

Residential Mortgage Issues

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INTRODUCTORY REMARKS

Most persons buying residential real estate in Alberta don't use their own money to do it. This is equally true in the case of natural persons and corporate purchasers buying residential real estate. Consequently, mortgage financing is inextricable from real estate practice, and the ongoing collective satisfaction of the lending industry with the functions performed by lawyers in such transactions, together with the relative certainty provided by the Alberta Land Titles Office, is a significant factor in real estate continuing to be part of practice for Alberta lawyers. Many American jurisdictions, by contrast, simply rely on title insurance to give some protection against chain of title defects, and lawyers play no role.

That being said, the role of lawyers in working with lenders is essentially the same as it is in working with any other client. We take instructions, give advice, procure and interpret information to form opinions, and give those opinions on the basis that they are intended to be relied upon by the party for whom they are prepared. These opinions are, in turn, backstopped by a lawyer's professional liability insurance coverage, with the end result being that lenders believe it is appropriate to task lawyers with assisting them in obtaining reliable security for loans that they make to borrowers.

The matters that come within the purview of a lawyer fulfilling this role evolve with the times, and we are now being asked to assist in monitoring our files for indicia of fraudulent activity, which can find fertile ground in the typically fast paced carriage of a real estate transaction. The architects of these schemes seem to be readily exploiting changes in technology and are aware of the steps taken by lenders, and others, to try to thwart them.

Additionally, as more and varied lenders enter the Alberta market place, some only by means of a virtual presence with no physical offices in the province, greater efforts must be taken to deal with mortgage instructions that may not always be consistent with the law in Alberta. In recent years, it has become common for some of these lenders to channel their instructions to us through another intermediary, often a title insurance provider packaging lender coverage with those intermediary services and being paid out of the mortgage advance before it arrives in the lawyer's trust account. In these multi-layered relationships, it is important that a lawyer be satisfied that those relationships are defined and understood to the extent that it is clear from where the instructions are coming, and that those instructions are properly in the name of the lender client, by agency or otherwise. This is also an important distinction to be conscious of when a mortgage broker is heavily involved in a file.

Regardless of whether a lender is familiar in the Alberta context or not, lawyers must also be conscious of instructions that are simply impossible to comply with on their face. This may be as simple and innocent as the incorrect identification of some third party document, easily revised by the lender, or something more fatal to the financing transaction, such as the intended use to be put to the mortgaged property by the borrower being different from the intended use contemplated, and required, by the mortgage instructions.

In the context of typical residential mortgage transactions, it is the borrower, not the lender, who makes an election to use a particular lawyer or firm, and the mortgagee follows suit with mortgage instructions being sent to that same lawyer or firm. This means that, in the overwhelming majority of residential mortgage transactions involving the registration of a mortgage that is to enjoy first priority in Alberta, a lawyer will act for both the lender and the borrower. In the case of purchase and sale transactions, the lawyer will almost always act for the borrower in the capacity of purchaser, as well, and may also act for the vendor in certain circumstances.

This creates a potential conflict of interests for the lawyer, and as in any case where a lawyer is faced with the proposition of acting for more than one party to a matter; the suitable considerations must be given to the propriety of such an arrangement. If, at the end of that analysis, such multiple representation of parties is deemed appropriate, then the lawyer must ensure that the proper communication is made and steps taken to comply with a lawyer's ethical and professional duties when acting for more than one party in the same matter. Alternatively, in those cases that involve a private lender, or something other than a first priority mortgage, it is less common for a lawyer to be able to properly act for both lender and borrower.

Moreover, this area of practice is fraught with potential traps for the unwary. As eluded to earlier, it is commonplace for a lawyer to be managing short timelines in conducting a real estate file, and haste always creates dangers that might otherwise be easily avoided with the luxury of more time. A lawyer must always consider whether haste is warranted when the result could very well be approaching negligence in practice, and, of course, the answer is almost always in the negative.

Among the common, avoidable pitfalls, the myriad boilerplate type precedents in use as offers to purchase, loan commitment agreements, disclosures, mortgage and other security documents, and even forms of opinion and reporting documents, create opportunities for efficiency in practice; however, this efficiency may also invite over delegation to staff and overreliance on a lawyer's recollection of the history of acting in transactions using the same essential documents, as in the case of mortgage instructions and lender documents that the lawyer has dealt with in many previous

transactions. Absent proper scrutiny and attention being paid to the unique file by the lawyer, these helpful tools can create dangers of their own through careless use and application. This, of course, must be avoided in all matters in which the lawyer is acting, and the lawyer must always be in charge of the conduct of the file. In addition, the lawyer must attend to the unique facts and the ever-present possibility of amendments to the standard forms, either by the parties to a particular transaction, or by the originator of the boilerplate document via an update or an alternative version.

While it is undeniable that a lawyer carrying out a practice, in real estate or otherwise, must delegate non-legal work to staff at every appropriate opportunity, simple distraction and disorganization can quickly lead to negligence. This is particularly true in the case of a lawyer with too much on the go, and with no proper system to monitor that workload. Our own Law Society, in the materials it makes available on its various webpages, and other media related to identifying and avoiding mortgage fraud has commented on overtaxed, or over trusting, lawyers being targeted by rogues and used as dupes in perpetuating frauds against lenders, and real life instances of this can be found amongst the matters that have been subject to hearing reports of the Benchers in recent years. Some of the reaction to this can be seen in changes to lender documentation related to identity verification, and the solicitation of statements or representations on the part of borrowers having the apparent purpose of minimizing the likelihood of fraud, as well as the Law Society of Alberta's own initiatives to assist lawyers in this regard. In most cases, at least as far as the lenders are concerned, strict adherence to these instructions will be expected from lawyers as participants in a given lender's strategy to combat fraud, and failure to carry out, even the minutia of those instructions, may very well result in a lender refusing to fund until such deficiency is rectified. Worse yet, is a situation in which negligence in this regard leads to the missed opportunity to prevent fraud and the occurrence of an actual loss.

The intent of this paper is to discuss these and other issues in residential mortgage financing, not in any kind of exhaustive, categorical way, but by focusing on simple fundamental concepts that can help a lawyer stay on the right path when dealing with difficult mortgage instructions or avoid some of the dangers associated with running multiple real estate files on tight timelines. Ultimately, there is little in a mortgage financing transaction that will be within the control of the lawyer, short of the systems that the lawyer has in place to deal with the files, and the level of care and attention applied in exercising the lawyer's training and experience. The lender and the borrower are the parties to the transaction, and the lawyer is best served by focusing on the role of the lawyer and attending to it diligently and efficiently, as to fail in this regard can lead to delay, or worse, for the parties to the