Mortgage Financing: Successful Due Diligence and Document Preparation Strategies

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Common Ethical Issues
The Joint Retainer: Don't Be Paranoid - Be Prepared!

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For better or worse, a multi-faceted joint retainer is a reality in residential real estate. The overwhelming majority of a real estate lawyer's institutional financing work includes a joint retainer between (at the very least) a borrower and a lender client. Rarely will a borrower client prepared to pay the added cost of an independent lawyer for the lender, and absent unusual circumstances, the lender will typically accept joint representation by the borrower's chosen lawyer.

The following discussion focuses broadly on the professional and ethical obligations typical to such a joint retainer. In light of myriad factors that can "go wrong" in a joint retainer, a certain level of paranoia is perhaps inevitable, but the author aims to set out some practical steps to allow a practitioner to be prepared for managing common ethical issues in such a transaction.

Lawyer's Relationship With Parties to the Transaction

Even a "simple" mortgage transaction can be a busy place, with multiple different players all looking to the same lawyer. To be able to manage joint allegiances, it is important above all else that a lawyer identify the multiple clients (and non-clients) to be able to appreciate the inter-related joint retainers that might be present in even a "simple" mortgage transaction.

The Borrower: The borrower client is invariably the one paying the account on the mortgage, and generally expects the lawyer to "do the legal paperwork" necessary to get them their money. As such, until told otherwise they can quite reasonably expect that the lawyer works for their interests, and even when advised of the lawyer's joint obligations to borrower and lender, may still have difficulty understanding why the lawyer at times may appear to be working for the lender and not the borrower. The lawyer may or may not have an existing relationship with the borrower, but will (or should be) be meeting them face-to-face, talking on the telephone, and probably getting to know them at some personal level.

The Lender: Looks to the lawyer to ensure that they have a valid mortgage, and that transaction specific conditions are met. Unless it is private lender (where there is not as often a joint retainer), lawyer and lender will almost certainly not meet face-to-face. Interaction with the lawyer may be variable: some leave the lawyer to do their thing, others may micromanage. When the lawyer calls its lender client to seek clarification, he or she may find that their call centre agents at some have variable understanding of what we do.

Co-borrowers: There may be multiple borrowers. In a residential context, it is often husband and wife, but intergenerational dynamics increasingly common. In commercial mortgages (or some residential), the co-borrowers may not be related. The lawyer may have a pre-existing relationship with one, but not

all of the co-borrowers. All co-borrowers are the lawyer's clients equally, if proceeding on a joint retainer.

Consenting Spouse: A consenting spouse may rely on the lawyer to explain the effect of a Family Law Act consent he or she is giving. While the interaction is minimal (often little more than an explanation of the statutory right being waived, followed by one or two signatures), the spouse still looks to the lawyer to advise them to make an informed decision. A lender also looks to the lawyer to ensure that any spousal consent is both valid and informed. While small, and perhaps easily overlooked, the lawyer's duty to the consenting spouse is by no means trivial.

The Broker/Agent: I use this term loosely, but most transactions have a mortgage broker (and/or real estate agent) inexorably linked to them. Quality may vary—many are studious, honest and meticulous, while a memorable few are wanting some or all of these characteristics. They may be an established referral source, or they may promise to be one in the future. The borrower (or even lender) client may at times prefer their advice to ours. The broker is not a client, but one may have challenges demarcating this boundary with some.

All of these clients entrust us as lawyers to represent their interests in a mortgage transaction, and we must guard that trust carefully—a delicate balancing act at times.

It is perhaps human nature to tend to favour one party over another. In a mortgage deal, the very nature of the transaction may cause natural affinity to drift toward one or more of our non-lender clients. After all, it is the borrower with whom we interact personally. This interpersonal relationship can create a natural bond with the borrower client. If and when things go southbound, it is the borrower who will be in our office crying (or worse). A borrower may explain to us personal reasons for the urgency of resolving a financing quickly, tugging at our heartstrings while perhaps pleading with us overlook certain "minor" issues.

By contrast, an institutional lender client is one we rarely, if ever, meet face-to-face. If the lender is hands-off, we may forget they are there; if they are hands-on, we may wish that we could forget about them. The opportunity for a comparable personal bond to form with the lender is often not present.

As such, there is may be a natural inclination to view or speak of the borrower(s) as the "client" and the lender as an "other" to the retainer.

Ethically and professionally, any such instinct favouring one party over the other must be suppressed to the extent it prejudices our treatment of or advice to the other jointly retained parties. In the joint retainer, the lawyer's duty of care is equal to all clients: fiduciary obligations to each client are not diminished by a joint retainer, nor is the professional duty of honesty and candour to each.[1]

[1] See Rules of Professional Conduct 2.02(1)

Rules for Managing a Joint Retainer

The Law Society's Rules of Professional Conduct provide guidance in how to manage such joint retainers effectively and professionally.

Rule 2.04(6) requires that the lawyer disclose to each jointly retained client the nature of a joint retainer:

> (6) Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that
>
> (a) the lawyer has been asked to act for both or all of them,
>
> (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
>
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

The lack of confidentiality between the parties is reinforced in a mortgage transaction by the positive requirement in Rule 2.04(6.1) that all material information be disclosed between parties before the transaction closes:

> (6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

By Rule 2.04(7), the lawyer are required to advise of any pre-existing relationships with clients who form part of the joint retainer:

> (7) Except as provided in subrule (8.2), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Rule 2.04(8) requires that the lawyer obtain the consent to the joint retainer from all jointly represented parties at the outset:

> (8) Except as provided in subrule (8.2), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

A joint retainer may set out from the outset that, should a conflict arise, the lawyer may continue to represent one client. Such an arrangement is permitted by Rule 2.04(10), though in practical terms a joint retainer involving lenders and borrowers will never see a lender agree to such an arrangement. Such an arrangement is likely only viable if the joint retainer is limited to the lawyer representing multiple co-borrowers:

> (10) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

Disclose Joint Retainer Early and Clearly

It is imperative that a joint retainer be discussed with all clients (save an institutional lender, as noted below) at the outset of a retainer.

My view is that this discussion shouldn't be too technical, lest its meaning be lost on our clients in a haze of bafflegab. There are a few salient points to outline to each client, and confirm that they are accepting:

- I am being asked to work for multiple people (and identify them)
- There will be no confidentiality between these people for any information I receive from one of them
- I have to look out for all people equally and cannot prefer one over the other
- I may have to withdraw if an irreconcilable conflict develops between these people
- (If applicable) I have a pre-existing relationship with one of these people. All other people in this matter should consider getting advice from another lawyer about the nature of this joint retainer before agreeing to it.

One should also at this time establish with each client that there is no existing or anticipated contentious issue between the parties. If one does exist, it would be prudent for the lawyer to recommend independent representation, or decline the joint retainer outright.

Such discussion and acceptance of the joint retainer must be confirmed in writing, perhaps by a template e-mail or incorporation into a standard engagement letter to be sent to clients (see sample wording in Appendix A).

Additionally, getting the clients to sign back an acknowledgement of the conflict at the early stages is likely an ideal practice (see sample precedent in Appendix B). In practice, such sign-back is not always

easily secured, particularly on the short timeline of a refinance. If no signed acknowledgement can be obtained at the outset of the retainer, it should be included in a checklist of closing documents to be signed by clients.

When dealing with an institutional lender, the lawyer does not need to follow the same procedure of making disclosure to and securing the consent of the lender client, as there is a specific exclusion in Rule 2.04(8.2):

> (8.2) If a lawyer is jointly retained by a client and by a lending client[2] in respect of a mortgage or loan from the lending client to that client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to
>
> (a) provide the advice described in subrule (6) to the lending client before accepting the employment,
>
> (b) provide the advice described in subrule (7) if the lending client is the other client as described in that subrule, or
>
> (c) obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

It is, however, prudent to review the instructions to ensure that the lender does, for example, not require independent representation or ILA for any other clients, as a more stringent lender instruction would trump the Rules in such circumstances.

Address Issues Proactively

A proactive management of the joint retainer can help a lawyer avoid being caught in the midst of contentious issues arising between borrower and lender. Specifically, if certain matters issues present themselves in a transaction, the joint retainer may best be managed by the lawyer facilitating or encouraging an open disclosure of such matters, typically from borrower to lender, and not waiting until instructed by the lender to address potential concerns.

The purpose of such proactive steps is two-fold.

First, without the lawyer's advice, inexperienced borrower clients (and brokers) may not always realize the implications of certain required disclosures to the lender. Being proactive affords an opportunity to explain the importance of such matters to the borrower client. The purpose of proactive management is to encourage open disclosure of relevant information, to ensure that the transaction runs as smoothly as possible, and that the interests of both borrower and lender remain in concert.

[2] "lending client" defined in Rule 2.04 (8.1) as "a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business"

Second, if the borrower is unwilling to participate in such proactive disclosure when merited, or indeed asks that they lawyer overlook issues that clearly merit disclosure, it can suggest that the lawyer may later be forced into a conflict between borrower and lender clients. Depending upon the gravity of the issue, such a realization may constitute a "serious loss of confidence between the lawyer and the client", which is a permitted ground for withdrawing from representation under Rule 2.09(2). It is infinitely preferable for a lawyer to become extricated from a problematic retainer before the expenditure of significant time and money.

The degree to which one might need be proactive varies from transaction to transaction. Some will require virtually no intervention, particularly if the dynamics of loan are all readily apparent and entirely innocuous. Others may call for a higher degree if involvement as potential issues manifest themselves. There is no hard-and-fast standard. Such proactive management is admittedly easier on a purchase financing (when one may have a few months lead time) in comparison to a refinance (when one may have a matter of days), and is difficult to organize if the borrower fails to retain us until after the financing is arranged. It is nevertheless a useful combination of service to clients and personal self defence that may help prevent divisions from developing.

Anticipate standard lender requirements of borrowers: One can safely assume certain lender requirements will likely be made in certain classes of transactions. For example:

- Lender approval required for secondary financing
- Lender approval of any tenancies
- Lender approval of Powers of Attorney
- Requirement for water potability certificates in non-urban properties

Standard intake questions of borrowers can be tailored to assess whether any of these issues may be present in a transaction. My practice is to discuss property-appropriate matters of this sort with borrower clients from the outset and, should the answers reveal any concerns, confirm that this information has been or will be appropriately disclosed to the lender, and the mortgage instructions contain an appropriate acknowledgement of such disclosure. Conversely, if the borrower tells me to mind my own business, I will often advise him or her to find another lawyer.

Admittedly, issues of this sort should likely have been addressed at the time of the mortgage application, before the lawyer touches the file, but experience teaches that such gathering and relay of information on the information is at times imperfect (or worse). I consider it good defensive practice to presume such imperfection may be present, minimizing the risk for unpleasant surprises when the lender finally instructs.

Title and Off-Title Issues: Proactively addressing property-specific title and off-title issues can help prevent a deal collapsing at the last minute (or else being hopelessly delayed) because of a lender's concerns with any such issues. Borrowers (and some brokers) are often unaware of the concerns that

certain title and off-title issues might raise with a mortgage lender, perhaps mistakenly believing that title insurance can satisfy all potential lender concerns (or that such a solution will be acceptable to the lender), thus there is good reason to raise these issues proactively while the financing is still in a formative stage.

Some practical illustrations:

Status Certificate Issues: On condominium purchase financings, it is not uncommon to find minor issues in the status certificate. For example, one may find that the condo is subject to a civil lawsuit which may be covered by insurance, and/or to which the unit owner's proportionate financial exposure is tolerable to the purchaser/borrower. When reviewing such matters, it is important to address not just whether the purchaser/borrower will accept them, but also whether the lender will as well. In such circumstances, it might be appropriate to:

- Try to negotiate affirmative title insurance coverage in favour of lender at the status review stage

- Advise the borrower to disclose the issue to the lender at the application stage, so that the lender might review and approve the nominal risk being assumed. Even if title insurance protection is available for the lender, this disclosure may also be prudent if the lender is known to require a copy of the status certificate before funding, to ensure that they are aware of the issue, and it will accept the affirmative coverage.

Major/Unusual Easements: A minor utility easement to provide services to the property is unlikely to phase most lenders. Many have pre-approved them as acceptable title insurance exemptions.[3] Others list in their general instructions the sort of easements they will accept as a matter of course. But, at the other extreme, a pipeline or major hydro transmission corridor easement bisecting the property and placing significant restrictions on its use may raise significantly greater complications, including valuation concerns, of which the borrower (and broker) may be unaware. An affirmative title insurance protection for the lender may be difficult, if not impossible, to obtain for such an easement. Should such an easement appear in an APS or title search, it would be prudent to advise the borrower (and broker) to ensure that it is brought to the lender's attention, the loan approved on the basis of the property being subject to the easement, and the lawyer advised of same in his or her instructions. A major easement of this sort needs to be disclosed to the lender at some point in the transaction – if possible, it is hardly ideal practice to wait until instructed to begin addressing it.

When a Contentious Issue Arises

Despite best efforts to avoid a conflict or contentious issue between joint clients, one may arise in any transaction at any time. As a general rule, these seem to arise at the worst possible time, perhaps on the eve (or morning) of closing, and may come out of seemingly innocent client conversation which may

[3] For TitlePLUS pre-approved lender exceptions, see http://titleplus.lawyerdonedeal.com/LenderChart.asp

betray a conflict between clients. It is for this reason that the early disclosure of the joint retainer obligations, discussed earlier, is essential – if these discussions are left too late (in the worst possible scenario, after the conflict has arisen), a client might pursue disciplinary or civil remedies against its lawyer, claiming that it would never had made the incautious disclosure had the joint retainer obligations been explained and agreed to.

Not all disputes between clients should be considered contentious. It is not uncommon for mortgage documentation that accompanies instructions to require amendment. A borrower questioning a term in the mortgage documentation (e.g., inconsistent interest rate, a condition that was not in the application, term of the mortgage) is hardly a conflict between the parties, and is often resolved by a telephone conversation seeking clarification from the lender client. Lack of clarity is not necessarily a conflict.

It is, however, important in addressing such matters for the lawyer to remember professional obligations to treat all jointly retained clients equally, and not to advocate for one client over the other in trying to, for example, amend the terms of the mortgage to be more favourable to the borrower client. Matters requiring such advocacy or negotiation may best be referred back to the broker to keep the lawyer from negotiating for one client against another.

A truly contentious issue arises when the interests and expectations of the clients cease to be aligned. This may include situations of the instructions or interests of one client coming into conflict with those of another, or the lawyer coming to know facts about one client (or the transaction generally) that might prejudice the rights or reasonable expectations of one or more jointly retained clients. The lawyer cannot continue to give joint representation in resolving such a contentious point as he or she risks preferring one client over another.

Most often in an institutional refinance, the conflict will pit the borrower against the lender, and may or may not be capable of resolution. The issue is often factual and not purely "legal" – perhaps inevitable as some lender clients increasingly download on lawyers elementary due diligence, and undertake minimal (if any) know-your-client work of their own. For example:

- Lawyer becomes aware of unauthorized secondary financing
- Borrower reveals that property is or will be tenanted, despite lender requirements of complete owner-occupancy
- Borrower(s) have lost job(s) immediately before closing
- A borrower is a bare trustee, which was not disclosed to or approved by the lender
- Borrower reveals that he or she is an undischarged bankrupt
- Borrower reveals that he or she hasn't remitted HST in years, leading to a potential superpriority above the security of the mortgage
- Borrower ID is visibly forged or altered
- Lawyer becomes aware of flags of fraud relative to the borrower or the transaction generally

One may at times be faced with conflicts between other clients, for example:

- Stated intent of one borrower to default on mortgage, leaving the other(s) fully exposed to the liability
- Stated intent of borrower to use refinance as an equity strip against consenting spouse, whom he or she surreptitiously plans to divorce shortly thereafter

All such issues have a material impact on another jointly retained client, and need to be addressed immediately.

When issues of this sort arise in a joint retainer, a number of key ethical and professional duties come into play, forcing the lawyer to make disclosures of the information, assess whether it is appropriate to continue to act in the matter, and avoid becoming inappropriately entangled in resolving any consequent contentious issue between the parties.

Disclosure Obligations to Joint Clients*:* On multiple grounds, the lawyer is professionally obliged by multiple professional obligations to make an open disclosure of the information to other clients on the joint retainer:

- Duty of honesty and candour: Per Rule 2.02(1), a lawyer must be honest and candid with clients, including all of those on a joint retainer.

- No confidentiality between joint clients: Per Rule 2.04(6), in a joint retainer there is no confidentiality of the information received from one party as against the other.

- Duty to disclose material information if the information is between borrower and lender: Per Rule 2.04(6.1), the lawyer has a positive professional duty to disclose "all material information" in writing to both borrower and lender before the advance or release of the mortgage or loan funds. "Material information" is interpreted in the commentary as "facts that would be perceived objectively as relevant by any reasonable lender or borrower", thus can be very broad. The lawyer must disclose material information to lender or borrower in writing, before proceeding with registration (or, if possible, receiving the advance).

As such, the contentious information must be disclosed fully to the client impacted by it and await further instructions. The nature of that client's response determines how the retainer will proceed. If the client acknowledges the matter and directs that the lawyer proceeds notwithstanding the adverse information – for example, a lender approving a tenancy or secondary financing – the transaction may proceed. (If the party making such a direction is not a sophisticated client, the lawyer may be advised to recommend independent legal advice.)

It is, however, quite possible that the disclosure of the information will put the clients in conflict over a contentious issue, which forces the lawyer to proceed with extreme caution.

Assessing Mandatory Withdrawal*:* If a contentious issue so arises, it is not to be unexpected that one or more jointly retained clients (often the impugned client) may fire the lawyer at this point, ending the joint retainer. If not fired by a client, the lawyer should consider whether the subject matter of the conflict may compel him or her to withdraw outright from representation. Should there be indicators of fraud, dishonesty, or illegality inherent in the client's conduct, such as mortgage fraud, continued representation may place the lawyer in breach of Rule 2.02(5):

> (5) A lawyer shall not
> (a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct;
> (b) advise a client or any other person on how to violate the law and avoid punishment.

Per Rule 2.09(7), a lawyer is obliged to withdraw from representation if "it becomes clear that the lawyer's continued employment will lead to a breach of these rules."

As such, an appreciable number of potential contentious issues in a mortgage transactions may well require the lawyer to withdraw from representation.

Recuse Self From Resolution of Contentious Issue*:* Should the lawyer not find the retainer at an end, he or she is required by Rule 2.04(9) to stand back from resolving the contentious issue:

> (9) Save as provided by subrule (10), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall
> (a) not advise them on the contentious issue, and
> (b) refer the clients to other lawyers, unless
> (i) no legal advice is required, and
> (ii) the clients are sophisticated,
> in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

As such, once a contentious issue arises, the jointly retained lawyer must not become entangled in its resolution. The lawyer must recuse himself or herself from any efforts to resolve the conflict, and, if appropriate, refer the clients to other lawyers.

A lawyer may continue to represent a specific party only if, in accordance with Rule 2.04(10), the clients had agreed at the outset of the retainer to such an arrangement. As noted earlier, it is rare for a lender client to agree to such a joint retainer arrangement, and thus this may be a practical issue only when jointly retained by co-borrowers alone.

Standing on the sidelines in such circumstances may be personally difficult, as the lawyer may have invested a significant amount of time in the transaction and may genuinely wish to facilitate its successful completion. One may get pressure from various parties to "fix the problem", with proposals of varying levels of legitimacy. Such temptation to meddle must, however, be resisted. Only if and

when the contentious issue is resolved can the lawyer again start working toward closing the transaction.

Ongoing Obligations on a Joint Retainer

The lawyer's obligations to all clients on a joint retainer to not end with the closing of the mortgage transaction, per Rule 2.04(4):

> (4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter
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> (a) in the same matter,
>
> (b) in any related matter, or
>
> (c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information
>
> unless the client and those involved in or associated with the client consent.

As such, a lawyer who acted on joint retainer for borrower and lender almost certainly should not act in the following circumstances as long as the mortgage remains on title:

- Representing or advising either borrower or lender in a mortgage enforcement proceeding
- Acting for the borrower on a subsequent second mortgage in the face of a lender stipulation of no secondary financing without consent, such consent not being sought by the borrower
- Acting for the borrower on a subsequent title transfer in the face of a lender stipulation of no transfers without consent, such consent not being sought by the borrower

A lawyer so acting opens himself up to a professional misconduct claim, in addition to claims for damages suffered by the party being acted against.

In purely practical terms, a lender client that finds a lawyer so acting against it may look to decline the use of that lawyer's services in the future, providing a tangible (and completely permissible) economic sanction against the lawyer's future business.

Absent express lender instructions to the contrary, there does not seem to be any impediment to acting on a subsequent refinance by the borrower client with a different lender, paying out the original lender client. One should, perhaps, be careful of advocating for the borrower against the lender if the payout statement is to be challenged or disputed.

APPENDIX A

Sample Confirmation of Joint Retainer

(for e-mailing to clients, and/or inclusion in engagement letter)

I confirm that I have been asked to act for all of **[name borrowers and the lender]** in this transaction. In such joint representation, I must represent all parties with equal diligence. You have advised me that no contentious issues exist between any of you at this time with respect to this transaction. I confirm that I have explained to you that my professional obligations require that I treat no information concerning this matter that I receive from any client in this retainer as confidential so far as any other client in this retainer is concerned. If a conflict develops that cannot be resolved, I cannot continue to act for any of you and may have to withdraw completely. **[IF APPLICABLE:** I confirm advising that I have a continuing relationship with **{PRE-EXISTING CLIENT NAME}**, and that I have advised **{OTHER CLIENTS NAMES}** of such relationship, and recommend that **{HE/SHE/THEY}** obtain independent legal advice about this joint retainer.**]** I confirm that all of you have consented to me acting on your behalf on this basis and notwithstanding the conflict.

APPENDIX B

Sample Consent to Act Re. Conflict (Mortgage)

TO: **[Law Firm Name]** (The "Firm")

RE: **[BORROWERS]** mortgage to **[LENDER]** *(the "Mortgagee")*
Property Address:
Closing Date:
Your File No.:

All of the undersigned (the "Undersigned Parties") hereby acknowledge and confirm to you that:

1. The Undersigned Parties have requested that the Firm act jointly for them, in addition to the Mortgagee (collectively with the Undersigned Parties, the "Clients"), in the above-noted transaction (the "Transaction").

2. The Undersigned Parties confirm that there is no contentious issue between the Clients with respect to the Transaction.

3. The Firm has advised the Undersigned Parties that all information received in connection with this transaction from any one Client cannot be treated as confidential as far as any other Client is concerned.

4. The Firm has advised the Undersigned Parties that in the event of a conflict developing between any of the Clients which cannot be resolved, it may be necessary for the Firm to discontinue acting for all Clients in the Transaction.

5. **[IF APPLICABLE]** The Firm has advised the Undersigned Parties that it has a continuing relationship with **[NAME OF ESTABLISHED CLIENT]**, being one of the Undersigned Parties for whom the Firm acts regularly, and that all other Undersigned Parties have been advised by the Firm to seek independent legal advice prior to entering into this joint retainer. Notwithstanding such advice, the Undersigned Parties hereby request that the Firm act for them despite such conflict.

Dated at Toronto this day of , 2014.

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