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TitlePLUS®

Thursday Tips with LAWPRO and TLA:  
Unlocking Real Estate Wisdom (2024)

May 2, 2024

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## DID YOU KNOW?

Many endorsements that provide coverage for lawyers' mistakes are subject to the exclusions, limits, and exceptions contained in the title insurers policy.

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### UNIQUE AND UNPARALLELED COVERAGE

Responds if the lawyer "Commits an error or omission in providing legal services for the transaction for which liability is imposed by law."



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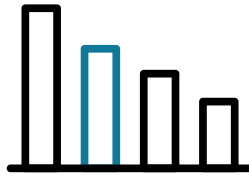
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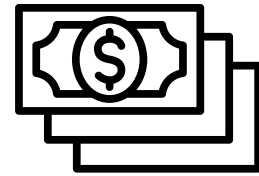
## # 2 claims area by cost

- average total cost \$22.7 million per year



## # 2 claims area by count

- average 665 claims per year



## \$34,000 average cost per claim

## RISK MANAGEMENT TIPS



### Meet clients in person at least once

Meet with the client in person to review the transaction and understand client instructions, particularly with respect to the client's intended uses of the property. Not every matter is straightforward, and you don't want to have to address a problem that was only noticed the day of closing, or never noticed at all.



### Remember, the lender is also your client in most residential transactions

The lender is also your client and is owed a duty of care. Provide any information to the lender that is material to the lender's decision to advance funds under the mortgage. Lending clients can sue lawyers for failing to disclose all relevant information they knew or ought to have known.



### Document your conversations with and instructions from the client

This is the best defence against a malpractice claim. Clients may only be involved in one or two real estate transactions in their lifetime and will remember the details, while the lawyer who sees countless transactions will likely have little specific recollection of one matter. Keep notes of your conversations and document discussions and your actions in a detailed reporting letter to the client.



### Do not give your Teraview password to anyone

Your Teraview PIN is only valid for your transactions. As tempting as it may be in a busy real estate practice to let the clerk register instruments requiring a lawyer's electronic signature...just don't.



### Review the title insurance policy with your client

You should have a solid understanding of the title insurance policy and be able to explain standard coverages, exclusions and property-specific exceptions. It is also important to have a detailed understanding of the client's planned use of the property to ensure the coverage obtained applies to those uses.

# COMMON MALPRACTICE ERRORS

## Communication - 36%

- Failing to inform a client about restrictions on land use contained in a subdivision agreement
- Failing to review the survey and to discuss the risks or problems it reveals with the client
- Not inquiring about or following through on the client's intentions for future use of the property. For example, not doing the necessary zoning searches or getting title insurance with a future use endorsement. The client may intend to build a swimming pool, but sewers or utility easements may make this impossible. Zoning may not permit a home-based business or multiple dwelling units
- Failing to ensure that the condominium unit shown on the plan meets the client's expectations (e.g., whether it overlooks a lake or a parking lot)

## Inadequate investigation - 35%

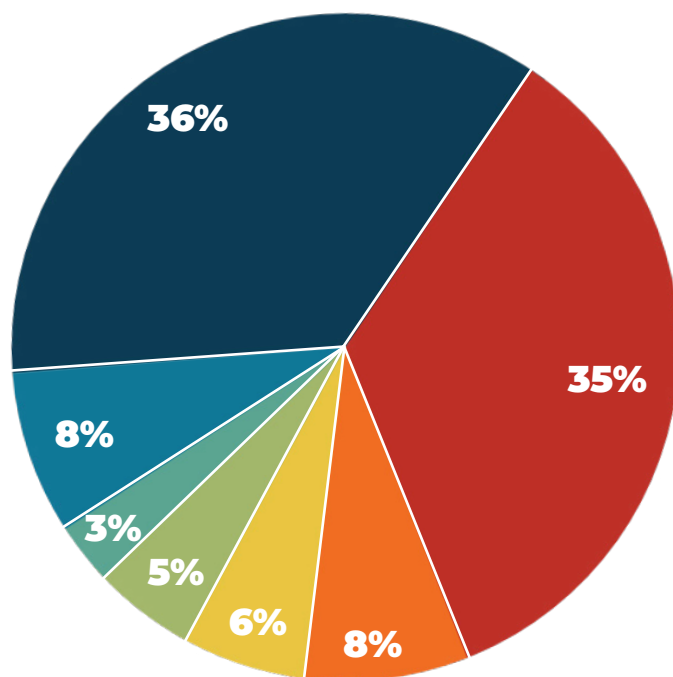
- Misreading (or not reading) a survey, search, or reference plan
- Failing to review a condo status certificate and bring deficiencies to the client's attention
- On a condominium purchase, failing to ensure that the parking space and locker specified in the agreement of purchase and sale are actually for sale and that the legal description of both units is correct

## Errors of law - 8%

- Failing to fully understand or properly apply the part-lot control provisions of the Planning Act
- Not being sufficiently aware that different types of searches are required depending on the type of property being purchased (e.g., single unit vs. multi-unit, commercial vs. residential)

## Clerical and delegation - 6%

- Not meeting with the client. Delegating the entire file/transaction to a law clerk
- Failing to review the statement of adjustments for clerical errors



Conflict of interest - 5%

Fraud - 3%

Other - 8%

Visit [practicepro.ca](https://practicepro.ca) for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more

Be aware of frauds involving deposit cheques and fund diversion emails. Visit

[practicepro.ca/fraud](https://practicepro.ca/fraud).

\*All claim figures from 2012-2022. All cost figures are incurred costs as of April 2023

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# REAL ESTATE SCAMS


Real estate frauds often occur in situations where the true owner's identity is stolen (ID theft) for sale or mortgage purposes, or the value of a property is exaggerated (flips).

## Identity theft

When a client uses fake ID to assume the identity of existing property owners or uses a Notice of Change to become a director or officer or corporate owner for the purpose of committing fraud, this is identity theft. Once identity has been stolen, the fraudster sells or mortgages the property, or discharges a mortgage from title, then gets a new mortgage from another lender.



# FRAUD WATCH



The background of the lower half of the page is a complex digital visualization. It features several vertical columns of glowing blue numbers, resembling a data stream or a server rack. In the foreground, there are various glowing elements: a large, semi-transparent exclamation mark on the left, a glowing blue circle with a red vertical line through its center, a glowing pink and purple area that looks like a stylized map or a data plot, and several glowing green and blue circles and lines. The overall aesthetic is futuristic and high-tech, with a color palette dominated by blues, greens, and pinks.

If you aren't completely sure a matter is legitimate, terminate the retainer.  
If you've been asked to do something that seems irregular, ask questions.  
If it looks too easy or sounds too good to be true, it probably is.

## SIGNS that your client may be a fraudster

- Property owned by same person or family for several years
- Property may be mortgage free or may be subject to an institutional first mortgage and may have lots of equity, one or more recently discharged mortgages, or recent transfers. (Always request a PIN printout with full history of deleted instruments)
- Client is in a hurry and may discourage house inspection or appraisal
- Transaction closes, funds are withdrawn quickly and client disappears
- New client for you and/or new referral source if any, or no referral source
- Funds directed to parties with no apparent connection to borrower, property or transaction
- Client changes instructions regarding amounts or payees just before closing, or fails to bring in funds as promised
- Client does not care about property, price, mortgage interest rate, legal and/or brokerage fees
- Client does not appear familiar with property
- Client won't permit contact with prior lawyer or have a valid explanation why they are not using them
- Other party appears to control the client
- Client advises funds were paid privately. No funds pass through a lawyer's trust account
- One spouse or business partner mortgaging equity in property owned by both
- Client contact is only by email or text
- Client says title insurance for new mortgage is not required
- Client pushes for fast closing

## SIGNS that the transaction is fraudulent

- Repeat, recent transfers, mortgages, or discharges on a single property or for a single client
- New referral source sending lots of business
- Use of Power of Attorney and/or funds directed to the Attorney instead of borrower
- Power of Attorney is not executed correctly
- Rental, Airbnb, and vacant properties are especially vulnerable
- Property listing expired without sale (i.e., sale may be unregistered)

- Recent registrations and discharges of private mortgages
- Property has been mortgage free, or subject only to an institutional first mortgage, but owner now registering a large mortgage in favour of private lender
- Property area and/or client residence is distant from your office
- Deposit not held by agent or lawyer
- Deposit is higher than normal and is paid directly to the vendor
- Small deposit relative to price
- May target long time owners or deceased, ill, or elderly who may be less alert to signs their identity is being stolen
- Rush deals, sometimes with promise of more
- 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

## TIPS to help verify ID

- Is the person smiling in their ID photo? Smiling isn't allowed in government ID.
- Compare the images on the different pieces of ID – they shouldn't be the exact same image.
- Verify the date on the IDs. Does the person look like they've aged if the ID was from some time ago? If two pieces of ID are many years apart but the image doesn't reflect whether the person has aged, ask questions.
- Does the minister on the ID match who was in office at the time the ID was issued?
- Does the same picture appear on two different types of ID issued years apart?
- Is the signature similar to your client's?
- Is the client's name spelled differently in different types of documents/ID?

## TIP

Advise lenders of recent activity on title, amendments to purchase price and significant changes in value in advance of closing.



If you suspect fraud, call LAWPRO at 1-800-410-1013 or 416-598-5899 and forward any suspicious emails and documents received to [fraudinfo@lawpro.ca](mailto:fraudinfo@lawpro.ca). Visit [AvoidAclaim.com](http://AvoidAclaim.com) and click on "All Fraud Warnings" for a list of confirmed fraudsters.

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## WIRE FRAUD

Fraudsters are actively trying to direct lawyers and law firms to wire money to them – often through spoofed emails of people you know or hacking into emails.

**Fraudsters have pretended to be:**

- A lawyer in the firm directing staff to wire funds to a client or to complete a transaction
- A lawyer or staff acting for a seller in a transaction directing the other side to wire funds
- A financial institution directing wire payment to itself
- A client seeking payment of funds by wire



# FRAUD WATCH

If you aren't completely sure a matter is legitimate, terminate the retainer.  
If you've been asked to do something that seems irregular, ask questions.  
If it looks too easy or sounds too good to be true, it probably is.



It starts with a hacked email system or impersonation using a lookalike fake email address. In the hacked email situation, the fraudster hacks into a lawyer or law firm email system, the client's email, or the email of others related to the transaction (or those copied in the email thread) and monitors the emails. The fraudster then sends wire transfer instructions from legitimate email addresses directing the wiring of funds to a particular account that the fraudster has set up or can access. When using a lookalike fake email address, the fraudster sends instructions that appear to be legitimate. In some cases, corporate records may be altered to add credibility to the scheme.

In recent cases reported to LAWPRO, a fraudster infiltrated a law firm email system, intercepted correspondence regarding a transaction, and then sent wiring instructions from a law clerk's email address. Since the wire instructions were being sent from a legitimate law firm email address, there was nothing to suggest anything suspicious from the email itself. Given that the fraudster could see incoming emails, only a separate means of verifying the instructions could stop the fraud.

## TIPS

*Verify instructions independently:* Anytime you receive instructions to wire money to a bank account, contact the payee directly by an independent method (not replying to the email sending the instructions) to verify the instructions received and the accuracy of the bank routing information.

*Double check email addresses to see if they are fake:* Fraudsters will spoof an email address by creating a very similar looking address by adding an extra letter/number or changing a character(s). Having hacked into one account, they may spoof other email addresses that were in the email thread to increase your confidence that it is a proper message. It is important to carefully look at all the email addresses in the message. And remember, if the client's email account is compromised, it could be the fraudster sending you emails that look like they are coming from your client.

*Implement two-factor authorization on your email systems:* Two-factor authentication is an extra layer of security to make sure that people trying to gain access to your email are who they say they are. First, a user will enter their username and password. Then, instead of immediately gaining access, they will be required to provide another piece of information such as a code. Outlook and Gmail both offer two-factor authentication.

*Regular training:* Train staff in what to look out for and have regular discussions to reinforce the cyber security message. Someone from the office may see information or indications of fraud that others may not.

*Educate your clients:* Advise your clients of wire transfer risks. If you do not accept wire payments from them, tell them so that if they are approached to send funds by wire, they know it will be a fraud. If you do accept wire payments, explain your process and insist that they call you before they send you payments.

## Examples of independent verification in action

*Internal verification:* The law firm partner purportedly emails from the firm address or a personal email address instructing you to wire money out of trust. Walk down the hall to the partner's office to ask if the partner sent the instructions. If the partner is out of the office, rather than replying to the email to confirm the direction (which will not help if the lawyer's email account has been compromised), call or text the lawyer.

*Before wiring funds to another firm:* If a lawyer at one firm emails wire instructions to a lawyer at another firm, that lawyer should call them to confirm the wire instructions. The same process can apply on receiving wire instructions from a financial institution or any other request for payment by wire transfer.

*Before wiring funds to a client:* A client may email you to instruct you to wire payments to an account. You can call the client to verify that the client's instructions are valid and that the client's account has not been hacked.

Firms that have implemented independent verification protocols have successfully blocked fraud attempts. A quick call to verify written wire payments might save you from being a victim of fraud.

## Use this wire checklist: Funds Transfer Instructions Verification Checklist.



If you suspect fraud, call LAWPRO at 1-800-410-1013 or 416-598-5899 and forward any suspicious emails and documents received to [fraudinfo@lawpro.ca](mailto:fraudinfo@lawpro.ca). Visit [AvoidAClaim.com](http://AvoidAClaim.com) and click on "All Fraud Warnings" for a list of confirmed fraudsters.

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## BAD CHEQUE SCAMS

Fraudsters retain the firm on a contrived legal matter so they can run a counterfeit cheque or bank draft through the firm trust account and walk away with real money. The fraudster will provide real looking ID and documents. When the bad cheque or draft bounces, there will be a shortfall in the trust account.



# FRAUD WATCH



! If you aren't completely sure a matter is legitimate, terminate the retainer.  
If you've been asked to do something that seems irregular, ask questions.  
If it looks too easy or sounds too good to be true, it probably is.

## SIGNS

- Initial contact email is generically addressed (e.g., “Dear attorney”) and/or BCC’d to many people.
- Client uses one or more email addresses from a free email service (e.g., Gmail, Yahoo!), even when the matter is on behalf of a business entity.
- Domain name used in email address or website was recently registered (check at Whois.com or a similar service provider).
- Email header indicates sender is not where they claim to be.
- Client is new to the firm.
- Client says they prefer email communication due to time zone differences.
- Client may sign retainer but never actually makes the payment.
- Client is in a rush and pressures you to “do the deal” quickly, before the cheque clears.
- 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 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 another bank account based on changed or urgent circumstances.

## TIPS

### **Cross-check and verify information provided to you by the client:**

- Google names, addresses, and phone numbers of the client and other people/entities involved in the matter.
- Look up addresses using Street View in Google Maps.
- Search AvoidAClaim.com’s database of bad cheque fraud names.
- 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.
- Hold the funds until all banks confirm funds are clear and can be withdrawn.



If you suspect fraud, call LAWPRO at 1-800-410-1013 or 416-598-5899 and forward any suspicious emails and documents received to [fraudinfo@lawpro.ca](mailto:fraudinfo@lawpro.ca). Visit [AvoidAClaim.com](http://AvoidAClaim.com) and click on “All Fraud Warnings” for a list of confirmed fraudsters.

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# Wire Fraud Scams on the Rise: 5 Tips to Reduce Your Risk

*Juda Strawczynski*

LAWPRO is seeing an increase in phishing attacks against lawyers trying to trick them into wiring funds out of their trust accounts to the fraudster.

There are different ways that fraudsters are trying to direct lawyers and law firms to wire money to them. Fraudsters have pretended to be:

- A lawyer in the firm, to direct staff to wire funds to a client or to complete a transaction
- A lawyer or staff at a firm acting for a seller in a transaction, to direct the other side to wire funds
- A financial institution, to direct wire payment to it
- A client, to seek payment of funds by wire

It starts with a hacked email system or impersonation using lookalike fake email address. We have seen cases where the fraudster has hacked into a lawyer or law firm email system, the client's email, or the email system of others related to the transaction. In these situations, fraudsters monitor the emails and send wire transfer instructions from legitimate email addresses to send out wire payment instructions. Follow the tips below to reduce your risk of falling victim to these increasingly sophisticated fraud scams.

## **Tip 1: Don't Be Spoofed: Check the Email Address**

Lawyers should use spam filters and check email addresses to reduce the risks posed by fraudsters impersonating lawyers, law firm staff, clients, financial institutions and others. For more tips to avoid spoof email addresses, see our article [here](#).

## **Tip 2: Check Documents to Make Sure They Haven't Been Manipulated**

When sending documents electronically, on receipt back, double check to make sure that key information, such as wire direction instructions, have not been manipulated. If you send out a document with wire instructions or other key financial information, you can check the document on receipt back that this information has not been changed.

## **Tip 3: Implement Independent Verification on All Wire Payments**

Verify all directions to wire funds out of trust by confirming the instructions using a different medium than they were first received. This step can help reduce the risks posed by e-mail hacks and cases where documents have been intercepted and manipulated.

Here are a few examples of independent verification in action:

- **Internal verification:** The law firm partner purportedly emails from the firm address or a personal email address instructing you to wire money out of trust. Walk down the hall to the partner's office to ask if the partner sent the instructions. If the partner is out of the office, rather than replying to the email to confirm the direction (which will not help if the lawyer's email account has been compromised), call or text the lawyer.

- **Before wiring funds to another firm:** If a lawyer at Firm A emails wire instructions to a lawyer at Firm B, the lawyer or staff from Firm B can call Firm A to confirm the wire instructions. The same process can apply on receiving wire instructions from a financial institution or any other request for payment by wire transfer.
- **Before wiring funds to a client:** As another example, a client may email you to instruct you to wire payments to an account. You can consider calling the client to verify that the client's instructions are valid, and that the client's account has not been hacked.

Firms that have implemented independent verification protocols have successfully foiled fraud attempts. A quick call to verify written wire payments might save you from being a victim of fraud.

#### **Tip 4: Make Fighting Fraud Part of Your Firm Culture**

Continue to train yourself and train your staff about fraud risk.

- For related CPD programming on fraud prevention, see our watch-anytime CPD programs on [real estate fraud](#), [bad cheque and cyber fraud](#). These programs are free for you, your colleagues and staff to view, and are eligible for LAWPRO's Risk Management Credit.
- Subscribe to [avoidclaim.com](http://avoidclaim.com) for fraud warning updates.

Try incorporating these tips into your practice to help reduce the risk of fraud.

#### **Tip 5: Stay on constant alert**

Fraud prevention is not a one and done task. You and your staff need to be constantly vigilant. A few of the fraud scenarios we have recently seen include:

##### *The fake instruction to wire funds*

The fraudster sends instructions directing the wiring of funds to a particular account that the fraudster has set up or can access. In recent cases reported to LAWPRO, a fraudster infiltrated a law firm email system, intercepted correspondence regarding a transaction, and then sent wiring instructions from a law clerk's email address. Since they were being sent from legitimate law firm email addresses, there was nothing to suggest anything fraudulent from the email itself. Since the fraudster could see incoming emails, as described further below, only a separate means of verifying the instructions could stop the fraud.

##### *Fake documents may strengthen the credibility of the direction to wire funds*

We have seen instances where fraudsters have manipulated documents to alter wire payment instructions. We have even seen "secure" electronic documents prepared by a law firm intercepted, manipulated to provide new account information for wiring funds, and then sent back to the firm.

*Last minute changes are a red flag, but aren't the only flag*

Often, the fraud may include a last-minute direction to wire funds to a new account. Any late change in payment instructions should be treated with caution, as this is a red flag of fraud. However, we have also seen cases where the fraudster has sent out the wire fund instructions early in the transaction.

Bottom line – there are all sorts of ways that fraudsters try to trick lawyers and their staff to wire funds to them. Lawyers and their staff should be on constant alert for these frauds and can adopt proactive measures to reduce the risk of these attacks.

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# Common HST Errors in Real Estate Transactions

Shawn Erker – Writer & Content Manager, LAWPRO<sup>1</sup>

Determining HST-applicability to real estate transactions can be more complicated than many lawyers assume. What's more, a lack of clarity and errors can often lead to substantial unforeseen costs for clients. This is a dangerous combination from a claims perspective.

This paper will discuss the common categories of HST errors and provide tips on how to avoid such errors and flag potential HST problems. This paper does not provide an exhaustive guide to dealing with HST in specific scenarios, and lawyers should make separate determinations as to HST applicability for each transaction they handle.

## When does HST apply to Real Estate Transactions?

In Ontario a 13% HST surcharge applies to all real estate transactions—unless the transaction is exempt. The default position under the *Excise Tax Act* is that HST will be added to the cost of the transaction, and lawyers should consider this the presumptive result unless they can definitively show that the transaction in question qualifies as an “exempt supply”.<sup>2</sup>

The most common category of “exempt” real estate transactions are residential resales: sales of “used” primary residences from one individual to another. However, there are many exceptions, and exceptions to the exceptions, and exceptions to the exceptions to the exceptions, that can impact whether a specific transaction qualifies.

## How is HST collected and paid on real estate transactions?

Generally, collection of HST and remittance to the CRA is the responsibility of the vendor. If a non-exempt transaction takes place, and absent facts that shift the burden of HST remittance to the purchaser (discussed below), the CRA will deem the HST to have been collected by the vendor—regardless of whether HST was, in fact, paid. The vendor will be obligated to immediately pay the HST owing to the CRA—such amounts often constituting five-figures or more when dealing with real property.

Typically, although the vendor is burdened by the CRA with remitting any HST owing on the transaction, it is *de facto* paid by the purchaser as an amount owing from the purchaser to the vendor and considered *on top* of the purchase price. For example, the Ontario Real Estate Association (OREA) Standard Form “Agreement of Purchase and Sale” (APS) includes a clause stating that “if” HST is owing

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<sup>1</sup> I wish to acknowledge the assistance of Simona Ristic, Student-at-Law, who undertook research for this paper. 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.

<sup>2</sup> Exempt supplies are set out in Schedule V of the *Excise Tax Act* (ETA).

on the transaction, it is owing from the purchaser to the vendor “in addition to” the purchase price. Of course, this standard clause can be altered by the parties to make any HST owing “included in” the purchase price, for various reasons.

However, there are situations where the vendor is relieved from the obligation to collect and remit HST owing on the transaction, and instead it is the purchaser’s responsibility to make payment.<sup>3</sup> The most common of these situations is where the purchaser is an HST registrant with an HST account number. HST registrants are commercial suppliers of goods and services. Registration is required for any person with supply in excess of \$30,000 annually.

If the purchaser is a registrant, the purchaser must self-assess for any HST owing on the transaction and file such assessment with the CRA. When the purchaser is tasked with self-assessing, the vendor must not collect and remit HST, or else the parties may end up double paying.

When an HST registrant self-assesses, they are often able to offset much of the HST owing on the transaction by claiming “Input Tax Credits”, shifting the cost of HST to the “second-order purchasers” of the registrant’s supply. (This reflects a policy that tax should only be collected “once” for each new “product or service,” so the supply chain isn’t taxed until the “final product or service,” so to speak.)

Generally, the APS states that “if” HST does not apply, the vendor will provide to the purchaser a warranty or assurance to that effect. However, should the CRA determine that HST does, in fact, apply, the amounts will be owing regardless of the agreement and any such assurances by the vendor.

## Why are HST errors such a problem?

Nobody wants to pay the HST on a transaction, yet many parties will neglect to discuss or negotiate HST before an APS is signed. This can create an unpleasant surprise just prior to closing when the parties finally turn their mind to it; or, even worse, after closing when the CRA comes knocking.

Remember that lawyers have a responsibility to advise on the HST implications of any transaction unless they have explicitly excluded it from their retainer and advised their client to receive advice elsewhere. Even a global exclusion in the retainer that the lawyer is not giving “tax advice” can be contradicted by actions taken over the course of the transaction, such as drafting documents pertaining to HST indemnities, certificates, registration, or other HST related matters. Lawyers should be certain they understand and have advised their client on the HST implications of the transaction, or explicitly inform their client that they are not advising on HST, remind their client that they should get outside advice anytime HST matters arise during the transaction, and document every statement made to such effect.

From a claims perspective, the biggest problems with HST mistakes is that the CRA will demand payment immediately (generally from the vendor), regardless of who owes what under the sale contract. This means minor errors or disagreements can have major costs associated with them as a large HST payment must go out the door immediately, creating interest costs and lost opportunity costs.

Consider the example of the CRA demanding an unexpected payment from the vendor for HST that was owing and not paid. Even if a vendor’s lawyer “covered their bases” and drafted the agreement such that the purchaser must indemnify the vendor for any “surprise” amounts owing to the CRA, the time it

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<sup>3</sup> Or, more accurately, the “recipient” of the taxable supply. Discussed in more detail below.



takes to collect those amounts after the fact (and potentially argue about who owes what in court) can lead to a malpractice claim or a potential claim and repair costs, even if the vendor will likely be made whole down the road.

## Common Categories of HST Errors in Real Estate Transactions

Mistakes when determining whether HST applies to a given transaction often fall into one of two categories:

1. Failing to confirm the purchaser's HST registration status; or
2. Mistakenly assuming HST does not apply to a given transaction.

These errors can be made by lawyers for either the purchaser or the vendor and claims consequences can result for lawyers on either side of the transaction.

### Confirming the recipient's HST registration status

One common claim scenario we see at LAWPRO involves a vendor's lawyer being provided with an HST registration number by the purchasing party, closing the transaction without collecting HST, and then later being assessed for the outstanding HST by the CRA because the recipient/purchaser was not, in fact, registered with the CRA.

This can be caused by the purchaser mistakenly believing they were registered, providing an incorrect HST number due to confusion or clerical error, the registration had been cancelled or voided before closing the transaction, or any other reason.

Anecdotally, we have seen multiple claims at LAWPRO that involve purchasers providing incorrect HST numbers mistakenly, not out of bad faith, because they confused a corporate registration or payroll number with the correct HST number, have an old number that is no longer valid, or obtained an HST number for the purposes of the transaction but the registration has not been finalized for whatever reason. In all these circumstances, the vendor is liable for the full amount and must pay it to the CRA and then seek reimbursement from the purchaser. Regardless of the error and who made it, the HST owing will become the responsibility of the vendor.

These errors may not be easily rectified. HST registration can only be effected retroactively up to 30 days after the transaction unless registration was mandatory for the purchaser (that being purchasers supplying more than \$30,000 in goods and services). Since the vendor usually does not know there has been a problem until they are assessed by the CRA (which is generally much more than 30 days after the transaction closes), HST registration errors can usually not be fixed on the purchaser's end, and the vendor must pay the amount owing. While the vendor can often seek reimbursement from the purchaser, such actions may incur additional costs for the client, leading to a potential malpractice claim.

Lawyers for both purchaser and vender should always conduct an online search with the CRA to ensure that the purchaser's HST number is valid and the purchaser is registered with the CRA. A written record of this search should be kept with the file documentation.

To complete the search online, you will need the HST number provided by the purchaser along with the corresponding business name. To confirm whether the purchaser is currently registered, use today's date as the transaction date.<sup>4</sup>

Two example potential claims may help illustrate the importance of properly documenting and protecting oneself on the question of HST registration. In one potential claim, the lawyer called the CRA and requested a confirmation over the phone that the purchaser was, indeed, properly registered. The CRA agent allegedly provided such a confirmation, but the lawyer took no documented record or evidence of the conversation. Later, it was found that the purchaser was not, in fact, properly registered. While the lawyer in that case may have had a defence against any malpractice claim, proving that they took the necessary steps may have been difficult.

In another potential claim a lawyer instructed their clerk to check the HST registration of the purchaser. The clerk did so and documented the result, but failed to note that the search stated that the purchaser was *not* registered. The lawyer did not check the clerk's work until after the transaction had closed and it was too late to rectify the situation.

In these scenarios, simply running an online check with the CRA as to the HST registration status of the recipient will provide assurances as to whether additional steps are needed in order to avoid unforeseen HST liability falling on the vendor, but remember to document your search by printing the results and adding it to your file.

## Types of transactions (and their potential HST implications)

The following is a non-exhaustive list of common types of real estate transactions and the HST implications of consequential facts.

### Residential properties

Sales of residential homes that have been previously lived in and have not been substantially renovated by the vendor are generally exempt from HST. Since HST is typically applied to the sale of *new* goods or services, residential homes are generally not taxed after the initial sale by the builder.

This means, however, that *newly built homes*, as well as homes that have been substantially *rebuilt*, will generally be subject to HST when initially sold.

Certain types of residential homes may lose their exemptions, such as the four listed below.

#### 1. Renovated homes

Resale homes that have been "substantially renovated" by the vendor are generally not exempt from HST when sold. "Substantially renovated" means that all or substantially all of the building that existed immediately before the renovation or alteration has been removed or replaced.

The CRA generally interprets "all or substantially all" to mean at least 90%. However, this is merely a guideline. While there is no proscribed method of calculating what constitutes "90%", one typical

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<sup>4</sup> The online HST registration search can be done at [https://www.businessregistration-inscriptionentreprise.gc.ca/ebci/brom/registry/pub/reg\\_01\\_Ld.action](https://www.businessregistration-inscriptionentreprise.gc.ca/ebci/brom/registry/pub/reg_01_Ld.action)

method is comparing the square footage of habitable floor space renovated compared to the total habitable floor space of the building.

### *2. Rental properties and AirBnbs*

Rental properties used for long-term rentals (generally a period of 60 days or more) are usually exempt from HST on resale (absent substantial renovations or other facts that void the exemption). However, properties used for short-term rentals (rental periods of fewer than 60 days), such as AirBnb properties, do not qualify for such an exemption. Properties are generally considered short-term rental properties if 90% or more of the rentals are for fewer than 60 days.

Properties with a primary use of short-term rental (such as AirBnb or vacation properties included in a rental pool) are therefore considered commercial in nature and taxable when sold. “Primary” use is determined by majority use, so HST would apply if more than 50% of a property’s use is for short-term rentals or other commercial purposes. Properties that are used as a primary residence for more than 50% of the time, even if rented on a short-term basis for less than 50% of the time, will generally still not be taxable.

### *3. HST rebates for new residential properties*

New residential homes to be used as primary residences or long-term rental units will usually qualify for HST rebates that can reimburse the purchaser for a portion (sometimes substantial portion) of the HST paid on the property. It is a common practice for builders to therefore include HST in the purchase price of a new home, on the condition that the buyer’s HST rebate be assigned to the builder.

Although the purchase of a long-term rental unit may also qualify for an HST rebate, such rebates cannot be assigned to the builder, and the recipient must therefore pay the full HST amount owing at the time of closing and be reimbursed through the rebate at a later date.

Lawyers should take care when structuring transactions involving a potential HST rebate, as the CRA may deny rebates if the transaction does not strictly qualify. For example, buyers of a new primary residence that would otherwise qualify for a rebate may lose that qualification if they use a corporate body to take legal ownership of the property, even if title is later transferred to the individuals seeking the rebate. The recipient (that being the person obligated to pay the consideration through the agreement) must be an individual and that same individual (or one of their family members) must then take possession of the property as a primary residence in order to qualify. This can cause problems for a builder that takes assignment of the buyer’s HST rebate, only to find that the transaction didn’t qualify because of a structural choice.

### *4. House flipping and investment properties*

Land used in the furtherance of an “adventure in the nature of trade” is generally considered commercial in nature and not exempt from HST. The most common example of this is “house flipping.” While “substantial renovations” before resale will void an HST exemption regardless of the owner’s intent, unaltered residences can still be subject to HST at resale if the vendor did not use the home as a primary residence and purchased it for the primary purpose of reselling it at a profit.

## Vacant Land, Farmland, and subdivisions

Sales of vacant land by individuals that has been kept for personal use is generally exempt from HST. However, distinguishing between vacant land for personal use and farmland (or other commercial purposes) can sometimes be a complicated matter.

### 1. *Farmland*

When selling farmland that contains a residence, CRA views the sale as two separate supplies of property. One exempt and the other taxable. An allocation of value between the two “properties” must be obtained in order to determine the amount of HST payable. This can be done by way of valuation or appraisal.

The CRA refers to a “residential complex” portion of the land as including an amount of land that is reasonably necessary for the residential unit's use and enjoyment as a place of residence for individuals.<sup>5</sup> As a general rule, this is quantified as one half-hectare or less, unless it can be demonstrated that lands in excess of one half-hectare are reasonably necessary for the residence's use and enjoyment.

### 2. *Vacant land*

Vacant land put to a personal use (such as land used by the owner for hunting) is generally not taxable. However, any commercial actions taken by the vendor, such as licensing lumber or resource rights, or renting out a portion of the land, could be seen as transforming the land into a commercial property where HST would apply on resale.

Additionally, vacant land sold by a corporation, rather than an individual, is generally taxable regardless of its previous use.

Lawyers should be careful to inquire as to the complete history of a vendor's use of apparently “vacant land,” in order to confirm whether HST does, in fact, apply.

### 3. *Subdivided land*

Land that has been subdivided into more than two lots is generally *not* exempt from HST. This includes previous subdivisions of the property.

Therefore, for example, if vacant land or farmland including a residence is subdivided into three or more lots, HST will apply to all the properties in question. This would include an unrenovated residential resale.

It is therefore important to inquire as to the subdivision history of the property for an otherwise HST exempt transaction.

## Conclusion

HST errors are common within real estate transactions, and can lead to a large, unforeseen HST bill and potential litigation over *who* will pay that bill. The most common errors we see at LAWPRO usually

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<sup>5</sup> Based on GST/HST memoranda 19.5 and 19.2.1

involve either a failure to check the purchaser's HST status, or a failure to properly determine whether HST applies to the transaction. The former error is easily avoidable by lawyers for both the vendor and purchaser always running an online check with the CRA to confirm HST registration status.

The latter, however, is a more complicated question and may require additional research on the lawyer's part or assistance from a tax specialist. What's clear is that lawyers should not presume HST will not apply to the transaction, or that the client's accountant, real estate agent, or anyone else has already properly made a determination as to HST applicability.

If a lawyer intends to restrict their retainer and avoid advising on all tax matters, including HST, this should be explicitly conveyed to the client *and documented*. The lawyer should document additional reminders to the client of this limitation to the retainer at any point where the lawyer is asked to draft documents or convey information pertaining to HST matters.

We have set out [questions a lawyer should ask themselves about HST](#) when acting on a real estate transaction.

# Ten Questions About HST to Ask Yourself When Handling a Real Estate Transaction

## 1. Are you comfortable giving your client tax advice?

- a. If you are not, have you advised your client, in writing, that you will not be giving tax advice with respect to the transaction and explicitly excluded tax and HST matters from your retainer?
- b. Lawyers should not simply rely on statements from the vendor as to whether HST applies to the property (whether or not the vendor is their client). Even when representing sophisticated clients, potentially with accountant advisors or real estate agents involved in the transaction, the lawyer has a responsibility to advise their client on HST matters unless they have explicitly excluded it from their retainer and recommended their client receive outside advice with respect to HST (and documented this advice).
- c. If the client has not received outside HST advice, lawyers should consider seeking expert assistance if they are not confident in the HST implications of a given transaction.
- d. The CRA can provide interpretations (non-binding) or rulings (binding) on the applicability of HST to a particular transaction.<sup>1</sup> However, obtaining such rulings or interpretations can often take too long to be helpful when negotiating an APS. (The CRA states it is a “goal” to provide answers on HST matters within “45 Days”, but such results can and do take longer)
- e. More immediate assistance may be available by consulting with a specialized tax lawyer.

## 2. Does the transaction involve a new home?

- a. Primary residence buyers may qualify for HST housing rebates. (These are often assigned to the builder as part of the APS.)
- b. Landlords may qualify for the new residential rental property rebate (NRRP)
  - i. Rental rebates cannot be assigned to a builder.
- c. These rebates are conditional on the purchaser actually using the property for the intended purpose. That is, the *recipient* who pays for the property must actually reside in it upon taking position (or, alternatively, an immediate family member of the

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<sup>1</sup> See online: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/1-4/excise-gst-hst-rulings-interpretations-service.html>

*recipient*). In the case of a NRRP rebate, the property must, in fact, be used for long-term rentals (longer than 60 days).

### 3. If the property is a residence, who will live in it?

- a. For a “new home” to qualify for the New House Rebate, the purchaser or one of the purchasers or their “relatives” (within the meaning of the *Income Tax Act*) must reside in the property after purchase as their primary place of residence.
- b. For a “new home” to qualify for the New Residential Rental Property Rebate, the purchaser must not sell the property within one year after its first occupied, the landlord cannot occupy the property themselves, and the first people to occupy the property must be tenants.

### 4. Who is the supplier and who is the recipient?

- a. The *ETA* places HST obligations on the *supplier* of the property (defined as the “person making the supply”) and the *recipient* of the property (generally defined as the person who is liable under an APS to pay the consideration for the property). This can create complications if the person liable to pay the consideration (such as a corporate body named in the APS, a trustee taking legal title, or other arrangement) is not the party intended to take possession of the property.
- b. Land purchased in the name of a corporation may be disqualified from claiming an HST rebate.
- c. Vacant land sold by a partnership, association or corporation does not qualify for an HST exemption.

### 5. To what use did the vendor put the property?

- a. The nature of the property and use by the vendor generally determines whether HST will apply, not the nature of the purchaser or the intended use.
- b. Generally, property used as either a personal primary residence or for long-term rentals are exempt from HST (\*note: property used for short term rentals like AirBnb rentals are treated differently, as discussed below)
- c. Land used in the furtherance of an “adventure in the nature of trade” is not exempt from HST. The most common example of this is “house flipping”. A house that was not purchased for the primary purpose of being resided in by the purchaser or a family member of the purchaser may be considered an investment property and may not qualify for an HST exemption when it is resold.
- d. Property that had a primarily commercial use (other than long-term rentals) will not qualify for an HST exemption.
- e. Vacant land by an individual may be HST exempt if the land was for “personal use”. However, if the vendor once licensed timber rights to the land, or otherwise used the land for a commercial purpose at any point, that exemption may be lost.

- f. Use of the property by the vendor for short-term rentals can impact the exemption status of a residential property. If the primary use of the property is as a rental property, and if those rentals are short-term, the property may be considered commercial in nature and HST will apply.
- g. Under section 194 of the ETA, the sale is deemed to have been tax-included if the seller provides a written certification to the buyer that the sale is exempt under certain provisions and this proves to be incorrect, unless the purchaser knows or ought to have known the sale was not exempt.

## 6. Has the land been subdivided into more than two parcels?

- a. If HST-exempt land is subdivided into more than two parcels, those resulting parcels of land will no longer qualify for an HST exemption. Lawyers should be careful that HST may be later applied to the sale of a residential resale property, for example, if the lot in question resulted from a subdivision by the vendor into more than two lots.
- b. Vacant land can only benefit of the exemption if the supplier is an individual or a personal trust (not a partnership, association or corporation).

## 7. Was the property renovated by the vendor?

- a. Resale homes that have been substantially renovated by the vendor are not exempt from HST when sold. “Substantially renovated” means that all or substantially all of the building that existed immediately before the renovation or alteration has been removed or replaced.

## 8. Is the recipient confirmed to be an HST registrant?

- a. Purchasers that intend to self-assess as an HST registrant can make mistakes as to their registration status or registration number.
- b. Doing an online search and documenting the results of that search is the safest way for the vendor to protect themselves from being on the hook for the HST on the transaction.<sup>2</sup>

## 9. Is the purchaser being assigned a previous APS?

- a. Some tax implications, such as the availability of rebates, turn on the identity of the person providing the consideration (i.e., the *recipient*). If assignments are not drafted to ensure assignees legally qualify as the *recipient* of the property under the *Income Tax Act*, rebates may not be available (and other unforeseen tax consequences could occur).

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<sup>2</sup> HST registrations can be checked online at [https://www.businessregistration-inscriptionentreprise.gc.ca/ebci/brom/registry/pub/reg\\_01\\_Ld.action](https://www.businessregistration-inscriptionentreprise.gc.ca/ebci/brom/registry/pub/reg_01_Ld.action)



10. Has the vendor claimed any ITCs (Input Tax Credits) on the acquisition of the property or any improvement to the property?

HST registrants can claim ITCs on costs incurred when acquiring, developing, or renovating property that will be taxable on resale. For example, house flippers that “substantially renovate” a residential property, such that it becomes subject to HST, can claim ITC on the input costs of the renovation project

Confirm and document in your file the exemption!

## S. 116 ITA Flowchart for sale by a non-resident

Follow this flowchart when dealing with the sale of a property by a non-resident vendor where there is no s.116 certificate of compliance on closing. LAWPRO sees claims from the vendors and purchasers lawyers who have missed or misinterpreted the obligations and liabilities which arise when a non-resident sells a property without delivering a s.116 certificate of compliance as part of the closing process.

CAUTION: If you are not comfortable with the issues described below, have your client seek appropriate professional advice from a tax lawyer or accountant. Refer to ITA and supporting material for full details.



1. Taxable Canadian Property (TCP) for purposes of s.116 will typically be:

- (a) real property situated in Canada, whether capital property or inventory;
- (b) shares, partnership interests or interests in trusts where more than 50% of the fair market value of such shares, partnership interests or interests in trusts is (or was at any time within the prior 60 months) derived from any combination of Canadian real property, Canadian resource property, timber resource property or options of or interests in such property; or
- (c) options in respect of or interest in such properties

2. Residency Test - Is your vendor "not a non-resident"? (it's about residency and not citizenship!)

- Determination of residency depends on many factors, including, ties to Canada, ties to another country and special rules;
- Ties to Canada, include: home in Canada, spouse or common-law partner or dependants who stay in Canada, personal property in Canada (car or furniture), social ties, economic ties, Canadian driver's licence, provincial health insurance; etc.

- Special rules:

- Deemed residency if stayed in Canada for 183 days or more;
- Government employee outside Canada or member of Canadian Forces serving outside Canada;
- Rules may apply whether or not any gain is realized or any Canadian tax is owing from the disposition by the vendor;

For more information: click [here](#) (Income Tax Folio S5-F1-C1, Determining an Individual's Residence Status which cancelled Interpretation Bulletin IT-221R3); Form NR74, Determination of Residency Status (entering Canada); or, Form NR73, Determination of Residency Status (leaving Canada)

3. Usually confirmed by way of statutory declaration: "The vendor states that he/she/they is/are not now and will not be at the time of closing of this transaction a non-resident of Canada for the purpose of applying s.116 of the *Income Tax Act* (Canada)." The Residency paragraph of the OREA Agreement of Purchase and Sale provides that "Purchaser shall not claim such credit if Vendor delivers on completion the prescribed certificate". Case law (see *Kau v. The Queen*, 2018 TCC 156) has found that the receipt of a certificate remains subject to reasonable inquiry not revealing any indicators to the contrary

4. CRA Principal Residence Guide available [here](#)

5. Quantum of withholding tax:

- 25% of sale price - non s.116(5.2) taxable Canadian properties;
- 50% of sale price for s.116(5.2) property (see note 7) (typically commercial type properties, depreciable taxable Canadian properties, resource properties, etc.)
- Payment directly to CRA; payment confirmed by letter of acknowledgement (LoA) issued by CRA – no Certificate of Compliance – purchaser no further obligation once has LoA;
- Purchaser: entitled to deduct from the purchase price and remit to CRA, 25% or 50% of property's purchase price on account of the vendor's Canadian tax liability

6. Filing – Form T2062 – Advise clients ASAP of required supporting documents:

- Offer to purchase (for arms length transactions)
- Original deed from the time of acquisition
- Copy of registered transfer from the sale
- Copy of original receipts for any capital improvements claimed
- Letter of opinion or original appraisal (for non-arms length transactions)
- ITN for each vendor
- Notarized copies of non-resident's ID

7. Section 116(5.2) property is typically depreciable property, Canadian resource property and timber resource property, however if unsure consult a tax professional. Caution of the status of mixed (e.g. residential/commercial) use properties, properties which have been used for short term rental (e.g. Airbnb) or homes with home offices, which might be categorized as depreciable property. Although non-s.116(5.2) is typically residential or recreational property, beware of the caution above

8. Purchaser withholds based on purchase price, unless vendor provides certificate of compliance for which vendor paid tax or security based on purchase price less ACB. ITA and OREA agreement provide for a credit to the purchaser for the amount of the holdback if the vendor does not have a s.116 certificate on closing

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9. Penalties

- Vendor's failure to report – s.162(7) ITA – greater of \$100 and \$25/day, max of \$2,500
- S.116(5) ITA-purchaser liable to pay vendor's tax unless obtain Certificate of Compliance or comfort letter from CRA (why critical to get vendor's lawyer's undertaking to obtain, if not available prior to closing, in addition to the holdback)
- Purchaser failure to pay within 30 days of the end of the month in which the property was acquired – 10% of the amount that was to be paid
- s.227(9) interest on tax and penalties, compounded daily, current rate 5%

10. Individual Tax Number – Form T1261 (online also) each owner is required to obtain an ITN for Non-Residents from CRA; required for any filings; CRA accepts one notification filed on behalf of all partners for a partnership disposition. Need notarized copies of non-resident's ID required to obtain ITN

Other useful information:

a) Period of ownership

- No capital gains tax in Canada prior to 1972;
- Under the Canada-U.S. Tax Convention the gains derived in Canada by U.S. Vendors were exempt until Dec 31, 1984, provided the property was owned on September 26, 1980;

b) U.S. dollars structured transactions:

- ACB converted into Canadian dollars at its historical rate;
- proceeds of disposition converted at the exchange rate in effect at the date of disposition (appears may be either the date of the agreement of purchase and sale or the closing date);

c) Canada – United States Tax Convention (1980), Fifth Protocol (September 2007) – U.S. non-resident vendor may qualify for a reduction in tax payable as capital gains in Canada:

- See Period of ownership
- Pro-rata method calculation: # of months between date of acquisition or Jan 1, 1972 (whichever is later) and Dec 31, 1984, divided by # of months between date of acquisition or Jan 1, 1972 (whichever is later) and date of disposition, (see publication IT-173R2SR);
- Transitional Tax Treaty Rule Method or Fresh Start Rule calculation with CRA approval: (if want allocation for significant pre 1984 appreciation)

d) Non-arms length transfers: (spouses, adult children and related parties)

- FMV proceeds deemed at FMV, even if only adding spouse to title – only exception if the result of the death of a spouse;

e) Reporting Requirements

- Non-residents need not file a tax return in Canada however, they may want to – filing T2062 and receiving Certificate of Compliance only establishes withholding tax; filing tax return, establishes actual amount of capital gains tax payable and certain expenses not allowed to calculate withholding tax are deductible and likely to create a refund. Forms are available [here](#)
- Vendor's tax = Fair Market Value (FMV)/proceeds of disposition, less adjusted cost base (ACB) & period of ownership; (for non-arms length disposition for less than FMV, proceeds deemed = FMV) of taxable Canadian property – defined in s.248(1) ITA, which includes any "real property in Canada".
- U.S. tax filing different as U.S. citizens required to report annually on their worldwide income when they file their U.S. tax returns. Capital gains in Canada and U.S. calculated differently and so need to fully re-report and be re-assessed in the U.S. but as a result of the Tax Convention (1980) they will get a credit in the U.S. for tax paid in Canada

f) Timing: CRA requests a minimum of 30 days prior to closing to review, process and issue a Certificate of Compliance, although it should be anticipated to take longer

g) This checklist is based on a paper and presentation by Clare Brunetta, Barrister and Solicitor-Canadian Cottage and Recreational Properties Owned by United States Residents: s.116 *Income Tax Act* Considerations, OBA Institute program February 4, 2016, Quirky Conveyancing – Tools for the Modern Real Estate Lawyer. Click [here](#) to read full paper

h) See Working Group on Lawyers and Real Estate, Forms – Undertaking (Non-Resident) for when no certificate is produced on closing [here](#)

# You transferred funds to the wrong account what now?



Fraudsters try to trick lawyers into wiring funds to an account that the fraudster controls. Sometimes, they succeed, and the funds get into the hands of criminals. What do you do then?

Below are some examples that have been reported to us:

1. A lawyer's office received a last-minute redirection of monies payable on the sale of a property, which was a spoofed email from fraudsters.

Without verifying the legitimacy of the redirection (other than by email with the fraudsters through the firm's law clerk), the funds were wired to the account of the fraudsters.

It was later determined that the email account of the law clerk had been compromised (likely by guessing an easy password or the clerk responded to a phishing email.) It was by hacking into the law clerk's email account that the fraudsters learned about the transaction and were able to

read and send genuine emails in furtherance of the fraud. The rules of the email account were re-written so that these emails were sent to folders other than the Inbox and Sent folders so the clerk wouldn't catch on.

2. A lawyer acted for the seller on a non-real estate transaction. The purchaser's lawyer attempted to cc them in an email, but sent the correspondence to an address that was one letter off from the real email address. In response, the purchaser's lawyer received instructions from this fraudulent email address with new trust account information and payment instructions.

The purchaser's lawyer thought this was suspicious, and called the seller's lawyer, who was able to confirm that the instructions were fraudulent. Independent verification saved the day.

It is unclear how the email hack occurred in the first place.

## Three simple things you can do



### 1) Call before you click

If you receive instructions from a client, colleague, or other lawyer that involves a change in wire transfer account numbers or relates to a transfer of funds, always pick up the phone and call the individual to verbally confirm those instructions.



### 2) Train your lawyers and staff

Make sure all the lawyers and support staff in your firm are aware of the likelihood of spear-phishing attacks and the need to verbally confirm any changes to wire-transfer instructions received by email.



### 3) Warn your clients

Alert your clients of the dangers associated with wire fraud and advise them to verbally confirm with your firm any bank account details received by email.

## What should you do if this happens to you?

### What to do immediately



#### Contact the bank

The person who initiated the wiring of funds should immediately report the diversion to the bank from where the wire was initiated, requesting that they stop the wire. This is not always possible as wires are usually instantaneously dispatched and irrevocable, however, they may get caught in the financial institution's suspicious transaction filters and be pending.

Also, request that they contact the bank they sent the wire to and so on until the trail disappears or the money is found and frozen.



#### Report to LAWPRO

File a claim ([lawpro.ca/claim](http://lawpro.ca/claim)) with LAWPRO as soon as possible. Provide all the relevant documents in your possession.



#### Alert your client

Notify your client of the diversion fraud immediately and request that they consider whether their systems have been compromised and they should seek the assistance of IT professionals.

The systems of third parties with knowledge of the transaction (e.g., in the email thread) may have also been compromised. Speak with your client about similarly alerting such third parties to the fraud, with your client's permission. If no system was hacked, consider if this was an inside job.

### What to do next



#### Notify the authorities

Report the matter to your local police as a fraud, and the Canadian Anti-Fraud Centre.



#### Review your other insurance policies

Consider filing a claim under other policies you may have intended to respond to this type of risk, including but not limited to professional liability excess coverage, cyber insurance, commercial general liability, crime, computer fraud, and fidelity insurance. It is important that you obtain complete copies of all your insurance policies, including the declarations, policy wordings, and endorsements, for purposes of analyzing the potential coverages available to you. Your insurance broker may be of great assistance to you in this regard.



#### Seek IT help

Obtain the assistance of an IT specialist if it appears that your systems were hacked. Even if you received a spoofed email from a fraudster, the fraudster may have hacked into your systems to determine when to make the request for the wire transfer and which client representative to impersonate.

Be prepared to act quickly and work closely with your insurer(s) and other professionals retained. Cooperation between the parties is vitally important in these types of situations. ■



## Tips to avoid being a victim:

**Review our article [Wire Fraud Scams on the Rise](#): 5 Tips to Reduce Your Risk**

**Verify instructions independently:** Anytime you receive instructions to wire money to a bank account and especially if the instructions are changing previous instructions, contact the payee directly by an independent method (not replying to the email sending the instructions) to verify the instructions received and the accuracy of the bank routing information.

**Confirm instructions before a transfer:** Advise your clients, or anyone you expect funds from, of the potential for a diversion attempt and to confirm the instructions before initiating the wire transfer.

**Double check email addresses to see if they are fake:** Fraudsters will spoof an email address by creating a very similar looking address by adding an extra letter/number or changing a character(s). Having hacked into one account, they may spoof other email addresses that were in the email thread to increase your confidence that it is a proper message. It is important to carefully look at all the email addresses in the message. And remember, if the client's email account is compromised, it could be the fraudster sending you emails that look like they are coming from your client.

**Regular training:** Train staff in what to look out for and have regular discussions and to reinforce the cyber security message. Someone from the office may see information or indications of fraud that others may not.

**Stay up to date:** For general cyber prevention tips, review our Cybersecurity and Fraud Prevention Tips, and subscribe to [AvoidAClaim.com](http://AvoidAClaim.com) for fraud alerts.

# Wiring Funds Checklist

Date: \_\_\_\_\_ Verifier Name: \_\_\_\_\_

File Number: \_\_\_\_\_ File Name: \_\_\_\_\_

1. Attach a copy of the funds transfer instructions to this page.
2. Check that the name of the sender of the instructions matches the name of the person you were expecting to send instructions in your file.
3. Verification method. (DO NOT use the phone number in the instructions)

Always use a trusted number such as the one from the file opening sheet or from a reliable directory.  
\*On file opening, obtain a password from the client and record it in the physical file

- Phone call OR  In person  
 Phone # called \_\_\_\_\_ Name on ID: \_\_\_\_\_  
 Password confirmed\* \_\_\_\_\_

4. Verify sender identity and payment details:

Person contacted (name and date): \_\_\_\_\_

Does the sender confirm they sent the funds transfer instructions?

- YES – continue on OR  NO – immediately involve a lawyer or partner and proceed to Step 6

- Verify the payee and bank account details:

Payee: \_\_\_\_\_ Bank: \_\_\_\_\_

Institution number \_\_\_\_\_ Transit number \_\_\_\_\_ Account number \_\_\_\_\_

- Are the bank account details correct? If yes, continue on. If not, immediately proceed to Step 6.
- Are there any red flags? Any typos in the instructions or email address? Any issues or concerns that came up? If something is amiss, trust your instincts. Make a note and raise it with a lawyer or partner.

5. If the sender and payment instructions are correct, continue with normal processes and request cheque or wire.
6. If any part of the verification fails, STOP. Immediately involve a partner at your firm.
7. If payment instructions change, STOP. Involve a partner at your firm and complete the verification process again.
8. If funds were mistakenly sent before the process was completed:
  - a) IMMEDIATELY contact the bank and request a freeze and reversal.
  - b) IMMEDIATELY report the matter to LAWPRO: [www.lawpro.ca/claims](http://www.lawpro.ca/claims).
  - c) Consider reporting to any crime or cyber insurer you may have.
  - d) Review our article *You transferred funds to the wrong account – what now?* for further guidance.

This template is based on a document created by the Law Society of British Columbia's Lawyers Indemnity Fund (LIF)

# This is not a claim, but...

*Katie James, Claims Counsel*

At LAWPRO we often get explanations from insureds as to why they feel their matter is not reportable to LAWPRO. Commonly we hear the following: “There is no claim against me. No one has commenced an action, there is no litigation. So, there is no claim”.

In this article I will explain common misunderstandings about reporting to LAWPRO. In particular, I will focus on de-bunking the following myths:

1. being sued is the only time an insured needs to report,
2. there is no claim so an insured does not need to report, and
3. the allegation has no merit, so there is no need to report.

In fact, the duty to give notice to LAWPRO is as broad as it is so that LAWPRO can proactively assess, and possibly, repair a matter. While the idea of contacting LAWPRO can feel stressful, it should not be confusing. I want to de-bunk common myths we hear when processing Claim Notice Reports.

## Myths about reporting to LAWPRO

**Myth #1: I have not been sued and/or there is no action against me, so I do not need to report**

It is important to understand that the commencement of litigation and/or any proceeding against an insured is not the defining factor in submitting a Claim Notice Report. While an action being commenced is one reason for reporting to LAWPRO it is not the only instance when a matter ought to be reported. LAWPRO does not take the word “claim” to mean only a civil suit or other proceeding.

There are many Claim Notice Reports that are investigated and proactively handled that do not involve litigation or threatened litigation against an insured. These matters are reported due to the potential for allegations or assertions being made against insureds.

**Myth #2: This is not a claim under the Policy, so I don’t need to report this matter**

The term/word claim is often misunderstood.

LAWPRO encourages insureds to report even if they are unsure their situation falls under the definition of claim or CIRCUMSTANCE(S). A lawyer’s deductible and levy surcharge history is not triggered by reporting a claim and/or CIRCUMSTANCE(S) itself.

LAWPRO has defined the word CIRCUMSTANCE(S) to assist insured’s with understanding their reporting requirements. We will now review some of the policy wording.

## The Policy:

In the 2020 Policy, the term CIRCUMSTANCE(S) is defined as:

(c) CIRCUMSTANCE(S) means any circumstances of an alleged, actual, or possible error, omission, or negligent act of which the INSURED becomes aware, which from the perspective of a reasonable LAWYER or LAW FIRM could potentially give rise to a claim hereunder.

General Condition E, sets out how notice of a CLAIM is required to be provided (*"If during the POLICY PERIOD the INSURED first becomes aware of any claim or CIRCUMSTANCE(S), such INSURED shall immediately give written notice thereof or cause written notice to....."*).

CLAIM is defined in Part V of the Policy as:

(e) CLAIM(S) means:

(i) a written or oral demand for money or services; or

(ii) a written or oral allegation of breach in the rendering of PROFESSIONAL SERVICES; received by the INSURED and resulting from a single error, omission or negligent act or RELATED ERROR(S), OMISSION(S) OR NEGLIGENT ACT(S) in the performance of PROFESSIONAL SERVICES for others.

All CLAIMS which arise from a single error, omission, or negligent act or RELATED ERROR(S), OMISSION(S), OR NEGLIGENT ACT(S) shall be deemed a single CLAIM regardless of the number of INSUREDS or the number of persons or organizations making a claim or the time or times the error(s), omission(s), negligent act(s) or claim(s) took place.

As well, Section 7.8-2 of the Law Society of Ontario's Rules of Professional Conduct requires lawyers to "give prompt notice of any circumstance that may give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced."

There are endless situations where claims and CIRCUMSTANCE(S) can arise. LAWPRO cannot put them into neat, defined categories.

Under General Condition (G), found on pages 6-7 of the Policy, insureds are required to assist and cooperate with LAWPRO in its handling of a matter on behalf of the insured. This includes:

- Not voluntarily assuming any liability or settling a claim (other than with respect to a Prescribed Penalty);
- Cooperating with LAWPRO in the investigation, defence and repair of any claim;
- Not interfering in any negotiations or settlement of any claim;
- Whenever requested by LAWPRO, aiding in securing information and evidence and the attendance of any witnesses;
- Cooperating with LAWPRO in enforcing any right of contribution or indemnity against any person or organization (other than the insured's employees who acted within the scope of their employment), and enforcing any entitlement to costs.

A lawyer may lose their coverage if *inter alia* they settle a claim without LAWPRO's involvement, refuse to help with their defence, interfere in negotiations etc.



## Late Notice:

Late notice often allows small problems to become big ones, and they can jeopardize coverage. Do not allow a potential claim/circumstance(s) to fester. Early notice gives us the best chance to help put things right.

It cannot be stressed enough how important it is to provide immediate notice of any claim or circumstance(s) that could give rise to a solicitor negligence claim. To avoid coverage issues that can result from late reporting of a claim or circumstance(s), don't find yourself in a position where it is too late for LAWPRO to effectively investigate, defend or repair a matter. If adverse findings of fact are made in a disciplinary, administrative tribunal process, appeal or Judicial Review, this could impair LAWPRO's ability to defend a later civil suit.

The consequences of not cooperating, or failing to provide notice of a claim can lead to the Law Society of Ontario being asked to step in to the insured's shoes (which would be at the Law Society's discretion to decline to do), and/or LAWPRO can rely on any such breach by the insured to deny coverage. This would be an unsatisfactory result, from the perspective of both the insured and the complainant if damages are owed.

## Myth #3: The allegations are without merit, so I don't need to report

LAWPRO understands that a common sentiment in the legal community is: "There is no merit to the allegation so I am not reporting." This is not a good idea. LAWPRO encourages and requires insureds to provide notice of real or possible mistakes immediately. Whether or not a matter is meritorious is not a factor in reporting a claim or circumstances. In addition, the Law Society Rules commentary states that a duty to report arises whether or not the lawyer considers the claim to have merit.

## What Happens When You Report

Once a matter is reported a Claims Counsel will contact you to discuss the report as well as obtain more information and determine a strategy.

As a risk management initiative, LAWPRO will often investigate, monitor or assist on an ex gratia basis. This usually involves LAWPRO retaining investigation counsel, who often becomes involved in responding to the allegations. If necessary, LAWPRO counsel will attend at cross-examinations with you provided LAWPRO is given timely notice of the allegations of ineffective assistance of counsel by an insured. If a matter is reported late, i.e. the insured takes steps to self-repair including but not limited to responding to the appellant or new counsel by responding to the investigation inquiries, swears an affidavit, goes to cross examinations without prior notice to LAWPRO, then LAWPRO cannot guarantee assistance as the matter is potentially a late report.

LAWPRO has experienced high success rates with having ineffective assistance of counsel allegations dismissed or dropped. This reduces the likelihood of a former client commencing a solicitor's negligence claim and their chance of success if they do. In several instances, LAWPRO has succeeded in dissuading the appellant's counsel from maintaining the issue in its Notice of Appeal and/or Judicial Review, thereby extricating its insured lawyer immediately.

## Immigration and Criminal Specific Claims and Circumstances(s)

In recent years, LAWPRO has seen a steady increase in allegations of various types of claims and circumstance(s) pertaining to the immigration and criminal bar. Ineffective assistance of counsel is an example of a common type of claim. LAWPRO requires its insured to report any such allegations immediately and before the formal protocol is engaged. Therefore, if an appeal counsel or your client's new counsel writes or calls you to 'investigate' or talk about steps taken by you previously for the client, whether at trial or some other proceeding, LAWPRO requests the matter is reported at that time. This allows us to engage at an earlier stage.

Claimants/clients who are considering allegations of incompetent representation often also file a complaint to the Law Society of Ontario. This can be a precursor to the client alleging ineffective assistance of counsel and insureds ought to report this. In addition, the client may commence a fee assessment. While the LAWPRO Policy would not on the face of it apply to a matter that is solely for the return of fees paid (such as a fee assessment), or a disciplinary process where the penalty would be a fine or similar penalty, these types of proceedings are often the precursor to civil suits that fall squarely within the coverage grant.

Other examples of possible claims/circumstance(s) can be: missed deadlines, failure to submit documentation or wrong documentation submitted, missed emails resulting in missed deadline (went into SPAM), miscommunication with client, allegation process was not explained properly, misinformed plea or application process taken, alleged failure to keep client updated, clerical errors and applications to strike pleas, failure to understand or advise the client of the law, election process (judge alone). This is just a sample of the types of claim notifications that LAWPRO receives and is not meant to be inclusive. As stated earlier, if you are unsure, the best step is to report.

The comments in this article speak only to the general availability of coverage under the LAWPRO Policy. Coverage is determine on an individual case basis, subject to the specific circumstances of the particular claim/circumstance(s), allegations made and applicable Policy provisions.

This resource is provided by Lawyers' Professional Indemnity Company (LAWPRO®). The material presented does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.



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## Resources and CPD for Lawyers

<b>LAWPRO's Practice Management Resources</b>	
<a href="#">Government announces two-year extension to ban on foreign ownership of Canadian housing</a>	Federal government's announcement on the extension
<a href="#">Are you ready for the Law Society's new client ID requirements on January 1, 2024</a>	Information on virtual ID verification
<a href="#">Virtual Identity Verification (IDV) service Provider Chart</a>	Information on virtual ID verification and service provider chart
<a href="#">All Fraud Warnings</a>	Various fraud alerts
<a href="#">Social Engineering Toolkit</a>	How to increase your primary E&O coverage from \$250K to \$1M for social engineering fraud
<a href="#">How to ensure you have secure funds</a>	Hold periods and irrevocable funds
<a href="#">Vacant Home Tax: Is your client buying or selling?</a>	Best practices when dealing with the vacant home/unit tax
<a href="#">CRA's new trust reporting requirements</a>	What you should know about T3s and bare trusts going forward
<a href="#">Important Reminder: Update to Non-Resident Speculation Tax</a>	Keep up to date with NRST rules
<a href="#">Retainers and Non-engagement letters</a>	Precedents and tips on retainers and
<b>Additional Resources</b>	
LSO: <a href="#">Client identification and verification requirements</a>	Information on ID requirements
LSO: <a href="#">Retainer or non-engagement</a>	Tips, checklists, and templates
<b>CPDs for Lawyers</b>	
<a href="#">Protecting your firm against fraud (2023)</a>	Information on actual fraud attempts, the types of fraud claims LAWPRO counsel see, and how best to avoid these scams.

## SPEAKER BIOS

### *Brendan Fagan*



**Brendan Fagan** is Chief Underwriter for TitlePLUS. He is responsible for managing the underwriting risk by developing underwriting guidelines, internal processes, and by keeping up to date on emerging risks, especially relating to fraud. In conjunction with the sales and business units, he sets the underwriting strategy and develops product ideas based on innovation, data, and customer feedback, with the goal of generating profitable growth within the company's risk parameters. He also manages a group of highly experienced underwriting lawyers.

Brendan has been in the title insurance industry for 15 years. Prior to that, he worked for a couple of years at two litigation firms, first in Montreal and then in Toronto. He started in title insurance with Chicago Title in 2009, working in claims for several years and then moving into underwriting, in both the residential and commercial spheres. In 2015, he went to FCT where he continued as an underwriter for five years. He was promoted in 2020 to Chief Underwriter, where his focus shifted to assessing risk across FCT's various lines of business, assisting in the development and implementation of new products, and advising senior management on developing trends in risk and underwriting matters.

## *Mark Giavedoni*



**Mark Giavedoni** is a partner in Gowling WLG's Hamilton office and a member of the firm's National Expropriation Law Group and National Municipal Law Group.

Mark prides himself on being a responsive and dedicated strategic adviser on all aspects of real property transactions: title repairs, financing, project structure and development, dispute prevention and resolution. As a Certified Specialist in Real Estate Law by the Law Society of Ontario, Mark has the expertise and personal touch to bring the right solution to advance your project, transaction or file.

He is frequently consulted by municipalities, universities, school boards, utilities and other lawyers to advise on complex matters. His experience enables him to guide and represent clients on condominium structures and developments; commercial leases; financings and secured lending; purchase and sale transactions; land use planning and assembly; expropriations (for LRT projects and otherwise); construction contracts and facilities management. From multi-million-dollar infrastructure and private/public partnerships to land conveyancing and transactional due diligence, Mark is equipped to be your single-source real property adviser.

Mark is the immediate past president of the Hamilton Law Association. He is a member of the Real Estate, Municipal and Education Sections of the Ontario Bar Association.

## *Zahra Ziaie Moayyed*



**Zahra Ziaie Moayyed** is retained on all real estate law related matters, including those dealing with the purchase and sale of properties, financing, leasing, zoning and land use planning as well as development projects. She is also a mediator who assists parties with resolving their real estate disputes. She frequently lectures at professional development programs, including ones hosted by the Law Society of Ontario, the

Ontario Bar Association, and the Toronto Lawyers Association.

## *Safiyya Vankalwala*



**Safiyya Vankalwala** is Communications Counsel at LAWPRO, focusing on risk management, including monitoring changes in the law and claim trends as well as developing and delivering practical resources to lawyers across Ontario.

Prior to joining LAWPRO, Safiyya worked at a fintech company in strategic planning and legal technology development. She spent 15 years practicing law, has an undergraduate degree in Political Science and Law & Society from York University and her LL.B. is from the University of Ottawa. Safiyya was called to the Ontario Bar in 2007.

Safiyya is co-author of a book focusing on legal considerations for entrepreneurs and has been a speaker and panelist at various educational seminars. She enjoys playing an active role in her local community.