

The following report was prepared and approved by the South Alberta Real Property Subsection of the Canadian Bar Association, by resolution in December 2006. It replaces and updates an earlier trust condition report prepared by a similar committee in approximately 1995. The following is made available on the website of the Law Society of Alberta in order to provide current information to the membership regarding the activities of the CBA, in matters which may be of interest to Alberta practitioners.

**REPORT ON STATUS OF TRUST CONDITIONS
- REVISED 2006 -**

**SOUTH ALBERTA REAL PROPERTY SUBSECTION-
CANADIAN BAR ASSOCIATION**

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FORMAL RECOMMENDATIONS

Trust Conditions Committee

The recommendations set forth in this report are designed to deal with practical problems encountered on a daily basis by residential real estate practitioners. They are not intended to be an absolute requirement for all transactions or situations. They should not be applied where the contract between the parties clearly deals with the issue in another manner. They do not, in all instances, deal with case law that suggest different conclusions, but where the law is not clear in a particular area, we have recommended a practice which we consider to be logical and practical, given the attendant risks involved.

1. Senior Citizens Tax Adjustments

It is recommended that as the benefit of the senior citizen tax credit is a personal benefit to the senior citizen, it is therefore not an item to be adjusted at closing, unless otherwise mutually agreed to between the parties. In other words, taxes are to be adjusted without taking into account any senior tax credit.

2. Weekend Closings

Where the possession and adjustment date are on a non-business day, and the offer is silent as to how the mechanics of closing are to occur, it is recommended that the purchaser's lawyer has two options:

(a) to release funds on the business day preceding the non-business possession and adjustment date even though there is no guarantee that possession will be available in accordance with the terms of the offer, provided that the purchaser's lawyer has obtained informed consent from his client; or

(b) to release funds on the business day following the non-business closing and adjustment date and pay interest from the possession and adjustment date to such next business day at the rate stipulated in the offer.

3. Timing of Adjustment

The current form of offer to purchase used in Alberta requires adjustment as at 24:00 hours on the adjustment date. It is recommended however that to adjust one-half of that day to each party is unwieldy and that the possession and adjustment date should be considered the purchaser's day for adjustment purposes. Accordingly, no late interest should be paid if funds are received by the Vendor's solicitor prior to 12:00 noon. This recommendation should not necessarily apply to large commercial transactions.

4. Condominium Transactions

It is recommended that the vendor should have an obligation to provide any condominium documents listed in the offer to purchase at the vendor's expense. The 2006 committee agreed that paragraph 4.7 of the standard real estate purchase contract currently clarifies the specific obligations of the seller's lawyer to provide an estoppel certificate within a reasonable time after the completion date.

5. Builder's Lien Holdbacks in New Home Construction

Due to the uncertainty of the law in this area, it is recommended that in all cases where a purchaser has contracted with a builder or is purchasing a new completed home from a builder, an appropriate builder's lien holdback be maintained by the builder's solicitor. Unless the contract specifically deals with interest on the lien holdback, the builder should be entitled to interest earned on the holdback funds while they remain in trust unless the holdback is held back at source by a lender in which event the purchaser should pay interest on the lien holdback amount at the mortgage rate for the statutory period. The committee also noted that they considered it to be unreasonable for a builder to require a purchaser to contract for payment of interest at a penalty rate on lien holdback amounts.

6. Assignment of Sale Proceeds

It is recommended that in a situation where the parties have agreed to close a transaction on the basis of an assignment of sale proceeds, the vendor's solicitor should allow possession on the strength of the assignment of sale proceeds, but the transfer of title should

not occur until the sale proceeds are unconditionally available, unless the vendor has provided an informed consent to its solicitor to proceed with registration in order that the transaction is not unduly delayed. It is further recommended that where transfer of title takes place after possession, the purchaser's lawyer be placed under trust that there clearly will be no ability to hold back. It is also recommended that the vendor's solicitor advise the vendor as to the ramifications of passing title and possession on the strength of an assignment of sale proceeds even though the vendor may be contractually bound at that point in time.

7. Trust Conditions at Variance with Contract

It is recommended that solicitors have a duty to review the contract notwithstanding that it may be binding, to advise the client as to any potential difficulties arising therefore and that if amendments are required as a result of such review, they should be done by way of addendum to the contract and not through trust conditions.

8. Encroachments and Relaxations

The 2006 committee agreed that the standard real estate purchase contract currently addresses the obligations of the seller in paragraph 6.1.

9. Restoration of Title

It is recommended that a purchaser's solicitor should never provide an undertaking or covenant to restore title and that it is unreasonable for a vendor's solicitor to impose such a trust condition. It is recommended that the purchaser's solicitor should undertake nothing more than to deliver a properly executed transfer of land to the vendor's solicitor in the event that completion cannot occur. It is recommended that it is an appropriate trust condition for the vendor's solicitor to require the purchaser's solicitor to deliver out of the cash difference, a reasonable amount in order to restore title.

10. Documentation in Cash and Cash Assumption of Mortgage Transactions

It is recommended that where the transaction is a full cash transaction or cash to assumption of mortgage transaction, there is no necessity for a transfer back, tenancy-at will agreement or unpaid vendor's lien caveat. The only purpose for such security in transactions of

this type is to guard against a solicitor who misappropriates funds. It is assumed that the Law Society would swiftly come to the aid of the innocent solicitor in this situation.

11. Unpaid Vendor's Lien Caveats

The committee recognizes that different practices have developed in certain parts of the province with regard to the filing of unpaid vendor's lien caveats, and that Calgary practitioners do not typically file them any longer. In the event a solicitor deems it appropriate to file such a caveat, it is recommended that, where the offer discloses that the Purchaser is obtaining a new mortgage, the vendor should file and discharge an unpaid vendor's lien caveat where required at the vendor's expense and that such caveat should be filed as soon as the transaction is unconditional. The unpaid vendor's lien caveat can claim an interest as unpaid vendor or as unregistered transferee or both. Where the offer is silent as to new mortgage financing, it is recommended that the purchaser be required to pay for the cost of registering and discharging the caveat.

12. Contemplating Late Closings

It is recommended that a vendor not be entitled to refuse to close the transaction if the vendor has not given the purchaser sufficient time to register documentation at the Land Titles Office, and, where applicable, obtain a mortgage advance. It is recommended that it is not appropriate for the vendor's solicitor to require the purchaser's solicitor to submit documents to Land Titles on or before a specified date in advance of the closing. Where a vendor is late in providing conveyancing documents to the purchaser's solicitor, it is recommended that late interest be payable on the mortgage amount at the mortgage interest rate and that the vendor be entitled to retain whatever interest can be earned on the cash difference. It is recommended that the time for completion of the transaction be the current land titles turn-around plus two business days and if there is a lender involved which takes longer than two business days to advance, the obligation should be on the purchaser's solicitor to advise the vendor's lawyer of this as soon as this becomes known. For ease of administration, it is recommended that the ATB rate be calculated as at the date of release of funds.

The 2006 committee felt that this recommendation may be redundant in light of potential amendments to the AREA contract which have not yet taken effect at the time of drafting.

13. Form of Tenancy-at-Will Agreement

It is recommended that the Form of Tenancy-at-Will Agreement attached hereto and marked as Schedule "A", being a tenancy having a seven day fixed term, be considered to be an appropriate tenancy-at-will form.

14. Holdbacks

It is recommended that partial release of funds not be allowed except with the informed consent of both parties involved. It is recommended that the purchaser's solicitor not be entitled to prevent the release of any portion of the purchase monies to the vendor once the purchaser's solicitor has used the documentation and title and vacant possession have passed. It is recommended that under the current rules of the Law society of Alberta, a vendor's solicitor can ignore trust conditions purported to be placed by the purchaser's solicitor where the subject matter of those trust conditions has already been dealt with by the vendor's trust conditions and undertakings, but as a courtesy that the vendor's solicitor should advise the purchaser's solicitor that he/she is proposing to ignore same.

15. Certification of Trust Cheques

It is recommended that unless the agreement between the parties specifically requires a certified cheque, it is inappropriate for a vendor's solicitor to require the purchaser's solicitor to certify cheques. As a matter of courtesy, a purchaser's solicitor should consider complying with a request for certification where the vendor's solicitors are in a different city.

16. Solicitors Undertaking Re: Discharge of Existing Encumbrances

While it is recognized that there is a risk involved in undertaking to discharge existing encumbrances, it is recommended that vendor's solicitors continue to do so, as any other proposed solution (such as having the purchaser's lawyer provide the undertaking to the new mortgagee or attempt to obtain the informed consent of all parties to a situation where

potentially an existing mortgage may not be discharged) are, in the committee's view, unworkable. It is recommended that any undertaking with respect to discharge of municipal utility charges should be limited only to amounts indicated orally by the municipality as outstanding as of the closing date. It is also recommended that it is reasonable to expect an undertaking from a vendor's solicitor with respect to adjustments that are made to the purchase price and which are based upon payments assumed to have been made, such as a monthly mortgage payment or a City of Calgary TIPP payment. It is further recommended that any lake or community fee encumbrances should be assumed by the purchaser. It is also recommended that this committee write to the Mortgage Loans Association requesting their co-operation either in guaranteeing the accuracy of payout statements or alternatively providing discharges in advance of, or concurrently with, closing, as we continue to be of the view that it is dangerous for a vendor's solicitor to undertake to payout existing encumbrances.

17. Investing the Cash to Close

It is recommended that it is reasonable that a vendor's solicitor should be entitled to charge a reasonable fee for this service and, in any event, the vendor's solicitor should be entitled to refuse to invest.

18. Satisfaction of Mortgagee's Requirements

It is recommended that where timing is not a problem, it is appropriate that a vendor's solicitor place the purchaser's solicitor under trust to ensure all known preconditions to funding (other than registration requirements) have been met before registration is commenced. It is recommended however that where timing is a problem, the vendor's solicitor must be flexible in this regard (for example it may not be possible to obtain a new real property report with a municipal certificate of compliance thereon between the time that the purchaser's lawyer becomes aware of the transaction and the date he wishes to submit documentation to registration in order to complete on time).

19. GST Declaration and Vendor's Residency

The 2006 committee agreed that the standard real estate purchase contract has eliminated the need for any GST declaration. If GST is applicable, it is automatically included in the purchase price and it is the seller's responsibility to remit it.

It is reasonable for the buyer's lawyer to expect that a declaration of the seller's residency status will be included on or with the transfer of land. Where the seller's lawyer is aware of a client's non-residency status, it is not appropriate for the seller's lawyer to simply not provide a residency declaration, hoping that the buyer's lawyer does not notice or ask for one. In the event a vendor is a non-resident, the seller's lawyer ought to undertake to hold back the requisite funds (presently 25% of the sale price) from the seller, pending the receipt of a Clearance Certificate from the Canadian Revenue Agency.

20. Vendor Take Back Mortgages

It is recommended that where the terms of a vendor take back mortgage are not specified in the contract, the parties should accept such standard provisions as covenants to insure, covenants to pay taxes, prohibition against waste, assignment of leases and rents, Land Titles Act short form covenants, cross default provisions in respect of prior mortgages, and general remedy provisions. It is recommended however that unless dealt with by the contract, a vendor take back mortgage should not include any rights of prepayment, any due on sale clause or provisions requiring financial reporting.

21. Exculpatory Language and Statement of Adjustments

It is recommended that it is inappropriate to rely on any "errors and omissions excepted" statement in a statement of adjustments prepared by a vendor's solicitor. To the extent that the statement includes an amount that the vendor's solicitor is not prepared to stand behind, it is recommended that that be made absolutely clear in the explanatory notes to the statement of adjustments.

22. Modification of Trust Conditions by Non-Lawyers

It is required by the Law Society's *Code of Professional Conduct* that lawyers do not delegate authority to non-legal staff to amend trust conditions or undertakings, and accordingly no amendments to trust conditions or undertakings should be made or confirmed by non-legal staff. It is recognized that non-legal staff play a key role within their firms in facilitating real estate transactions, and often participate in discussions with other firms and other counsel when amendments to undertakings and trust conditions are required. While certain trust conditions are routinely amended on the basis of initial discussions with or between non-legal staff, this is a practice which is carried on at the risk of the lawyers involved. It should be recognized that amendments must be confirmed in writing by the responsible lawyer before they are binding. There are other matters which are more complex or controversial in which lawyers ought to be involved more directly from the outset. It is a lawyer's responsibility to ensure that he or she is available to supervise staff and to respond to requests and communications from other lawyers in a timely manner. If unavailable, it is the lawyer's responsibility to ensure that another lawyer is available to fulfill these obligations.

SCHEDULE "A"

TENANCY AT WILL AGREEMENT made as of the _____ day of _____,
20____.

BY:

(The "Purchaser(s)")

TO:

(The "Owner")

MUNICIPAL ADDRESS AND LEGAL DESCRIPTION:

(the "subject property")

IN CONSIDERATION of the Owner granting possession of the subject property to the Purchaser, prior to the Purchaser paying the Owner the full purchase price, plus interest, if any, the Purchaser does hereby agree with the Owner as follows:

1. THAT until such time as the entire cash to close, plus interest, if any, is unconditionally paid and released by the Purchaser to the Owner for the purchase of the subject property, the Purchaser shall be deemed to have taken possession thereof as a tenant-at-will only at a rent for use and occupation thereof, equivalent to interest at the rate equivalent to the posted weekly Bank of Canada Treasury Bill rate calculated as at the date the Purchaser takes possession of the subject property plus Three (3%) per centum per annum on the total purchase price, said interest to commence on the date of possession and to run to and including the date the premises are vacated. The said rent shall be paid by the Purchaser without any holdback, set-off, or claim for expenses that the Purchaser, or anyone else, may have incurred as a result of the said taking of possession, or otherwise; provided that no rent shall be payable if the cash to close, together with interest thereon, if any, is unconditionally released to the Owner on possession date.
2. THAT the Purchaser hereby instructs his solicitors to now deliver to the Owner's solicitors all monies which represent the difference between the cash balance to close and the estimated net mortgage proceeds.
3. THAT if, at the expiry of seven (7) days from the adjustment date for the sale and provided that the Vendor has fully complied with the terms and conditions of the Real Estate Purchase Contract governing the transaction, all of the cash balance to close (with the exception of a builder's lien or seasonal holdback, if any) plus interest thereon has not been unconditionally paid to the Owner, then:

- (a) The Purchaser shall deliver, at his cost, vacant possession of the subject property to the Owner within forty eight (48) hours after written demand by the Owner to the Purchaser or to the Purchaser's solicitor;
- (b) The Purchaser shall pay for all damages to the subject property caused due to the Purchaser's use thereof and which occurred prior to the delivery of vacant possession to the Owner. The damage referred to herein shall be deemed to include, but not be limited to, cleaning costs (if required) and the cost of removal of any goods or chattels abandoned on the subject property by the Purchaser,
- (c) The Purchaser shall pay for all utilities consumed during the Purchaser's possession of the subject property;
- (d) The Purchaser shall pay the cost of registration of a Transfer of Land back into the name of the Owner and any and all other costs and expenses incurred by the Owner in regaining vacant possession and restoring the title and property to its prior condition, or in enforcing and realizing upon any unpaid vendor's lien. The costs referred to herein shall include, but not be limited to, the legal fees and costs on a solicitor/client basis and any costs incurred in regard to restoring title into the name of the Owner shall be deducted from the cash difference paid by the Purchaser to the Owner in accordance with paragraph 2 hereof;

4. THAT this Agreement is in addition to and is in no way whatsoever to affect, nullify, alter or amend any trust condition imposed on the Purchaser or his solicitor, by the Owner's solicitor, in the use or registration of any Transfer of Land or title document in his favour, and the Purchaser agrees that the taking of possession is not to be construed by him as a matter of right arising out of the registration of tide to the subject property into the names of the Purchaser.

5. THAT the covenants and agreements contained herein on the part of the Purchaser shall be binding jointly and severally on all persons comprising or obtaining an interest in the property through the Purchaser's interest in the Real Estate Purchase Contract.

Witness to the signatures of
The Purchaser(s)

(This Agreement must be signed by the Purchaser(s) and the spouse of the Purchaser)