

BY EMAIL

December [●], 2017

[Names and Addresses of Commercial Lenders]

Dear Sirs/Madams:

Re: First Canadian Title - Commercial Services

The County of Carleton Law Association Real Estate Lawyers Committee (the "Committee") works at the local and provincial level, to maintain high standards among real estate lawyers and to enhance understanding of the real estate lawyer's role through education, mentoring, advocacy and resource sharing.

Recently, the Committee learned that First Canadian Title ("FCT") has arranged with certain financial institutions to provide services to lenders in commercial loan transactions which would result in the elimination of legal counsel acting for the lender.

We are writing to you and other lenders, to ask that you choose to be represented by lawyers knowledgeable in commercial financing transactions, rather than proceeding on an unrepresented basis using FCT as merely a service provider.

Although title insurance has proved to be an effective tool, regularly used by lenders and commercial lawyers in commercial financing transactions, the lender's counsel brings irreplaceable advice and expertise to the transaction for the lender. The lender's counsel ensures that the lender obtains the valid, quality security it requires, is liable to the lender for its advice and direction and coordinates the transaction with the borrower's counsel in an efficient manner that serves the needs of both borrower and lender. A commercial lending transaction has much greater complexity and consequences than can be solved simply by issuance of a lender's policy of title insurance.

Replacing the expertise of the lender's counsel with another layer of administration will only likely increase the risk of delay and complexity in the transaction.

We feel that such an arrangement is not in the interests of the lender or the borrower for the following reasons:

1. The lender receives no legal advice. Security documents often require tailoring to the individual situation and commitment letters often require further clarification and instructions from the lender. Without a lawyer acting for the lender, this advice will be lacking, potentially eroding the quality of the security and exposing the lender to scrutiny from internal and external auditors. We are aware of situations where advisable security was either not required or not registered where no lawyer acted for the lender.

2. The cost to the borrower may increase and will almost certainly not decrease. Additional borrower counsel costs appear to be inevitable given the increased time and effort that will be required by borrower's counsel to address transaction specific issues that require resolution. Without the benefit of lender counsel to facilitate such resolution, and given that transaction costs are usually for the account of the borrower, the overall costs to the borrower will likely be the same or higher. In any case, costs could certainly increase over time as has been the case in the United States where title insurance companies replaced lawyers in real estate transactions and then, once a monopoly was obtained, charged fees much larger than was ever paid previously to lawyers.
3. The transaction may well be delayed as a result of the introduction of an additional "transaction administrator" function on top of an existing commercial mortgage transaction administration system set up by the lender (which for the most part works very efficiently and effectively) without the benefit of a lawyer to solve issues.
4. FCT requires the mortgage be insured with a FCT title insurance policy, and will not permit other title insurers. This is of course the right of the lender in the transaction, however, it has a significant implication for borrowers in a purchase transaction. Where lender and owner policies of title insurance are purchased from different companies, the cost of the owner's policy is prohibitive for the borrower and consequently rarely occurs, resulting in the borrower being forced to use FCT title insurance – creating a monopoly and pricing vulnerability for the public.

We believe that delay, increased costs and lack of choice in selection of a title insurance company will affect a borrower's decision as to which financial institution it wishes to engage for financing, potentially causing a loss of business opportunities to the lender.

We ask that before entertaining any such arrangements with FCT, you seek meaningful consultation with the legal community regarding the implication of such services and the impact it will have on both lenders and your customers, the borrowers. We firmly believe that such consultation would enormously assist lenders in devising policies that will enhance your internal efficiencies and be satisfying to both you and your customers.

Thank you for taking the time to review our concerns. We would be happy to meet with you or speak with you to further discuss this matter.

Yours very truly,