

REAL ESTATE & MORTGAGES

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The process of buying a home is almost everyone's single biggest purchase in life, and is often one of the most stressful experiences. A knowledgeable real estate lawyer can assist in complementary ways to the services a real estate agent and mortgage broker can provide.

1. BUYING

At Mountain Law Corporation we offer experienced advice and reasonably-priced services to help buyers. We can give advice to you before you remove your subject clauses and certainly we handle the entire process thereafter, by providing further advice/opinions, preparing closing documents, arranging signing by both seller and buyer, registering the transfer documents, disbursing funds and reporting.

Our legal fees for a straightforward purchase start at \$595.00. In addition to those fees, the lawyer will need to be reimbursed by the buyer for "disbursements" relating to the transaction, such as search and registration fees. GST and PST apply to the legal fees and GST to most disbursements. If there is a mortgage involved, then see our commentary under "Mortgaging" regarding the process and costs involved.

2. SELLING

Though few people seem to obtain legal advice before signing a sales contract, there are definite benefits. Once an offer is accepted by a seller, there is little opportunity for that person to correct any error or oversight in the process. While the agreement may still be subject to various conditions, those are almost always exclusively for the buyer's benefit, and so control is out of the seller's hands.

An experienced real estate lawyer can identify any issues which may impede an orderly sale at an early stage, and certainly will help smooth the closing process. That will usually involve obtaining an accurate mortgage payout statement and handling that disbursement on receipt of sale proceeds; that is, after reviewing, approving and attending the seller on signature of the sale documents presented by the buyer's conveyancer.

Legal fees with disbursements and GST/PST generally total close to \$1,000.00 for a sale, though with the complexities of a non-resident seller the costs will be higher. Please read the "Non-Residents" section for a more detailed explanation.

3. MORTGAGING

Mortgaging or financing your property can take many forms. It may be that you need to borrow money from a financial institution to combine with your down payment in order to acquire a home. Or, you may need to amend your banking arrangements either by borrowing against some of your equity, or by changing lenders.

Knowledgeable real estate lawyers can make the process fairly straightforward, by receiving instructions from the lender, conducting the necessary searches, preparing documents, arranging the explanation of them and their signature, then registering the mortgage and disbursing funds.

In B.C., both the lender and you as borrower can be represented by the same lawyer if the parties agree and the transaction is simple. There are exceptions, such as when the lender is not a financial institution or the borrower is not an individual. There are considerable cost savings when only one lawyer is involved.

The legal fees start at \$495.00, plus disbursements such as searches and filing fees, and of course GST/PST.

4. CLOSING ADJUSTMENTS

For all real estate transactions, whether purchases, sales or financings, there are a number of adjustments which need to be taken into account, quite apart from legal costs, disbursements, and title insurance (covered under "Buying", "Selling", "Financing" and "Title Insurance" discussions).

The most common one would be municipal taxes, which are based on a calendar year and are payable in early July (except for Vancouver where there is an advance payment in February, besides the mid-year payment). Similarly, municipal sewer and water utility costs (even dyking for Pemberton, and resort association fees for Whistler) need to be considered and adjusted. The principle involved is that the parties should only be responsible for any costs of property for the time they are in possession.

Other common adjustments are for monthly strata fees, and any adjustment for outstanding strata fees; in the case of a rental property, there would be adjustments for both monthly rent and any security deposit held.

The calculations are performed by the law office staff, and are shown on a Statement of Adjustments or Order to Pay. These identify the credits and debits involved in the transaction, and at the bottom show the balance needed for the purchase, the net sale proceeds, or net sum to be received on a re-financing.

Other costs for buying include building inspection, survey costs and taxes (see below), while for re-financing there are appraisal and commitment fees, and for selling there is the real estate commission (and applicable GST thereon).

5. TAXES

As the old saying goes, the only things inevitable in life are death and taxes. For real estate transactions, the latter is certainly a significant factor (especially for newly built or substantially renovated homes).

The Property Transfer Tax administered by the B.C. government applies to all real estate transactions (subject to certain exemptions, so view the discussion under "First-Time Buyers"). The rate is 1% on the first \$200,000.00 of the fair market value (usually the same as the purchase price), and 2% on the excess. Payment is collected by the lawyer and remitted at the time of registration at the land title office.

The Goods and Services Tax of 5% returned to B.C. on April 1, 2013, after the Harmonized Sales Tax was defeated by a referendum some months earlier. Depending on the language in the agreement between the parties, the GST may or may not be included in the purchase price (read more below).

There is a potential rebate applicable to the GST, with a 36% rebate on the 5% payable, called the GST new housing rebate or GST new residential property rebate. However, the fair market value of the home being purchased must be \$350,000.00 or less, while between \$350,000.00 and \$450,000.00 the rebate is phased out on a straight-line basis. There are some exceptions, so contact us for more details.

GST can apply to properties other than newly built or substantially renovated ones. Transactions involving commercial properties are GST taxable, as are many resort properties zoned for short-term rentals (which might nevertheless be “residential”). The general rules are that GST will be payable by the buyer if:

- 1) the seller had claimed an input tax credit (ITC) on the GST (or HST) paid at the last acquisition of the property;
- 2) the seller had used the property primarily for making short-term rentals; or
- 3) the property had not been used primarily (more than 50%) as the seller’s place of residence and all or substantially all (90% or more) of the rentals of the property have been for periods of less than 60 days.

GST would not normally be applicable to vacant land kept for personal use. However, the tax would usually be applicable for the sale of vacant land, where (for example):

- 1) it was capital property used primarily in a business;
- 2) the sale of land is in the course of business; or
- 3) the land sold was created from the subdivision of a parcel into 3 or more lots.

There are certain exceptions, such as sales by charitable organizations.

Finally, for any new residential homes at least 10% constructed as of April 1, 2013, there are complicated rules involving a 2% B.C. Transition Tax which will end March 31, 2015. Please contact us for more details.

6. FIRST-TIME BUYERS

If you are reading this explanation, then you may well be a prospective first-time buyer, so welcome to the world of home ownership! Be sure to peruse some of the other discussions under “Real Estate Law”, “Closing Adjustments”, “Taxes” and “B.C. Land Title System”.

Fortunately, there is a great deal of information available on the internet to assist and inform First-Timers, but be sure to view B.C. specific sites. You will also need to have confidence in your team of advisors, from your realtor to your mortgage broker to your lender’s representative to your property inspector (quite apart from your lawyer).

Besides the possible rebate under the federal GST regime for new homes (see the commentary under “Taxes”) in many cases first-time buyers will be eligible for an exemption from B.C.’s Property Transfer Tax.

Subject to the other criteria below, full exemption is available for properties with a fair market value (usually the purchase price) up to \$425,000.00, with a proportionate exemption from that threshold to \$450,000.00. Buyers must also be either Canadian citizens or landed immigrants, have resided in B.C. for at least the past year (or filed tax returns as a B.C. resident at least 2 of the prior 6 years) and never lived in a home in which they have held an interest, at anytime and anywhere in the world. In addition, the buyer must move into the property within 92 days after registration of the purchase and reside there for at least a year. There are a few other restrictions, too, such as the size of the property being less than 1.24 acres.

Finally, the first-timers can avail themselves of the federal Home Buyers’ Plan, (though so long as at least 4 years have elapsed since owning a principal residence, even non-first-timers may also be eligible). The program allows the withdrawal of up to \$25,000.00 from one’s RRSP without the usual deduction of tax, for application against the purchase of a qualifying home or for a related person with a disability, so long as the amount withdrawn is repaid within 15 years. Note that there are strict rules associated with this programme.

7. NON-RESIDENT BUYERS

For purchasers, there are few restrictions on ownership of property in Canada (except under the *Investment Canada Act*, which should be reviewed for acquisitions in excess of Cdn\$5 million). There is also no difference for foreign investors from residents in applicable acquisition taxes. However, the non-resident purchaser will face some challenges regarding mortgage qualification, and the current banking practice is to require approval in person to open a Canadian bank account.

Through e-filing technology, original signed documents do not need to be in our possession as lawyers handling the closings, because faxed or scanned/mailed documents will now suffice. Non-resident buyers will need to appear in front of a notary in their home jurisdiction, and should make plans well in advance for the transfer of money to one of our trust accounts for the closing.

During the time of property ownership, if the non-resident receives rental income, there must be 25% withholding of taxes to Canada Revenue Agency on the gross amount. However, a special form to reduce those taxes can be filed before January 1st of each year. View the discussion under "Non-Resident Sellers" too.

8. NON-RESIDENT SELLERS

On sales of property in Canada by non-residents, there are several factors to be considered which require advice from knowledgeable tax and legal advisors.

Canada's *Income Tax Act* stipulates that whenever a non-resident disposes of property, the applicable taxes are payable on the capital gain. To be sure that the seller remits the correct amount (and also any taxes still owing on income generated by the property), and because the buyer would otherwise be held liable for that tax remittance, the buyer requires the withholding of a portion of the sale proceeds until proof of payment is provided.

That proof is made under s.116 of the *Income Tax Act*, in the form of Clearance Certificates issued by Canada Revenue Agency. Although ideally those certificates are available on closing, there are substantial delays (currently about 3 months), from the time of CRA's receipt of the application, which make their availability for closing a rarity.

Therefore, the conveyancers involved in the transaction follow a protocol to allow the sale to complete while a certain percentage of the gross sale price (not net sale proceeds) is held back, typically by the seller's conveyancer, pending issuance of the Clearance Certificates. That percentage is 25% for personal use property, but usually about 33% (rarely as much as 50% of the sale price), for depreciable property which has been rented. Those percentages apply regardless of whether or not there is an apparent capital loss on the subject property. Where the holdback amount would not leave enough funds to pay real estate commissions and any mortgage(s) on closing, the seller can claim hardship to accelerate the clearance certificate issuance process.

9. STRATA OWNERSHIP

In B.C. most real estate transactions now involve the sale or purchase of strata units. Affordability and lifestyle choices are dictating the move from single family homes. Strata titled properties have been in existence in B.C. for over 40 years, and besides the most popular condominium form of ownership, others involve townhouses, duplexes and bare land stratas.

While most stratas are freehold (where the owner is registered on title as such), some are leasehold, where the home-owner leases the underlying land on a very long term basis (often 99 years) from a third party, usually the city or municipality.

The *Strata Property Act* of B.C. (formally *Condominium Act*) governs the stratas. Owners become members of a Strata Corporation and elect from amongst themselves a strata council to run the affairs of the strata, almost always with the assistance and direction of a professional strata management company.

Though the owners are responsible for their individual units, monthly strata fees levied on each owner contribute to the strata budget, which is generally for common costs (such as maintenance, landscaping and insurance).

More excellent information is available from the dozens of guides on the B.C. government website <http://www.fic.gov.bc.ca/responsibilities/strataowners/overview.htm>.

However, one evolving topic of great interest is that of the December, 2011 amendments to the *Strata Property Act* regarding "Depreciation Reports". These reports (to be obtained every 3 years) oblige strata corporations to:

- (a) create a physical inventory of common property, including building systems;
- (b) anticipate repair, maintenance and replacement costs for common expenses projected over 30 years; and
- (c) develop a financial forecasting model containing at least 3 cash flow funding models for the contingency reserve fund.

Strata corporations need to vote before December, 2013 whether or not to waive the new report request, by at least a 75% vote resolution, and then must vote each year thereafter.

We have found that many stratas are waiving the report requirement, believing that the current cost estimates for the reports will come down in price and that they are pro-active anyway with maintenance issues. The danger in making decisions such as these is the potential impact of the reports' absence for prospective buyers and their lenders. Other provinces' experiences suggest that in the absence of such a report, an institutional lender may be very reluctant to advance funds using a unit in that strata as security.

More information (updated as applicable, because legislative amendments are expected to clarify certain wording) can be obtained at The Condominium Home Owners Association of B.C.'s website <http://www.choa.bc.ca>.

10. B.C.'S LAND TITLE SYSTEM

In B.C. almost all land, apart from aboriginal title, is governed by the *Land Title Act* and is administered by the B.C. government. That Act follows the system of title registration originated by Robert Torrens of Australia in 1858. His system provided that registrations raised an "indefeasible title", meaning that one received what one expected, as shown in the records, without concern for past defects in the line of title.

That degree of certainty is very different from most other jurisdictions, even now, where a type of "deed" system would not allow a buyer the assurance of knowing that the person registered as owner was in fact the owner. There were certain exceptions set out in the legislation creating the Torrens system, and in B.C. that was modified by allowing rights and obligations established by judicial decisions to remain.

We have a "pending registration" system here. That means that when we submit a document for registration at the land title office (through our office's computer system) we obtain a pending number which may mean that document is not completely registered until a few days have elapsed. However, registration is effective on the date and at the time the document was submitted, and the parties rely upon that fact to close the transaction on that initial date.

The land title office records given to clients are copies of what is recorded in the government records, and therefore have no value on their own, which is something very different from the importance of a Deed. The names of registered owners will be clearly shown on title, but unless indicated otherwise, co-owners are

deemed to be “tenants in common”, each with an equal and separate interest. If the survivor is to take the deceased’s interest, then the words “Joint Tenants” must be shown on title, to allow for right of survivorship.

11. USING POWERS OF ATTORNEY

Though the wide-spread use of electronic filing at the Land Title Office has greatly reduced the need for Powers of Attorney in real estate transactions, these documents might still be needed if a buyer, seller or borrower is not available to sign in person and is not easily accessible by email or fax.

The laws affecting Powers of Attorney changed on September 1, 2011, though mostly associated with the forms used. Please see our general commentary under the “Wills, Estates & Personal Planning” section elsewhere on our website.

For real estate transactions, if our firm did not prepare the Power of Attorney, then please provide us with a copy early on so we can give an opinion on its efficacy.

Some Powers of Attorney are limited in their validity. For example, s.56 of the *Land Title Act* of B.C. stipulates that a Power of Attorney is not valid for land title office purposes after more than three years have elapsed since execution, unless it is an “enduring” one (meaning no expiry date) or unless that provision in the Act is specifically excluded.

Also, some lenders are quite strict in the use of Powers of Attorney for borrowers, often requiring advance notice and approval for their use, and even requiring that a title insurance premium be paid at the borrower’s cost.

12. WHISTLER’S PROPERTY TYPES

In Whistler, befitting a world-class resort, there are several variations on the conventional form of home ownership, that of “residential use” only.

Most of the properties located in the Village, on the Benchlands and to some degree around Whistler Creek, are zoned “Tourism Accommodation”. There are also other sections of certain residential areas which allow short-term or “nightly” rentals, such as Nicklaus North. Within these Tourism Accommodation zones, there are two different forms of properties, being “Phase 1” and “Phase 2”:

Phase 1 properties provide for unrestricted use by owners, and in most cases they can rent out their units. The covenant on their titles does put an obligation on the owners to rent them out when not using them, though the legal effect is questionable and is currently not generally enforced. Rentals are often generated through internet-based owner-direct rental services, or through specialized rental companies, some of whom even have hotel-style front desks.

Phase 2 properties have more restricted usage terms for the owners, and typically are in the Village’s hotels and lodges. Owners are permitted use of their units up to a maximum of 28 days in summer and 28 days in winter, with the specific dates typically booked in advance with the management company.

Shared Ownership properties consisting of either quarter share or one-tenth share ownerships also exist in Whistler, in addition to time-shares which are commonly found in other resorts.

In most instances, the advice of an experienced local lawyer is needed to understand the complexity of the different types of properties and ownership in Whistler.

13. TITLE INSURANCE

Though American buyers of real estate are very familiar with title insurance, this insurance product only recently began to gain widespread acceptance in Canada. Given the integrity and efficiencies of our land title registration system in B.C. (see our commentary "B.C.'s Land Title System"), the added cost of the title insurance premium is rarely a necessary expense for the consumer in most residential transactions.

In B.C., title insurance is most useful to protect owners, purchasers and lenders from defects which would be revealed by a survey, such as an encroachment on a building set-back in contravention of municipal bylaws. However, we would always recommend a survey be undertaken for any purchase of non-strata titled properties, if indeed one cannot be obtained from the seller or from government records.

Other reasons for obtaining title insurance would be for errors in government records or for fraud, forgery or wrongful impersonations, all of which are exceedingly rare in British Columbia.

The uniqueness of title insurance should be understood in that most risks covered do not relate to possible events in the future, such as are usually the case with property and life insurance coverage. Instead, coverage is generally for specified losses arising from something that has already occurred but which are not yet known (such as zoning bylaws' contravention arising out of the walling-in of a carport to make a garage).

In our view, the usefulness of the insurance is primarily in complicated commercial transactions or where there is a known problem with a charge on title (such as an undischarged mortgage which has been paid out). However, lenders increasingly insist on title insurance to protect them, and so we offer the service of procuring at no charge the insurance from Stewart Title Guaranty Co. Ltd., (<http://www.stewart.ca/>) where the one-time premium of (usually) between \$120.00 to \$195.00 is payable by the client.

14. DUE DILIGENCE

Prospective purchasers of real estate have a somewhat bewildering myriad of "due diligence" issues to consider before they should feel comfortable closing their deals. Fortunately, experienced realtors and lawyers familiar with their local markets would address these matters well.

The top 10 of such matters requiring consideration, in approximate priority of relevance, are as follows:

(a) Title: Check non-financial charges ("encumbrances") on the Land Title Office's title to ensure the intended use or occupancy of the property, regardless of the present use, is not restricted in some unanticipated way by the presence of wording in "easements", "rights of way" or "restrictive covenants". In Whistler, the distinction between "Phase 1" and "Phase 2" properties is an excellent example, with the latter only allowing personal use through advance booking for 28 days in summer and 28 days in winter.

(b) Strata: Review strata minutes, bylaws, financial statements and strata plans for indicators of possible future special levies, restrictions on use and occupancy, or illegal additions to the subject unit (amongst many other issues). The hot topic right now is whether the strata has voted to defer a "Depreciation Report" or to order one.

(c) Leasehold: If the title is not freehold, read the ground lease's terms for its length, renewal provisions and restrictions on usage.

(d) GST: This federal tax of 5% (down from 12% as of spring, 2013) applies to newly built or "substantially renovated" ones, as well as to commercial properties. Residential properties used for short-term rentals often attract GST, and the assistance of knowledgeable accountants is critical in determining the applicability of this tax.

(e) **Ownership:** Early consideration of how to take title is important, whether it be individually, through a company, or a trust (and even in different combinations). In addition, consider addressing whether title should be held in fractional interests or together as “joint tenants” (with right of survivorship).

(f) **Parking:** With many stratas a major issue is often parking, depending on the location and number of stalls associated with the strata unit. Is the parking limited common property (attached to the unit) or common property (possibly subject to the whims of the strata council), or even a separate strata?

(g) **Foreclosures:** Despite the experience south of our border, courts here are obligated to sell foreclosed properties at close to their market value. Offers are subject to court approval, so acceptance by the foreclosing lender is only a first step. No subject conditions are accepted, and therefore the property is purchased “as is, where is”, and competing bids at the court hearing can drive up the price.

(h) **Site Survey:** For non-stratified properties, one should procure a survey showing the location of the building(s) in relations to the property lines, prepared by a registered surveyor. If the seller does not have one, it might be found in municipal records, and if not then with sufficient lead time one may be ordered. Title insurance can be obtained both to cover the absence of a survey and address any imperfection with one.

(i) **Building Inspections:** The use of Property Condition Disclosure Statements (now very common if property being sold by realtors) has greatly improved the due diligence process in buying properties, but independent investigations should still be made of the condition of the target property. Local building inspection services can often, though not always, reveal the presence of mold, rotting support, and inadequate electrical systems (amongst many other problems).

(j) **Statutory Searches:** Ensure a final occupancy permit from city hall has been issued, and look at the filed plans to figure out (if possible) what unauthorized changes seem to have been made after the permitting-process ended. Ask about outstanding “Work Orders” (not always registered on the title) and about possible or proposed changes in density or use of the neighbouring areas.

In conclusion, the above due diligence list illustrates the crucial role realtors and lawyers have in the successful conclusion of a real estate transaction.

Mountain Law Corporation provides the above for informational purposes only. No legal advice on any issue is to be construed from the contents contained herein. In addition, it is understood that no content should be interpreted as the basis for a solicitor-client relationship. Please contact one of our lawyers if you wish to obtain legal advice.

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