

The Role of a Lawyer

You are nearing the home stretch on the purchase of your first home. You have negotiated the right price with the help of a realtor you trust. A mortgage broker with all the right connections has found you the best mortgage financing. All that's left is to hand over the purchase price in exchange for the keys, or so it seems.

You might wonder where a lawyer fits in. Why do you have to fork out hundreds of dollars to accomplish that simple exchange?

The reason is that there are a series of dilemmas arising from the sequence of closing procedures. It's like the ancient philosophical question, "which came first, the chicken or the egg".

The mortgage company is not going to hand over the proceeds of the mortgage until you own the home and they can register their mortgage against your title. The thing is, you cannot actually complete the purchase and own the home without first getting the mortgage proceeds to pay to the vendor.

Even if you are able to get the mortgage money, you are not going to hand over the purchase price unless you are provided with title to the home. The thing is, the seller can't pay off his or her own mortgage and give you title without first receiving the purchase price.

Lawyers are needed to get around these chicken and egg dilemmas. We do it with glorified promises, known as "undertakings". A lawyer failing to fulfill an undertaking faces very serious consequences. As well, any losses that might be suffered as a result of a broken undertaking will be paid for by the lawyer's insurance. It is the security of the undertaking that makes these transactions work.

The mortgage company will send over the mortgage proceeds on your lawyer's promise to get their mortgage registered against title once the property is in your name. That promise can be made because the seller's lawyer will promise to pay off the seller's mortgage and provide clear title after receiving the purchase price. The chicken and egg dilemma is resolved by both materializing at the same time.

Of course, you need not concern yourself with those legal details. That all takes place behind the scenes.

Financial Details on Closing

The details you need to concern yourself with are the financial ones that might hit your pocket book during the closing procedures. As a British Columbia lawyer, I am writing this in a British Columbia context. I expect, though, that many of these financial details are applicable to other jurisdictions.

One financial detail arising on the closing of a real estate purchase is provincial government tax:

- In British Columbia, and perhaps in other provinces, there is a tax imposed on the purchase of real estate. In B.C., that tax is currently (March, 2008) calculated as 1% of the first \$200,000 and 2% on the balance of the purchase price of a home.
- It is a massive tax grab. On the purchase of a \$350,000.00 home, the Province of British Columbia "earns" \$5,000.00.
- I am pleased to advise, however, that most first time home buyers in B.C. are currently

exempt from having to pay this tax, but only if your home is worth less than \$425,000.00. There is a partial exemption for homes worth between \$425,000.00 and \$450,000.00, and no exemption for homes worth \$450,000.00 and over.

- I say “most” first time home buyers in B.C. are currently exempt because there are factors that could disqualify you. Ensure you receive reliable tax advice on this point.

Another financial detail has to do with your mortgage financing:

- As unlikely as it may seem, sometimes homes are positioned improperly on a lot. The home may have been constructed such that part of the home extends partially onto a neighbouring property. Just as problematic, the home may have been constructed on a sewer easement or other area on the lot that should not be constructed on.

- These types of problems should not arise because a municipal authority supervises the construction of homes. On the off chance that such a problem arises, however, the value of the property will be seriously impacted because the home might have to be moved or destroyed. A reduction in property value puts the mortgage company at risk because the loan may exceed the lowered property value.

- A survey of the property showing where the home is situated on the lot and where easements lie will satisfy the mortgage company. Surveys are expensive, though, typically costing approximately \$400.00. Alternatively, there are insurance companies that insure against title defects. Title insurance typically costs approximately \$225.00.

- A survey costs more than title insurance, but can be used every time you get a mortgage. Title insurance is a little bit cheaper, but needs to be purchased with every transaction.

- The very best scenario is if the seller of the property already has a survey and is prepared to hand it over to you. It costs them nothing to do you this favour. Perhaps consider asking your realtor to require the survey as a term of the sale.

- The next best scenario is if both the mortgage company and the lawyer you hire are willing to adopt a relatively new initiative, the Western Law Societies Conveyancing Protocol. Not all mortgage companies participate. Nor do all lawyers. If both do, then the lawyer’s insurance will protect the mortgage company if there is a problem, at no additional cost to you. Unless the vendor has provided you with a survey, be sure to consider this issue when choosing your mortgage company and your lawyer.

- If the vendor does not provide you with a survey, and either your lawyer or mortgage company do not adopt the Western Law Societies Conveyancing Protocol, then budget on spending an extra few hundred dollars for title insurance or a survey.

Perhaps the most confusing financial detail has to do with “adjustments” for utilities and property tax:

- These “adjustments” have nothing to do with the government or the mortgage company. They actually change how much you need to pay the seller for the property. Yes, you have already negotiated a purchase price, but these “adjustments” could change that price by hundreds of dollars.

- Adjustments have to be made to take into account property taxes, rents, water and garbage tolls and other charges or credits that are paid up for a certain period of time that does not match up exactly with the completion date.

- Typically, the most significant “adjustment” is with annual property taxes. In British Columbia, property taxes for the entire calendar year are paid on July 1. It is the person who owns the property on July 1 who has to pay the entire calendar year’s property taxes. If your purchase completes on any date before July 1, then you will be the owner on July 1 and be stuck with paying the property taxes for the entire year. You will want to be reimbursed for the portion of the year the house had been owned by the vendor. The reverse is true for purchases completing after July 1.

Lawyer or Notary

The giving of undertakings and calculating adjustments is not rocket science. In fact, real estate conveyancing is more of an administrative matter, and one of the things that a Notary Public is permitted to handle. Notaries Public are not required to have a law degree.

There is a common misperception that a Notary Public will charge less than a lawyer for the same real estate transaction. Get some quotes. I have found quite the contrary. Real estate conveyancing is a very price competitive. I have seen Notary Public fees higher than lawyer fees.

It’s not just about money, though.

As straight forward as real estate conveyancing might seem, things can go wrong. What if your seller has a last minute offer come in \$100,000.00 higher than your purchaser price and wants to get out of the deal? You may want to be working with someone who has the experience necessary to handle the situation, in the Courts if necessary. A Notary Public would have to refer the litigation work out to a lawyer. A lawyer with no litigation experience would have to do the same.

There are lawyers who do real estate conveyancing who also have litigation experience. Do some looking around and you will find them.

Legal Fees Comparison

When comparing quotes for a real estate transaction, make sure you are comparing apples to apples. Insist on full disclosure of what is and what is not included in the quote.

For comparison simplicity, I recommend obtaining “all inclusive” quotes. This way, there can be no surprises. Get a quote that includes all fees, disbursements, and taxes so that you know exactly what you will be paying for the legal services.

In order to obtain a proper quote, you will likely have to provide a legal description of the property. There are “hard” costs that depend on whether or not the property is in a strata corporation, and depending on the number of non-financial charges such as easements and statutory building schemes registered against title.

Beware companies that tack on such expenses as “software fees” as if they are “hard” expenses. You don’t want to find yourself paying a portion of the company’s overhead that ought to be included in a lump sum quote.

Also, if there is a particular lawyer you wish to use, but his or her quote has been undercut by the competition, the lawyer you wish to use may be willing to match the competitor’s quote. Don’t be too shy to ask if your chosen lawyer will do that for you.

Level of Service Comparison

As with every service industry, there is a wide range of service levels among lawyers and notaries who do real estate conveyancing.

Important service elements include:

- The turn-around time between being hired and producing the documentation necessary to complete the deal. You do not want to be anxiously waiting for things to happen with a looming completion date.
- Responsiveness to your questions or concerns. While an immediate call back might not be realistic, you should at least be able to expect a return call the same day.
- Accommodation to your schedule. Yes, there are lawyers who make themselves available for consultations before or after regular business hours, and on weekends if necessary, so as to accommodate their clients' schedules.
- Reporting to you. You will find a wide range of service levels in reporting to you, from getting a stack of disorganized paper to receiving an indexed and tabbed binder of documentation.

The best way to assess a lawyer's level of service, aside from first hand experience, is by reputation. Ask around. Past performance is a clear indicator of future performance.

What You Can Expect

Once you have chosen your lawyer, you can simply give the name of the lawyer to your real estate agent or mortgage broker and then sit back and wait for things to happen.

The lawyer will receive a copy of the contract directly from your real estate agent and a copy of the mortgage documentation directly from the mortgage company. You will not have to provide any of that material yourself.

You should be able to simply wait for a call from the conveyancing secretary looking after your deal to obtain any additional information that may be needed, such as confirming how the purchases are to be shown on title, and to schedule an appointment to sign up the documentation.

You will be advised, before the sign up appointment, exactly how the numbers shake out, and how much money will be required in order to complete the purchase in addition to the mortgage proceeds. You will need to bring that amount in certified funds or, if your lawyer has a trust account with your bank, you can directly deposit the funds into the lawyer's trust account. Some lawyers have trust accounts in all major banks and credit unions so as to provide this convenience.

The lawyer will need to satisfy the mortgage company by providing a photocopy of identification, that he or she actually met with you. Different mortgage companies have different identification requirements. Currently, a driver's license and major credit card satisfy all mortgage companies. If you do not have both of those, then bring whatever you have.

The lawyer will go through the documentation with you so that you understand what you are signing. You can budget one-half hour or so for the appointment. You should be provided with copies of all the important documentation, hopefully in a reasonably organized format.

Once the documentation is signed, you leave everything in the lawyer's hands to complete the deal. Your lawyer's office will notify the realtor when the key to your new home can be handed over to you.