

Insurance Issues: Risk Management

Curbing risk in real estate practice

Commercial and residential deals now move at a furious pace, and BC real estate lawyers work ever harder to complete transactions properly and on time. It is in this heated environment — as lenders make new demands and parties are less tolerant of accommodations — that lawyers are exposed to greater risk of claims.

Some recent insurance reports suggest that lawyers should look carefully at two risk management practices in particular. The first is to adopt e-filing in the Land Title Office. The second is to keep copies of picture identification you take from parties.

This edition of *Insurance issues: Risk Management* explains these practices. In light of new developments in lending practices, it also offers advice on managing instructions from lenders.

LTO e-filing – a good safeguard for meeting deadlines

Since April 1, 2004, the Land Title Office has accepted electronic filings of key documents in land registrations from BC lawyers, notaries and land title agents. Lawyers who are still devoted to paper-based registrations may want to rethink this choice, given the flexibility, certainty and convenience of e-filing. While not commonly heralded as a risk management technique, e-filing in fact would have saved the day in a couple of recent land transactions that failed to complete. Both resulted in claim reports to the Lawyers Insurance Fund.

In the first case, the purchaser's lawyer tried to send the registration documents to the LTO agent via overnight courier. Unfortunately, the courier decided to wait to pick up deliveries

from a ferry, long delayed by a winter storm, and the courier arrived at the LTO after closing. In the second case, the purchaser's lawyer became embroiled in a last-minute dispute with the lender's lawyer over the closing undertakings. By the time the dispute was resolved, the LTO was closed. In both instances, the vendors refused to give extensions and purported to terminate the contracts because the purchasers had failed to complete on time.

E-filing would have offered these lawyers and their clients greater flexibility and avoided problems entirely. In the first instance, e-filing would have allowed the purchaser's documents to be registered at the LTO directly from the lawyer's office, eliminating the need for the courier. In the second, the documents could still have been registered on the completion date, since there was no specific requirement that registration occur by 4:00 pm (see bulleted note below) and e-filing effectively extends the LTO's "office hours" to 8:00 pm.

A number of other benefits flow from the electronic filing system that lead to better service for clients. These benefits include a reduced risk of lost or late documents as documents can be emailed for execution, faster service and reduced costs. To learn more about the process, see *Land Title Office offers online filing beginning April 1* in the March-April 2004 issue of the *Benchers' Bulletin*. Resource materials are available from the Land Title & Survey Authority (www.ltsa.ca), BC Online (www.bconline.gov.bc.ca/EFS) and CLE.

If you are using the new system, please

remember:

- Although registration is possible between 6:00 am and 8:00 pm (except Sunday), review the terms of any contract of purchase and sale to ensure compliance with any specific time limitations, and note the provision of any "time of the essence" clause. For instance, if the contract is in the standard form approved for use by the BCREA and CBA, it will require the documents to be lodged for registration in the appropriate LTO by 4:00 pm on the completion date.
- Any lawyer who wishes to make electronic filings in the Land Title Office must first register with and obtain an Adobe Acrobat Signing Certificate from Juricert (www.juricert.com), a company owned by the Law Society. If you do not pay your Law Society fees when due, your Juricert registration will be suspended. Without an active Juricert registration, electronic filings will not be accepted.

Picture ID – keep copies

Obtaining picture identification is a critical step in preventing both value and identity frauds. Even if a fraud occurs, you want to know that you discharged your obligations to the lender. Remember, however, that you want proof that the identification was reviewed. In this respect, legible copies of the identification is the best evidence. Simply recording the driver's licence number is probably not sufficient, although you may still need to write down the number if it is not legible on the copy. Two recent reports involved lawyers who quite properly

insisted on picture identification from the purchaser/borrowers. Unfortunately, the lawyers did not keep copies, creating evidentiary problems for their defence.

In addition to keeping copies of identification, you also want to note any specific steps the lender asks you to take in trying to ascertain identity. These instructions may include taking identification from a list acceptable to the lender and completing a form regarding identification.

Mortgage instructions

As lenders continue to revise the detailed mortgage instructions given to lawyers, you should consider any new provisions very carefully before accepting them. Pay particular attention to instructions that:

- *Ask you to take steps that are not part of your usual practice.* These steps may range from the primarily procedural, such as obtaining a certified copy of the insurance policy, to the more substantive, such as requiring higher liability coverage on the property than is usual, or asking you to conduct execution searches of guarantors or obtain waivers of equitable liens from the

Insurance Issues

The Insurance Issues is published by the Lawyers Insurance Fund of the Law Society of British Columbia, the governing body of the legal profession, and is distributed to all lawyers and articulated students in the province to keep them updated on the group liability insurance program.

Additional subscriptions to this and the Law Society's other regular publications may be ordered at a cost of \$50.00 per year, prorated at \$12.50 per quarter. [See the Benchers' Bulletin for subscription information.]

If you have ideas on how to improve the Issues to make it more useful, please contact Susan Forbes, QC, Director of Insurance, Lawyers Insurance Fund.

vendor in certain circumstances.

- *Require you to provide services in areas that fall outside your legal expertise.* For instance, a lender that asks you to obtain "appropriate" or "adequate" property insurance is asking you to provide a service that falls to the expertise of an insurance agent, not a lawyer. As such, you risk giving the wrong advice in circumstances in which your professional liability insurance will not cover you.
- *Require you to notify the lender of facts or circumstances of which you have no knowledge.* You may, for instance, be asked to notify the lender of any significant escalation in the value of the property over a short period of time. You want to clarify that the intent of these instructions is to advise the lender only if you have the information in your possession that allows you to give the advice.
- *Impose an obligation that you cannot meet.* For example, lawyers for mortgagors are still being asked to go beyond the officer certifications contained in ss. 41 to 48 of the *Land Title Act*. Under those provisions, lawyers are not required to confirm that a person is who they say they are. In addition, the instructions may ask you to ensure that any identification offered is "valid." Clarify that any assurance you give assumes that the identification reviewed is authentic.
- *Ask you to accept liability for your own actions or the actions of others.* You may find yourself facing a contractual claim for compensation by the lender for the actions of some third party, for example, in circumstances where your professional liability insurance policy will not cover you.
- *Impose an undertaking on you.* As undertakings are intended to deal with issues between lawyers, not

between lawyers and clients, it is not appropriate to accept such an undertaking. In addition, the undertaking may impose terms with which you are unable or unwilling to comply. If you are asked to accept such an undertaking, please contact the Law Society's Ethics Advisor, Jack Olsen (604 443-5711 or jolsen@lsbc.org), for advice.

Whether you are asked to accept instructions, or have in fact already accepted instructions, deal proactively with these risks by taking the following steps:

- Read each and every provision of the mortgage instructions carefully and thoroughly.
- Identify any instructions that you are unable or unwilling to comply with, as well as any ambiguities.
- Raise these issues with the lender, explaining your position that the particular service cannot be provided by a lawyer (or anyone), or address the cost of so doing and who will bear it.
- Confirm the revised instructions in writing.

If you are asked to sign your acceptance of general mortgage instructions that will govern all future transactions, your systems should ensure compliance in the absence of separate instructions for each transaction.

Risk management resources

For more on risk management in real estate, consult the following materials:

- *Real estate fraud – a prevention primer* in the October 2005 edition of *Insurance Issues: Risk management*.
- Risk management in real estate conveyancing practice in the March 2004 *Alert!* bulletin.

Both are available in the Regulation & Insurance section of the Law Society's website: www.lawsociety.bc.ca, under "risk management."