



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada



# REAL ESTATE Practice Basics 2016

CHAIR

**Joel Kadish**  
Barrister and Solicitor

December 9, 2016

**cpd** Continuing  
Professional  
Development



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du Haut-Canada

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## REAL ESTATE

# Practice Basics 2016

**Chair: Joel Kadish**  
**Barrister and Solicitor**

**December 9, 2016**  
**9:00 a.m. to 12:30 p.m.**

**Total CPD Hours = 2.5 h Substantive + 1.0 h Professionalism **

**The Law Society of Upper Canada**  
**130 Queen Street West**

**SKU CLE16-0120201**

### **Agenda**



**9:00 a.m. – 9:05 a.m.**

**Welcome and Opening Remarks**

Joel Kadish, Barrister and Solicitor

**9:05 a.m. – 9:30 a.m.**

**The Agreement of Purchase and Sale (10 minutes )**

Lorne Shuman, *Isenberg & Shuman Professional Corporation*

- 9:30 a.m. – 9:55 a.m.**      **Title Searching** (5 minutes )  
Joel Kadish, Barrister and Solicitor
- 9:55 a.m. – 10:20 a.m.**      **Title Insurance**  
Lori Swartz, Legal Counsel, TitlePLUS®  
*Lawyers' Professional Indemnity Company (LAWPRO®)*
- 10:20 a.m. – 10:45 a.m.**      **Fraud** (20 minutes )  
Raymond Leclair, Vice-President, Public Affairs  
*Lawyers' Professional Indemnity Company (LAWPRO®)*
- 10:45 a.m. - 11:00 a.m.**      **Coffee and Networking Break**
- 11:00 a.m. – 11:25 a.m.**      **Residential Mortgage Financing** (5 minutes )  
Zahra Ziaie Moayyed  
*Ziaie Professional Corporation*
- 11:25 a.m. – 11:50 a.m.**      **Closing** (5 minutes )  
Tannis Waugh, *Tannis A. Waugh Professional Corporation*
- 11:50 a.m. – 12:15 p.m.**      **Practical and Substantive Issues Arising in Residential Real Estate Transactions** (15 minutes )  
Joel Kadish, Barrister and Solicitor  
Raymond Leclair, Vice-President, Public Affairs  
*Lawyers' Professional Indemnity Company (LAWPRO®)*  
Lorne Shuman, *Isenberg & Shuman Professional Corporation*  
Lori Swartz, Legal Counsel, TitlePLUS®  
*Lawyers' Professional Indemnity Company (LAWPRO®)*

Tannis Waugh, *Tannis A. Waugh Professional Corporation*

Zahra Ziaie Moayyed  
*Ziaie Professional Corporation*

**12:15 p.m. - 12:30 p.m.**      **Question and Answer**

**12:30 p.m.**                      **Program Ends**



# REAL ESTATE Practice Basics 2016

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Zahra Ziaie Moayyed  
*Ziaie Professional Corporation*

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Presented by:  
Tannis Waugh  
*Tannis A. Waugh Professional Corporation*

TAB 1



# REAL ESTATE

## Practice Basics 2016

# The Agreement of Purchase and Sale

**Lorne Shuman**  
*Isenberg & Shuman Professional Corporation*

December 9, 2016

## **THE AGREEMENT OF PURCHASE AND SALE**

**Lorne Shuman  
Isenberg & Shuman**

### **Introduction**

In Ontario, most real estate transactions for the sale of residential property are entered into by your clients using the Ontario Real Estate Association (“OREA”) standard form with the assistance of real estate agents. A sample copy of the OREA form is attached to this paper and has been reprinted with the permission of OREA. Once accepted, the Agreement of Purchase and Sale (the “Agreement”) is a contract which sets out the rights and obligations of the buyer and seller under the law of contracts.

Unfortunately many clients believe that all Agreements are standard. However, every real estate transaction is unique and therefore, you should encourage both parties to seek legal advice prior to entering into an Agreement. Once binding, the Agreement hopefully contains the provisions and protections to meet your clients’ requirements.

In most cases, however, you will not be consulted prior to the Agreement becoming a binding contract. However, even if not consulted prior to this time, it is your responsibility as a solicitor to ensure that the contract reflects what your client bargained for. You are also responsible for ensuring that your client has an understanding of the rights and obligations contained in the Agreement.

Unfortunately, real estate law continues to be a dangerous area of practice for lawyers resulting in a disproportionate and large percentage of LawPro claims. A closer examination of these claims indicates that the majority of them arise from what can loosely be termed as communication claims. For this reason, it is imperative that a prudent lawyer speaks to his or her client at the commencement of the retainer. The purpose of this communication is to provide the client with a roadmap of the transaction and process. Further, such communications can delineate what you as the solicitor will be doing and what you will not be doing and what is expected from your client. It would also be advisable for you to follow up this communication with an opening letter once you have been retained. Once again, the purpose of such a letter is to avoid miscommunications in case of problems during the course of your retainer and the transaction. Effective communication with your client from the outset is an essential step to avoiding claims.

If you are consulted prior to the transaction becoming firm, there are a number of important issues that need to be addressed with your client. These are matters like intended or future use, survey issues, title insurance, financing, and the due diligence and letter inquiry searches that you may or may not be conducting as part of your retainer. Further, clients need to be advised of deadlines, in particular, the importance of ensuring that you receive mortgage

instructions in a timely manner.

The focus of my comments in this paper is on a single family dwelling resale transaction using the OREA form.

### **The Parties**

The contract begins by identifying the parties who are the buyer and the seller. The buyer has the right to direct title to another party on closing unless the seller has inserted a provision in the Agreement to the contrary. The buyer may be identified with its name and the words following its name "in trust". If this is the case, the seller's lawyer should be concerned. If you are acting as the solicitor for the buyer, the seller's name needs to be correctly identified. It may be prudent to conduct a subsearch of the property to do this. If the seller is Corporation, it is important to ensure that the authorized persons have signed the Agreement. If the seller is in an estate, all estate trustees should sign the Agreement. They should be identified in the will of the deceased. If there is no will for the deceased, an Application to court will be required to be made to appoint estate trustees for the estate.

### **Real property**

This section of the Agreement identifies the property which is the subject matter of the transaction. The municipal address and the dimensions of the lot should be identified and be accurate. There are a number of court decisions which have attempted to define the term "more or less". This can become an issue where the purchaser intends to renovate or rebuild and requires a building permit for the property. I suggest attaching a survey of the property to the Agreement if one is available. The legal description should clearly identify the lot and plan, or unit, level and Condominium Corporation if the property is a condominium. Easements and rights-of-way should be identified in the Agreement as well. Misdescriptions can cause problems such as delays in obtaining responses to off title searches and disputes between the parties which could unfortunately lead to litigation. The solicitor for the buyer can verify the title by doing a title search and obtaining the parcel page for the property. This will confirm the identity of the registered owner as well as the correct legal description of the property.

### **Purchase Price**

The purchase price is inserted and often negotiated through offers and counteroffers. All amendments to the purchase price should be legible and initialed by all parties.

## **Deposit**

The amount of the deposit will vary from transaction to transaction. A deposit equivalent to 3 to 5% of the purchase price is standard. The seller would prefer a larger deposit whereas the buyer would prefer to provide a smaller deposit. The deposit will be presented with the offer or paid upon acceptance of the offer. The deposit is normally paid to the listing agent. If the transaction is a private deal without real estate agents, the deposit should be payable to the seller's solicitor in trust.

## **Irrevocability**

This is the time period during which the offer is open for the offeree to accept. If it is not accepted within this time period, the offer ends.

## **Completion Date**

It is important to ensure that the completion date does not fall on a weekend or holiday or a day when the land registration system is closed. When possible, it is preferable to avoid closing dates on a Friday or the last day of the month as these are typically very busy days. The completion date is the day when the keys and funds are exchanged and the title is transferred to the buyer.

## **Chattels and Fixtures**

A chattel is personal property which can be removed. Fixtures are items more permanently attached. It is very that all chattels and fixtures to be clearly identified in the Agreement. Transactions can be put in jeopardy over a \$20 item. Therefore it is important to clear. When in doubt, spell it out in the Agreement.

## **Rental Items**

These items typically include the hot water tank and may also include the furnace or air conditioner. It is important that the Agreement clearly states whether or not the items are rented or owned and if the buyer will be assuming the contract for these items. Otherwise, disputes can arise between the parties.

## **HST**

HST applies to all transactions unless specifically exempted. Resale residential transactions have specific exemptions. Therefore, HST will usually not apply to these transactions. If however, there is a non-residential component to the property, HST may apply. It is important to be careful and determine at the earliest possible opportunity whether or not HST applies to the transaction.

## **Title Search and Requisition Date**

This is a very important section of the Agreement. The requisition date is the date by which the buyer's solicitor must examine title to the property and submit a letter of requisitions to the seller's solicitor. If the letter of requisitions is sent late, the buyer may be prejudiced if there is a title or off-title problem.

For a requisition to be valid, it should identify a specific problem or deficiency and require a solution. Many requisition letters contain standard or boiler-plate requests such as compliance with subdivision agreements, municipal agreements, release of easements, compliance with restrictions and other standard matters.

If the seller is unwilling or unable to remove, remedy or satisfy a valid objection, the transaction may be at an end. It is important to note that title insurance may, in some instances, be a sufficient response to a title or off title requisition. In these circumstances, the issue to be determined is whether or not the buyer is obliged to accept a title insurance policy as a legitimate response to an otherwise valid requisition. There has been little jurisprudence on this matter and solicitors are advised to be very careful in these circumstances. You will need to obtain clear instructions from clients in these situations.

## **Closing Arrangements**

This section sets out the process and protocol for closing the transaction through the electronic land registration system and the use of the Law Society of Upper Canada's recommended form of Document Registration Agreement ("DRA") between the respective solicitors. Lawyers practicing in the area of real estate should be familiar with the terms of the DRA.

## **Documents and Discharge**

The Agreement obligates the seller to provide the buyer with title documents in the seller's possession. As well, upon request, the seller is to supply a sketch or survey of the property in its possession. This survey clause may not be sufficient for the buyer. Where possible, the buyer

should have a clause inserted clause requiring the seller to provide an up-to-date survey. Of course, the seller should resist this if it does not have one.

The paragraph goes on to state that if the seller has an outstanding mortgage which the buyer is not assuming, then a discharge need not be delivered on closing provided the seller delivers a discharge statement for the mortgage, directs funds to pay off the mortgage and provides a solicitor's undertaking to discharge the mortgage. Where the mortgage is a private mortgage, a discharge must be registered on closing.

## **Insurance**

This provision transfers the risk to the seller once the Agreement is signed between the parties. The seller is a trustee holding the property in trust for the buyer. Because not all transactions are completed on the scheduled closing date. It is therefore important to advise your seller clients not to cancel the insurance until they have received confirmation that the transaction is closed.

## **Residency**

Section 116 of the Income Tax Act imposes tax liability upon a non-resident seller. If the tax obligations are not fulfilled, the buyer may face liability. The buyer's solicitor must make reasonable inquiries as to the residency of the seller. On closing, the buyer's solicitor must obtain a statutory declaration from the seller that the seller is not a non-resident of Canada or a clearance certificate from Canada Revenue Agency. When acting for a seller, it is important to confirm that this seller is a resident of Canada in advance of closing. Where the seller is a non-resident, you will need to advise the seller to immediately retain an accountant to obtain the necessary clearance certificate from Canada Revenue Agency and to ensure that 25% of the sale price is held back until the certificate is received.

## **Adjustments**

The usual adjustments in a residential transactions are made for property taxes and monthly common expenses. In some situations there will be adjustments for tenant rents, oil and flat rate water. The buyer is responsible to pay for the adjustments for the closing day and onwards.

## **Time Limits**

This important section reinforces that the dates and times for completing all matters must be strictly adhered to. If a party defaults under its obligations, the non-defaulting party may pursue damages provided the non-defaulting party can demonstrate it was ready, willing and able to complete the transaction on the scheduled closing date.

## **Tender**

If the transaction is not completed, in order to pursue any remedies, the parties must demonstrate that they were ready, willing and able to complete the transaction as per the Agreement. Evidence can be demonstrated by delivery and presentation of all closing documents including keys. An imperfect tender can result in serious repercussions and can prejudice your client's legal position. Much has been written about tender in an electronic registration environment and solicitors are advised to be aware of how to properly tender in an electronic environment.

## **Family Law Act**

The matrimonial home has special meaning in real estate transactions. The non-titled spouse, as defined under the Family Law Act, must consent to the sale of the matrimonial home. It is important for lawyers to ask clients at the outset whether or not the property is a matrimonial home and if the spouse will consent to the transaction.

## **Agreement in Writing**

This paragraph provides that anything written in the Agreement supersedes anything in the preprinted forms. This clause continues to say that the Agreement is complete and any representations, warranties or collateral Agreements are not part of the Agreement.

## **Direction to Pay Commission**

The signing page contains irrevocable instructions to the seller's solicitor to pay the unpaid balance of the realtors' commission from the sale proceeds. The seller's solicitor may be personally liable for nonpayment. The seller's solicitor should obtain a commission statement from the listing agent to determine the correct amount of commission so that it can be paid out of the sale proceeds. It would also be prudent to provide this statement to the seller upon execution of the closing documents.



## **Successors and Assigns**

The purpose of this paragraph is to have the contract enforceable in cases where one or more of the parties are deceased.

## **Schedules**

The schedules to the Agreement include additional provisions and should address the particular needs of your client.

Where you have been retained to act as the solicitor for the purchaser, some, but not all of the following clauses should be added as schedules to the Agreement:

### **Representations:**

The seller represents and warrants that the chattels and fixtures included in this agreement of purchase and sale will be in good working order and free from all liens and encumbrances on completion.

The seller represents and warrants that there are no work orders or deficiency notices outstanding against the property and if so will be complied at its own expense, on or before closing.

The seller represents and warrants that there are no special assessments levied against the condominium unit as of the date of closing. The seller further covenants that should any special assessments be levied prior to closing, the seller shall be responsible for all costs associated with the said assessment.

The seller represents and warrants that during the time the seller has owned the property, the use of the property and the buildings and structures thereon has not been used for the growth or manufacture of illegal substances and that to the best of the seller's knowledge and belief, the use of the property and the buildings and structures thereon has never been used for the growth or manufacture of illegal substances. This warranty shall survive and not merge on completion of this transaction.

The seller represents and warrants that during the time the seller has owned the property, there has never been any murders, deaths or suicides on the property. This warranty shall survive and not merge on completion of this transaction.

## **Conditions**

This offer is conditional upon the buyer arranging, at the buyer's own expense, a new first Charge/Mortgage satisfactory to the buyer in the buyer's sole and absolute discretion. Unless the buyer gives notice in writing delivered to the seller personally or in accordance with any other provisions for the delivery of notices in this Agreement or any schedules thereto not later than 6 PM on the 5th banking day following the confirmation of acceptance being executed (excluding Saturdays Sundays and statutory holidays), that this condition is fulfilled, this offer shall be null and void and the deposit shall be returned to the buyer in full without deduction. This condition is included for the benefit of the buyer and may be waived at the buyer's sole option by notice in writing to the seller as aforesaid within the time period stated herein.

This offer is conditional upon the inspection of the subject property by a qualified home inspector at the buyer's own expense, and the obtaining of a report satisfactory to the buyer in the buyer's sole and absolute discretion. Unless the buyer gives notice in writing delivered to the seller personally or in accordance with any other provision for the delivery of notices in this Agreement not later than 6 PM on the third banking day following the confirmation of acceptance being executed, that this condition is fulfilled, this offer shall be null and void and the deposit shall be returned to the buyer in full without deduction. The seller agrees to cooperate in providing access to the property for the purpose of this inspection. This condition is included for the benefit of the buyer and may be waived at the buyer's sole option by notice in writing to the seller within the time period stated herein.

This offer is conditional upon the buyer's solicitor reviewing the Condominium Corporation's documentation including the status certificate and attachments and finding all of the foregoing satisfactory in the buyer's solicitor's sole and absolute discretion. Unless the buyer gives notice in writing delivered to the seller personally or in accordance with any other provision for the delivery of notices in this Agreement not later than three business days (excluding Saturdays, Sundays and statutory holidays) after receipt by the buyer's solicitor of the foregoing documentation, that this condition is fulfilled, this offer shall be null and void and the deposit shall be returned to the buyer in full without interest or deduction. Seller agrees to request the foregoing documentation within ten business days (excluding Saturdays, Sundays and statutory holidays) after acceptance of this Agreement. This condition is included for the benefit of the buyer and may be waived at the buyer's sole option by notice in writing to the seller or in accordance with any other provision for the delivery of notices in this Agreement within the time period stated herein.

## **Inspection/property visits**

Buyer shall have the right to inspect the property on two occasions prior to completion at a mutually agreed-upon time, on not less than 48 hours prior written notice, provided that written notice is given to the seller. The seller agrees to provide access to the property for the purpose of this inspection.

**Notices – Facsimiles and Electronic Signature:**

This offer, any subsequent counteroffer, amendments, notices, acknowledgments, directions or other documents shall be in writing and shall be deemed given and received, when hand-delivered to the parties or their respective solicitors at the address for service provided herein or, where a facsimile number is provided herein, when transmitted electronically to the facsimile number. All documents that are delivered between the parties by electronic facsimile transmission shall be treated as signed originals.

TAB 2



# REAL ESTATE

## Practice Basics 2016

# Title Searching A Checklist

**Joel Kadish**  
Barrister and Solicitor

December 9, 2016

# **TITLE SEARCHING** **A CHECKLIST**

**JOEL KADISH**  
**BARRISTER & SOLICITOR**  
**JOEL@KADISHLAW.COM**

A title search is a means to an end.

You have been retained by a purchaser and a lender in a residential real estate transaction. Your job is to tell your purchaser client that they have good and marketable title in fee simple and that the lender has a good and valid charge enforceable in accordance with its terms. You must determine the quality of title.

In order to do so you must search the title to the property your client is purchasing.

- 1. Find the legal description of the property.** Most, but not all, searches can be done on the Teranet system using Teraview software. You may search title by owners name or municipal address. You can also obtain this information from the vendor's solicitor or by reading a survey. Assessment maps can also be of assistance. These are available at the Land Registry Offices.
- 2. What system is the property registered under?** We have two land registration systems in Ontario. The Registry system, governed by the *Registry Act* and the Land Titles system, governed by the *Land Titles Act*.

## **Land Titles**

**Automated** – When we use the term “automated” we mean that you can conduct the search electronically, using Teraview. A PIN (Property Identification Number) is assigned by the government to a particular piece of property. A PIN map is available to locate a PIN relative to others. The legal description is contained in the Thumbnail description. I have attached to this paper two examples where you

can see the description which will disclose such things as rights of way (“subject to” or “together with”).

The Parcel register has Estate/Qualifiers – three main types:

Land Titles Conversion Qualified – Land converted under public conversion – main difference is that land is subject to possessory claims of adjoining owners.

Land Titles Plus – An upgrade from LTCQ – owner application

Land Titles Absolute – On application of owner from Registry to Land Titles.

See section 44(1) of the Land Titles Act for the exceptions

### **Registry Non-Convert Properties**

There are almost six million parcels in the land registration system. All have been converted to Land Titles. But there are Registry non-convert property that have not been converted through automation. Approximately 36,000 exist.

Some of the reasons why properties could not be converted:

- a) Planning Act issues
- b) Description issues
- c) Easement and water issues
- d) Conflicts of ownership and inability to establish owners
- e) Breaks in chain of title

Sometimes issues need to be resolved by court order or by First Application to Land Titles. The lawyer must conduct a full search of title to determine all of the issues. The process of conversion is set out in Registrars Bulletin No. 2004-02. For this reason we need to continue to learn and understand the Registry system under the Registry Act.

## **Registry**

**Automated** – Registry properties may also be assigned a PIN. In this case instruments are loaded into the system by registry office staff. This is called Parcelized Day Forward Registry (“PDFR”).

It is not sufficient to rely on a Registry PIN. You must search behind it for the relevant period to establish title.

While reference need be made to the relevant legislation, the Land Titles system offers something of a government guarantee with respect to the status of title, while the Registry system does not. The registry system is older and has almost been phased out in favour of the certainty of the Land Titles system.

### **3. What is the length of time that I need to search title for?**

## **Land Titles**

All of the relevant instruments are disclosed on the parcel. There is no need to search “behind” the registered owner. Of course, you must still review each document set out on the parcel to determine its effect.

## **Registry**

40 years dating back from the date of the Agreement of Purchase and Sale. Find a “root of title”. Section 112(1) of the *Registry Act*.

### **4. Registry – you must determine each documents legal effect**

Each document must be reviewed to determine if it does what it is supposed to do. There has been no review of it by the government for sufficiency. You will need to check each deed, each deposit, and each document to determine legal sufficiency.

## **5. Crown Patent**

This is the first transfer from the Crown to a private party. One must determine if there are any restrictions in it that will affect the property and/or your client's intended use.

## **6. Planning Act**

Any violations of the Planning Act are fatal. A party can not retain the fee in abutting land. The last general forgiveness was June 15, 1967. In addition, you need not search "behind" the three boxes being signed – see section 50(22) *Planning Act*.

## **7. Corporate Ownership – Escheat**

If a corporate owned property and its charter dissolved during its ownership period, the land reverts to the crown. Search back 40 years and then conduct a corporate search to ensure there are no "gaps".

## **8. Execution searches**

### **Registry**

All owners' names in the 40 year search must be searched.

### **Land Titles**

Only the current owner's names must be searched.



## **9. Mortgages, Leases, Liens, Subdivision Agreements, Easements, Rights of Way, Notices of Security Interests, and a host of characters.**

If title is not to be taken subject to the various interests as disclosed by your search and by your review of the agreement then requisitions are formed on this basis.

## **10. Subsearch of title**

We search title again at the time of closing to ensure that nothing has changed from the time we initially searched title.

## **11. Off Title searches**

Taxes, Hydro, water, gas, building and zoning, unregistered easements and potentially many, many others. Many of the searches can now be done online. Check with the relevant authority to determine if you can simply get a tax certificate via email. Ottawa, Mississauga and Oakville offer these services as examples. Toronto is supposed to be going online in 2016.

## **12. Reference Plans and Surveys**

As part of a search of title you will order the relevant reference plan. This will also help you determine if there are any **access** issues. You can also make sure your client is, in fact, purchasing the property that they think they are.

As I said, a title search tells you about the quality of title. A **survey** tells you about the quantity of title. It shows you the extent of the property, buildings situate thereon, physical features such as fences and encroachments. It is invaluable. A survey is signed and sealed by an Ontario Land Surveyor and contains two parts.

Other things of note:

## **The Two Lawyer Rule**

You must comply with Rules 3.4-16.7 to 3.4-16.9. The Law Society formalized the necessity for two lawyers to transfer title. Essentially to register a deed the Transferor and Transferee must each have their own lawyer. There are a few exceptions. This rule codified common sense in my view.

Please see

Steps to Assist in Complying with the Two-Lawyer Requirement for Transfers of Title to Real Property, Rules 3.4-16.7 to 3.4-16.9 – For Individual Lawyers

<http://www.lsuc.on.ca/with.aspx?id=2147499343>

## **Client Identification and Verification Requirements For Lawyers**

Part III of By-Law 7.1

Part III of By-Law 7.1 contains four main requirements:

- identifying the client and certain third parties
- verifying the identity of the client and certain third parties
- maintaining records, and
- withdrawing from representation in appropriate circumstances.

<http://lsuc.on.ca/with.aspx?id=2147499242>

It is easy to use the forms from the web site as part of your file for each transaction. The real emphasis is to know your client.

## **Delegation to non-lawyers**

Quite often in the Registry System we delegate the function of title searching to a freelance conveyance who works at the local registry office. Remember you are obligated, as a lawyer, to review title and review the requisition letter and sign it. Rule 6.1-1 – see commentary.

With prior express instruction and authorization, a lawyer or paralegal may allow a non-lawyer employee to

- take instructions from the client
- give or accept an undertaking on the lawyer or paralegal's behalf
- act before an adjudicative body on the lawyer or paralegal's behalf in respect of a scheduling or other related routine administrative matter, and
- upon client consent, conduct routine negotiations with third parties in relation to the client's matter, where the negotiation results are approved by the lawyer or paralegal before any other action is taken.

Lawyers or paralegals must not allow a non-lawyer or non-paralegal employee to

- accept a client on the lawyer or paralegal's behalf
- provide the client legal advice
- act finally in respect of the client's affairs
- perform any of the duties that only lawyers or paralegals may do
- perform any duties that lawyers or paralegals themselves are not permitted to do, or
- be held out as a lawyer or paralegal.

Lawyers or paralegals should ensure that non-lawyer or non-paralegal employees clearly identify themselves as such when

communicating with clients, prospective clients, or the public. This includes both written and oral communications.

The commentary to rule 6.1-1 of the lawyers' [Rules](#) provides examples of appropriate delegation of tasks as they relate to real estate matters, including electronic registration and title insurance; corporate and commercial matters; and wills, trusts, and estates.

## **Fraud – Fraud – did I mention Fraud**

Learn to search title with an eye on for fraud. Quick transfers where value of consideration varies widely and recently discharged mortgages are a couple of things which suggest fraud and may merit further review. Always print abstracts with deleted instruments.

<http://www.practicepro.ca/practice/fraud.asp>

## **Teranet System Access**

To get on the system to search and register documents you have to have a license. You will be required to sign a license agreement. You will have a Personal Security License housed on a flash drive which, along with a password, will give you access to the system. There are statements only a lawyer can make and only a lawyer may “sign” electronically for certain things. While it may seem obvious you may not let anyone else use your access. It is a violation of the license agreement and your rights could be revoked. You will also have to sign up for a Deposit Account Payment Plan to fund your Teraview account and you will need an Electronic Registration Bank Account (ERBA). This will allow you to transfer funds from your trust account to your ERBA for withdrawal.

[www.teranetexpress.ca](http://www.teranetexpress.ca)

## **Title Insurance and Searching**

Remember that if you are purchasing title insurance for your purchaser or purchaser and lender clients then the search requirements may change. Please check each provider to determine what searches are necessary. As one example, you may not have to do certain “off title” searches.

## **Real Estate Transaction Levy Surcharge**

Ah yes more things to file – quarterly, in fact. On a sale, mortgage or on a purchase you have to pay \$65.00, inclusive of PST, to the Law Society. The attached “Q & A” located at

[https://www.lawpro.ca/file\\_online/transaction\\_levy\\_faqs.asp](https://www.lawpro.ca/file_online/transaction_levy_faqs.asp)

tells you how to remit and how to charge. The exception as outlined is if you title insure on a purchase or mortgage. When billed to the client it is \$65.00 plus HST. There is also a chart on the LawPRO web site entitled “When do levys apply”. You have to be logged on to use this resource.

## **BIBLIOGRAPHY**

There are many great resources for title searching. These are the ones I have used and find quite valuable on an ongoing basis:

1. Ontario Residential Real Estate Practice Manual  
Lexis Nexis Canada – Butterworths – Founding Author  
Gowling Lafleur Henderson; Updated Author Rosemary  
Bocska Looseleaf service

2. Real Estate Practice In Ontario, 6<sup>th</sup> Edition  
Lexis Nexis Canada – Butterworths – D.J. Donahue,  
Q.C., P.D. Quinn & Danny C. Grandilli

3. Document Registration Guide

4. CCH - Rose H. McConnell

5. Title and Off-Title Searching  
Law Society of Upper Canada  
Annually

5. Licensing Process  
Law Society of Upper Canada  
Reference Material – Solicitor

6. What lawyers forgot or never learned about title searching but  
needed to know  
Ontario Bar Association  
October 7, 2010

7. Law Society of Upper Canada – Practice Guides

[http://rc.lsuc.on.ca/pdf/practiceGuides/realEstatePractice  
Guide.pdf](http://rc.lsuc.on.ca/pdf/practiceGuides/realEstatePracticeGuide.pdf)



Ministry  
of Government  
and Consumer  
Services

LAND  
REGISTRY  
OFFICE #65

PARCEL REGISTER (ABBREVIATED) FOR PROPERTY IDENTIFIER



PAGE 1 OF 1  
PREPARED FOR [REDACTED]  
ON 2008/11/27 AT 15:52:46

\* CERTIFIED BY LAND REGISTRAR IN ACCORDANCE WITH LAND TITLES ACT \* SUBJECT TO RESERVATIONS IN CROWN GRANT \*

PROPERTY DESCRIPTION: PT LT 22 PL 3541 VAUGHAN, PT 4 65R30122, VAUGHAN

PROPERTY REMARKS: PLANNING ACT CONSENT ON YR1045364

ESTATE/QUALIFIER:  
FEE SIMPLE  
LT CONVERSION QUALIFIED

RECENTLY:  
DIVISION FROM [REDACTED]

PIN CREATION DATE:  
2008/08/07

OWNERS' NAMES

CAPACITY SHARE

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
** PRINTOUT INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE: 2008/08/07 **						
**SUBJECT, ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO:						
** SUBSECTION 44(1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11, PARAGRAPH 14, PROVINCIAL SUCCESSION DUTIES						
** AND ESCHEATS OR FORFEITURE TO THE CROWN.						
** THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF						
** IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION, MISDESCRIPTION OR BOUNDARIES SETTLED BY						
** CONVENTION,						
** ANY LEASE TO WHICH THE SUBSECTION 70(2) OF THE REGISTRY ACT APPLIES.						
**DATE OF CONVERSION TO LAND TITLES: 1998/05/28 **						
65R30122	2007/06/27	PLAN REFERENCE				
YR1045364	2007/08/30	TRANSFER REMARKS: CONSENT OF THE COMMITTEE OF ADJUSTMENT	\$356,875	OWNERS	[REDACTED]	C
YR1045365	2007/08/30	CHARGE	\$150,000	[REDACTED]	[REDACTED] CATHERINE	C
YR1045370	2007/08/30	CHARGE	\$835,000	[REDACTED]	THE CANADA TRUST COMPANY [REDACTED] MALCOLM [REDACTED] ALEC	C
YR1154700	2008/04/28	TRANSFER OF CHARGE REMARKS: YR1045370 RE-STATEMENT		[REDACTED] MALCOLM & FELICE [REDACTED] ARE THE OWNERS OF CHARGE YR1045370. (FELICE [REDACTED] 5/8 FELICE [REDACTED])	[REDACTED] FELICE	C
YR1167598	2008/05/27	TRANSFER OF CHARGE REMARKS: YR1045370 RE-STATEMENT		[REDACTED] FELICE & MARIO [REDACTED] ARE THE OWNERS OF CHARGE YR1045370.	[REDACTED] MARIO	C
YR1222006	2008/09/09	TRANSFER OF CHARGE REMARKS: YR1045370		[REDACTED] ALEC	CONGREGATION [REDACTED] TORONTO	C

81504

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Ministry of Government and Consumer Services

LAND REGISTRY OFFICE #20

PARCEL REGISTER (ABBREVIATED) FOR PROPERTY IDENTIFIER

SUBJECT TO RESERVATIONS IN CROWN GRANT

PAGE 1 OF 1  
PREPARED FOR [REDACTED]  
ON 2008/12/02 AT 14:17:44

PROPERTY DESCRIPTION:

PT BLK 10, PLAN 20M914, PTS 18, 19 & 20 20R15861; OAKVILLE T/W ROW 76926 OVER PTS 6 TO 9 20R13607. S/T EASE HR341836 OVER PT 20 20R15861 FOR PTS 21 & 22 20R15861 S/T EASE HR341836 OVER PT 18 20R15861 FOR PT 17 20R15861. S/T EASE HR352390 PRIOR TO THE EARLIER OF 10 YRS FROM 2005 01 27 OR THE DATE OF COMPLETE ASSUMPTION OF THE SUB'D WORKS & SERVICES BY THE CORPORATION OF THE TOWN OF OAKVILLE & THE REGIONAL MUNICIPALITY OF HALTON.

HT 317  
22 250  
06 150

PROPERTY REMARKS:

ESTATE/QUALIFIER:  
FEE SIMPLE  
ABSOLUTE

RECENTLY:  
DIVISION FROM [REDACTED]

PIN CREATION DATE:  
2004/12/20

OWNERS' NAMES

CAPACITY SHARE  
BENO

PRO  
EST  
FEE  
AB:  
OWN  
XID

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CHGT/CHRD
** PRINTOUT INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE: 2004/12/20 **						
20M914	2004/07/15	PLAN SUBDIVISION				CH
HR304144	2004/07/19	NO SUB AGREEMENT		THE REGIONAL MUNICIPALITY OF HALTON	1312200 ONTARIO LIMITED	CH
HR304146	2004/07/19	NO SUB AGREEMENT		THE CORPORATION OF THE TOWN OF OAKVILLE	1312200 ONTARIO LIMITED	CH
HR321325	2004/09/20	APL ANNEX REST COV		1312200 ONTARIO LIMITED		CH
REMARKS: EXPIRES ON THE EARLIER OF 10 YRS FROM 2004/09/20 OR UNTIL THE PLAN IS ASSUMED BY THE CORPORATION OF THE TOWN OF OAKVILLE AND THE REGIONAL MUNICIPALITY OF HALTON.						
20R15861	2004/10/19	PLAN REFERENCE				CH
HR341225	2004/12/03	BYLAW		THE CORPORATION OF THE TOWN OF OAKVILLE		CH
REMARKS: EXEMPT PART LOT CONTROL						
HR341836	2004/12/07	TRANSFER		*** DELETED AGAINST THIS PROPERTY *** 1312200 ONTARIO LIMITED	1312200 ONTARIO LIMITED	CH
HR352390	2005/01/27	TRANSFER	\$208,556	1312200 ONTARIO LIMITED	[REDACTED]	CH
HR352391	2005/01/27	CHARGE	\$179,070	[REDACTED]	CIBC MORTGAGES INC.	CH

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The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

# Real Estate Practice Guide

**FOR LAWYERS**

June 2010

Visit *For Lawyers* at [www.lsuc.on.ca](http://www.lsuc.on.ca) or phone 416-947-3315 or 1-800-668-7380 ext 3315

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Tuesday, August 21, 2012

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## LAWPRO CEO: Six things I hate to read in a real estate claim file

*Kathleen Waters, CEO of LAWPRO, reveals which protestations from claims-plagued real estate lawyers are the least musical to her ears.*

When I talk about the disturbing escalation we have seen in claims costs in the past few years, I am often asked why real estate claims are so prominent, and what can be done to get these claims under control.

Besides the usual advice about careful review of transaction details, effective and regular lawyer-client communication, and good general practice management (you can find the details of these recommendations, and others, in the resources available at [practicepro.ca](http://practicepro.ca)), I recommend a measure of self-reflection.

When LAWPRO counsel work with lawyers to resolve claims, they ask questions about how the problem that led to the claim arose. The answers to those questions can be as varied as the claims themselves.

The following are the six “explanations” I most hate to read – whether in a payment request memo, a trial preparation memo, or any other part of a real estate claim file.

### **1. I gave my disc and password (for the electronic land registration system) to \_\_\_\_\_.**

Whose name fills in the blank? It could be a clerk, a summer intern, a disbarred lawyer – it doesn’t matter. Any time a lawyer starts a sentence this way, it’s a problem. Only the lawyer who received the electronic registration credentials provided by the Ministry of Government Services is entitled to use the lawyer disc and password to register an instrument on title using the electronic system. Permitting anyone else to pose as the authorized lawyer for the purpose of accessing the system is a breach of the *Rules of Professional Conduct* (hereafter *Rules*).

But sometimes the answer is problematic because it could be a lie. A lawyer may allege access by an unauthorized party, where in fact the authorized lawyer did log in personally using his or her own name and password... but then committed an act of fraud, and is now scrambling to deflect responsibility or avoid detection. Which is worse: Admitting to a breach of the *Rules* or to commit a fraud? Not much more I need say about *that*..

### **2. I didn’t meet with the client(s) (or, I didn’t sign up the clients).**

There are many good reasons for individuals other than the responsible lawyer – for example, law clerks or other office staff – to handle aspects of a client’s matter. However, the ultimate responsibility for the work remains with the supervising lawyer, and he or she is required to obtain and review instructions from the client.

Claims may occasionally arise out of circumstances where there was a misunderstanding in instructions or a lapse in supervision. But if the lawyer doesn’t meet with the client, it puts the lawyer in a more challenging position if the client later alleges certain instructions or information were provided orally to someone other than the lawyer, and now a claim related to the relevant issue is in the offing.

Much more troubling, however, are instances where our investigation of a claim reveals that a lawyer's name and trust account are simply being used (with his or her knowledge and consent) in a practice that is effectively being conducted by a non-lawyer. This, of course, is problematic under the *Rules*, a very high-risk way to do business, and depending on the details, potentially outside the scope of LAWPRO policy coverage.

### **3. I would never have even considered doing that – that's not the standard of practice.**

When a claimant complains that a lawyer failed to take a particular step, investigate a detail, or deliver a warning – or committed some other alleged oversight – the lawyer often defends him or herself by asserting that the "omission" was not part of the standard of practice. The lawyer's expectation is that the standard of practice will define the standard of care in the subject circumstances.

We are familiar with this argument; we use it ourselves when warranted (and when it's supported by expert opinion – we obtain several of these each year). However, a policy of blind adherence to the bare standard of practice, regardless of circumstances, is not always enough. On occasion, a LAWPRO claims adjuster or junior claims counsel (in other words, not a real estate expert) reviews the file and immediately identifies a glaring risk that could have been avoided by a simple and reasonable extra step. The question then becomes whether that extra step, while not necessarily within the normal standard of practice, was sufficiently warranted under the circumstances that it would be seen by a judge as part of the standard of care.

Practitioners must be thoughtful as they go about the client's work, and must make reasoned choices about when to deviate from the standard of practice. For a reminder, see *Edward Wong Finance v. Johnson, Stokes* (1984, JCPC), which stands for the principle that a lawyer must, after establishing that the standard of practice has been met, consider the facts and ask him or herself: Is there a foreseeable risk in the standard, and could the risk reasonably have been avoided?

In other words, thinking critically about the standard is part of the standard.

### **4. The property value isn't my responsibility – that's the lender's job.**

Lawyers are not well-placed to appraise the value of the properties they transfer, and so should not be expected to guarantee value. However, lawyers are occasionally in a position to spot certain red flags that might indicate that value is being misrepresented.

Red flags that should prompt additional enquiries include:

- irregularities on the parcel page;
- unusual terms for the deal (for example, unexplained credits); or
- evidence of multiple recent transactions.

(For a fuller list of red flags in a real estate deal, see LAWPRO's Fraud Fact Sheet, available at: <http://www.practicepro.ca/practice/pdf/FraudInfoSheet.pdf>.)

When an aspect of the deal provokes suspicion, the lawyer has a duty to communicate his or her concerns to the lender client. The lender may or may not choose to act on the information; however, by documenting the communication, the lawyer can protect him or herself from a potential claim.

### **5. I just dealt with the \_\_\_\_\_ (mortgage broker, property manager, real estate agent, client's son or daughter, etc.) – it's easier that way.**

While a lawyer may need to gather information relevant to the deal from a variety of sources, he or she must always be able to answer "yes" to the question: "Do I have instructions to do this work from the person or entity who really has value at risk in this transaction, and (where applicable) have they clearly instructed

# FRAUD

# FACT SHEET

LAWPRO® ...making a difference for the legal profession

## How you can avoid being duped

Fraud continues to be a significant and costly problem for LAWPRO. Fraudsters are successfully duping lawyers and law clerks, and it's not just real estate lawyers who are being targeted. Litigation, business, IP and family law lawyers are frequent targets of bad cheque scams involving debt collections, business loans, licensing disputes, and spousal support payments.

**Don't be complacent and think you would never be fooled.** These frauds are very sophisticated. The matters will look legitimate, the fraudsters will be very convincing and the client ID and other documents you get will look real. The fake cheques have fooled bank tellers and branch managers. There may even be two or more people collaborating on both sides of a transaction to make the scenario more convincing.



## What to do if you have a suspicious file

Proceed with caution if you have even the slightest suspicion that the matter you are handling isn't legitimate.

- Look for the red flags of a fraud. See the lists on the following pages.
- Ask questions and dig deeper, especially if the facts don't add up or are inconsistent. See the next page for a list of things you can do.
- Visit the [AvoidAClaim.com](http://AvoidAClaim.com) blog to see email messages and documents from the frauds LAWPRO is seeing. Click on the Confirmed Frauds button to see a full listing of names of confirmed fraudster clients.

If you still aren't sure the matter is legitimate, call LAWPRO. Our experience with multiple frauds can help determine if you are being duped. If the matter turns out to be a fraud and there is a potential claim, we will work with you to prevent the fraud, if possible, and to minimize potential claims costs.

Ultimately, if you aren't completely sure a matter is legitimate, terminate the retainer. Don't be sucked in by your emotions or a strong desire to help. Don't let the lure of a generous fee cause you to ignore your concerns as to the legitimacy of a matter. If it looks too easy or sounds too good to be true, it probably is.

### Report obvious frauds to LAWPRO

Help us help other lawyers by sending obviously fraudulent messages or scans of identification and other documents provided to you to [fraudinfo@lawpro.ca](mailto:fraudinfo@lawpro.ca)

### Get fraud updates from AvoidAClaim.com blog

For immediate updates on fraud and claims prevention, subscribe to the email or RSS updates from LAWPRO's AvoidAClaim blog.

# Bad cheque scams

Fraudsters retain the firm on a contrived legal matter so that they can run a counterfeit cheque or bank draft through the firm trust account and walk away with real money. These contrived

matters will look real. The fraudster will provide extensive and very real looking ID and documents. When the bad cheque or draft bounces, there will be a shortfall in the trust account.

## Common types of bad cheque fraud:

### Debt/loan collection fraud

- Targets litigators.
- Fraudster will ask for help with a personal or business debt collection.
- Debtor will pay up with little or no pushing.

### Spousal support collection fraud

- Targets family lawyers.
- Fraudster will ask you to help with collection from ex-spouse, often further to a “collaborative settlement agreement.”
- Ex-spouse will pay up with little or no pushing.

### Trademark and copyright infringement fraud

- Targets IP lawyers.
- Fraudster seeks damages from a breach of a trademark or copyright agreement.
- The company in breach will pay up with little or no pushing.

### Business equipment purchase fraud

- Targets business lawyers.
- Fraudster will ask you to handle a purchase (e.g., a dredger).
- Sale proceeds are coming from fake buyer.

### Real estate deposit fraud

- Contacts realtors, who put fraudsters in touch with real estate lawyers.
- Overseas client sends lawyer a deposit cheque for a property they saw online.
- Fraudster then backs out of the deal, and asks lawyer to wire the deposit funds back (minus any fees and penalties).

## Red flags

These are the common red flags that can indicate that a matter is a fraud. While some of these things may occur on legitimate matters, you should proceed with extreme caution if many of them appear on any matter you are handling.

- Initial contact email is generically addressed (e.g., “Dear attorney”) and BCC’d to many people.
- The name and/or email address in the FROM line is different from the name and/or email address of the person you are asked to reply to in the body of the email.
- Client uses one or more email addresses from a free email service (e.g., Gmail, MSN, Yahoo!), even when the matter is on behalf of a business entity.
- Client raises issues of conflicts or payment of a retainer.
- Domain name used in email address or website was recently registered (check at WhoIs.net).
- Email header indicates sender is not where he/she claims to be.
- Client is new to your firm.
- Client is in a distant jurisdiction.
- Client shows up and wants the matter completed around banking holidays.
- Client says he prefers email communication due to time zone differences.
- Client is in a rush – and pressures you to “do the deal” quickly.
- Client and others involved don’t seem concerned if shortcuts are taken.
- Client is willing to pay higher-than-usual fees on a contingent basis from (bogus) funds you are to receive.
- Despite the client stating a lawyer is needed to help push for payment, the debtor pays without any hassle.
- Cheque or bank draft arrives at your office in a plain envelope and/or without a covering letter.
- Cheque is drawn from the account of an entity that appears to be unrelated (e.g., a spousal arrears payment from a business entity).
- Payment amounts are different than expected or change without explanation.
- Client instructs you to quickly wire the funds to an offshore bank account based on changed or urgent circumstances.
- Some or all of the payment is going to third party who appears unrelated to the matters.

## Due diligence on suspected fraudster

Take these steps to cross-check and verify information provided to you by the client.

- Cross-check names, addresses, and phone numbers of the client and other people/entities involved in the matter on Google® and other search engines.
- Tip: To find exact matches, enclose your search terms in double quotes.
- Do reverse searches on phone numbers.
- Look up addresses using Street View in Google Maps.
- Ask your bank or the issuing bank to confirm the branch transit number and cheque are legitimate.
- Call the entity making the payment or loan and ask if they are aware of the transaction.
- Contact the company to confirm it is expecting debtor’s payment or business loan.
- Hold the funds until your bank confirms the funds are “good” by contacting the other bank, and have the bank confirm, in writing, that it is safe to withdraw from the deposit.

# Real estate scams

## Identity theft fraud

- Client uses fake ID to assume identity of existing property owner (or by filing Form 1 to become director/officer of corporate owner).
- Client sells or mortgages the property, or discharges mortgage from title, then gets new (often high-ratio) mortgage from another lender.
- Paperwork looks in order; no encumbrances on title, but one or more recently discharged mortgages.
- Client in a hurry and accommodating; may discourage house inspection or appraisal.
- Transaction closes, you pay proceeds to client who makes a few mortgage payments, then disappears with funds.
- Lender sues you for value of mortgage.

## Red flags: The client

- Funds directed to parties with no apparent connection to borrower or property. Client changes instructions regarding amounts or payees just before closing, or fails to bring in funds as promised.
- Does not care about property, price, mortgage interest rate, legal and/or brokerage fees.
- Does not appear familiar with property.
- Won't permit contact with prior lawyer.
- Client is "out of sync" with property – e.g., don't appear educated/affluent enough.
- Stranger who appears to control client attends to sign documents.
- One spouse or business partner mortgaging equity in property owned by both.

### **TIP: BE ALERT**

- Avoid having documents executed outside your office.
- Include deleted instruments in title search.
- If Ontario driver's licence used as ID, consider verifying it on the MTO website.

## Flip (value) fraud

- Happens on purchase or refinance deals.
- Client says she or he is a real estate agent or in business of buying and selling.
- Client promises high fees, lots of business for quick turnaround on deals. (Short turnaround means proper searches aren't conducted.)
- Once transaction closes, client flips property to accomplice (e.g., appraiser and/or mortgage broker) for much higher value.
- Lender issues mortgage on inflated property value.
- Client uses mortgage proceeds to pay initial purchase price, splits excess funds with accomplices.
- Client makes a few payments, and then disappears with funds.
- Lender sues you for excess/inflated value of mortgage.

## Red flags: The transaction

- Repeat activity on single property or for single client. Title shows one or more recent transfers, mortgages or discharges.
- Rental and vacant properties especially vulnerable.
- Client buys and sells often, prefers to deal in cash.
- Property listing expired without sale (i.e., sale may be unregistered).
- Frequent and quick mortgage discharges on property.
- New referral source sending lots of business.
- Transaction area is distant from your office.
- Deposit not held by agent or lawyer.
- May target long time owners (deceased, ill, or elderly who may be less alert to signs their identity is being stolen).
- "Rush" deals, often with promise of more.
- Client produces small deposit relative to price.
- Amendment to Agreement of Purchase and Sale reducing price, deposit, or adding creditors.
- Sale is presented as a "private agreement" – no agent involved, or named agent has no knowledge of transaction.
- Municipality or utility companies have no knowledge of client's ownership.
- Client paying little or nothing from own funds.
- Unusual adjustments in favour of vendor, or large vendor-take-back mortgage.
- Use of counter cheques.
- Use of Power of Attorney.



## More information on protecting clients against real estate fraud

TitlePLUS® title insurance provides coverage for your clients when they buy a home. Through the OwnerEXPRESS® program, TitlePLUS insurance also provides fraud protection for clients who may have purchased a property earlier but did not also secure title insurance protection on that purchase.

TitlePLUS insurance provides fraud coverage as follows:

- for frauds that may have occurred prior to purchase (e.g., it turns out that the vendor does not really have the right to sell the property);
- if the property becomes a target of fraud at a later date. This is part of the post-Policy Date protection in the TitlePLUS policy.

There is also a “duty to defend” in the policy, which means that it is our problem, not yours, if someone must contact the government to request that title be restored to your client in the official records. (Please refer to the policy for full details, including actual terms and conditions.)

For more information visit [titleplus.ca](http://titleplus.ca) under our "Products and Services," and "Publications" tabs.

The TitlePLUS policy is underwritten by Lawyers' Professional Indemnity Company (LAWPRO).



# Is the fraudster in your office?

Not all fraudsters are strangers. Even partners, associates, law clerks or other employees may turn to fraud because of financial pressures from a divorce, failed business venture, or other personal crisis.

## Red flags

- Someone never takes vacation or sick leave, works overly long hours, or refuses to delegate work.
- A firm member undergoes a sudden change in lifestyle or temperament.
- The firm receives mail for a corporation for which no client file is opened or billed, or minute books are kept in the lawyer's office instead of with the corporate law clerk.
- Unusual patterns such as a sudden increase in payments to a person or entity, or complaints about slow payment from suppliers or clients, or an increase in written-off work in progress (WIP).

For more information see “Fraud on the Inside: What to do when partners, associates or staff commit fraud” at [lawpro.ca/magazine](http://lawpro.ca/magazine)

### More information on fraud

To learn more about what fraud looks like and how to prevent it from happening to you and your firm, go to: [practicepro.ca/fraud](http://practicepro.ca/fraud)



# LAWPRO's enhanced coverage for counterfeit certified cheques, bank drafts

As of January 1, 2010, the LAWPRO policy provides some overdraft protection to lawyers in relation to their trust accounts where liability for the overdraft results from the handling of a counterfeit certified cheque or counterfeit bank draft in the capacity of a practising lawyer. This enhanced protection is subject to several conditions and limitations. Review the FAQs ([lawpro.ca/FAQs](http://lawpro.ca/FAQs)) on the LAWPRO website to make sure you understand this coverage and the extra steps you must take to qualify for it.


This information bulletin is published by LAWPRO to provide lawyers and law firm employees with an overview of some common types of fraud, and to provide practical advice on ways to minimize their exposure to fraud-related claims. The material presented does not establish, report or create the standard of care for lawyers. The material is not a complete analysis of the topics covered, and readers are encouraged to conduct their own appropriate legal research. The comments in this publication are intended as a general description of the insurance and services available to qualified customers through LAWPRO. Your policy is the contract that specifically and fully describes your coverage and nothing stated here revises or amends the policy.


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# REAL ESTATE

## Practice Basics 2016

# Introduction to Title Insurance

Lori Swartz, Legal Counsel, TitlePLUS®  
*Lawyers' Professional Indemnity Company (LAWPRO®)*

December 9, 2016

# Introduction to Title Insurance<sup>1</sup>

Lori M. Swartz, TitlePLUS<sup>®</sup> Legal Counsel  
Lawyers' Professional Indemnity Company (LAWPRO<sup>®</sup>)

**Real Estate Practice Basics Program  
Law Society of Upper Canada**

**December 9, 2016**

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<sup>1</sup> The opinions expressed herein are those of the authors and do not represent the position of Lawyers Professional Indemnity Company, the TitlePLUS Department or any other entity, except where expressly stated. The material presented does not establish, report or create the standard of care for lawyers. I wish to acknowledge the assistance provided for this paper by Rahim Andani, Student-at-Law.

<sup>®</sup> Registered trademark of Lawyers' Professional Indemnity Company

Title insurance, which has been available to American homeowners for decades, was introduced to the Canadian residential real estate market in 1997. Its use has grown exponentially since then. However, even though almost all residential real estate transactions are now title insured, most real estate purchasers remain unfamiliar with title insurance, or have a limited understanding of their title insurance policies. As a result, clients rely on their real estate lawyer to assess their insurance needs and recommend an appropriate title insurance product. In order to meet their obligations to clients under the *Rules of Professional Conduct*, lawyers must familiarize themselves with title insurance and how to best deal with title insurers. This paper will address these concepts. Please note that this paper covers title insurance for purchase and mortgage transactions dealing with residential properties only. Discussions about title insurance for commercial properties are beyond the scope of this paper.

### **What is Title Insurance?**

In order to advise clients about which title insurance product is most suitable for their needs, lawyers must fully understand the purpose of title insurance and the limits associated with it. This understanding begins with knowing what title insurance is and is not.

Title insurance is:

- a method of assuring marketable title;
- a legal contract with carefully crafted definitions and terms;

- a policy of insurance providing insured purchasers and/or mortgage lenders with protection against specific risks and an agreement to indemnify, up to the face amount of the policy.

Title insurance **is not**:

- a replacement for the lawyer in the real estate transaction.

Title insurance should be a tool to help the lawyer consider the property, clients and circumstances, and to determine how best to give effect to the transaction and protect his or her clients. In order to do so, lawyers must be aware of title insurers' requirements for the issuance of a title insurance policy. These requirements often involve waiving steps traditionally undertaken by the lawyer. Thus, it remains important for the lawyer to consider the client's intentions and plans for the property, in order to fully address the client's interests.

### **Title Insurance vs. Solicitor's Opinion**

Before title insurance (and still, as an alternative to title insurance), solicitors provided their purchaser and lender clients with their written opinion on title. The "solicitor's opinion" sets out the lawyer's view on the status of title to the property in the transaction. Under an opinion regime, if the purchaser or mortgage lender had a problem after closing, they had to claim against the lawyer for negligence, triggering a legal malpractice claim under the lawyer's Errors & Omissions ("E&O") policy. If the lawyer was found to have met the standard of practice, or if the lawyer could not reasonably have discovered the problem, the clients were not able to recover their losses from the lawyer's E&O insurer. Also, if the loss arose because of third party error

(e.g., a municipality erred in its response to a search request), it was generally not covered under the lawyer's E&O policy. It is important to remember that the E&O insurance policy insures the lawyer, and not his or her clients. Thus, the E&O insurer has a duty to defend the lawyer, and not his or her clients.

There can also be issues about whether the lawyer has adequate E&O coverage. Problems may arise where the lawyer is retired (or has otherwise left practice) and if his or her runoff coverage limits have been exceeded. Practicing lawyers also have coverage limits that may have been exceeded because of other claims. Furthermore, practicing lawyers' E&O coverage is limited to \$1 million per claim. In these circumstances, there may be no recovery from the E&O insurer even if it can be shown that the lawyer was negligent.

The main difference between a solicitor's opinion on title and a title insurance policy is that with the latter, there is direct recourse to the title insurer. This means that, instead of suing the lawyer, the homeowner or the lender simply submits a claim under their title insurance policy. The claimant only needs to prove that they have suffered a loss as a result of a risk covered by the policy.<sup>2</sup> A title insurance policy also provides protection for some post-policy date events (such as a fraudulent transfer or mortgage of the property). In contrast, a solicitor's opinion on title only addresses the state of the property as of the date of closing. Title insurance policies also

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<sup>2</sup> Subject to all the terms and conditions of the policy. Please refer to the policy for full details.

generally include “gap coverage,” which protects the homeowner or the lender from loss or damage incurred as a result of matters arising during the period between closing and registration.

Title insurance may also facilitate closings because of the insurer’s ability to “insure over” some problems, if the risk is acceptable to the insurer and/or provides cost savings for the purchaser, especially regarding survey costs and some off-title searches.

There are currently five insurance companies providing title insurance for residential properties in the Ontario market: Lawyers’ Professional Indemnity Company (LAWPRO) via its TitlePLUS program, Chicago Title, First Canadian Title, Stewart Title and Travelers.<sup>3</sup> It is important to note that each insurer varies in terms of their form of policy, their underwriting and their handling of claims. Lawyers should ensure that they are familiar with the policies of all of the title insurers, so that they can recommend the best policy for each client’s specific transaction.

### **Lawyers’ Obligations Regarding Title Insurance**

In order to fully understand the lawyer’s role with respect to providing advice regarding different title insurance products, we must consider the regulatory context in which title insurers and legal professionals operate.

*Title Insurance Licences, Ontario Insurance Act Regulation 69/07, formerly Regulation 666,* requires that all title insurance policies issued in the province are supported by a lawyer’s certificate of title:

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<sup>3</sup> CCH Ontario Real Estate Guide (looseleaf), volume 1, ¶1170.

s. 1. A licence issued to an insurer to undertake title insurance in Ontario is subject to the limitation and condition that no policy of title insurance shall be issued unless the insurer has first obtained a concurrent certificate of title to the property to be insured from a solicitor then entitled to practise in Ontario and who is not at that time in the employ of the insurer.

The Law Society of Upper Canada's *Rules of Professional Conduct* also contain provisions relating to title insurance, namely Rules 3.2-(9.4)-(9.7) and 6.1-6.1.

**Rule 3.2: Title Insurance in Real Estate Conveyancing**

The relevant sections of Rule 3.2 state:

3.2-9.4 A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

3.2-9.5 A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to their client.

3.2-9.6 A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage.



3.2-9.7 If discussing TitlePLUS insurance with a client, a lawyer shall fully disclose the relationship between the legal profession, the Law Society, and the Lawyers' Professional Indemnity Company (LAWPRO).

In order to meet their obligations under the *Rules of Professional Conduct*, lawyers must be aware of the various title insurance policies, costs and coverages, and be prepared to contrast them with the traditional approach of a solicitor's opinion.

**Rule 6.1-6.1: Title Insurance**

6.1-6.1 A lawyer shall not permit a non-lawyer to

- (a) provide advice to the client concerning any insurance, including title insurance, without supervision,
- (b) present insurance options or information regarding premiums to the client without supervision,
- (c) recommend one insurance product over another without supervision, and
- (d) give legal opinions regarding the insurance coverage obtained.

While it may seem simple to delegate the explanation of title insurance in general and the explanation of the specific policy being obtained to a staff member, it is important for the lawyer to provide the advice regarding title insurance and to properly supervise his or her staff at all times.<sup>4</sup>

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<sup>4</sup> The "Working With A Lawyer When You Buy A Home" brochure is published by the Law Society of Upper Canada and the Ontario Bar Association to help lawyers meet the obligations for explaining title insurance that are set out in the *Rules of Professional Conduct*. It can be downloaded for free from <http://www.oba.org/en/pdf/lawyer1.pdf> or ordered from the Ontario Bar Association. This brochure sets out what the clients

## Lawyer and Client

Since clients are usually most interested in how much money title insurance can save them on a deal, it is extremely important for the lawyer to discuss what will and will not be covered by the title insurance policy. It is also crucial for a lawyer to explain what he or she will and will not be doing, and ensure that the client understands the implications of these actions. The waiver of certain common items of due diligence by a title insurer is an underwriting decision made by the title insurer. While most clients will be satisfied with the cost savings and the coverage afforded, it is important to ascertain if the lender or purchaser clients have any particular concerns regarding the property. These concerns might make certain searches advisable, even if they are not required for the purposes of the title insurance application.

Lawyers should not advise a client against title insurance without exploring the benefits of coverage. For example, title insurance provides the best protection for post-closing fraud. However, notwithstanding the benefits of a title insurance policy, ultimately it is the client's decision whether to obtain or forego title insurance. In the event a client opts not to obtain a title insurance policy, the lawyer should obtain a written waiver signed by the client.<sup>5</sup>

Since a title insurance policy is issued for a specific property, lawyers should ensure that the insurance product they recommend to their clients corresponds to the clients' intended use of

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need to know about working with you and provides a concise explanation of the features of a solicitor's opinion, title insurance in general and TitlePLUS title insurance. The use of this brochure is not obligatory; some lawyers use other means to comply with their obligations to explain the options available to assure title.

<sup>5</sup> A sample waiver is available on [titleplus.ca](http://titleplus.ca), a copy is attached.

the property. For instance, if a client intends to rent out a house's basement apartment, and this use was not included in the title insurance application, then their title insurance policy will only cover a single family dwelling.<sup>6</sup> Thus, it is crucial for lawyers to ask their clients about how they intend to use the property. Standard title insurance policies do not provide coverage for any changes which the client wishes to make to the property after the closing date, unless the client buys coverage for the legality of a future use of the property. To obtain this coverage, an additional premium will usually be payable, and further searches may be required.

When advising clients regarding title insurance, it is important to explain when the title insurance coverage is likely to be engaged. Clients often do not understand the type of loss that is covered under title insurance policies. Thus, it is important to explain to clients that the mere existence of a defect in title does not necessarily trigger the title insurer's duty to indemnify. In order to trigger the coverage, the defect must be one of the covered defects and give rise to a financial loss, such as a diminution in the property value or loss of sale. Furthermore, clients often mistakenly believe that title insurance is akin to ordinary home insurance. Thus, lawyers should ensure that their clients understand that the title insurance policy will only protect against title-related defects, survey, zoning, access and other real estate-related defects as of the closing date. Title insurance will not protect against issues like leaky roofs, furnace problems, etc.

### **Understanding a Title Insurance Policy**

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<sup>6</sup> For more information, see Weinstein, L.M., Leclair, R. G., and Guslits, B. "What do Title Insurers Expect from Their Lawyers?", Lawyers' Professional Indemnity Company, 2015.

Title insurers will generally evaluate the degree of risk before agreeing to provide coverage. Title insurance policies:

- a) are issued for **enumerated risks** for a specific property;
- b) contain **exclusions** for any risks, which the title insurer is not prepared to cover; and
- c) will contain many **terms and conditions**, which add to or qualify the covered risks.

A typical title insurance policy includes the following:

1. **Title coverage:** for defects in title, survey risks, compliance risks, access and other rights and defects.
2. **Defence coverage:** The title insurer is obliged to defend and pay the costs, legal fees and expenses incurred in any legal proceeding, which is brought by a third party against the owner, because of a risk covered under the policy.
3. **Inflation coverage:** At the time of a claim, the policy amount will increase to reflect any increase in the fair market value of the land due to inflation (not improvements), usually up to twice the amount stated in the policy. Lenders' policy limits are set at the greater of the purchase price or 125% of the principal amount of the lender's mortgage.
4. **Property-specific exceptions:** Exceptions to coverage are set out in a schedule to the policy, together with the legal description of the property covered by the policy, the amount of insurance and other property-specific and transaction-specific details. If the lawyer discovers a problem at the time of ordering the policy that would be a property-specific exception, he or she may ask the insurer to **insure over** the problem for the mortgage lender and/or the

purchaser, so that it does not become an exception to coverage.

5. **Endorsements:** Many title insurance policies also contain **endorsements**, which add specific types of coverage to a title insurance policy.

All title policies are standard printed forms, which no lawyer has the ability to change. Each policy contains a tailored schedule that sets out the particulars of the client's interest and any property-specific information. For example, in the TitlePLUS policy, this information is contained in Schedule "A" to the policy.<sup>7</sup> It is vital that lawyers carefully review this schedule prior to closing the deal and issuing the policy. Care must be taken to ensure that the clients' names are spelled properly, the complete municipal address and legal description are provided, and appropriate property-specific exceptions are included.

The TitlePLUS policy contains coverage for the purchaser and the mortgage lender in one combined policy. Other title insurers issue separate policies for the purchaser and the mortgage lender.

### **The TitlePLUS Difference: Legal Service Coverage<sup>8</sup>**

The TitlePLUS policy is the only title insurance policy generally available in Canada that provides **legal service coverage** at no extra cost. This coverage protects the insured homeowner and the insured mortgage lender from losses which result from a lawyer's negligent error or omission for

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<sup>7</sup> A sample TitlePLUS policy is attached.

<sup>8</sup> TitlePLUS policies issued with respect to properties in Québec and OwnerEXPRESS® policies do not include legal services coverage.

any matter the lawyer attended to, or should have attended to, within the file. Other title insurers may not explicitly cover lawyer's negligence. They only cover such lawyer's negligence indirectly, in circumstances where the result is a loss arising from a covered risk. For example, if a client suffers a loss because his lawyer negligently failed to discharge a mortgage registered against the insured's property, conventional title insurance would cover this loss. This is because the mortgage encumbering the property would be a covered title defect, not because the insurer covers the lawyer's negligence. The legal service coverage in the TitlePLUS policy explicitly covers losses resulting from the lawyer's negligence regardless of whether or not the loss otherwise falls under one of the covered risks. This would include, for example, bad advice in drafting the agreement of purchase and sale or any tax matter applicable to the transaction.

There are substantial benefits to having legal service coverage, for the lawyer, the insured homeowner, and the insured lender. From the lawyer's perspective, legal service coverage provides a direct benefit by diverting negligence claims away from the lawyer's E&O insurer, saving the lawyer's deductible and a possible increase in premium. From the insured policyholder's perspective, rather than having to sue the lawyer personally, which may take a long time and be costly, the policyholder can simply make a claim under the title insurance policy.

First Canadian Title has a product called "E&O Extra." This is a policy that may be purchased by the lawyer. We understand that the policy will reimburse a lawyer, in the event of a claim against him/her, for the deductible and increase in premium resulting from errors or omissions in connection with a residential or commercial real estate transaction, provided it was title insured by First Canadian Title. There is an annual premium for this policy and maximum coverage limits.

Stewart Title Guaranty Company provides an endorsement to its title insurance policy, referred to as a Closing Protection Letter. We are told that this endorsement covers losses sustained by an insured that arise from situations where the representing lawyer commits an error or omission in providing legal services, and where such error or omission affects the title to the insured property or the right to the use and enjoyment of the insured property and for which liability is imposed by law. There is an extra premium for this endorsement, each time it is requested for a policy.

LAWPRO's E&O program continues to process claims against real estate lawyers, even when the transaction is covered by a title insurance policy (other than a TitlePLUS policy). Title insurance does not remove the risk from the real estate transaction for lawyers. There are hundreds of claims each year against lawyers acting on real estate transactions. Some claims are monitored while they are assessed by the title insurer to determine whether coverage is available under the title insurance policy; others address issues for which the lawyer is liable and not covered by the title insurance policy.<sup>9</sup>

Legal service coverage should not be confused with a waiver of subrogation. A waiver of subrogation prevents a title insurer from pursuing a subrogated claim against a lawyer due to a claim arising under a title insurance policy. Pursuant to Endorsement 2 to the LAWPRO E&O Policy,

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<sup>9</sup> See the December 2010 issue of LAWPRO Magazine (Volume 9, Issue 4), to read more on the interaction between title insurance and your primary liability insurance (available at [http://www.practicepro.ca/LawPROmag/LawPROmagazine9\\_4\\_Dec2010.pdf](http://www.practicepro.ca/LawPROmag/LawPROmagazine9_4_Dec2010.pdf)).

a real estate transaction levy is payable to LAWPRO for each real estate transaction on which a lawyer acts, except in certain excluded circumstances. The levy is not payable if title insurance is issued for the purchaser and the lender, if any, and the title insurer has entered into a waiver of subrogation agreement, in a form acceptable to the Law Society of Upper Canada. Notwithstanding the waiver, there have been a number of court challenges to determine the extent of the protection offered under it.

### **Additional Responsibilities: Accuracy, Due Diligence and Timeliness**

Title insurance policies define the property for which coverage is extended by way of legal description. Consequently, a lawyer must ensure that the title insurance application properly describes the client's property and attendant interests. For example, if the parking and storage units in a condominium are separate units and are not included in the description of the property in the title insurance application and resulting policy, the title insurer may justifiably deny coverage for claims relating to those units.

Lawyers should either complete title insurance applications themselves or review the applications completed by staff before they are submitted for approval by the title insurer. All staff should be trained on the importance of accuracy, timeliness and full disclosure when submitting title insurance applications.

In addition, lawyers must ensure that they meet the title insurer's requirements, including reviewing deleted instruments when conducting a title search. Lawyers and their staff must also be vigilant, aware of the current market specific risks, and look for any signs of fraud.



The title insurance application should be submitted as far as possible in advance of the closing date. It is crucial to obtain a pre-approved policy from the title insurer before closing. It is better to know as soon as possible whether something will be covered by the policy, so that issues that will not be covered can be discussed with the purchaser and lender clients in advance of closing.

Title insurance can be a helpful tool for real estate lawyers. However, notwithstanding its availability, it is not a panacea for real estate problems. Knowledge of specific title insurance coverage, its limitations and exclusions, diligent execution of a real estate transaction and appropriate client communication are the necessary practice conventions that will help decrease the risk of malpractice claims.

Policy Number: SAMPLE  
Policy Date: SAMPLE



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**Policy of Insurance for**

**SAMPLE ONLY**

First mortgage: **SAMPLE ONLY**

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**Lawyers' Professional Indemnity Company**

250 Yonge Street  
Suite 3101  
Toronto, Ontario  
M5B 2L7  
416-598-5899  
1-800-410-1013

Policy Number: SAMPLE  
Policy Date: SAMPLE

**POLICY OF INSURANCE**

Issued by: Lawyers' Professional Indemnity Company

**PART I - INSURANCE COVERAGE**

This POLICY insures your interest in the LAND described in Schedule "A" and the legal services provided by your lawyer for the TRANSACTION subject to:

- ◆ the Exclusions set out in this POLICY;
- ◆ the Exceptions set out in Schedule "A" (if any); and
- ◆ the terms and conditions set out in this POLICY.

Your insurance coverage is described below and starts on the POLICY DATE. This POLICY does not cover or insure you against any risks described in the "Title Coverage" section that arise or begin to affect the TITLE or the LAND after the POLICY DATE unless expressly stated in this POLICY.

***TITLE COVERAGE***

This POLICY insures you if you suffer an ACTUAL LOSS because of any of the risks listed below, provided they affect your TITLE as of the POLICY DATE (except for risks (8) and (15) which are insured if they arise or occur after the POLICY DATE):

***Defects in your Title***

- (1) anyone else having ownership to, or any other interest in, your LAND as disclosed by REGISTERED TITLE;
- (2) anyone else having an interest in your LAND not disclosed by REGISTERED TITLE;
- (3) any lien or charge disclosed by REGISTERED TITLE;
- (4) any liens or charges arising as a result of judgments, special assessments for local improvements, realty tax arrears or public utility arrears;
- (5) any unregistered hydro EASEMENTS;
- (6) any improperly completed, delivered or registered document;
- (7) the invalidity of your TITLE because of any fraudulent act, forged document, exertion of undue influence or lack of capacity of any person;
- (8) the forgery of a document after the POLICY DATE as the result of which someone other than you claims to own or have an interest in your LAND;
- (9) the expropriation of all or part of your LAND occurring prior to the POLICY DATE;
- (10) you cannot legally enforce the closing of a sale, lease or mortgage of your LAND because (a) your TITLE is unmarketable; (b) of any violation, variation or adverse circumstance that would have been disclosed by an up-to-date survey; or (c) your LAND is subject to the jurisdiction of a conservation or similar authority and that authority has not approved the residential dwelling existing as of the POLICY DATE;

***Compliance Risks***

- (11) any breach of a restrictive covenant which you are being forced to remedy by a court or other authority after the POLICY DATE;
- (12) any outstanding notice of violation, deficiency notice or work order issued as of the POLICY DATE, other than a violation or order relating to a fence or boundary wall;
- (13) any order by a court or other authority after the POLICY DATE forcing you to remedy any of the following conditions existing as of the POLICY DATE: (a) a breach of a zoning by-law; (b) the lack of approval from a conservation or similar authority for the existing residential structure; or (c) the lack of a building permit for the existing residential structure;
- (14) any encroachment or setback deficiency which you are being forced to remedy by a court or other authority after the POLICY DATE, except for those relating to a fence or boundary wall;
- (15) the construction after the POLICY DATE by someone other than you of a structure, other than a fence or

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- boundary wall, which encroaches onto your LAND;
- (16) the inability to use your LAND as a single residential dwelling, or such other residential dwelling as described in the Agreement of Purchase and Sale for the TRANSACTION, because such use contravenes a zoning by-law;

***Access, Other Rights and Defects***

- (17) the absence of a legal right of access to and from your LAND;
- (18) the invalidity of any EASEMENT benefiting your LAND which is described in the Agreement of Purchase and Sale for the TRANSACTION and in Schedule "A";
- (19) any rights arising from tenancies, contracts, options, or rights of possession under the *Family Law Act*;
- (20) the LAND not containing a single residential dwelling or such other residential dwelling as described in the Agreement of Purchase and Sale for the TRANSACTION;
- (21) any other defects in your TITLE so long as they are not otherwise excluded by the terms and conditions of this POLICY.

***LEGAL SERVICE COVERAGE***

This POLICY insures you if you suffer an ACTUAL LOSS in the TRANSACTION because your lawyer:

- (1) fails to register, or ensure the registration of, any document required to provide you with marketable TITLE, so that you cannot later enforce the closing of a sale, lease or mortgage of your LAND;
- (2) fails to remove an encumbrance or lien that exists as of the POLICY DATE against any chattel included as part of the purchase price in the Agreement of Purchase and Sale for the TRANSACTION;
- (3) incorrectly adjusts any item to be apportioned between the purchaser and vendor under the Agreement of Purchase and Sale for the TRANSACTION, where the error results in an ACTUAL LOSS of more than \$50.00;
- (4) commits an error or omission in providing legal services for the TRANSACTION for which liability is imposed by law.

***DEFENCE COVERAGE***

We will defend and pay the costs, legal fees and expenses incurred in any legal proceeding, or in that part of a legal proceeding, which is brought by a third party against you because of a risk covered under this POLICY.

We can end our duty to defend you in such proceedings, however, by exercising any of our options after you notify us of a claim, set out in PART IV - YOUR POLICY CONDITIONS.

**PART II - LIMITS ON OUR LIABILITY**

***OBLIGATION TO PAY***

Our obligation to pay for any one or more claims made under this POLICY is limited to the lesser of:

- a) your ACTUAL LOSS; or
- b) the POLICY AMOUNT in force when the claim is made;
- plus any costs, fees and expenses we incur in defence of any third party claim and the reimbursement of rent for substitute accommodation, and this limit shall apply regardless of any other terms and provisions of this POLICY.

If we remove or rectify a claim, we will have no further liability for it except for any ACTUAL LOSS that remains afterwards.

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***REDUCTIONS TO COVERAGE***

***Reductions to POLICY AMOUNT***

The POLICY AMOUNT will be reduced by all payments made or required to be made under this POLICY (including any amount we pay to a MORTGAGE LENDER), except for costs, fees and expenses we incur in the defence of any third party claim and the reimbursement of rent for your substitute accommodation.

***Other Reasons for Reduction***

The POLICY is the entire contract between you and us. Any claim you make against us must be made under this POLICY and is subject to its terms and conditions. Your coverage under this POLICY will be eliminated or reduced to the extent of any actual prejudice suffered by us if you:

- a) do anything to prejudice any right of recovery you may have;
- b) knowingly make a false statement to your lawyer handling the TRANSACTION about a risk covered under this POLICY;
- c) fail to give us prompt notice of any claim; or
- d) fail to provide any assistance in handling a claim that may be required under this POLICY.

***INFLATION COVERAGE***

The POLICY AMOUNT will increase to reflect any increase in the fair market value of the LAND as of the date you make your claim under this POLICY up to a maximum of two times the original POLICY AMOUNT stated on Schedule "A".

**PART III - EXCLUSIONS TO POLICY COVERAGES**

This POLICY does not cover or insure you if you suffer an ACTUAL LOSS because of any of the risks listed below:

- (1) the exercise of governmental power or discretion, or the applicability or contravention of any law, by-law, order, code, rule or regulation. This includes but is not limited to any law, by-law, order, code, rule or regulation concerning land use, improvements on the LAND, land division or the control of environmentally sensitive areas. This exclusion does not limit the Title Coverage provided for:
  - (a) any risk covered by items (4), (5), (9), (10)(b) or (c), (12) - (14), (16) or (17) of the "Title Coverage" provisions of this POLICY;
  - (b) any violation or enforcement proceeding disclosed by REGISTERED TITLE which relates to a matter excluded above;
  - (c) any contravention of the subdivision control provisions of the *Planning Act*;
  - (d) any subdivision, development or related agreement;
- (2) the existence or presence of any dangerous or hazardous substance on the LAND or the violation of any law, by-law, order, code, rule or regulation relating to the environment, unless express notice of it appears on REGISTERED TITLE. This exclusion does not limit any Legal Service Coverage under this POLICY;
- (3) any inability to use the LAND or construct any improvements on the LAND except as set out in item (16) of the Title Coverage in this POLICY. This exclusion does not limit any Legal Service Coverage under this POLICY;
- (4) any native or aboriginal land claim affecting your LAND. This exclusion does not limit any Legal Service Coverage under this POLICY;
- (5) any title risk:
  - (a) created, allowed, accepted or otherwise agreed to by you; or
  - (b) KNOWN by you but not by your lawyer handling the TRANSACTION and not disclosed by REGISTERED TITLE.

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#### **PART IV - YOUR POLICY CONDITIONS**

##### ***DEFINITIONS***

Certain words have been capitalized throughout this POLICY to indicate that they have the specific meaning set out below:

“ACTUAL LOSS”	means any direct financial loss incurred by you or any MORTGAGE LENDER: a) due to a decrease in the value of your TITLE or the LAND; b) due to bringing your LAND into compliance with any of the title risks covered by items (11) - (16) of your Title Coverage, and with respect to the MORTGAGE LENDER, items (6) - (11) of the Mortgage Coverage; c) arising directly from a delay in the sale, mortgaging or leasing of your LAND; or d) arising from any of the risks listed under the Legal Service Coverage.
“CORPORATE TRANSFEREE”	means any transferee of the estate or interest of the MORTGAGE LENDER in the LAND after the MORTGAGE LENDER becomes the LANDOWNER, provided that the transferee is (i) a parent or wholly owned subsidiary of the MORTGAGE LENDER, or (ii) one of their corporate successors by operation of law and not by purchase.
“EASEMENT”	means an interest or right of way in the LAND (or in other lands) entitling one or more persons to the use of same for a stated purpose.
“EXISTING IMPROVEMENT”	means an existing improvement on the LAND as of the POLICY DATE and includes any existing landscaping.
“KNOWN” or “KNOWLEDGE”	means actual knowledge, but not knowledge or notice which may be imputed by reason of REGISTERED TITLE or any other records which are deemed at law to impart actual notice of matters affecting the LAND.
“LAND”	means the land described in Schedule "A" to this POLICY together with any improvements on the land (such as buildings or other permanent improvements) which are real property.
“LANDOWNER”	means the MORTGAGE LENDER after it has become the owner of the LAND as described in the “Continuation of Mortgage Coverage” provisions of the POLICY.
“MINERAL RIGHTS”	means any lease, grant, exception or reservation of minerals or mineral rights appearing on REGISTERED TITLE.
“MORTGAGE/CHARGE”	means the mortgage/charge(s) against the LAND in favour of the MORTGAGE LENDER which is intended to constitute security for the TRANSACTION.
“MORTGAGE LENDER”	means the lender(s) described in Schedule "A" who are providing mortgage financing as part of the TRANSACTION together with any insurer of the MORTGAGE/CHARGE(s) legally entitled to issue mortgage insurance in Canada.

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- “POLICY” means this policy of insurance together with attached schedule(s) and endorsements, if any. This policy is not complete without Schedule "A".
- “POLICY DATE” means the Policy Date described in Schedule “A”.
- “POLICY AMOUNT” means the dollar amount described as the Policy Amount in Schedule “A”, provided however that for the MORTGAGE LENDER, the Policy Amount is the higher of the Policy Amount in Schedule “A” and 125% of the principal of the MORTGAGE LENDER’S MORTGAGE/CHARGE described in Schedule “A”.
- “REGISTERED TITLE” means the records relating to the LAND established and maintained under the *Land Titles Act* or the *Registry Act*.
- “TITLE” means your ownership interest in the LAND.
- “TRANSACTION” means your purchase of the LAND together with any mortgage financing arranged in connection with your purchase, as described in Schedule "A".

***CONTINUATION OF COVERAGE***

This POLICY protects you for as long as you own your LAND. If you sell your LAND you will continue to be covered under this POLICY for as long as you:

- a) are liable for any covenants given by you in respect of a risk covered under this POLICY or that are implied by the *Land Registration Reform Act*; or
- b) own a mortgage which you took back from anyone who bought the LAND from you. If you re-acquire TITLE as a result of enforcement proceedings under your mortgage or through other means involving a discharge of the mortgage, this POLICY will continue to protect you for as long as you own the LAND. This POLICY also covers any successor or assign of the mortgage you took back but any successor or assign will be subject to the rights or defences we may have against you or any intervening successor or assign.

This POLICY will (subject to the rights or defences we may have against you) continue to cover:

- a) anyone who inherits the LAND from you;
- b) your spouse (as defined under the law of the province where the LAND is located) if you transfer TITLE to your spouse;
- c) your child (as defined under the law of the province where the LAND is located) if you transfer TITLE to one or more of your children;
- d) any trustee to whom you transfer TITLE (or a successor trustee) after the POLICY DATE, if you are the settlor of the trust; or
- e) any beneficiary under the trust to whom TITLE is transferred upon your death under the provisions of the trust.

The “Continuation of Coverage” provisions contained in this POLICY do not extend the POLICY DATE or provide coverage for matters occurring subsequent to the POLICY DATE, except as expressly set out in the “Title Coverage” or “Mortgage Coverage” provisions of this POLICY.

***IF YOU HAVE A CLAIM***

***You Must Give Us Notice of Your Claim***

You must notify us in writing of any claim against your TITLE or that you may have under this POLICY as soon as reasonably possible after becoming aware of it. Your notice must be delivered to our offices and include an explanation of the claim together with copies of any supporting documentation.

In order to properly deal with the claim we will require that you:

- a) cooperate fully with our investigation of the claim and our handling of any legal proceeding;

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- b) provide copies of all documentation we request;
- c) answer questions under oath if requested; and
- d) provide access to the LAND.

***Our Choices When You Notify Us of a Claim***

After we receive your claim notice or otherwise become aware of a matter for which we are liable, we can in our discretion do one or more of the following:

- a) Pay the claim against your TITLE;
- b) Repair, replace or relocate any building, structure or improvement on the LAND;
- c) Remove any building, structure or improvement from the LAND altogether and pay you any resulting diminution in value to the LAND;
- d) Negotiate a settlement of any claim made against your TITLE;
- e) Prosecute or defend a legal proceeding related to the claim;
- f) Pay you the amount required by this POLICY;
- g) Take other action which will protect you;
- h) Cancel this POLICY by paying the POLICY AMOUNT then in force and only those costs, legal fees and expenses incurred up to that time which we are obligated to pay.

If we prosecute or defend a legal proceeding, we have the right to:

- a) choose the lawyer;
- b) appeal any decision to the highest court, at our discretion; and
- c) not to pay your claim until the legal proceeding is finally decided.

If you incur settlement costs, legal fees and expenses, we will not reimburse you for them unless they have been approved by us in advance.

If you cannot live on the LAND because of a risk covered under this POLICY and you rent reasonable substitute accommodation, we will repay you for your actual rent until you can live on the LAND or we settle your claim.

***Payments Under This POLICY***

We will reimburse you directly for out-of-pocket expenses paid by you and covered under this POLICY. Any other payments made under this POLICY will be made first to any MORTGAGE LENDER(s) in the order of priority of their MORTGAGE/CHARGE(s) and once those MORTGAGE/CHARGE(s) have been entirely repaid, any remaining monies will be paid to you.

***Transfer of Your Rights***

When we settle a claim, we have all of the rights you had against any person or property related to the claim. You must transfer these rights to us when we ask, and you must not do anything to affect these rights. You must let us use your name in enforcing these rights.

We will not be liable to you for any failure to pursue these rights or if we do not recover any amount that might be recoverable.

With the money we recover from enforcing these rights, we will pay whatever part of your ACTUAL LOSS we have not paid. We have a right to keep the balance of the money.

***NON-TRANSFERABILITY OF POLICY***

Only those persons named in Schedule "A" are covered under this POLICY unless someone else is entitled to coverage under the "Continuation of Coverage" provisions contained in this POLICY.



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**PART V - MORTGAGE PROVISIONS**

***GENERAL APPLICABILITY***

Subject to the specific provisions set out under these Mortgage Provisions, the terms, conditions, Exclusions and Exceptions set out in this POLICY apply equally to any MORTGAGE LENDER.

***MORTGAGE COVERAGE***

This POLICY insures any MORTGAGE LENDER if the MORTGAGE LENDER suffers ACTUAL LOSS under its MORTGAGE/CHARGE as the result of any of the following existing as of the POLICY DATE (except for risks (3) and (4) which are insured if they arise or occur after the POLICY DATE):

- (1) the MORTGAGE LENDER not having a valid charge on the LAND in the priority described in Schedule "A";
- (2) the failure to register, or to ensure the registration of, any document required to implement the MORTGAGE LENDER's mortgage financing for the TRANSACTION;
- (3) any construction lien arising from an improvement or work on the LAND which is contracted for and commenced subsequent to the POLICY DATE and which is not funded in whole or in part by the proceeds of the MORTGAGE/CHARGE;
- (4) the forgery after the POLICY DATE of (a) an assignment, release, partial or full discharge, postponement or modification of the MORTGAGE/CHARGE, or (b) if the MORTGAGE LENDER has become the LANDOWNER, any instrument by which TITLE is purported to be conveyed;
- (5) any covenant, condition or restriction on REGISTERED TITLE which allows for (a) the MORTGAGE/CHARGE to be divested, subordinated or extinguished, or its validity, priority or enforceability impaired; (b) a lien for liquidated damages; or (c) a private charge or assessment;
- (6) any breach of a restrictive covenant;
- (7) any encroachment (other than by a fence or boundary wall) of the EXISTING IMPROVEMENTS onto an adjoining property or an EASEMENT, or of the existing improvements located on an adjoining property onto the LAND;
- (8) the inability to use the LAND as a residential dwelling because such use contravenes any MINERAL RIGHTS;
- (9) the inability to use the existing residential dwelling in whole or in part, because that use contravenes a restrictive covenant, an EASEMENT, or MINERAL RIGHTS;
- (10) any damage to an EXISTING IMPROVEMENT resulting from (a) the use of an EASEMENT for the purpose granted or reserved; or (b) MINERAL RIGHTS;
- (11) any breach of the applicable zoning by-law;
- (12) the LAND not having the municipal address set out in Schedule "A" (if any);
- (13) the lawyer failing to advise the MORTGAGE LENDER that: (a) the TRANSACTION does not comply with the Canadian Criminal Code provisions regarding legality of interest rate; or (b) the MORTGAGE/CHARGE is invalid, unenforceable or lacks priority due to its terms providing for (i) interest on interest; (ii) changes in the rate of interest; or (iii) addition of unpaid interest to the principal balance of the loan;
- (14) the unenforceability of the MORTGAGE/CHARGE, or any guarantee contained in the MORTGAGE/CHARGE, as determined by a Court or other authority because of a lack of, or inadequate, independent legal advice;
- (15) someone else having a right of approval over a future purchaser or occupant;
- (16) any of the risks listed under the Title Coverage;
- (17) any of the risks listed under the Legal Service Coverage.

In addition, any MORTGAGE LENDER is also entitled to the Defence Coverage described above for any claim affecting the MORTGAGE/CHARGE arising from a risk covered under this POLICY.

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**EXCLUSIONS**

In addition to the Exclusions otherwise stated in this POLICY, this POLICY does not cover or insure the MORTGAGE LENDER if it suffers an ACTUAL LOSS because of any of the risks listed below:

- (1) any law, by-law, order, code or governmental regulation (including but not limited to zoning by-laws) restricting, regulating, prohibiting or relating to (i) land use; (ii) improvements on the LAND; (iii) land division; or (iv) the control of environmentally sensitive areas. This exclusion does not limit the coverage provided for:
  - (a) any risk covered by items (4), (5), (9), (10)(b) or (c), (12) - (14) , (16) or (17) of the Title Coverage under this POLICY;
  - (b) any risk covered by item (11) of the Mortgage Coverage under this POLICY;
  - (c) any violation or enforcement proceeding disclosed by REGISTERED TITLE which relates to a matter excluded above;
  - (d) any contravention of the subdivision control provisions of the *Planning Act*;
  - (e) any subdivision, development or related agreement; or
  - (f) any Legal Service Coverage under this POLICY;
- (2) any governmental power not excluded by (1) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the LAND is disclosed by the REGISTERED TITLE at the POLICY DATE. This exclusion does not limit the coverage provided for:
  - (a) any title risk covered by items (4), (5), (9), (10)(b) or (c), (12) - (14) , (16) or (17) of the Title Coverage under this POLICY;
  - (b) any risk covered by items (11) or (13)(a) of the Mortgage Coverage under this POLICY;
  - (c) any violation or enforcement proceeding disclosed by REGISTERED TITLE which relates to a matter excluded above;
  - (d) any contravention of the subdivision control provisions of the *Planning Act*;
  - (e) any subdivision, development or related agreement; or
  - (f) any Legal Service Coverage under this POLICY;
- (3) the failure of the mortgage or the MORTGAGE LENDER to comply with any consumer protection laws or laws regulating its ability to carry on business in the province where the LAND is located. This exclusion does not limit the Mortgage Coverage provided in item (13)(a);
- (4) the pre-printed or standard provisions contained in the MORTGAGE LENDER's form of mortgage unless those provisions invalidate the charge created by the mortgage upon the LAND, in which case this exclusion will not apply. This exclusion does not limit the Mortgage Coverage provided in item (13)(b);
- (5) any loss that would not have been sustained if fair value had been paid for the MORTGAGE/CHARGE.

The Mortgage Coverage under this POLICY is not subject to item (1) of PART III - EXCLUSIONS TO POLICY COVERAGE. Furthermore, the Mortgage Coverage under this POLICY:

- a) is not subject to item (5) of PART III - EXCLUSIONS TO POLICY COVERAGE; and
  - b) will not be eliminated or reduced as a result of actual prejudice as described in the "Reductions to Coverage - Other Reasons for Reduction" provisions of this POLICY,
- unless that exclusion is directly applicable to, or the actual prejudice is caused by, the MORTGAGE LENDER as opposed to or in addition to you.

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***REDUCTIONS TO COVERAGE FOR MORTGAGE LENDER***

The provisions set out under “Reductions to Coverage - Reductions to POLICY AMOUNT” do not apply to the MORTGAGE LENDER. For the MORTGAGE LENDER, the POLICY AMOUNT will be reduced by:

- (a) all payments made or required to be made by us under this POLICY, except for (i) costs, fees and expenses we incur in the defence of any third party claim, and (ii) any payments we make before the MORTGAGE LENDER becomes the LANDOWNER which do not reduce the indebtedness under the MORTGAGE/CHARGE; and
- (b) any payments of principal made to the MORTGAGE LENDER by any person under the MORTGAGE/CHARGE.

Where the POLICY AMOUNT has been reduced as set out above, it may be increased by accruing interest and advances made to protect the MORTGAGE/CHARGE, plus interest on those amounts, but the POLICY AMOUNT will not exceed the amount defined in PART IV - POLICY CONDITIONS of this POLICY.

***CONTINUATION OF MORTGAGE COVERAGE***

In addition to the “Continuation of Coverage” provisions otherwise stated in this POLICY, this POLICY protects the MORTGAGE LENDER for as long as the MORTGAGE/CHARGE constitutes a charge on the LAND, regardless of whether:

- (a) the term of the MORTGAGE/CHARGE is renewed or extended from time to time;
- (b) the provisions of the MORTGAGE/CHARGE are amended; or
- (c) the MORTGAGE LENDER has released or substituted the personal liability of any debtor or guarantor or any collateral,

provided that (i) the validity, priority or enforceability of the MORTGAGE/CHARGE is not affected, and (ii) if the MORTGAGE LENDER had KNOWLEDGE of any claim under this POLICY or any matter adverse to the validity, priority or enforceability of the MORTGAGE/CHARGE at the time of any action described above, there shall be no coverage under this POLICY to the extent that our rights of subrogation have been impaired.

This POLICY will continue to cover any successor or assign of the MORTGAGE LENDER. Any successor or assign will be subject to the rights or defences we may have against the MORTGAGE LENDER or any intervening successor or assign, unless the successor or assign is a good faith purchaser of the mortgage for value without notice of the matter or fact giving rise to the right or defence against the MORTGAGE LENDER or the intervening successor or assign.

If the MORTGAGE LENDER sells the LAND under the MORTGAGE/CHARGE, or it becomes the owner of the LAND as a result of enforcement proceedings under the MORTGAGE/CHARGE or through other means involving a discharge of the MORTGAGE/CHARGE, the MORTGAGE LENDER and any CORPORATE TRANSFEREE will continue to be covered under this POLICY for as long as it:

- (a) owns the LAND;
- (b) is liable for any covenants given by it in respect of a risk covered under this POLICY or that are implied by the *Land Registration Reform Act*; or
- (c) owns a mortgage/charge which it took back from anyone who bought the LAND from the MORTGAGE LENDER or a CORPORATE TRANSFEREE. If the MORTGAGE LENDER or the CORPORATE TRANSFEREE re-acquires ownership of the LAND as a result of enforcement proceedings under the take-back mortgage/charge or through other means involving a discharge of the take-back mortgage/charge, this POLICY will continue to protect it for as long as the MORTGAGE LENDER or CORPORATE TRANSFEREE owns the LAND. This POLICY also covers any successor or assign of the mortgage/charge the MORTGAGE LENDER or CORPORATE TRANSFEREE took back, but any successor or assign will be subject to the rights or defences we may have against the MORTGAGE LENDER, the CORPORATE TRANSFEREE or any intervening successor or assign.

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**SCHEDULE "A"**

**INSURANCE PARTICULARS**

**Issued by:** Lawyers' Professional Indemnity Company    **Policy Version:** 2.0  
**Policy Date:** SAMPLE ONLY    **Policy Amount:** SAMPLE ONLY  
**Policy Number:** SAMPLE ONLY    **Premium+:** SAMPLE ONLY  
+(not including processing fee or taxes)

**Name of Insured(s) and Registered Owner(s):**  
SAMPLE ONLY

**Interest of Registered Owner(s):** Fee Simple

**Mortgage Lender(s) and Priority:**  
First Mortgage: SAMPLE LENDER

**TRANSACTION**

**Lawyer's Name:** SAMPLE ONLY  
**LSUC Number:** SAMPLE ONLY  
**Firm Name:** SAMPLE ONLY  
**File Number:** SAMPLE ONLY  
**Purchase:** SAMPLE p/f SAMPLE

**Mortgage(s) from:**  
First mortgage: SAMPLE LENDER  
Mortgage Reference: SAMPLE ONLY

**LAND**

**PIN:** SAMPLE ONLY

**Legal Description:**  
SAMPLE ONLY

**Municipal Address:**  
SAMPLE ONLY

**Assessment Roll No.:**  
SAMPLE ONLY

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**INSURED EASEMENTS WHICH BENEFIT YOUR LAND**

The easements, if any, benefiting the LAND, which are included in the Legal Description section of Schedule "A".

**EXCEPTIONS**

This POLICY does not insure against ACTUAL LOSS (and we will not pay costs, legal fees, expenses or reimbursement of rent for substitute accommodation) which arise by reason of:

**SAMPLE ONLY**

No EXCEPTIONS noted.

The listing of any restrictive covenants above does not restrict the coverage provided under item (11) of the Title Coverage or item (6) of the Mortgage Coverage, except for any instance of non-compliance as of the POLICY DATE:

- (i) specifically noted above; or
- (ii) related to the survey exception (if any) listed in this Schedule "A".

Each exception set out in this Schedule "A" shall operate independently and the inclusion of a specific exception in this Schedule "A" shall not restrict or otherwise limit the applicability of any other exception noted in this Schedule "A".

A MORTGAGE LENDER's coverage:

- (a) under this POLICY is not limited or restricted by the inclusion of that MORTGAGE LENDER's security documentation in the Exceptions set out in this Schedule "A"; and
- (b) under items (7) – (10) of the Mortgage Coverage is not limited or restricted by the listing of any easement or mineral rights as Exceptions in this Schedule "A" unless expressly stated above.

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### CONDOMINIUM ENDORSEMENT

This POLICY insures you if you suffer an ACTUAL LOSS because of any of the risks listed below provided they affect your TITLE as of the POLICY DATE:

- ◆ your dwelling unit, parking unit, locker unit or other unit set out in Schedule "A" together with the proportionate interest in the common elements attributable to that/those unit(s) are not properly part of a condominium created under the applicable condominium legislation of Ontario;
- ◆ the inability to use your dwelling unit as a single residential dwelling because such use contravenes the condominium's declaration, by-laws and/or rules;
- ◆ a lien for common expenses;
- ◆ a special assessment levied against the unit(s) described in Schedule "A" that should have been (but was not) disclosed in the estoppel certificate issued by the Condominium Corporation pursuant to your lawyer's request;
- ◆ non-compliance of the condominium's declaration, by-laws or rules with the applicable condominium legislation of Ontario;
- ◆ an alteration to or unauthorized improvement of the common elements in existence on the POLICY DATE which you are being forced to remove or rectify by the Condominium Corporation, a court or other authority.

**You are not entitled to the special assessment coverage set out above if your lawyer was not able, or was instructed not to, procure an estoppel certificate in respect of the unit(s) set out on Schedule "A" before closing.**

*This endorsement is part of the POLICY and is subject to all of the terms and provisions of the POLICY, including any other endorsements. This endorsement applies equally to any MORTGAGE LENDER insured under the POLICY. This endorsement does not:*

- ◆ *modify any of the terms and provisions of the POLICY, including any other endorsement;*
- ◆ *extend the effective date of the POLICY, including any other endorsement; or*
- ◆ *increase the face amount of the POLICY;*

*unless expressly stated above.*

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### **RURAL PROPERTY ENDORSEMENT**

**Other than as stated in this Endorsement, there is no coverage under this POLICY for any risks involving the private water or septic system servicing your LAND. In this Endorsement, a "private" system means a system that is non-municipal and does not service more than one unit in a condominium.**

#### ***Additional Compliance Risks***

If there is a:

- ◆ private water system which is the primary source of potable water for; and/or
- ◆ private septic system servicing,

your LAND, item (12) of the Title Coverage insures you if you suffer an ACTUAL LOSS arising from any outstanding notice of violation, deficiency notice or work order issued as of the POLICY DATE affecting the private water or septic system.

Item (16) of the Title Coverage insures you if you suffer an ACTUAL LOSS due to the inability to use your LAND as a single residential dwelling as of the POLICY DATE because a certificate of approval and/or use permit was not issued for the septic system servicing your LAND. However, there is no coverage under this POLICY if you suffer an ACTUAL LOSS because the certificate of approval and/or use permit for the private septic system servicing your LAND was canceled or revoked by improvements, alterations, modifications or additions to any buildings on your LAND that were not authorized or contemplated under the certificate of approval and/or use permit.

#### ***Exclusions to Rural Property Coverage***

Coverage under this POLICY only applies to septic systems installed after April 15, 1974 and provided that the governmental authority having jurisdiction over the regulation of septic systems makes available written confirmation as to the existence (or lack of) certificates of approval, use permits and/or work orders.

*This endorsement is part of the POLICY and is subject to all of the terms and provisions of the POLICY, including any other endorsements. This endorsement applies equally to any MORTGAGE LENDER insured under the POLICY. This endorsement does not:*

- ◆ *modify any of the terms and provisions of the POLICY, including any other endorsement;*
- ◆ *extend the effective date of the POLICY, including any other endorsement; or*
- ◆ *increase the face amount of the POLICY;*

*unless expressly stated above.*

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**SUPPLEMENTARY COVERAGE ENDORSEMENT**  
**FOR RESIDENTIAL PROPERTIES<sup>1</sup>**  
**(VERSION: OCTOBER 12, 2016)**

1. The following risks are hereby added to the “Title Coverage” section of “PART I – INSURANCE COVERAGE” of the POLICY:

*Supplementary Coverage*

- (22) anyone else having an ownership interest in your TITLE occurring after the POLICY DATE;
- (23) anyone else having a right affecting your TITLE after the POLICY DATE arising from a tenancy, contract or option;
- (24) an impersonation of you or other fraudulent act after the POLICY DATE as the result of which someone other than you claims to own or have an interest in your LAND;
- (25) anyone else having an EASEMENT on your LAND occurring after the POLICY DATE;
- (26) after the POLICY DATE, a governmental authority having jurisdiction assessing supplemental realty tax not previously assessed against the LAND for any period before the POLICY DATE;
- (27) your existing improvement(s), if any (or a replacement or modification made to them after the POLICY DATE), being damaged because of the exercise after the POLICY DATE of a right to use the surface of the LAND for the extraction or development of minerals, water or any other substance, even if those rights were excepted or reserved from the description of the LAND or excepted in Schedule “A”;
- (28) anyone else having the right to limit your use of the LAND, whether the right affects TITLE to the LAND on or after the POLICY DATE;
- (29) your TITLE being lost or taken because, before you acquired your TITLE, there was a breach of a covenant, condition or restriction, even if the covenant, condition or restriction is excepted in Schedule “A”;
- (30) the existing improvement(s), if any, with the municipal address shown in Schedule “A” not being located on the LAND at the POLICY DATE;
- (31) you being forced to remove or remedy an existing structure (if any) on your LAND because it encroaches onto an EASEMENT, even if the EASEMENT is excepted in Schedule “A”;
- (32) your existing structure (if any) having been damaged because of the exercise of a right to maintain or use any EASEMENT affecting the LAND, even if the EASEMENT is excepted in Schedule “A”;
- (33) any construction liens on your TITLE for service or material furnished before the POLICY DATE;
- (34) any incorrectness in a written statement received by you from a governmental authority indicating that there are no defects relating to the LAND’s compliance with applicable building or zoning by-laws at the POLICY DATE;
- (35) any contravention of the subdivision control provisions of the *Planning Act*;
- (36) any violation of a subdivision, development or related agreement;
- (37) the registration against your TITLE to the LAND of any liens or encumbrances between the POLICY DATE and the registration of the instruments creating the interest insured by this POLICY;
- (38) if the LAND contains one or more new residential dwelling(s) purchased from a builder in the TRANSACTION, with respect to improvements to the LAND which the vendor to you was contractually obligated to construct as of the POLICY DATE, any of risks 10(b) or (c), (12), (13), (13.1), (14), (15), (27), (29), (31), (32), (33) or (34) in the “Title Coverage” section of “PART I – INSURANCE COVERAGE” of this POLICY, if the risks affect the LAND before or on a date 365 days after the POLICY DATE.



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2. The descriptions of items (13), (17) and (21) of the risks in the “Title Coverage” section of “PART I – INSURANCE COVERAGE” of the POLICY are hereby deleted and replaced with the following:

- (13) any order by a court or other authority after the POLICY DATE forcing you to remedy any of the following conditions existing as of the POLICY DATE: (a) a breach of a zoning by-law of a governmental authority having jurisdiction; (b) the lack of approval from a conservation or similar authority for the existing improvement(s) or any part thereof; or (c) the lack of a building permit for the existing improvement(s) or any part thereof;
- (13.1) any adverse circumstance affecting the LAND which would have been disclosed by a search, at the POLICY DATE, of local government records pertaining to the LAND which would customarily be required by a solicitor qualified to practise law in the jurisdiction in which the LAND is located in the normal course of a real estate transaction;
- (17) the lack of a legal right for existing vehicular access, if any, and for existing pedestrian access, if any, to and from the LAND, or where there is no existing access of either type, the LAND being land-locked by other properties and thus without any legal right of access;
- (21) any other defects in your TITLE on or after the POLICY DATE so long as they are not otherwise excluded by the terms and conditions of this POLICY;

3. The following wording in the “Title Coverage” section of “PART I – INSURANCE COVERAGE” of the POLICY is hereby deleted and replaced with the following:

Deletion: (except for risks (8) and (15) which are insured if they arise or occur after the POLICY DATE):

Replacement: or, to the extent expressly stated, after the POLICY DATE:

4. The description of the following exception to exclusion (1) in “PART III – EXCLUSIONS TO POLICY COVERAGES” of the POLICY is hereby deleted and replaced with the following:

- (1)(b) any violation or enforcement proceeding disclosed by REGISTERED TITLE as of the POLICY DATE which relates to a matter excluded above;

5. The definition of “ACTUAL LOSS” in “PART IV – YOUR POLICY CONDITIONS” of the POLICY is hereby amended by adding the words, “or (31)” following the words, “items (11) – (16)”.

6. The definition of “TRANSACTION” in “PART IV – YOUR POLICY CONDITIONS” of the POLICY is hereby deleted and replaced with the following:

“TRANSACTION” means your purchase of the LAND together with any mortgage financing arranged in connection with your purchase, as described in Schedule “A”, or where no insured and registered owner is stated in Schedule “A” of the POLICY, the MORTGAGE LENDER’S acquisition of a MORTGAGE/CHARGE of the LAND, as described in Schedule “A”.

7. The following provision is added to the end of the section entitled, “Our Choices when you Notify Us of a Claim” of “PART IV – YOUR POLICY CONDITIONS” of the POLICY:

We will reimburse you for the reasonable costs paid by you to move any personal property you have the right to remove from the LAND, including transportation and storage of that personal property for up to fifty (50) kilometers from the LAND, and repair of any damage to that personal property resulting from the move. The

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amount we will pay you under this paragraph of the POLICY is limited to the value of the personal property before you move it.

8. Wherever the term, “estoppel certificate” is used in the POLICY, it is hereby replaced with the term, “status certificate”.
9. The word “title” in item (5) in “PART III – EXCLUSIONS TO POLICY COVERAGES” of the POLICY is hereby deleted. This deletion does not apply to “PART V – MORTGAGE PROVISIONS” of the POLICY.
10. The following exclusion is added to “PART III – EXCLUSIONS TO POLICY COVERAGES” of the POLICY:
  - (6) the failure of the existing improvement(s) or any part thereof to be constructed in accordance with applicable building codes. This exclusion does not limit the coverage provided for any risk covered by items (12), (13) or (13.1) of the Title Coverage provisions of this POLICY.
11. The description of the following risk in the “Mortgage Coverage” section of “PART V – MORTGAGE PROVISIONS” of the POLICY is hereby deleted and replaced with the following:
  - (11) any breach of the applicable zoning by-law or any order by a court or other authority after the POLICY DATE forcing you to remedy any of the following conditions existing as of the POLICY DATE: a breach of a property standards by-law or the building code of a governmental authority having jurisdiction;
12. The following provision is added to the end of the section entitled “Exclusions” of “PART V – MORTGAGE PROVISIONS” of the POLICY:

The Mortgage Coverage under this POLICY is not subject to item (6) of PART III – EXCLUSIONS TO POLICY COVERAGES.
13. The following wording in the “Mortgage Coverage” section of “PART V – MORTGAGE PROVISIONS” of the POLICY is hereby deleted and replaced with the following:

Deletion: (except for risks (3) and (4) which are insured if they arise or occur after the POLICY DATE):

Replacement: or, to the extent expressly stated, after the POLICY DATE:
14. The word “unmarketable” in risk 10(a) of the “Title Coverage” section of “PART I – INSURANCE COVERAGE” of the POLICY is hereby deleted and replaced with “UNMARKETABLE”.
15. The word “marketable” in risk (1) of the “Legal Service Coverage” section of “PART I – INSURANCE COVERAGE” of the POLICY is hereby deleted and replaced with “MARKETABLE”.
16. The following are added to the “Definitions” section of “PART IV – YOUR POLICY CONDITIONS” of the POLICY:

“MARKETABLE” means that TITLE is not affected by an alleged or apparent matter that would make the closing of a sale, lease or mortgage of your LAND legally unenforceable. Matters relating only to the physical condition of any improvements on the LAND do not cause TITLE not to be MARKETABLE, unless (a) notice of those matters appears on REGISTERED TITLE as of the POLICY DATE; or (b) the matter falls within the coverage provided by risks (10)(b) or (c), (11),

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(12), (13), (13.1), (14), (16), (27), (29), (31), (32) or (34) of the “Title Coverage” provisions of this POLICY.

“UNMARKETABLE” means that TITLE is affected by an alleged or apparent matter that would make the closing of a sale, lease or mortgage of your LAND legally unenforceable. Matters relating only to the physical condition of any improvements on the LAND do not cause TITLE to be UNMARKETABLE, unless (a) notice of those matters appears on REGISTERED TITLE as of the POLICY DATE; or (b) the matter falls within the coverage provided by risks (10)(b) or (c), (11), (12), (13), (13.1), (14), (16), (27), (29), (31), (32) or (34) of the “Title Coverage” provisions of this POLICY.

*This endorsement is part of the POLICY and is subject to all of the terms and provisions of the POLICY, including any other endorsements. This endorsement does not:*

- *modify any of the terms and provisions of the POLICY, including any other endorsement;*
- *extend the POLICY DATE or the effective date of any other endorsement; or*
- *increase the POLICY AMOUNT;*

*unless expressly stated above.*

<sup>1</sup> Excluding OwnerEXPRESS<sup>®</sup> and leasehold policies.

1998 TitlePLUS Policy Version 2.0

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TAB 4



# REAL ESTATE

## Practice Basics 2016

# Fraud in Real Estate & More

**Raymond Leclair**, Vice-President, Public Affairs  
*Lawyers' Professional Indemnity Company (LAWPRO®)*

December 9, 2016

2015

Raymond G Leclair

Vice President, Public Affairs  
Lawyers` Professional Indemnity Company

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# [FRAUD IN REAL ESTATE & MORE]<sup>1,2</sup>

The Law Society of Upper Canada  
Real Estate Practice Basics Program  
December 9<sup>th</sup>, 2015

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<sup>1</sup> I wish to acknowledge the able assistance of Margaux Malkina, Student-at-Law, who undertook research and an initial draft paper.

<sup>2</sup> The opinions expressed herein are those of the author and do not represent the position of Lawyers` Professional Indemnity Company, the TitlePLUS Department or any other entity, except where expressly stated. The material presented does not establish, report or create the standard of care for lawyers.

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## INTRODUCTION

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Over the last few years there has been an epidemic of frauds targeting lawyers, both in Ontario and in other provinces right across Canada. LAWPRO has seen a significant number of very costly fraud related claims, both TitlePLUS-insured claims and E&O claims, and we are also aware of many lawyers who have narrowly avoided being victims, sometimes due to their own diligence, sometimes only by good luck. It is important to realize that firms of all sizes, including large firms, are being victimized, and that new and improved fraudulent schemes are being constantly developed.

The purpose of this paper is to discuss different kinds of fraud real estate lawyers may come across in their legal careers, as well as to provide advice that can help young lawyers to recognize red flags and to prevent becoming victims of fraud. A lawyer may be the target of a fraud or be the tool or dupe that assists the fraudulent transaction proceed. Neither position is a comfortable one for a lawyer to be in. We will begin by distinguishing two general categories of fraud and then, we will discuss different common fraud scenarios, followed by a section of the paper that will provide practical tips on how to recognize and prevent fraud in your firm. We will conclude this paper with a list of additional sources that may be useful for lawyers seeking to learn more.

## WHAT IS FRAUD

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Fraud can broadly be categorized as fraud for shelter and fraud for profit, with the former one having the ultimate goal of obtaining ownership of a real estate property for a laudable legitimate goal but by questionable means. In order to accomplish this goal, purchasers may provide different kinds of misrepresentation, such as giving false information regarding mortgagor's financial situation, home value and employment status. Providing the true or complete information may not allow them to qualify for a mortgage. Notwithstanding that the individual believes and may be able to make the payments, this is a fraud on the lender.

On the other hand, the purpose of fraud for profit, is not obtaining a particular piece of property, but rather, via fraudulent real estate transactions, acquiring large sums of money from different parties, including a registered owner, a mortgagee or a *bona fide* purchaser. This can be accomplished in many different ways, many of which are complex and highly sophisticated.

## WHY IT IS IMPORTANT

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Fraud is one of the risks associated with practicing real estate law. Lawyers ought to be vigilant, in order to protect not only their own practices, but their clients and the legal profession in general. A lawyer's involvement in a fraudulent transaction destroys public trust, and sometimes, in order to repair such trust, extreme measures must be taken. For instance, there is an infamous fraud case from British Columbia that clearly demonstrates that fraud affects all lawyers: not only victims of fraud, but also other practitioners of the bar.<sup>3</sup> In that case, a former lawyer, by forging legal documents, misappropriated, by failing to pay discharged mortgages, more than \$38 million dollars. The Law Society of British Columbia paid the loss incurred as a result of this fraud, by using its special compensation fund. In order to pay these astronomical losses, the annual fees for the fund were raised from \$250 to \$600 for every lawyer in the province.<sup>4</sup>

Unfortunately, there is no easy “quick fix” way to avoid these frauds and the reality is that, as never before, lawyers have to take control of the processes and procedures in their offices and be constantly vigilant. Lawyers can be duped by the sophistication of the fraud and quality of the supporting documentation, but of more concern, because of the lack of attention paid to the file by lawyers or the lack of supervision, that lawyers may be “wilfully blind” to warning signs of fraud and increase their risk of a negative impact to their practices. **Although title insurers generally have waived their rights of subrogation against lawyers, the waiver does not extend to gross negligence, wilful misconduct and/or any fraudulent act or omission by the lawyer.** Even if a title insurer does not seek indemnification from the lawyer, it may decide to no longer issue policies to that lawyer, possibly crippling the lawyer's ability to continue doing real estate.

It is important to fully understand why real estate lawyers must be cognizant of the risk associated with being involved, even if either negligently or innocently, in a fraudulent real estate transaction. Lawyers, who get involuntary involved in fraud, will suffer detrimental reputational consequences, as well as the potentially significant increases in their insurance premiums, in addition to dealing with their unhappy clients, and being subject to the Law Society of Upper Canada's investigation, which may result in a disciplinary hearing and potentially, disbarment. Currently, there are approximately 63<sup>5</sup> lawyers who are being investigated by the Law Society for their involvement in a real estate fraud, many of whom were

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<sup>3</sup> <http://www.cbc.ca/news/canada/british-columbia/2-charged-in-30m-real-estate-fraud-in-b-c-1.770819>

<sup>4</sup> <http://www.cbc.ca/news/canada/british-columbia/disbarred-vancouver-lawyer-gets-7-year-jail-sentence-for-fraud-1.835474>

<sup>5</sup> The Law Society of Upper Canada presently is seeing an average of 2.2 new cases of fraud per month. In 118 mortgage fraud prosecutions, 45 lawyers' licence was revoked, 18 lawyers were allowed to surrender their licence, 52 lawyers had their licence suspended and 3 had other or a lesser penalty



victims who were unable to recognize red flags associated with a particular transaction. In addition, the Director of Titles may summarily suspend a lawyer's registration rights pending an investigation. Furthermore, even if a lawyer is not responsible for a fraud, title insurance companies may refuse to accept title insurance requests from lawyers who have been involved with fraud.

Finally, an involvement in a fraud may affect a lawyer's REPCO coverage: legal practitioners, who have been disciplined or convicted in connection with real estate fraud, are not illegible for the coverage, meaning that these lawyers will be unable to continue to practice real estate.<sup>6</sup>

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## THE EASY VS. THE SOPHISTICATED FRAUDS

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In hindsight, sometimes, it is extremely easy to see a fraud attempt. The advance-fee or 419 scams (the number refers to the provision of the Nigerian Criminal dealing with fraud) for a reasonable bystander, may appear obvious, but thousands of people have been duped and hundreds more each year are still going to believe that a random email from a Nigerian royalty, promising millions of dollars for, basically, no reason, is their "golden ticket" in life. Even lawyers fall for these scams<sup>7</sup>: recently there has been a lawyer in Iowa who fell for the Nigerian inheritance scam.<sup>8</sup> However, the real problem in the real estate market and the legal profession is not that people are gullible, and of course, some of them are, but that fraud became a highly sophisticated industry, with "crooks" acting for different sides involved in real estate deals.

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## FRAUD 101

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Fraud for profit can be further divided into nine broad categories: identity fraud, value fraud, straw buyer, equity stripping, power of attorney, reverse mortgages, cybercrime, bad cheques and internal fraud.<sup>9</sup> The following provides a quick explanation of these schemes.

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## THE BASICS OF FRAUD

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### IDENTITY FRAUD

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<sup>6</sup> [https://www.lawpro.ca/insurance/practice\\_type/repcov\\_coverage.asp](https://www.lawpro.ca/insurance/practice_type/repcov_coverage.asp)

<sup>7</sup> <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/even-lawyers-fall-for-spam-scams/article1390543/>

<sup>8</sup> <http://abovethelaw.com/2013/12/lawyer-falls-for-nigerian-inheritance-scam-gets-suspended/?rf&rf=1>

<sup>9</sup> For more information see: Lisa Weinstein's "Recent Developments in Fraud", 2009.

This form of fraud is not new and, generally, the most widely known. It involves one or more individuals, fraudsters, who will impersonate existing owners of a real estate property, in order to sell or mortgage the property. This impersonation can be extremely elaborate and include fake identity documentation that cannot be physically distinguished from the real one. Some fraudsters are so bold as to create a forged corporate minute book for corporate owned real estate, complete with government filings of officer names and contact information.

One particular type of identity fraud is the fraudulent discharge of a mortgage and the placement of a subsequent, new mortgage from another mortgagee. The fraudsters in this case will disappear with the proceeds from the new mortgage(s), leaving real owners dealing with two or more mortgages against their property. This is why it is crucial to review deleted documents anytime one does a Teraview search. The observation of one or more registrations in a short time frame is an indicator that needs to be followed up.

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#### RENT/STEAL FRAUD

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This is a sub-category of an identity theft, a very effective one, which involves a fraudster obtaining the physical possession of a property, as a tenant, for example, and then subsequently selling or mortgaging the property. In this scenario, the fraudster may prepay the rent for several months in advance, in order to avoid the real owner regularly inspecting the property. During this time, the tenant will impersonate the real owner in order to perpetuate the fraud, and once, successful, he or she will abscond with the proceeds. The true owner, once the rent payments stop, will contact the tenant or will visit the property to find it occupied by a *bona fide* purchaser.

Lawyers who are aware that their clients rent their properties, may want to advise them to visit the rental properties regularly, and if unable to do so, to arrange for someone else to inspect the property frequently, in order to minimize their becoming a victim of fraud. Much attention must be paid to vacant properties, which are vulnerable targets of this kind of fraud.

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#### VALUE FRAUD

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Also known as “Oklahoma Flips”, value fraud involves a transfer or mortgaging of a real estate property at a price, higher than the market value of the property. The fraudster typically obtains a mortgage based on the inflated price and later, after few payments, if any, are made, disappears with the difference between the market value and the mortgaged amount. The lender will obtain the property and will sell it under Power of Sale, but will be unable to recover all of its costs. This kind of fraud is easier to perpetrate

in a “hot” real estate market. This demonstrates the importance of verifying the previous sale price of the property from the title search to ascertain if there is a dramatic increase in value in a short period of time without a valid explanation (i.e. substantial renovation). Equally important, the lawyer must advise his/her lender client of any adjustments or other changes to the purchase price, balance due on closing or value of the property that could affect the lender’s underwriting valuation.

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### STRAW BUYER

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This is a relatively new form of fraud in Canada that involves a fraudster paying a certain sum of money to an individual, known as the “straw” buyer, who, legally, purchases a property for the fraudster. The fraudster lures the straw buyer into this agreement by promising easy money and no liability, usually based on a compelling reasons why the fraudster cannot purchase the property him/herself. For instance, in *Kulaga v First National Financial GP Corporation*<sup>10</sup> the straw buyer, a highly educated individual, a physician and pathologist, agreed to provide bridge financing and to purchase the home for an undisclosed buyer, who was unable to arrange financing for three months. The transaction turned out to be a value fraud.

The straw buyer can be an innocent victim, who might have been persuaded to act as a legal buyer due to financial circumstances. Indeed, some of the straw buyers are homeless people or university students, who obtained financing through fake employment documents, provided by fraudsters. In many cases, innocent straw buyers had to declare bankruptcy as a result of the fraud, which detrimentally affected their lives. On the other hand, the buyers can be accomplices in the fraud.

One of the biggest challenges associated with this kind of fraud is that numerous frauds can be perpetrated, creating multimillion losses, until the mastermind fraudster is exposed. For example, sometime ago, there was a highly sophisticated fraud scheme exposed in Toronto. In that case, fraudsters engaged in 33 real estate frauds<sup>11</sup>, with as many as 73 co-defendants implicated in this scheme, which resulted in the fraudulent mortgage loans of more than \$5 million.

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### EQUITY STRIPPING

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This is another form of identity theft, involving a new mortgage signed by one of the spouses in family law proceedings and an impersonator of the other spouse. However, equity stripping is not limited to situations involving spousal separation, as it may also occur in a commercial context, with one of the

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<sup>10</sup> *Kulaga v First National Financial GP Corporation*, 2014 ABQB 400 (CanLII).

<sup>11</sup> *Royal Bank of Canada v. Welton*, 2007 CanLII 52984 (ON SC)

business partners stripping equity from the joint business property. The spouse/partner then absconds with the proceeds, leaving the other spouse/partner with the debt in lieu of equity. This is why getting proper identification from clients and never allowing any document to which your name is attached to be signed outside of your presence or a very trustworthy colleague or office personnel is so important.

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## POWER OF ATTORNEY

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The improper use of powers of attorney, either fraudulent ones or legitimate powers of attorney, misused by a family member is always a concern. There is substantial case law dealing with powers of attorney, included well known cases such as *O'Brien v Royal Bank of Canada*<sup>12</sup> and *Reviczky v Meleknia*<sup>13</sup>. The in depth discussion is beyond the scope of this paper, however, the lawyers should familiarized themselves with the Law Society's `Guidelines on Powers of Attorney in Real Estate Transactions'<sup>14</sup>, which, for your convenience, are provided as an attachment in the appendix section of this paper. Many financial institutions will not lend on the strength of a power of attorney and therefore it wise to determine early if one is being relied upon, obtain a copy, review it and ensure that all parties to the transaction are aware of the fact. In fact, some title insurers will require a copy of the instrument or further documentation before accepting to provide a title insurance policy for the transaction. Particular care should be exercised when presented with a power of attorney, including possibly contacting the donor directly and independently in order to confirm the bone fides use of the power of attorney. All powers of attorney should also be carefully reviewed in order to confirm that there are no restrictions or limits to it's use and the powers of the attorney purporting to exercise it. A good common sense rule, since the attorney is always required to exercise his/her authority in the best interest of the donor, is to consider the reason for using the power of attorney and the results to be achieved to confirm if it is consistent with the attorney's mandate.

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## REVERSE MORTGAGE

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Reverse mortgages are a newly developed product designed for older people, who have significant equity in their property, but lack regular income. Reverse mortgages operate as an income generator: a mortgagor receives regular payments, or a lump sum, from the mortgagee, and accumulated interest and principal are only due upon the occurrence of a certain event, usually the death of the mortgagor but also on a subsequent sale of the property or a breach of the mortgage terms, such as, failure to pay property taxes or insurance.

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<sup>12</sup> *O'Brien v. Royal Bank of Canada*, 2008 CanLII 6422 (ON SC).

<sup>13</sup> *Reviczky v. Meleknia*, 2007 CanLII 56494 (ON SC).

<sup>14</sup> [http://www.lsuc.on.ca/media/power\\_of\\_authority.pdf](http://www.lsuc.on.ca/media/power_of_authority.pdf).

A reverse mortgage typically generates regular payments of capital to the mortgagor or a lump sum which is invested in an annuity, which itself then provides regular payments to the mortgagor. A fraudster either diverts the regular payments from the mortgagor or the lump sum is stolen by a fraudster. Although the registration of the mortgage and especially when done with the legitimate owner of the property is a routine matter for a lawyer, lawyers can become entangled into the following litigation once the money disappears on the basis that they reassured the elderly mortgagor that this was a normal process or for failing to forewarn the elderly mortgagor against the risks which ultimately lead to the fraudster being successful in getting the money. As our population ages and individuals seek to remain in their homes longer, this potential scheme may grow.

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### BAD CHEQUES

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Traditionally, real estate lawyers have had many other issues to worry about and simply accepted that receipt of certified funds from their purchaser clients and lenders was good money once it was deposited into their trust accounts. However, they, and in fact any lawyer, can no longer rely on these funds being good. This is a growing concern and one which we need to address. **Lawyers can no longer assume that a cheque, even a certified one or a bank draft, is good money** and must consider the risk associated with the method, by which funds are received. Certified cheques and bank drafts have been counterfeited, wire transfers are revocable and third party deposits to a lawyer's trust account can be reversed.

One may question what source of a financial transfer is safe. The source of the funds is a starting point, meaning that a common sense consideration of the trustworthiness of the drawer of the cheque must be assessed. The next thing to consider is the transfer itself: was it done on final and irrevocable basis? There is a growing concern about certified cheques and bank drafts being counterfeited. For further information on the types of transfers under the Canadian Payment Associations rules, please see "What is LVTS v. ACSS & why should you care" LAWPRO magazine article<sup>15</sup>. LAWPRO now provides some limited protection in its policy and Endorsement 7.<sup>16</sup> However, to rely on the coverage, a lawyer must follow certain best practices, including either getting confirmation from the bank, in writing, of the validity of the cheque or waiting eight business days prior to paying out the funds.

A possible solution to this problem may be a trend that is establishing itself in some provinces and many states for the early receipt of the client's monies to be used in a transaction, even if this appears to be more problematic to implement in the real estate market. Many lawyers report that they are being forced

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<sup>15</sup> <http://www.practicepro.ca/lawpromag/FundsHandling.pdf>.

<sup>16</sup> For more information see Appendix X, attached at the end of this paper.

into this practice as banks are freezing funds in lawyer's trust accounts for varying periods of time. However, do not be misled by the fact that the bank does not freeze or removes the restrictions on your use of the funds, as they are doing so based on your good credit with them and not necessarily the validity of the funds. If the funds later prove to be deficient, the bank will simply take the money from your trust account or cause you to go into overdraft and possibly take the funds from your general account or any other account that you have with them.

The introduction of electronic funds transfer, seen as another possible answer, is creating its own challenges as well. Many people believe that wired funds are guaranteed funds, but, unfortunately, wired funds are not always irrevocable. While the Large Value Transfer System (LVTS) offered by the Canadian Payments Association does provide timely, irrevocable funds, our access as consumers to the LVTS is limited and controlled by the banks, who will often substitute their own wire transfer system, and there is no easy way to identify how funds are received, when you see them in your trust account via your electronic access. LVTS is also a more expensive method to transfer money.

The Law Society of Upper Canada and LAWPRO are working to address this issue. The federal government's Task Force into the Canadian Payment System<sup>17</sup> made recommendations to improve the funds transfer process for all Canadians, including real estate lawyers, but these have not yet been fully implemented. Pending further development in this area, lawyers need to specifically consider as part of the real estate transaction, the reliability of the funds they receive.

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## CYBERCRIME

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Law firms are actually very appealing and sought-after targets of cyber criminals for three reasons. Firstly, law firms have large amounts of valuable sensitive and confidential information. Secondly, law firms tend to have very large sums of money in their bank accounts. Finally, law firms tend to have weaker security protection in place on their networks and systems. Thus, these fraudsters will use any tool available to attack law firms, including sending spam and phishing messages, installing malware and creating backdoors into the firm's computers, and exploiting any weaknesses in the firm's security configurations to gain access to firm networks. For more information, see the special, cybercrime themed, issue of the LAWPRO's magazine.<sup>18</sup> The information and tips provided in this issue are valuable for lawyers and their staff, for in the office and in their personal and home use. It is recommended that all personnel, professional and other, of the law firm, be given a copy of the magazine and encouraged to read it and put the recommendations into practice. Some law firms have in fact held office meetings

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<sup>17</sup> For more information see <http://paymentsystemreview.ca/index.php/home/>.

<sup>18</sup> [http://www.practicepro.ca/LawPROmag/LawPROmagazine12\\_4\\_Dec2013.pdf](http://www.practicepro.ca/LawPROmag/LawPROmagazine12_4_Dec2013.pdf).

solely to review consider and discuss the information provided. An ounce of prevention in cyber security may very well be worth its weight in gold.

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## INTERNAL FRAUD

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All lawyers must guard against fraud in their practices, especially as the variety of the fraudster widens and the complexity and types of fraud increase. Fraudsters are not only third parties to the transaction or clients, but also office staff, colleagues, and even senior partners. Increasingly, LAWPRO has seen fraud claims with all of the above by completely incredulous and disheartened lawyers, whose trust was ruthlessly exploited. Lawyers need to have systems in place that minimise the opportunities of fraud, examples of which will be discussed further in this paper. One is reminded of the maxim, “trust by verify”.

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## WHAT TO DO TO RECOGNIZE AND PREVENT FRAUD

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### RED FLAGS

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We have divided this section into two general categories: red flags associated with bad cheque scams, and red flag pertaining to other forms of real estate fraud. It should be noted that some of the red flags can occur on legitimate business matters, and thus, lawyers ought to investigate the matter further and proceed with caution, especially if several red flags appear in connection with one specific transaction or one particular client. The list below is non-exhaustive, and lawyers should familiarized themselves with LAWPRO`s materials on this topic.<sup>19</sup>

One particular concern was recently discovered in connection with lack of title insurance coverage in fraudulent private mortgage transactions by title insurers other than TitlePLUS. Lawyers should be aware of the limitation of the title insurance coverage, when the proceeds of the private mortgage go to a third party not authorized by the policy. If a lawyer is not aware or fails to advise a lender of this exception, and subsequently, the transaction proves to be a fraudulent one, most likely, the lender`s only recourse will be a negligence claim against the lawyer after the title insurer rejects the claim.<sup>20</sup> Thus, lawyers are admonished to be extra diligent when clients instruct to transfer mortgage funds to a party not permitted expressly by the title insurer.

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<sup>19</sup> See LAWPRO`s Fraud Fact Sheet, available online at <http://www.practicepro.ca/practice/pdf/FraudInfoSheet.pdf> or see <http://practicepro.ca/practice/fraud.asp>

<sup>20</sup> <http://avoidclaim.com/2014/warning-re-claims-exposure-where-private-mortgage-advance-goes-to-third-party/>.

**Bad Cheque Scam:**

- ✓ Initial correspondence, usually via email, is generically addressed, i.e. “Dear Attorney”, which may indicate that this email had been sent out to many different lawyers;
- ✓ Client uses free email services, and many have more than one email address;
- ✓ Client is a new client and/or from a distant jurisdiction and/or prefers email communication due to zone differences;
- ✓ Client refuses to allow contract with previous lawyer
- ✓ Client’s mailing address is a post office box;
- ✓ Client is in a rush and encourages you to complete the matter quickly or around banking holidays;
- ✓ Client does not seem to be concerned about taking shortcuts and/or is willing to pay higher-than-usual fees on a contingent basis from the funds you will receive upon the completion of the matter;
- ✓ Client, due to unforeseen, usually compelling, changes in circumstances, instructs to you to urgently wire the funds to an offshore account or to an unrelated third party.

**Other Real Estate Scams:**

- ✓ Client is in a rush and encourages you to complete the matter around banking holidays or quickly, without conducting all the usual title searches, appraisals and house inspection;
- ✓ Client appears to be unfamiliar with the property or is not concerned with the price, mortgage interest rate, legal or brokerage fees;
- ✓ Client cannot produce title documents, survey, reporting letter, tax or utility bills for the property;
- ✓ Funds are directed to a third party that has no apparent connection with a transaction;
- ✓ Client promises high fees, many referrals, lots of business for quick turnaround on deals;
- ✓ Client buys and sells often, prefers to deal in cash;
- ✓ Client produces small deposit, relative to price, and/or deposit not held by agent or lawyer;
- ✓ The property is subject to a frequent repeated activity, including one or more recent transfers, mortgages or discharges;
- ✓ There is an immediate resale without re-listing;
- ✓ Transacted property is distant from your office;
- ✓ Unusual adjustments in favour of vendor, or large vendor-take-back mortgage;
- ✓ Use of counter cheques and/or use of Power of Attorney;
- ✓ Client makes no inquiry about picking up keys or moving in;
- ✓ Lack of access by purchaser to the property or unusual restriction on access;



- ✓ “Private agreement” with no real estate agent being involved, or real estate agent named in agreement has no knowledge of the deal;
- ✓ Agreement of Purchase and Sale has no handwritten changes or there are amendments to the original agreement, that lower the original price or that grant credit to the purchaser;
- ✓ Parties to the Agreement of Purchase and Sale are between relatives or business associates;
- ✓ Tenant is paying more than two months’ rent in advance, etc.

Sometime, having several red flags associated with one particular transaction may raise the lawyer’s suspicions, but because all of these red flags occur in legitimate business deals, it may be hard to say whether this particular transaction is fraudulent or not. In cases of uncertainty, lawyers are encouraged to search the parties’ names in the [www.AvoidAClaim.com](http://www.AvoidAClaim.com) database of known fraud attempts or contact the Law Society’s **Practice Management Helpline** that can provide assistance to lawyers with ethical questions on the topic and can be contacted at 416 947-3315 or toll-free at 1-800-668-7380, ext 3315. LAWPRO also will accept calls from lawyers who suspect a fraud and wish more information to properly assess their particular transaction. Alternatively, seeking assistance from more experienced lawyers may prove helpful as well. Sometimes, describing, of course, subject to lawyer’s duty of confidentiality, the situation that arose one’s suspicions to another individual can be all that is needed for legal practitioners to realize that they were a target of a fraud. A useful resource for all the law firm staff is practicePRO’s Fraud Fact Sheet<sup>21</sup>

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## HOW TO PREVENT FRAUD

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The good news is that lawyers, by implementing administrative and procedural safeguards, can successfully minimize their exposure to fraud. The following suggestions are some of the recommended procedures that can be adopted to minimize frauds, however, because each legal practice is unique, lawyers should determine what procedures are suited for the circumstances of their firms and their clients. For more information, please see the Law Society’s “Fighting Real Estate Fraud” guidelines<sup>22</sup>, provided in the Appendix X.

### **Hiring practices**

In order to minimize a risk of an internal fraud, lawyers should consider implementing several hiring practices, including verifying past employment, checking the details of the resume and calling the references. Depending on the nature of the advertised position, background checks may be desirable.

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<sup>21</sup> <http://practicepro.ca/practice/pdf/FraudInfoSheet.pdf>.

<sup>22</sup> For more information see Fighting Real Estate Fraud, available online at <http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Real-Estate-Law/Fighting-Real-Estate-Fraud/>.

This applies not only to potential future support staff or colleagues, but also to third parties to which you outsource some of your administrative or accounting functions. Lawyers have been known to hire personnel who were let go from their previous employment after being suspected and in some cases charged with fraud, when they did not consult the references because they were too busy with client work.

### **Accounting controls**

There are basic cheque processing rules that all law firms should implement. Lawyers should always carefully review cheques before signing and should never sign blank cheques or cheques that have no payee, nor amount, stated in it. Another good step is to adopt any security measures their bank recommends or makes available to its customers (i.e. positive pay) and establish a policy to always issue receipts for all cheques or cash received by the law firm. Cheques, and receipts as well, should be numbered and the sequence should be checked. In addition, cheques should be stored in a secure location with limited access by authorized staff, and incoming cheques should be deposited on the same day the cheque is received, if possible. Finally, consider stamping original copies of invoices, as well as incoming cheques, to prevent any misuse of the documents.

With respect to staff supervision and segregation of duties, lawyers, should periodically conduct spot review of client files, including the trust ledger, and should implement safeguards to ensure that no one function is completely within the purview of one individual, at least without having adequate supervision. A simple safeguard could be ensuring that everyone in the office must take five consecutive days of holidays every year to ensure that the function or processes are scrutinized by someone else at least once during the year.

Bookkeeping policies should also be implemented to reduce risk of internal fraud: have your banks statements delivered to you unopened, review your books, records and source documents regularly, do not let accounting records fall into arrears and reconcile your trust accounts within the stipulated timelines, i.e. by the 25<sup>th</sup> day of the following month.

### **Electronic registration and personal security package (PSP)**

The importance of safeguarding PSPs and not sharing PSPs cannot be emphasized enough: now it is part of the real estate bar material, it is almost always mentioned during real estate themed CPDs events, but there are still lawyers who give their Teraview access codes to their clerks. To put it simply, YOU CANNOT AND MUST NOT SHARE YOUR PSP, and if you do, you will be reported to the Law Society, which will begin a disciplinary investigation. It may seem like a trivial matter to warrant this kind of harsh punishment, however, there are valid reasons to be extremely strict with this requirement.

There are five reasons why lawyers are not permitted to share the password: it is against the Law Society's Rules of Professional Conduct<sup>23</sup>, against the agreements with Registry Office and with Teranet; and , it undermines the trust the Ontario government placed in legal profession. Finally, lawyers must provide the Law Society with an annual report and real estate lawyers in particular have an additional declaration. The lawyer declares that he/she did not share their Teraview access devise and password. Thus, lawyers should understand the importance of not sharing their PSPs and ought to implement policies to safeguard their PSPs, including requiring staff to report any misuse of PSPs, periodically reviewing disbursements in the Teraview account, and cancelling PSPs belonging to departed colleagues.

It should be noted that being away from the office has never been a reasonable explanation to share personal PSP with a law clerk. With technology, lawyers, who are on vacations or simply away from their desk, can access Teraview remotely: for more information, please see an article, "Up, up & far away (and still be able to close)" by Jeffrey Schwartz<sup>24</sup> and the Law Society's "The Teraview Reference Guide".<sup>25</sup>

### **Joint retainers**

If you are acting in a joint retainer for both a lender and a borrower in a mortgage transaction, ensure that you act in the best interests of both clients, which includes disclosing to the lender, in writing, before the advance of the mortgage funds, all material information relevant to the transaction.

### **Reasonable inquiries and Know your client rules**

If you have doubts about a particular transaction or there are several red flag associated with this transaction – investigate! Make reasonable inquiries about your client, the purpose of the retainer, about the nature of the transaction. Document the results of your investigation and, if appropriate, consider disclosing your concerns to the client. If a transaction is legitimate, clients may clarify and explain the issues and lawyers can proceed further. However, if an explanation is not reasonable and you are still not satisfied and uncertain about the legitimacy of the transaction, consider, if appropriate, withdrawing from representation, or, as was mentioned before, seek advice from the Practice Management Hotline or a more experienced counsel.

Of course, notwithstanding the absence of red flags, lawyers must comply with the Law Society's Know Your Client requirements<sup>26</sup> and other ID verification procedures, and are advised to implement strict guidelines with respect to identification documents, including examining the authenticity of provided

<sup>23</sup> See Rule 6.1-5, available online at [https://www.lsuc.on.ca/with.aspx?id=2147502074#ch6\\_sec1-6-signing](https://www.lsuc.on.ca/with.aspx?id=2147502074#ch6_sec1-6-signing)

<sup>24</sup> Available online at [http://c.ybcdn.com/sites/www.ccla-abcc.ca/resource/dynamic/blogs/20131120\\_095902\\_10543.pdf](http://c.ybcdn.com/sites/www.ccla-abcc.ca/resource/dynamic/blogs/20131120_095902_10543.pdf) <https://www.lsuc.on.ca/with.aspx?id=2147491963>.

<sup>26</sup> <http://lsuc.on.ca/with.aspx?id=2147499242>.

identification documentation, checking the validity of the driver's license provided on the Ontario Ministry of Transportation website, insisting on producing original documents and identification records. In addition, lawyers should consider adopting several simple signature rules for their legal practice, such as attesting client's signatures in their law office and not permitting legal documents to be signed or executed outside without lawyer's supervision. Finally, lawyers, if still doubtful about the nature of the proposed transaction, may consider verifying the identity of the counsel acting for the other side, via among, other things, contacting the Law Society.

### **Due Diligence**

While it may not be possible to completely eliminate all of the risks associated with real estate fraud, familiarity with the red flags, as well as due diligent execution of real estate deals, can significantly reduce fraud occurrence. Most importantly, due diligence cannot be overemphasized enough in this context. Lawyers ought to pay attention and develop checklists to monitor red flags indicators, and be alert if, based on their experience, the price, or other considerations, in connection with a suspicious real estate transaction, do not correspond with the current market trends. Lawyers, also, should, review the client's instruction and assess before hand, if they are able to meet the requirements.

Lawyers should remain apprised of the new ways that fraudsters use to get our and our clients' hard earned money. One easy way to do so is to register with the AvoidAClaim blog<sup>27</sup> to receive an email notification each time a new fraud scheme or risk managements tip is added to the blog. This will also assist you to sign your annual declaration to the Law Society that you are keeping yourself informed.

Finally, one of the most important practical tips young lawyers ought to implement in their practice is a proper and fulsome title search. Identify all the title documents, including the ones that have been deleted. Investigating deleted instruments allows lawyers to consider if there was any suspicious or recent title registration activity.

## ADDITIONAL SOURCES

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### **Useful Resources to Help You Fight Fraud**

- ✓ LAWPRO's Fraud Fact Sheet (copy attached to this paper)
- ✓ "Recent Developments in Fraud" by Lisa Weinstein and Joseph Salmon, presented at The Six-Minute Real Estate Lawyer, November 18, 2009 (copy attached to this paper)

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<sup>27</sup> <http://avoidaclaim.com/>

- ✓ Fighting Real Estate Fraud on LSUC website: <http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Real-Estate-Law/Fighting-Real-Estate-Fraud/>
- ✓ PracticePRO® Practice Aid re: Fraud: <http://www.practicepro.ca/practice/fraud.asp>
- ✓ Avoid A Claim Blog, PracticePRO's blog to help you avoid legal malpractice claims: [www.avoidclaim.com](http://www.avoidclaim.com)
- ✓ [Real Estate Claims Malpractice Fact Sheet:](http://www.practicepro.ca/information/doc/RealEstate-FactSheet.pdf)  
<http://www.practicepro.ca/information/doc/RealEstate-FactSheet.pdf>

## CONCLUSION

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Unfortunately, the reality is that fraud will continue to be an area of concern: new improved fraudulent schemes will be introduced and lawyers, due to the fact that they handle big sums of their client money in their trust accounts, will remain one of the primary targets of fraudsters. However, lawyers can and should protect themselves and their practices: by following the aforementioned recommendations, legal practitioners can minimize the risk of becoming involved in a fraudulent transaction. While the old adage “forewarned is forearmed” still applies, lawyers must go beyond simple knowledge. They must implement procedural and administrative precautions in their daily practice in order to safeguard their professional reputation, their clients’ interest and the legal profession in general. Finally, consider adopting a realist’s view: “If it seems too good to be true, it probably is.” Despite the sophistication of our law practices and the advancements in technology, a little common sense applied to every transaction remains one of the best test to be applied.

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# Recent Developments in Fraud

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and

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The Six-Minute Real Estate Lawyer  
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## **Introduction**

Real estate fraud is a significant problem for real estate lawyers and clerks in Ontario that will not go away. In the year 2008, LAWPRO dealt with 136 fraud claims, many of which involved real estate transactions. Although fraud can never be completely eliminated, awareness of common fraud warning signals coupled with a thorough understanding of the methods employed by fraudsters will help control the occurrence of fraudulent real estate transactions. This paper will describe some typical types of fraud and set out tools to detect them, in the hope that this information will be useful to Ontario real estate practitioners.

## **Fraud Defined**

Fraud is broadly divided into fraud for shelter and fraud for profit. The motive behind fraud for shelter is gaining ownership of a house by providing false information. Fraud for shelter includes misrepresentations to mortgage lenders regarding employment status, assets and home value to qualify for mortgages to buy a home, refinance or pay debts. The frauds that have gained attention recently are not for shelter, but schemes by fraudsters (some sophisticated, some not) aimed at stealing value from members of the public by setting up fraudulent real estate transactions. Frauds for profit are simply for the purpose of acquiring large sums of money as quickly as possible. This type of fraud is generally more complex than fraud for shelter. The focus of this paper is on fraud for profit.



**Case Law before Bill 152: *Lawrence v. Maple Trust Company***<sup>1</sup>

Before exploring recent developments in real estate fraud, it is important to understand what the courts and legislators have done when presented with fraud that impacts titles registered under the Land Titles system in Ontario.<sup>2</sup> Any case involving instruments registered before October 19, 2006<sup>3</sup>, should be considered in light of the Ontario courts' approach to the doctrine of deferred indefeasibility and its interaction with the *Land Titles Act*<sup>4</sup>. Ontario had traditionally followed this doctrine, under which the registration of a fraudulent document was not necessarily sufficient to protect the interest created by the document. If the document involved a fraud, it could be expunged from the parcel register. However, if an innocent party, such as a mortgage lender, relied on that document, that party's interest was sometimes held to be indefeasible.<sup>5</sup>

The Court of Appeal's decision in *Lawrence* appears to be the leading case on registrations made before October 19, 2006. In the *Lawrence* case, a fraudulent transfer and mortgage had been registered by a fraudster who impersonated the real registered owner of the property. The court held that both the transfer and mortgage were invalid. Although the mortgage lender acted in good faith, the court reasoned that the lender was in the best position to detect and prevent the fraud.

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<sup>1</sup> 84 O.R. (3d) 94 • 278 D.L.R. (4th) 698 (C.A).

<sup>2</sup> Approximately 96% of Ontario titles are now registered under the Land Titles system.

<sup>3</sup> The effective date of Bill 152. See page 5.

<sup>4</sup> R.S.O. 1990, c. L.5, as amended.

<sup>5</sup> See, for example, *Toronto-Dominion Bank v. Jiang*, 2003 CanLII 38078.

There is still some debate regarding the exact application of the *Lawrence* case, as evidenced in *Salna v. Chetti*<sup>6</sup>, where the Ontario Superior Court of Justice considered an application involving the registration of a fraudulent discharge of mortgage. The debate was how to interpret the meaning of “true owner” as used in the *Lawrence* Case. The Court of Appeal’s decision in *Lawrence* focused on the protection afforded to the true owner, but did not elaborate on the interpretation of the “true owner”.

In the *Salna* case, one party argued that the doctrine of deferred indefeasibility would protect the true owner of any registered interest which is removed by fraud, provided the claim is brought against the party dealing with the fraudster. It was further argued that deferred indefeasibility permits the setting aside of any fraudulent instrument, including a discharge, when the interest is stolen and then conveyed to an intermediate owner. Mr. Justice Pollak did not appear to agree with this more expansive interpretation of “true owner”, but denied a motion to strike the claim on the basis of disclosing no cause of action, because it was not plain and obvious that this interpretation is incorrect.

***Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*<sup>7</sup> (“Bill 152”)**

The highly anticipated reaction from the legislature regarding real estate fraud occurred with the enactment of Bill 152 as the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*. The amendments to the *Land Titles Act* in this statute apply to all instruments registered on and after October 19, 2006. The

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<sup>6</sup> 2009 CanLII 6100

<sup>7</sup> S.O. 2006, c. 34, in force December 20, 2006.

purpose of the amendments was to clarify the law and better protect existing homeowners. Subsections 78 (4), (4.1) and (4.2) of the *Land Titles Act* now read as follows:

“(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

(4.1) Subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19, 2006.

(4.2) Nothing in subsection (4.1) invalidates the effect of a registered instrument that is not a fraudulent instrument described in that subsection, including instruments registered subsequent to such a fraudulent instrument.”

It is evident that the definitions of “fraudulent person” and “fraudulent instrument” which have been inserted in Section 1 of the *Land Titles Act* must be read with the above amendments in order to understand their application. These definitions are:

“‘Fraudulent person’ means a person who executes or purports to execute an instrument if,

(a) the person forged the instrument,

(b) the person is a fictitious person, or

(c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument.”

“‘Fraudulent instrument’ means an instrument,

- (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,
- (b) that is given under the purported authority of a power of attorney that is forged,
- (c) that is a transfer of a charge where the charge is given by a fraudulent person, or
- (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument.”

These new provisions codify the Ontario law governing fraud, with the result that the case law dealing with deferred indefeasibility will likely be of limited or no use when considering fraudulent registrations made on or after October 19, 2006. There is, as yet, no significant case law interpreting these provisions.

## **Types of Fraud**

### **Identity Fraud**

This type of theft is probably the most widely known. Generally, one or more fraudsters use forged identification to impersonate existing property owners, or the directors and officers of a corporate owner. In the latter case, the fraudsters may make false corporate filings and even produce a forged minute book. The fraudsters then purport to sell and/or mortgage the property.

Another well-known form of identity fraud involves the fraudulent discharge of a mortgage from title, and its replacement by a new mortgage from another lender. This can be repeated several times with the same property, using different lenders and lawyers

each time. When each transaction closes, the lawyer pays the proceeds to the client, who makes a few mortgage payments, then disappears with the funds.

A subset of identity fraud that has garnered much attention over the past few years is “rent/steal fraud”. A defining feature that allows this type of fraud to be so effective is that the fraudster is able to get physical possession of the house, thereby avoiding any problem associated with the lender inspecting the property.

This type of scheme will usually involve the fraudster renting a home that is free of any mortgages. Typically, several months’ rent will be paid in advance to ensure that the real owner does not have his or her attention directed to the property during that time. The fraudster may then agree to sell the property, or arrange a mortgage. In either case, the fraudster impersonates the true registered owner. When the transaction closes, the proceeds will be paid to the fraudster, who vanishes. The true owner usually does not become aware of the fraud until the prepaid rent runs out, and he or she visits the property, to find it either abandoned, or occupied by an innocent purchaser.

To prevent “rent/steal fraud”, clients who intend to rent a property should be advised to visit it at regular intervals. If the clients cannot check up on the property personally, a friend or neighbour should be asked to help out. Clients should obtain and check references from prospective tenants before renting to them. If clients intend to leave a property vacant for several months, they should arrange for someone else to check the property regularly, as vacant properties are often the target of fraud.

### Value fraud

In this type of fraud, a fraudulent agreement of purchase and sale is prepared in which the “purchaser” is either non-existent or complicit in the fraud. The property is usually transferred at a price exceeding its real value. The fraudster then obtains a mortgage from a financial institution or other lender based on the inflated property value, and finances most or the entire purchase price. A few payments are made, and then the fraudsters disappear with the funds. In this case, the lender obtains a valid mortgage on the property and will usually sell it under Power of Sale, but will not recover all of its investment in the property. Value fraud is usually easier to perpetrate in an active real estate market.

### “Straw Buyer” Fraud

A relatively new trend in mortgage fraud in Canada is the use of “straw buyers”. The usual scenario involves a fraudster paying a few thousand dollars in cash to someone who is in need of money, such as an unsophisticated, unemployed or homeless person. The fraudster promises that the buyer will have no liability, and merely asks him or her to attend at a lawyer’s office to “sign a few papers”. The buyer becomes the owner of a property, often one that is undesirable or in bad repair. The fraudster provides the buyer with forged employment letters and other material to support the granting of a large mortgage to finance the purchase.

In some cases, the “straw buyer” is an accomplice in the fraud. “Straw buyer” fraud is often found in concert with value fraud.

A fraudster may use the same “straw buyer” several times, with different properties and lenders. The fraudster takes the mortgage money, makes few or no payments, and the buyer never moves in. Upon default under the mortgage, the buyer has no assets to satisfy the mortgage debt, and will often declare bankruptcy.

One of the greatest challenges regarding “straw buyers” is that until the fraudster behind the scheme is exposed, s/he can use multiple “straw buyers” to carry out numerous frauds. *Royal Bank of Canada v. Welton*<sup>8</sup> illustrates the sheer volume of fraudulent transactions that can be carried out in this way. In this case, it is alleged that the defendant solicitor for the bank, together with a number of co-defendants, fraudulently deceived Royal Bank into giving 33 mortgage loans for over \$5 million on generally run down properties. The bank alleges that in 22 instances, the properties were transferred to the straw person at well above market value. Additional properties were purchased at market value, and then sold to other straw buyers. The outcome of these allegations has yet to be decided, but the case highlights the danger of this type of fraud.

### Equity Stripping

This type of fraud occurs when a spouse who is going through a separation seeks to encumber property and take the proceeds for him/herself, so that the equity in the property is not subject to the other spouse’s property claims. Equity stripping is not new, but can still be factor in situations that make it possible. For example, where a spouse owns investment properties in his/her own name and a separation from the other spouse is imminent, the titled spouse may seek to place new mortgages on the properties without

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<sup>8</sup> [2007] O.J. No. 4800 (Sup. Ct.)

the other spouse's knowledge. Equity stripping may also occur in a business context, when partners or business associates have come to a parting of the ways.

### Power of Attorney Fraud

This mode of fraud can either involve a genuine power of attorney that is being used improperly, or a form of identity theft in which the fraudster forges a power of attorney to allow him/her to sell or mortgage a property. This form of fraud has been identified in case law over the past few years and there is some uncertainty surrounding it.

The case of *O'Brien v. Royal Bank of Canada*<sup>9</sup> provides an example of how a power of attorney can be fraudulently used to affect title. In this case, title to a condominium was held in one-third interests by a husband, wife and daughter. The father had left Canada. The daughter was going through financial difficulties and wished to mortgage the property further, but the mother objected. The daughter held a valid power of attorney from her father, and forged a power of attorney from her mother authorizing her to enter into transactions on her behalf. In 2005, the daughter transferred the interests of her parents to herself and refinanced the property with Royal Bank of Canada. This mortgage went into default, and the mother challenged the validity of the mortgage.

The court held that the mother was entitled to have the mortgage set aside, but that the bank was entitled to an equitable charge to preclude the mother's enrichment at the bank's expense. However, the bank was not permitted to enforce its equitable charge against the mother's interest in the property.

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<sup>9</sup> [2008] O.J. No. 653, 68 R.P.R. (4th) 261 (Sup. Ct.).



In *Reviczky v. Meleknia*<sup>10</sup>, an 88-year old owner rented his house to a tenant who turned out to be a fraudster. The fraudster assumed the identity of an imaginary grandson of the owner, and forged the owner's signature on a power of attorney to this fictitious person. He then sold the property to a good faith purchaser who mortgaged it to HSBC Bank of Canada. The bank, through the lawyer acting for it and the purchaser, dealt with the fraudster through the fraudster's lawyer. The power of attorney was dated one month before the transaction closed, It was witnessed by only one person, instead of the two mandated by the *Substitute Decisions Act, 1992*<sup>11</sup>. Neither of the lawyers in the transaction noted the lack of a second witness. The court held that both the mortgage and transfer were invalid, as the bank (through its lawyer) could have avoided the fraud by examining the power of attorney document and raising questions that likely would have avoided the fraud.

It should be noted that transfer and mortgage in the *Reviczky* case were registered before October 19, 2006, although it appears that the result likely would have been the same under the new legislation.

While there has been some debate as to the exact standard of care required from lawyers when dealing with power of attorneys<sup>12</sup>, all agree that lawyers must be cautious when presented with a power of attorney in a real estate transaction. The instructions of lenders

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<sup>10</sup> [2007] O.J. No. 4992, 88 O.R. (3d) 699 (Sup. Ct.).

<sup>11</sup> S.O. 1992, c. 30, s.10 (1).

<sup>12</sup> For more on this topic see: Brian Bucknall, Case Comment on *Reviczky v. Meleknia*, (2008), 66 R.P.R. (4th) 274, and Debra Rolph, "Powers of Attorney and Solicitors' Liability: The Case Law" *LawPRO* 7:2 (Summer 2008) 9.

and title insurers with respect to power of attorney transactions should be followed. Additionally, lawyers should familiarize themselves with the Law Society of Upper Canada's "Guidelines on Powers of Attorney in Real Estate Transactions"<sup>13</sup>.

### Reverse Mortgage Fraud

Reverse mortgages are becoming more common. They are designed for older people who have significant equity in a property, but lack income. The mortgage allows the owners to use their home equity to generate the income they need. The mortgagors are not required to make payments under the mortgage; instead, they receive regular or lump sum payments from the lender. The accumulated principal and interest becomes due when the homeowners sell, move, die, or fail to pay taxes or insurance on the property.

The fraudster in a reverse mortgage fraud may impersonate an elderly or deceased person who owns a property, or use a power of attorney. The fraudster then steals the proceeds of the reverse mortgage. This kind of fraud is often committed by relatives, caretakers or financial advisors who are familiar with the older person's affairs and may have access to their records. Because no regular payments are due under the mortgage, a fraud of this type may not become known for several years.

A criminal case in British Columbia illustrates how reverse mortgages can be an effective tool for fraudsters, even outside the real estate context. In *R. v. Kralik*<sup>14</sup>, the British Columbia Supreme Court was presented with a case in which a fraudster charged an elderly lady \$200,000.00 for home repairs that had a real value of under \$40,000.00. The

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<sup>13</sup> [http://www.lsuc.on.ca/media/power\\_of\\_authority.pdf](http://www.lsuc.on.ca/media/power_of_authority.pdf).

<sup>14</sup> [2006] B.C.J. No. 1831, 2006 BCSC 648 (B.C.S.C).

court was persuaded beyond a reasonable doubt that the accused had knowingly engaged in dishonest conduct and was aware that his conduct was depriving the complainant of significant amounts of money. Aside from persuading the elderly lady that her home required extensive repairs when it did not, he also persuaded her to take a reverse mortgage on her home to enable her to pay for the repairs. Although this case does not involve a fraudulent reverse mortgage *per se*, it does illustrate how reverse mortgages can be tools of fraud.

In the United States, reverse mortgages are more common, and fraud schemes involving them are more complex, often incorporating identity theft and value fraud. Although there are no allegations of widespread abuse, schemes that have succeeded have often been more daring than those found in Canada. Some American lenders now require evidence that reverse mortgage applicants have owned their homes for at least six months to a year.<sup>15</sup> These new requirements are meant to prevent value fraud and reverse mortgage fraud from operating together.

A common American scenario involves speculators purchasing distressed properties, performing minor cosmetic repairs and obtaining inflated appraisals. They promise seniors who are in need of money that they can obtain homes with little or no money down, then transfer the homes to them at above-market prices. The seniors obtain a large reverse mortgage and divert some, if not all, of the proceeds to the scheme's promoters.<sup>16</sup>

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<sup>15</sup> Anne Tergesen, "Mortgage Fraud: A Classic Crime's Latest Twists - As 'Reverse' Loans Grow More Popular, Scams Put Older Adults at Risk" *The Wall Street Journal* (27 August 2009), online: *The Wall Street Journal* <http://online.wsj.com/article/SB10001424052970204044204574362641338197748.html>.

<sup>16</sup> *Ibid.*

It will be seen that this type of fraud has many factors in common with “straw buyer” frauds.

### Internal Fraud

While real estate fraud often involves cunning clients or detailed schemes, it can also involve lawyers, law clerks or other support staff in law offices who have access to information, documents and money. Internal frauds may be motivated by the need for cash, generated by:

- personal stress, such as divorce, business reversals, gambling or substance abuse;
- unrealistic lifestyle expectations; or
- feeling that the person is overworked and underpaid and is “setting things right”.

Opportunities for internal fraud occur when lawyers:

- work in “silos” isolated from other parts of the firm;
- only inform staff of what they are doing;
- are able to avoid or override internal controls; or
- deal with suspicions or complaints through direct client contact,

and when staff:

- take advantage of flaws in internal controls; or
- have access to lawyers’ PSPs and passwords<sup>17</sup>.

Some signs of possible internal fraud include:

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<sup>17</sup> Prohibited by Rule 5.01(3) of the Law Society of Upper Canada Rules of Professional Conduct.

- not taking holidays, especially for several consecutive days;
- sudden change in a staff member's lifestyle or personality;
- receiving mail for a corporation that has no client file;
- receiving past due account notices;
- changes to documents or cheques; or
- missing original documents.

To prevent internal fraud, lawyers can enforce separation of duties between employees, conduct surprise audits or inspections, or have regular staff rotations. If “past due” notices are received, contact suppliers to ensure that they are receiving payments made by the firm. If possible, do not sign cheques or documents in a hurry. When hiring new employees, check their references carefully.

The case of *793470 Ontario Ltd. v. Stafford (Royal York) Ltd*<sup>18</sup> provides an example of real estate fraud by a lawyer, in a case that did not involve the registration of fraudulent documents (and therefore probably would have fallen outside the scope of the Bill 152 amendments if it had occurred after October 19, 2006). In this case, a private lender authorized a discharge of its mortgage, expecting to be paid out. The lender's lawyer forged a direction from the lender to pay funds to a company controlled by the lawyer, and advised the lender that the borrower had changed its mind about paying off the mortgage. The discharge was registered, and was later followed by several new mortgages which relied on the title being free from the discharged encumbrance.

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<sup>18</sup> [2008] O.J. No. 5764 (Sup. Ct.), affirmed [2009] O.J. No. 725 (C.A.).

The lender sought to have its mortgage restored to title in priority to the subsequent mortgages. The court held that because the discharge was not fraudulent, the lender's mortgage would not be restored. Despite the fraud, the discharge was still legitimate; it was the direction of the funds that was fraudulent, and the lender's remedy was against the lawyer who forged it.

### **“Red Flags” of Fraud**

Lawyers and their staff should be aware of the signs of possible mortgage fraud. The presence of one or more of these “red flags” does not necessarily mean that the transaction is a fraud; however, it does mean that questions should be asked, and adequately answered, before the deal proceeds. The presence of multiple “red flags” should be considered a serious warning.

In addition, a lawyer representing a borrower and lender must disclose to the borrower and lender, in writing, before funds are released, all material information (such as possible indicia of fraud) that is relevant to the transaction.<sup>19</sup> The lawyer should then obtain the clients' instructions on whether to proceed.

Some “red flags” involving the client include:

- new client (offshore or otherwise);
- client presses for closing quickly, sometimes promising more business in return;

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<sup>19</sup> Subrule 2.04(6.1) of the Law Society of Upper Canada Rules of Professional Conduct.

- client having no interest in the property, price, mortgage interest rate, legal or brokerage fees, or the lawyer's explanation of mortgage documents;
- cell phones are the only contact numbers provided;
- client cannot produce title documents, survey, reporting letter, tax or utility bills for property;
- client cannot produce photo identification;
- funds are directed to one or more third parties with no apparent connection to the transaction;
- client's mailing address is a post office box;
- client is "out of sync" with property (i.e., does not appear to be the type of person who usually purchases property of this type); or
- client refuses to allow contact with prior lawyer.

The transaction itself can present "red flags", such as:

- repeat activity on a single property, or by a single client or set of clients;
- someone other than the buyer appears to control the transaction;
- client makes no inquiry about picking up keys or moving in;
- deposit not held by real estate agent or lawyer;
- no deposit, or small deposit relative to purchase price;
- immediate resale without re-listing;
- one lawyer acting for many parties;
- tenant paying more than 1 or 2 months' rent in advance;
- title shows several recent mortgage discharges, without reasonable explanation;

- Agreement of Purchase and Sale with no handwritten changes;
- Amendments to the original Agreement of Purchase and Sale, lowering the price or granting credits to the vendor;
- municipality or utility companies have no knowledge of client's ownership of property;
- funds provided to lawyer by way of temporary cheque without a pre-printed name or address;
- name of purchaser spelt differently throughout the transaction;
- unusual adjustments in favour of the vendor, or large vendor take back mortgage;
- purchaser supplies little or no of his/her own money to close;
- lack of access by purchaser to property, or unusual restrictions on access;
- "private agreement" with no real estate agent involved, or real estate agent named in agreement has no knowledge of deal; or
- Agreement of Purchase and Sale between relatives or business associates.

### **Detection and Prevention**

Some simple and effective methods that real estate lawyers can use to assist in detecting and preventing fraud include:

- Comply with the Law Society of Upper Canada client identification and verification requirements;
- Insist on the client producing original documents and identification, not just photocopies;



- Hold the card or document – if it is forged, there may be a burning sensation due to chemicals used;
- Review date of birth, picture, address and other personal details to ensure they match the client;
- Check for misspellings, in client’s name or in standard form wording – they may mean the document is a fake;
- If in doubt regarding the authenticity of an Ontario driver’s licence, check it on the Ontario Ministry of Transportation website at: <https://www.dlc.rus.mto.gov.on.ca/dlc/OrderForm.aspx>  
or call 1-900-565-6555  
The charge is \$2.00 for a website check and \$2.50 for a check by phone;
- Ask questions on deals where the client is pressing to close quickly;
- Do not allow documents to be taken outside your office for execution;
- If a party cannot come to the office and you cannot meet with them, have them execute documents before another lawyer or notary who is qualified in the jurisdiction where they are located. If documents are signed in another lawyer’s or notary’s office, obtain evidence of compliance with Ontario’s Law Society of Upper Canada’s identification and verification requirements; and
- Be alert if the price or type of transaction is inconsistent with market trends in the area.

While it is difficult to completely prevent the occurrence of fraud, familiarity with the common methods of fraud and an understanding of how to recognize and avoid fraudulent transactions will thwart many attempts.

### **Criminal Penalties for Fraud**

The awareness of the significance of fraud has increased to a point where the federal government introduced Bill C-52: *An Act to Amend the Criminal Code (sentencing for fraud)*.<sup>20</sup> Upon proclamation, these amendments will impose a minimum sentence of two years for fraud convictions under the *Criminal Code*.<sup>21</sup> Furthermore, aggravating factors in sentencing will include whether the magnitude or duration of the fraud was significant; whether the offender failed to comply with a licensing or professional standard; and whether the offender concealed or destroyed records related to fraud.

### **American Real Estate Frauds**

Fraudsters in both Canada and the United States can be intelligent people, often working in groups, who are constantly inventing new schemes to evade detection. Some are local “mom and pop” fraud shops; others have links to organized crime or money laundering.

In the past, we have seen fraudsters in Canada use methods that have already been successful in the United States. Although the current state of the American housing market is generally quite different from Canada’s, a review of fraud methods in use there can assist in identifying and reacting to new types of fraud here, more quickly and efficiently than would otherwise be the case.

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<sup>20</sup> 2<sup>nd</sup> Sess., 40<sup>th</sup> Parl., 2009.

<sup>21</sup> R.S.C. 1985, c. C-46.

The sources of information on real estate fraud in the U.S. are myriad, and include the F.B.I website.<sup>22</sup> One scheme that has been singled out by the F.B.I. is the foreclosure rescue fraud.<sup>23</sup> In this ploy, the perpetrator convinces a defaulting homeowner that they can save their home from foreclosure through a transfer of the property and payment of up-front fees to the fraudster. The fraudster then sells or mortgages the house without the homeowner's knowledge. This scheme is especially prevalent where homeowners are unsophisticated and real estate prices have fallen. Millions of dollars in losses have been sustained in the U.S. due to schemes like this.<sup>24</sup>

Another type of fraud that the F.B.I. has brought to the American public's attention is "short sale" fraud. In this scenario, the perpetrator engages a straw buyer as an accomplice to finance the purchase of a property with a large mortgage. No payments are made under the mortgage. The property goes into foreclosure, and the lender may be prepared to sell it at a low price in order to get the mortgage off its books and avoid having to take possession of the property. The perpetrator takes advantage of this situation by purchasing the property from the lender at the low, or "short sale" price. The fraudster then sells the property at its actual value, for a profit.<sup>25</sup>

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<sup>22</sup> [http://www.fbi.gov/hq/mortgage\\_fraud.htm](http://www.fbi.gov/hq/mortgage_fraud.htm)

<sup>23</sup> Scott Broshers, "Mortgage Loan Fraud: How Bad Is It?" (Presentation at the Property Records Information Association 2009 Real Estate Fraud Prevention Summit, 4 March 2009).

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

While Canadians largely have not seen the conditions which gave rise to the frauds described above, Canadian lawyers who are aware of them will be better equipped to detect them if they occur here.

### **Conclusion**

Real estate fraud is always evolving, but value and identity fraud remain the most dominant, sometimes combined with straw buyer or power of attorney frauds. A strong understanding of these two modes, coupled with an awareness of the new approaches and techniques and their associated red flags, will help in detecting real estate fraud and controlling its spread. A commitment to vigilance against fraudulent transactions together with new government initiatives will help ensure that real estate remains a sound and secure investment. For more information and red flags concerning all types of fraud, see the fraud section of the LAWPRO website at [www.practicepro.ca/fraud](http://www.practicepro.ca/fraud) and the Law Society of Upper Canada website at [www.lsuc.on.ca](http://www.lsuc.on.ca)

# FRAUD

# FACT SHEET

LAWPRO® ...making a difference for the legal profession

## How you can avoid being duped

Fraud continues to be a significant and costly problem for LAWPRO. Fraudsters are successfully duping lawyers and law clerks, and it's not just real estate lawyers who are being targeted. Litigation, business, IP and family law lawyers are frequent targets of bad cheque scams involving debt collections, business loans, licensing disputes, and spousal support payments.

**Don't be complacent and think you would never be fooled.** These frauds are very sophisticated. The matters will look legitimate, the fraudsters will be very convincing and the client ID and other documents you get will look real. The fake cheques have fooled bank tellers and branch managers. There may even be two or more people collaborating on both sides of a transaction to make the scenario more convincing.



## What to do if you have a suspicious file

Proceed with caution if you have even the slightest suspicion that the matter you are handling isn't legitimate.

- Look for the red flags of a fraud. See the lists on the following pages.
- Ask questions and dig deeper, especially if the facts don't add up or are inconsistent. See the next page for a list of things you can do.
- Visit the [AvoidAClaim.com](http://AvoidAClaim.com) blog to see email messages and documents from the frauds LAWPRO is seeing. Click on the Confirmed Frauds button to see a full listing of names of confirmed fraudster clients.

If you still aren't sure the matter is legitimate, call LAWPRO. Our experience with multiple frauds can help determine if you are being duped. If the matter turns out to be a fraud and there is a potential claim, we will work with you to prevent the fraud, if possible, and to minimize potential claims costs.

Ultimately, if you aren't completely sure a matter is legitimate, terminate the retainer. Don't be sucked in by your emotions or a strong desire to help. Don't let the lure of a generous fee cause you to ignore your concerns as to the legitimacy of a matter. If it looks too easy or sounds too good to be true, it probably is.

### Report obvious frauds to LAWPRO

Help us help other lawyers by sending obviously fraudulent messages or scans of identification and other documents provided to you to [fraudinfo@lawpro.ca](mailto:fraudinfo@lawpro.ca)

### Get fraud updates from AvoidAClaim.com blog

For immediate updates on fraud and claims prevention, subscribe to the email or RSS updates from LAWPRO's AvoidAClaim blog.



## **Real Estate Fraud Being Creative and Fighting Back**

Real estate fraud is a serious issue. Lawyers should consider implementing procedures within their firms to fight fraud. The following is a list of steps that a lawyer can take to fight fraud. This list is not exhaustive nor is it intended to replace the lawyer's professional judgment. With the exception of those steps that a lawyer must take in order to comply with legal or regulatory requirements (Rules of Professional Conduct or By-Laws), a lawyer should take steps and implement procedures to fight fraud best suited to the lawyer's practice and the circumstances of the individual client file.

Consider taking some of these steps to fight fraud.

### **Hiring Practices**

- ❑ Verify past employment.
- ❑ If there are gaps in the employment history, obtain explanations for those gaps.
- ❑ Check the details of the resume and call the references.
- ❑ In appropriate circumstances, do background checks.

### **Accounting Controls**

#### **Cheques**

- ❑ Never sign a blank cheque.
- ❑ Never sign a cheque with no payee or no amount stated.
- ❑ Carefully review cheques before signing.
- ❑ Develop a policy where requests for cheques are accompanied by a signed cheque requisition evidencing approval.
- ❑ Establish a policy to always issue receipts for all cash and cheques received.
- ❑ Keep cheques in a secure location and allow access only to authorized staff.

- ❑ Stamp incoming cheques “for deposit only” and whenever possible deposit cheques the same day that the cheque is received.
- ❑ Stamp original copies of invoices “paid” to prevent a person from using the invoice more than once to obtain payment.
- ❑ Number cheques in order and check the sequence.
- ❑ Number receipts in order and check the sequence.

### **Bookkeeping**

- ❑ Regularly review your books and records including source documents such as deposit books and cancelled cheques.
- ❑ Do not let accounting records fall into arrears.
- ❑ Reconcile your accounts within the required time period (by the 25<sup>th</sup> day of the month following) and look at all original bank statements, cheques including cheque numbers, deposit books, computer print outs or ledger sheets as part of the process.
- ❑ Periodically check the clients’ trust ledger looking for unusual or incorrect items.
- ❑ Ensure that you have adequate documentation in the file for trust transfers - for example, written instructions from the client authorizing the transfer of funds to another client.

### **Segregation of Duties and Handling of Money**

- ❑ If possible when assigning duties separate the duties of staff so that one person does not have complete control of the process. For example, assign the task of opening the mail and receiving deliveries to one person and the duty to make deposits to another person.
- ❑ If possible separate the tasks of creating and posting cheques and reconciling cheques and receipts.
- ❑ If practicable, have two signing authorities for cheques over a certain amount of money.

### **Supervision of Staff**

- ❑ Set an example by acting ethically.
- ❑ Periodically conduct spot reviews of files.
- ❑ Have a policy of keeping a copy of cheques relating to a matter in the file so that multiple staff sees the cheques.

- ❑ Have bank statements delivered to you unopened.

## **Electronic Registration – Personal Security Package (PSP)**

- ❑ Implement policies in your firm to safeguard your PSP(diskette and pass phrase used to access the electronic registration system) and all PSPs issued under your Teraview account.
- ❑ Train staff to ensure they understand the importance of not sharing PSPS and safeguarding their PSPs.
- ❑ Review disbursements made through your Teraview account.
- ❑ Develop policies requiring staff to report to you any misuse of PSPs by anyone who has a PSP under your account.
- ❑ Take steps to cancel PSPs belonging to persons no longer with your firm.
- ❑ Periodically review disbursements made through your Teraview account looking for any unusual disbursements or activity.

## **Joint Retainers**

- ❑ If you are acting in a joint retainer ensure that you act in the best interests of both clients throughout the retainer and that you do not prefer the interest of one client to the other.
- ❑ If you are acting for both a borrower and a lender in a mortgage transaction, disclose to the borrower and the lender in writing before the advance or release of the mortgage funds, all material and information that is relevant to the transaction.

This information might include:

- ❑ the fact that there is a flip (the property is being re-sold the same day or within a short period of time at a higher price)
- ❑ the fact that there are amendments to the agreement of purchase and sale, either formal or otherwise, changing the terms of the agreement upon which the lender has based its mortgage transaction. Examples include:



- ❑ purchase price reductions
  - ❑ extra deposits payable
  - ❑ renovation or other credits
  - ❑ cash-backs or other credits to the purchaser
  - ❑ changing the parties to the transaction
  - ❑ changing the purchase price
  - ❑ adding subsequent mortgages
  - ❑ adding a vendor take back mortgage
  - ❑ changing the amount payable on closing and
  - ❑ changing the manner of taking title
  
- ❑ the fact that the mortgage documentation is to be executed under power of attorney where this fact is not apparently known to the lender
  
- ❑ information about the circumstances of the agreement of purchase and sale upon which the lender has based its mortgage transaction and which could affect the lender's ultimate decision to advance funds. Examples include:
  - ❑ the vendor named in the agreement of purchase and sale is not the registered owner of the property at the time of the agreement of purchase and sale
  - ❑ the actual deposit being paid
  - ❑ the actual date of closing
  - ❑ the actual proceeds of sale expected by the vendor
  - ❑ the use of counter cheques
  - ❑ identification irregularities
  
- ❑ information about the transaction or purchaser that is inconsistent with the information shown in the mortgage commitment. Examples include:

- ❑ changes in the mortgagor's economic circumstances
  - ❑ changes in the mortgagor's employment
  - ❑ changes in the mortgagor's marital status and
  - ❑ evidence of inaccurate appraisals
- ❑ mortgage surpluses - the fact that the mortgage advance exceeds the balance due or actually paid on closing
- ❑ the direct payment of the deposit or down-payment to the vendor.

## **Be on Guard against Becoming the Tool or Dupe of an Unscrupulous Client**

- ❑ If you have suspicions or doubts that you might be assisting a client in dishonesty, fraud or illegal conduct:
  - ❑ make reasonable inquiries about the client
  - ❑ make reasonable inquiries about the subject matter and purpose of the retainer
  - ❑ make notes of the results of these inquiries
  - ❑ disclose your concerns to all of the clients in the retainer
  - ❑ if appropriate withdraw from representing the client (s).
- ❑ Clarify the nature and purpose of a complex or unusual transaction where the purpose is not clear and make notes to the file.
- ❑ Comply with the Law society Know Your Client requirements.

- ❑ Make it a practice whenever possible or practicable for you to meet personally with the client and attend to the signing of the closing documents.
- ❑ Undertake steps to verify that the person retaining you and/or signing documents under your supervision has reasonable identification to substantiate that he or she is the named client/party and retain details or information in the file about the identification obtained.
- ❑ If you are acting for a corporation or an organization, ensure that the person giving instructions for the organization or corporation is acting within that person's actual or ostensible authority.
- ❑ If you are acting for a corporation, request and review the original minute books of the corporation.
- ❑ If you are concerned about the identity of a lawyer acting in a transaction, verify that the address and phone number of that lawyer match the information on file with the Law Society.

## **Closing Transactions and Due Diligence**

- ❑ Develop and use checklists of red flag indicators to assist you to identify transactions that could involve real estate fraud;
- ❑ Review instructions from the lender carefully as soon as possible upon receipt and develop a list of requirements. If you are unable to meet the requirements immediately notify the clients.

- Review when doing a title search:
  - all documents on title affecting the client's interest in the property and retain notes on the search of title with respect to every real estate file
  - the values revealed by arms-length transfers in the recent past, to determine if there have been any suspicious changes in value
  - the pattern of inactive or deleted instruments on the parcel register and inquire about any suspicious patterns of transfers or discharges.
  
- Report the results of the title search and due diligence process and in particular any suspicious patterns of transfers or discharges and/or any suspicious changes in values revealed by the due diligence process to the purchaser/borrower if you are acting for the purchaser/borrower, the lender if you are acting for the lender and the title insurer.
  
- Prior to registering electronic documents, obtain and retain in your file the client's written authorization.
  
- Develop a policy that whenever possible only a lawyer in your firm will sign for completeness documents that require electronic registration.
  
- Carefully review documents before they are signed.

- ❑ Develop checklists of red flag indicators of real estate fraud for use by staff so that files containing certain indicators are brought to your attention immediately.
- ❑ Train staff to look for indicators of real estate fraud in real estate files and to bring those files to your immediate attention.
- ❑ Discuss title insurance options with your clients including coverage for fraud so that they fully understand the scope of the coverage available and if the client decides not to obtain title insurance, obtain a written waiver from the client.
- ❑ Where title insurance is being obtained, issue the title insurance policy as soon as possible after closing to insure that an issued policy exists should the client need to make a claim.
- ❑ Where title insurance has been obtained, compare the issued policy carefully to the draft policy or binder/commitment received before closing to ensure that there are no discrepancies in coverage.

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- i. Some of the practice tips included in this article have been adapted from an article entitled “*Is there a crook in the firm?*” written by Susan Elliott for the Law Society Program, *Fighting Real Estate Fraud* presented on October 19, 2004, and from the LAWPRO publication, “*The Many Faces of Fraud*”, published June, 2004.

*This information is not a substitute for the member’s own research, analysis and judgment. The Law Society of Upper Canada does not provide substantive legal advice or opinions.*

# Bad cheque scams

Fraudsters retain the firm on a contrived legal matter so that they can run a counterfeit cheque or bank draft through the firm trust account and walk away with real money. These contrived

matters will look real. The fraudster will provide extensive and very real looking ID and documents. When the bad cheque or draft bounces, there will be a shortfall in the trust account.

## Common types of bad cheque fraud:

### Debt/loan collection fraud

- Targets litigators.
- Fraudster will ask for help with a personal or business debt collection.
- Debtor will pay up with little or no pushing.

### Spousal support collection fraud

- Targets family lawyers.
- Fraudster will ask you to help with collection from ex-spouse, often further to a “collaborative settlement agreement.”
- Ex-spouse will pay up with little or no pushing.

### Trademark and copyright infringement fraud

- Targets IP lawyers.
- Fraudster seeks damages from a breach of a trademark or copyright agreement.
- The company in breach will pay up with little or no pushing.

### Business equipment purchase fraud

- Targets business lawyers.
- Fraudster will ask you to handle a purchase (e.g., a dredger).
- Sale proceeds are coming from fake buyer.

### Real estate deposit fraud

- Contacts realtors, who put fraudsters in touch with real estate lawyers.
- Overseas client sends lawyer a deposit cheque for a property they saw online.
- Fraudster then backs out of the deal, and asks lawyer to wire the deposit funds back (minus any fees and penalties).

## Red flags

These are the common red flags that can indicate that a matter is a fraud. While some of these things may occur on legitimate matters, you should proceed with extreme caution if many of them appear on any matter you are handling.

- Initial contact email is generically addressed (e.g., “Dear attorney”) and BCC’d to many people.
- The name and/or email address in the FROM line is different from the name and/or email address of the person you are asked to reply to in the body of the email.
- Client uses one or more email addresses from a free email service (e.g., Gmail, MSN, Yahoo!), even when the matter is on behalf of a business entity.
- Client raises issues of conflicts or payment of a retainer.
- Domain name used in email address or website was recently registered (check at WhoIs.net).
- Email header indicates sender is not where he/she claims to be.
- Client is new to your firm.
- Client is in a distant jurisdiction.
- Client shows up and wants the matter completed around banking holidays.
- Client says he prefers email communication due to time zone differences.
- Client is in a rush – and pressures you to “do the deal” quickly.
- Client and others involved don’t seem concerned if shortcuts are taken.
- Client is willing to pay higher-than-usual fees on a contingent basis from (bogus) funds you are to receive.
- Despite the client stating a lawyer is needed to help push for payment, the debtor pays without any hassle.
- Cheque or bank draft arrives at your office in a plain envelope and/or without a covering letter.
- Cheque is drawn from the account of an entity that appears to be unrelated (e.g., a spousal arrears payment from a business entity).
- Payment amounts are different than expected or change without explanation.
- Client instructs you to quickly wire the funds to an offshore bank account based on changed or urgent circumstances.
- Some or all of the payment is going to third party who appears unrelated to the matters.

## Due diligence on suspected fraudster

Take these steps to cross-check and verify information provided to you by the client.

- Cross-check names, addresses, and phone numbers of the client and other people/entities involved in the matter on Google® and other search engines.
- Tip: To find exact matches, enclose your search terms in double quotes.
- Do reverse searches on phone numbers.
- Look up addresses using Street View in Google Maps.
- Ask your bank or the issuing bank to confirm the branch transit number and cheque are legitimate.
- Call the entity making the payment or loan and ask if they are aware of the transaction.
- Contact the company to confirm it is expecting debtor’s payment or business loan.
- Hold the funds until your bank confirms the funds are “good” by contacting the other bank, and have the bank confirm, in writing, that it is safe to withdraw from the deposit.

# Real estate scams

## Identity theft fraud

- Client uses fake ID to assume identity of existing property owner (or by filing Form 1 to become director/officer of corporate owner).
- Client sells or mortgages the property, or discharges mortgage from title, then gets new (often high-ratio) mortgage from another lender.
- Paperwork looks in order; no encumbrances on title, but one or more recently discharged mortgages.
- Client in a hurry and accommodating; may discourage house inspection or appraisal.
- Transaction closes, you pay proceeds to client who makes a few mortgage payments, then disappears with funds.
- Lender sues you for value of mortgage.

## Red flags: The client

- Funds directed to parties with no apparent connection to borrower or property. Client changes instructions regarding amounts or payees just before closing, or fails to bring in funds as promised.
- Does not care about property, price, mortgage interest rate, legal and/or brokerage fees.
- Does not appear familiar with property.
- Won't permit contact with prior lawyer.
- Client is "out of sync" with property – e.g., don't appear educated/affluent enough.
- Stranger who appears to control client attends to sign documents.
- One spouse or business partner mortgaging equity in property owned by both.

### **TIP: BE ALERT**

- Avoid having documents executed outside your office.
- Include deleted instruments in title search.
- If Ontario driver's licence used as ID, consider verifying it on the MTO website.

## Flip (value) fraud

- Happens on purchase or refinance deals.
- Client says she or he is a real estate agent or in business of buying and selling.
- Client promises high fees, lots of business for quick turnaround on deals. (Short turnaround means proper searches aren't conducted.)
- Once transaction closes, client flips property to accomplice (e.g., appraiser and/or mortgage broker) for much higher value.
- Lender issues mortgage on inflated property value.
- Client uses mortgage proceeds to pay initial purchase price, splits excess funds with accomplices.
- Client makes a few payments, and then disappears with funds.
- Lender sues you for excess/inflated value of mortgage.

## Red flags: The transaction

- Repeat activity on single property or for single client. Title shows one or more recent transfers, mortgages or discharges.
- Rental and vacant properties especially vulnerable.
- Client buys and sells often, prefers to deal in cash.
- Property listing expired without sale (i.e., sale may be unregistered).
- Frequent and quick mortgage discharges on property.
- New referral source sending lots of business.
- Transaction area is distant from your office.
- Deposit not held by agent or lawyer.
- May target long time owners (deceased, ill, or elderly who may be less alert to signs their identity is being stolen).
- "Rush" deals, often with promise of more.
- Client produces small deposit relative to price.
- Amendment to Agreement of Purchase and Sale reducing price, deposit, or adding creditors.
- Sale is presented as a "private agreement" – no agent involved, or named agent has no knowledge of transaction.
- Municipality or utility companies have no knowledge of client's ownership.
- Client paying little or nothing from own funds.
- Unusual adjustments in favour of vendor, or large vendor-take-back mortgage.
- Use of counter cheques.
- Use of Power of Attorney.

## More information on protecting clients against real estate fraud

TitlePLUS® title insurance provides coverage for your clients when they buy a home. Through the OwnerEXPRESS® program, TitlePLUS insurance also provides fraud protection for clients who may have purchased a property earlier but did not also secure title insurance protection on that purchase.

TitlePLUS insurance provides fraud coverage as follows:

- for frauds that may have occurred prior to purchase (e.g., it turns out that the vendor does not really have the right to sell the property);
- if the property becomes a target of fraud at a later date. This is part of the post-Policy Date protection in the TitlePLUS policy.

There is also a “duty to defend” in the policy, which means that it is our problem, not yours, if someone must contact the government to request that title be restored to your client in the official records. (Please refer to the policy for full details, including actual terms and conditions.)

For more information visit [titleplus.ca](http://titleplus.ca) under our "Products and Services," and "Publications" tabs.

The TitlePLUS policy is underwritten by Lawyers' Professional Indemnity Company (LAWPRO).



# Is the fraudster in your office?

Not all fraudsters are strangers. Even partners, associates, law clerks or other employees may turn to fraud because of financial pressures from a divorce, failed business venture, or other personal crisis.

## Red flags

- Someone never takes vacation or sick leave, works overly long hours, or refuses to delegate work.
- A firm member undergoes a sudden change in lifestyle or temperament.
- The firm receives mail for a corporation for which no client file is opened or billed, or minute books are kept in the lawyer's office instead of with the corporate law clerk.
- Unusual patterns such as a sudden increase in payments to a person or entity, or complaints about slow payment from suppliers or clients, or an increase in written-off work in progress (WIP).

For more information see “Fraud on the Inside: What to do when partners, associates or staff commit fraud” at [lawpro.ca/magazine](http://lawpro.ca/magazine)

### More information on fraud

To learn more about what fraud looks like and how to prevent it from happening to you and your firm, go to: [practicepro.ca/fraud](http://practicepro.ca/fraud)



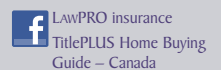
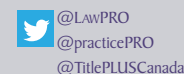
## LAWPRO's enhanced coverage for counterfeit certified cheques, bank drafts

As of January 1, 2010, the LAWPRO policy provides some overdraft protection to lawyers in relation to their trust accounts where liability for the overdraft results from the handling of a counterfeit certified cheque or counterfeit bank draft in the capacity of a practising lawyer. This enhanced protection is subject to several conditions and limitations. Review the FAQs ([lawpro.ca/FAQs](http://lawpro.ca/FAQs)) on the LAWPRO website to make sure you understand this coverage and the extra steps you must take to qualify for it.

This information bulletin is published by LAWPRO to provide lawyers and law firm employees with an overview of some common types of fraud, and to provide practical advice on ways to minimize their exposure to fraud-related claims. The material presented does not establish, report or create the standard of care for lawyers. The material is not a complete analysis of the topics covered, and readers are encouraged to conduct their own appropriate legal research. The comments in this publication are intended as a general description of the insurance and services available to qualified customers through LAWPRO. Your policy is the contract that specifically and fully describes your coverage and nothing stated here revises or amends the policy.

[lawpro.ca](http://lawpro.ca)  
Tel: (416) 598-5800 or 1-800-410-1013  
Fax: (416) 599-8341 or 1-800-286-7639  
Email: [practicepro@lawpro.ca](mailto:practicepro@lawpro.ca)

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# Introduction to Fraud

Real Estate Practice Basics 2016  
December 9, 2016



Raymond G Leclair  
Vice President, Public Affairs  
Lawyers' Professional Indemnity Company

## AGENDA



- What is fraud and why is it of concern?
- Categories of fraud and basic scenarios
- Red flags and tips on how to recognize fraud



## What is fraud?

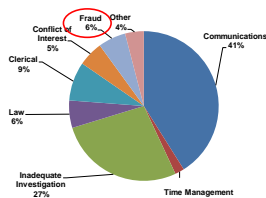
- Fraud for profit
- Fraud for shelter



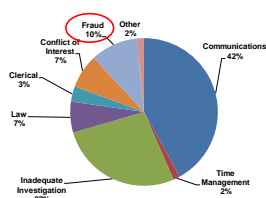
## What's the big deal about fraud?



## Real Estate Claims Causes (2005-2015)



By Count



By Cost



## Fraud claims: still a concern

### 2015 E&O program

- 18 fraud related claims
- \$1.2 million in costs (actual + reserves)
- In 2014 - 108 claims costing \$6.4 million
- In 2013 - 72 claims costing \$3.9 million
- In 2012 - 78 claims costing \$5.8 million
- In 2011 - 70 claims costing \$5.0 million
- In 2010 - 53 claims costing \$5.0 million

### TitlePLUS program since inception

- 1.4% of claims are fraud-related
- 17% of claims costs

As of November, 2015



### Consequences of being involved in a fraudulent transaction

- Public trust:
  - A case from BC - \$38 million in damages, costs absorbed by the bar – annual fee increase for special fund: from \$250 to \$600 (2003-2009)
- Reputational damage
- Professional liability
- LAWPRO coverage and REPCO coverage
- Mortgage fraud investigation by the Law Society:
  - 34 new lawyers investigated in 2015 (224 since 2011)
  - 2.8 cases of fraud per month in 2015
  - since 2001:
    - 45 lawyers' licenses were revoked
    - 18 surrendered licence & 51 suspended



### Fraud 101: Basic Scenarios

- Fraud can be sophisticated, but:
  - Simple scams, like Nigerian advance-fee scams, trap many
  - Lawyers can be busy
  - A crook can be anyone, including another lawyer or staff
  - People can be gullible
- Lawyer - scoundrel or dupe?



### Real estate fraud: Types

- Identity Theft (forgery, impersonation)
  - Sophisticated fake documents
  - Rent/steal fraud
- Equity Theft
- Value Fraud



### Real estate fraud: Types

- Straw buyer
- Power of Attorney
- Reverse mortgage



### Real estate fraud: Types of "Bad" Cheques Scam

- Real Estate
- Business Loan
- Debt Collection
- Collaborative Family Law Agreement
- Employee Theft
- Retainer or Deposit Refunds



### Real estate fraud: "Bad" Cheques Scam examples

Lawyers can no longer assume that a cheque, even a certified one, is good money. Why?

- Counterfeited
- Revocable
- Then what is safe?



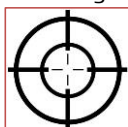
## Cybercrime

Targets

How?

- Spam and phishing messages;
- Installing malware;
- Etc.

See special LawPRO magazine on cybercrime



[http://www.practisepro.ca/LawPROmag/LawPROmagazine12\\_4\\_Dec2013.pdf](http://www.practisepro.ca/LawPROmag/LawPROmagazine12_4_Dec2013.pdf)



## What is phishing?

Trying to obtain financial or other confidential information from Internet users

Typically, by sending an email that looks as if it is from a legitimate organization or person



## Spear phishing

A phishing attack directed at a specific person

Will use information known to that person to make it more convincing



To: **Undisclosed recipients**  
From: **BMO <xxcze@bmo.cm.com>**  
Subject: **New Security Measures**

To protect your account, Bank of Montreal has implemented security questions and answers for you to create and use whenever you log in from a different location.

Please create security questions and answers for your BMO online account by [clicking here](#)

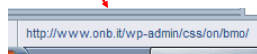
<<clicking here>>

Hover mouse over words – DO NOT CLICK!

We strongly advise you to enroll now. The new login method will be effective within the next 24 hours.

Thank you for using BMO.

Regards,  
BMO Support Dept.



## Hacked email account



- Client email account hacked
- Hackers monitor email
- Watch for discussion of payment of some sort
- Hackers send spoofed email redirecting payment (e.g. once settlement is achieved)
- Variations on who is hacked
  - Lawyer, self-rep opponent, third-party dealing with client



## Internal fraud

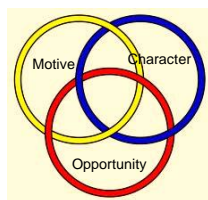
Internal frauds happen because three things come together:

- Motive
- Opportunity
- Character

“Trust but verify”

### Red Flags:

- No vacation or sick days
- A sudden change in lifestyle
- Mail for an unopened file
- Unusual patterns



## RED FLAGS



### Bad Cheque Scams

Initial correspondence is generically addressed, i.e. “Dear Attorney”.

Free email services and more than one email address;

New client and/or from a distant jurisdiction and/or prefers email communication due to zone differences;

No contract with previous lawyer

Client’s mailing address is a post office box;

In a rush and encourages you to complete the matter quickly or around banking holidays;

Not concerned about taking shortcuts and/or higher-than-usual fees on a contingent basis from the funds you will receive upon the completion of the matter;

Client instructs you to urgently wire the funds to an offshore account or to an unrelated third party.

### Other Real estate Scams

In a rush and encourages you to complete the matter without conducting all the usual searches and inspection;

Unfamiliar with the property or is not concerned with the price, mortgage interest rate, legal or brokerage fees;

Funds are directed to a third party that has no apparent connection with a transaction;

Promises high fees, many referrals, lots of business for quick turnaround on deals;

Small deposit, relative to price, and/or deposit not held by agent or lawyer;

The property is subject to a frequent repeated activity

An immediate resale without re-listing;

Transacted property is distant from your office;

Use of counter cheques and/or use of Power of Attorney;

No inquiry re picking up keys or moving in;

### Educate & discuss with Staff

<http://www.practisepro.ca/practice/pdf/FraudInfoSheet.pdf>



# Seven Steps to Prevent Fraud



## 1. Use your common sense:

- Know red flags & apply “smell” test
  - - rely on your instinct
- If it’s too good to be true...it probably is!



Seven Steps to Prevent Fraud



## 2. Do not share you PSP

- YOU CANNOT AND MUST NOT SHARE YOUR PSP (personal security package)
- Helps prevent internal fraud
- Why?
  - Against LSUC Rules of Professional Conduct (6.1-5 & 6.1-6)
  - Against agreements with Registry office & with Teranet
  - Undermines the trust govt placed in legal profession
  - Part of lawyer’s annual declaration



But what if I am away and need to close?  
 ■ See OBA Real Property Section article by Jeffrey Schwartz: “Up, up & far away (and still be able to close)”

Seven Steps to Prevent Fraud



## 3. Follow the “Know Your Client Rule”

Implement strict guidelines:

- Examine authenticity of provided identification documentation
- Check validity of driver’s license provided on OMT website – see paper for URL
- Insist on producing original documents and ID records



Implement signature rules:

- No legal documents signed outside without lawyer’s presence / supervision!!!



Seven Steps to Prevent Fraud



## 4. Proper and fulsome title search!!!

- Identify all title documents, **including** ones that have been deleted.
- Planning Act search still important



Seven Steps to Prevent Fraud



## 5. Adhere to cheque processing rules

- Never sign a blank or incomplete cheques
- Adopt security measures your bank recommends
- Issue receipts for all cheques & cash payments
- Cheques should be numbered and sequenced – verify regularly
- Deposit time rules
- Store in secure location
- Adhere to bookkeeping policies



Seven Steps to Prevent Fraud



## 6. Supervise your staff

- Do not abrogate your duties to your law clerks
- Periodically, conduct spot review of client files, including trust ledger
- Implement safeguards to ensure that no one function is completely within purview of one individual
- Ensure that everyone in office takes five consecutive days of holidays.



Seven Steps to Prevent Fraud



## 7. Due diligence – investigate!

- Make reasonable inquiries about:
  - your client
  - the purpose of the retainer
  - about nature of the transaction
- Review client's instruction and determine if you can meet requirements before hand
- Document results of your investigation.
- Develop checklists to monitor red flag indicators

Seven Steps to Prevent Fraud



## Call for help

Another lawyer in firm or outside

Law Society Practice Advisory Service

Practice Management Helpline

- 416-947-3315 or toll-free at 1-800-668-7380, ext 3315

LawPRO or TitlePLUS Customer Service

- 1-800-410-1013 or 416-598-5899

[www.AvoidAClaim.com/blog](http://www.AvoidAClaim.com/blog)



## Getting more information

LawPRO Fraud page

- [www.practicepro.ca/fraud](http://www.practicepro.ca/fraud)

Articles from LawPRO Magazine

- [www.practicepro.ca/magazinearchives](http://www.practicepro.ca/magazinearchives)

LawPRO Fraud Fact Sheet

- [www.practicepro.ca/practice/pdf/FraudInfoSheet.pdf](http://www.practicepro.ca/practice/pdf/FraudInfoSheet.pdf)

LSUC fraud page

- <http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Real-Estate-Law/Fighting-Real-Estate-Fraud/>



## Supplemental Materials

Tech tip: Don't take the bait on a spear phishing attack

[http://www.practicepro.ca/LAWPROMag/Don't\\_Take\\_Bait\\_Phishing\\_Attack.pdf](http://www.practicepro.ca/LAWPROMag/Don't_Take_Bait_Phishing_Attack.pdf)

Tech tip: Danger - when a hacker emails you instructions in the name of your client

[http://www.practicepro.ca/LAWPROMag/Danger\\_Hacker\\_Email\\_Instructions.pdf](http://www.practicepro.ca/LAWPROMag/Danger_Hacker_Email_Instructions.pdf)

Tech tip: Keeping your passwords strong and secure

[http://www.practicepro.ca/LAWPROMag/Keeping\\_Passwords\\_Secure.pdf](http://www.practicepro.ca/LAWPROMag/Keeping_Passwords_Secure.pdf)

Tech tip: 15 tips for preventing identity theft and online fraud

<http://www.practicepro.ca/LAWPROMag/TechTip-15-Tips-Identity-Fraud.pdf>

Fraud: How to avoid becoming its next victim

<http://www.practicepro.ca/practice/pdf/FraudInfoSheet.pdf>

PracticePRO's best claims prevention tools and resources

[http://www.practicepro.ca/LAWPROMag/LAWPRO\\_best\\_claims\\_prevention\\_tools.pdf](http://www.practicepro.ca/LAWPROMag/LAWPRO_best_claims_prevention_tools.pdf)



## For more info:



lawpro.ca



titleplus.ca



lawpro.ca/excess



practicepro.ca



LAWPRO  
TitlePLUS Home Buying Guide



@lawpro  
@practicepro  
@titlepluscanada



LAWPRO  
LAWPRO staff

## Questions? - Thank you

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Blog: [AvoidAClaim.com](http://AvoidAClaim.com)



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Twitter: @LAWPRO and @practicePRO



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# REAL ESTATE

## Practice Basics 2016

# Residential Mortgage Financing

Prepared and presented by Karen Yolevski, *Wellspring Financial* for the Real Estate Practice Basics program held December 9, 2015. (Updated with new web links for 2016.)

Presentation summary prepared and presented by:

**Zahra Ziaie Moayyed**  
*Ziaie Professional Corporation*

December 9, 2016

**Residential Mortgage Financing**  
**LSUC Real Estate Practice Basics**  
**December 9, 2015<sup>1</sup>**

*Karen Yolevski*  
*Wellspring Financial*

Financing will comprise a significant component of nearly every residential purchase file you complete, and refinancing transactions, especially given the continued trend of low interest rates, are also common fare in any residential real estate practice. A residential purchase transaction or refinance is somewhat of a “2 for 1 deal” for you as the lawyer. In almost every purchase transaction or refinance transaction, not only will you act on behalf of the borrower, but also on behalf of the borrower’s lender.<sup>2</sup> This paper discusses your role in the residential mortgage financing process and will review the steps and requirements you must follow to ensure your files close smoothly.

**A Primer on Terms**

Before getting into substantive details, it is useful to understand the terms used to describe the parties and documents involved in a financing transaction. As noted, oftentimes the borrower is also a purchaser, and you are representing him or her in both capacities. The borrower will also often be referred to as the “mortgagor” or “chargor”. The terms “lender”, “mortgagee” and “chargee” are also used interchangeably. The mortgage itself is also referred to as a “charge”. Finally, in practice, you will often find yourself speaking of your “client” in reference to your purchaser/borrower client. While this is fine in a conversational sense, when it comes to your obligations as solicitor, it is imperative to remember that the lender is also your client to which you owe a professional duty, and to be aware of potential conflicts which may affect your ability to act for both lender and borrower.

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<sup>1</sup> This paper is an updated version of the paper entitled “Residential Mortgage Financing” by Karen Yolevski which was presented at the Law Society of Upper Canada’s New Lawyer Practice Series-Real Estate 2009-2014.

<sup>2</sup> Please note this paper does not provide a detailed overview of a mortgage transaction wherein private lenders (non-arms length or otherwise) are involved. The issues and steps discussed relate to transactions wherein you are acting for both a borrower, and a borrower’s institutional lender (i.e. bank, credit union, etc.). The topic of private mortgages is discussed briefly at the end of this paper.



### **Residential Mortgage Financing: Outline of Events**

The following is a list outlining the process you as solicitor should follow when acting for a lender in a residential transaction:

1. Obtain lender instructions and commitment;
2. Prepare the standard mortgage documents (and lender-specific documents if required) based on your instructions from the lender;
3. Obtain the information/documents you require to meet the solicitor's conditions contained in the mortgage commitment;
4. Draft the charge;
5. Meet with your borrower-client to review and execute the mortgage documents;
6. Obtain identification from your borrower-client in accordance with lender instructions and By-Law 7.1 of the Law Society of Upper Canada;
7. Requisition and receive funds;
8. Register the mortgage; and
9. Report to the lender and borrower.

### **Obtaining Instructions**

Buying a house or condominium can be stressful for the buyers. Be proactive in obtaining mortgage instructions. This will prevent your clients from panicking during an already stressful period, and keep you from having to put together a deal, 'under the gun'.

Upon being retained by your purchaser/borrower client, the first thing they will probably ask you is "what must I do now"? That is the perfect time to let the client know that you will be acting on behalf of their lender, and that they need to arrange their financing and have instructions sent over to you as soon as they can. This information should be included in the retainer letter you send to your clients. Even prior sending the retainer letter, it is a good idea to tell the client by telephone or by email to speak with their lender and finalize their mortgage as soon as possible. Do not overestimate the client's understanding of how a real estate transaction comes together. In today's world of convenient and fast electronic banking, many clients do not realize that they need to make mortgage arrangements in advance (not a day or two before closing), and that those

arrangements often include gathering their personal financial information, and attending at their financial institution in order to sign their commitment. Managing your client's expectations is just as important as meeting your client's expectations. Make sure your client knows these things must be done prior to the lender providing you with instructions. Tell your client to provide their lender with your full contact information, and obtain the lender's contact information so that you may follow up if necessary. Lack of communication can lead to misunderstandings, and part of your job is to keep both the lender and the borrower in the loop so that closing will proceed smoothly.

Do not be afraid to follow up! Keeping yourself informed will help you keep your closing on track. If it is a week before closing and you haven't received instructions yet, call the lender and find out why. If it is the borrower that is slowing down the process (i.e. the borrower hasn't provided all of their financial information to the lender), a gentle reminder to the borrower from you may get things moving. If it is the lender or mortgage broker that has not forwarded you instructions yet, some persistence from your end will likely speed up the process. Remember that there are certain documents that you must have before you can close (for instance, proof of home insurance, or in the case of a condominium, a status certificate). Ensure that you request these documents well in advance of closing.

### **Understanding and Following Mortgage Instructions**

Mortgage instructions set out the terms of the mortgage and your obligations to the lender. Once you have mortgage instructions, your job is to read them, understand them, and implement them. Remember that as the lawyer on the file, it is your name and ultimately your responsibility to ensure the mortgage is registered correctly, and that your client is aware of what they are getting. Keep in mind that as a rule, lenders will not review draft documents. Therefore, careful review and adherence to the lender's instructions is even more important.

The word "instructions" is somewhat of a misnomer. In every mortgage transaction the lender will send to you:

- The Loan Commitment

- Solicitor's Instructions;
- Identification Verification Form
- Preliminary Report on Title/Solicitor's Request for Funds
- Blank Solicitors Report on Title

The mortgagee may also send documents such as:

- Additional schedules to be added to the charge
- Pre-authorized payment request form
- Realty tax forms
- Mortgage life insurance application/waiver

In order to properly advise the borrower and follow the instructions of the lender, you must understand the contents of all of these documents.

In addition, you will have to obtain the Standard Charge Terms applicable to your borrower's mortgage. These terms are available online<sup>3</sup>, and will be discussed below.

Depending on the borrower and the lender's representative, you may have borrowers that come to your office with a full understanding of their mortgage commitment and their obligations under the mortgage. On the other hand, you will have clients who want to review the meaning of the commitment in detail with you. The commitment is a binding contract between the borrower and the lender. You must understand the commitment and the accompanying documents in order to explain their meaning and implications to the borrower. Regardless of the borrower's understanding of the mortgage before stepping in to your office, it is your job to review the commitment and accompanying documents with the borrower and ensure the terms are consistent with the borrower's expectations.

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<sup>3</sup> Standard mortgage terms for all lenders can be found on Teraview's website at: <http://www.teraview.ca>

Lenders, like borrowers, depend on you to ensure good and marketable title to the property on closing. Given the widespread use of title insurance in residential mortgage transactions, the number of searches you will likely have to complete in order to satisfy the lender's requirements and establish good and marketable title to the property have been greatly reduced. However, it is still important to carefully review the instructions for any requirements that cannot be fulfilled through the purchase of a title insurance policy. It is also important that you complete your title search and other necessary due diligence early on and communicate with your title insurance provider in a timely fashion so that any issues that may affect the lender's coverage can be rectified or insured-over prior to closing. There are other good reasons to complete at least some off title searches despite the purchase of a title insurance policy as doing so will protect your purchaser-client and your reputation as a diligent and competent lawyer.

In addition to good and marketable title, lenders are concerned about priorities. Lenders do not want any other encumbrances taking priority over their charge.

Encumbrances that take priority over charges are:

- Liens for unpaid property taxes
- Writs of Execution
- Condominium Liens (for unpaid condominium expenses)
- Certain Construction Liens<sup>4</sup>

In order to protect the lender from losing priority, certain searches, in addition to your title search, should be conducted. Ordering a tax certificate, reviewing the status certificate of the property if the property is a condominium, and performing an execution search will alleviate most of these issues. Prior to closing, you should update your status certificate, ideally with a new certificate, and at the very least with a verbal update from the condominium's management company indicating that the unit owner's monthly common expenses are not in arrears. As a prudent solicitor these searches will already be part of your due diligence for the purchase transaction.

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<sup>4</sup> A discussion concerning the priority of construction liens over charges is beyond the scope of this paper.

## **Reading the Fine Print**

You will soon see that every purchase transaction you complete, while similar in many respects, will each be a little bit different. The same rule applies in respect of the various lenders involved in the residential mortgage business. Although you will come to recognize the ‘standard form’ portions of the documents for each lender, conditions and instructions vary from file to file. It is important that you read every commitment and set of instructions for each transaction you handle. Within the fine print of the instructions often lie special conditions or requirements the borrower must meet in order for the lender to fund on closing. Some of the unique requirements you may come across include:

- Affidavits concerning use of the property (i.e. single family residential)
- Affidavits concerning child support payments by the borrower
- Manner of taking title and names that must be on title
- Payments of certain credit card or line of credit debts that must be paid down on closing
- Proof of zoning
- Proof of rents/copies of leases
- Payout statements for other mortgages given by the borrowers
- Condominium documents
- Statements of the borrowers regarding the use of the property by third parties
- Statements of the borrowers relating to fraud or terrorism

Some conditions require you to draft documents other than the standard mortgage documents. Other conditions may require you conduct searches. Fulfilling these conditions may take time, which is another reason to request mortgage instructions as far in advance as you can. If you have not followed the lender instructions and met their conditions, they may not fund the mortgage, or you may face consequences when the breach is discovered.

If the mortgage is a high ratio mortgage, ensure that CMHC/Genworth insurance has been approved. The underwriting requirements for these insurers can differ from the requirements of the lender, and their approval is necessary before the lender can fund any high ratio loan.

### **Conditional Mortgage Commitments**

Sometimes you will receive a mortgage commitment wherein funding is conditional on certain evidence being provided, or a baseline appraisal value being assigned to the property. It is important in files such as these to follow up with your client and the lender to ensure the evidence required to finalize the commitment is being sought. In some cases, the lender will rely on you to provide such evidence. A good example of this would be a mortgage conditional on proof of the property being zoned as a legal triplex. In this situation, it is prudent that you order a zoning search as soon as possible so that evidence regarding zoning can be forwarded to the lender in advance of closing.

Conditions based on the appraised value of a property are common, and can be troublesome during unstable economic times. Lenders arrange for their own independent appraisal of the property. If the appraisal comes in at a lower value than what the home was purchased for, the amount the lender is willing to lend may decrease. With high ratio mortgages, sometimes the lower appraisal value will cap the amount the insurer (i.e. CMHC or Genworth) is willing to insure for, thereby lowering the total loan amount. This is especially important for high ratio borrowers to understand, as a low appraisal may mean the bank will not fund enough money to cover the cost of the home on closing, and leave the purchaser scrambling for the difference. The earlier it is known that an appraisal will result in less funding being provided to the purchaser the better, as it gives the purchaser the option to ‘shop’ the mortgage to another bank or insurer, or find alternative resources for the funds.

### **Drafting the Charge**

As solicitor for the lender, it is your responsibility to draft the charge in accordance with the lender's instructions. The vast majority of properties in Ontario are in the electronic system of land registration. Therefore, we will examine the steps involved in drafting an electronic charge in this paper.<sup>5</sup> A sample charge is attached as an appendix to this paper.

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<sup>5</sup> A detailed review of the how-to's for drafting and registering charges, as well as other land registration documents can be found in the *Document Registration Guide*, Rose H. McConnell, 9<sup>th</sup> Edition, 2008, CCH Canadian Limited, as well as Teraview's Electronic Registration Procedures Guide, found at: [https://www.teranetexpress.ca/content/tvuser/customer/resources/manual/V5\\_ProGuide.pdf](https://www.teranetexpress.ca/content/tvuser/customer/resources/manual/V5_ProGuide.pdf)

Section 6 of the Electronic Registration Regulation (O. Reg. 19/99) of the *Land Registration Reform Act* R.S.O. 1990, c. L.4 sets out that a charge must contain the following information:

- (a) a statement of the principal amount or other obligation secured by the charge;
- (b) the rate of interest and periods of payment under the charge;
- (c) the due date of the charge or a statement that the charge is payable on demand, whichever is the case;
- (d) a statement of the interest or estate charged;
- (e) the filing number of standard charge terms included in the charge, if any;
- (f) a statement that the chargor charges the land that it affects;
- (g) unless the chargor is a corporation, a statement by the chargor that the chargor is at least 18 years old;
- (h) unless the chargor is a corporation, a statement of spousal status under the *Family Law Act* by the chargor; and
- (i) a statement that the chargor acknowledges receipt of a copy of the charge.

In the electronic registration system, basic information concerning the legal description of the property, and name of the owner (who will be the chargor, or borrower) are automatically imported into the document.

Within the charge, statements must be made concerning the age and marital status of the chargor. The chargor must state that he or she is at least 18 years of age.

As noted, the chargor must also state if they are a spouse. If the chargor is married, and if the property being encumbered is a matrimonial home as defined by the *Family Law Act*, the chargor's spouse (if not a party to the charge) must consent to the registration of the charge against the property. Therefore you should ask your client early on whether they are married, so that you can ascertain whether spousal consent is necessary.

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The chargor must also state whether the charge is authorized under a Power of Attorney. For transaction involving a Power of Attorney, you should consult the Ministry of Government and Consumer Services Land Registry Bulletins 2009-01 and 2009-02 before proceeding.

The details of the mortgage to be included in the Charge are as follows:

- Principal amount of the loan
- Calculation period
- Balance Due Date
- Interest Rate
- Payments
- Interest Adjustment Date
- Payment Date
- First Payment Date
- Last Payment Date
- Standard Charge Terms
- Insurable Amount
- Guarantor

The details required to complete the above fields are found in the lender's instructions to the solicitor. Review all draft charges to ensure the registration details are accurate prior to registration.

Depending on the mortgage instructions, you may or may not have to attach a schedule of terms to the charge. These terms will be provided by the lender.

### **Standard Charge Terms**

Section 7(5) of the *Land Registration Reform Act* sets out that a charge includes the prescribed set of charge terms unless a set of standard charge terms is filed with the Director of Titles and referred to in the charge by its filing number.



Standard charge terms set out the rights and responsibilities of the lender and borrower in regard to a specific type of mortgage (i.e. variable, fixed, etc.). Typically, standard charge terms cover matters such as:

- The application of mortgage payments to interest and principal
- Property taxes
- Covenants of the chargor (i.e. paying the mortgage, good title to the property, having the right to charge the property, quiet possession on default of the charge, insurance, etc.)
- Right of entry of the chargee
- Payment of Principal on default
- Quiet possession until default
- No duty to advance funds
- Fixtures forming part of security
- Rights on default
- Liens and construction
- Discharge of the charge
- Renewal of the charge
- Spousal consent
- Receivership

All standard charge terms are similar in substance, however standard charge terms are not identical as between lenders. Each lender, and each type of mortgage has its own set of terms. It is advisable to review the terms in advance of meeting with your client so that you can advise as to their contents.

Prior to closing, the borrower must also sign an acknowledgement that they have received a copy of the standard charge terms.

## **Documents**

There are various documents you will generate in connection with the mortgage. The standard set of documents for a residential mortgage transaction include the following:

### *Acknowledgement re: Joint Retainer*

As discussed, in a typical residential real estate transaction, you will be retained by the purchaser/borrower and the lender and be expected to act for both with regard to the same transaction. The Law Society of Upper Canada's Rules of Professional Conduct set out certain requirements for joint retainers.

Rule 2.04(6) sets out a lawyer's obligation prior to accepting a joint retainer. Under Rule 2.04(6), prior to accepting a joint retainer the lawyer shall advise the clients that:

- (a) the lawyer has been asked to act for both or all of them
- (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

The lender, so long as they are an institutional client (i.e. a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business) is exempt from the joint retainer rule.

Rules 2.04(8.1) and (8.2) set out the exception to the rule. Under the exception, you are not required to advise the lender of the facts set out in Rule 2.04(6), nor is the lender required to consent to the joint retainer in writing. Consent by the lender is deemed to exist upon the solicitor's receipt of written mortgage instructions from the lender.

In order to comply with the joint retainer rule, purchasers should sign an Acknowledgment which sets out the advice in Rule 2.04(6).

Acknowledgement re: Standard Charge Terms

Prior to closing, a borrower must also sign an acknowledgement that prior to signing off on the mortgage, he or she has received a copy of the standard charge terms incorporated into the mortgage.

Acknowledgement re: Electronic Registration of Charge

The same Acknowledgement executed by the purchaser with regard to the electronic registration of the transfer must be signed in order to register the charge.

The Acknowledgement and Direction states that the borrower understands the effect of the charge and agrees to be bound by its provisions, and gives you permission to register the charge on behalf of the borrower.

If the property being encumbered is a matrimonial property, the spouse of the borrower (if they are not a party to the charge) should sign the Acknowledgement evidencing the spouse's consent to the encumbrance of the matrimonial home.

Declaration

Prior to closing, the borrower will also sign a declaration wherein the borrower makes certain statements concerning the borrower's marital status, the contents of any survey of the property that is available, the supply of construction or renovations to the property prior to the registration of the mortgage, and the use of the mortgage proceeds for construction to the property.

Direction re Funds

Prior to closing, the borrower will sign a Direction directing the lender to pay the mortgage proceeds to the solicitor's trust account.

Examples of these documents form an appendix to this paper.

**Insurance**

A requirement of every mortgage registered against a freehold property is the arrangement of fire insurance for the full insurable value of the property naming the mortgagee as the first loss payee

on the policy. You must request that the borrower provide you with an insurance binder evidencing the existence of such a policy prior to closing. Not all lenders will require that you send them confirmation of insurance prior to closing, however insurance is a requirement of all residential freehold mortgages and therefore it is your responsibility to ensure your client has arranged sufficient insurance prior to closing the transaction. Mortgagees of condominium units require there be sufficient insurance covering damage from major perils to the condominium itself. In Ontario, condominium corporations are required to obtain and maintain this insurance. Often, lenders will want to see the condominium's certificate of insurance prior to funding. The certificate of insurance should be a part of the materials provided with the status certificate. Carefully review the status certificate materials—sometimes you may find last year's certificate which has expired, or no certificate at all. This sort of error can leave you scrambling and chasing down documents from the property management company on the day of closing.

### **Meeting with the Borrower Client**

As noted, you are responsible not only for conducting due diligence on behalf of the lender and following the lender's instructions, but for ensuring the borrower is aware of the terms and implications of the mortgage.

During your meeting with your client, take the time to review the mortgage in detail. Although it may seem obvious, ensure that your client is aware of the principal amount of the mortgage, the interest rate, whether that rate is variable or fixed, whether the mortgage is open or closed, the amortization period of the mortgage, the borrower's payment schedule (i.e. weekly, bi-weekly, monthly, etc.), and what each of those items mean in plain language.

The term 'interest adjustment date' is a good example of 'mortgage-speak' that can create confusion for clients. The interest adjustment date is the date from which your lender actually starts calculating the interest a borrower will pay. If the interest adjustment date does not fall on the closing date, interest will be payable for the time the money is advanced until the interest adjustment date. This money is usually deducted from the mortgage advance. This deduction will be noted in the mortgage commitment. This sort of language must be clarified for the borrower to avoid misunderstandings and a potential shortfall of closing funds.

It is also important to review with your client their pre-payment options, and penalties for paying out the mortgage before the end of the term. The lender's rules for these items are spelled out in the commitment, mortgage schedule and/or standard charge terms.

As lending is a business, there is discretion in how some of the rules apply (i.e. some lender's waive the pre-payment penalty when a client refinances or obtains a new mortgage with the same lender), and therefore it is a good idea in addition to reviewing the standard terms in the commitment and charge, to advise the client to contact the lender directly to discuss her or her specific situation.

Depending on the lender, the borrower may or may not have to execute the commitment in your presence. In addition, some lenders require the borrower to initial certain items, clauses, or pages. Others provide no further paperwork to be executed by the borrower, except the standard forms you will produce. Once again, reviewing the documentation from the lender in advance will allow you to adequately prepare for the meeting, and ensure you have met the requirements of the lender on closing.

### **Identification Verification**

The issue of fraud and money laundering remains of great concern to the real estate bar and lenders, as well as the land registrar. In order to prevent fraudulent transactions, on December 31, 2008, the Law Society introduced identification requirements which members of the Bar must abide by. These requirements are in addition to the identification requirements already established by lenders.

Generally, lenders require that the solicitor, prior to closing, examine and copy for their records two pieces of identification of the borrower, one of which has to be a government issued photo I.D. of the borrower. Prior to closing, an Identification Verification Form setting out the details of the identification examined and other details of the borrowers (e.g. occupation, contact information) is executed by the solicitor.

The Law Society of Upper Canada's By-Law 7.1 sets out the identification requirements.<sup>6</sup> The By-Law differentiates between identifying and verifying the identity of your clients. Under the By-Law, when you are retained to provide legal services, you must identify your client, subject to exceptions.

In relation to a residential mortgage transaction, you are required to obtain the following information about the borrower:

1. Full Name;
2. Business address and telephone number, if any;
3. Home address and telephone number; and
4. Occupation or occupations.

Your lender client falls in to the category of an 'organization'. Under the new by-law, organizations must be identified by obtaining and keeping the following information:

1. The organization's full name;
2. Business address and telephone number;
3. The organization's incorporation or business identification number and the place of issue of its incorporation or business identification number, if any;
4. The general nature and type of business activities engaged in by the organization unless the organization is a financial institution, government body or is not a private company; and
5. The name, position, and contact information of all individuals authorized to provide you with instructions on behalf of the organization.

As your lender-client would be considered a financial institution, it is unnecessary to record the general nature of the lender's business activities. Most of the other required information is available from the correspondence you will receive from the lender.

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<sup>6</sup> A memo published by the Law Society setting out the identification requirements is attached as an appendix.

Under the By-Law, if you act for or give instructions on behalf of a client regarding the receiving, paying or transferring of funds, you must verify the identity of the client, subject to exceptions.

Under the By-Law, a purchaser/borrower obtaining a mortgage would fall under the category of a client receiving funds. Therefore you must verify the identity of the borrower. In accordance with Subsection 23(4) of the By-Law, verification is done by looking at an original identifying document that you reasonably believe to be reliable.

Acceptable identifying documents should be government issued identification of the borrower that is valid and has not expired such as a:

- Driver's Licence;
- Birth Certificate;
- Provincial or Territorial Health Card (where permitted);
- Passport; or
- Other similar record.

A copy of the identification document should be made for your file.

There is an exception to the verification rule for institutional clients. Therefore you do not need to review any identifying documents (i.e. corporate documents) of the lender.

Once you have identified the clients and verified the borrower's identity, you must retain the information you received and copies of the identification you viewed for the longer of: (1) Six years following the completion of your retainer; or (2) The duration of the lawyer-client relationship for as long as is necessary to provide service to the client.

If you are involved in a transaction where you suspect you are assisting your client in dishonesty or fraudulent, criminal, or illegal activity, you must cease from engaging or assisting the client in such conduct, or withdraw from representing the client.

### **Requisitioning Funds**

Once you have completed your due diligence and fulfilled the conditions of the mortgage, you may proceed to requisition funds from the lender. This is done by providing the lender with the completed Preliminary Report/Request for Funds sent to you with the mortgage commitment. This document contains details about the property including tax information, the property's legal description and municipal address of the property, the borrower's legal name, fire insurance information and particulars of the title insurance policy obtained on behalf of the lender. If there are any issues affecting title or the lender's interest in the property, you must disclose them on the preliminary report.

Most lenders request that you requisition funds 3-5 days prior to closing. Wherever possible, requisitioning funds on a timely basis will assist with a smooth closing day.

Depending on how your firm obtains mortgage funds, when sending in your request for funds you may wish to forward the lender a copy of your firm's void trust cheque, so that mortgage proceeds may be directly deposited to your firm's trust account. Depending on the lender, they may ask that copies of the borrower's identification and the Identification Verification Form be forwarded to them at this time as well.

### **Electronic Assistance**

As of late a number of online based programs have been created to allow for paperless mortgage transactions<sup>7</sup>. These programs allow the solicitor to communicate with the lender electronically, and submit all documentation, including the lender's report, online. In addition, these programs allow solicitors to request funds be delivered electronically, by way of wire transfer. The main goals of the various programs are to streamline the lending process, reduce paper, and provide a cost-effective and efficient way to handle mortgage transactions.

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<sup>7</sup> Assyst Real Estate (Telus/Stewart Title), VIP(Lawyer Done Deal), and Lender Lawyer Connect (First Canadian Title) are examples of online mortgage applications you may wish to consider using in your practice



Currently none of these programs are mandatory however, as the bar's reliance on and preference for electronic work processes continues to increase, you would be well advised to familiarize yourself with the various applications that are available.

### **On the Day of Closing**

On occasion, a bank draft for the mortgage funds will be sent to your office in advance of closing. More often, on the morning of closing, mortgage funds are sent to the bank branch of your choosing or deposited directly to your firm's trust account. Each office has its own procedures regarding the receipt of mortgage funds and in regard to purchase transactions, the delivery of closing funds to the vendor's solicitor.

Prior to registering the mortgage you must complete another search of executions against the purchaser/borrower, as well as conduct a sub-search of the property to ensure no further encumbrances have been registered against title since your original search.

### **Reporting**

As part of your requirements to the lender, and under the Law Society's Rules of Professional Conduct , you must report the mortgage transaction to the lender within 60 days of closing.

Rule 2.02 (14) and (15) state:

**2.02 (14)** Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender.

**2.2 (15)** The final report required by subrule (14) must be delivered within the times set out in that subrule even if the lawyer has paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a

discharge of the encumbrance or encumbrances but the discharge remains unregistered.

Although the Rules set out a 60 day period in which reports must be submitted, you should note that most lenders request that final reports be delivered within 30 days of closing. In order to ensure you meet the deadlines set by the lenders and the Law Society, it is best to set an office policy that lender reports are submitted as soon as possible (i.e. within one week) of closing, and devise a checklist to track the submission of such reports.

Included in the report to the lender is the:

- Copy of the charge
- Lender's title insurance policy or the solicitor's opinion on title
- Insurance binder naming lender as first loss payee
- Acknowledgement and Direction re: E-registration of Charge
- Tax Certificate or proof that taxes have been paid
- If the property is a condominium, copy of the status certificate

### **Discharging Mortgages**

When acting for a purchaser, it is likely that prior to closing there is an outstanding mortgage on title to the property your purchaser is buying. This mortgage would have been included in your requisition letter, and common practice is that on closing, the vendor's solicitor provides his or her undertaking to obtain a discharge of the mortgage following closing. A sample undertaking is included as an appendix. It will be your responsibility to follow up with the vendor's solicitor regarding the discharge of any mortgages on title prior to closing. It is good practice to set up automatic reminders for this purpose, and to send a letter to the vendor's solicitor requesting the discharge if you do not receive it within 30 days of closing.

If you are acting for a vendor, it is you that has given the undertaking to obtain a discharge of your client's mortgage. Most times the lender has its own solicitor or processing centre responsible for discharging the mortgage. Your request for the discharge should be enclosed

with the funds payable to the lender to pay out the existing mortgage. If you have not received a copy of the registered discharge within 30 days of closing, follow up with the lender. Once you receive the registered discharge, forward a copy to the purchaser's solicitor. Purchasers' solicitors should provide a copy of the registered discharge to their client.

Further to any other undertakings, outstanding issues, or unfinished reporting, this will complete the transaction and you may proceed to close your file.

### **A Few Words About Private Mortgages**

On occasion you may be asked to act on behalf of a private lender, borrower, or both. The scope of this paper is not broad enough to cover the entire topic of private mortgages however, there are some key issues that may arise when dealing with private mortgages which you should be aware of. I encourage anyone encountering a private mortgage for the first time to consult the Law Society of Upper Canada's website ([www.lsuc.on.ca](http://www.lsuc.on.ca)) as it contains excellent resources and practice guidelines for this type of transaction. Portions of the Law Society's materials concerning private mortgages form an appendix to this paper.

The first question to ask when dealing with a private mortgage is 'who is your client?'. Often a solicitor is approached to assist with the funding and registration of private mortgage between, for example, two family members. You must determine whether you can act for both parties before proceeding. Subrule 2.04(11) of the Law Society's Rules of Professional conduct states that a lawyer or law firm may not act for both lender and borrower in a mortgage or loan transaction unless:

- a. the lawyer practices in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction,
- b. the lender is selling real property to the borrower and the mortgage represents part of the purchase price,

- c. the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the course of its business,
- d. the consideration for the mortgage or loan does not exceed \$50,000, or,
- e. the lender and borrower are not at "arm's length" as defined in the *Income Tax Act Canada*

You will note that banks, trust companies, credit unions and finance companies are excluded from the prohibition. Exception (c) allows you to act for both lender and borrow in almost all 'standard' residential mortgage transactions.

The definition of non-arm's length party (also known as a 'related person') can be found in Section 251 of the Income Tax Act. The full definition is included as an appendix to this paper, however in essence, a non-arm's length party is a party related to another party by blood or marriage.

Before agreeing to act for both lender and borrower in a private mortgage transaction, ensure your joint retainer will not offend Rule 2.04(11). If a joint retainer is disallowed, each party must have independent legal representation in connection with the transaction.

Once your retainer has been established, you must ensure that you follow the proper reporting and record keeping requirements for private mortgages. The Law Society's regulations requires two forms, Forms 9D and 9E be produced whenever a lawyer acts or receives money from a lender (see Section 24(1) of the By-Law 9). Samples of Form 9D and Form 9E are attached to this paper.

In addition to the forms noted above, it is also compulsory to provide specific details of any private mortgage transaction you were involved in on your Annual Report to the Law Society.

# **Appendix A**

## **Standard Documents**

**AUTHORIZATION TO TRANSFER INTEREST IN INSURANCE**

**TO:**

COMPANY:

**RE POLICY:**

PROPERTY: <Address>

OWNER: <Name>

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I, the undersigned, being the owner of the subject property, hereby authorize and instruct you to, as of the date hereof, amend the above-described insurance policy, including all substitutions and renewals thereof, to note the interest of:

<Name of Lender >

<Address of Lender >

Loan Number: <000000>

as first mortgagee in the loss payee section, and to forward a certified copy of the policy, as amended, to such first mortgagee and to forward an amended copy of the policy or endorsement directly to me and for so doing, this shall be your good and irrevocable authority.

**DATED** at Toronto this        day of \_\_\_\_\_, 20        .

<Name of Borrower >

By his/her solicitors

<NAME OF FIRM>

Per: \_\_\_\_\_

**DIRECTION AS TO FUNDS**

**TO:**            <Lender >

**RE:**            <description of transaction> [*i.e.*: *Smith first mortgage to ABC Bank*]  
                  <Property Address>  
                  Loan Number: <000000>

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This is to direct you and shall constitute your good and sufficient and irrevocable authority to make your cheque for the above mortgage advance payable in favour of my solicitors:

<NAME OF FIRM>, IN TRUST

or as they may otherwise direct.

**DATED** at Toronto, this        day of \_\_\_\_\_, 20    .

\_\_\_\_\_  
<Name of Borrower>

**ACKNOWLEDGEMENT RE: STANDARD CHARGE TERMS**

**TO:** <Name of Lender>  
**RE:** <description of transaction> [*i.e: Smith first mortgage to ABC Bank*]  
<Property Address>  
Loan Number: <000000>

---

I, the undersigned, being the mortgagor in the above transaction, hereby acknowledge receiving a copy of Standard Charge Terms No. <000000> before signing the above charge or mortgage, and I understand that the said Standard Charge Terms are incorporated by reference into such charge or mortgage.

**DATED** at Toronto, this        day of \_\_\_\_\_, 20    .

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<Name of Borrower>



**IN THE MATTER OF** a mortgage (charge) from **<Name of Borrower>** in favour of **<Name of Lender>** on the premises municipally known as **<address of property>**

I, **<Name of Borrower>**, SOLEMNLY DECLARE that:

1. I am the mortgagor in the above-described transaction and have knowledge of the matters hereinafter deposed to.
2. There is not currently and nor has there been within the past 45 days, any construction, alterations, renovations improvements or building materials supplied to the subject property.
3. The proceeds of this mortgage will not be used to finance any construction, alterations, renovations or improvements to the subject property or to repay a mortgage which was taken out for this purpose.
4. Within the meaning of the Family Law Act (Ontario):

*[Options- choose one]:*

*[One borrower, not married]:*

I am not a spouse

*[Two borrowers, not married]:*

I, **<borrower #1>**, am not a spouse. I, **<borrower #2>**, am not a spouse.

*[Two borrowers, married to each other]:*

We are spouses of one another.

*[One borrower, married, spouse not on title, property is the matrimonial home]:*

I am a spouse and my spouse, **<name of spouse>**, has consented to the registration of this mortgage.

***[Note: in this circumstance, ensure spouse signs standard charge terms and Acknowledgement and Direction]***

*[One borrower, married, spouse not on title, property is not matrimonial home]:*

I am a spouse and the property charged is not ordinarily occupied by me, and my spouse, who is not separated from me, as our family residence.

AND I make this solemn Declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

DECLARED before me }  
at the **<City/Town>** }  
in the Province }  
of Ontario }  
this \_\_\_\_ day of \_\_\_\_\_ }  
20\_\_\_. } **<Name of Borrower>**

A COMMISSIONER, ETC.

**ACKNOWLEDGEMENT AND DIRECTION**

TO: <Name of lawyer registering the charge>

AND TO: <Name of Law Firm>

RE: <description of transaction> [*i.e.: Smith purchase of 123 Any Street, Toronto, and first mortgage to ABC Bank*]

---

This will confirm that:

- I/We have reviewed the information contained on the following document(s) (the “Documents”) attached hereto as Schedule “A” and this information is accurate:

- Transfer
- Charge

*[Note: amend as required—you may use one Acknowledgment and Direction for both the transfer and charge, if a transfer forms part of the transaction. Note that some lenders require that you use their form of Acknowledgment and Direction in connection with the charge.]*

- You are authorized to make any non-material, clerical amendments to the Documents as you consider necessary or appropriate without advising or obtaining further instructions from me/us;
- You are authorized and directed to enter into an escrow closing agreement substantially in the form attached hereto as Schedule “B” (the “Document Registration Agreement”) and to complete this transaction in accordance with its terms; I/we agree to be bound by the terms of the Document Registration Agreement;
- The effect of the Documents and the Document Registration Agreement described in this Acknowledgment and Direction has been fully explained to me/us and I/we understand that I/we am/are a party/parties to and bound by the terms and provisions of the Documents to the same extent as if I/we had signed the Documents;
- You are authorized and directed to register the Documents with any amendments as authorized herein electronically on my behalf/our behalf as well as any other documents required to complete the transaction described above;
- I/We hereby authorize and consent to the release of this executed Acknowledgment and Direction and attached Documents to the Director of Land Registration, upon request of the Director; and
- I/We are in fact the party/parties named in the Documents described in this Acknowledgment and Direction and we have not misrepresented my identity/our identities to you.

Dated at the City of Toronto in the Province of Ontario this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Witness: )  
)  
) \_\_\_\_\_  
<Name of Borrower/Purchaser>

**Appendix B**  
**Sample Registered Charge**

The applicant(s) hereby applies to the Land Registrar.

yyyy mm dd

Page 1 of 2

**Properties**

PIN	LT	Interest/Estate	Fee Simple
Description			
Address			

**Chargor(s)**

The chargor(s) hereby charges the land to the chargee(s). The chargor(s) acknowledges the receipt of the charge and the standard charge terms, if any.

Name

Address for Service

I am at least 18 years of age.

I am not a spouse

This document is not authorized under Power of Attorney by this party.

Name

Address for Service

I am at least 18 years of age.

I am not a spouse

This document is not authorized under Power of Attorney by this party.

**Chargee(s)**

Capacity

Share

Name

Address for Service

**Provisions**

Principal	\$ 190,000.00	Currency	CDN
Calculation Period	semi-annually, not in advance		
Balance Due Date	2015/07/16		
Interest Rate	3.697%		
Payments	\$ 200.21		
Interest Adjustment Date	2013 02 21		
Payment Date	Every Thursday		
First Payment Date	2013 02 28		
Last Payment Date	2015 07 16		
Standard Charge Terms	201201		
Insurance Amount	See standard charge terms		
Guarantor			

The applicant(s) hereby applies to the Land Registrar.

**Signed By**

acting for Signed 2013 01 31  
Chargor(s)

Tel  
Fax

I have the authority to sign and register the document on behalf of the Chargor(s).

**Submitted By**

2013 01 31

Tel  
Fax

**Fees/Taxes/Payment**

Statutory Registration Fee	\$60.00
Total Paid	\$60.00

**File Number**

Chargor Client File Number :

Chargee Client File Number :

**Appendix C**  
**Sample Identification Form (pursuant to LSUC By-law 7.1)**

# IDENTIFICATION OF CLIENT - INDIVIDUAL

## Part A

**\*Full Name:**

\_\_\_\_\_

*(title) (surname) (first given name) (middle name(s))*

Date of Birth:

\_\_\_\_\_

*( month / day / year )*

Former Name(s):

*(if applicable)*

**\*Home Address:**

\_\_\_\_\_

*Street and Unit or Apartment*

\_\_\_\_\_

*City / Province / Postal Code*

Mailing Address:

*If mail to be sent to  
an address other  
than residence above.*

\_\_\_\_\_

*Street and Unit or Apartment*

\_\_\_\_\_

*City / Province / Postal Code*

**\*Home Phone No:**

Cell Phone No:

**\*Occupation(s)/Profession**

*(if applicable)*

**\*Place of Employment:**

*(If applicable)*

**\*Business Address:**

*(If applicable)*

**\*Business Phone No:**

*(If applicable)*

E-mail

Facsimile

**[IMPORTANT: All matters in bold/marked with asterisk are LSUC requirements and must be completed]**

**Part B**

**\*Date Identity Verified:** \_\_\_\_\_

**\*Original Identification Document Reviewed**     Expiration checked     Verified     Scanned   

- Driver's Licence**
- Birth Certificate**
- Passport**
- Other (specify type) \_\_\_\_\_**

**\*Identity Verified By:** \_\_\_\_\_

**\*Date Verification Reviewed by Lawyer:** \_\_\_\_\_

**\*Name of Lawyer:** \_\_\_\_\_

*Attention: Parts A and B of this document to be photocopied along with ID to fulfill LSUC verification requirements*

**[IMPORTANT: All matters in bold/marked with asterisk are LSUC requirements and must be completed]**



**Appendix D**  
**Undertaking to Discharge Mortgage**

**SOLICITOR'S UNDERTAKING TO DISCHARGE 1<sup>ST</sup> MORTGAGE**

**TO:** <Name of new owner/borrower>  
**AND TO:** <Name of law firm representing new owner/borrower>  
**RE:** <description of transaction> [i.e. Smith purchase from Brown, 123 Any Street, Toronto]

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IN CONSIDERATION of and notwithstanding the closing of the above-noted transaction, with respect to the Mortgage or Charge described as follows *[Note; if there is more than one outstanding charge, edit accordingly]*:

1. obtain and register a good and valid cessation of the charge registered as Instrument Number <AA000000> in favour of <Lender>;

THE UNDERSIGNED UNDERTAKES AS FOLLOWS:

1. To forthwith pay the mortgagee or person entitled thereto any sums of money required to fully pay out and discharge the said mortgages as set out in the attached Statement from the Mortgagee;
2. To be responsible for any additional monies payable for the discharge of the mortgage as a result of any delay in delivery of the funds to the person entitled thereto; and
3. To make every reasonable effort to obtain and register a proper form of discharge of the mortgage as soon as possible after closing.

In this undertaking, any reference to the word "mortgage" or any variation thereof shall also include a "charge", and registration shall apply to the appropriate land Registry office, in which the lands are registered.

<Law Firm>

Per:

\_\_\_\_\_  
<Name of Lawyer>

## Appendix E

### Links to Useful Additional Resources

1. The Law Society of Upper Canada - [Bookkeeping Guide for Lawyers - Private Mortgages – Record Keeping](#)
2. The Law Society of Upper Canada - [Private Mortgages – Definitions and Terms](#)
3. The Law Society of Upper Canada - [Forms 9D and 9E - FAQ](#)
4. The Law Society of Upper Canada - [Sample Form 9D - Investment Authority](#)
5. The Law Society of Upper Canada - [Sample Form 9E - Report on the Investment](#)
6. [Section 251 of the \*Income Tax Act\*, Canada](#)

## Residential Mortgage Financing

Zahra Ziaie Moayyed  
December 9, 2016

### Types of Transactions

- Purchase Transaction
- Second, Third, etc., Mortgage Transaction
- Re-finance Transaction

### Purchase Transaction

- Client intake
  - Identification requirements
    - By-Law 7.1 of the Law Society of Upper Canada
    - Lender-specific requirements
  - Occupancy-related information
  - Spousal status implications
  - Power of Attorney problems
- Instructions from the lender
  - Before your first transaction: register with lenders
  - Obtaining the instructions
    - How do you receive the instructions?
    - What to expect from the instructions?
    - What do you do if you have not received the instructions?
  - Understanding the instructions
    - Call centre help
    - Mentorship
    - Title insurer guidelines
- Solicitor conditions
  - Types of conditions
  - What do you do if you cannot satisfy a condition?
- Preparation and signing of documents
  - Documents for the lender
  - Documents for registration
  - Documents for your file

- Third party deliverables
  - Fire Insurance
    - Responsibility of the borrower client
    - Specific instructions from lenders
    - Various capacities of fire insurers
  - Title Insurance
    - Your responsibility
    - Search requirements
    - Focus: adequate coverage for lender client
- The funds
  - Amount of available funds
  - Requisitioning the funds
  - Payments to third parties
  - Hold backs
  - Returning the funds if the transaction does not close
- Registration requirements
  - Preparation and registration of the charge instrument
  - Other registrations:
    - Assignment of Rents (and PPSA registrations)
    - Postponement of Security Interest
    - Power of Attorney
  - Writ search and subsearch requirements
- Reporting requirements
  - Report to lender
  - Report to client
- The role of the mortgage broker
  - Mortgage broker conditions
  - Client confidentiality
  - Learning and un-learning

### **Second, Third, etc., Mortgage Transaction**

- All of the above, and...
- Search requirements

### **Re-finance Transaction**

- All of the above, and...
- Discharge obligations

For questions, please email me at [zahra@ziaielaw.com](mailto:zahra@ziaielaw.com). Thank you.



# REAL ESTATE

## Practice Basics 2016

# Let's Close a Deal!

## Closing Procedures for Residential Real Estate Transactions

Prepared and presented by Rebecca Hartley, *City of Toronto Legal Services*  
for the Real Estate Practice Basics program held December 9, 2015

Presented by:

**Tannis Waugh**

*Tannis A. Waugh Professional Corporation*

December 9, 2016

# Let's Close a Deal!

## Closing Procedures for Residential Real Estate Transactions

Real Estate Practice Basics 2015  
December 9, 2015

*Rebecca Hartley*  
*City of Toronto Legal Services*<sup>1</sup>

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### 1. Introduction

Closing a residential real estate transaction is a process that starts as soon as the agreement of purchase and sale is signed, with organization being the key to a successful closing. If you do not yet have your bring-forward systems set up, now is the time to create them. They are going to keep you on track for a successful and stress-free closing – and legal practice generally.

One rule of thumb is this: Never put off until tomorrow what you can do today. It will stand you in good stead while bringing your deal to a successful close.

Essentially, this means that if you can do the following:

- draft your closing documents for the other side's review,
- prepare your electronic registration ("e-reg<sup>TM</sup>") transfers to work out any unforeseen kinks; and
- outline your closing letter to remind yourself of uncompleted tasks before the eleventh hour,

you will be in a much better position to smoothly close your transaction.

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<sup>1</sup> The views expressed herein are those of the author and do not necessarily represent the views or opinions of the Legal Services Division or the City of Toronto.

## **2. Preparing for Closing**

### Critical Dates

Whether you are acting for the Purchaser or the Vendor, it is crucial to carefully review the agreement of purchase and sale (the “APS”) to determine the relevant dates. Especially as a new lawyer, keeping a list of these dates in addition to diarizing them in your bring forward systems will help keep you on track for the closing. When you have multiple files to close at once, a standard form that you have created will help you understand the transaction at a glance. When you need to review many at once, it will assist your office staff in finding information quickly. Once you hit your stride in your practice, having a standard form with relevant file details will be central to your organization system so that you can input important information to find easily without having to seek it out. See Appendix 1 to this paper for a Critical Dates form; you will want to adapt it to include other information you find relevant, or to delete that information which is superfluous to your day-to-day practice.

### Closing Agenda/Checklist

You may find that you would prefer to have more information included than simply critical dates, and that you find a Closing Agenda/Checklist more appropriate. A Closing Agenda/Checklist is more of a “to do” list for the



transaction and sets out the various tasks which must be attended to, the documents that must be prepared, reviewed, exchanged and finalized and any matters that must be attended to prior to closing. Many lawyers use this document to flag abnormal off-title search results, flaws on title or other due diligence matters. See Appendix 2 for a sample Closing Agenda/Checklist which could be used when acting for a Purchaser.

You may wish to have both a Critical Dates and a Closing Agenda document, or create a hybrid of the two. No matter which best suits your practice and your style, keeping it/them in the same location in every file will make file management much easier. If you start a habit of always keeping an electronic copy stored in one drive or under one folder heading, and a hard copy always stapled to the front of the correspondence folder, you and your staff will always have this critical information at your fingertips.

### Teraview®

Teraview® is the software used to access the electronic registration system. You will need to arrange to have a Teraview® docket (account) set up for each transaction so that you can perform the various functions, depending on who you are acting for:

- subsearch title – pull the parcel register to review the registrations on title (done by both lawyers so that everyone knows what is on title)
- subsearch the abutting lands as part of the Purchaser’s due diligence
- prepare the transfer document
- search executions against the Vendor, if acting for the Purchaser

Preparing the Teraview® documents well in advance of closing will allow for the other party to review and amend the documents if necessary. If there are going to be any problems with the drafting of the Teraview® documents – and throughout the transaction – it is best to know sooner rather than later.

### Requisitions

As the drafting and delivery of the requisitions letter is going to be addressed in a separate paper, the following is only a brief discussion of the document. A requisitions letter is correspondence that requests remediation to title issues and is sent by the Purchaser’s solicitor to the Vendor’s solicitor. These letters serve two purposes: (i) they address title defects, and (ii) they detail the contractual matters that require completion prior to closing. These letters “preserve and protect your client’s contractual rights”.<sup>2</sup>

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<sup>2</sup> Donahue, D.J., P.D. Quinn and D.C. Grandilli, *Real Estate Practice in Ontario – 6<sup>th</sup> Edition*, Butterworths (2003), p.256.

Requisitions are only necessary if title is deficient in some manner; each individual requisition should include the instrument number, date of registration, description of instrument, what it is missing from the title/what should not be registered on title but is. Valid requisitions may, for example, request that an execution against the Vendor be removed, that the name of the registered owner of the property mirrors the name of the Vendor on the APS or that an expired Notice be removed.

Any requisition and/or answer thereto may go before the court under the *Vendors and Purchasers Act*, R.S.O. 1990 c. V.2 if the Purchaser's lawyer makes a requisition and is unhappy with the Vendor's lawyer's response. In this case, the court will rule as to whether the requisition has been wholly and validly answered. If so, a copy of the court order will go on title to the land and that particular problem is solved for this property forever. It is therefore important that requisitions be clearly worded and ask specific questions.

These *Vendors and Purchasers Act* applications can be lengthy and must be completed before the close of the transaction. An applicant cannot insist on an extension of the closing date in order to make the application to the court. Either party may, in fact, rely on the "time is of the essence" provision in the APS to close notwithstanding the other party's application. While rare, these matters do arise; prompt attention to requisitions letters is therefore critical.

When responding to a letter of requisitions, it is best to attend to the requests promptly. Many of the requisitions will be able to be answered easily and with little effort, but time is required to obtain releases, quit claim deeds and mortgage discharges executed by third parties, if required. Where there are requisitions that cannot be answered, it is critical that you speak with your Vendor clients well in advance of the close to discuss the possibility of a delayed or even terminated transaction. It is also important to advise the Purchaser's solicitor of your client's inability to answer the requisition so that (s)he can get instructions on how to proceed.

It has become standard practice to include routine transactional matters in a requisitions letter. For instance, as the Purchaser's solicitor you may wish to deliver your draft documents to the Vendor's solicitor at this time and request that (s)he review them. While this is not a true requisition, many lawyers find it easiest to bundle their correspondence to streamline the process.

Appendix 3 shows a standard requisitions letter that contains both valid title requisitions, and routine transactional information/requests.

### **3. CLOSING DOCUMENTS**

As mentioned in the opening paragraphs, drafting closing documents early for circulation and review by all parties is critical in executing a stress-free

transaction. The other party's solicitor requires reasonable time to review documents; the more time that you have before the closing date to resolve unforeseen problems and concerns, the better for all parties.

Teraview® has a number of electronic template documents to allow for the four types of registrations allowed by the *Land Registration Reform Act*, R.S.O. 1990, c. L.4, being:

1. Transfer/Deed of Land;
2. Charge/Mortgage of Land;
3. Discharge of Charge/Mortgage of Land; and
4. Document General.

A document general is the catch-all covering page for every document that does not fall into one of the first three categories, above. Documents are registered electronically by lawyers using compliance with law statements. Remember that according to Rule 5.01 of the *Rules of Professional Conduct* the lawyer is responsible for all functions, even those delegated to a non-lawyer. It must only be lawyers, therefore, who use their Teraview® password and access hardware to register documents. Do not provide either your password or access hardware to any staff member, no matter how trusted.

Documents are not certified by the Land Registry Office ("LRO") immediately on registration, but are rather given a "Received As" reference number. When a

LRO staff member then reviews and certifies the documents, this number becomes the registration number for that instrument.

### Standard Documents

Depending on where you practice in Ontario, your standard documents may differ. Traditionally, residential transactions have used a series of documents to fulfill the requirements of the APS. These are attached in the appendices for your review, as they are still the method by which many lawyers conduct their transactions. Some lawyers are moving towards an all-inclusive document, or the "Mega-Doc". This is essentially one certificate that fulfills all the secondary documentation requirements of the APS. The County of Carleton Law Association, for instance, has moved towards a Mega-Doc standard.

A group of lawyers from across Ontario recently came together to draft standardized closing documents. The Working Group on Lawyers and Real Estate (the "Working Group") created their Ontario Standard Closing documents to bring closing documents more in line with the Ontario Real Estate Association ("OREA") standard APS used by the vast majority of sellers of residential real property in Ontario. As the OREA form has become widely used, the Working Group wanted a set of standard closing documents to be aligned with this form of APS and to end repetition in the closing documents used by many lawyers.

Information on the Working Group can be found at [www.lawyersworkinggroup.com](http://www.lawyersworkinggroup.com); this is an invaluable resource to both the new real estate practitioner and to the more seasoned lawyer. Information on this website will prove extremely helpful in streamlining your real estate practice and bettering your client service. With the generous permission of our friends at the Working Group, we have included their standard documents here. Appendix 18 sets out the Working Group's Ontario Standard Closing Document User Guide and Standard Documents, which can also be found at the website noted above.

The Working Group has also set out a number of Draft Condominium documents that you may find helpful in your practice. These documents will prove invaluable to you as you work through your first (and second... and third... and eighth!) closing of a condominium unit in Ontario.

Because change is coming about more slowly in some areas of the province, this paper focuses on the more traditional documentation, and the examples set out in the Appendices follow the standard form more widely used in Ontario. No matter how your documentation is drafted, it is essential to review carefully to ensure that you are not giving more to the other side than what is provided for in APS.

## Vendor's Documents

The following table details the documents that the Vendor is responsible for, along with a brief discussion of each:

Document	Description
<p><b>Transfer/Deed of Land</b></p>	<ul style="list-style-type: none"> <li>• <i>Family Law Act</i> statement – included to protect spousal rights regarding the matrimonial home</li> <li>• <i>Planning Act</i> statement – optional statements by the Vendor, his/her solicitor and the Purchaser's solicitor that effectively void any prior contravention of the <i>Planning Act</i> as follows:               <ol style="list-style-type: none"> <li>1. <u>Vendor's statement</u>: to the best of his/her knowledge and belief the conveyance does not contravene s. 50 of the <i>Planning Act</i></li> <li>2. <u>Vendor's solicitor's statement</u>: (s)he has explained the effect of s. 50 of the <i>Planning Act</i> to the Vendor and has made inquiries of the Vendor to determine that no breach has occurred</li> <li>3. <u>Purchaser's solicitor's statement</u>: (s)he has investigated title to the property and there appears to be no contravention of s. 50 of the <i>Planning Act</i></li> </ol> </li> </ul> <p><b>**NB** these statement are optional and should, if desired by the parties, be included as a term of the APS.</b></p>
<p><b>Statement of Adjustments</b></p> <p>(see Appendix 4)</p>	<ul style="list-style-type: none"> <li>• prepared by Vendor's solicitor</li> <li>• balance sheet which lists adjustments to the purchase price</li> </ul> <p><u>Vendor Credit</u>: sale price, expenses prepaid by the Vendor (eg: realty taxes, utilities, condo fees)</p> <p><u>Purchaser Credit</u>: deposit, underpayments by the Vendor during the Vendor's ownership</p>
<p><b>Direction/Re-direction re: Funds</b></p> <p>(see Appendices 5 &amp; 6)</p>	<ul style="list-style-type: none"> <li>• various payees – mortgagees, real estate commission, tax and utility arrears, common expense arrears</li> <li>• balance to Vendor's law firm "in trust" to pay for</li> </ul>



Document	Description
	<p>legal fees and disbursements</p> <p><u>Direction re: Funds:</u> to Vendor's solicitor to whomever that solicitor may direct (signed by the Vendor)</p> <p><u>Re-direction re: Funds:</u> to the various payees such as outstanding utility accounts, property taxes and mortgage-holders (signed by the Vendor's solicitor)</p>
<p><b>Declaration of Possession</b></p> <p>(see Appendix 7)</p>	<ul style="list-style-type: none"> <li>• the Vendor's statutory declaration regarding his/her use and occupation of the property during his/her ownership</li> <li>• includes information regarding the location of fences, boundaries, any claims that may have been made against the property</li> <li>• typically not provided in land titles transactions</li> <li>• as a Vendor's solicitor, be VERY careful with this document – ensure that no more is being given than is required under the APS</li> </ul>
<p><b>Income Tax Affidavit</b></p> <p>(see Appendix 7 ¶ 6)</p>	<ul style="list-style-type: none"> <li>• s. 116 of the <i>Income Tax Act</i> requires that Purchasers buying from non-resident Vendors keep back a portion of the purchase price to satisfy the non-resident's tax liability UNLESS the Purchaser believes that the Vendor is not a non-resident</li> <li>• Purchaser has to make a "reasonable inquiry" into the Vendor's status</li> <li>• Vendor makes a statement to this effect which satisfies the Purchaser's requirements under the <i>Income Tax Act</i></li> </ul>
<p><b>Bill of Sale</b></p> <p>(see Appendix 8 ¶ 2)</p>	<ul style="list-style-type: none"> <li>• no longer strictly required, still a good idea to show which chattels are being transferred to the Purchaser, and to get a statement attesting to the fact that they are unencumbered</li> <li>• relevant in properties that are leased – show which chattels belong to the Vendor and are being sold with the property, and which chattels belong to the tenants</li> </ul>
<p><b>Insulation</b></p>	<ul style="list-style-type: none"> <li>• confirmation of the Vendor's warranty made in the APS that the property does not contain urea</li> </ul>

Document	Description
<b>Warranty</b>  (see Appendix 8 ¶ 1)	formaldehyde foam insulation (“UFFI”) <ul style="list-style-type: none"> <li>• Vendor’s solicitors ensure that this statement does not expand the warranty beyond what is contained in the APS, eg: to asbestos</li> </ul>
<b>Affidavit re: Executions</b>	<ul style="list-style-type: none"> <li>• Vendor will have to pay to have the executions lifted from title prior to closing</li> <li>• examples: construction liens, family support orders</li> </ul> <p><u>Caution:</u> if you are the Purchaser’s lawyer, holding back money to lift executions post-closing may be problematic as it is possible that more money will be owed to lift the execution against title than is held back</p> <p><u>Same or Similar Name Executions:</u></p> <ul style="list-style-type: none"> <li>• Vendor swears an affidavit stating that they are not the person named in the execution</li> <li>• Creditor’s solicitor verifies that the Vendor is not the person named in the execution</li> <li>• registration of this Affidavit re: Executions on title; the LRO then removes the execution from title</li> </ul>
<b>Undertakings</b>  (see Appendix 9)          (see Appendix 10)	4 types of possible Undertakings: <ol style="list-style-type: none"> <li>1. <u>Client’s Undertakings on Own Behalf</u> <ul style="list-style-type: none"> <li>• To readjust, deliver vacant possession and keys on closing, to pay all utility and realty accounts, supply and pay for home heating fuel → all as set out in APS</li> </ul> </li> <li>2. <u>Solicitor’s Undertaking on Client’s Behalf</u> <ul style="list-style-type: none"> <li>• obtain client’s written instructions</li> <li>• give an undertaking on the client’s behalf, eg: “<i>the undersigned undertakes on behalf of his/her client, [Client Name], and without personal liability...</i>”</li> <li>• <u>caution:</u> odd/unusual undertakings that are not typically part of real estate transactions may not be covered by Errors and Omissions Insurance</li> </ul> </li> <li>3. <u>Solicitor’s Personal Undertaking</u> <ul style="list-style-type: none"> <li>• ensure that it is within your power to give and that you have your client’s instructions</li> <li>• do it – or follow up on it – promptly, eg: undertaking re: discharge of mortgage</li> </ul> </li> </ol>

Document	Description
	<p>4. <u>Best Efforts Solicitor's Undertaking</u></p> <ul style="list-style-type: none"> <li>• Given regarding matters beyond the immediate control of the solicitor</li> <li>• <u>caution</u>: case law is not clear about what constitutes "best efforts" – more money, effort and frustration may be spent than anticipated</li> </ul>

Purchaser's Documents

While the Vendor's Solicitor is putting together the foregoing documents, the Purchaser's Solicitor has his/her fair share of documents to draft as well. The table below sets out the documents that are the Purchaser's responsibility, along with a short description of each:

Document	Description
<b>Direction re: Title</b>	<ul style="list-style-type: none"> <li>• required if the Purchaser is taking title in another name than was on the APS</li> </ul>
<b>Land Transfer Tax Affidavit</b>	<p>Purchaser is required to pay:</p> <ol style="list-style-type: none"> <li>1. land transfer tax on the registration of any Transfer/Deed of land;</li> <li>2. sales tax on the value of goods and chattels transferred; and</li> <li>3. municipal land transfer tax if the property is in a jurisdiction that charges this tax (eg: Toronto)</li> </ol> <ul style="list-style-type: none"> <li>• Purchaser's statement contains information about the transaction and the consideration paid for the property – part of the Transfer/Deed of Land</li> </ul>
<b>Vendor Take-Back Mortgage</b>	<ul style="list-style-type: none"> <li>• Purchaser may give the Vendor a mortgage as part of the closing proceeds</li> <li>• s. 7(1) of the <i>Land Registry Reform Act</i> states that a charge in the prescribed form shall be deemed to</li> </ul>

Document	Description
	include certain implied covenants → the parties need to draft a schedule of those that are being opted out of
<b>HST</b>  (see Appendix 11)	<ul style="list-style-type: none"> <li>• HST applies to every supply of real property UNLESS there is an exemption under Schedule V of the <i>Excise Tax Act</i></li> <li>• some HST exemptions:               <ul style="list-style-type: none"> <li>○ sale of used residential property</li> <li>○ condominium common elements expenses</li> <li>○ certain sales of farmland</li> <li>○ sale of personal use of real property</li> </ul> </li> <li>• Vendor does not have to collect HST if the Purchaser is a registrant under the <i>Excise Tax Act</i> and provides a statement to that effect</li> </ul>
<b>Undertaking to Readjust</b>  (see Appendix 12)	<ul style="list-style-type: none"> <li>• a document signed by the Purchaser agreeing to readjust any mis-calculations or errors on the Statement of Adjustments</li> </ul>

#### 4. PREPARATION FOR CLOSING

##### Closing Funds

As the Purchaser’s lawyer, it is important to advise your client well in advance of the amount of money they will need to close, even if you do not yet have the Statement of Adjustments from the Vendor’s lawyer. Many people, especially first time home-buyers, will underestimate the costs associated with closing a property. You do not want your clients to be scrambling at the last minute to secure their closing funds.

Purchasers often turn their minds to the costs for moving supplies, movers, storage of their goods and personal accommodations if necessary, but don't always budget for the less intuitive incidental costs that come with purchasing real property. Some of the costs that your Purchaser client will need to be aware of and prepare for:

- land transfer tax (and municipal land transfer tax, if applicable);
- sales tax if goods and chattels are being transferred;
- registration costs;
- legal fees;
- estimated disbursements;
- title insurance;
- utility set-up charges; and
- condominium common elements fees and elevator booking charges, if applicable.

As a Purchaser's lawyer, you will want to obtain certified funds from your client so that you can cut cheques or wire funds to the Vendor's lawyer or as (s)he may direct. Be very careful, however, that you are not an unwilling participant to a fraud. Vigilance is crucial when accepting certified funds from your client.

### Pre-Closing

There are many stages to a successful pre-closing, with the key being – you guessed it! – organization. Raising, addressing and solving issues and problems

that arise early will help your closing run smoothly. A general timeline of tasks follows:

*As Soon As Possible:*

- review any problems with your clients, including title issues, and discuss with them how to resolve them
- summarize these issues in writing and get or confirm your client's instructions on how to address these problems in writing. This will be helpful if you ever find yourself in need of defending claims made by your client, and will be useful as you start your closing report
- where your client has another transaction closing that day, discuss the alternative plan if one of the transactions does not occur for some reason (eg: bridge financing, alternative accommodations etc.)

*Week Before Closing*

- meet with client to review all documents, and to explain what they mean – remembering that your time is money and that time spent with a client means less time to do other things, you may want to train a staff person to undertake this role or to answer subsequent questions that your clients often have
- provide your client with copies of all relevant information

- have your client complete the Acknowledgement and Direction for any documents that you are registering electronically by way of e-reg™ on behalf of your clients – see Appendix 13

### *2 Days Before Closing*

- check executions against Vendor, if acting for Purchaser, and Purchaser if acting for Vendor AND the Vendor is taking a vendor take back mortgage
- if the client has to be away for the closing, consider a limited power of attorney
- discuss the logistics of the move in/out times, transferring the key and alarm code, if applicable

## **5. CLOSING**

### Paper Closing at the Registry Office

Most transactions are completed electronically, and the steps to an electronic closing are similar to a paper closing – they just happen in the comfort of your own office. There may be some circumstances, however unlikely, where you might need to close at the registry office. If you make sure that you hit all the highlights of your electronic closing procedure (as set out below), registering in paper at the LRO registration desk will be no different in substance. Staff at the registry office are very experienced and will be able to assist you in the

improbable event that you will need to attend to a paper closing. It is important to note, however, that when doing a paper closing that each party release their documents, cheques and keys only when the registration has occurred.

### Electronic Closing – Escrow

As the registry system requires lawyers to transfer documents, cheques and keys to the other party in advance of the day of closing, an escrow closing is required and has become the norm. “Escrow” is the conditional delivery of documents pending a certain event (in this case, the registration of the transfer of land) taking place.

The lawyers enter into a Document Registration Agreement (the “DRA”) – see Appendix 14 – to govern the relationship between them. The funds and documents are held in escrow in accordance with the terms of the DRA while any problems or concerns with the documents are identified and rectified. The DRA determines who is responsible for the registration, and provides a timeline for the release of documents and fund by the non-registering solicitor.

There are two options for a solicitor after (s)he receives and approves the deliveries from the other side: (i) the registering lawyer can register and notify the non-registering solicitor that the transaction has been completed in the e-



reg™ system, or (ii) either lawyer can notify the other that (s)he will not be proceeding with the registration and send the deliveries back.

It is important to note that the DRA does not change the parties' substantive rights under the APS, and that your client will still be responsible for whatever representations and warranties provided thereunder. As the DRA is a document between the lawyers, signed by the lawyers, it is important to get your client's written instructions to enter into the DRA. Include this in your list of documents set out in the Acknowledgement and Direction.

#### Electronic Closing – Practical Steps

The following are the chronological steps in an electronic closing:

1. Funds: Purchaser's solicitor receives closing funds, deposits same into trust fund, draws closing cheques in accordance with the Direction/Redirection re: Funds.
2. Deliveries: *Vendor's lawyer to Purchaser's lawyer*: documents, keys, alarm codes if applicable  
*Purchaser's lawyer to Vendor's lawyer*: documents, cheques
3. Registration: both parties put their e-reg™ electronic signature on the electronic documents for completeness and release; registering party registers and lets the other party know

4. Completion: the lawyers then provide their clients with the funds and the keys

Unfortunately, the Purchaser's lawyer cannot transfer funds directly to the Vendor or his/her lawyer using the e-reg™ system. Alternatives to a certified cheque include direct wire to the Vendor's solicitor's trust account, or a remote deposit to another bank branch. There are difficulties, however, in counting on these methods to transfer funds – often the banks do not act with the same haste as you need them to, and often time the money will be lost in the banking ether for some time. Not having your money transmittal verified or not getting it done quickly enough can cause the deal to be delayed. Until advances in electronic banking provide a reliable method for electronic funds transfer in real-time, many solicitors are content to use certified cheques for standard transactions.

### Problems with Closing

Notwithstanding all your hard work, organization and preparation, there are times that your deal will not go smoothly. In the event that your client or the other party is not able to complete the transaction, you will have to be very careful to retain your client's rights under the agreement of purchase and sale. There are two main options to deal with transactions that cannot close in the typical fashion: either (i) enter into an escrow closing, or (ii) extend the closing date. Each will be discussed in turn.

## *Escrow Closings*

While all e-reg<sup>TM</sup> closings are escrow closings (discussed above), there are other kinds of escrow closings that can occur. An escrow closing will become necessary when the parties run out of time to register documents and close the transaction. While the safest thing to do is to extend the closing date (discussed below), it is not always possible. When, for example, the Purchaser's belongings are waiting outside the property in a moving truck, the parties may instruct their solicitors to enter into an escrow agreement for an escrow closing. This gives the Purchaser the right to occupy the property, but the documentation certifying them as the true owner of that property has not been registered.

It is highly recommended that you enter into an escrow agreement if performing an escrow closing – this provides your clients (and you, as lawyer) much more protection than a verbal escrow agreement. The written agreement should contain the following provisions:

- documents, funds, keys are to be exchanged and held by the solicitors in escrow pending fulfilling certain conditions (ie: the registration of the transfer for the property);
- the Purchaser's solicitor undertakes to register the documents as soon as possible after the escrow, subject only to registrations being placed on title;

- deliveries released only once the registration has occurred;
- if registration does not occur by a certain time, the deliveries must be returned;
- where the Purchaser is to occupy the property, the agreement must provide for this right and set out the Purchaser's responsibility for damages caused during the Purchaser's occupation, and the terms under which they must vacate if they are in default;
- the Vendor requires a waiver of any further conditions being raised by the Purchaser (ie: no further title, off-title requisitions); and
- obtain the mortgagee's express instructions to permit funds to be held in trust.

In addition to the foregoing, the insurance company for each of the Vendor and Purchaser must be informed of the escrow agreement.

### *Extending the Closing Date*

As you can see, an escrow agreement is a lengthy document with extensive provisions that must be negotiated. Many solicitors and clients alike would prefer to extend the closing date by way of a simple letter agreement – see Appendix 15. This is a much safer option, as the terms of the APS are still the same, save and except for the closing date. Include the following in your extending letter:

- new closing date;
- that all terms and provisions of the APS shall remain the same;

- when the Statement of Adjustments shall be calculated; and
- that “time shall remain of the essence”.

The Working Group document set out at Appendix 18 has a form of Delayed Closing Escrow Agreement which you may, at some point in your practice and likely sooner than you anticipate, find useful.

## **6. POST-CLOSING AND REPORTING**

Now that you have completed the task of closing the transaction, do not think that your job is done and you can get forget about this transaction entirely. Your work is only partially done – you have a number of post-closing matters to address before your file can be sent to storage. As you become comfortable in your practice, you will find tasks for which your support staff will be able to provide invaluable assistance; post-closing matters including reporting is likely one of these areas.

### Acting for the Purchaser

When acting for the Purchaser, you will need to advise the tax department and all utility companies of the change of ownership of the property. Advise them of the name of the new owner as registered on the Transfer/Deed of Land, along with

the legal description of the property, the municipal address, and any previous account information your client may have had with that company.

You will have to report to your clients which may take time, but you will want to ensure that they are advised immediately of any time-sensitive material, including information regarding upcoming mortgage, tax or utility payments. After this is done, you will want to ensure that you bring forward/diarize the file to complete the following tasks:

- obtain confirmation from the Vendor's lawyer discharging any mortgages that were previously on title;
- compliance with all undertakings received on closing;
- providing your client with a statement of your account.

While these may take time to obtain and prepare, the final reporting booklet should be a work in progress from Day 1 of the transaction. Along with your reporting letter (see Appendix 16 for an example), which should provide an overview of the transaction, you will want to include the following in your reporting package:

- legal opinion re: validity of title;
- the client's instructions, and how you fulfilled those instructions;
- information regarding the statement of adjustments;
- particulars of mortgages;
- responses to search letters;

- factual information for quick reference;
- other important information or unusual issues.

While this may seem like a daunting task, these pieces of the puzzle will come together as you work through the transaction. It is helpful, especially in your first few transactions, to start at the end – as soon as you receive a file, start putting together the closing deliveries and reporting letter. This way you will ensure that you do not miss any important steps or issues along the way.

### Acting for the Vendor

The tasks associated with acting for the Vendor are not nearly as onerous as those required to be completed by the Purchaser's Lawyer. Post-closing matters include discharging any mortgages on title, and fulfilling any undertakings. As with the Purchaser's solicitor, if you were provided with any undertakings on closing, you will want to diarize and follow up on them to ensure their completion.

As for your reporting letter (see Appendix 17), you will want to include information respecting the following:

- statement of adjustments and disbursement of funds;
- discharging of mortgages;
- details on any vendor take back mortgage, if applicable; and
- any special client instructions, and how you fulfilled them.

Once you have reported out on your transactions, you are in a position to organize the file, send it to your storage facility, and move on to the next transaction.

## **7. SUMMARY**

There are quite a number of steps outlined in this paper, but these will all become second nature to you as you proceed with your real estate practice. Being aware of issues and concerns from an early stage of the transaction will stand you in good stead to problem solve solutions and keep your clients' deals from sliding off the rails.

While attending to a real estate closing may not be as technical as tax law or as complex as trans-border business mergers, it does take a lot of careful thought, time and organization to ensure your client's needs are met. There are a number of potential pitfalls that you will learn how to sidestep as you expand your practice and set up the systems and practices that work for you.

As you head out into the wild world of real estate law, remember this: while the golden rule of real estate might be location, location, location, the golden rule of real estate law is organization, organization, organization!



## Appendix 1

### Critical Dates

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#### Hill purchase from Wade

**Property:** 67 The Parkway, Toronto

**Client:** Helena and Jake Hill  
1121 Bay Street, Suite 3106  
Toronto ON M5S 6C2  
  
416.555.6789  
  
thehills@sympatico.ca

**Notes:** Dealing with Jake at work – direct line 416.555.6123, his assistant Pat (416.555.9431) can usually track him down

**Other Party:** Miriam Wade

**Other Party Solicitor:** Sam Smythe  
55 Victoria Avenue, Suite 201  
Toronto ON M5T 3X6  
  
416.555.1212 (phone)  
415.555.1213 (fax)  
  
ssmythe@smythelawyers.ca

**Notes:** Sam's law clerk Cecilia (416.555.1211, cclarke@smythelawyers.ca) has carriage of this file

Action	Responsible Party	Section	Date
Execution by Hill	Hill	n/a	September 17, 2015
Execution by Wade	Wade	n/a	September 18, 2015
Delivery of Survey	Wade	6(1)	September 23, 2015
Due Diligence Period	Hill	11(1)	From September 18, 2015 to November 4, 2015
Notice of Satisfaction or Waiver of Conditions	Hill	11(1)	October 19, 2015
Requisition Date	Hill	12(1)	November 4, 2015
Closing	Both	1(l)	60 Business Days after Notice of Satisfaction/Waiver ~ December 18, 2015

Revised: September 21, 2015

**Appendix 2**  
**Closing Agenda/Checklist**

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IMA LAWYER, BARRISTER & SOLICITOR  
123 Main Street, Suite 2200  
Anytown, Ontario L4S 3A7

**PURCHASE CLOSING**

RE: Jones purchase from Smith  
PROPERTY: 789 High Park Ave., Toronto  
City of Toronto, Province of Ontario  
PIN No. 98765-2008  
Part (Lot) 7, Plan 571  
CLOSING DATE: August 29, 2015  
CLOSE WITH: McKinnon & Associates  
George McKinnon  
416-555-1212  
MORTGAGE INFO: 1st mtg arranged Toronto Helps Credit Union Ltd.

---

**BEFORE CLOSING**

- ( ) Notice Letter sent to Vendor's Solicitor
- ( ) Executions certificate vs. purchasers & vendor
- ( ) Search Property
- ( ) Requisition Letter
- ( ) Draft Undertaking and Purchaser's Direction re. Title
- ( ) Vendor's Documents to be executed and returned on closing
- ( ) Proof of Home Insurance
- ( ) Mortgage Instructions
- ( ) Request For Mortgage Funds
- ( ) Title Insurance
- ( ) Mortgage Documents to be Executed by purchaser
- ( ) Trust Ledger and Statement of Account prepared
- ( ) Certified Funds as per Re-Direction re: Funds forwarded to our office.

**OBTAIN:**

- ( ) Deed- compare to draft- Note changes in Boxes
- ( ) Direction for funds and re-direction- as per my
- ( ) Undertakings and warranties & Section 116- see draft
- ( ) Declaration of possession with survey attached- see draft
- ( ) Discharge(s) or solicitor's PERSONAL undertaking to
- ( ) Actual discharge(s) of:
  - [mortgages on title]
- ( ) Copy of discharge statement(s) for any mortgages to be discharged
- ( ) Keys

**REGISTER**

- ( ) Deed
- ( ) Mortgage(s)

**AFTER CLOSING:**

- ( ) Report to client
- ( ) Report to Bank Re. 1<sup>st</sup> Mortgage

**Appendix 3**  
**Purchaser's Requisitions Letter**

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**IMA LAWYER**  
**BARRISTER & SOLICITOR**

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November 26, 2015

McKinnon and Associates  
482 Lancaster Way, Suite 1012  
Malton, ON P4S 3W7

Attn: George McKinnon

Dear Sir or Madam:

Re: Jones purchase from Smith  
789 High Park Ave., Toronto  
Part (Lot) 7, Plan 571  
My File No.: Jones09

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Without prejudice to the rights of my clients under the Agreement of Purchase and Sale, and reserving the right to submit such further and other requisitions as may be deemed necessary from time to time as well as the right to waive any or all of them, I wish to raise the following requisitions:

1. **REQUIRED:** Draft Deed/Transfer of Land, engrossed as follows:

<u>Full Name</u>	<u>Birthdate</u>
JONES, Jason	March 5, 1973
PAINTER, Sarah	June 16, 1974
as joint tenants	

2. **REQUIRED:** An up-to-date survey of the subject lands. Please advise immediately if one is not available.
3. **REQUIRED:** Statement of Adjustments, in duplicate.
4. **REQUIRED:** On or before closing, satisfactory evidence of compliance with the following legislation:
- a) The Family Law Act, Ontario;
  - b) Section 116 of the Income Tax Act, Canada;
  - c) The Planning Act, Ontario, including completion of the Planning Act statements in the Deed/Transfer of Land;
  - d) The Construction Lien Act, Ontario.

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123 Main Street, Suite 2200 Anytown, Ontario L4S 3A7  
Telephone: (416) 555-5565 Fax: (416) 555-5566

5. REQUIRED: On or before closing, satisfactory evidence that there are no executions affecting title to the subject property.
6. REQUIRED: On or before closing, production and delivery of evidence that all buildings situate on the lands herein are located entirely within the limits thereof, that possession has been consistent with registered title to the property and that there are no encumbrances, liens, rights of way, easements, encroachments, restrictions, or agreements of any kind affecting the property which are not disclosed by the registered title.
7. REQUIRED: On or before closing, evidence that there are no work orders outstanding and that the lands and premises and all structures erected thereon comply with all by-laws, standards and regulations enacted or passed by the City of Toronto and any other governmental body or department having jurisdiction thereover.
8. REQUIRED: On or before closing, evidence that:
  - a) there are no arrears of municipal taxes or other municipal charges or assessments, including penalties, and that taxes have been paid in accordance with the Statement of Adjustments;
  - b) payment of water, hydro, and gas are not in arrears and that each shall be paid to the date of closing;
  - c) the fuel oil tank has been filled if the vendor has been so credited in the Statement of Adjustments, such evidence to be by receipted bill, failing which I shall require your personal undertaking to withhold a like amount from the proceeds of sale pending verification by my clients that the tank is full.
9. REQUIRED: On or before closing, satisfactory evidence that the property has not been insulated with urea-formaldehyde foam insulation.
10. REQUIRED: On or before closing, satisfactory evidence that the fixtures affixed to the lands and buildings, and the chattel property included in the purchase price are the property of the vendors and are not subject to any conditional sales contract, chattel mortgage or lien note and that the vendors are the absolute owners of all such fixtures and chattels, free of any encumbrances.
11. REQUIRED: An opportunity for my clients to perform a final inspection of the premises.
12. REQUIRED: On closing, keys and vacant possession, subject to any tenancy which the purchasers has expressly agreed to assume pursuant to the Agreement of Purchase and Sale.
13. REQUIRED: Insertion of the PIN Number for the property, into Box 3 of the Transfer.
14. REQUIRED: On or before closing, evidence that this transaction is not subject to Goods and Services Tax.
15. REQUIRED: That the following documents which are enclosed herewith, be executed by the vendors and returned to my office, in duplicate, on or before closing:
  - a) Vendor's undertakings;
  - b) Warranties/Bill of Sale;
  - c) Declaration of Possession;

d) Statutory declaration re HST.

16. The parcel is subject to debts in instrument # WT123456 registered on August 23, 1974.

REQUIRED: On or before closing, removal of same from the thumbnail description.

17. The parcel is subject to instrument # AT7770101 registered on July 10, 1989, being a Notice of Lease that was to have expired on June 30, 1999.

REQUIRED: On or before closing, removal of same from title to the Property.

Yours very truly,

Ima Lawyer

IL:rh

**Appendix 4**  
**Statement of Adjustments**

**Statement of Adjustments**

**Vendor:** Julia Fortin  
**Purchaser:** Edna Louis and Peter Myna  
**Property:** 2328 Oak Tree Trail, Toronto ON  
**Adjusted as of:** November 21, 2015

	<b>Credit Purchaser</b>	<b>Credit Vendor</b>
<b><u>SALE PRICE</u></b>		\$377,500.00
<b><u>DEPOSIT</u></b>	\$5,000.00	
<b><u>REALTY TAXES</u></b>		
2015 Total Taxes: \$3,419.48		
Vendor has paid: \$3,419.48		
Vendor's share for 325 days \$3,036.42		
<b>Credit Vendor</b>		\$383.06
<b><u>BALANCE DUE ON CLOSING</u></b>		
Payable to Lou Tucker, Barrister & Solicitor, in trust or as further directed	\$372,883.06	
	<b>\$377,883.06</b>	<b>\$377,883.06</b>

E. & O.E.

**Appendix 5**  
**Direction re: Funds**

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**Direction re: Funds**

**To:** Edna Louis and Peter Myna  
**And to:** Green & Boyer LLP  
**Re:** **Fortin sale to Louis and Myna**  
**2328 Oak Tree Trail, Toronto**  
**Date:** November 21, 2015

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The undersigned hereby irrevocably authorizes and directs you to make all monies owing and payable regarding the above-noted transaction payable to Lou Tucker, Barrister & Solicitor, in trust, or as he may re-direct in writing.

This direction shall be your good, sufficient and irrevocable authority for so doing.

Dated at Toronto, Ontario November 17, 2015

Edna-Jean Duncan  
Witness: Edna-Jean Duncan

Julia Fortin  
Julia Fortin

**Appendix 6**

**Re-direction re: Funds**

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**Re-direction re: Funds**

**To:** Edna Louis and Peter Myna

**And to:** Green & Boyer LLP

**Re:** **Fortin sale to Louis and Myna**  
**2328 Oak Tree Trail, Toronto**

**Date:** November 21, 2015

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This is to direct you and shall constitute your good and sufficient authority to make certified cheques for the proceeds of sale in the above transaction payable as follows:

Bank of Montreal	\$201,022.50
Receiver General for Canada	\$29,313.64
Sutton Group Signature Realty Inc.	\$14,818.76
Jude Fortin	\$81,545.90
Lou Tucker, Barrister & Solicitor	\$950.00
Julia Fortin	\$45,232.26
<b>TOTAL</b>	<b>\$372,883.06</b>

Lou Tucker

Lou Tucker, Barrister & Solicitor



**Appendix 7**

**Declaration of Possession**

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**IN THE MATTER OF** title to:  
Part (Lot) 41, Plan M911  
2328 Oak Tree Trail, Toronto

**AND IN THE MATTER OF** the sale thereof from  
Julia Fortin to Peter Myna and Edna Louis

I, JULIA FORTIN, SOLEMNLY DECLARE that:

1. I am the absolute owner of the above mentioned lands and either personally or by my tenants have been in actual, peaceable, continuous, exclusive, open, undisturbed and undisputed possession and occupation thereof, and of the houses and other buildings used in connection therewith throughout our period of ownership of the property.
2. I am not aware of any person or corporation having any claim or interest in the said lands or any part thereof adverse to or inconsistent with registered title and are positive that none exists.
3. That possession and occupation of the above lands by the vendor has been undisturbed throughout by any action, suit or other proceedings or adverse possession or otherwise on the part of any person whomsoever and during such possession and occupation, no payment has ever been made or acknowledgment of title given by the undersigned, or, so far as we know, by anyone else, to any person in respect of any right, title, interest or claim upon the said lands.
4. To the best of my knowledge and belief, the buildings used in connection with the premises are situate wholly within the limits of the lands above described, and there is no dispute as to the boundaries of the said lands. Except as may be registered on title, I have never heard of any claim of easement affecting the lands, either for light, drainage, or right of way or otherwise.
5. I do not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment with respect to any land abutting the lands being conveyed in the subject transaction.
6. I am not a non-resident of Canada within the meaning of Section 116 of the Income Tax Act (Canada) and nor will I be a non-resident of Canada at the time of closing.
7. Within the meaning of the Family Law Act (Ontario): I am not a spouse.

AND I make this solemn Declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

DECLARED before me	}	
at the City of Toronto	}	_____
in the Province	}	Julia Fortin
of Ontario	}	
this    day of November	}	
2015.	}	

A COMMISSIONER, ETC.

**Appendix 8**

**Statement**

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**TO:** Peter Myna and Edna Louis

**AND TO:** Green and Boyer  
Barristers & Solicitors

**RE:** Fortin sale to Myna and Louis  
2328 Oak Tree Trail, Toronto

---

**UREA-FORMALDEHYDE WARRANTY**

I the vendor in the above transaction, hereby warrant that, to the best of my knowledge and belief, the subject property has not been insulated with urea-formaldehyde foam insulation.

**BILL OF SALE**

IN CONSIDERATION of payment of the purchase price herein, the undersigned, being the vendor of the subject property, does hereby sell, transfer and convey to the purchasers the chattels and fixtures included in the purchase price as specified in the Agreement of Purchase and Sale; and I covenant that I am the lawful owner thereof and have the right to transfer and convey the same and that such chattels and fixtures are free of all encumbrances, liens and claims of any kind whatsoever.

**GOODS AND SERVICES TAX**

The above property is occupied as a residential unit and I did not acquire the property or carry on any construction or renovation of the property in the course of business or adventure or concern in the nature of trade and, to the best of our knowledge and belief, the sale of the property is exempt from HST under the Excise Tax Act (Canada).

**DATED** at Toronto, this            day of November, 2015.

\_\_\_\_\_  
Julia Fortin

**Appendix 9**

**Vendor's Undertaking**

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**UNDERTAKING**

**TO:** Peter Myna and Edna Louis

**AND TO:** Green and Boyer  
Barristers & Solicitors

**RE:** Fortin sale to Myna and Louis  
2328 Oak Tree Trail, Oakville

---

IN CONSIDERATION of and notwithstanding the closing of the above transaction, we hereby undertake as follows:

1. TO deliver up vacant possession of the premises on closing;
2. TO pay all arrears of taxes to the extent that an allowance has not been granted to the purchasers on account thereof and to pay the 2015 taxes in accordance with the Statement of Adjustments;
3. TO readjust, forthwith upon demand any item on the Statement of Adjustments, if necessary;
4. TO pay all utilities accounts, including hydro-electric, water and gas charges, to the date of closing;
5. To pay all amounts required to obtain a discharge of the mortgage(s) registered on title to the property and to obtain and register a discharge of such mortgage(s) as soon as possible after closing; and
6. TO leave on the premises all chattels and fixtures specified in the Agreement of Purchase and Sale, free of encumbrances, liens and claims of any kind whatsoever.

**DATED** at Toronto, this            day of November, 2015.

\_\_\_\_\_  
Julia Fortin

**Appendix 10**

**Solicitor's Undertaking**

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**UNDERTAKING**

**TO:** Peter Myna and Edna Louis

**AND TO:** Green and Boyer  
Barristers & Solicitors

**RE:** Fortin sale to Myna and Louis  
2328 Oak Tree Trail, Toronto

---

IN CONSIDERATION of and notwithstanding the closing of the above-noted transaction, I hereby personally undertake to:

1. obtain and register a good and valid cessation of the charge in favour of Bank of Montreal;
2. obtain and register a good and valid cessation of the Lien, registered as instrument number AT123456, in favour of The Minister of National Revenue;
3. obtain and register a good and valid cessation of the Lien, registered as instrument number AT78910, in favour of The Minister of National Revenue.

Without limiting the generality of the foregoing, with respect to each mortgage or charge referred to above, I personally undertake as follows:

- a) to forthwith pay to the Mortgagee or person lawfully entitled thereto all monies required to fully pay out and discharge such mortgage;
- b) to obtain and register a proper form of discharge as soon as possible after closing and to forthwith thereafter provide you with registration particulars thereof;
- c) in the event that I have not obtained the discharge within one hundred and twenty days from the date hereof, to commence and diligently pursue a Court application for an Order discharging such mortgage and, upon such Order being granted, to forthwith register the same on title and advise you of registration particulars; and
- d) to indemnify you from and against any and all direct or consequential claims, costs or damages arising from failure to discharge the said mortgage in accordance with the terms of this undertaking.

**DATED** at Toronto this 21st day of November, 2015.

Lou Tucker Barrister & Solicitor

Per: \_\_\_\_\_

**Appendix 11**

**HST Certificate**

---

**HST CERTIFICATE AND INDEMNITY**

**TO:** Vera Venderson (the "Seller")

**AND TO:** Albertson, Becker and Charleston LLP, her solicitors herein

**RE:** Patti Purchaser (the "Buyer") purchase from Vera Venderson, Part Lot 53, being Parts 1-6, Plan 64M-18402, City of Toronto, known municipally as 987 Sesame Street, Toronto (the "Property") further to an Agreement of Purchase and Sale dated October 22, 2015 (the "APS")

---

In consideration of and notwithstanding the closing of the above-noted transaction, the Purchaser certifies that with respect to Harmonized Sales Tax ("HST") imposed under the *Excise Tax Act* (Canada) (the "Act") in respect of the transfer of the Property, buildings, structures and improvements on the Property, where applicable:

- (i) The Buyer is purchasing the Property as principal, for the Buyer's own purposes and benefit, and the Buyer is not an agent or trustee or acting for another individual or corporation in completing the transaction;
- (ii) HST is payable in respect of this transaction in accordance with the Act and the Buyer, having agreed to pay consideration for the transfer, is liable for the payment of HST in respect of the consideration;
- (iii) At the closing of the transaction contained in the APS, the Buyer is a registrant under the Act (HST Registration Number RT1234567), which registration has not been cancelled, suspended or revoked. The Buyer shall self-assess her HST liabilities herein, file returns and remit to the appropriate authority on a timely basis any HST owing on the transfer of the Property as required under the Act;
- (iv) The Buyer shall indemnify and hold the Seller, her heirs and trustees, harmless from any Seller's liability under the Act that may occur due to incorrect statements or breaches of the obligations of the Buyer set out in this Certificate and Indemnity or the APS or arising under the Act, in addition to all fines, penalties, costs, expenses and interest charges resulting from such incorrect statement or breach; and
- (v) The Buyer agrees that this Certificate and Indemnity shall survive and shall not merge in the closing of the transaction provided for in the APS.

**DATED** the 27<sup>th</sup> day of November, 2015.

\_\_\_\_\_  
Witness Name:

\_\_\_\_\_  
Patti Purchaser

**Appendix 12**

**Purchaser's Undertaking**

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**UNDERTAKING TO RE-ADJUST**

TO: Vera Vendorson

AND TO: Albertson, Becker and Charleston LLP, her solicitors herein

RE: Patti Purchaser purchase from Vera Vendorson, Part Lot 53, being Parts 1-6,  
Plan 64M-18402, City of Toronto, known municipally as 987 Sesame Street,  
Toronto

In consideration of and notwithstanding the closing of the above transaction, the undersigned hereby undertakes to re-adjust all items on the Statement of Adjustments and any items omitted in error, if necessary, forthwith upon demand.

DATED at Toronto, this 27<sup>th</sup> day of November, 2015.

\_\_\_\_\_  
Patti Purchaser

Appendix 13

Acknowledgement and Direction

**ACKNOWLEDGEMENT AND DIRECTION**

TO:

RE:

\_\_\_\_\_  
(insert brief description of transaction)

This will confirm that:

- The undersigned (has) have reviewed the information set out in the draft document(s) attached, and that this information is accurate;
- You are authorized and directed to register **or cause to be registered** electronically on behalf of the undersigned the following document(s):
  - 1.
  - 2.

as well as any other document(s) required to complete the transaction described above;
- **You are authorized to amend the above-described documents as required in order to complete the transaction in accordance with its terms or as the undersigned may instruct from time to time;**
- You are authorized and directed to enter into a Document Registration Agreement substantially in the form attached hereto as Schedule "A" and the undersigned acknowledge(s) that the undersigned shall be bound by the terms of that Agreement;
- The effect of the electronic documents described in this Acknowledgement and Direction has been fully explained to the undersigned and the undersigned understand(s) that the undersigned (is a party) are parties to and bound by the terms and provisions of these electronic document(s) to the same extent as if the undersigned had **personally** signed these documents; and
- The undersigned (is) are in fact (the party) parties named in the electronic documents described in this Acknowledgement and Direction and the undersigned (has) have not misrepresented the identity of (any of) the undersigned to you.

**[Family Law Act statement where required]**

**The undersigned acknowledges and agrees that in effecting the electronic registrations hereby authorized, you will be relying on the accuracy and authority of the foregoing statements.**

Dated at Toronto, this \_\_\_\_\_ day of \_\_\_\_\_, 200\_.

\_\_\_\_\_  
Witness: (as to all signatures, if applicable)

\_\_\_\_\_  
<>

\_\_\_\_\_  
<>

Appendix 14

Document Registration Agreement

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**DOCUMENT REGISTRATION AGREEMENT**

**BETWEEN:**

**Ima Lawyer**

(hereinafter referred to as the "**Purchaser's Solicitor**")

**AND:**

**George McKinnion**

(hereinafter referred to as the "**Vendor's Solicitor**")

**RE:** Mary Jones and David Jones (the "**Purchaser**") purchase from John Smith and Megan Smith (the "**Vendor**") of 789 High Park Ave., Toronto (the "**Property**") pursuant to an agreement of purchase and sale dated September 18, 2015, as amended from time to time (the "**Purchase Agreement**"), scheduled to be completed on November 21, 2015 (the "**Closing Date**")

---

**FOR GOOD AND VALUABLE CONSIDERATION** (the receipt and sufficiency of which is hereby expressly acknowledged), the parties hereto hereby undertake and agree as follows:



Holding Deliveries In Escrow

1. The Vendor's Solicitor and the Purchaser's Solicitor shall hold all funds, keys and closing documentation exchanged between them (the "Requisite Deliveries") in escrow, and *shall* not release or otherwise deal with same except in accordance with the terms of this Agreement. Both the Vendor's Solicitor and the Purchaser's Solicitor have been authorized by their respective clients to enter into this Agreement. Once the Requisite Deliveries can be released in accordance with the terms of this Agreement, any monies representing payout funds for mortgages to be discharged shall be forwarded promptly to the appropriate mortgage lender.<sup>3</sup>

Advising of Concerns with Deliveries

2. Each of the parties hereto shall notify the other as soon as reasonably possible following their respective receipt of the Requisite Deliveries (as applicable) of any defect(s) with respect to same.

Selecting Solicitor Responsible for Registration

3. The Purchaser's Solicitor shall be responsible for the registration of the Electronic Documents (as hereinafter defined) unless the box set out below indicating that the Vendor's Solicitor will be responsible for such registration has been checked. For the purposes of this Agreement, the solicitor responsible for such registration shall be referred to as the "Registering Solicitor" and the other solicitor shall be referred to as the "Non-Registering Solicitor":

Vendor's Solicitor will be registering the Electronic Documents

Responsibility of Non-Registering Solicitor

4. The Non-Registering Solicitor shall, upon his/her receipt and approval of the Requisite Deliveries (as applicable), electronically release for registration the Electronic Documents and shall thereafter be entitled to release the Requisite Deliveries from escrow forthwith following the earlier of:

and

- a) the registration of the Electronic Documents;
- b) the closing time specified in the Purchase Agreement unless a specific time has been inserted as follows [\_\_\_\_\_ a.m./p.m. on the Closing Date] (the "**Release Deadline**"), and provided that notice under paragraph 7 below has not been received; or
- c) receipt of notification from the Registering Solicitor of the registration of the Electronic Documents.

Release of Requisite Deliveries by Non-Registering Solicitor

If the Purchase Agreement does not specify a closing time and a Release Deadline has not been specifically inserted the Release Deadline shall be 6.00 p.m. on the Closing Date.

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<sup>3</sup> Solicitors should continue to refer to the Law Society of Upper Canada practice guidelines relating to recommended procedures to follow for the discharge of mortgages.

Responsibility of Registering Solicitor 5. The Registering Solicitor shall, subject to paragraph 7 below, on the Closing Date, following his/her receipt and approval of the Requisite Deliveries (as applicable), register the documents listed in Schedule "A" annexed hereto (referred to in this agreement as the "**Electronic Documents**") in the stated order of priority therein set out, as soon as reasonably possible once same have been released for registration by the Non-Registering Solicitor, and immediately thereafter notify the Non-Registering Solicitor of the registration particulars thereof by telephone or telefax (or other method as agreed between the parties).

Release of Requisite Deliveries by Registering Solicitor 6. Upon registration of the Electronic Documents and notification of the Non-Registering solicitor in accordance with paragraph 5 above, the Registering Solicitor shall be entitled to forthwith release the Requisite Deliveries from escrow.

Returning Deliveries where Non-registration 7. Any of the parties hereto may notify the other party that he/she does not wish to proceed with the registration<sup>4</sup> of the Electronic Documents, and provided that such notice is received by the other party before the release of the Requisite Deliveries pursuant to this Agreement and before the registration of the Electronic Documents, then each of the parties hereto shall forthwith return to the other party their respective Requisite Deliveries.

Counterparts & Gender 8. This Agreement may be signed in counterparts, and shall be read with all changes of gender and/or number as may be required by the context.

Purchase Agreement Prevails if Conflict or Inconsistency 9. Nothing contained in this Agreement shall be read or construed as altering the respective rights and obligations of the Purchaser and the Vendor as more particularly set out in the Purchase Agreement, and in the event of any conflict or inconsistency between the provisions of this Agreement and the Purchase Agreement, then the latter shall prevail.

Telefaxing Deliveries & Providing Originals if Requested 10. This Agreement (or any counterpart hereof), and any of the closing documents hereinbefore contemplated, may be exchanged by telefax or similar system reproducing the original, provided that all such documents have been properly executed by the appropriate parties. The party transmitting any such document(s) shall also provide the original executed version(s) of same to the recipient within 2 business days after the Closing Date, unless the recipient has indicated that he/she does not require such original copies.

Dated this \_\_\_\_\_ day of November, 2015.

Name/Firm Name of Vendor's Solicitor  
George McKinnon

Name/Firm Name of Purchaser's Solicitor  
Ima Lawyer

McKinnon & Associates

\_\_\_\_\_

<sup>4</sup> For the purpose of this Agreement, the term "registration" shall mean the issuance of registration number(s) in respect of the Electronic Documents by the appropriate Land Registry Office.

\_\_\_\_\_  
Name of Person Signing

\_\_\_\_\_  
Name of Person Signing

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Signature)

**Note: This version of the Document Registration Agreement was adopted by the Joint LSUC-CBAO Committee on Electronic Registration of Title Documents on March 29, 2004 and posted to the web site on April 8, 2004.**

**SCHEDULE "A" TO THE DOCUMENT REGISTRATION AGREEMENT**

**Electronic Documents to be registered on closing (in order of priority)**

**Transfer/Deed of the Property from the Vendor in favour of the Purchaser.**

**First Charge/Mortgage against the Property from the Purchaser in favour of Toronto Helps Credit Union Ltd.**

**Appendix 15**

**Extension Letter**

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**IMA LAWYER**  
BARRISTER & SOLICITOR

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December 10, 2015

**SENT BY FAX**

McKinnon and Associates  
482 Lancaster Way, Suite 1012  
Malton, ON P4S 3W7

Attn: George McKinnon

Dear Sir or Madam:

Re: Jones purchase from Smith  
789 High Park Ave., Toronto  
Part (Lot) 7, Plan 571  
My File No.: Jones09

---

Further to your letter of December 9, 2015 and our subsequent telephone conversations, I am writing to confirm our respective clients' agreement to extend the Closing Date for the above-noted transaction from December 10, 2015 to December 14, 2015. All other terms and conditions of the Agreement of Purchase and Sale shall remain the same and time shall remain of the essence. Adjustments shall be as of December 14, 2015.

Would you please sign and return a copy of this letter at your earliest convenience to confirm your client's agreement with the foregoing.

Yours truly,

Ima Lawyer

c. Mr. and Mrs. Jones

On behalf of Tony and Toni Smith, the undersigned  
agrees to the terms  
set out above.

\_\_\_\_\_  
George McKinnon, Mackinnon Associates

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123 Main Street, Suite 2200 Anytown, Ontario L4S 3A7  
Telephone: (416) 555-5565 Fax: (416) 555-5566

Appendix 16

Purchaser's Reporting Letter

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IMA LAWYER  
BARRISTER & SOLICITOR

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January 17, 2015

Jason Jones  
789 High Park Ave.  
Toronto, Ontario  
M6J 3Z1

Dear Sir or Madam:

Re: Your purchase from Smith  
789 High Park Ave., Toronto  
Part (Lot) 7, Plan 553  
My File No.: Jones08

---

I am pleased to now submit my reporting letter in relation to your purchase of the above property, which transaction was completed on November 21, 2015.

**TITLE**

In accordance with your instructions, your title to the property is protected under a title insurance policy issued by First Canadian Title as Policy No. ONPOT08097641083491. Schedules identifying the property and the insured, and listing additional exceptions as well as affirmative assurances relating to matters not covered, excluded or excepted, are attached to the title insurance policy. Your copy of the policy, including Schedules, is enclosed with this report. Should you ever be required to file a claim, it is important that you follow the procedures set out in the policy.

Title to the property was taken in the following manner:

**Full Name**

**Birthdate**

JONES, Jason  
JONES, Sarah  
as joint tenants

March 5, 1973  
June 16, 1974

I am enclosing herewith the duplicate registered Transfer/Deed, the original of which I registered on your behalf on December 14, 2015 as Instrument No. AT9753416.

---

123 Main Street, Suite 2200 Anytown, Ontario L4S 3A7  
Telephone: (416) 555-5565 Fax: (416) 555-5566

**FIRST MORTGAGE ARRANGED**

Mortgagee: Toronto Helps Credit Union Ltd.  
Address: 1234 Bloor Street West  
Toronto, Ontario  
M9P 3K5  
Loan Number: 99999  
Principal: \$634,000.00  
Interest Rate: 4.0% per annum calculated Semi-Annually, not in advance  
Interest Adjustment Date: December 14, 2015  
Maturity Date: December 14, 2020

**Regular Payments:**

Payment Frequency:	Monthly
Principal and Interest:	\$3,690.00
Payments Due:	29th day of each month
First Payment Date:	January 13, 2010

The Standard Charge Terms filed as Number 200033 are incorporated by reference into this mortgage.

**INSURANCE**

It is of the utmost importance to maintain adequate fire and liability coverage on the property and I wish to confirm that you arranged fire insurance effective from the date of closing. Although it is recommended that the amount of coverage be for replacement cost, it is necessary to maintain, at the very least, coverage in an amount not less than the aggregate secured by any mortgages on the property from time to time, and, in addition, the interests of such mortgagees must be noted on the policy.

**STATEMENT OF ADJUSTMENTS**

I am enclosing herewith a copy of the Statement of Adjustments which contains details of the various adjustments to the purchase price. The statement is used so as to determine the cash balance which you were required to pay to the vendor on closing. The figures on the right-hand side are credits to the vendor (and, as such, are added onto the purchase price) while those on the left are credits to you.

You will see from the Statement of Adjustments that you were charged with the purchase price of \$792,500.00 and you received credit with the deposit monies which you had already paid. With respect to realty taxes, the statement shows the vendor's proportionate share of the annual tax bill for the period from January 1st, 2015 to the date of closing as well as the amount actually paid by the vendor on this account. The difference between these two figures appears as an adjustment to the purchase price.

The balance due on closing was determined by adding to the sale price the credits to the vendor as shown in the right-hand column of the Statement of Adjustments, and deducting therefrom the credits to the purchaser as set out in the left-hand column.

**ENCLOSURES**

I am enclosing the following documents:

- i. Duplicate registered Deed No. AT9753416.
- ii. Statement of Adjustments
- iii. Direction Re: Title
- iv. Acknowledgement of Title Insurance
- v. Property Insurance Binder Letter
- vi. Warranty and Undertaking
- vii. Bill of Sale
- viii. Declaration of Possession
- ix. Statutory Declaration re: HST
- x. Undertaking to Re-Adjust the Statement of Adjustments
- xi. Acknowledgement and Direction re: Electronic Registration with respect to the Purchase of the Property
- xii. Charge/Mortgage of Land, electronically registered as AT1881354
- xiii. Statutory Declaration
- xiv. Acknowledgement re: Standard Charge Terms
- xv. Standard Charge Terms
- xvi. Direction re: Funds
- xvii. Acknowledgement and Direction re: Electronic Registration with respect to the Mortgage of the Property
- xviii. My Statement of Account
- xix. My Trust Ledger Statement

I trust that this transaction has been completed to your satisfaction and if you have any questions or comments, please do not hesitate to contact my office.

Yours very truly,

Ima Lawyer

IL:rh

Encls.

**Appendix 17**

**Vendor's Reporting Letter**

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**IMA LAWYER**  
BARRISTER & SOLICITOR

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November 26, 2015

Julia Fortin  
1020 Bay Street, Suite 3105  
Toronto ON M5X 3A7

Dear Madam:

Re: Your sale to Edna Louis and Peter Myna  
2328 Oak Tree Trail, Toronto  
My File No.: Fortin 09

---

I am pleased to now submit my reporting letter in relation to your sale of the above property.

**AGREEMENT OF PURCHASE AND SALE**

This transaction was completed in accordance with the Agreement of Purchase and Sale executed by you and the purchasers. The sale price was \$377,500.00 with \$5,000.00 being paid as a deposit and the balance payable to you by certified cheque on closing subject to adjustments.

The transaction was completed on November 21, 2015.

**STATEMENT OF ADJUSTMENTS**

The Statement of Adjustments sets out closing adjustments between you and the purchaser, calculated as at November 21, 2015.

The Statement reflects a credit to you in the amount of \$377,500.00, being the sale price of the property, and a credit to the purchaser for the deposit monies of \$5,000.00.

REALTY TAXES - Taxes were adjusted based on the 2015 final tax bill of \$3,419.48. Since your prorated share of the taxes, for the period from January 1, 2015 to November 21, 2015 amounted to \$3,036.42 whereas you had paid \$3,419.48 on this account, you received credit in the Statement of Adjustments with the sum of \$383.06.

---

123 Main Street, Suite 2200 Anytown, Ontario L4S 3A7  
Telephone: (416) 555-5565 Fax: (416) 555-5566



BALANCE DUE ON CLOSING - After accounting for the foregoing adjustments, the purchaser was required to pay the balance due on closing in the amount of \$372,883.06.

For details as to the disbursement of funds received by my office, please refer to my Trust Ledger Statement which is enclosed.

### **PREVIOUS FIRST MORTGAGE**

From the funds which we received from the purchasers on the closing of this transaction, I forwarded the sum of \$201,022.50 so as to discharge the previous first mortgage in favour of Bank of Montreal.

The amount required to discharge this mortgage was determined in accordance with the mortgage statement for discharge purposes obtained by my office, and I am enclosing a copy thereof for your reference.

I will be obtaining and registering a discharge of this mortgage as soon as possible after closing.

### **ENCLOSURES**

I am enclosing the following documents:

- Statement of Adjustments.
- Copy of first mortgage statement for discharge purposes.
- My Statement of Account.
- My Trust Ledger Statement.
- My trust cheque payable to your order for \$45,232.26

I trust that this transaction has been completed to your satisfaction and if you have any questions or comments, please do not hesitate to contact my office.

Yours very truly,

Ima Lawyer

IL:rh

Encls.

## Appendix 18

### Working Group on Lawyers and Real Estate Ontario Standard Closing Documents User Guide and Documents

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# Working Group on Lawyers and Real Estate Ontario Standard Closing Documents User Guide

The Ontario Standard Closing Documents have been designed to assist lawyers to be more efficient in closing standard residential real estate transactions. This Guide is provided to assist the users of the Ontario Standard Closing Documents.

1. The Ontario Standard Closing Documents were approved as of **April 2, 2009** by the Working Group on Lawyers and Real Estate. The official versions of the documents are posted in English and French on the Working Group's web site at ([www.lawyersworkinggroup.com](http://www.lawyersworkinggroup.com)). The approved documents are:
  1. Vendor's Closing Certificate;
  2. Purchaser's Undertaking & Direction Re Title;
  3. Lawyer's Direction Re Funds;
  4. Lawyer's Undertaking; and
  5. Lawyers' Delayed Closing Escrow Agreement.
2. Each document states at the top, "***This Document is in the Form approved by the Working Group on Lawyers and Real Estate on April 2, 2009, except for clearly shown changes. Any changes not clearly shown are of no effect.***" Thus, each document may be relied upon as being in its original approved format, except for matters which are added or modified in a clear highlighted fashion such as *handwritten text*, BLOCK CAPITALIZED LETTERS, underlined, **bolded** or ~~struck out~~ so as to be clearly obvious to the reader. Whichever method is used should remain visible if the document is photocopied or faxed. A different colour font or text highlighted in yellow is not always visible when photocopied or faxed and is not recommended.
3. The documents are designed to require no, or a minimum number of, additions or modifications. Inapplicable clauses should not be struck or deleted as they are drafted to apply only if necessary by using such terms as "if any", "if applicable" or "in accordance with the Agreement of Purchase and Sale".

4. The documents are based on the OREA Agreement of Purchase and Sale (“APS”) and the generally use the same words as used in the APS. The documents reflect the rights and obligations of the parties as set out in the standard APS. Lawyers should review their clients’ agreement to determine if any modifications or additions to the usual terms have been made and whether any other changes to the documents need to be made.
5. The documents all have the same heading and only require inserting the name of the purchasers and vendors, the municipal address or legal description of the property, and the Completion Date. All the documents are one page long, except for the Vendor’s Closing Certificate, which requires the Vendor’s initials on the bottom of the first page, and the Lawyers’ Delayed Closing Escrow Agreement, which requires the initials of both lawyers on the bottom of the first page.
6. The Direction re Title has been expanded to show the complete legal name of the Purchasers, their dates of birth and the manner of taking title. Their address for service need not be added as the document refers the reader to the address in the Transfer/Deed of Land.

### **Purchaser’s Undertaking and Direction re Title:**

This document combines the Purchaser's Undertaking and Direction re Title as both should be used in every transaction. The Undertaking mirrors the Undertaking given in the Vendor's Closing Certificate. The Direction ensures that the correct names and manner of taking title of the Purchasers are set forth in writing.

### **Lawyers’ Delayed Closing Escrow Agreement**

This document is not truly a standard closing document as it will rarely be used. This document does not replace the DRA, but may be used when a transaction is delayed beyond its original closing date. This document, whether used as drafted or as a checklist, provides lawyers with a useful tool when dealing with a delayed closing. Lawyers should review their clients' situation and modify this document accordingly to reflect the parties’ rights and obligations.

This Document is in the Form approved by the WORKING GROUP ON LAWYERS AND REAL ESTATE on **April 2, 2009**, except for clearly shown changes. Any changes not clearly shown are of no effect.

## VENDOR'S CLOSING CERTIFICATE

VENDOR:

PURCHASER:

PROPERTY:

COMPLETION DATE: , 2009

---

IN CONSIDERATION OF AND NOTWITHSTANDING THE CLOSING OF THIS TRANSACTION, THE VENDOR CERTIFIES TO THE PURCHASER THAT AS OF THE COMPLETION DATE:

1. POSSESSION Subject to the Agreement of Purchase and Sale ("Agreement") in this transaction, the Vendor shall deliver vacant possession of the Property and possession of any chattels included in the Agreement.
2. KEYS If and as applicable, all keys, entry mechanisms, and access and alarm codes for the Property in the Vendor's control not included with the Requisite Deliveries shall be left on the Property.
3. BILL OF SALE The Vendor owns the chattels included in the Agreement, and conveys title to them to the Purchaser free and clear of all demands, claims, security interests, liens and encumbrances of any kind whatsoever.
4. PROPERTY TAXES The Vendor shall have paid the Property taxes and any local improvement rates and other charges included on the tax roll (and any interest and penalties thereon), as shown on the Statement of Adjustments.
5. UTILITIES The Vendor has paid or will pay on time any utility accounts to the Completion Date that may form a lien against the Property.
6. FUEL If the Vendor has adjusted for fuel oil, propane or condensed gas, the Vendor has filled the tank(s) to capacity, and paid for same in full.
7. ADJUSTMENTS If the Statement of Adjustments herein is or becomes inaccurate or incomplete in the Vendor's favour, the Vendor shall readjust and make any appropriate payments forthwith, provided the Purchaser has delivered on closing a reciprocal undertaking.
8. DIRECTION The Vendor authorizes and directs the Purchaser to pay the Balance Due on Closing as the Vendor's Lawyer in writing directs.
9. DELETIONS FROM TITLE The Vendor shall pay all amounts and take all steps necessary to cause to be registered at the Vendor's expense a deletion from title of every encumbrance or instrument that the Vendor's Lawyer has agreed in writing to cause to be deleted from title.
10. GST/HST This transaction is not subject to GST/HST as the Property is a personal use property or a used residential complex occupied by the Vendor or persons authorized by the Vendor, and is not a substantially renovated residential complex, under the *Excise Tax Act* of Canada. The Vendor has

not claimed and will not claim any input tax credit for the acquisition, improvement or renovation of the Property.

\_\_\_\_\_  
Vendor's Initials

11. RESIDENCY Each Vendor is and will be on the Completion Date not a non-resident of Canada under s. 116 of the *Income Tax Act* of Canada.
12. FAMILY LAW The Transfer delivered in this transaction correctly shows each Vendor's spousal status and address for service.
13. PLANNING ACT To the best my knowledge and belief, this transaction does not contravene the subdivision or part lot control provisions of the *Planning Act* of Ontario.
14. SURVEY If the Vendor has agreed in writing to deliver a plan or survey, then, to the best of my knowledge and belief, the building(s) and any other structures, fences and other boundary markers on the Property are accurately shown on the attached copy of the plan or survey prepared by \_\_\_\_\_, O.L.S., dated \_\_\_\_\_, except:
15. CONDOMINIUM If the Property is governed by the *Condominium Act, 1998* of Ontario, the common expenses have been paid as shown on the Statement of Adjustments. The Vendor has not made any material changes to the common elements other than those permitted by an agreement registered on title. The Vendor has not received a notice respecting the termination of the Condominium Corporation, any substantial alteration in or addition to or renovation of the common elements, any substantial change in the assets or liabilities of the Condominium Corporation, or any special assessments against the Property.
16. BINDING All the statements in this Certificate are binding upon each Vendor and the heirs, successors and assigns (jointly and severally for multiple Vendors) of each Vendor, and are enforceable after closing.
17. RELIANCE I make the above statements conscientiously believing each one to be true, and having the same force and effect as if made under oath or affirmation, and knowing that the Purchaser will be relying on them.

DATED at \_\_\_\_\_, Ontario, on \_\_\_\_\_, 2009.

\_\_\_\_\_  
WITNESS'S SIGNATURE

\_\_\_\_\_  
[VENDOR'S NAME]

\_\_\_\_\_  
WITNESS'S PRINTED NAME

\_\_\_\_\_  
WITNESS'S SIGNATURE

\_\_\_\_\_  
[VENDOR'S NAME]

\_\_\_\_\_  
WITNESS'S PRINTED NAME

This Document is in the Form approved by the WORKING GROUP ON LAWYERS AND REAL ESTATE on **April 2, 2009**, except for clearly shown changes. Any changes not clearly shown are of no effect.

## PURCHASER'S UNDERTAKING & DIRECTION RE TITLE

VENDOR:  
PURCHASER:  
PROPERTY:  
COMPLETION DATE: , 2009

---

### UNDERTAKING

If the Statement of Adjustments delivered in this transaction is inaccurate or incomplete in the Purchaser's favour, and if the Vendor has delivered a reciprocal undertaking to readjust, then I/WE UNDERTAKE to the Vendor and the Vendor's Lawyer to readjust and to make any appropriate payments forthwith for any such inaccurate or incomplete item.

### DIRECTION RE TITLE

I/WE AUTHORIZE AND DIRECT the Vendor to prepare the Transfer/Deed of Land in this transaction in favour of:

, 19  
, 19  
[as joint tenants][as tenants in common][as tenants in common as to %]

and to show as the Purchaser's address for service the address shown in the tendered Transfer/Deed of Land or provided by the Purchaser's Lawyer, and for so doing this shall be your good and sufficient authority.

DATED at \_\_\_\_\_, Ontario, on \_\_\_\_\_, 2009.

WITNESS

\_\_\_\_\_  
WITNESS'S SIGNATURE

\_\_\_\_\_  
[NAME OF PURCHASER]

\_\_\_\_\_  
WITNESS'S PRINTED NAME

\_\_\_\_\_  
WITNESS'S SIGNATURE

\_\_\_\_\_  
[NAME OF PURCHASER]

\_\_\_\_\_  
WITNESS'S PRINTED NAME

This Document is in the Form approved by the WORKING GROUP ON LAWYERS AND REAL ESTATE on **April 2, 2009**, except for clearly shown changes. Any changes not clearly shown are of no effect.

## LAWYER'S DIRECTION RE FUNDS

VENDOR:  
PURCHASER:  
PROPERTY:  
COMPLETION DATE: , 2009

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In accordance with the Vendor's Closing Certificate in this transaction, I/WE DIRECT the Purchaser to make the Balance Due on Closing payable by bank draft(s) or certified cheque(s) drawn on a Lawyer's trust account or other means agreed to by the Lawyers as follows:

[Municipality]

[Encumbrancer]

[Vendor's Lawyer] in Trust

BALANCE DUE ON CLOSING \$

DATED at , Ontario, on , 2009.

[LAW FIRM]  
PER:

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[VENDOR'S LAWYER]

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## LAWYER'S UNDERTAKING

VENDOR:

PURCHASER:

PROPERTY:

COMPLETION DATE: , 2009

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I/WE UNDERTAKE to the Purchaser and the Purchaser's Lawyer to take all steps necessary to cause to be deleted from title each of the following encumbrances or instruments, and to advise the Purchaser's Lawyer of the registration particulars thereof within a reasonable time after the closing of this transaction:

REGISTRATION NUMBER

NAME OF ENCUMBRANCER OR INSTRUMENT

**IF** I/we have agreed in writing to pay property taxes, development charges or other amounts, then I/WE UNDERTAKE to the Purchaser and the Purchaser's Lawyer to deliver satisfactory proof of payment thereof to the Purchaser's Lawyer within a reasonable time after the closing of this transaction.

DATED at \_\_\_\_\_, Ontario, on \_\_\_\_\_, 2009.

[LAW FIRM]

PER:

\_\_\_\_\_  
[VENDOR'S LAWYER]



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## LAWYERS' DELAYED CLOSING ESCROW AGREEMENT

VENDOR:  
PURCHASER:  
PROPERTY:  
COMPLETION DATE: , 2009

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IN CONSIDERATION OF THE MUTUAL BENEFITS ACCRUING TO EACH PARTY, THE VENDOR AND PURCHASER AGREE TO CLOSE THIS TRANSACTION IN ESCROW UPON THE FOLLOWING TERMS:

1. ESCROW OCCUPANCY The Parties being satisfied with all other aspects of this transaction save as disclosed herein, the Completion Date of the transaction is extended to \_\_\_\_\_(Extended Date) to enable the (**choose one**) Purchaser/Vendor to: [*insert requirement(s)*].
2. STATEMENT OF ADJUSTMENTS The adjustments shall be calculated as of the (**choose one**) Completion Date/Extended Date. The Purchaser shall be responsible for the utilities as of the date of taking possession.
3. REGISTRATION Subject to a subsearch of title and search of executions satisfactory to the Purchaser's Lawyer, and resolution of the reason(s) for the escrow satisfactory to the parties, the Purchaser's Lawyer undertakes that, on the Extended Date, s/he will either (a) register the Transfer/Deed of Land and notify the Vendor's Lawyer of the registration, or (b) notify the Vendor's Lawyer of the inability to register.
4. PURCHASER'S ESCROW Subject to anything to the contrary in this Agreement, the Purchaser's Lawyer shall hold all Requisite Deliveries (except keys) delivered to him/her in escrow until s/he has delivered to the Vendor's Lawyer notice of registration of the Transfer/Deed of Land.
5. VENDOR'S ESCROW Subject to anything to the contrary in this Agreement, the Vendor's Lawyer shall hold all Requisite Deliveries delivered to him/her in escrow until s/he has received from the Purchaser's Lawyer notice of registration of the Transfer/Deed of Land.

\_\_\_\_\_  
Purchaser's  
Lawyer's  
Initials

\_\_\_\_\_  
Vendor's  
Lawyer's  
Initials

6. POSSESSION The Vendor shall permit the Purchaser to take immediate possession of the Property and any applicable keys, entry mechanisms, and access and alarm codes for the Property in the Vendor's control. Such possession shall not constitute a tenancy under the *Residential Tenancies Act, 2006* of Ontario.
7. INSURANCE The Vendor shall not cancel the Vendor's insurance on the Property until after the registration of the Transfer, and shall provide, upon request, proof that such insurance continues in place until then. The Purchaser shall insure the Purchaser's chattels as of the date of possession. The Purchaser and Vendor shall advise their respective insurance companies immediately after entering into this Agreement of the escrow closing.
8. WAIVER The Purchaser waives any rights to terminate this transaction by reason of any damage that is not the responsibility of the Vendor occurring to the Property during the Purchaser's possession thereof.
9. INDEMNITY Upon taking possession and without derogating from any other rights the Purchaser may have in law or contract, the Purchaser shall indemnify the Vendor from any and all demands, claims, liens, causes of action, losses and damages arising from the Purchaser's possession of the Property.
10. PURCHASER'S OBLIGATIONS Until the Transfer/Deed of Land has been registered and the Balance Due on Closing has been released, the Purchaser shall not improve or change the use of the Property, and shall not assign, lease, part with possession, or encumber the Property in any manner whatsoever, and shall maintain the Property as would a prudent owner.
11. VENDOR'S OBLIGATIONS The Vendor hereby reserves to itself, its servants, agents, workmen and others authorized by it, or for any municipal, provincial or other governmental authority, the right to enter upon the Property at all reasonable times for the purposes of making inspections, effecting repairs or conducting any work required to complete its obligations under the agreement or to protect the Property.
12. FURTHER ASSURANCES Each party shall execute all such documents and do all such things as may be reasonably required by the other to give effect to the terms of this Escrow Agreement.
13. NO REGISTRATION Neither this Escrow Agreement nor any notice of it shall be registered on title.

\_\_\_\_\_  
Purchaser's  
Lawyer's  
Initials

\_\_\_\_\_  
Vendor's  
Lawyer's  
Initials

14. TERMINATION If registration of the Transfer/Deed of Land does not occur on the Extended Date, and if this Escrow Agreement has not been renewed or extended or if a new Escrow Agreement has not been entered into by the Parties, their respective Lawyers shall forthwith return to the other all Requisite Deliveries received from the other, and the Purchaser shall immediately return possession of the Property to the Vendor together with any applicable keys, entry mechanisms, and access and alarm codes received from the Vendor, and shall leave the Property in the same condition as at the time of escrow possession.
15. TERMS UNCHANGED Except as amended by this Escrow Agreement, all the terms and conditions of the Agreement of Purchase and Sale shall remain in full force and effect, and time shall remain of the essence.
16. OTHER TERMS Notwithstanding the foregoing, the Parties agree as follows:
17. COUNTERPARTS This Agreement may be signed in one or more counterparts.

DATED at \_\_\_\_\_, Ontario DATED at \_\_\_\_\_,  
 Ontario \_\_\_\_\_, 2009. on \_\_\_\_\_,  
 on \_\_\_\_\_, 2009.

\_\_\_\_\_  
 AGREED TO BY THE VENDOR BY THE  
 THE  
 VENDOR'S LAWYER DULY INSTRUCTED  
 INSTRUCTED

\_\_\_\_\_  
 AGREED TO BY THE PURCHASER BY  
 PURCHASER'S LAWYER DULY

## **Let's Close a Deal!**

### **Presentation Summary**

Rebecca Hartley  
City of Toronto Legal Services

- **Golden Rule of Real Estate**
  - Location, Location, Location
- **Golden Rule of Real Estate LAW**
  - Organization, Organization, Organization!

### **SECTION 1**

#### **PREPARING FOR CLOSING**

##### **Make your Grade 6 Teacher Proud**

- Review APS
- Critical Dates Document
- Closing Agenda/Transaction Checklist
- Teraview® docs
  - Purchaser: subsearch, PIN, executions
  - Vendor: PIN, Transfer/deed of land

#### **VENDOR'S DOCUMENTS**

*Nobody ever said selling would be a cake walk!!*

##### **(i) Transfer/deed of land**

- Document preparation – e-reg™
- *Family Law Act* statement
- *Planning Act* statement
  - 3 Requirements:
    - Vendor's Statement
    - Vendor's Solicitor's Statement
    - Purchaser's Solicitor's Statement
  - **\*Caution\*** - optional! Include in APS

## **(ii) Statement of Adjustments**

- balance sheet – shows adjustments to purchase price
- Credit Vendor:
  - purchase price
  - Expenses prepaid by Vendor (realty taxes, utilities, condo fees, etc)
- Credit Purchaser:
  - Deposit
  - Underpayments by the Vendor

## **(iii) Direction re: Funds**

- Made so that all the payees get their \$
- Direction: “to Vendor’s Solicitor or to whomever the Vendor’s Solicitor may direct”
- Re-Direction: signed by Vendor’s Solicitor to whomever the solicitor may direct – the payees

## **(iv) Declaration of Possession**

- Vendor’s declaration regarding matters relating to use and occupation of property
  - eg: exclusive, undisturbed occupation; no claims or interest in property
- VENDOR’S SOLICITORS BEWARE!

## **(v) Income Tax Affidavit**

- *Income Tax Act* requires Purchaser buying from non-residents to withhold a portion of purchase price
- Vendor’s statement that (s)he is “not a non-resident within the meaning of the *ITA*”
- Purchaser’s reasonable inquiry

## **(vi) UFFI Warranty**

- Urea Formaldehyde Foam Insulation  
– UFFI
- Confirmation of Representations and Warranties contained in APS
- Standard APS – this is the warranty that does not merge on closing

## **PURCHASER'S DOCUMENTS**

*Your work has just begun!*

### **Direction re: Title**

Required if Purchaser is taking title in another name than was on the APS

### **(ii) Land Transfer Tax Affidavit**

- Purchaser is required to pay:
  - land transfer tax on the registration of any Transfer/deed of land
  - Provincial sales tax on the value of goods and chattels transferred
- Purchaser's statement contains info re
  - transaction;
  - consideration being paid for the property

### **Pre-Closing**

*Dot all the i's, cross all the t's,*

*then you'll be able to close with ease!*

### **ASAP**

- review problems (including title issues) and docs with clients
- worst case scenario plan if your client has another deal closing that day
- electronic registration – Acknowledgement and Direction

### **2 Days Before Closing**

- Check executions against Vendor
- if client is away, consider a limited power of attorney
- logistics of move in/out time, key/alarm code transfer

## **SECTION 2**

### **CLOSING**

#### **Electronic Closing - Theory**

- escrow closing is required
  - “escrow” – conditional delivery of documents pending a certain event taking place
- Document Registration Agreement
  - governs the relationship between the parties

#### **Electronic Closing - Practice**

1. Purchaser’s Solicitor receives closing funds – deposit to trust fund, draws closing cheques
2. deliveries – documents, keys, cheques
3. registry on e-reg™
4. deliveries to clients

## **SECTION 3**

### **POST-CLOSING AND REPORTING**

#### **Acting for Purchaser**

- Letters:
  - to utilities, MPAC
  - brief letter to client with time-sensitive materials
- Diarize completion of:
  - confirmation of discharge of mortgage
  - undertakings
  - reporting and statement of account
- Full Report to include:
  - legal opinion re: validity of title
  - client’s instructions & how you followed them
  - info re: statement of adjustments
  - particulars of mortgage(s)
  - factual, important and unusual info

## Acting for Vendor

- Full Report to include:
  - info re: statement of adjustments
  - disbursement of funds
  - discharging mortgage(s)
  - details re: VTBM
  - client's special instructions

*Organize it, file it and move on!!*