

July 24, 2001

Mr. Charlie O'Hara
Chief, Policy Development Financial Sector Policy Branch
Finance Canada
L'Esplanade Laurier, East Tower, 20th Floor
140 O'Connor Street
Ottawa Ontario
K1A 0G5

Dear Mr. O'Hara,

Re: Cost of Borrowing Regulations

On behalf of the Joint National Real Estate Committee of the Canadian Bar Association (CBA) and Federation of Law Societies of Canada (FLSC), we urge the Department of Finance to interpret the Cost of Borrowing Regulations in a manner which treats legal fees and disbursements incurred in the normal course of a real estate transaction¹ the same as the costs of title insurance.

Specifically, normal course legal fees should be excluded because they are not charges for services of a lawyer² which the bank "required the borrower to retain", under section 2(b) of the Regulations. In virtually all residential transactions where a lawyer is retained, the purchaser — not the financial institution — retains the lawyer. The lawyer takes instructions from the purchaser on all matters relating to the purchase, except for mortgage financing. The financial institution provides instructions on the mortgage financing. The purchaser typically pays the lawyer for all of the legal services, whether provided to the purchaser or the financial institution.

It is difficult to suggest that the financial institution "requires" the purchaser to retain the lawyer, except in a very technical sense. The arrangement benefits the purchaser *and* the financial institution, both of whom want to ensure the purchaser receives good title. Given this dual benefit, normal course legal fees would be excluded under the Regulations because they do not fit within the category of charges "required by the financial institution".

¹ Referred to in this letter as "normal course legal fees".

² When we refer to "lawyers", we include Quebec notaries.

Such an interpretation would ensure consistency with the treatment of title insurance, which is excluded from the cost of borrowing under the Regulations. This exclusion is an anomaly because title insurance is no less a “requirement” of the financial institution than a lawyer’s title opinion. To ensure that its security can be enforced, the financial institution requires one of two things from the purchaser in a residential real estate transaction — either a opinion that the purchaser will obtain clear title or title insurance. There is no logical reason for a difference in treatment.

Generally speaking, regulations should not be interpreted to provide one type of competitor with an unfair advantage in the marketplace. In the real estate market, it is no secret that lawyers and title insurers are competitors. An interpretation requiring the disclosure of normal course legal fees would give an unfair advantage to title insurers in at least two ways, both of which would encourage financial institutions to promote — or even pressure purchasers to use — title insurance.

First, the inclusion of normal course legal fees and the exclusion of title insurance would make the overall cost of borrowing seem lower for transactions involving title insurance. This would provide an incentive for financial institutions to encourage their customers to use title insurance.

Second, on a practical level, the administrative cost of estimating legal fees renders the use of title insurance attractive to lenders and may promote its use over independent legal services. It is substantially easier for a financial institution to estimate the cost of title insurance than the cost of legal fees. While there is a misconception that normal course legal fees are standard, in fact they can vary widely depending on a number of factors, including:

- the clarity (or lack thereof) of the financial institution’s mortgage instructions;
- whether the property is rural or urban;
- whether the transfer is for new construction or resale;
- whether the transfer is freehold or condominium;
- whether the property is single family or has more than one dwelling unit;
- whether the property earns income;
- whether the property is on a registered plan of subdivision;
- the requirements of applicable planning legislation;
- the requirements of applicable law related to searching title;
- whether there are zoning issues for a given property;
- the regional market for legal services; and
- whether there are last-minute problems with closing.

The cost of title insurance is relatively standard across the country, in part because insurance premiums spread the risks (and therefore the cost) among all policyholders. Legal fees vary to reflect the cost in each individual case.

We would welcome an opportunity to discuss these matters further with you and your colleagues. We invite you to contact Ann Tremblay, Project Manager, to set a mutually convenient time to meet.

Yours truly,

A handwritten signature in black ink, appearing to read "B. Tabor".

Brian Tabor
CBA, Co-chair
National Real Estate Committee

A handwritten signature in black ink, appearing to read "Sherron Dickson".

Sherron Dickson
FLSC, Co-chair
National Real Estate Committee