

TitlePLUS Commercial Coverage Available In Ontario



Do you want to reduce the risks associated with financing a commercial or industrial property? TitlePLUS title insurance can help.

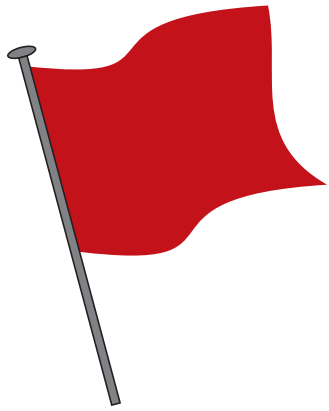
TitlePLUS commercial coverage is available in Ontario for purchase or

refinance transactions up to \$2 million. We provide comprehensive coverage for the title risks and the legal services provided by the lawyer in the transaction.¹ Most

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FRAUD

What Lenders Need To Know To Protect Themselves

As incidents of mortgage fraud and title theft gain greater prominence in the media, the real estate industry as a whole is facing a challenge that, if left unresolved, could make real estate look less like a good investment and more like a risk for many consumers.

Types of real estate fraud

Lenders should be concerned about these four types of real estate fraud:

Identity Theft involves either forgery or impersonation. For example, a fraudster may change title to a different name illicitly, or just impersonate the current registered owner. This type of fraud is usually aimed at getting mortgage proceeds from property the fraudster does not own. It could also involve an attempt to sell, in which case, it is often a tenanted property rented by the fraudster or an accomplice. In the corporate setting, a fraudster may pretend to be an officer of the corporation using a fake Minute Book, with the hopes of stealing property owned by the corporation.

Equity Theft most often involves one spouse closing a mortgage on a family-owned property to steal equity from the other spouse. This is a variation of identity theft.

Power of Attorney Fraud sometimes involves an identity theft. For example, the fraudster may pretend to be a relative and use a forged power of attorney. In other cases, it is a genuine power of attorney that is used improperly.

Value Fraud occurs when a fraudster makes property look like it is worth more than it is. In most cases, this is an attempt to get mortgage proceeds.

What can lenders do to protect themselves? Watch for red flags!

Don't fund mortgages where the **closing date has passed** or is imminent by the time you are approached to approve the financing. Don't fund mortgages where there are **similarities found in the names** of the buyer and seller or listing and selling agents.

Check identification and confirm referral sources. If a referral source is strange or doesn't check out, do not fund the mortgage. In cases involving a power of attorney, consider whether the explanation for invoking the power of attorney is reasonable.

Take extra steps to **verify a transaction** if access to the property is limited, subject to unusual restrictions

or if the borrower refuses to have a full appraisal completed (where required).

If there are **unusual financial provisions in the Agreement of Purchase and Sale**, such as credits on schedule or fees and payments being made to the vendor without substance (i.e., not to lower the purchase price), you should be concerned.

Consider the deposit. Did the buyer pay the deposit directly to the vendor or is there another unusual deposit arrangement?

Do the **details on your application documents match?** Is the date of the offer outside the listing date time-frame? Are signatures different on the application compared to the Agreement of Purchase and Sale? Do details such as SIN, address and name on the application match the credit bureau?

Work with other professionals who are being equally careful. Know and trust the other professionals with whom you're working. This helps to protect your interests and allows you to be confident your borrowers are receiving the highest standard of professional service.

The TitlePLUS Team Provides Valuable Resources To Lenders

There are many ways in which the TitlePLUS program may assist your organization. Here are some ideas to consider:

- Are you hosting an upcoming home buyer seminar in your community? We will provide free home buyer brochures and promotional giveaways, and we can even have a representative on hand to answer questions.
- Is it time to review your technology needs? We can arrange a personal demonstration of LawyerDoneDeal Corp.'s Virtual Intermediary Program (VIP®), a web-based program that allows for seamless electronic transaction processing, from sending out instructions through to receiving a final report **at no cost to the lender**. For more information on VIP, call LawyerDoneDeal Corp. at 1-800-363-2253.
- Do you provide ongoing training and educational programs for your staff? We have speakers available for your next staff or department meeting to discuss topics of



interest to lenders, such as title insurance and mortgage fraud.

- If you are one of our Confirmed Lenders, are you receiving the most out of your relationship with us? We can provide free home

buyer and OwnerEXPRESS® brochures to display in your branches, and we can put a link to your website on our website.

® VIP is a registered trademark of LawyerDoneDeal Corp.

Psst... Are Your Documents *Really* Securing That Mortgage Advance?



As a lender, you know that your documents are sound and that they are providing you with the security that you expect on that mortgage loan, right? Not so fast. If you are taking collateral mortgages as security for lines of credit, for example, and the terms of your mortgage are not properly drafted, you may have *lost* that mortgage security at some point.

The problem arises specifically with line-of-credit mortgage loans due to

the way that funds are advanced and repaid. Unlike traditional mortgage loan situations, where funds are advanced in one lump sum and then repaid in blended monthly payments of principal and interest over the term of the loan, with a line-of-credit mortgage, funds may not be initially advanced at all. When funds are advanced, they may be paid back in full one day and re-advanced the next.

How can you lose your security?

Some lenders still use mortgage terms that can in some cases completely *void* the mortgage! Here is an example: A recent review of the mortgage terms of one Canadian bank revealed the following payment provision:

PROVIDED this mortgage to be void upon payment of the sum of x DOLLARS (\$x.xx) in lawful money of Canada together with interest ...

Consider this provision in the context of a line-of-credit mortgage. Let's assume that this provision is in one of your mortgages. If the amount secured under the mortgage is \$100,000.00 and the full amount is advanced on day 1 and repaid (with interest) on day 2, your mortgage is now void. Not possibly void or even avoidable, but simply and completely void. If this is starting to make you uncomfortable, it should, because you now have **no security** for this line-of-credit.

This is not to say that your borrower is not obligated to repay the money borrowed, but if the money is not repaid and you choose to enforce, you have lost your rights under the mortgage. That means no power-of-sale rights, for example. You are left suing your borrower as an unsecured creditor. This is not the position you want to be in when you need to enforce.

What about the fact that you still have a registered mortgage on the borrower's property? Surely this puts you in a better position than an unsecured creditor, does it not? The answer is that from a practical perspective it is useful, but ultimately it will not save the day. Once a mortgage has become void, it cannot normally be reinvigorated. You may still technically have your mortgage registered on title to the borrower's property, but that does not make it any less void. If you were to try to enforce through the use of your power-of-sale rights in the mortgage, the borrower could quite correctly

argue that any attempt to do so would be of no effect given that your rights under the mortgage were extinguished when it became void. In fact, it is arguable that your borrower might be successful in having your mortgage deleted from title to the property as it no longer binds the property.

At this point you may be wondering why any lender would have *that* wording in their mortgage terms. The answer is that it is a historical remnant. It likely goes back to a time when all mortgages were conventional mortgages with funds being advanced in full and then repaid over time. In that sense, the wording that makes the mortgage void upon repayment reflected the state of affairs at the time. Lenders could not permanently bind a borrower's property if the borrower fully repaid all amounts owing. The wording simply reflected this reality. The problem is that the wording does not work in the context of collateral mortgages securing a revolving credit facility. Even so, the wording still appears in some lenders' mortgage terms to this day.

If you are concerned about this issue, raise it with your legal department. If this type of wording still appears in any of your collateral mortgage documents, consideration should be given to having it changed. In fact, your legal department may suggest that your documents provide expressly that a zero balance does **not** void the security provided by the mortgage for subsequent advances.

Fortunately, this issue is something that is often covered by title insurance. In the case of the TitlePLUS policy, an Endorsement for Collateral/Line of Credit Mortgages provides coverage for actual losses as a result of the invalidity, unenforceability or lack of priority of the mortgage regarding advances made after the policy date.² So, if you cannot enforce your mortgage because it has become void due to the type of wording discussed above, you could make a claim under your TitlePLUS policy.

As a result of these issues and others related to maintaining mortgage priority, and prior to offering coverage for subsequent advances to a lender for the first time, we review the lender's mortgage documents to ensure that the necessary wording appears. The result is that **lenders obtaining TitlePLUS coverage are doubly protected** for these issues: by the wording of their own mortgage terms and by the coverage in the TitlePLUS policy.

² Please refer to the TitlePLUS policy and endorsements for full details, including actual terms and conditions.

Lawyers & You

TitlePLUS-subscribing lawyers are trained professionals, located across the country. They can help you with your real estate transactions and minimize your company's risks. For a list of TitlePLUS-subscribing lawyers in your neighbourhood, visit the Real Simple Real Estate Guide on titleplus.ca and click on "Locate a Lawyer."

New Residential Real Estate Transactions Practice Guidelines For Ontario Lawyers: What Should Lenders Know?



Have you seen the new Practice Guidelines released by the Law Society of Upper Canada earlier this year? If you have not yet reviewed them and you lend money in Ontario, they are available online at <http://mrc.lsuc.on.ca/pdf/realEstatePracticeGuidelines/realEstatePracticeGuidelines.pdf>.

Perhaps the Law Society's most significant attempt to provide guidance to the Ontario real estate Bar since the mid-1990s, the Practice Guidelines bring a clear focus to real estate issues in the new millennium when title insurance is ever-expanding and fraud is an everyday reality.

The Practice Guidelines are built around six professional principles: Client/Lawyer Relationship, Due

Diligence, Proper Filing and Record-keeping, Document Preparation and Registration, Financial Issues, and Extraordinary Matters. The Guidelines are not mandatory in the same fashion as the *Rules of Professional Conduct*. It is clear that the lawyer is expected to consider the needs of the individual transaction and may deviate from the Guidelines in appropriate circumstances.

Having said that, **lenders doing business in Ontario may be particularly interested in the recommended fraud prevention practices, which include:**

- looking at inactive or deleted instruments and inquiring about suspicious patterns of transfers or discharges,
- considering values revealed on recent arm's-length transactions, to watch for suspicious changes in value, and
- reporting the issues noted to the lender.

The Guidelines also state that the lawyer shall undertake steps to verify that the borrower has reasonable identification to substantiate that he/she is the person named and should retain details about the identification.

Comprehensive advice is provided on the use of title insurance, from doing an appropriate intake of the transaction to reviewing the terms of the coverage with the client, ensuring

that there are no errors in the policy and having the policy issued as soon as possible after closing. The TitlePLUS web-based system makes it easy for lawyers to comply with many aspects of the Practice Guidelines, since they are already embedded in the TitlePLUS way of doing a deal.

For lenders who are relying on title insurance to advance funds before registration of the mortgage, the Guidelines encourage lawyers to obtain evidence of an express title insurer obligation to provide coverage for any adverse registrations occurring between the release of funds and registration. For example, the TitlePLUS Gap Endorsement is attached to draft Ontario policies in our mortgage-only (refinance) program and where requested for purchase transactions, so there is no question that the necessary coverage is available. The Gap Endorsement is also attached automatically to all TitlePLUS policies in Western Canada and Newfoundland & Labrador.

The experience of lenders and borrowers should only get better as the new Guidelines begin to influence day-to-day conveyancing practices. The TitlePLUS program will also be there to ensure that while purchasers and lenders get the expected insurance coverage, Ontario lawyers have the support they need to make a seamless implementation of the Guidelines.

The TitlePLUS Program Is Pleased To Sponsor The Ontario Bar Association's Half-Day Program On

MORTGAGE ENFORCEMENT



OBA • ABO

Ontario Bar Association
Association du Barreau de l'Ontario

How much longer can this buoyant real estate market last? Are you ready for the downturn? This is the first program devoted to **mortgage enforcement and realization** in a number of years, and it will address and update you on the significant

changes in law that have occurred. You will learn what you need to know to protect your company when dealing with enforcement issues.

If you cannot attend the program in person, you can still participate: watch a live webcast from your desk or watch the program later on a CD-ROM or video stream, or, simply order the written materials, either in a binder or in downloadable form.

For more information or to register for the program, please call the **Ontario Bar Association at 1-800-668-8900**.

Highlights of this program will include:

- Critical business and legal strategies when choosing a remedy and how to avoid mistakes;
- The obligations of the lender: preservation of property and accounting for surplus on sale;
- All about Power of Sale Proceedings from Notice of Sale to closing documents; and
- A review of important new case-law affecting various aspects of mortgage enforcement and related issues.

When:

December 4, 2007
9:00 a.m. – 1:00 p.m.

Where:

Ontario Bar Association
Conference Centre
20 Toronto Street, Toronto

The Virtual Intermediary Program (VIP)

Many lenders have now signed on to use The Virtual Intermediary Program (VIP). Owned and developed by LawyerDoneDeal Corp. ("LDD"), VIP is a complete, web-based transaction processing platform that integrates seamlessly with TitlePLUS policy issuance. Lenders instruct lawyers through a secure system that ensures prompt and accurate electronic delivery. Document preparation by the lawyer is system-directed to virtually eliminate errors or time-consuming questions. Electronic funding requests and electronic reporting make the exchange of information effortless and instantaneous. For more information or to arrange a full demonstration of this program, please contact Mark Farrish at mark.farrish@lawpro.ca or 416-598-5866 or 1-800-410-1013.

other commercial title insurance products typically limit the scope of coverage provided to defined title risks only, thus providing the small business buyer and their lender with significantly less protection than TitlePLUS insurance offers.

We believe that we offer the highest level of coverage for commercial properties among title insurers in North America. This sets the TitlePLUS program apart from the general commercial title insurance market.

lawyer handling the transaction makes a mistake for which liability is imposed by law, any losses that the business owner incurs as a result of those errors or omissions are covered by the TitlePLUS policy.

Become a TitlePLUS Confirmed Lender

All it takes is your signature on a simple letter agreement signed by the TitlePLUS Department. Then we publish your requirements on all of our websites and notify our subscribing lawyers. For more details and a copy of the agreement, contact Mark Farrish at mark.farrish@lawpro.ca or 1-800-410-1013 or 416-598-5866.

Our Confirmed Lenders' list consists of numerous lenders with local and national presence. We would be pleased to put you on the list, too.

TitlePLUS insurance benefits small business owners and/or their lenders in numerous ways:

- it can eliminate the need for costly, up-to-date surveys;
- its use may streamline the searches and inquiries required to close a transaction, again saving the borrower money;
- it provides coverage for issues such as outstanding work orders, liens, adverse financial interests (such as an old mortgage, tax arrears, etc.), encroachments and encumbrances (identified as at closing) that could adversely affect title, thus giving both the purchaser and the lender the peace of mind that comes from knowing their legal interest in the property is well-protected; and
- its legal services coverage, which is unusual among commercial title insurers, ensures that if the

TitlePLUS coverage is available for many types of commercial properties, including multi-unit residential, industrial/commercial condominium units, retail units (single or multi-tenant), mixed residential and retail, and other industrial/commercial properties. Vacant and improved properties are both eligible. Premiums vary depending on the purchase price and number of mortgages. Please contact us at 416-598-5899 or 1-800-410-1013 to get full premium details.

If you are a Confirmed Lender who would like to have access to TitlePLUS commercial coverage, please contact Mark Farrish at 416-598-5866 or 1-800-410-1013 to ensure your Confirmed Lender Agreement has been amended to include this coverage.

¹ Please refer to the TitlePLUS policy for full details, including actual terms and conditions.

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focus
ON LENDERS

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