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## Part I

### A Comparison of Residential and Commercial Title Insurance Policies

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A Comparison of Residential and Commercial Title Insurance Policies

Both commercial and residential title insurance policies are policies of indemnity that insure against loss or damage arising from a title defect as well as from certain off-title issues. Commercial policy jackets tend to provide rather basic coverage, with many of the risks addressed through the addition of endorsements to the policy. The residential policies currently in use in Canada are considered to contain “extended” or “comprehensive coverage. This means that the residential policy jacket contains the bulk of the covered title risks for which coverage is provided, such that endorsements provide a more limited role, as the available covered title risks are generally broader than that found in commercial policies. This paper focuses on a comparison of the differences in coverage available in both policies, the differences in search requirements, and also examines the various commercial endorsements available which provide coverage similar to that found in the residential jacket.

Whether residential or commercial, a typical policy contains a policy jacket, Schedule A, Schedule B and generally some endorsements. The policy jackets consist of the coverage statement, a list of covered risks, a statement confirming the duty to defend (defence of title), exclusions, and conditions and stipulations. The coverage statements, whether residential or commercial, indicate that the insurer will insure against loss or damage sustained by the insured for matters occurring up to the date of policy (except to the extent than any covered risks will also insure for matters first occurring after the Date of Policy). Post policy coverage, in this respect, only applies to the residential jacket; there would be no post policy commercial coverage. Another difference arising from the coverage statement is evident in the Lender’s Policy, which extends coverage to 125% of the policy amount. The residential Owner’s policy contains inflation coverage raising the policy amount to a maximum of 200% of the original policy amount. No similar provisions are contained in the commercial policy.

Covered Title Risks -Owner

The ten covered title risks in the commercial policy jacket are set out below along with the provisions in the Owner policy which cover the same risks. It is important to note that the commercial and residential coverages do not necessarily align. An example would be access, where more extensive coverage is provided in the residential jacket. For this reason, the following chart serves as only a guideline for comparable coverage provisions:

<table>
<thead>
<tr>
<th>Residential Policy</th>
<th>Commercial Policy</th>
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<tbody>
<tr>
<td>1. Someone else owns an interest in your Title.</td>
<td>1. Title being vested other than as stated in Schedule A.</td>
</tr>
<tr>
<td>2. Your Title is defective. 9. A document upon which your Title is based is invalid because it is not properly signed, sealed, delivered, registered or recorded. 11. There is a lien or charge on your Title because of:</td>
<td>2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from: (a) A defect in the Title caused by: (i) forgery, fraud, undue influence, duress, incompetency,</td>
</tr>
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</table>
11. a mortgage;  
12. Charges incurred for public utilities supplied to the Land prior to the Policy Date—except for charges you agreed to pay.
13. There is a lien or charge on your Title because of a local improvement charge, as to that portion of the total amount of the charge which had accrued prior to the Policy Date, unless you agreed to pay the local improvement charge.
14. After the Policy Date a Governmental Authority assesses supplemental real estate taxes not previously assessed against the Land for any period before the Policy Date, unless you agreed to pay the supplemental real estate taxes.
15. Other defects, liens, charges or encumbrances on your Title.
of the Land;
(b) the character, dimensions, or location of any improvement erected on the Land; or
(c) the subdivision of land if a notice, describing any part of the Land, is registered in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

6. An enforcement action based on the exercise of a governmental power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is registered in the Public Records, but only to the extent of the enforcement referred to in that notice.

7. The exercise of rights of expropriation if a notice of the exercise, describing any part of the Land, is registered in the Public Records.

1. Someone else owns an interest in your Title.
2. Your Title is defective.

8. Any expropriation by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.

9. Title being vested other than as stated in Schedule A or being defective as a result of the avoidance in whole or in part, or from a court order providing an alternative remedy, of a transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A because that prior transfer constituted a fraudulent or preferential transfer under federal, provincial or territorial bankruptcy or insolvency, or similar creditors’ rights laws.

33. Any defect in or lien or encumbrance on the Title or other matter included in Covered Title Risks 1 through 32 above attaching or created subsequent to Date of Policy and prior to the date and time of registration or recording of the instrument by which you obtained your interest in the Land, unless you agreed to be responsible for them.

10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 (unless the Insured agreed to be responsible for them) that has been created or attached or has been filed or registered in the Public Records subsequent to the Closing Date and prior to the date and time of registration of the transfer/deed in the Public Records, or by reason of the Insured,
In addition, there are matters covered in the residential Owner policy jacket that are not covered in the commercial policy jacket. In this regard, there are also instances where commercial endorsements may contain similar coverage to that found in the residential jacket. These have been identified below. Where this is the case, and a commercial endorsement equivalent exists, the provision of such endorsement may be subject to the meeting of applicable issuing guidelines.

Coverage for some of these equivalent matters may also be, subject to transactional criteria, found in Schedule B, where affirmative coverage, such as coverage for compliance up to the policy date with registered restrictions and agreements, may be available.

Matters covered in the residential jacket but not specifically referenced in the commercial jacket include (identified by Covered Title Risk number):

3. Someone else has rights affecting your Title arising out of leases, contracts, or options.
4. Someone else has an Easement on your Land.
5. Someone else claims to have rights affecting your Title arising out of forgery, fraud, duress, incompetence, incapacity or impersonation.
6. Forgery of an instrument by which someone else claims to own an interest in or have a lien on your Title.
7. Someone else has the legal right to limit your use of the Land.

Although not specifically referred to, residential Covered Risks 3-7 would likely be covered in Covered Risk 1 and/or 2 of the commercial jacket. Other comparable coverage is identified with the following commentary:

8. Any of Covered Title Risks 1 through 7 occurring after the Policy Date.

This post policy coverage is not available for commercial policies. Of particular note, therefore is that the post policy date title fraud coverage is not available in commercial policies. Such title fraud coverage is set out in Covered Title Risks 5 and 6 of the residential policy and the post policy aspect is brought in through Covered Title Risk 8, which indicates that all of the Covered Title Risks 1 to 7 include post policy date coverage.
15. Your Land is unmarketable, which allows another person to refuse to perform a contract to purchase, lease or make a mortgage loan because:

(a) it violates a restriction set out in Schedule B; [This would be contained in the Restrictions, Encroachments, Minerals “REM” endorsement, and in the Covenants, Conditions and Restrictions “CCR” endorsement].
(b) of adverse matters that would have been disclosed by an up-to-date Survey; [Found in the commercial Survey endorsement].
(c) your Land violates an existing zoning by-law or ordinance; or [ Covered in the Zoning endorsement].
(d) your existing structures or any part of them are located on land under the jurisdiction of conservation or similar Governmental Authority without approval. [Coverage for this issue is not available for commercial properties].

16. There are construction, builders’ or mechanics’ liens or rights of priority on your Title, arising now or later, for labour, service or material furnished before the Policy Date—unless you agreed to pay for the labour, service or material. [To the extent that Covered Title Risk #2 of the commercial policy covers any defect in or lien or encumbrance on the Title, this matter would be covered under the commercial jacket].

17. Rights of possession in favour of a spouse under applicable provincial or territorial legislation dealing with matrimonial property rights. [This coverage is not available for commercial properties].

18. Someone else claims an interest in your Title because of a violation of any restriction, covenant, or condition which occurred before you acquired your Title, even if the restriction, covenant or condition is excepted in Schedule B. [While there is no equivalent language in the commercial policy, this may partially be dealt with by the Restrictions, Encroachments, Minerals “REM” endorsement, which deals with “present” violations”, and may also be covered by Covered Risk # 1 in the commercial jacket].

20. You are forced by a Governmental Authority (or in the case of 20(a) hereunder, you are forced by the affected neighbour or a party who benefits from the Easement) to remove or remedy your existing structure(s), or any portion thereof, other than a boundary wall or fence, because:

(a) it extends on to adjoining land or on to any Easement (even if the Easement is excepted in Schedule B); [ Coverage may be found in the Survey Endorsement, and for adjoining land encroachments in the Restrictions, Encroachments,
Minerals “REM” Endorsement].
(b) it violates a restriction, covenant or condition affecting the Land, even if the restriction, covenant or condition is excepted in Schedule B; [Restrictions, Encroachments, Minerals “REM” Endorsement, and the Covenants, Conditions and Restrictions “CCR” Endorsement].
(c) it violates an existing zoning by-law or ordinance; [Coverage is found in the Zoning Endorsement].
(d) It is located on land under the jurisdiction of a conservation or similar governmental authority without approval; [Coverage for this issue is not available for commercial properties].
(e) of any outstanding notice of violation or deficiency notice; [Commercial Owner Endorsement covers municipal building department work orders for purchases up to $1 million].
(f) any portion of it was built without obtaining a building permit from the proper Governmental Authority, provided a building permit would have been required by such Governmental Authority at the time of construction of the structure or relevant portion thereof. [Coverage for this matter is available in the Commercial Owner Endorsement up to $1 million].

21. There is a violation of the provisions of a provincial or territorial act which restrict the subdivision of land. [This matter is dealt with in the Subdivision Endorsement; although as a title defect, this would be covered in Covered Risk # 2 of the commercial policy jacket].

22. Work orders, unless you agreed to be responsible for them. [Municipal building department work orders are covered in the Commercial Owner Endorsement for policies up to $1 million] Thus the coverage in a residential policy is broader due to the fact that it is not limited to just municipal building department work orders.

23. Someone else, after the Policy Date, builds a structure – other than a boundary wall or fence—which encroaches on to your Land. [This coverage is not available for commercial policies].

24. The Land is in violation of a subdivision or development agreement. [While there is no equivalent provision in the commercial jacket, this matter is often covered through our affirmative underwriting in Schedule B].

25. A residence with the municipal address shown in Schedule A is not located on the Land at the Policy Date. [The Address Endorsement provides the equivalent coverage in a commercial context].
26. Your existing improvements (or a replacement or modification made to them after the Policy Date) including lawns, shrubbery or trees are damaged because of the future exercise of a right to use the surface of the Land for the extraction or development of minerals, water, or any other substance, even if those rights are excepted or reserved from the description of the Land or excepted in Schedule B. [Coverage can be found in the Restrictions, Encroachments, Minerals “REM” Endorsement, however it does not mention lawns, shrubbery, or trees, and also does not deal with replacements or modifications made to improvements after the Policy Date. As well, the REM Endorsement only refers to minerals, not water or other substances].

27. Your existing structure(s) have been damaged because of the exercise of a right to maintain or use any Easement affecting the Land, even if the Easement is excepted in Schedule B. [Coverage for this matter is available in the Restrictions, Encroachments, Minerals “REM” Endorsement].

28. Any incorrectness in a written statement received by you from a Governmental Authority, indicating that there are no defects relating to the Land’s compliance with applicable building and zoning by-laws or ordinances at the Policy Date. [Coverage for this can be found in the Government Response Endorsement for those searches listed in that endorsement].

29. Any adverse circumstance affecting the Land which would have been disclosed by a Local Authority Search of the Land at Date of Policy. [While there is no equivalent language in the commercial policy jacket, as a practical matter where search requirements waive a search, then coverage in this manner would be provided for the subject matter referenced by that search].

30. You are forced to correct or remove an existing violation of any restriction, covenant, or condition affecting the Land, even if the restriction, covenant, or condition is excepted in Schedule B. [Covered in the Restrictions, Encroachments, Minerals “REM” Endorsement].

31. Your Title is lost or taken because of a violation of any restriction, covenant, or condition which occurred before you acquired your Title, even if the restriction, covenant, or condition is excepted in Schedule B. [Although there is no equivalent
language in the commercial jacket, this may be partially dealt with by the Restrictions, Encroachments, Minerals “REM” Endorsement which deals with “present" violations”. It may also be covered by Covered Risk # 1 in the commercial jacket].

32. Other defects, liens, charges or encumbrances on your Title. [While the language is not identical, these matters would be covered in Covered Risk #2 of the commercial jacket].

33. Any defect in or lien or encumbrance on the Title or other matter included in Covered Title Risks 1 through 32 above attaching or created subsequent to Date of Policy and prior to the date and time of registration or recording of the instrument by which you obtained your interest in the Land, unless you agreed to be responsible for them. [There is no equivalent language in the commercial jacket, although since the policy date is the date of registration, effectively all commercial owner policies contain gap coverage, which provides essentially the same assurance as the language in the residential policy].

**Exclusions and Exceptions from Coverage**

The exclusions, while worded somewhat differently, are essentially the same between the two policies. In addition, the residential policy, in excluding environmental matters, sets out for clarity purposes that items like water potability and underground fuel oil tanks are not covered. The residential exclusions also refer to:

8. A breach of any governmental regulation requiring that improvements on your land be retrofitted to comply with fire safety regulations. [Fire safety regulations are not included in the Covered Title Risks in the commercial owner policy, and would thus not be covered in any event]; and

9. Any matters disclosed in a building inspection report or home inspection report obtained by the Insured prior to the Policy Date. [In addition to being inapplicable commercially for reason that it refers to a residential home inspection report, this matter would also not be covered commercially because it would be considered a known risk to the Insured].

The following matter is excluded in the commercial Owner policy but not the residential Owner policy:
4. Any claim, by reason of the operation of federal, provincial or territorial bankruptcy or insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is

   a) a fraudulent conveyance or fraudulent transfer; or

   b) a preferential transfer.

Accordingly, as the risk that a transaction may be conducted for the purpose of defeating creditors is greater for commercial policies, this is specifically mentioned in the commercial policy as being not covered.

With respect to exceptions from coverage, these vary considerably between residential and commercial policies. Residential Owner policies have one standard exception: “Environmental concerns or matters of any kind, and any native or aboriginal claim affecting the land.”

Commercial Owner policy exceptions vary depending on the policy amount. At a minimum, they all include:

1. Reservations, exceptions, limitations, provisos, restrictions and exceptions contained in the letters patent or the original grant from the crown, unpatented mining claims, environmental concerns or matters of any kind, and any native or aboriginal claim affecting the Land.

2. Taxes not yet due and payable.

3. Any unregistered leases, terms contained therein, and amendments thereto.

With respect to Conditions and Stipulations, they are similar, but must be reviewed for a full determination of what applies to each form of policy.

**Covered Title Risks - Lender**

The fourteen Covered Title Risks in the commercial policy jacket are set out below along with the provisions in the Lender policy which cover the same risks. The residential Lender policy is not written in “plain language”, as the residential Owner policy is, to reflect the generally more sophisticated (and often institutional) nature of a lender insured. Again, I would point out that the residential and commercial coverages do not necessarily align. An example would be
coverage found in the residential jacket for usury and work orders, although both of these coverages are available commercially, if applicable, by way of endorsement. The following chart therefore serves as a guideline for comparable coverage provisions:

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<thead>
<tr>
<th><strong>Residential Policy</strong></th>
<th><strong>Commercial Policy</strong></th>
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</thead>
<tbody>
<tr>
<td>1. Title to the estate or interest described in Schedule A being vested other than as stated therein.</td>
<td>1. Title being vested other than as stated in Schedule A.</td>
</tr>
</tbody>
</table>
| 2. Any defect in or lien or encumbrance on the title. | 2. Any defect in, charge, lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from:  
   (a) A defect in the Title caused by:  
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;  
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;  
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;  
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;  
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;  
      (vi) a document not properly filed, registered, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law;  
      (vii) a defective judicial or administrative proceeding; or  
      (viii) a violation of the provisions of a provincial or territorial law which restricts the subdivision of land.  
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority or public utility due or payable, but unpaid.  
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land, other than boundary walls or fences; (note – the
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<tbody>
<tr>
<td>1. Title to the estate or interest described in Schedule A being vested other than as stated therein.</td>
<td>8. Any expropriation by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.</td>
</tr>
<tr>
<td>2. Any defect in or lien or encumbrance on the title.</td>
<td>5. The violation or enforcement of any law, bylaw, code, notice, ordinance, permit or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to: (a) the occupancy, use, or enjoyment of the Land; (b) the character, dimensions, or location of any improvement erected on the Land; or (c) the subdivision of land if a notice, describing any part of the Land, is registered in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice. 6 An enforcement action based on the exercise of a governmental power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is registered in the Public Records, but only to the extent of the enforcement referred to in that notice. 7. The exercise of rights of expropriation if a notice of the exercise, describing any part of the Land, is registered in the Public Records.</td>
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<tr>
<td>3. Unmarketability of the title.</td>
<td>3. Unmarketable Title.</td>
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<tr>
<td>4. Lack of a right of pedestrian and vehicular access to and from the Land.</td>
<td>4. No right of access to and from the Land.</td>
</tr>
<tr>
<td>5. The invalidity or unenforceability of the Insured Mortgage upon the title.</td>
<td>9. The invalidity or unenforceability of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following affecting the validity or enforceability of the Insured Mortgage upon the Title: (a) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation; (b) failure of any person or Entity to have</td>
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<td><strong>6.</strong> The priority of any lien or encumbrance over the Insured Mortgage;</td>
<td><strong>10.</strong> The lack of priority of the Insured Mortgage upon the Title over any other lien or encumbrance.</td>
</tr>
<tr>
<td><strong>7.</strong> Lack of priority of the Insured Mortgage as to each and every advance of proceeds of the indebtedness secured by the Insured Mortgage, which at Date of Policy the Insured has made or is obligated to make, over any statutory lien for services, labour or material arising from an improvement or work related to the Land, whether or not: (a) The statutory lien or liens arise prior to or after Date of Policy; or (b) The improvement of work is contracted for or commenced prior to or after Date of Policy;</td>
<td><strong>11.</strong> The lack of priority of the Insured Mortgage upon the Title: (a) as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labour, or material arising from construction of an improvement or work related to the Land when the improvement or work is either: (i) contracted for or commenced on or before Date of Policy; or (ii) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance; and (b) over the lien of any assessments for street improvements under construction or completed at Date of Policy.</td>
</tr>
<tr>
<td><strong>8.</strong> Any assessments for street improvements under construction or completed at Date of Policy which now have gained or hereafter may gain priority over the Insured Mortgage;</td>
<td><strong>12.</strong> The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment</td>
</tr>
<tr>
<td><strong>9.</strong> The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment authorized a transfer or conveyance; (c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered; (d) failure to perform those acts necessary to create a document by electronic means authorized by law; (e) a document executed under a falsified, expired, or otherwise invalid power of attorney; (f) a document not properly filed, registered, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; (g) a defective judicial or administrative proceeding; or (h) a violation of the provisions of a provincial or territorial law which restricts the subdivision of land.</td>
<td></td>
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<tr>
<td>Showing in Schedule A to vest title to the Insured Mortgage in the named insured assignee free and clear of all liens;</td>
<td>Showing in Schedule A to vest title to the Insured Mortgage in the named insured assignee free and clear of all liens.</td>
</tr>
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</tr>
<tr>
<td>1. Title to the estate or interest described in Schedule A being vested other than as stated therein.</td>
<td>13. The invalidity, unenforceability, lack of priority or avoidance of the Insured Mortgage upon the title resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the Title to or any interest in the Land occurring prior to the transaction creating the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal, provincial, or territorial bankruptcy, insolvency, or similar creditors’ rights laws.</td>
</tr>
<tr>
<td>2. Any defect in or lien or encumbrance on the title.</td>
<td>14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 (unless the Insured agreed to be responsible for them) that has been created or attached or has been filed or registered in the Public Records subsequent to the Closing Date and prior to the date and time of registration of the Insured Mortgage in the Public Records, or by reason of the Insured, for reasons beyond its control and despite its best efforts, being prevented from effecting registration of its interest in the Land, provided the title search is brought up to date as of the Closing Date and the Insured is making reasonable efforts to effect registration with a minimum delay.</td>
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No equivalent language – although since we make the policy date the date of registration, effectively all residential lender policies have gap coverage that is the same as the language in the commercial policy.

Matters covered in the residential Lender policy jacket that are not covered in the commercial policy jacket are set out below. In this regard, there are also instances where commercial endorsements may contain similar coverage to that found in the residential Lender jacket. These have been identified below. Where this is the case, and a commercial endorsement equivalent exists, the provision of such endorsement may be subject to the meeting of applicable issuing guidelines.

Also, Schedule B underwriting may provide coverage for compliance up to the policy date with many restrictions and agreements registered on title.

10. The invalidity or unenforceability of the Insured Mortgage upon the title based upon a violation of the usury laws of the jurisdiction where the Land is located: [Coverage can be found in the Usury Endorsement].
11. The failure of Land to have the municipal address shown in Schedule A;

12. The failure of the Land to contain a single family residential structure or a condominium, with the municipal address shown in Schedule A. [The Address Endorsement encompasses the coverage found in paragraphs #11 and #12 of the residential jacket].

13. (a) Any outstanding work orders against the Land. [Commercial Lender Endorsement up to $10 million]; or (b) the failure of the Land to comply with the applicable zoning by laws; [Zoning Endorsement] or (c) the failure of the land to be zoned to permit a single family residential structure or, if stated in Schedule A, a condominium. [This coverage is not applicable for commercial policies].

14. The failure of the Land to be a lawfully created parcel according to provincial statutes governing subdivision of Land and local ordinances adopted pursuant thereto; [While this would be covered in the Subdivision Endorsement, as a title defect it would also be covered in the commercial policy jacket].

15. Failure of the existing residential structure, any portion thereof, or a modification thereof or replacement thereof constructed after Date of Policy, to have been constructed with a valid building permit from the appropriate local government issuing office, provided a building permit would have been required by such office or agency at time of construction, modification or replacement of the structure; [This coverage can be found in the Commercial Lender Endorsement up to $10 million, however, the endorsement language does not contain coverage for post policy construction as the residential jacket language does].

17. The inability to use the existing single family residential structure or condominium or any portion thereof, or any replacement thereof constructed after Date of Policy for residential purposes because that use violates a restriction referred to in paragraph 7 of the Exclusions from Coverage; [not applicable for commercial policies; coverage for violations of restrictions is found in the [Restrictions, Encroachments, Minerals “REM” Endorsement]

18. Encroachment onto the Land of an improvement constructed after Date of Policy by someone other than the then owner of the estate or interest referred to in Schedule A; [no equivalent coverage for commercial]

19. Any existing improvements, or those constructed after Date of Policy, encroaching upon any easement or right of way referred to in paragraph 7 of the Exclusions from Coverage and the use of that easement or right of way for the purpose granted or reserved interfering with or damaging the improvements, including lawns, shrubbery and trees; [Restrictions, Encroachments, Minerals “REM” Endorsement – however the endorsement does not cover improvements constructed after the policy date]

20. Any use of the Land for single family residential purposes being affected or impaired by reason of any lease, grant, exception or reservation of minerals or mineral rights referred to in paragraph 7 of the Exclusions from Coverage and damage to existing and future improvements, including lawns, shrubbery and trees resulting from the future exercise of any right to use the surface of the Land for the extraction or development of the minerals or mineral rights referred to in paragraph 7 of the Exclusions from Coverage; [Restrictions, Encroachments, Minerals “REM” Endorsement]
– but, of course, it does not refer to single family residential and the endorsement only contains the second italicized portion of coverage – it does not contain the coverage for the use being affected by leases, grants, exceptions etc. for minerals]

21. The invalidity, unenforceability or lack of priority of the Insured Mortgage resulting from any provisions therein which provide for (i) interest on interest; (ii) changes in the rate of interest; or (iii) the addition of unpaid interest to the principal balance of the loan; [The Variable Rate Endorsement provides coverage for changes in the rate of interest].

22. Forgery after Date of Policy of any assignment, release, discharge (partial or full), postponement or modification of the Insured Mortgage; or in the event the insured has acquired the estate or interest in the manner described in Section 2(a) of the Conditions and Stipulations and has not conveyed the title, forgery of any instrument by which another claims the title has been conveyed after Date of Policy; [There is no equivalent commercial coverage].

23. The invalidity, unenforceability or lack of priority of the Insured Mortgage as to:
   (a) Advances made after Date of Policy pursuant to the terms of the Insured Mortgage existing at Date of Policy; and
   (b) Advances made and/or changes in the rate of interest charged subsequent to any modification to the terms of the Insured Mortgage made after Date of Policy which are by the terms of the Insured Mortgage, as modified, secured thereby. [Revolving Credit Endorsement for (a); no equivalent for (b)].

24. Any covenants, conditions or restrictions, appearing in the Public Records, under which the Insured Mortgage can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired; [Restrictions, Encroachments, Minerals “REM” Endorsement].

25. Any violations on the Land of any enforceable covenants, conditions or restrictions appearing in the Public Records; [Restrictions, Encroachments, Minerals “REM” Endorsement].

26. Any future violations on the Land of any existing covenants, conditions or restrictions appearing in the Public Records, occurring prior to the acquisition of title to the estate or interest in the Land by the Insured, provided the violations result in:
   (a) invalidity, loss of priority, or unenforceability of the Insured Mortgage; or
   (b) loss of title to the estate or interest in the Land if the Insured acquires title in satisfaction of the indebtedness secured by the Insured Mortgage. [Restrictions, Encroachments, Minerals “REM” Endorsement].

27. Any covenants, conditions or restrictions, appearing in the Public Records, providing for:
   (a) A lien for liquidated damages;
   (b) A private charge or assessment; or
   (c) An option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant. [Restrictions, Encroachments, Minerals “REM” Endorsement].

28. Any adverse circumstance affecting the Land which would have been disclosed by a Local Authority Search of the Land at Date of Policy. [no equivalent in the
language in the commercial Lender policy jacket – but as a practical matter where our search requirements waive a search then coverage as per this clause would be provided for that search].

Exclusions and Exceptions from Coverage

The exclusions, while worded somewhat differently, are essentially the same between the two policies. In addition, the residential Lender policy sets out for clarity purposes only that overvaluation of the land is not covered. The following matter is excluded in the commercial Lender policy but not the residential Lender policy:

• Any claim, by reason of the operation of federal, provincial or territorial bankruptcy or insolvency, or similar creditors’ rights laws, that the transaction creating the Insured Mortgage, is:
  a) a fraudulent conveyance or fraudulent transfer; or
  b) a preferential transfer.

Accordingly, as the risk that a transaction may be conducted for the purpose of defeating creditors is greater for commercial policies, this is not covered.

The residential Lender policy has the following exclusion which is not in the commercial Lender policy. However, this should not been interpreted to mean that the commercial policy covers these matters – the language in the jacket or endorsements may provide some coverage and a review of the specific policy would have to occur to determine coverage:

• Any covenants, conditions, restrictions, easements, rights of way, statutory building schemes, and regarding minerals and mineral rights, any lease, grant, exception or reservation, appearing in the Public Records. This exclusion does not limit the coverage provided under insuring provisions 17, 19, 20, 24, 25, 26, and 27 of this policy.

With respect to exceptions from coverage, these vary considerably between residential and commercial policies. Residential Lender policies have one standard exception: “ Environmental concerns or matters of any kind.”

Commercial Lender policy exceptions vary depending on the policy amount. At a minimum, they all include:

1. Taxes not yet due and payable.

2. Reservations, exceptions, limitations, provisos, restrictions and exceptions contained in the letters patent or the original grant from the crown, unpatented mining claims, environmental concerns or matters of any kind, and any native or aboriginal claim affecting the Land.

3. Any unregistered leases, terms contained therein, and amendments thereto.

With respect to Conditions and Stipulations – they are similar, but must be reviewed for a full determination of what applies to each form of policy. Of note, as well, is that the residential Lender jacket contains a provision which allows the policy amount to be up to
125% of the policy amount listed in Schedule A. This is not the case with commercial policies.

Search Requirements

As can be seen, a commercial title insurance policy is different from a residential policy in that the commercial policy jacket itself tends to be a bare bones policy. Much of the coverage that has come to be expected as standard in residential title insurance policies is added into commercial policies through some of the additional endorsements mentioned herein. Commercially, an insurer’s search requirements may be affected by the dollar value of a transaction in that an insurer may only be prepared to take on a particular risk up to a certain dollar amount. Residentially, these monetary thresholds do not exist, and we waive some of the searches (for example with municipal reality taxes where a verbal confirmation, receipted tax bill or Statutory Declaration are unavailable), which lawyers normally do. These searches are not waived for commercial policies.

Title insurers are very conscious about making sure that the commercial endorsements and policy coverage given corresponds with their Required Search Lists, so that anything that is indicated as not requiring a search should be something that is covered by their policy or in an endorsement that they provide. If, for example, and insurer indicates that a law firm does not have to search zoning on purchase up to $10M, than that endorsement would automatically be attached for all commercial Owners policies up to that amount, unless, of course, the insurer is informed of a known zoning problem. In that way, certain commercial endorsements are added on by some insurers, depending on the policy amount, and on whether it is an Owners or a Lender’s policy.

In terms of thresholds, by way of an example, an Owner policy under $1M may get coverage for zoning, municipal building department work orders, building permit coverage, and coverage for parking compliance without the law firm having to do a search. Some of these coverages for Owners may not exist over this policy amount. This coverage would correspond with the search requirements.

Residentially, while verbal confirmation is sufficient for water, hydro and gas arrears, if verbal confirmation is not available, these searches are waived. Such is not the case commercially. Some of the matters mentioned in the residential search requirements, for example septic file searches and fire department work order searches differ from commercial requirements in that the coverage provided in the policies vary. In general, the commercial search requirements are more closely aligned with monetary thresholds, and fewer searches are waived.