

**Recommended Rules Of Practice Respecting Real
Property Reports**

**As Endorsed By Unanimous Consent Of The
Canadian Bar Association Alberta Branch
Real Property Sections:
South Alberta, April 9, 2003
North Alberta, November 12, 2003**

OVERALL RATIONALE: To reduce the uncertainty and disagreements that often arise between lawyers concerning Real Property Reports.

The Committee met for three meetings in February March and April of this year to come up with some basic rules and rationale.

Brad Sinclair chaired the Committee with the following in attendance at some or all of the meetings:

Lou Pesta	Howard Lowenstein
Bill LeClair	Sandra Albus
Jocelyn Frazer	Dave Oke
David Busheikin	Alice Ho
Ken Keeler	Steve Raby
Larry Hurd	

There was unanimous agreement in the committee for recommending the rules.

The draft was brought forward to the CBA Real Property section in Calgary on Wednesday, April 9, 2003 and was passed with unanimous consent of those in attendance. It was brought forward to the CBA Real Property section in Edmonton on November 12, 2003 and passed with unanimous consent of those in attendance.

Although the rules are not an exhaustive list that applies to all circumstances, they give clear direction as to the way in which RPRs should be interpreted in the vast majority of cases.

It is also noted that these rules are intended to apply to the terms set out in the standard AREA Real Estate Purchase Contract and **NOT** to contracts involving builders for new home construction.

RULES:

1. The Buyer's lawyer should not and cannot be compelled to proceed to registration without having the opportunity to review the RPR. In such circumstances the Seller's lawyer shall use their best and reasonable efforts to accommodate the Buyer obtaining possession of the property and the Buyer shall only be required to pay late interest/occupancy rent at the mortgage rate of interest on the Buyer's mortgage amount. If the Buyer does not wish to take possession until the RPR has been provided, then the possession and adjustment date shall be postponed and the Buyer shall pay no late interest. Notwithstanding this rule, where an existing RPR reflects the substantial improvements on a property but an update may be required for improvements of a minor nature, the lawyers are encouraged to negotiate an appropriate holdback amount prior to obtaining compliance, and proceed to registration.

RATIONALE: It was the consensus of the Committee that this ought to be the primary practice standard and that the RPR should be fundamental to the closing process. The Buyer should not be held responsible for delaying or refusing to close a transaction if the Seller has not at the very least provided the RPR. Indeed if the Seller cannot provide the RPR in accordance with the terms of the Agreement, or agree to a sufficient holdback to cover any potential damages, then the Buyer may have the option of forcing the Seller to comply or rescind the Agreement. The Committee also agreed that if a closing is delayed due to this, the Buyer ought to have the choice of taking possession and pay mortgage rate/mortgage amount late interest or postpone possession and pay no late interest.

2. A clear and legible photocopy of a Real Property Report reflecting the current state of improvements on the property along with either an original or a photocopy of a Certificate of Compliance from the municipality satisfies the requirements of the standard Residential Real Estate Purchase Agreement.

RATIONALE: Legal Counsel to AREA advises that the standard contract was never intended to mandate original RPRs. The Alberta Land Surveyor's Association has relaxed their copyright endorsements on RPRs, and now most new RPRs specifically authorize photocopying of the document for the use of future owners and lenders.

3. The age of the RPR and the date of the Certificate of Compliance shall not be considered relevant as long as the RPR reflects the current improvements to the property as defined in the Purchase Contract.

RATIONALE: The Committee decided that it should not matter if an RPR or Compliance Certificate is 3 months old or 10 years old, the only relevant factor with respect to the document is whether it properly reflects the current improvements as set out in the contract.

4. When an RPR was prepared prior to the date of final acceptance on the Purchase Contract, the Seller's solicitor shall, wherever practicable, have the Seller sign a Statutory Declaration in the form attached as Appendix "A".

RATIONALE: The Seller is in the best position to know and advise whether any improvements have been constructed since the date of the RPR. Since the new ALSA standards of practice only require certain improvements like concrete driveways, landings and ground level decks to be shown where they encroach, the Buyer and the Buyer's lawyer need to know whether the improvements existed at the date of the RPR. Having the Seller sign the Statutory Declaration will allow the Seller's lawyer to address the need for a new or updated RPR early, and will provide greater transparency in the process from the Buyer's perspective. This does not eliminate the requirement of the Buyer completing their own statutory declaration for their own lender.

5. The exclusion of sidewalks, driveways, landings on RPRs cannot be used as a reason to refuse the document as long as the RPR was completed in accordance with the Alberta Land Surveyor's Manual of Standard Practice at the time the RPR was surveyed.

RATIONALE: Although some surveyors include driveways, sidewalks, or small sheds and other minor improvements on the RPRs they complete, it is not strictly something that must be shown according to their practice standards. It should not therefore be something that must be shown if it is not necessary in the opinion of the surveyor. If a situation exists where the Seller has added a sidewalk or driveway or other minor improvement which obviously is not a compliance issue, then they might simply indicate so on their Stat Dec when they provide it to the Buyer.

6. The provision of an RPR, which was completed at the construction stage, shall not in and of itself be deemed not to comply with the requirements of the Purchase Contract if the RPR shows all of the current improvements as contemplated in the Contract.

RATIONALE: It seemed to the Committee that the words "construction stage" should not render an RPR invalid as long as the depiction of the property is still accurate even several months later. An RPR completed at "foundation stage" is a different matter in most cases because important developments such as the eaves were not finished at the time the RPR was made.

7. The removal of an improvement shall not necessitate an RPR update. If the improvements have not been removed, but have been otherwise altered or modified or enlarged, then an update of the RPR shall be required.

RATIONALE: If a Seller had an RPR with compliance showing a deck or a fence on it and that fence or deck has now been completely removed, there could not logically be any compliance issues arising for the Buyer as there is no development in existence. Again, the Seller could simply indicate as such in their Stat Dec when they provide the RPR to the Buyer.

8. All fences in urban areas must be shown on an RPR if they appear to define a boundary, regardless of who constructed the fence or whether the fence is actually on the property line.

RATIONALE: The Committee felt that the issue of fencing is fundamental to the RPR because it is recognized in paragraph 7.6.9 of the ALS Manual and gives the Buyer an accurate portrayal of where their actual property line lies in relation to the fences which have been constructed.

9. A Certificate of Compliance on an RPR does not guarantee that there are not other building location issues that may need to be addressed. Also, if an unpermitted Encroachment exists from the Seller's property into neighboring lands or municipal lands, the Seller's lawyer shall use their best efforts to resolve the matter.

RATIONALE: There may be encroachment advisory stamps on RPR's which require attention or there may be issues related to restrictive covenants registered on title which are concerned with building location issues. The Buyer should also not be forced to accept potential defects such as encroachments as they are fundamental to the warranties given by the Seller in the Agreement. In a worst case scenario, an encroachment can, in the case of fencing, lead to the discovery of serious misrepresentations as to the size of a lot or, in the case of buildings, result in the requirement to remove or demolish a structure if it is onto neighboring property or a URW. The risk for a Buyer is simply too great to ignore. The best efforts of the Seller's lawyer may include attempting to obtain encroachment agreements, arranging to remove encroachments or otherwise negotiating compensation (or title insurance) for the Buyer.

10. If an RPR discloses that a third party adjacent property owner has an encroachment onto the Seller's land, it does not constitute a breach of Seller's warranties and the Seller is not obligated to obtain an encroachment agreement for this kind of encroachment.

RATIONALE: The Agreement makes no reference to encroachments from neighboring lands onto the Seller's property and the Seller has made no representations or warranties with respect to these situations and has no obligation to the Buyer in that regard.

11. Both the Seller's lawyer and the Buyer's lawyer ought to address the availability and adequacy of the RPR immediately on receiving instructions to act on a file.

RATIONALE: By addressing the matter at the outset instead of in the final week prior to closing, it is presumed that unnecessary delays will also be avoided and the closing process will be made easier. Finally, it would be important for all lawyers to attempt to educate clients and realtors to take these matters more seriously and provide further assurances so that delay and confusion will not result on closing.

12. It is unethical for the Seller's lawyer to provide a survey, plot plan or RPR, which they know to be inadequate without bringing the deficiencies to the attention of the Buyer's lawyer.

Appendix "A"

STATUTORY DECLARATION

CANADA)	IN THE MATTER OF THE PROPERTY LEGALLY
)	DESCRIBED AS PLAN ; BLOCK ; LOT;
PROVINCE OF ALBERTA)	(MINERALS)
)	
)	AND MUNICIPALLY DESCRIBED AS:
)	(ADDRESS)
TO WIT:)	

I/We (first vendor) and (second vendor), both of the City of Calgary, in the Province of Alberta, DO SOLEMNLY DECLARE THAT:

1. I/We am/are the Seller(s) of the above described lands.
2. I/We have examined the attached Real Property Report dated _____, prepared by _____, Alberta Land Surveyor, and declare that:
 - (a) The Real Property Report reflects the current state of improvements on the property; and
 - (b) To the best of my/our knowledge, no improvements (including fences, decks, driveways and landings) have been constructed on the said lands since the date of the Real Property Report, except for:

AND I/WE MAKE THIS SOLEMN DECLARATION conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

SEVERALLY DECLARED BEFORE ME)	
at the City of Calgary, in the Province of)	
Alberta, this ____ day of (Month))	_____
(Year))	,
))
))
)	_____
)	,
_____)	

A Commissioner for Oaths in and for
The Province of Alberta