

## **Western Law Societies Conveyancing Protocol (British Columbia)** (the "Protocol")

### **Purpose of the Protocol**

The primary purpose of the Protocol in B.C. is to allow a lawyer to advise an institutional lender client in a residential mortgage transaction that the lender need not obtain an up-to-date building location survey before the lender funds a loan secured by a mortgage, provided no known building location defects exist. This advice is given by the lawyer issuing a *Western Law Societies Conveyancing Protocol Solicitor's Opinion* (a "protocol opinion").

This Protocol describes the effect of a protocol opinion, what loan transactions qualify for a protocol opinion and the requirements that must be met for a lawyer to issue a protocol opinion.

**Although some additional practice standards are set for lawyers issuing protocol opinions, nothing in the Protocol otherwise diminishes or changes in any way the usual practices of prudent law firms or the standard of care for lawyers acting on mortgage transactions.**

### **The effect of a protocol opinion**

In providing a protocol opinion, a lawyer is advising the lender that a current building location survey need not be obtained. If a building location defect exists that would have been disclosed by a standard building location survey done prior to the release of the mortgage funds, then that advice is wrong and the lawyer's insurance is available to respond. In the unlikely event that the lender suffers an actual loss as a result of that advice, the lawyer's insurance will, as appropriate, pay on behalf of the lawyer the cost of repair or of any actual loss suffered.

Provided a lawyer complies with the requirements for lawyers issuing a protocol opinion, the Lawyers Insurance Fund will waive any deductible and surcharge, and allow the lawyer to remain eligible for the part-time discount.

Lenders, loans and property that qualify for a protocol opinion

**Lenders** – Only eligible participating financial institutions are entitled to receive protocol opinions. Eligibility requires the financial institution to be regulated by provincial or federal law, with lending money as a primary business purpose. Participation requires the financial institution to agree, in writing, to accept protocol opinions instead of requiring standard building location surveys.

**Loans and property** – A protocol opinion may be issued on purchase and mortgage transactions or mortgage-alone transactions relating to residential properties of four units or less. Strata title properties are included, leasehold properties are not. Construction loans are excluded.

The lender and borrower must be at arms length. Further, the loan transaction cannot involve the lawyer's family or an "organization" in which the lawyer, his or her family, partners or associates or his or her law firm's partners or associates have or might in the future have effective management or control or beneficial ownership in an amount greater than ten percent (10%). "Organization" means any business, business venture, joint venture, proprietorship, partnership, limited partnership, cooperative, society, syndicate, corporation, association or any legal or commercial entity.

### **Requirements for issuing a protocol opinion**

The lawyer must first review the lender's mortgage instructions and ensure that they have been fully complied with. If there are any qualifications that the lender has accepted regarding the loan, other than a known building location defect, the lender's instructions must be confirmed by the lawyer in his or her usual fashion before the mortgage funds are released.

To determine if there is a building location defect that is already known to the parties or is readily apparent from the public documents, the lawyer must do the following:

## Western Law Societies Conveyancing Protocol (British Columbia)

### If acting for the lender and the borrower(s):

*Please note that as the lawyer is acting for more than one party in the transaction, the lawyer must comply with the provisions of the Professional Conduct Handbook and be guided by those provisions in regard to the borrower's information.*

1. Obtain and review any easements, right of ways or similar charges, and review all of these documents with the borrower. If the borrower refuses to authorize the lawyer to obtain copies of these charges, or allows copies to be obtained but refuses to authorize the lawyer to review them, the lawyer must confirm in writing both the borrower's refusal and the lawyer's advice regarding the risk of that refusal.\* The lawyer is then relieved of the obligation to obtain and review these charges.
2. Ask the borrower if any building location survey can be made available. If it can, the lawyer must examine the survey.
3. On a purchase, ask the vendor (through his or her solicitor) to provide:
  - a) copies of any available building location surveys for examination; and
  - b) the usual statutory declaration of the vendor that nothing has changed since the last time a building location survey was prepared or ask the vendor to state in a signed declaration (in a separate document, or as part of a document prepared in the course of the conveyance) that he or she is unaware of any survey-related problems.
4. On a refinance, ask the borrower for a signed declaration that nothing has changed since the last time a building location survey was prepared, or if no building location survey exists, ask the borrower to state in a signed declaration (in a separate document, or as part of a document prepared in the course of the loan transaction)) that he or she is unaware of any survey-related problems.\*
5. On a purchase, recommend that the borrower obtain an up-to-date building location survey. Explain that, without a survey, the borrower has no specific assurances as to the location of the buildings in relation to the lot boundaries, the impact of any constraints on building location such as such as easements and right of ways or the dimensions of the property or the buildings. If the borrower does not wish to obtain a building location survey, the lawyer must document his or her advice to the borrower as to the advantages of a survey and the fact that, in the event of an unknown building location defect, only the lender benefits from the issuance of a protocol opinion.\*

### If acting for the lender only:

1. Ask the borrower (through his or her solicitor) if any building location survey is available. If it is, the lawyer must examine the survey.
2. Ask the borrower (through his or her solicitor) to state in a signed declaration that nothing has changed since the last time a building location survey was prepared, or if no building location survey exists, ask the borrower to state in a signed declaration that he or she is unaware of any survey-related problems.\*

If all of these steps have been carried out *without* discovery of a building location defect, the lawyer will prepare a protocol opinion. The lawyer and the lender may decide if and when this protocol opinion must be delivered to the lender. If, however, there is a building location defect already known to the parties or readily apparent from a survey or the public documents, the lawyer must advise the client(s) of the defect and obtain instructions as to how to proceed. If the lender is still prepared to advance the mortgage funds, the lawyer must prepare and deliver to the lender a protocol opinion *qualified as to known building location defects before* releasing the mortgage funds. The protocol opinion qualified as to known building location defects must describe the known building location defect, state that it may impair the lender's security, and confirm the lender's instructions to fund the mortgage despite the known defect. If the lender suffers an actual loss from the known defect, the lender bears the loss.

The lawyer must keep a copy of the protocol opinion, or the protocol opinion qualified as to known building location defects, in his or her file.

\* *The Law Society will provide sample wording.*

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Note: This is Version 3.0 of the Protocol, and it is effective November 1, 2006. Version 3.0 of the Protocol amends Version 2.0 of the Protocol, issued February 15, 2001. It is expected that the Protocol will be revised from time to time, and lawyers are advised to watch for notices regarding revisions in the *Benchers' Bulletin* and on the Law Society web site ([www.lawsociety.bc.ca](http://www.lawsociety.bc.ca)). Copies of this and other documents relating to the Protocol will be available for download from the web site.