

COVID-19 IMPACTS ON CONVEYANCING FOR BC LAWYERS AND NOTARIES

The following is our understanding at the time of writing. The situation is subject to quick changes. Specific practices will vary between conveyancers. You should contact a lawyer/notary to discuss any specific issues.

“Conveyancer” is being used in this work to refer to the lawyer or notary closing the deal.

THE CONVEYANCING AND CLOSING PROCESS

1. Is COVID-19 impacting the number of closings?

Comments under this heading are based on anecdotal data about the Vancouver market.

a. Purchase Mortgages

- very often, there is a 4 to 6-week lag time between a purchase being agreed upon and the deal being closed by the conveyancer
- purchase agreements reached prior to COVID-19 have been and are closing, for the most part, as scheduled
- there is a sharp drop in new purchasers being agreed upon arranged and hence there are now fewer purchase deals closing
- some lenders have backed off from financing a purchase because of their change of perception as to the risk (such as the borrower being laid off without a scheduled return date)
 - other lenders have often stepped in where the deal still makes sense for them, perhaps at a higher interest rate and/or lower loan-to-value
 - the situation could be interesting where a buyer expects to use an existing line-of-credit to fund a future purchase, but the lender caps or calls in the line-of-credit due to changed circumstances (such as the borrower becoming unemployed)

b. Mortgage Refinances

- the lag time for mortgage refinances is far less than for purchase mortgages
- some private lenders are busier than ever, while others have taken a wait and see approach and have backed off from doing deals entirely

c. How can mortgage brokers help?

- mortgage brokers may need to identify and pursue the changed types of deals available in the changed marketplace
- they may be able to help locate replacement lenders, when an existing lender backs out of a deal

2. Is COVID-19 impacting how people involved in the closing interact with each other?

a. Some Impacts

- there are a number of players involved in closing a deal. There needs to be considerable interaction and exchanging of information between these players for the deal to close.
- communication between the players in the COVID-19 environment has become more difficult, including because:
 - people are working in locations different from their usual locations (such as from home)
 - they can be hard to reach
 - their intra-office communications may now be slower
 - they may be working with less than ideal equipment than to which they are accustomed (such as a slow laptop instead of a fast computer connected to a large database or an old or no printer instead of the office lightning-fast laser printer)
 - some generally expected services are not available during COVID-19
 - for example, in some small towns the one and only financial institution is closed or has very restricted hours. This makes even the essential steps in closing deals difficult, such as making deposits and clients getting bank drafts.
- the real estate closing sector is not a business environment accustomed to quick changes
 - for example, some institutions are saying they cannot change the mortgage instructions even in this environment and want conveyancer to do in-person signings with the client
 - this necessitates sometimes considerable discussions to have them alter their instructions
- many of the players are acting out of goodwill and putting in a good and creative effort to get deals closed, but not without issues
 - the legal foundations of some of the changed practices are not court-tested
 - regardless of legality, some players (such as lenders) are not receptive to some of the needed changes
 - as discussed elsewhere in this document, for example e-signatures are not accepted by some lenders

b. How can mortgage brokers help?

- mortgage brokers are in the deal early, have established relationships with some lenders and other players, and tend to know their clients well and can in some instances facilitate quicker and smoother communications between 'late in the game' conveyancers and other players
- many problems can be solved easily (such as amending something in the lender's instructions) once communications is established

3. What changes are there in the closing process to better ensure deals close?

- the types and degrees of changes vary across conveyancers, but various combinations of the following have appeared:
 - controlled access to waiting room
 - prudent, safe processes in the office (much of this is a struggle with the unknown)
 - such as not photocopying possibly infected paper for at least 4 days (the length of time the virus is thought to survive on paper)
 - to do other could contaminate the printer and make transfer to others more likely
 - some possibly infected documents are being photographed rather than copied
 - working outside the office, such as from home
 - keeping the area for meeting clients separate from other working areas
 - sanitizing the meeting area after client meetings
 - meeting behind a plexiglass shield
 - attending at the client's home to obtain signatures on Land Title Office forms
 - signatures being witnessed through windows, through car windows, or at a safe distance through the front door entry
 - documents being witnessed by a non-conveyancer or signed in counterpart (these are discussed in more detail in another question and answer)

WITNESSING AND SIGNING DOCUMENTS

4. How are Land Title Office documents being signed?

a. Choices

- the witnessing of the person signing the Land Title Office document must be in person and not by remote or videoconferencing means. The Law Society of BC is working with the BC government on a solution to this issue.

i. Witnessed by Lawyer or Notary

- generally, Land Title Office documents are required by legislation to be signed personally in front of the conveyancer. However, the Registrar of Land Titles may accept a document signed otherwise, if in his opinion circumstances require.

ii. Witnessed by Non-Lawyer/Non-Notary

- the Registrar has confirmed that circumstances do require changes to signing requirements during COVID-19. The Land Title Office, temporarily, will accept documents where the person who witnessed the signature of the document:
 - is at least 16 years old,
 - is acquainted with the transferor,
 - is acquainted with the transferor's signature,
 - believes that the signature on the document is that of the person named in the document, and
 - swears an Affidavit of Execution confirming the above facts.
- the requirements concerning witnessing a signatory of a corporation is a slightly different but similar in effect

iii. Witnessed in Counterparts

- the Registrar indicates that documents signed in counterpart would also be acceptable
- the signatory would sign in the presence of, but at a safe distance from, the conveyancer who would then sign as a witness on an identical execution copy

b. Problem

- some parties do not understand or accept documents witnessed by a non-conveyancer or in counterpart
 - some lenders will not accept
 - title insurers seem to be content with the process as an insured item, but time will tell if they raise any issues in the face of future claims.
 - Society of BC Notaries has been trying to get the BC Attorney General and government, pursuant to the Emergency Powers Act, to remove any uncertainty and make things like counterpart signings clearly legal
- many people don't have printers at home, and it then takes more steps to accomplish the above workarounds
 - such as providing delivering printed documents to the person to sign

c. How can mortgage brokers help?

- brokers can be the non-conveyancer witness

- this can save time for the conveyancers and cost for the client
- brokers who assist in this way should take steps to ensure they are themselves safe
- brokers can prepare their clients to expect some changes to the way things are usually done
- brokers can let their clients know that the more extensive procedures take time and will cost money
 - brokers can save their clients money by making it easier for conveyancers to obtain the needed information and signatures

5. How are non-LTO documents being signed?

- BC Electronic Transactions Act gives legal effect to documents in electronic form
 - however, this does not apply to Land Title Office documents
 - government has been asked to relax the exclusion during the emergency, but has not done so yet
- some lenders accept e-signed documents on non-Land Title Office documents, but others (including some banks) refuse them
 - the Electronic Transfer Act applies to these lenders (including banks), but they have not adjusted their practice to comply

OVERCOMING SIGNING CHALLENGES

6. Clients with language, knowledge of technology, physical or other challenges

- language has always been something addressed in our multicultural society
 - a conveyancer who speaks the client's language can often be arranged
 - whatever the challenge (language technological know-how, physical, or other), the person will need to arrange assistance to overcome the challenge so that needed signatures can be taken (such as by arranging for assistance from a friend/family member and, where acceptable to other parties, a power of attorney)
 - be aware that some financial institutions do not accept or have strict limitations concerning documents signed under power of attorney

a. How can mortgage brokers help?

- identify the challenge early
- assist the client to make arrangements to overcome the challenge
- advise the conveyancer as soon as possible about the challenge

PAYOUTS

7. What impact is COVID-19 having on payouts?

a. What impact is COVID-19 having on purchaser's conveyancer paying out seller's conveyancer?

- contracts generally contain time is of the essence clauses, meaning that the other party can refuse if an obligation is not performed as and by when required
 - most significantly, a seller can refuse to close if sale proceeds are not received by the deadline for closing
 - this is not one of those areas that best efforts applies, either the funds arrive in time or they do not
- it is now harder than usual to close on time
 - fewer financial institutions are open and those that are open have shorter hours
 - open financial institutions sometimes have shortage of staff, due to COVID-19 related absences
 - hard to make deposits quickly
 - harder to get courier
 - downtown Vancouver couriers, for example, are now being sent all over Greater Vancouver
 - as well, other businesses are using couriers more often
 - such as takeout food is now more often being delivered by couriers
 - taking longer to arrange a courier to deliver funds

b. What impact is COVID-19 having on paying out mortgages?

- the client is responsible to pay interest on mortgages while they are outstanding, this means they pay on the new mortgage from the time it is funded and on the old mortgage until the lender receives the money to pay it out
- the longer it takes to payout the existing mortgage after the new mortgage is funded, the more time for which the client is paying for two mortgages
- for reasons as indicated above regarding delivering sale proceeds, paying out an existing mortgage is taking longer, and so clients are more often having to pay on two mortgages for more time

c. How can mortgage brokers help?

- mortgage brokers can alert their clients to the greater likelihood of overlapping mortgage obligations

VACANT POSSESSION

8. What if the lender requires vacant possession and the tenant won't leave?

- even though a tenant may be obligated to leave, it is almost impossible at present to obtain a possession order
 - this means, the only way to get the tenant to vacate might be by way of negotiating
 - for example, offer a cash incentive
- this can be a real problem if a chain of closings depends on prior deals to complete and the chain is interrupted due to a seller in the chain not being able to deliver required vacant possession
 - the buyer may not be willing to accept the tenant, particularly if they want to move in themselves
 - the lender might, for example:
 - refuse to fund if the property is not owner-occupied or may require different terms (such as a higher interest rate) or
 - allow a period of time where the property can be subject to a tenancy rather owner-occupied
 - the insurer will need to be advised of this change in risk so they can provide the appropriate insurance at perhaps an increased cost

a. How can mortgage brokers help?

- where possible and in the mortgage brokers control, allow time for negotiations with the tenant, the lender, and the insurer as to possession

TIMELINES

9. How much extra time is being taken to close deals?

- there are more rushed deals, sometimes because the original lender has backed off because of a perceived greater risk and a new lender has come in at the last minute
 - every step takes longer as people are working in locations and environments different than to which they are accustomed. This includes:
 - obtaining property tax statements
 - obtaining strata certificates
 - obtaining mortgage balance and/or payout statements
 - delivering sale proceeds or mortgage payouts
 - depositing cheques at financial institutions

- as well, some banks are delayed in processing payments due to lower staffing levels
 - obtaining insurance binders
 - obtaining new construction occupancy permits
- this can lead to more escrow closings
 - the key aspect of an escrow closing is that the seller's lawyer holds all moneys received from the buyer until registration is complete
 - there is no right for either party to insist on an escrow closing, it is a matter of the parties agreeing to one

a. How can mortgage brokers help?

- adding a day or two extra to allow deals to close
- brokers can start the communication with the conveyancer earlier (while the deal is in the final stages of being structured) and convey any special needs, kinks, or issues
- time is of the essence clauses can cause deals to collapse if not closed within the required time and it may not be possible to close deal when too little time is allowed
- where possible, allow times for transactions to close rather than having a tight domino line of deals closing at more or less the same time
- where possible, encourage parties to allow grace periods for matters to close rather than time is of the essence clauses
 - in many cases, this simply will not be possible

FRAUD

10. What impact is the COVID-19 having on fraud?

- brokers don't see the elaborate instructions sent by lenders to conveyancers and conveyancers don't see the mortgage application material
 - the gap in information is ripe opportunity for fraudsters
 - present compromises in processes, difficult communications, and changed work circumstances make the risk more real than ever
- notaries have to comply with FINTRAC requirements concerning verifying identity of signatories and lawyers have very strict Law Society Rules regarding the same

a. How can mortgage brokers help?

- mortgage brokers, as always, need to be on the alert for fraud
- the need to be alert should now be heightened



11. General note for brokers

- things are tougher now more than usual
- overcoming challenges now can create goodwill and serve well after COVID-19