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LEGAL REPRESENTATION IN A MORTGAGE TRANSACTION

Introduction: I have written this report based on questions often asked of me while in private law practice in British Columbia and Alberta, Canada, since 1975. Although my first hand experience is limited to those jurisdictions, wherever possible I have written in non-legal terms and with general principles in mind.

It is a very common practice that when a borrower arranges to borrow money, the lender (eg a Chartered Bank or Credit Union) will ask the borrower the name of the borrower's lawyer, indicating that they (the lender) will send their instructions to that lawyer. The lender will also indicate that the costs of that lawyer are to be paid by the borrower. One of the most common of such transactions is a debt secured by a residential mortgage. (While there are many other kinds of these transactions, for the purposes of this report, we will use the term mortgage.)

In that sequence of events, most borrowers conclude (quite reasonably) that their lawyer is acting for them in the mortgage transaction, particularly given that the borrower is paying the legal costs. This conclusion is wrong. *When the lender sends the security instructions to the lawyer the borrower has named, the instructions state (and the facts are) that the lawyer is acting for the lender, not for the borrower.*

The benefit of this sequence is a savings in cost; in other words, there is only one lawyer involved, rather than one lawyer acting for the lender and one lawyer acting for the borrower.

Despite that "one cost" savings advantage, there are consequences to this practice, including the following:

1. No lawyer is representing the borrower. This is serious. Most likely this transaction will be one of the most important financial transactions in the borrower's life.
2. If a dispute arises between the lender and the borrower, the lawyer definitely cannot act for the borrower, and in most cases will find it practically impossible to act for either party.
3. Whenever a party is paying for their own legal costs, there is a natural cost-driven constraint on the range of legal services requested. When a party is not paying for their own legal costs, that constraint is gone. In the particular case of mortgage transactions, this lack of constraint has manifested itself in the growing size of lender requests that accompany the mortgage instructions. Over the years of our practice since 1975, lender's instructions in mortgages have grown from a couple of pages to commonly twenty pages and more.

If it is our firm that is representing the lender in the above situation, and if we also have a relationship with you on other legal matters, then (within the limitations of our representation of the lender) we will do all we can to have the transaction unfold as you wish and expect.

Despite the above mentioned negative consequences to the borrower, we doubt this method of handling residential mortgage transactions will change. Notwithstanding that fact, borrowers should be aware of those consequences, which is the purpose of this report.

You wouldn't expect to read anything "legal" without some kind of caution - so here it is: This report is general information only and not to be relied upon without legal advice. For legal advice, call us.

I hope this helped answer your questions.

For more answers to common legal questions, please visit our website: www.salmonarmlaw.com

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