

Overview of the Residential Real Estate Transaction



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Learning Outcomes

After reading this chapter, you will understand:

- The stages of a residential real estate transaction.
- How the agreement of purchase and sale affects the residential real estate transaction.
- What a survey is and why it is important when you are purchasing residential real property.
- What searches are required to ensure that good title is delivered to a buyer of residential real property.
- The relevance of title insurance.
- How a residential real estate transaction is completed.

Introduction

A legal professional's responsibilities in a residential real estate purchase are to:

- open and organize a file;
- review the agreement of purchase and sale;
- review the plan of survey of the property (if one is available);
- search the title to the property;
- conduct other relevant searches, known as off-title searches;
- arrange to have the client set up new utility accounts;
- discuss with the client the advantages of obtaining title insurance;
- advise the client on how to take title to the property;
- prepare or review all of the necessary documents;
- prepare for the closing, including the execution of documents by the client;
- close the transaction and register the documents;
- notify the realty tax department of the change in ownership; and
- provide the client with a reporting letter and opinion as to title or title insurance.

Some of these tasks are performed by a law clerk; others may be done only by a lawyer. These tasks have changed a great deal in recent years because the province of Ontario has essentially completed the process of automating its land registration system. At this time, the title records of 99.9 percent of all properties in the province are stored electronically in databases that are part of the Province of Ontario Land Registration Information System (POLARIS). The conversion from a paper system to the electronic one, which started back in 1985, has been implemented gradually across the province. Law firms are able to access POLARIS online and conduct searches and register documents by using software known as "Teraview."

Before learning about these tasks—the steps and procedures, within a residential real estate transaction, for which a legal professional is specifically responsible—you must understand the general stages of the transaction and the purpose of each stage.

The Stages of a Real Estate Transaction

Let's take a closer look at the stages of a real estate transaction, which comprises:

- the offer;
- the agreement of purchase and sale;
- the survey;
- the title search;
- other searches, considerations, and inquiries;
- obtaining title insurance;
- taking title;
- preparing and reviewing the documents;
- preparing for closing;

- the closing; and
- meeting the post-closing requirements.

The Offer

A real estate purchase starts with an **offer**—usually an offer by the buyer to purchase a particular property. A lawyer should review an offer to purchase before the buyer signs it, but often this doesn't happen. Instead, the offer is usually prepared by a real estate agent, signed by the buyer as the **offeror**, and presented by the agent to the seller as the **offeree**. The standard form of offer is meant to allow the offeree to accept the offer by signing it. Instead of accepting the offer, the offeree may reject it or "sign it back"—that is, amend it in some way and present it back to the original offeror as a **counteroffer**. If there is a **sign-back**, the original offeror may accept it, reject it, or sign it back to the offeree in turn. Once the offer is accepted, it becomes a contract that is referred to as the **agreement of purchase and sale**.

The Agreement of Purchase and Sale

The work of the law firm usually starts when it receives a copy of the signed agreement of purchase and sale.

The parties to the agreement of purchase and sale are the seller and the buyer. The seller agrees to transfer title to the property to the buyer on the **closing date** in return for the payment of a specified amount. The buyer agrees to accept title and to pay that sum of money. The agreement sets out the terms on which and the manner in which title is to be transferred. *The agreement does not transfer title.*

The residential real estate transaction covers the time from the **execution** or signing of the agreement of purchase and sale to, and in fact beyond, the actual transfer of title on closing. During this time, it is the role of the buyer's lawyer to make sure that the title transferred on the closing date is exactly the same as the title the seller promised to deliver. It is the role of the seller's lawyer to make sure that the seller is in a position to transfer title.

The buyer's lawyer makes sure that proper title is transferred by conducting a number of searches and by making various inquiries. The seller's lawyer must anticipate and respond to questions raised by the buyer's lawyer and clear up, where possible, any matters that are contrary to the agreement of purchase and sale.

The Survey

When clients buy "a house," what they are actually buying is the land and the buildings that happen to be located on it. It is therefore important to make sure that:

- the house and other structures are located wholly within the property lines of the land being purchased,
- neighbours' buildings are not located on the land,
- the parcel of land is as big as the client has been led to believe,

offer

proposal from one person to another that, when accepted, becomes a contract

offeror

person who makes an offer

offeree

person to whom an offer is made

counteroffer

offer tendered by the original offeree as an alternative to the original offer; also known as a "sign-back"

sign-back

offer whereby the original offeree changes some of the terms in the original offer, initials the changes, and then submits it to the original offeror

agreement of purchase and sale

contract created once an offer of purchase and sale has been accepted

closing date

day on which a real estate transaction is completed and title is transferred

execution

signing of a document; also a short name for a writ of execution or a writ of seizure and sale

- any fences are located on the lot lines, and
- the size and location of the house and other buildings satisfy zoning requirements.

plan of survey
schematic sketch showing the boundaries of a property and the location of all fences, structures, and rights of way

You can be sure of these matters only if a **plan of survey** exists for the property being purchased. A plan of survey is prepared by an Ontario land surveyor and is based on a physical examination of the property. That is, the surveyor examines the property and prepares a schematic sketch showing its boundaries and the location of fences, structures, and rights of way.

Often, no up-to-date plan of survey is available because earlier surveys have been lost or become obsolete. However, title insurance (discussed in detail in Chapter 17) will usually protect the buyer against problems that the plan of survey might have revealed.

The Title Search

encumbrances
charges, claims, liens, or liabilities attached to a property

The agreement of purchase and sale usually states that the property's title is to be transferred to the buyer free of **encumbrances**, except those specified in the agreement. One such exception might be a mortgage that the buyer has agreed to assume.

It is up to the buyer's lawyer to satisfy himself or herself that the title to the property delivered on closing is the title that was promised to the buyer. The buyer's lawyer will search the title to the property to confirm that the seller is the owner of the land and to identify any encumbrances against the property. If the search of title reveals any encumbrances that are not supposed to be there, the buyer's lawyer will require the seller's lawyer to correct these title defects by the time of closing. For example, if there is a mortgage registered on title that the buyer has not agreed to assume, the buyer's lawyer will require the seller's lawyer to have the mortgage *discharged* (in other words, paid off and removed from title). If there are any title problems that the seller cannot clear up, the buyer may be entitled to end the deal and get his or her **deposit** back.

deposit
(1) part of the purchase price prepaid when the contract is entered into and applied against the purchase price;
(2) document registered on title that verifies or clarifies facts related to the title

The seller's lawyer must make sure that title to the property conforms to the agreement. If it does not, it is the lawyer's job to "fix" the title by the time of closing. For example, the lawyer must arrange to discharge any outstanding mortgage that the buyer did not agree to assume.

Other Searches and Inquiries

A number of other matters that affect title to the land are dealt with in the agreement of purchase and sale and must be confirmed through various searches and inquiries. These are known as off-title searches, and the extent to which they are required depends on whether or not title insurance is being obtained. The most common off-title searches involve searching for building and zoning issues, utility arrears, and outstanding realty taxes.

Building and Zoning Considerations

Is the property zoned to allow the buyer's intended use? Do the size and location of the buildings on the property conform with relevant by-laws? Are there outstanding work orders against the property? You must contact the municipal building and zoning departments for the answers to these questions, which can be answered fully only if you provide these departments with a copy of the survey. If there is no

survey to provide, title insurance will protect the buyer against potential building and zoning problems.

Public Utility Accounts

Certain unpaid utility accounts, such as water, can be added to the municipal tax bill and become a lien on the land. Therefore, you must contact any public utilities provided by the municipality to find out the status of the accounts. The seller must pay any outstanding balances by closing. These utility searches will probably not be required if the buyer is obtaining title insurance.

Realty Taxes

Realty tax arrears also constitute a lien on the land. Accordingly, you must contact the municipality to ensure that the seller has paid all taxes owing up to the closing date. You do this by requesting a tax certificate from the municipality. Again, if title insurance is being obtained, a tax certificate may not be necessary.

Writs of Execution

You must contact the sheriff of the relevant judicial district to ensure that there are no outstanding writs of execution, also called writs of seizure and sale (outstanding judgments). Such writs constitute a lien against the land.

Other Inquiries

Depending on the nature of the property, you may have to make additional inquiries of municipal, provincial, or federal government departments. For example, if the property is rural, you will need to inquire about whether the well water and the septic system meet government standards.

Mortgages

In most real estate transactions, the buyer will arrange a charge or mortgage in order to pay for the property. Because the mortgagee (lender) is receiving an interest in the land, the mortgagee (just like the buyer) must be sure that the title to the property is good. The mortgagee will need a lawyer to check the title and to prepare the mortgage documents. The mortgagor (borrower) pays the mortgagee's legal fees. In order to keep the fees as low as possible, the mortgagee will usually agree to use the mortgagor's (the buyer's) lawyer to do the work. As a result, when your firm is acting for a buyer, you will often be doing the legal work for the mortgagee too.

The interests of the mortgagee and the buyer are similar. As a result, much, although not all, of the work that you will be doing for the mortgagee will also be for the buyer.

Mortgages are discussed in more detail in Chapter 6.

Title Insurance

In Ontario, in recent years, title insurance has become an increasingly popular option for buyers of property and for the lawyers representing them. A buyer may purchase title insurance for the property instead of relying on a lawyer's opinion that the buyer

has good title to the property. Without a title insurance policy, it is up to the lawyer to ensure that there are no problems with the title, and he or she will do so by conducting searches and making letter inquiries, all of which cost money—sometimes a significant amount.

Under a title insurance policy, the insurer “insures over” certain problems that might arise on title. Title insurers assume the risk of some of the problems that searches or letters of inquiry might disclose, thus saving the buyer the cost of the searches. Many policies protect the buyers from problems that an up-to-date survey might disclose, such as an encroachment by a neighbouring property. A buyer may save several hundred or even several thousand dollars by not having to pay for a new survey. Title insurance also protects a buyer against post-closing events, such as a fraudulent mortgage being placed on the property.

Every title insurance policy has exceptions to its coverage and specific requirements that the lawyer acting for the buyer must meet. It is up to the lawyer to discuss with the client whether he or she wishes to purchase title insurance and what policies are available. Under Rule 6.1-6.1 of chapter 6 of the *Rules of Professional Conduct*¹ governing lawyers (see Chapter 2), this task cannot be delegated to a law clerk.

It should be noted that most transactions are title insured today. In fact, some mortgagees (discussed in Chapter 6) will actually insist on it. Title insurance is discussed in more detail in Chapter 17.

Taking Title

The lawyer will also talk to the client about how ownership of the property will be taken—whether in one name alone or with another person, either as tenants in common or as joint tenants. Again, this is something only a lawyer should do. Taking title is discussed in Chapter 3.

Document Preparation and Review

The seller’s lawyer prepares the transfer, which the buyer’s lawyer reviews before closing. The seller’s lawyer also prepares a **statement of adjustments**. This statement determines the exact amount to be paid on closing, and the lawyer prepares it by calculating various credits and debits against the purchase price as set out in the agreement of purchase and sale. Adjustments are made for expenses such as taxes, utilities, and mortgage payments that the seller paid in advance. If the seller has paid more than his or her share of the expense, the buyer will have to compensate the seller for that overpayment. If the seller has not paid enough, the unpaid portion will be subtracted from the purchase price on the grounds that the buyer will ultimately have to pay the expense.

For example, suppose a purchase is closing on September 15 and the seller has paid the realty taxes for the entire year. The seller is responsible for the payment of taxes only until the date of closing. Taxes will therefore be prorated to the date of closing, and the buyer, in addition to the purchase price, will have to reimburse the seller for that overpayment.

¹ Law Society of Ontario, *Rules of Professional Conduct* (1 October 2014, amendments current to 26 April 2018), online: <<https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>>.

statement of adjustments
statement that outlines the various credits and debits against the purchase price and specifies the exact amount to be paid on closing

Although the seller's lawyer prepares the statement of adjustments, the buyer's lawyer reviews it. You must have the information required to verify all amounts that appear. You must also know how to calculate the various adjustments.

In addition to the transfer and statement of adjustments, other documents must be prepared in order to close the deal. These documents, discussed in Chapter 21, include directions, undertakings, declarations, warranties, and affidavits.

Preparation for Closing

In preparation for closing, some documents must be signed by the buyer and others by the seller. Conveyancing documents that are registered electronically are not actually signed by the parties. Instead, the parties sign an acknowledgement and direction, authorizing their respective lawyers to sign and release the documents electronically on their behalf using e-reg™. The lawyers must explain to their respective clients the conveyancing documents that are covered by the acknowledgement and direction before having the clients sign the form. E-reg™ and the electronic signing process are explained in detail in Chapter 7.

Pursuant to Rule 6.1-6.2, lawyers assume complete professional responsibility for documents signed electronically. They have an obligation both to ensure that documents registered electronically are completed properly and to certify that fact by signing for "completeness" (to be discussed in more detail in Chapter 7). A law clerk cannot sign for completeness.

The seller's lawyer will (1) calculate how much money is required to complete the transaction (the **balance due on closing**), (2) decide to whom the money should be paid, and (3) give that information to the buyer's lawyer. The buyer's lawyer will tell the buyer how much money is needed in order to close. The buyer's lawyer will receive the closing funds from the buyer and any lenders involved and ensure that they are payable as the seller directs. Both lawyers must finalize arrangements for the actual closing of the transaction.

The Closing

The lawyers do not physically meet for electronic closings. Rather, they follow an **escrow closing** procedure set out in the **document registration agreement (DRA)**, which the lawyers sign prior to the closing. They courier to each other any materials required for closing, such as documents, keys, and money. When the seller's lawyer is satisfied that he or she has received all that is required, he or she releases, through Teraview, the transfer for registration. When the buyer's lawyer is satisfied that he or she has received all that is required, he or she signs in to Teraview, checks to make sure that title to the property has not changed since the title search was done (known as a **subsearch**), and then registers the transfer and mortgage, if any.

If the closing is not done electronically, the lawyers for the parties (or their agents) meet, usually at the appropriate land registry office. At that time, the seller's lawyer gives a key and all the necessary documents, including the transfer, to the buyer's lawyer. The buyer's lawyer gives the seller's lawyer the closing funds. The buyer's lawyer does a subsearch of title to make sure that the state of the title has not changed since the search of title was completed. If satisfied that there have been no changes, the buyer's lawyer registers the transfer/deed of land and charge/mortgage of land, if any.

balance due on closing

exact amount the buyer pays to the seller when the real estate deal closes

escrow closing

exchange and holding of documents, keys, and money by the lawyers pending registration of the electronic documents

document registration agreement (DRA)

agreement entered into by the lawyers for the parties in a purchase and sale transaction that deals with the procedures for electronic registration and the escrow closing arrangement

subsearch

brief examination of title records, undertaken on closing, that covers the period from the date of the title search up to the date of closing to make sure that nothing has been registered on title since the title search was done

Post-Closing Requirements

After the closing, the lawyers notify the relevant offices, such as the municipal assessment department, of the change in title. The seller's lawyer pays any outstanding real estate commission and pays off any liens, expenses, or mortgages that still need to be discharged. The balance of the proceeds will be paid to the seller. Both lawyers must follow up on any undertakings given on closing, prepare reporting letters to their clients, and submit their statements of account.

KEY TERMS

agreement of purchase and sale, 5

balance due on closing, 9

closing date, 5

counteroffer, 5

deposit, 6

document registration agreement (DRA), 9

encumbrances, 6

escrow closing, 9

execution, 5

offer, 5

offeree, 5

offeror, 5

plan of survey, 6

sign-back, 5

statement of adjustments, 8

subsearch, 9

REVIEW QUESTIONS

1. How does a real estate purchase start?
2. Who are the parties to the agreement of purchase and sale?
3. What do the parties to the agreement of purchase and sale agree to do?
4. Does the agreement of purchase and sale transfer title?
5. What is the role of the buyer's lawyer in a residential real estate transaction?
6. What is the role of the seller's lawyer?
7. How can a buyer of real property confirm the boundaries of the property and the location of fences, structures, and rights of way, if any?
8. Why does the buyer's lawyer search the title to the property?
9. What are some of the other searches or inquiries that the buyer's lawyer might conduct?
10. How does title insurance save a buyer money?
11. Sandra is selling her property, with a scheduled closing date of November 18. She has paid her realty taxes for the entire year. How will she be compensated for her overpayment?
12. What is the procedure for an electronic closing?