

## CERTIFYING TO MORTGAGE LENDERS - THE LIMITATIONS

In this day of frantic real estate practices, I wonder how many of us have reviewed with a fine tooth comb the mortgage instructions we receive from lenders in a purchase transaction. I recently reviewed again what I believed to be the broadest solicitor instructions from a mortgage lender, namely the instructions from First Line Trust. Complying with the strict letter of the mortgage instructions completely would require you to not only provide three sets of reports to the mortgage lender, one five business days before mortgage funds are advanced, the second three business days before mortgage funds are advanced, and as well your undertaking to the mortgage company prior to funds being advanced that you will forward all final documentation within 30 days of the date funds are advanced. I believe that we have become too comfortable "overlooking" the instructions we receive, or taking for granted that we cannot comply with the strict letter of what they ask for, and proceeding to provide what we generally feel a prudent practitioner would provide in any mortgage transaction. In this day of high insurance claims perhaps it is appropriate for us to take stock of what we take for granted and assess whether we can do anything to minimize the hazards inherent in what we do.

### Scope of Opinion Requested

The mortgage instructions that I have referred to from First Line Trust outline the solicitor's responsibilities. (See Attached Appendix "A"). These responsibilities include, among others, the following:

- (a) that the building and any ancillary building or structure does not with respect to its location or use violate any registered restrictions provincial statutes and regulations thereto, municipal zoning or building by-laws or regulations of any competent authority;
- (b) that there are no existing easements, encroachments, reservations or restrictions affecting the lands and premises;
- (c) all outstanding utility accounts and penalties are paid in full to the date of advance of funds;
- (d) if the mortgagor is a corporation .... (the solicitor must provide) .... notarial copies of the Articles of Incorporation, .....

The instructions proceed to require an up-to-date "survey" prepared by a qualified land surveyor under seal showing among other things, "the dimensions of the existing building or structure and the number of stories of each and the dimensions of all foundations of all improvements under construction ... and the location of all easements ...".

I believe it is important for those of us who practice real estate law in Nova Scotia to clarify the limitations of what we do, and can reasonably be expected to do in the course of providing our opinion to the mortgage lender in any transaction. I enclose an extremely useful short discussion of both mortgage instructions and opinions pursuant to those instructions extracted from the Nova Scotia Bar Admission Materials (Appendix "B"). This paper is useful in reviewing many of the aspects of our opinion as a lender's solicitor and the necessary qualifications to our opinion.

I do not intend to review in detail with you today in the short time allotted particular limitations of our ability to certify to mortgage lenders. The purpose of my paper and my presentation today is to strongly recommend to those of you present that we must take steps to ensure that mortgage lenders located for the most part in Ontario and Quebec understand the way practice is conducted in Nova Scotia. To this end, there are some general limitations to our ability to certify that have universal application to all mortgage lenders. There may be some additional specifics that are peculiar to different financial institutions, or peculiar to a specific transaction. However, the focus of my discussion will be the general limitations that would apply to all mortgage instructions.

It is my recommendation that all real estate practitioners advise the mortgage lender upon receipt of the instructions of the general limitations of our opinion as a lender's solicitor. I propose that this advice take a fairly consistent form so that mortgage lenders get used to the general parameters of the opinion lawyers can reasonably be expected to provide in Nova Scotia. The extent to which we are successful in getting mortgage lenders to understand the general limitations of our ability to certify will depend on the frequency and consistency with which Nova Scotia lawyers are prepared to confirm those limitations to the lenders. To this end, I have prepared a sample letter for discussion purposes which is attached to my paper (Appendix "C"). I believe it is important that the letter of advice to mortgage lenders have the following characteristics:

- (a) It must be easy to understand;
- (b) It must be clear as to the limitations of certification;
- (c) It should be as short and to the point as possible.

Let us turn for a moment to the sample letter attached. The limitations that I outline in the letter are what I personally believe to be limitations of my ability to be able to certify to a mortgage lender. If any of you are in disagreement with these limitations, please feel free to comment or otherwise vary their description.

If real estate practitioners in Nova Scotia are generally in agreement with the limitations of certification described in the sample letter, and if we proceed to attempt to advise mortgage lenders of these limitations, then this will provide a forum for us to meet with the Mortgage Lender's Association to discuss variations that we would like to see in mortgage instructions. The first step in the process is a discussion of this kind. The second step is to ascertain the extent to which the practice in Nova Scotia is as I have described it to be. The third step in the process is for practitioners to consistently advise mortgage lenders of the limitations and any changes to these limitations as they arise. The fourth and final step will be a lobby with the Mortgage Lender's Association to revise their instructions.

#### SUMMARY

I believe in summary that the time has come for us to address specifically the issues involved in the opinions we render in real estate transactions. We can no longer afford the luxury of proceeding with blinders or proceeding on a hope and prayer that the phone will not ring with an objection to any opinion we may have provided. I encourage real estate practitioners in Nova Scotia to examine the way in which their opinions are provided to mortgage lenders and to examine the way in which we can incorporate those limitations to reduce the hazards of real estate practice.