Mortgages

Registering mortgages is perhaps the most irritating part of any real estate transaction because the lender is particular about the transaction. Every lender will be idiosyncratic in its approach to transactions. Rapid and precise work on mortgage transactions is required.

Core documents

Mortgages result from legislation and contract. Both sources must be consulted when reviewing mortgage terms.

Legislation

Contract terms

- Standard charge terms

Practice management

Many lenders will ask counsel to act for the lender and the borrower, which raises practice management issues. The requirement that counsel act for both parties is acceptable, but counsel should be wary of accepting such mandates. If any conflict of interest is suspected or becomes apparent, counsel should refuse to act for both parties. Counsel should also obtain the borrower's clear, written consent to act for both sides in the transaction.

Mortgage brokers

The greatest source of pressure in a mortgage transaction comes from mortgage brokers. Brokers should be treated with extreme skepticism, and their statements must be fact-checked to avoid misunderstandings. The difficulty with brokers is that they are “go-minded”: they want to close the deal because they get paid on closing. Many brokers are, therefore, unscrupulous.

Solicitors should not malign brokers as a class, especially not with clients. Clients do, however, need to be made aware of the very different preoccupations that brokers and solicitors will express. Ultimately, the solicitor's opinion will predominate. The solicitor is responsible for verifying and closing the transaction.

LSO rules of practice

Solicitors must avoid conflicts of interest (rule 3.4-1).

a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

If a solicitor acts in any potential conflict of interest, the solicitor must inform all parties of the potential conflict and ask them to voluntarily accept the solicitor's mandate despite the potential conflict of interest (rule 3.4-2).

A solicitor may not act if a potential or actual conflict will, in the solicitor's view, adversely affect the solicitor's representation of or loyalty to the client (rule 3.4-2).

Solicitors working in partnership or association may not act for both lender and borrower in mortgage transactions (rule 3.4-12) unless the lender is a “lending client” (rules 3.4-13 to 3.4-19).

“lending client” means:

a) a bank, trust company, insurance company, or credit union;

b) a finance company that is a corporation or partnership: (i) whose material business involves making or refinancing loans, or entering into other similar arrangements for advancing funds or credit; and (ii) whose shares or ownership interests (or another person or entity with which it is affiliated) are listed on a stock exchange within or outside Canada that is a Designated Stock exchange for the purposes of the Income Tax Act (Canada); including any subsidiaries of such finance companies;

c) a corporation or partnership designated as an approved lender under the National Housing Act (Canada); or

d) a Community Futures Development Corporation, a federal or provincial crown corporation or a corporation or agency affiliated with or funded by such a corporation, a municipality or an agency affiliated with or funded by a municipality.

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