

Western Law Societies Conveyancing Project

The Protocol (Alberta) Update

Prepared for the Legal Education Society of Alberta

39th Annual Refresher Course

Real Estate

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Introduction

The concept of the Western Law Societies Conveyancing Project was first introduced to the Alberta real estate bar at the LESA Banff Refresher Course in May 2000. The consultation paper that was presented in May 2000 sought direction from real estate practitioners on the viability and practicality of introducing revised real estate standards for lawyers that would facilitate and expedite residential real estate transactions.

The Law Society was provided with an overwhelming degree of support for the proposal at the Refresher course in May 2000. Together with our law society partners in BC, Saskatchewan and Manitoba, the Project was funded, a project director hired and a project plan was developed. The residential real estate Protocols were developed for each province and were effective as of February 15, 2001 across Western Canada.

The main purpose of the Project was to introduce new practice standards in the residential real estate closing process (the Protocol) backstopped by the existing lawyers' insurance programs. The main aspects of the Protocol focus on: 1) closing the "registration gap"; 2) eliminating the lender's need for a real property report (unless there is a known defect); and 3) providing the lender with the option of a short form opinion. In Alberta, the Protocol practice changes are covered through the lawyer's mandatory insurance program - Alberta Lawyers' Insurance Association (ALIA).

This paper and the presentation at the LESA refresher course is not intended to be thorough revisiting of the reasons, purposes and operation of the Protocol. It is intended to provide a brief update on some common questions asked regarding the operation of the Protocol.

After five years in operation, the Protocol has provided residential real estate lawyers with a new tool to meet their clients' needs. Our experience over the last five years indicates that the Protocol closing process has gained acceptance with lawyers and the lending industry. Overwhelming feedback from Alberta lawyers and our claims history indicates that Protocol closings work well and that Protocol claims are few and far between. Where there have been claims, they have been quickly and expeditiously resolved.

What is the Protocol?

The Protocol is a set of revised real estate practice standards backstopped by the existing mandatory lawyers' insurance program (ALIA) to facilitate the expeditious closing of residential

real estate transactions. It is not that much different from how a real estate transaction is completed “the old way” but it does require a shift in thinking.

The Protocol obviates the need for a transfer back, the tenancy at will and an unpaid vendors’ lien caveat. It may also obviate the need for interim financing. It allows the release of funds on the closing day without having to wait for confirmation of registration of the transfer and the mortgage.

When can you use Protocol?

- Cash deals
- Cash to assumption of mortgage
- Cash to new mortgage transactions where the lender provides Protocol instructions
- Refinancings where the lender provides Protocol instructions
- See list of lenders – this list may not be exhaustive, so check your instructions and ask!

Protocol applies to:

- Residential real estate transactions
- Single family dwelling (including rental and vacation properties not exceeding four units)
- Multi-family or existing condominium units to a maximum of four (4) units
- Existing condominiums
- Turnkey new homes
 - lien period must have expired and/or lien fund held
 - RPR recommended for the purchaser and lender
- Leasehold titles within National parks
 - All consents and other steps for National Park transactions must be complied with – the inclusion of national park leasehold titles has been the only amendment to the Protocol since the introduction in February 2001

Protocol does not apply to:

- Commercial real estate
- Agricultural properties
- Mortgages on new construction where the mortgage is a “draw” mortgage
- Sale of a condo unit by a developer (section 14(3) of the Condominium Property Act)
- Unrepresented party on the other side

How do you close a transaction using the Protocol?

- First, read the Protocol! The Seller’s lawyer’s process is in Part D and the Buyer’s lawyer’s process is in Part E.
- In Protocol transactions:
 - Conduct all the same due diligence
 - Conduct all the same searches
 - Prepare the mortgage documentation the same way
 - Calculate the statement of Adjustments and shortfall funds the same way
 - Payout mortgages and pay real estate commissions the same way.

- Ensure that the lender instructions provide for a Protocol closing. Follow the lender's instructions and check the lender's reporting requirement. Some lenders want the short form opinion; others have their own form.
- The Protocol does not change the obligations under the real estate purchase contract
- Seller's lawyer (Part D of the Protocol)
 - prepare usual transfer documents
 - Protocol trust letter sent to buyer's lawyer with transfer documentation
- Buyer's lawyer (Part E of the Protocol)
 - Perform all usual due diligence; Obtain cash difference; Mortgage documentation executed by buyer and lender's requirements complied with; Insurance in place; Real property report and compliance in place
 - On closing day:
 - Conduct title search to ensure no surprise registrations
 - Comply with lender instructions on the release of funds – do they need the short form opinion at this point? – obtain funds if not already provided by the lender
 - Release funds to seller's lawyer
 - Immediately submit documents to LTO for registration
 - Report to lender as instructed when registration complete

Real Property Reports

- **Lenders**
 - The Protocol provides that a residential real estate closing can proceed without a real property report for a lender this works well for refinancings
 - An opinion can be provided to the lender that an RPR is not necessary unless there is a known defect
- **Buyers**
 - We start from the premise that the buyer needs and wants to know the state of the property upon purchase. Find the problem if there is one and fix it!! Lawyers fix problems.
 - The standard real estate purchase contract provides that the seller is to provide the buyer with an RPR with municipal compliance (or non-conformance)
 - It is necessary therefore to deal with the RPR and compliance before closing - business as usual!
 - If the standard contract is not used or the RPR clause has been crossed out, advise the buyer of the options. If the buyer does not want an RPR, obtain a specific waiver from the buyer confirming they have decided to proceed without an RPR.
 - See the CBA Real Property Section recommendations

Converted Protocol

- One of the advantages to closing on Protocol is that the cash difference is not required from the buyer until closing day
- If the transaction has proceeded 'the old way', can the lawyers agree to convert to the Protocol? Assuming the Protocol is available (ie: the lender is on board), yes, amend the trust conditions to Protocol trust conditions and proceed; and then ask yourself, why didn't I do the Protocol in the first place!

What if the Documents do not register or there is something wrong?

- First, don't panic!! Look and see what the problem is. It may be that the problem can be easily resolved. Also remember that the seller's lawyer has agreed to assist in correcting any deficiencies.
- If the problem is unlikely to be resolved quickly, report the matter to the Alberta Lawyers' Insurance Association.

Protocol Claims

- Few and far between!! Of 843 real estate related claims since 2001, only 9 have been related to the Protocol.