



What is a holdback and when do they occur?



Jacques Robert REAL ESTATE LAW

A holdback is an amount withheld from the seller by either the seller's lawyer or the buyer's lawyer until a certain condition in the Agreement has been fulfilled. A clause providing for a holdback can be drafted into the Agreement at the time the Agreement of Purchase and Sale is being negotiated. These holdbacks will be known to both parties from the beginning of the transaction and there will be no need to negotiate the terms of the holdback just before the closing date. For simplicity, we shall call these holdbacks "pre-closing date holdbacks".

There are instances where holdback clauses are not drafted into the Agreement during the negotiations but a holdback will be required on closing because a term of the Agreement of Purchase and Sale has not been completed before closing. For these holdbacks, the lawyers will have to work out the terms of the holdback with their respective clients and then there will have to be an agreement to the terms of the holdback by the buyer and seller. These holdbacks are usually drafted and negotiated just before or on the closing date. For simplicity, we shall call these holdbacks "closing date holdbacks".

Pre-closing date holdbacks can arise in several instances, but two common types are:

- Where repairs or replacements are up coming after the closing;
- where an element of the property cannot be inspected before closing.

Examples of the first type, where repairs will need to be done in the future, include windows that have been ordered but could not be installed until after the closing date. Also, for condominiums, often a property manager will know that a special assessment will be required in the upcoming budget but until the budget is approved by the Board of Directors, the property manager will not know the exact amount. In both of these cases the lawyers will make an estimate of the cost with the help of the professionals (ie. the window installation company or the property manager for the condominium) and a holdback clause will be drafted and signed and the lawyers will hold back that estimated amount on closing. Examples of cases where elements of the property cannot be inspected, include a pool or air conditioner during the winter months. In these cases, the lawyers will negotiate a mutually agreeable amount to be held back that would cover the cost of the potential repairs until the pool or air conditioner could be inspected in the spring.

Closing date holdbacks occur when a clause in the Agreement is not fulfilled; for example where the seller agreed to repair the dishwasher at the property or where the house was not left in a broom-swept condition required by the Agreement. In cases where a clause of the Agreement was not fulfilled, the lawyers will have to negotiate a holdback until the seller arranges for the repair to be made and paid for, or until the buyer arranges and pays for the repair themselves. The lawyers will put a time limit on how long they

will hold back the funds and a date for completion of the repairs so that the lawyers are not holding funds in their trust account for an indefinite period of time.

In all instances of a holdback, the buyer is not entitled to be enriched by the situation. For example, if a holdback is required to repair a pool pump, the lawyers may hold back \$1,500 for the repair based on an estimate provided by a pool equipment and repair supplier. When the pool pump is repaired and the total cost of the repair is \$800, the remaining \$700 will be returned to the seller once the repairs are completed and receipts are provided to the lawyers. Further, if the dishwasher needing repair is 10 years old and has a market value of \$200, the buyer is not able to purchase a new \$3,000 dishwasher and demand the seller pay for the new dishwasher.

Holdbacks, while not commonplace, do occur frequently in real estate transactions. It is always best to negotiate the holdback as early in the transaction as possible. Inevitably, there are situations where negotiating a holdback will occur on the day of closing. It is important that you are available by telephone and email for your lawyer to contact you. Lawyers cannot agree to the terms of a holdback without their clients' approval and often it takes several emails or telephone calls back and forth to come to a mutually agreeable holdback. If you think there will be any cause for a holdback on the transaction, speak to your lawyer as early in the transaction as possible.

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What to consider when shopping for a mortgage

Even when interest rates are steady, many homeowners refinance their mortgages. In some cases, an existing mortgage is coming to an end and borrowers need to renegotiate. Other reasons for refinancing include funding renovations, paying for a child's education, or buying a second property.

Too often, homeowners enter mortgage negotiations without legal advice and without understanding the deal or its implications. Getting professional advice when refinancing can help you save money and protect your interests. Here are some key things to consider:

Lender choice

Look around for the lender with better terms or a lower interest rate - they are negotiable.

Legal advice

Never sign mortgage documents without fully understanding the terms they contain. A real estate lawyer can protect your interests by explaining your obligations under the mortgage. They can also explain what the lender can do if you fail to make mortgage payments on time. Finally, a lawyer can review the documents registered on the title for the home to check for unexpected liens or fraudulent transactions.

Pre-payment penalties

When refinancing, it's important to fully understand the implications of any pre-payment penalties that may be triggered. If you sell before the mortgage due date, will there be a pre-payment penalty?

Can the mortgage be transported free of charge to a future home? A lawyer can explain all the pros and cons before you commit to new mortgage terms.

Protecting your investment

Refinancing is a great opportunity to protect yourself from exposure to fraud and other risks. If you don't already have title insurance, this is the time to arrange a policy. Title insurance can provide solid protection, in case the property is targeted for mortgage fraud.

A real estate lawyer can help you achieve your refinancing goals. Visit titleplus.ca to use the find a lawyer tool.

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