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Overview of a Standard Real Estate Transaction

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I. Introduction

A lawyer'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);
- discuss the advantages of obtaining title insurance with the client;
- search the title to the property;
- conduct off-title searches, if required;
- prepare the requisition letter and send to seller's lawyer;
- arrange to have the client set up new utility accounts;
- advise the client on options of how to take title to the property;
- prepare or review all of the necessary documents;
- calculate the closing costs;
- 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. Title records of virtually 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, which enables lawyers and law clerks to conduct searches and register documents anywhere in Ontario by using software known as Teraview.

Before learning about these tasks—the steps and procedures within a residential real estate transaction—it is critical to understand the general stages of the transaction and the purpose of each stage.

II. The Stages of a Real Estate Transaction

The following are the stages of a real estate transaction:

- the offer;
- the agreement of purchase and sale;
- the survey;
- ordering title insurance;
- the title search;
- other searches, considerations, and inquiries;

- requisitions;
- dealing with mortgage financing;
- discussing taking title with the client;
- preparing and reviewing the documents, and meeting with the client;
- preparing for closing;
- the closing; and
- post-closing requirements.

A. The Offer

A real estate purchase starts with an offer—usually an offer by the buyer to purchase a particular property. Ideally, a lawyer should review an offer to purchase before the buyer signs it, but that usually doesn't happen. In most cases, the client will contact his or her lawyer after an agreement has been entered into. The offer is typically 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 allows the offeree to accept the offer within the “irrevocable period.” If the offer is not accepted within that time frame, it is no longer valid or binding on the buyer. Instead of accepting the offer, the offeree may present a counteroffer changing the price, the closing date, or any other terms in the agreement. There would be a new irrevocable period, allowing the original offeror to accept the counteroffer, reject it, or sign it back to the offeree. Once the final offer is accepted by both parties, it becomes a contract that is referred to as the agreement of purchase and sale.

Although the agreement is a binding contract, there may be outstanding conditions that need to be fulfilled or waived before it is firm. For example, there could be a condition on financing, or on a home inspection. Conditions are typically for the benefit of the buyer, but there can also be conditions for the benefit of the seller.

B. 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, with written confirmation that all conditions have been fulfilled or waived.

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 a specified date in return for the payment of the purchase price. The buyer agrees to accept title and to pay that sum of money. The date when title is to be transferred is known as the closing date. Until that time, title remains in the name of the seller. In addition to title, the buyer will also get possession of the property on the closing date, unless the agreement says otherwise.

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.

C. 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 buyer had contracted to purchase;
- any fences are located on the lot lines; and
- the location of the house and other buildings satisfies zoning requirements.

A lawyer can be sure of these matters only if a plan of survey exists for the property being purchased and if the survey is current, in that it illustrates all of the buildings, structures, and fences. A plan of survey is prepared by an Ontario land surveyor and is based on a physical examination of the property. 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 will usually protect the buyer against problems that the plan of survey might have revealed. In fact, title insurance is often used today in lieu of a survey that is unavailable or too expensive.

D. 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. Through his or her lawyer, a buyer may purchase title insurance for the property. This is in lieu 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 various 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. Some policies protect the buyer from problems that an up-to-date survey might disclose, such as an encroachment by a neighbouring property. A buyer may save hundreds or even thousands of dollars (depending on the size of the property) 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. A lawyer's title opinion, on the other hand, will not protect the buyer against fraudulent activities.

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.

It should be noted that title insurance is not an alternative to having legal representation. A buyer always requires a lawyer's representation when buying a property; however, the steps taken by the lawyer will depend on whether or not title insurance is being obtained. Therefore, title insurance should be discussed with a client right after the lawyer has been retained.

E. The Title Search

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 on or before 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. 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.

The seller's lawyer must make sure that title to the property conforms to the agreement. If it does not, the seller's lawyer must correct these discrepancies on or before closing. For example, the lawyer may have to arrange to discharge any outstanding mortgage that the buyer did not agree to assume.

F. 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.

1. Building and Zoning Considerations

The seller's lawyer must contact the municipal building and zoning department to find out, among other things:

- if there are any outstanding work orders;
- if the zoning of the property is consistent with the intended use by the buyer;
- if the location of the buildings conforms with the setback requirements of the relevant by-laws.

In order to answer these questions, the lawyer will have to write to the building department and provide a copy of the survey. If there is no survey to provide, title insurance will protect the buyer against potential building and zoning problems and writing to the building department will likely not be necessary.

2. 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, the lawyer 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 likely not be required if the buyer is obtaining title insurance.

3. Realty Taxes

Realty tax arrears also constitute a lien on the land. Accordingly, the lawyer must contact the municipality to ensure that the seller has paid all taxes owing up to the closing date, by requesting a tax certificate from the municipality. Again, if title insurance is being obtained, a tax certificate may not be necessary. Some law firms, however, prefer to obtain a tax certificate (and pay for it as a disbursement to the client) even when title insurance is being obtained.

4. Writs of Execution

The lawyer must search for executions in the sheriff's office 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 and therefore must be cleared up on or before closing.

5. Other Inquiries

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

6. Requisitions

Once the buyer's lawyer has completed the title search and other inquiries, he or she will prepare a requisition letter, compiling all of the outstanding issues that need to be addressed by the seller's lawyer on or before closing. The seller's lawyer will respond to this letter and is obliged, on behalf of his or her client, to clear up any outstanding issues in accordance with the agreement.

Requisitions are discussed in detail in Chapter 17.

7. 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, a lawyer who is acting for a buyer will often be acting for the mortgagee as well.

As discussed in Chapter 1, the lawyer must avoid conflicts of interest. Acting for a buyer (borrower) and an institutional lender falls within a lawyer's professional standards whereas acting for a buyer (borrower) and a private lender does not (unless the mortgage is not more than \$50,000 or it falls within another exception, such as a non-arm's-length transaction).

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

Mortgages are discussed in detail in Chapters 24 and 25.

G. 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 or persons, either as tenants in common or as joint tenants. A lawyer must explain the difference between the two capacities, as well as the “right of survivorship,” in order to determine how the client wishes to take title. Taking title is discussed in Chapter 4.

H. 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, some

utilities, and mortgages that have to be adjusted between the buyer and seller (assumed mortgages and vendor-take-back mortgages, discussed in Chapter 24). 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, because the buyer will ultimately have to pay the expense after the transaction has been completed.

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 day before 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.

Although the seller's lawyer prepares the statement of adjustments, the buyer's lawyer reviews it to make sure that it is correct. If the buyer's lawyer has information such as the tax certificate, he or she will use that to verify the calculations. If the lawyer does not have this information because he or she is obtaining title insurance on behalf of the client, he or she can rely on the statement of adjustments provided by the seller's lawyer. The buyer's lawyer must, however, obtain an undertaking by the seller to pay for taxes and all other expenses up to the date of closing.

In addition to the transfer and statement of adjustments, other documents must be prepared in order to close the deal. These documents include directions, undertakings, declarations, and affidavits, and will be discussed in Chapter 18.

I. 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 acknowledgment and direction authorizing their respective lawyers to sign and release the documents electronically on their behalf using e-reg.[™] The lawyers must explain the conveyancing documents that are covered by the acknowledgment and direction to their respective clients before having the clients sign the form. Once the transfer is prepared and complete, the lawyers will sign for completeness. E-reg[™] and the electronic signing process are explained in detail in Chapter 8.

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.

J. 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 they 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 the transfer for registration through Teraview. 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 sub-search), and then registers the transfer and mortgage, if any.

It is common today for the buyer's lawyer to not actually send the money by courier, but rather to do a direct deposit of the balance due on closing into the trust account of the seller's lawyer. That is done to save time, especially if the seller's lawyer's office is far from the buyer's lawyer. The buyer's lawyer will deposit the money into the closest branch of the bank used by the seller's lawyer. In this situation, the actual documents will usually be sent by fax together with a receipt from the bank confirming that the money has been deposited, and the original documents will be mailed or couriered after closing.

If the closing is not done electronically, the lawyers for the parties (or their agents) meet, usually at the appropriate land registry office. This is called a paper closing and is very rare today. At the meeting, 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 and mortgage, if any.

K. Post-Closing Matters

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.

Undertakings are an important part of the closing. If there is something that a lawyer cannot complete by closing, he or she will give a personal undertaking to complete the matter after closing. This is very relevant with respect to outstanding mortgages. In most cases, a lawyer will not have the discharge of a mortgage on or before closing, but will personally undertake to register the discharge as soon as possible after closing. The seller's lawyer must be sure to complete any outstanding undertaking and the buyer's lawyer must be sure to follow up on any outstanding undertakings in order to ensure that they are complete.

TABLE 3.1 Checklist for Buyer's Lawyer

Action	Completed	Date
Open file		
Review agreement of purchase and sale and make sure that all conditions have been removed		
Diarize relevant dates Requisition date Closing date		
Review survey, if available		
Search title		
Search executions against seller		
Search executions against buyer (if buyer is getting financing and you are representing lender)		
Discuss title insurance		
Review mortgage instructions, if applicable		
Conduct off-title search (depending on title insurance)		
Have client set up utility accounts (if applicable)		
Send requisition letter		
Calculate closing costs		
Meet client to sign documents		
Close transaction		
Notify tax department of new owner		
Report to client and enclose account		
Complete or follow up on undertakings		

Both lawyers must prepare reporting letters to their clients and submit their statements of account. It is typical for a lawyer to have sufficient money in trust to pay for the account. However, a lawyer cannot pay himself or herself from money in trust until the account has been billed to the client. The statement of account is typically sent to the client with the reporting letter, and it is therefore prudent to complete the reporting letter and statement of account as soon as possible after closing, in order to be paid in a timely fashion.

Post-closing matters are discussed in more detail in Chapter 20.

Nearby Table 3.1 is a checklist of the steps that a buyer's lawyer must follow.

