23. You are forced by a Governmental Authority to remove or remedy your existing structures or any part of them - other than boundary walls or fences - because any portion was built without obtaining a required building permit from the proper Governmental Authority.

The policy contained a general exclusion relating to the physical structure of the buildings:

You are not insured against loss, costs, legal and/or notarial fees, and expenses resulting from:

...

8. Physical/structural conditions and defects including but not limited to the improvements located on the Land, those that impact value or marketability and the failure of all or part of the improvement(s) located on the Land to have been constructed in accordance with applicable building codes and/or to comply with current building codes. This exclusion does not limit the coverage described in Covered Risks 17, 21, 22, 23, 25, 33 and 34.

Since the exclusion did *not* limit the coverage described in Covered Title Risk #23, the court reasoned that the risk of a government order to remove or remedy any illegally built structures was covered.

The policy provided the title insurer with specific options for dealing with claims under Covered

Risk #23:

Where the cost of removing or remedying the portion of the structure built without a permit exceeds \$50,000.00 we may:

- a) pay for the removal or remediation; or
- b) End the coverage described in Covered Risk 23 by paying you your Actual Loss resulting from the Covered Risk, as determined by an appraisal conducted by an AACI (Accredited Appraiser Canadian Institute) - accredited appraiser, and those costs, legal fees and expenses incurred up to that time which we are obligated to pay.

In response to the claim, the title insurer invoked the appraisal process and obtained an appraisal which concluded that the “Actual Loss” as defined in the policy was only \$85,000. The title insurer sought to rely on the Actual Loss calculation rather than covering the full cost of demolishing and rebuilding the deck and cabana.

The title insurer’s position was that the option to pay the “Actual Loss” resulting from Covered Risk 23 must necessarily be something different than the other option to pay the cost of “the removal or remediation”, particularly since it is an option provided to the insurer when the cost of remediation is over \$50,000.

In the court’s view, however, this did not accord with the following definition of “Actual Loss” in the policy:

“Actual Loss”: the difference between the value of the insured estate as insured and the value of the insured estate or interest subject to the defect, lien or

encumbrance insured against by this policy. The date used to assess Actual Loss will be the date the claim was made by [the policyholder] unless otherwise stipulated in the Conditions of this policy.

This definition describes a mathematical formula starting with “the value of the insured estate as insured,” which the parties agreed to be the fair market value of the whole property at the date of assessment as if there was no defect (*i.e.* with no order requiring remediation). In the case at hand, this figure was agreed to be \$1,745,000.

However, the parties disagreed over the second part of the formula which required subtracting “the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy”. The title insurer argued that this meant it could rely on the figure calculated by the appraiser to be the value of the land if it did not have the defects (*i.e.* the swimming pool, cabana or deck).

The court did not accept that the phrase “the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy” meant the land without the illegal structures. Rather, the value being determined is the value of the land subject to the defect insured against. The defect “insured against” was the government order.

The applicants’ position was that they did not buy a pristine piece of land with a manicured but empty back yard but rather a piece of land with a swimming pool with appurtenant structures that turned out to be both illegal and unsafe. The application judge agreed, as “[p]ostulating that there was no pool, deck, or cabana at all ignored the actual facts and ignores the insured risk that came to fruition”.

Based on this approach, the issue to be appraised was not what the value of the land was without the defects but what would a willing buyer pay in an arm’s length sale for the land subject to the defects. The words “Actual Loss” did not equate to a cheap “escape route” for the title insurer.

Since the title insurer’s appraisal could not stand, the application judge directed that the applicants’ “Actual Loss” was to be determined under section 128 of the [Insurance Act](#), which applies to a contract containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer.

The specific mechanism is provided by subsection 128(2) of the [Insurance Act](#), which states that the insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an umpire.

While the title insurer argued that there was a process set out in the policy, the court noted that section 126 of the [Insurance Act](#) states that no insurer shall make a contract of insurance inconsistent with the Act. Accordingly, the parties will have to proceed by retaining independent appraisers to appoint an “umpire”. How this plays out remains to be seen.

#### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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