

## Real Estate

# Strength in numbers: Pros and cons of joint residential ownership

By **Ray Mikkola**



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(October 25, 2018, 8:23 AM EDT) -- The cost of purchasing residential real estate has skyrocketed, causing affordability challenges to purchasers in many Canadian cities. As a result, some buyers are purchasing real estate together with friends and family and taking title typically as tenants-in-common.

The advantages of doing so are obvious: collectively, small contributions to the down payment result in all of the purchasers more likely satisfying the new 2018 mortgage "stress test" rule, and banks take comfort by the provision of multiple covenants to repay mortgages. After closing, the costs and burdens of ownership may be shared more easily among a number of owners.

But purchasers should understand the risks of jointly purchasing property, and thereafter, sharing the costs and other burdens of ownership.

Typically, the agreement of purchase and sale lists all of the purchasers but may be silent on joint or several liability. Most new condominium developer forms require all of the purchasers to take title to the unit on closing and require that where the purchaser is comprised of multiple persons, each purchaser is jointly and severally responsible for all of the collective purchasers' obligations under the agreement. This means that the vendor can look to any one of the purchasers for full recovery of its losses or damages arising from, for example, the failure of all of the purchasers to complete the transaction in accordance with the agreement.

Similar covenants are generally included in mortgage documents, which often impose mortgage application fees, legal fees and a host of other charges which are not always covered by the mortgage advance itself. Many purchasers do not put their obligations in writing, either under the mortgage, the mortgage application or the purchase agreement between themselves.

Such provisions, of course, are not included in any purchase agreement, and purchasers who are trying to save money on a group purchase are generally not inclined to spend legal fees to prepare even a basic agreement setting out how they will contribute to the purchase price or the deposit, subsequent deposits, condominium interim occupancy fees or mortgage application charges.

Co-purchasers can run into problems even where there is ample money to close the transaction. For example, where one of the purchasers is not a first-time homebuyer, the residential Land Transfer Tax rebate may be unavailable. If even one of the purchasers of the residential property is a non-resident, the 15 per cent non-resident sales tax (the NRST) will be payable on the full purchase price.

For example, if four purchasers buy a residential condominium unit, each as to an undivided 25 per cent interest, and one of the purchasers is a non-resident, the NRST will apply and be calculated on the full purchase price, notwithstanding that the remaining three transferees are residents.

Worse yet, if the NRST is not paid, all transferees (including the resident transferees) will be jointly and severally liable to pay the entire amount of the NRST. Clearly, it is important for a co-purchaser to understand the residency of the other purchasers.

Problems can arise post-closing as well. There is remarkably little case law or statutory protection regarding the obligation to share the ongoing expenses associated with property ownership among co-owners. A co-ownership agreement is useful to set out the duties and responsibilities of the co-owners among themselves, but the enforcement of such agreements is a messy and expensive process.

Extensions of mortgages require the co-operation and participation of all co-owners, and where any co-owner experiences financial difficulties, a lender may call the loan, or refuse to extend it on maturity, whereupon all co-owners will suddenly be reminded that each of them is individually liable to the lender for up to the full amount of the monies owing under the mortgage.

Even where co-owners are not disputing any matter among themselves, a spouse of a co-owner who claims that the residence is a matrimonial home can cause significant complications, expense and delay in mortgaging or conveying the property. The bankruptcy, disappearance, divorce, death or determination of incompetency of any of the owners often results in the need to obtain a court order for a sale of the property.

The non-residency of any of the owners will result in income tax holdback issues, which may result in an inquiry or audit by the Canada Revenue Agency as to whether the premises constituted the principal residence of the co-owners. Any capital gains issues may be difficult to resolve and may result in protracted audits and litigation, followed by penalties, interest and possible prosecution.

As in most cases, an agreement among co-owners is advisable, notwithstanding that such an agreement would not likely completely preclude all future possible disputes. Certainly, where one or more co-owners are determined not to co-operate with each other, even the most comprehensive agreement will not avoid disputes.

Purchasing and owning real estate with others can be a convenient route to home ownership. But steps should be taken to address the risks associated with so doing and to avoid expensive disputes which can undo the advantages of group purchases and mortgages, both before and after closing.

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