

Independent legal advice



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There are certain situations when purchasing a property where one or more of the parties to the transaction will require independent legal advice or independent legal representation. The two are not the same. Independent legal advice (ILA), is where an outside, unbiased lawyer is retained for the limited purpose of providing advice so the individual appreciates the nature and consequences of a decision that must be made. Independent legal representation (ILR), on the other hand, is where a separate lawyer is retained to act as the person's legal representative in the matter.

Where one spouse goes on title with a mortgage and other does not

One of the more common situations is where one spouse will be named on the title of the home with a mortgage while the other spouse is not named on the title or the mortgage. In these cases, the bank may require the spouse who will not be named on title to obtain independent legal advice. The independent unbiased

lawyer will advise the spouse on their rights to a matrimonial home and the consequences if his or her spouse defaults on the mortgage.

Guarantor

Sometimes the banks will require a guarantor on a mortgage or loan. In these cases, independent legal advice is not mandatory but is recommended. Especially, in cases where the guarantor is a spouse or family member, the bank will not assume that the guarantor is fully knowledgeable and informed about the loan and the consequences as a guarantor. A certificate of independent legal advice serves as a litigation avoidance tool for banks when guarantors raise the defence of non est factum, unconscionability, fraud, misrepresentation or undue influence. The burden of proof lies with the guarantor arguing these defences and a certificate of independent legal advice prevents the guarantor from escaping liability.

Private Mortgages Over \$50,000

If a private mortgage is being registered on a property and the loan amount is more than \$50,000, the lender is required to obtain their own independent legal representation. An example of this situation is when parents lend more than \$50,000 to their children and register the loan as a private mortgage to allow their children to purchase a home. Another example of where one party will require independent legal representation is when the buyers have a first mortgage with a traditional lender and have obtained a private lender for a second mortgage. If the value of the second mortgage is over \$50,000, the private lender will have to retain their own lawyer to register the second mortgage.

These are only some of the situations where either the bank or a lawyer will recommend a party to the transaction seek ILA or ILR. Even if the bank or lawyer does not require or recommend ILA or ILR, as a party to the transaction, it is always your option to obtain ILA for any decision you are being asked to make.

co-authored with Robin Goski, associate lawyer

Jacques Robert is an Ottawa real estate lawyer. For more information, visit www.jacquesrobert.com



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