

Running Real Estate Files: A How to Guide – Sales

Prepared for: Legal Education Society of Alberta
Real Estate Fundamentals & Alberta Land Titles Online

Presented by:
Jeff Kahane

Kahane Law Office
Calgary, Alberta

Bianca Kratt

Parlee McLaws LLP
Calgary, Alberta

Ryan MacKay

MacKay Real Property Law
Calgary, Alberta

For presentation in:

Calgary, Alberta – April 17, 2018
Edmonton, Alberta – April 24, 2018

RUNNING REAL ESTATE FILES: A HOW TO GUIDE

SALES

1. Opening a File

Lawyers receive real estate sale files from a real estate brokerage, or by being sent instructions from a realtor or a client directly contacting them about a transaction. In either case, the obvious first step is to open a file with whatever administrative system your office uses. All sale files that involve a real estate brokerage will need conveyancing that sets out the contract as well as the real estate commissions to be paid out.

(a) Tax Searches

A tax search for the Property and any parking titles (for condominiums) should be done when the file is opened. Searches are done in the municipality where the property is located, and are usually done by fax, phone or on-line, depending on the municipality involved. Some will allow you to set up an account, so that payment for each search does not have to be sent separately.

Contact information for the various municipalities in Alberta can be found at municipalaffairs.gov.ab.ca/cfml/officials/Official.doc. You should prepare and keep updated a similar list for your most common contacts. If the legal description was inaccurate in the Contract, the tax search will also give you the proper legal description for the municipal address.

The important information to be obtained from the tax search is the amount of the current year's taxes, when they are due, have they been paid and if the seller is on a monthly payment plan (TIPP). If the taxes are in arrears, you will normally have to undertake in your trust letter to pay the outstanding amount and any further penalties due before closing, and provide proof of payment. A receipt from the municipality is normally sufficient, and you don't need to undertake to provide a tax certificate to the Buyer.

The tax search will also indicate if the taxes are being paid by the Seller's mortgage company. This can be an issue if the sale closed near when the taxes are due, as the mortgage company will pay the taxes for hundreds of properties in one lump sum, and the municipality will not be able to process these payments for several days or weeks later. Therefore, a tax search done at closing will show the taxes are unpaid. The Buyer will therefore require an undertaking to ensure they are paid as they should not have to rely on a simple representation that the taxes will be paid by the mortgage company, as there have been occasions when the mortgage company did not in fact do so. It is the common practice to provide the undertaking, hold back an amount of the outstanding taxes until the

payments have been processed and release the holdback to the Seller once an updated tax search shows the taxes are paid.

Some municipalities also include utilities that “run with the land” in the same manner that taxes do. In these areas, it is important to ensure that there are no amounts owing for utilities as well.

(b) Title Search(s)

If you do not have an on-line account with Land Titles (through SPIN), you will need to contact the office to set one up. It is virtually impossible to complete a real estate transaction without one, particularly using the Western Torrens Protocol.

The information on the title should be cross checked with the Contract to ensure that all the names, legal descriptions, etc. match. It is not unusual for a name to be misspelled, a number reversed in the address, or the legal description on the title to be more detailed than in the contract.

When reviewing the registrations on title, you must evaluate which ones will remain on title and which ones the Seller is obligated to discharge. Generally, non-financial encumbrance, such as a Utility Right of Way, Easement, Party Wall Agreement, or Restrictive Covenant will remain on title. Mortgages (that are not being assumed), Builders Liens, Writs and Caveats securing a financial claim must be discharged. Some financial encumbrances, such as Homeowners Association and their related fees, are intended to remain on the title and become the Buyer’s obligation.

Note that the address on title may not be the address for the property being sold. This is true in the case of a rental property where the owner wants documents sent from Land Titles or the municipality to go to an address other than the rental property.

(c) Contacting the client

The client should be contacted as early as possible in the process. Not only do you want to confirm that they want your office to act for them before you spend time on the file, but you also want to find out about any potential issues sooner rather than later. In some firms, this contact is exclusively done by the lawyer, while others rely on the assistants for this. In other firms much of this information is obtained and communicated via email.

In any event, in the initial discussion with the client, you should cover the following:

- (i) Obtain all their current contact information, such as phone numbers, email, current mailing address etc.

- (ii) Confirm that the basics of the Contract are correct (closing date, purchase price, deposit amount, etc.).
- (iii) If there is only one person on title, you must find out if the Seller is married or not. If married, unless a Dower Release has been registered on the title, the spouse will have to sign a Dower Consent on the Transfer of Land.
- (iv) Discuss when you expect to schedule the appointment for them to sign the sale documents, and confirm if all parties that will have to sign are available. If not, you need to obtain the relevant contact information and send the documents to them well in advance of the closing.
- (v) Obtain the Seller's new address and if they are buying a new property, whether bridge financing has been arranged.
- (vi) Confirm the payouts you will be responsible for, based on the registration on title (mortgages, writs, caveats protecting a financial encumbrance, etc.) and non-registered payouts, such as outstanding condominium fees, property tax arrears, bridge financing and commissions.
- (vii) If the Property is a condominium, obtain contact information for the management company or the individual responsible for providing estoppel certificates and other condo documents if it is self-managed. Also inquire as to the nature of the parking stalls.
- (viii) If the Property is a house, duplex or bare land condominium, and the Contract requires the Seller to provide one, find out if the Seller has an up to date Real Property Report (RPR) and if it has compliance.
- (ix) If a realtor is not involved, obtain the contact information for the Buyer and/or the Buyer's lawyer.

Address any unusual terms in the Contract or concerns you have based on your review of the Contract.

(d) Payout Statements

If there is a mortgage on title, you must obtain a payout statement. The contact information for lenders changes frequently. Make sure that you use the most current one for specific lenders. Also know that some financial institutions will require requests to be submitted to a central office and others specific branches. Sometimes it is best to cover yourself and request a payout statement

from both. For payout statements for most other financial encumbrances, such as a Writ or Builders' Lien, your best starting point is the names and addresses included in the registered instrument. In most cases where the encumbrance has been registered by an individual, your client will be the best source of information.

You should not send the transfer documents to the Buyer's lawyer until you have all of the payout information. This is to ensure that you will have sufficient sale proceeds to pay all of the financial encumbrances before you undertake to pay them. For example, a mortgage payout penalty can add thousands of unexpected dollars to the required payouts, and amounts owing to Canada Revenue Agency can be substantially more than the amount registered on title in their Writ. Do not rely on a payout figure provided by your client after looking at their account online or a monthly mortgage statement. Clients are often surprised by the amount of penalties payable to their Lender!

(e) Sale Documents to Draft

All sale transactions require a Transfer of Land, Statement of Adjustments, Direction to Pay and Identification Verification. For typical real estate transactions, you will also require a GST certificate (stating that the Property is a residential property other than substantially renovated and therefore GST is not applicable) and a Real Property Report declaration (that the RPR depicts the current improvements on the Property.) All of the Land Titles forms are available on their website. Depending on your practice, you may also want to include a limitation of engagement. If you do not provide tax advice, or matrimonial advice with respect to the transaction, you may wish to have your client confirm that you have been retained for the real estate transaction only.

(f) Meeting With Clients

At some point, the lawyer will need to meet with the Seller to sign the transfer documents and obtain the identity verification. For a sale, only one piece of identification is necessary, usually a Driver's License, Passport, Military Identification Card or other government issued picture ID. During the appointments, we recommend reviewing the Statement of Adjustments, payout statements and commission statement with the client before asking them to sign the documents. The lawyer should also discuss any compliance or other issues, and get instructions regarding the holdback amounts, or possible tenancy, if necessary. The fees and estimated disbursements should also be reviewed.

At some point, often during the telephone contact or meeting, you must find out how the client wants the sale proceeds to be paid to them. They may decide to pick up a cheque from your office after closing or provide you with their bank account information, usually using a void cheque, so you can send the funds for direct deposit. However, not all banks will accept deposits from third parties