

What do Title Insurers Expect from Their Lawyers?

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Introduction

Title insurance is a tool used to reduce the risks associated with real estate purchases and mortgages. It is also available for existing owners of residential property who did not obtain a title insurance policy at the time of purchase. In Canada, real estate lawyers¹ are generally responsible for obtaining title insurance policies for their clients; meeting the title insurers' expectations when ordering policies; and explaining title insurance coverage to their clients².

Most purchasers of real estate are unfamiliar with this insurance product, and rely on their lawyer to obtain a policy which suits their needs. The same is true of most private or less sophisticated mortgage lenders. Lawyers act as intermediaries in obtaining title insurance for their clients. This paper will describe the 10 qualities that are expected of a lawyer when advising the client about title insurance, and ensuring that the coverage obtained is in accordance with the insurer's requirements and the client's expectations.

1. Know the Clients' Expectations

A title insurance policy is issued for a specific property. One of the most common errors that real estate lawyers make is purchasing the wrong title insurance policy for the property.³ For example, the lawyer may purchase a policy for a single-family dwelling when the property has more than one unit. Or, the lawyer may order a residential policy for a property which is used, wholly or partly, for commercial purposes. In that case, the client may not have coverage for the legality of the commercial use. The best way to avoid this problem is to communicate with the client, early and often.

At the outset of the retainer, lawyers should discuss with the client the nature of the property, as the client understands it. For instance:

- Is there a private or mutual drive, or laneway access for vehicles?
- Where will the client park?
- Does the client expect to rent out the basement, or other parts of the property, to generate income to help pay the mortgage?
- For rural properties, is there frontage on an open road, or valid easements for access? Title insurers will insure the validity of "together with" easements if they are described in the policy application, and the lawyer satisfies him/herself of the validity of the easement.
- If the client expects to be able to use a rural property year-round, does the zoning permit it, and is the access road open in winter? Who pays to maintain the access route?

¹ And notaries in Québec.

² Kathleen Waters, "When it comes to title insurance, don't go on autopilot" *The Lawyers Weekly* (22 February 2013) at 12 [Waters].

³ Megan Haynes, "Title insurance: Separating fact from fiction," *LAWPRO Magazine* Vol 9 No 4 (December 2010) at 23, available online: http://www.practicepro.ca/lawpromag/title_insurance_fact_fiction.pdf.

- If the client believes they are purchasing a waterfront property, is there a publicly owned road allowance between the property boundary and the body of water?
- Is the property subject to easements that may interfere with the client's use?
- Does the property have features that are important to the client, such as an in-law suite, addition or view? If so, the client may instruct the lawyer to conduct searches or obtain a survey even if title insurance is being obtained.

By canvassing these matters early in the deal, any misunderstanding by the client can be avoided. If there are issues with the property, the lawyer will have time to contact one or more title insurers to determine if "insure over" coverage is available; consider the options; and obtain instructions from the client.

The lawyer should also communicate with the client at the outset of the retainer to obtain information about the client's intentions regarding the future use of the property. Clients may buy a property expecting to add to or change the use after closing. Future uses are generally not covered by title insurance policies. For example, if a client wants to build an addition to a house, but after closing learns he or she can't proceed because the lot is not large enough to permit it under the zoning by-law, title insurance⁴ will not compensate the owner because he or she cannot use the property as intended.

At the outset of the transaction, advise the client of the cost of the title insurance policy, so that the client can arrange to bring in the appropriate amount, and there are no surprises later.

Title insurers may offer coverage for intended future uses on a transaction-specific basis, such as the Future Use Endorsement offered by the TitlePLUS program. An additional premium may be charged for this coverage, and searches other than standard due diligence may be required. If the client instructs the lawyer not to obtain this coverage, and/or not to complete the searches or due diligence necessary to determine if the future use is legal, the lawyer should confirm these instructions in writing. As always, if the client indicates that he or she will do the due diligence themselves (such as checking the local zoning by-law), this also should be confirmed in writing.

2. Know the Policies⁵

Attached is a sample TitlePLUS Version 2.0 policy, used in Ontario⁶. All Ontario TitlePLUS residential purchase and mortgage-only policies include the Supplementary Coverage Endorsement

⁴ Other than a policy with Legal Service Coverage, which may cover the loss if determining the legality of the future use was within the scope of the lawyer's retainer.

⁵ It is not possible to discuss all aspects of coverage here. Please refer to the individual title insurance policies for full details. Coverage in specific instances depends on the terms of the individual policy and circumstances of the claim.

⁶ The sample policy is also available here: <http://www.titleplus.ca//files/SamplePolv2SCE012008.pdf>. The Version 2.0 policy is also used in all other provinces and territories except Québec (for which the TitlePLUS Version 3.0 policy is used).

for Residential Policies. Policies for condominiums include the Condominium Endorsement; policies for properties on private water or septic services include the Rural Property Endorsement.

Rules 3.2-9.4 of the Law Society of Upper Canada's *Rules of Professional Conduct* (the "Rules") provide:

"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.

Commentary

[1] A lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

[2] The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge."

Lawyers should be familiar with the standard title insurance policies and endorsements used in Ontario, in order to advise their clients on their options for assuring title. This includes the standard coverages and exclusions in the policies. Exclusions are distinct from property-specific exceptions to coverage, which are found in a schedule to the policy – in a TitlePLUS policy, Schedule "A."

The "Policy Date" of a title insurance policy is normally the date of closing, and is stated in the policy. This date is important because the general rule is that title insurance policies only cover risks arising up to and including this date, unless expressly stated otherwise in the policy. Having said that, several express post-policy date coverages are included in standard-form title insurance policies, such as fraud and forgery; the construction of a structure encroaching on the insured property; and another party's acquisition of an ownership interest. The TitlePLUS Supplementary Coverage Endorsement for Residential Properties expands the coverage available for post-policy date risks.

If a client elects not to purchase title insurance, but to rely on the lawyer's opinion on title, it is good practice to have the client sign a waiver, acknowledging the coverages that would have been available under a title insurance policy.⁷

The amount of insurance being purchased, or "Policy Amount," is also important. This is stated in the policy (in TitlePLUS policies, in Schedule "A"). For a purchaser, it is usually the purchase price

⁷ A "Purchaser's Waiver of Title Insurance" can be found at <http://www.titleplus.ca/files/WaiverTI032011.pdf>.

or value of the property being purchased. For mortgage lenders, in a TitlePLUS policy, it is the higher of the amount in Schedule “A” and 125% of the principal amount of the lender’s mortgage, described in Schedule “A.” For purchasers, residential title insurance generally provides that the Policy Amount increases to reflect the fair market value of the property, up to 200% of the purchase price. This is called “Inflation Coverage.”

Lawyers should advise their clients of any relevant monetary sub-limits of coverage in the policy. For instance, a title insurer may have a sub-limit on the amount of coverage for certain issues in a specific geographical area, such as a sublimit of \$30,000.00 for issues related to building compliance. Additionally, the client should be made aware of standard exclusions to policy coverages, such as knowledge exclusions, exercise of governmental authority, hazardous substances on the land, accepted defects, or aboriginal land claims.

Additionally, the lawyer should be aware of the availability of legal services coverage. This coverage is automatically included in all TitlePLUS purchase and mortgage-only policies.⁸ For policies issued by other insurers, some legal services coverage may be available if requested in the application for insurance, and/or for an additional premium.

Title insurance also contains defence coverage, for the costs of legal proceedings brought by third parties against the insured because of a risk covered under the policy. In addition, where the insured cannot live on the property due to a covered risk, the TitlePLUS policy provides reimbursement for the cost of renting reasonable substitute accommodation.

Title insurance coverage generally continues in force as long as the insured purchaser owns the property. In addition, coverage continues for:

- (a) the insured’s spouse or children, if title is transferred to them; and
- (b) the insured’s heirs under a will or intestacy.

After the property is sold, coverage continues for as long the insured is liable for any covenants given in respect of a covered risk or that are implied by the *Land Registration Reform Act*⁹, or if the insured re-acquires title as a result of enforcement proceedings under a vendor-take-back mortgage.

For mortgage lenders, there is continuation of coverage notwithstanding renewal or amendment of the mortgage, and for successors and assigns. In general, coverage for lenders continues until the mortgage is discharged.

When discussing the options to assure title with the client, it should be explained that title insurance provides the insured with a claim to compensation, not a risk-free property. While many clients will be satisfied with the cost savings provided by title insurance coverage, the lawyer should ascertain whether the client has any concerns regarding the property that would make certain searches, or a

⁸ Except for policies insuring properties in Québec.

⁹ R.S.O. 1990, c. L.4.

survey, desirable even if they are not required by the title insurer. For example, if the client is particularly keen on an existing addition that does not show on the property survey (or there is no survey), the client might prefer to incur the cost of a search and/or survey to check on the addition's compliance with building and zoning provisions, rather than relying on a possible claim to the title insurer later on.

Title insurance policies generally provide that the insurer has options in how it deals with a claim. The lawyer should also explain this to the client to avoid disappointment down the road. The client keen on the particular addition may not be pleased, for example, if the insurer opts to remove the addition in order to bring the property into compliance with municipal requirements and then pays the diminution in value of the property.

3. Communicate with Clients

For each transaction where the clients choose title insurance, the lawyer should obtain a draft policy and review all exceptions to coverage with the clients before closing. This includes lender clients, unless an exception is fully insured over for the lender, or the exception is one that the lender has approved.¹⁰

“Insure over” terminology has developed to deal with cases where the lawyer advises a title insurer of a problem with a property, and asks the insurer to provide coverage. In a purchase transaction with a mortgage, the title insurer may agree to provide: “insure over” coverage for the lender only; full marketability coverage for the lender, with “forced removal” or other enforcement coverage for the purchaser; or full marketability coverage for both the purchaser and lender. When “insure over” coverage is granted, obtain confirmation in writing.

If there are limitations on the “insure over” coverage offered by a title insurer, ensure that the client understands them. For instance, where the insurer provides “forced removal” coverage for an encroachment, there will be coverage if the client is required to remove the encroachment after closing, but not if the encroachment is raised as a marketability issue by a purchaser at a later date.

Provide purchaser and lender clients with reports and their issued title insurance policies as soon as possible after closing. If a client wishes to make a claim, advise them to contact the title insurer immediately, and assist if necessary.

¹⁰ For a list of approved exceptions for TitlePLUS confirmed lenders, see the TitlePLUS Confirmed Lenders Chart at <http://titleplus.lawyerdonedeal.com/LenderChart.asp>.

4. Be Accurate

Information inserted in the application for title insurance is reflected in the resulting policy. Therefore, the lawyer must ensure that the application for title insurance contains the correct legal description of the property being insured, and that this description coincides with the expectations of the client. For instance, if the parking and storage units in a condominium which the client expects to acquire are separate units, their descriptions and PINs must be included in the title insurance application. The same applies for freehold properties comprising more than one parcel and PIN, such as where part of a lane or road allowance has been closed and conveyed to the adjacent property owner. If a legal description refers to a past instrument number, review that instrument to confirm that it includes all the land that the client expects to receive.

In general, the legal description and PIN(s) in the title insurance application should match the transfer and/or mortgage that will be registered on closing. Any valid easements benefiting the property should be included in the legal description, while easements to which the property is subject should be made exceptions to coverage and reviewed with the client before closing.

The lawyer should also verify that the names of the insured purchaser(s) and/or lender(s), and the manner in which the purchaser(s) will hold title, are correct in the title insurance application; match the documents to be registered on closing; and are in accordance with the clients' instructions.

If a policy is issued with incorrect particulars, advise the title insurer of the error and obtain a correction to the policy as soon as possible after closing.

5. Be Thorough

The lawyer should be familiar with the title insurer's due diligence requirements for different types of properties and transactions, as published by the title insurer¹¹, and carry them out in a timely way. If a required search cannot be done before closing, the title insurer should be notified. For TitlePLUS applications, an exception to coverage should be inserted in the application, for which an "insure over" request can be made. If search results disclose, or the lawyer knows of, any issues or concerns that will not be resolved before closing, the title insurer should also be notified as soon as possible.

A note with respect to title searches: All Ontario title insurers require the lawyer to complete and review a search showing instruments which have been deleted from title. If the lawyer finds a pattern of deleted instruments (such as frequent recent transfers at increasing value, or frequent and quick mortgage discharges) which may indicate an increased risk of fraud, the lawyer should advise

¹¹ For the TitlePLUS residential purchase due diligence requirements, see the TitlePLUS Ontario Quick Facts at <http://www.titleplus.ca/files/ONqf040114.pdf>.

the title insurer. The title insurance underwriter will then work with the lawyer to obtain more information and assess the risk.

6. Be Timely

Whenever possible, title insurance applications should be made well before closing. This avoids a time crunch as the closing date approaches and there is a rush to complete the application. It is especially important if there are issues with the property for which an “insure over” request will be made. Advance notice gives the title insurance underwriters time to contact the lawyer to discuss the matter and advise of any additional information or material which may be required before a decision on the “insure over” request can be made. Title insurance staff know that real estate transactions are time-sensitive, and will respond in a timely way.

Also bear in mind that even if there is no “insure over” request in an application, all title insurance applications do not receive immediate approval. For any given application, the title insurer’s review of the application may result in the need for communication between the underwriter and the lawyer prior to approval. Allowing additional time between submission of the application and the closing date makes it easier for the lawyer to work with the title insurer to resolve any concerns.

The title insurer’s commitment to insure the transaction should always be obtained before closing. For TitlePLUS applications, this is called “pre-approval.” In this way, the lawyer can be assured that coverage will be in place, and make the clients aware of any exceptions to coverage. If new information is received between the time of pre-approval and closing, advise the title insurer and determine if it affects the coverage offered.

Once the transaction closes, issue the title insurance policy promptly. It can be embarrassing for the lawyer if the client wants to make a claim and the policy is not yet issued. If payment of the policy premium is made by automated means, ensure that funds are available at the time the policy is issued.

7. Communicate with the Title Insurer

Good communication between the lawyer and title insurer are implicit in the relationship. Because the lawyer acts as insurance intermediary between the title insurer and the lawyer’s client, full disclosure is important. When discussing the transaction with the client (preferably early in the deal), determine if the client has adverse information about the property, and if so, advise the title insurer. Title insurance policies contain a “knowledge” exclusion which applies if the client has allowed, accepted or agreed to, or knows of, any matters that would otherwise be covered under the policy.

If a title insurance underwriter asks to speak with you (rather than your staff), take the call and provide the information or materials requested promptly. The establishment of a good working relationship between title insurers and lawyers/law firm staff, helps to ensure that issues are resolved in a timely and efficient manner.

8. Supervise and Train Law Firm Staff

If you have your staff prepare title insurance applications on your behalf, train them on the information required, and the need for accuracy, full disclosure and timeliness. They should also be trained to recognize possible signs of fraud, and kept up-to-date on emerging risks (see items 9 and 10 below). Don't allow other lawyers or staff inside or outside your firm to use your lawyer's e-regTM Personal Security Pass, or disclose your password – this is prohibited by Rule 6.1-5. Never sign blank trust cheques, and ensure that staff are subject to proper supervision at all times.

9. Know Existing and Emerging Risks

Real estate (and other) frauds come in all shapes and sizes, and are continually evolving as fraudsters become more inventive or seek to avoid fraud prevention measures. This does not mean that classic frauds such as identity theft and value (or “flip”) fraud have gone away, or are no longer a danger. But lawyers should be aware of the most recent trends, so that they can be vigilant, and train their staff, to spot the “red flags.” Among these trends are:

- (a) impersonation of a mortgagor, and payment of the proceeds of a mortgage to third parties with no credible relationship to the transaction, who in fact are working with the fraudster or are his/her *alter egos*; and
- (b) the use of fake title insurance policies.

With respect to the latter, don't accept title insurance policies in the name of a lawyer who does not act for a party to the transaction. The lawyer may not even be aware that his/her name is being used. If the policy looks strange, or it is produced after a title insurer has declined to insure the transaction, contact the title insurer who is said to have issued it to verify that it is authentic and that it will insure your client's interest.

10. Be Wary of Fraud

One of the most important skills that the lawyer brings to the real estate transaction is the ability to assess risks. This relates not just to title, survey, zoning and other matters, but the risk – unfortunately sometimes present – that a transaction may be a fraud. The value of real estate makes it a tempting target for fraudsters. If you believe that a transaction is at risk, don't hesitate to call the title insurer and discuss it with an underwriter. The underwriter may be able to provide you with

insights or ideas for further investigation that will either satisfy your concerns, or indicate that the probability of fraud is high.

The commentary under Rule 3.2-7 states:

“Red Flags in Real Estate Transactions

[4.1] A lawyer representing any party in a real estate transaction should be vigilant in identifying the presence of “red flags” and make inquiries to determine whether it is a *bona fide* transaction. Red flags include such things as

(a) purchase price manipulations (revealed by, for example, deposits purportedly paid directly to the vendor, price escalations and ‘flips’ in which a property is sold and re-sold within a short period of time for a substantially higher price, reductions in the balance due on closing in consideration of extra credits or deposits not required by the purchase agreement, amendments to the purchase price not disclosed to the mortgage lender, the acceptance on closing of an amount less than the balance due, a mortgage advance which approximates or exceeds the balance due resulting in surplus mortgage proceeds, and so on);

(b) a nominal role for one or more parties (fraud is sometimes effected through the use of ‘straw people’, who may not exist or whose identities have either been purchased or stolen, as well as through the suspicious use of powers of attorney);

(c) the purchaser contributes no funds or only a nominal amount towards the purchase price or the balance due on closing;

(d) signs that the parties are concealing a non-arm’s length relationship or are colluding with respect to the purchase price;

(e) suspicious or repeated third-party involvement (for example, giving instructions, supplying client directions or identification, and providing or receiving funds on closing); and

(f) the proceeds of sale are disbursed or directed to be paid to parties who are unrelated to the transaction.

[4.2] The red flags listed above are not an exhaustive list. Further information regarding red flags is available from many sources, including the ‘Fighting Real Estate Fraud’ page within the ‘Practice Resources’ section of the website of the Law Society. Fraudulent real estate schemes and the red flags associated with such schemes are numerous and evolving. Lawyers who practise real estate law have a professional obligation therefore to educate themselves on an ongoing basis regarding the red flags of real estate fraud.”

Mortgage lenders are often (though not exclusively) the target of fraudsters. In all transactions where the lawyer represents a lender, the lawyer should keep the lender fully informed. Rule 3.4-15 states:

“When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the

transaction.

Commentary

[1] What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or ‘flip’, where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.”

If the lawyer advises the lender of defects, concerns or possible risks of fraud, and the lender authorizes the lawyer to close, these instructions should be confirmed in writing.

It is not within the scope of this paper to review the different types and “red flags” of real estate, certified cheque and other frauds, but the following resources, available free of charge, can assist the lawyer in identifying danger signs:

- LAWPRO Fraud Fact Sheet – provides information on “red flags” of real estate and other types of frauds: <http://www.practicepro.ca/practice/pdf/FraudInfoSheet.pdf>;
- practicePRO anti-fraud resources: <http://www.practicepro.ca/practice/fraud.asp>;
- practicePRO AvoidAClaim blog – subscribe for the latest updates: <http://avoidclaim.com/>;
- follow LAWPRO on social media for breaking news; and
- call your title insurer to discuss issues, even if you are not yet ready to submit an application.

Above all, use your real estate knowledge and professional skepticism to evaluate situations. If something seems “too good to be true”, it probably is. That new client who is offering a string of deals if you turn this one around quickly, or the broker who acts for a client he/she can’t produce, may not be what they seem.

Conclusion

Title insurance is not a substitute for the lawyer’s legal services to clients. It is an insurance product which is available to clients, in respect of which the lawyer acts as an intermediary between the client and the insurer. In order to advise their clients properly, lawyers must be knowledgeable about all aspects of title insurance and how it interacts with other factors, such as the client’s expectations, search results, known problems and the process of making title insurance applications, to name a few. Lawyers also need to be open in their dealings with title insurers, so that all parties can work towards the best solution for the client. It is hoped that in describing the 10 qualities expected of a lawyer when obtaining title insurance, this paper will provide a guide to lawyers in providing legal advice to clients regarding title insurance in real estate transactions.