BC Notaries
A TRUSTED TRADITION

BEST PRACTICE MANUAL

Residential Real Estate Conveyancing

The material is this manual is for illustration purposes only and is not to be copied or shared.
Some of the information is compiled from the following sources:

Continuing Legal Education Society of British Columbia
Conveyancing Deskbook
Real Estate Practice Manual

The Society strongly recommends that its members subscribe to the CLE course materials noted above.

Law Society of British Columbia
Practical Legal Training Course

April 2009

Index

BC Notaries
A TRUSTED TRADITION

Residential Real Estate Conveyancing

The focus of this manual is on practice and procedure, rather than substantive law. The manual includes procedural checklists and many forms and precedents required in basic conveyancing practice. It is up to you to exercise your professional judgment about the correctness and applicability of the material and you must also refer to the relevant legislation and other sources as required. The forms and precedents should be used only as an initial reference point. Do not rely on them to the exclusion of other resources or without careful consideration of their applicability. Each real estate transaction is unique; the choice of a course of action and the content of the necessary documents depends on the particular circumstances and your client's instructions.

Introduction

"Best practice dictates" is the theme of this manual. It is *best practice* to understand all conveyancing issues. Consequently, this manual addresses professional responsibility arising with respect to conveyances after the purchase contract has been signed.

A discussion of the Society's Rules and Principles for Ethical and Professional Conduct (PEPC) relevant to this matter is included throughout.

Real estate conveyancing and related lending transactions traditionally form the primary area of practice for most notaries. For various reasons, this area of practice is no longer as lucrative as it was in the past. Real estate transactions are increasingly more complex and the courts are increasingly prepared to make lawyers and notaries the insurers of the interests of all parties to a real estate transaction, whether or not those parties are your clients. At the same time, the public is more likely to shop for price as well as service.

The definition of negligence has been changed by the courts in recent years. The "ordinary prudent solicitor" test seems to have been superseded by a test, based on public policy considerations, of avoiding foreseeable risk. The BC Supreme Court has held that the

Return to Index

finding of negligence against lawyers and notaries follows "from an application of the normal principles of negligence law – i.e., the existence of a duty of care, the foreseeability of injury, and the failure of the defendant [lawyer/notary] to take reasonable care to avoid such injury – rather than from a finding of accepted practice procedures or standards as such". Furthermore, it was suggested "that a publication or checklist widely circulated in the legal profession, indicating a standard 'sanctioned by common usage'," would be more useful than the opinion of another lawyer. In other words, the Courts would rather hear evidence that a legal practitioner uses a checklist or sanctioned practice manual to insure procedure rather than relying on "expert opinion" evidence.

Relying on Staff

Claims have been made against notaries who have not reviewed the work of their support staff. *You are completely responsible for all business entrusted to you as a notary public.* You must maintain *personal and actual control* and management of all services you provide. While tasks and functions may be delegated to staff and assistants, the notary must maintain direct supervision over each non-notary staff member. They must be supervised carefully and their training should be updated on a regular basis. Blaming staff is not a defence. *You are responsible for avoiding errors in your office.*

Best practice dictates:

- that you have regular staff meetings to discuss expectations
- that you personally review all incoming and outgoing documents and letters
- that your staff understand what they can say to clients on the phone or in person and what they cannot

Although many aspects of the real estate transaction fall within the responsibility of the notary, conveyancing support staff are usually the first line of communication with other parties involved in the real estate transaction, such as the other lawyer or notary, the realtor, the lender, and so on. It is your responsibility to insure that your staff understands the limits of their ability to give advice, take instructions, and commit to services.

Talking to your Client

The most common reason for insurance claims and complaints relates to communications with clients. Notaries either fail to communicate effectively with their clients or fail to record communications. Even if you perform according to the requisite standard of care, misunderstandings with your client may arise. A notary who fails to keep an adequate record of client communications will find it difficult to refute an allegation of professional negligence. A client's memory is often selective and the value of written confirmation cannot be overstated.

Return to Index

Best practice dictates:

- *Retainer letters* – that you confirm instructions in writing and define the responsibilities you undertake to do and those you don't. A well drafted, relevant retainer letter (Form 1) will allow you to help your client recognize the implications of unrealistic goals and objectives.
- *Conveyancing Software* – that you use a professional software program to prepare conveyance documents, ensuring a professional look to the product you produce and to ensure consistency in letters, forms, and documents.
- *Checklists* – that checklists (Form 2) are used for confirming advice and instructions and for recording information obtained in client interviews.
- *Notes to file* – that notes of conversations with clients be made. Because reconstruction of the sequence of events often can be critical to the outcome of litigation, notes and memoranda should be dated and filed chronologically. In some cases notes should be made of the precise words spoken.
- *Follow up letters* – that you confirm instructions in writing – by email, letter, faxed memo or other written communication.
- *"If it isn't written down, it didn't happen"* is the professional standard operating procedure.

Taking Instructions

To ensure that you have all the information necessary to conduct searches and prepare documents, it is important that you ask your client some specific questions. The questionnaire (Form 3) provided gives examples of the types of issues you may want to address with a purchaser before you start working on the file.

The questionnaire applies to residential conveyances only. It is not appropriate for use in commercial conveyances, conveyances of manufactured homes, or long-term leases. The checklist assumes that you act for the purchaser, not the vendor or mortgage lender. It also assumes that the land title office involved accepts documents for registration on a "pending" basis.

Best practice dictates:

- that you consistently use a standard written questionnaire (Form 3 Intake Questionnaire for Buyer), (Form 3A Intake Questionnaire for Seller) of questions for client intake conversations or meetings
- that you explain the general process involved
- that you explain your need to meet with the client a few days before closing to sign documents
- that you explain that closing proceeds will be required by certified cheque or bank draft

Return to Index

Scope of the Retainer

Taking a narrow view of your retainer can cause disputes. For example, a notary who fails to advise a client that the residential property being purchased is subject to a restrictive covenant or easement may attempt to justify that failure by claiming: *"I was only instructed to convey the property to the client. I did not prepare the purchase contract. The contract was binding when it came to me."* A judge may take a more expansive view of your responsibility. Consistent use of a retainer letter (Form 1) that encloses copies of registered charges likely to affect the purchaser's use of the property, may avoid these problems. The letter should include a list of services that you will perform and a list of services that you will not perform. Have your client acknowledge receipt of the letter for your file.

Many notaries take the view that obtaining copies of non-financial charges is a matter of preference for the client. *This is not best practice*. Your role is to advise your client and you cannot do that if you don't have all of the relevant information. When you consider the investment being made by your client in the property being purchased, copies of non-financial charges that will remain on title are not something your client *should have* but something he *must have.* If you routinely order the copies and have a meaningful discussion with your client about what they are, your client will not have any objection to your having ordered them on his behalf. Where your client has already received the copies as part of the contract negotiation process, a waiver in writing confirming your clients' instructions not to obtain the copies is required.

Best practice dictates:

- That you use a retainer letter (Form 1) to limit and confirm the scope of your service
- That you obtain copies of all non-financial charges that will be assumed by a buyer of property or obtain a specific, written waiver when you do not obtain them
- That you discuss all non-financial charges with your client and retain written confirmation of the discussion on your file
- That you obtain a print of the registered plan and have your client identify (by initials, for example) the lot being purchased

Return to Index

Multiple Clients

Care must be taken when acting for more than one buyer or seller of property. If, for instance, the parties are spouses, often only one of them will contact you to give instructions. In some cases, that can lead to the other party alleging that actions concerning him or her were taken without instructions.

Best practice dictates:

- That transaction proceeds be payable to all parties to the transaction and that you not take instructions to issue separate cheques unless such cheques are being paid to outside lawyers for the clients, in trust, with consent. For example, in a separation or divorce situation, the husband and wife may each have divorce lawyers and your role will be to facilitate a property transfer. In that case, the parties may require the proceeds be paid to one or both of the outside lawyers who will then work towards an agreement between the parties as to disposition.
- That the difference between joint tenancy and tenancy in common must be clearly explained to all clients and clear instructions taken as to how they intend to hold title.
- Where property is sold by joint tenant owners, one cheque should be issued to both owners jointly. If the owners intend to split the proceeds between them, they should make the split themselves once they have received and processed your cheque.
- That if one client is appointed to provide you with instructions, that all other parties confirm that appointment in writing.

Consent/Conflict of Interest

You may be asked to represent more than one party in a real estate transaction. The most common situation is acting for the purchaser and the lender in a residential conveyance transaction. Another situation is acting for both transferor and transferee in a family transaction. A Consent/Conflict letter (Form 5) should be obtained from the borrower and the lender or from the transferor and the transferee.

Rule 11 deals with this and you are responsible for insuring that you review and comply with the rule when asked to act for more than one party to a transaction.

Rule 11 does not allow a notary to act for two or more parties in a conveyance transaction unless the transaction is a "simple conveyance" or falls within the geographic exception. The definition of "simple conveyance" raises issues involving both the nature of the lender or the vendor, and specific aspects of the transaction.

A mortgage to an institutional lender, under the Rule, is stated to mean banks, trust companies, life insurance companies, and credit unions, but not other types of corporate lenders and certainly not "private" lender individuals or companies.

Return to Index

When the Rule does permit you to act for two or more parties in a transaction, you must recommend to all parties, in writing, that each obtain independent legal representation and continue to act only if the parties acknowledge and waive that recommendation, also in writing. A Consent to Act for More Than One Party (Form 5) should be obtained and kept in your file.

Best practice dictates:

- *Before agreeing to act, examine the transaction carefully*. It is important to know what the requirements of all of the parties are before agreeing to act. For example, if you act for the lender and purchaser in a residential conveyance transaction and where the title search indicates that there are non-financial charges that might adversely affect marketability or use; you should be alert to the fact that the lender's requirements may make the borrower's contractual commitments difficult, resulting in a conflict.
- *Use conflict letters and amend them to suit the transaction at hand*. A conflict letter has little force and effect if it doesn't say what it needs to say. A conflict letter should recommend that each party retain their own lawyer or notary; that if they choose not to, then you will act on condition that nothing is kept confidential from the other party. The conflict letter should also confirm that if a conflict does arise between the parties, then you cannot continue to act for either party.

Rule 11

11.02 *(a)* ***ACTING FOR BOTH SIDES***

No Member shall act or continue to act for more than one party where there is or might be a conflict of interest between any of the parties for whom the Member acts. A conflict of interest exists where the duty and loyalty owed by the Member to one party is, or is likely to become, adverse to the duty and loyalty that the Member owes to another.

(b) ***ACTING FOR MORE THAN ONE PARTY TO A CONVEYANCE TRANSACTION***

Where a Member is asked to act for more than one party with different interests in a conveyancing transaction, the Member shall recommend that each party have independent representation.

Having given that recommendation, a Member shall not act for one such party in a conveyancing transaction unless:

(i) *due to the remoteness of the location of the Member's practice it is impracticable for both sides to be separately represented; or*

(ii) *the transaction between vendor and purchaser is a simple conveyance involving only the assumption of one or more existing mortgages or agreements for sale where the vendor has received a release from the*

Return to Index

lender under the vendor's covenants, and the payment of the cash balance, if any; the payment of all cash for clear title; the discharge of one or more existing mortgages or agreements for sale, and the payment of the cash balance, if any; or

(iii) the transaction is a simple conveyance coupled with a mortgage for an institutional lender such as bank, trust company, life insurance company or credit union; or

(iv) the transfer of a leasehold interest where there are no changes to the terms of the lease;

but the above exceptions do not include:

(v) the sale and purchase of a business or any conveyance resulting therefrom;

(vi) a lease other than as set out above;

(vii) a conveyance where there is a mortgage back from the purchaser to the vendor, or an agreement for sale;

(viii) an assumption of mortgage or agreement for sale where the vendor has not been released from the personal covenant contained in the document;

nor shall a Member act for another party if that party is:

(ix) elderly and/or infirm; and/or

(x) uneducated and/or unsophisticated in the matter at hand.

(c) ***AGREEMENT TO ACT FOR MORE THAN ONE PARTY***

If a Member acts for more than one party in the circumstances of b(i), (ii), (iii), (iv), above and agrees to do so, then the member shall:

(i) inform each such party in writing, as soon as possible and in any event prior to completion, that the Member acts for more than one party and that should a conflict arise which cannot be resolved, the Member cannot act for any party and that no information received in connection with the matter from one can be treated as confidential so far as any of the others is concerned;

(ii) obtain the consent in writing of all such parties; and

(iii) raise all issues which may be of importance to any such party, and explain the effect and consequences of these issues to all parties

Return to Index

Independent Legal Advice

Sellers, especially sellers who own clear title to their property, often want to avoid the cost of retaining their own lawyer or notary. Often, the seller will ask the purchaser's notary to officer certify his signature on the necessary documents. Please note Rule 11.2(d) and (e):

(d) ***UNREPRESENTED PARTIES***

(i) *If one party to a real estate conveyance transaction does not want or refuses to obtain independent representation, the Member acting for the other party may allow the unrepresented party to execute the necessary conveyancing documents in the Member's presence as a witness or officer if the Member advises the party in writing that:*

- *the party should obtain independent representation but has chosen not to do so;*
- *the Member does not act for the party nor represent the party with respect to the conveyancing transaction; and*
- *the Member has not advised the party with respect to the conveyancing transaction but has only attended to the execution and attestation of the conveyancing documents.*

(ii) *If the Member witnesses the execution of the necessary conveyancing documents as set out in (d)(i) above, it shall not be necessary for the Member to obtain the consent of the other party or parties for whom the Member acts.*

(iii) *If one party to the conveyancing transaction is otherwise unrepresented but wants the Member representing another party to the transaction to act for the party to remove existing encumbrances, the Member may act for the party for those purposes only and may allow the party to execute the necessary conveyancing documents in the Member's presence as witness if the Member advised the party in writing that:*

- *the party should obtain independent representation but has chosen not to do so;*
- *the Member's engagement is of a limited nature and*
- *if a conflict of interest arises, the Member will be unable to continue to act for the party.*

(e) ***REFUSAL OF INDEPENDENT REPRESENTATION***

If one party does not want independent representation, or wants only limited representation to remove any existing encumbrances, the Member

Return to Index

acting for the other party shall recommend to the former that he or she obtain independent representation and shall confirm this recommendation in writing.

If the party refuses independent representation, or insists on only limited representation, the Member shall confirm in writing to that party that the Member does not act for that party, or, alternatively, the limited nature of the Member's engagement, as the case may be.

Even when the party obtains independent legal representation on your recommendation, where the transaction is on terms that are very favourable to your client and not favourable to the other party, the other party may claim that the legal advice he or she was given is either incorrect or not recorded in writing.

Best practice dictates:

- that you be aware of the possibility of unforeseen complications and ensure that the unrepresented party understands that he or she is not being represented
- that you document in writing the nature of the situation and confirm in a letter the lack of representation.

An Acknowledgement for unrepresented parties (Form 6) should be used.

Undertakings

An undertaking is a personal promise and cannot be released by anyone other than the person who accepted it. You must ensure that undertakings are not given by support staff. Undertakings must be given only in circumstances you control, where you have the ability to fulfill the undertaking without reliance on third parties. If the other notary or lawyer representing the other party to your transaction refuses to give an undertaking, you should be aware that the matter may warrant further investigation.

Rule 10.

10.01 *An undertaking is a written or implied absolute and irrevocable covenant and commitment to act without fail upon certain circumstances, facts, deeds or evidence. [Except in the most unusual and unforeseen circumstances (such as alleged fraud) the justification for which rests upon the member.]*

10.02 *A Member is personally responsible for undertakings given and for the breach of any undertaking given by them, notwithstanding that the Member may carry on practice under a name that does not set out the Member's name specifically. An undertaking given by a Member can be released or altered only by the recipient of that undertaking. Consent to amend must be received in writing.*

Return to Index

Transfer of Incorrect Property

Claims have been made by buyers who discover that they live in one property but are the registered owners of another. Other claims are made by clients who have bought only part of the property they intended to buy. If your client is unable to identify the property on the plan, investigations at the city or municipality may be in order. A BC Assessment search will indicate how many legal descriptions (PIDs) comprise the property. Making such additional searches to verify title is even more important when you are conveying property outside your regional area of practice as you will not be as aware of the vagaries of municipal title organization as you would be in your own back yard.

Best practice dictates:

- that you obtain a copy of the registered subdivision plan or strata plan
- that you have your client identify the lot or strata lot they have agreed to purchase
- that you take care to verify the legal description where appropriate
- that you have your client initial the lot or strata lot they are buying on the plan and keep a copy on your file

Parking Stalls

Purchase contracts for strata titled properties often indicate that the seller will provide the buyer with one or more parking stalls as part of possession. Developers use a variety of mechanisms to allocate parking stalls to buyers:

- as designated limited common property on the strata plan.
- by special resolution passed by the strata corporation and filed in the Land Title Office designating parking stalls as limited common property
- by long term lease of the parking stalls in favour of a related incorporated company and then having that company partially assign the lease to buyers. Such leases may or may not be registered in the Land Title Office by parking stall license or exclusive use agreement.

Parking stall ownership or use gives rise to many claims by strata lot buyers. Your client may be under the impression that he owns or has exclusive use of a particular parking stall, when in fact he doesn't.

Problems arise, and claims are made, when buyers are incorrect about the parking stalls they believe they own or have for their own exclusive use.

Lenders, as well, must be considered when dealing with strata lot mortgages. Many lenders require that you confirm and verify that the exclusive use of one or more parking stalls be included as part of the property purchase.

Return to Index

Best practice dictates:

- that you review the parking plan registered as part of the strata plan
- that you attempt to determine from the seller's notary the scheme of ownership, rights, or allocation of parking stalls for the strata corporation
- that you confirm in writing the seller's information directly with the strata corporation or management company
- that you have the seller execute the proper form of transfer or assignment of the parking stall, if required.
- that your retainer letter clearly limits your liability for verification of parking stall use or ownership.

The same principles also apply to the allocation of storage lockers.

Return to Index

Tax Considerations

Property Transfer Tax

Claims arise when notaries fail to properly deal with property transfer tax. The *Property Transfer Tax Act* (PPTA) requires that anyone acquiring an interest in land, pay a percentage of the fair market value to the provincial government on registration of the land transfer document. The tax is collected by the land title office when the application to transfer is filed. The rates of tax are:

- 1% of the first $200,000 of fair market value; plus
- 2% of the balance of the fair market value.

"Fair market value" is defined in Section 1(1) of the PPTA and should be reviewed whenever you are unsure whether the value declared on your client's transfer is "fair" for purposes of PPT payment. There are anti-avoidance rules in the Act that prevent parties from artificially reducing the fair market value of the property by registering certain interests, including lease agreements for less than 30 years, against the title to the property.

There are four forms of Property Transfer Tax Return provided in the Act. They are:

- General
- Special
- First Time Home Buyer
- Electronic

The electronic filing version of the form combines the first three into one.

For a full discussion of Property Transfer Tax issues, you should review the Taxation of Real Property and Notaries Services unit (Module 5, Unit 4) of the Notary Preparatory Course material.

Non-Resident Sellers

The purchase contract usually contains a declaration that the seller is a resident of Canada. If this is completed in the negative, if the seller's address on title or on any purchase contract is an address outside of Canada, or if the agreement is signed by a third party on behalf of the registered owner, further investigations should be made by the buyer's notary to avoid the ramifications of s. 116 of the *Income Tax Act*. These investigations should be directed to the real estate licensee or the seller's lawyer or notary and, unless a satisfactory clearance certificate is obtained from the Canada Revenue Agency, the buyer's notary should hold back the required percentage of the purchase price in order to avoid potential liability.

Return to Index

It is important that you remember that within the scope of a conveyance transaction, it is **not** necessary for you to:

- determine whether or not the seller is a resident of Canada;
- make application to CRA for clearance; or
- give accounting advice in that regard.

Those matters should be referred to the seller's accountant or directly to CRA. Determination of residency *as at closing date* is a question of fact. The seller can ask the International Tax Services department of CRA to make that determination—only after CRA receives completed form(s) NR73 or NR74, available at www.cra-arc.gc.ca.

Purchaser's Requirement to Inquire as to Residency

Under the *Income Tax Act*, the purchaser is required to make a "reasonable inquiry" as to the residency status of the seller in a real estate transaction. You generally do that by asking for a declaration of residency as part of your package of sale documents. (See Form 8 for a sample declaration).

If the seller is a non-resident and the appropriate inquiry has not been made, you may be personally liable for professional negligence to the purchaser for the amounts due to the Canada Revenue Agency.

If, however, there is a question about residency or whether the seller is being candid about his/her residency status, the level of inquiry increases.

- Perhaps the contract is ambiguous?

- Perhaps the seller's mailing address on title is a foreign address?

If the buyer is unsure as to the residency status of the seller or has information suggesting that the seller is a non-resident—but the seller signs a residence declaration (as a Canadian) anyway—the buyer should request further confirmation. CRA suggests that the buyer ask for copies of hydro and telephone account statements, employment records, or other tangible evidence of residency.

The point is this: **the buyer is required to inquire.** The onus is on the seller to satisfy the buyer's inquiry that the seller is a resident of Canada. Generally speaking, where there is evidence to the contrary, the buyer must investigate the seller's residency status in more depth; in the absence of any evidence to the contrary, the declaration constitutes the inquiry.

Return to Index

How Much to Hold Back?

The general rule is:

1. If the property has never been income-producing and was occupied by the seller or his/her family for personal use, the holdback is 25% of the sale price. One certificate will be issued per non-resident seller.
2. If the property has been income-producing, the holdback should be calculated at 25% of the land value and 50% of improvement value as pro-rated from current assessed values to actual price. One certificate for each holdback will be issued per non-resident seller.
3. If the seller is in doubt about the income producing status of the property, he should seek advice from a tax advisor.

Conflict arises when the seller's Notary disputes the amount of the holdback. "The seller lost money so there won't be any tax." Even if this is apparent, the buyer's protection should not be waived or reduced because CRA circulates the application internally to ensure all Canadian taxes have been paid in respect of all other Canadian transactions by the same seller.

So, while there may not be any tax owing on the sold property, there could be tax liability for the seller elsewhere that could be captured by the clearance application.

On the other hand, there is rarely justification for a holdback of a full 50% of sale price in a residential transaction unless the seller is a non-resident trader of land.

When to Remit?

The buyer's obligation to remit the holdback funds to CRA *arises* on the 30th day of the month following the month of closing. CRA, however, prefers that funds not be remitted if the seller's application for clearance has been received and is in process. Upon request, a letter will be issued by CRA authorizing continued retention of the holdback until further notice. If the seller has been remiss and has not made application for clearance (which must be done not later than 10 days after closing), CRA may require that the full holdback be remitted.

When Acting for the Seller

You must counsel your client regarding residency status. The declaration signed will be relied upon; a seller must understand the significance of the residency question. When in doubt, the seller must be advised to seek advice from his accountant or directly from CRA. He must be advised that the onus is on him to satisfy the purchaser's inquiry on this point.

If the seller is a non-resident, he should be encouraged to apply for clearance as soon as possible, to reduce the potential holdback period. Applications can be filed when the contract is accepted. The turnaround time for CRA to issue the certificate can be 8 to 10 weeks from application, depending on the complexity of the application and CRA's workload.

Return to Index

If the seller does not have enough money from the sale to satisfy the holdback requirement and to pay out his mortgage, hardship provisions may apply (subject to local policy). The onus of proof of hardship rests with the seller but if successful and the application is not complicated or lacks information, certificates can sometimes be issued within days. The best person to apply for clearance on an expedited basis on behalf of the seller is an accountant who has a professional understanding of the hardship process and who may be able to work with CRA for a quick course of action.

10-Day Reporting Requirement

As mentioned previously, the seller has an obligation under the Act to report his disposition of the property within 10 days of the closing date. This requirement doesn't affect the purchaser's holdback, but BC Notaries acting for non-resident sellers are reminded that **you must communicate this obligation to the seller as soon as you become aware that residency is an issue.**

Best practice dictates:

- That you use the form of undertaking provided at Form 9 when there is a non-resident holdback issue.
- That you provide the seller with a form of statutory declaration as to residency with your sale document package.
- That you make further inquiries as to the residency status of the seller if you or your client is suspicious about the seller's residency status.

Goods and Services Tax

As of January 1, 2008, the Excise Tax Act imposes a 5% value-added tax generally to the sale or rental of real estate (land and buildings) for commercial use, and to the sale of new or substantially renovated residential dwellings. Residential rentals and the resale of used residential dwellings are generally exempt from GST unless the resale takes place in the course of a business that involves the purchase, substantial renovation, and resale of used residential dwellings.

Some important issues arise in this regard.

- Is GST included in the price
- Does the purchaser qualify for a rebate
- Is the rebate (if any) assigned to the seller

Where the rebate is assigned to the seller, it forms part of the purchase price on which GST is calculated. A rebate factor of 103.2% is used to determine the value of the consideration for the purchase (GST Memorandum 19.3.1.2) Form 10

Return to Index

GST should be shown as a separate item on the statement of adjustments.
GST is also payable on:

- Legal fees
- Real estate commission
- Chattels and personal property that transfer with real property (but not on personal property such as fridges and stoves if it is included in the sale of a used residential building)
- Sale of rental pool residential units (rented for periods of less than one month)

A prudent purchaser will request representations from a seller as to whether the sale is taxable or not. To be protected from GST liability where a seller asserts that the sale is exempt from GST and the purchaser has no information to the contrary, the purchaser should obtain a written statement from the seller that the supply of the real property is exempt from GST under one of the provisions referred to in s. 194 of the ETA. The statement should be in the form of a certificate obtained as part of the completion document package, prior to closing. If the statement is incorrect and the transaction is not exempt from GST, the seller and not the purchaser will generally be liable for the GST.

Forms of GST Certificates are included at Form 11. Each certificate corresponds to one of the exemptions set out in Part 1 of Schedule V to the ETA, referred to in S. 194 of the ETA.

Although GST is generally payable by the purchaser, it is often the seller's use of the property that determines whether the sale is exempt from GST. The seller is usually also required to collect and remit the GST payable unless the seller is a non-resident of Canada or resident in Canada merely by virtue of having a permanent establishment in Canada, or the purchaser is registered for GST purposes and is a non-individual. The purchaser is required to collect and remit GST if:

- The seller is a non-resident or is resident only because of a permanent establishment
- The purchaser is registered for GST purposes and is not an individual
- The purchaser is registered for GST purposes and is an individual and the property is not a "residential complex" or place of burial
- The seller and the purchaser have made an election under s 2 of Part 1 of Schedule V; or
- The purchaser is a "prescribed recipient".

Best practice dictates:

- That where a purchaser states he is a GST registrant, you contact CRA before closing to confirm that the purchaser's GST number is validly issued by CRA and that the number was assigned to the purchaser.
- You can verify GST registrations online at http://www.cra-arc.gc.ca/esrvc-srvce/tx/bsnss/gsthstrgstry/menu-eng.html.

Return to Index

NOTE: Being registered for GST purposes is different from being a GST registrant; the ETA defines "registrant" to include persons who are required to be registered. Therefore, having a purchaser certify as a GST registrant is not sufficient.

If the seller is required to collect and remit the GST, the purchaser need not extract any further promises from the seller, or undertakings from the seller's lawyer or notary, to remit the GST. The purchaser's liability is satisfied upon remitting the tax owing to the seller. Where the seller is required to collect and remit GST, the seller is not required to be registered for GST purposes but is still obligated to remit the tax collected.

GST and Contracts of Purchase and Sale

When GST is payable on a transaction and is not collected, CRA generally assesses the seller. This can arise where the sale of property is subject to GST, but the contract of purchase and sale does not indicate whether the price is inclusive or exclusive of GST or is silent on whether GST is payable at all.

When this happens, s. 224 of the ETA gives the seller a right in limited circumstances to sue the purchaser to recover the tax that the seller should have collected. However, before a seller can rely on s. 224, the seller must have indicated in a prescribed manner (such as on an invoice or a receipt or some other written agreement with the purchaser) either the total GST payable or both the GST rate and the items that are taxable.

The courts have considered this matter many times and have generally held that ss 223 and 224 represent a code on this issue in that a seller has no common law right to recover from the purchaser. In one New Brunswick Court of Appeal decision, the court said that a right of action against a purchaser for the reimbursement of GST is not limited to s. 224.

In addition, the courts have generally held that the failure by the seller to stipulate that the GST was in addition to the price means that the seller has not conformed with s. 223(1) and accordingly is not permitted to recover GST from the purchaser. Various court cases have dealt with this matter and a seller caught in this position should seek legal advice from a qualified tax lawyer as soon as possible on discovery that GST has not been stipulated in the contract.

Purchaser Rebates

A purchaser who is an individual is eligible for a GST new housing rebate if he or she has purchased a new or substantially renovated residential complex such as a house, mobile home, or condominium from a builder as a primary place of residence if the price is less than $450,000. Section 254 of the ETA sets out when the rebate may be available to a purchaser:

- where the purchaser intends to reside in the premises as his or her primary place of residence
- where a relation of the purchaser intends to reside in the premises as his or her primary place of residence

Return to Index

The rebate is 36% of the GST paid on property costing $350,000 or less, to a maximum rebate of $6,300. This maximum amount is reduced at $1,000 intervals for new housing costing between $350,000 and $450,000. No rebate is available for residential complexes costing $450,000 or more.

Rebates may also be available for leases of residential complexes. Rebate Application Form 190E (Form 12) is prescribed and must be completed by the purchaser and must be filed within two years after ownership passes on closing.

If the seller agrees, the purchaser can claim the rebate directly from the seller, as agent of CRA, by deducting the GST rebate from the GST paid at the completion date. In this case, the application form must be completed by both the builder/vendor and the purchaser. Since not all information required by either party to establish qualification is present on the form, Forms 254-V and 254-P (Form 11) should also be completed by the seller and the purchaser, along with Form 190E (the Rebate application).

A new GST rebate was introduced in 2000, available to purchasers who acquire a "qualifying residential unit", if construction or substantial renovation of the unit commenced after February 27, 2000. In general, a "qualifying residential unit" is any "self-contained residence" if it can reasonably be expected that the unit's first use will be as long-term residential rental property (the primary place of residence of one or more individuals each of whom is given continuous occupancy of the unit, under one or more leases, for a period of at least one year). The amount of the rebate is computed in the same manner as the GST new housing rebate subject to a special allocation for purchases of multiple unit residential complexes.

Property Tax Adjustments

The Vancouver Real Property Section of the Canadian Bar Association has made recommendations for adjustment of property taxes when preparing statements of adjustments, in the absence of:

1. specific instructions from the client
2. specific provisions in the contract
3. a special fact pattern that indicates otherwise.

Best practice dictates:

- Before the due date – adjust net of the anticipated Home Owner Grant if both vendor and purchaser would be eligible to claim the grant in the year of sale but for the fact of the sale and only to the extent that both are eligible for the same amount of grant.
- After the due date – adjust on the amount actually paid
- The "estimated increase" for taxes be 5%

Return to Index

In Vancouver, advance taxes equal to one-half of the amount of the previous year's taxes are billed to property owners in February. If the seller has paid the advance taxes, but not the taxes billed for the year, the seller should receive a credit for the full amount of advance taxes paid and a debit for its *pro rata* share of taxes for the year.

For example: *John has paid his advance taxes in the amount of $1000.00. Last year's taxes were $2,000, net of the applicable Home Owner Grant. It is now April 15th.*

	DR	*CR*
Advance taxes paid by seller		*$1,000.00*
Seller's share of estimated taxes based on previous year plus 5% = $2,100.00 x 104/365	*$627.99*	

Interest and Penalties

Interest and penalties are charged for late payment of taxes. These should be debited to the seller and not adjusted between the seller and the purchaser.

Special Levies and Local Improvement Charges

The purchase contract should specify how local improvement charges are to be adjusted. The standard form MLS contracts usually provide that the purchaser will assume and will pay for all local improvement assessments from, and including, the adjustment date.

It is important to carefully review tax searches received from the city or municipality. Notice of local improvement assessments often appear as inconspicuous notations (eg "Bylaw 764 Loc Imp Pending") on tax searches.

In the absence of written agreement, the adjustment of local improvement charges between seller and purchaser can be difficult to resolve. The solution is to address this issue in the purchase contract.

Best practice dictates:

That in the absence of an agreement:

- Annual local improvement charges be adjusted to the extend paid or payable for the calendar year in which the closing occurs in the same manner as property taxes
- If the purchaser elects to pay the "commuted" amount following closing, the seller should not be penalized and the local improvement charges should be adjusted pro rata based on the annual amount otherwise payable for the calendar year in which he closing occurs
- If the seller has paid the "commuted" amount before the calendar year of the closing, no adjustment should be made.

Return to Index

Local improvement charges may be levied by a municipality several years after the work has been completed and the impending charge need not appear on title or be otherwise ascertainable by a purchaser. Some municipalities now make note on their tax searches that a bylaw has been passed approving local improvements, before the amount of the tax is available to post on the tax search.

Municipalities may also levy assessments for illegal use activities (such as grow-ops). Special care must be taken when reviewing municipal tax searches to determine if there is any indication that other levies, assessments, or taxes charge the property. If such indications appear, you should contact the City for further information and make a note of that inquiry in the file.

Return to Index

Gathering Information

If there is any comfort in residential conveyancing it is that many aspects are generally very straightforward. Basic searches are easy to do and usually easily identifiable. The successful notary will put office procedures in place and use them in every transaction so that the process becomes second nature, leaving you available to direct your mind to the unusual and problematic aspects of the transaction.

After a review of the contract of purchase and sale and a discussion of the matters raised in the client intake questionnaire (Form 3 or Form 3A), you can plan the conveyance. You can delegate the file generally to a staff member under your supervision.

Best practice dictates:

- that you conduct a title search and review it with the checklist as your guide
- that you obtain a print of the subdivision or strata plan
- that you obtain copies of non-financial charges
- that you review and investigate legal notations
- that you obtain a written tax search
- that you search the municipal tax records for local improvement or other charges
- that you obtain written water district searches (if any)
- that you obtain and review tenancy agreements or registered leases
- that you obtain Strata Property Act Forms B and F if the property is a strata
- that you obtain and review fire insurance binders (if required for lender)
- that you obtain and review survey certificate or title insurance (if required)

There are many matters that may affect title to or use of property being conveyed. When all searches and investigations are done, you should provide your client with your retainer letter (Form 1) confirming what searches were done, a summary of the results, and advice on matters that remain outstanding. The retainer letter is also where you should advise your client of what searches and investigations you will NOT do.

The retainer letter sets out what matters you will investigate and what matters you won't and each letter must be revised and amended to suit the transaction, depending on the contract and your instructions from your client.

Return to Index

Title Searches

Your primary role as a notary is to insure that your client receives what he bargained for under the purchase contract and to explain his obligations under the contract. The purchaser must obtain title without any charges other than those he has agreed to assume; the seller must deliver title in accordance with the purchase contract in order to obtain the sale price.

A search at the land title office may not disclose all matters that affect title; matters that are disclosed may need follow-up inquiries or investigations.

Section 23 of the Land Title Act lists exceptions to the indefeasibility of the seller's title that ultimately encumbers the title to be transferred to the purchaser.

In general, land includes things affixed to it. In each case, it is a question of fact whether something is a fixture or a chattel. Buildings are normally defined as fixtures and are included as part of the land. However, a building, or a portion of it, may be owned separately from the land underlying it. For example, buildings may be strata titled under the *Strata Property Act*, buildings or parts of them may be included in air space parcels under Part 9 of the *Land Title Act*, and some ground leases purport to reserve for the tenant the ownership of buildings constructed under those leases.

Most land in British Columbia falls within the provincial land title system and is governed by the *Land Title Act*. The Act creates a method of title registration based on the "Torrens system". That system provides that registration raises an "indefeasible title", good against the world, without concern for past defects in the chain of title, and subject only to the specific exceptions set forth in the statute. The BC land registration system is a modified Torrens system. The *Land Title Act* creates certain rights and obligations; however, rights and obligations created under the common law remain except where they are specifically modified by the L*and Title Act*. For a more complete discussion of the land system in British Columbia, see the BC Notaries Preparatory Course Units in Module III.

There are three land title offices in British Columbia:

- Victoria
- Lower Mainland (holding Prince George, Prince Rupert, New Westminster and Vancouver titles)
- Kamloops (holding Kamloops and Nelson titles)

The boundaries of each land title district are determined by regulation.

The Land Title Act is provincial legislation and does not govern federal land such as Indian reserve lands. Some Indian reserve lands, however, are also included in the provincial land title system. All transactions are handled through Indian and Northern Affairs Canada in Ottawa, which has regional offices throughout British Columbia. If the land is registered provincially, it may be dealt with provincially for registration purposes, but must also be

Return to Index

registered in the Indian land registry in Ottawa. Similarly, the Vancouver Port Authority handles land and water leases relating to foreshore property in BC that is owned by the federal government. Other water or foreshore licenses and leases are administered by Land and Water British Columbia on behalf of the Ministry of Sustainable Resource Management and various federal harbour commissions.

In order to search title, you need the legal description. This description can be obtained in various ways:

- by a title search agent with the civic address
- by a BC Assessment search of the civic address on BCOnline
- through municipal tax department searches of the civic address

Each document registered in a land title office is assigned a registration number. Documents can be registered "manually" in person by you or an agent, or "electronically" from your desktop. All land title offices are now computerized, but some exceptional titles are not on computer and must be searched manually. An example is the titles for co-operative buildings developed before the enactment of the *Condominium Act* (now the *Strata Property Act*).

Computerized titles are assigned a parcel identifier number to facilitate computer searching. The PID is unique to that parcel and does not change unless the parcel is subdivided or consolidated. The computerized title contains both pending and registered documents. Charges are listed, but not necessarily in order of priority.

Legal Notations

Legal notations are not defined in the *Land Title Act*. In most cases, they provide information or notice of the matter to which it relates. Some legal notations have the effect of preventing any dealing with the title without first meeting a particular condition or obtaining consent. Therefore, it is very important to order and review a copy of what was filed to initiate the registration of the notation on title and to read it in light of the appropriate legislation.

Notations may include references to covenants or easements benefiting the land and to the application of certain statutory provisions. If a restrictive covenant or easement has been created over other land for the benefit of a parcel (the dominant tenement) or if a parcel benefits from a party wall agreement, the benefit is registered on title as a notation. In addition, many statutes provide for a notation to be made against the title.

Common notations are registered to note that the property is located in an agricultural area and the *Agricultural Land Commission Act* may apply, or it is in the vicinity of an airport, so that the A*eronautics Act* may apply. Less common notations relate to bylaw infractions and can have serious consequences for a property owner or buyer.

Return to Index

Reviewing Charges

You should examine provisions of a document that creates a lien, charge, encumbrances, or notation on title in order to determine the actual interest created as well as its effect. Registration of a document does not necessarily guarantee its enforceability.

Charges creating an interest in land include:

- easements
- equitable charges
- judgments
- leases
- life estates
- certificates of pending litigation
- caveats
- mining agreements
- mortgages and assignments of rents
- options to lease
- options to purchase or rights of first refusal
- party wall agreements
- restrictive covenants
- rights of way
- agreement for sale or right to purchase
- assignments of lease
- claims of builders lien
- *Land (Spouse) Protection Act* entries
- Land Use Contracts (although they are no longer registered)
- *Strata Property Act* liens

Each charge must be reviewed in light of the purchase contract. All charges not excepted in the contract must be removed unless they have been otherwise accepted. For example, the following charges must be removed by the seller before closing unless otherwise agreed between the parties:

- certificates of pending litigation
- caveats
- *Land (Spouse) Protection Act* entries
- tax sale notices
- *Strata Property Act* liens
- *Land Tax Deferment Act* charges (although they can be paid out with the sale proceeds provided a letter is delivered to the LTO with the transfer confirming payout)

Return to Index

In many cases, these charges are dealt with by undertakings; however, you must be very careful to insure that the parties have *contractually agreed* to the use of undertakings to pay charges that require payout.

Duplicate Titles

The registered owner can apply to take out his Duplicate Certificate of Title if the property is clear of financial charges such as mortgages or agreements for sale. The duplicate title must be withdrawn by application signed by ALL registered owner and must be returned to the land title office and cancelled before a transfer, mortgage, or agreement for sale can be registered. This does not prevent other charges from being registered, such as long term leases, claims of builders lien, judgments or caveats.

Some financial institutions or private lenders take the owner's duplicate certificate of title as security for loans, although this practice is less common than it used to be. Pledging the title as security for a loan may create an equitable mortgage that, although not registrable, may have priority over certain charges, such as judgments, which can attach only to the interest beneficially held by the judgment debtor.

More recently, owners have decided to withdraw their duplicate title for security reasons. Due to media attention on identity theft and title fraud, some older owners might be well advised to withdraw the title and keep it in a safety deposit box so that no one can transfer the title fraudulently. This is an option for nervous owners that should be considered on a case by case basis.

Great care must be taken by the owner to safeguard the duplicate title while it is out, as it must be returned in order for the owner to deal with the property in the future. If the duplicate is lost, it can be time consuming and costly to apply to the land title office for a replacement duplicate. The *Land Title Act* (Section 193) allows the registrar to issue a provisional title if he or she is satisfied by affidavit that a duplicate indefeasible title has been lost or destroyed and if notice of intention to issue such provisional title is published in appropriate newspapers. The process for satisfying the registrar lies with the registrar and is dependent on the circumstances in each case. It is NOT RECOMMENDED that duplicate titles be lodged with you for safekeeping as this can create long-term liability issues that must be addressed even after you cease practice.

Miscellaneous Notes

Miscellaneous notes must be checked separately on the computer. Miscellaneous notes incorporate what would formerly have been noted on the index but would not have appeared as a charge on title. Posting plans, stand-alone statutory right of way plans (those without accompanying right of way agreements), crown grant information, highway gazette notices, registration of leases relating to city streets where no title is raised for the street, may all be registered under "MN".

Return to Index

Pending Applications

BC land title offices use a pending registration system. The system allows a document to be submitted for registration to the cashier at the land title office, endorsed with the date and time of filing, and assigned a number. The number is then entered by a clerk as a pending number on the computer file if the title is on computer, or marked up in the index book as a pending number if the title is not on computer.

Pending numbers are not always assigned or in the order of filing. Therefore, before relying on a pending application, sufficient time must be allowed for the numbers to be marked on all documents that are filed before the document in question. Only then should a post-registration search be conducted. All land title offices endeavour to record all pending applications by the close of business each day. The amount of time that should be allowed before doing a post-index search depends on the workload of the land title office and the number of documents being filed for registration. A good rule of thumb is to wait a minimum of one hour after registration before conducting a post-index search. When the document is ultimately registered, however, it will be effective as of the date and time it was submitted for registration.

Another consideration when conducting post-registration searches is when the buyer's mortgage funds are advanced. There is case law that says that, notwithstanding registration, the mortgage takes priority when the funds are advanced. For example, if you register your transfer and mortgage at 2:30 on Tuesday, but the bank does not advance the mortgage funds until 9:00 a.m. on Wednesday, your post-registration search must be conducted on Wednesday, after the funds have been advanced. If a post-search was conducted on Tuesday at 3:30, you must conduct another search on Wednesday after 9:00 a.m. and before paying out the sale proceeds.

Best practice dictates:

- That you conduct a pre-search prior to, but on the same day, that you submit documents for registration
- That you wait at least one hour after submission before conducting your post-registration search, or after receiving mortgage funds, whichever occurs later

Until registration is complete, there can be no certainty as to the order of registration of documents. The *Land Title Act* does not guarantee the accuracy of the notation of a pending application or, in the case of non-computerized titles, of the indexes. Furthermore, a document on which registration is pending may be affected by the filing of a certificate of pending litigation or caveat. However, the standard procedure is to close on pending registrations, despite the risk.

Paying out on pending registration is the procedure relied on in almost every residential conveyance in British Columbia; the result is that the purchaser pays the purchase price without having received title to the property or any of the protections afforded by the *Land Title Act*. The purchaser has only your opinion to support the release of funds. With the implementation of computer systems, registration times are shortening; however, for the time being, it appears that purchasers and their lawyers and notaries will remain unprotected by the *Land Title Act* while awaiting final registration.

Return to Index

Electronic Filing

One of the advantages of using the Land Title Office's Electronic Filing System (EFS) is that, because it will give almost instantaneous notice of pending numbers, the completion of post-closing documents can begin sooner. The Land Title and Survey Authority has advised that at least one hour should pass after the time the land title office has received and marked up a document with pending numbers through the EFS before a post-filing search is conducted. This allows for the possibility of a manual filing taking place at or near the time you electronically file your documents.

The land title office is open for manual filings of paper documents from 9:00 a.m. to 3:00 p.m. Monday to Friday. The EFS is available longer hours: Monday through Saturday from 6:00 a.m. to 8:00 p.m. If you file by EFS before 8:30 a.m. or after 5:00 p.m. weekdays (or at any time on Saturday), the Director of Land Titles advises that no waiting period is necessary to conduct a post-filing search. This is because no paper documents are received during these hours and the land title offices plan to have all paper documents filed on a weekday marked up by 5:00 p.m. that day.

All you need to know to get started with electronic filing can be found at https://www.bconline.gov.bc.ca/EFS/

Strata Property Searches

When you act for the purchaser of a strata property, you need to conduct some special investigations.

You must contact the strata corporation through its management company or strata council (if self managed) to obtain a Form B, Information Certificate. That certificate gives information regarding the strata corporation such as:

- the amount of the monthly maintenance fees
- whether the fees are paid up to date
- the amount in the contingency reserve fund
- whether there are any special resolutions proposed but not yet voted on
- how many units are rented in the building
- whether the strata corporation is involved in litigation

Section 44 of the Strata Property Regulation provides that the strata corporation may charge only $35.00 plus 25 cents per page for photocopying, for the Form B, although most charge rush fees if the certificate is required in less than 7 days.

A Form F Certificate is required to be filed with the transfer document at the land title office. The Form F is confirmation that all maintenance fees are either paid or arrangements for payment have been made.

Return to Index

Best practice dictates:

- that you obtain a Form B when dealing with a strata property
- that the Form B be issued no longer than within 30 days of the date of completion of the transaction so that the information is current

When reviewing the title search for a strata lot, in addition to matters set out above, you should pay particular attention to:

- the strata plan, including the parking plan
- unit entitlement
- interest upon destruction (for plans filed prior to 1998)
- voting rights
- limited common property
- the general index
- charges against common property
- bylaws and amendments

Insurance is another issue important in a strata lot acquisition. The strata corporation must have insurance. The property insurance must be on the basis of full replacement value, and insure against major peril, as set out in the Strata Property Regulation, and any other perils specified in the bylaws. As well, the strata corporation must obtain and maintain liability insurance to insure the strata corporation against liability for property damage and bodily injury. Contact the strata corporation's insurance agent and request that the purchaser be identified on the policy and obtain written confirmation that this has been done.

Municipal Tax Searches

A written statement of outstanding taxes and arrears must be obtained. In organized areas, this information can be obtained from the local municipal office or city hall. In unorganized territories, the information can be obtained from a rural tax search on BCOnline or from the nearest government agent's office. In general, taxes are levied for the calendar year but are paid mid-year and, in the City of Vancouver, in two parts throughout the year. If taxes for the current year have not been levied, they can be estimated based on the previous year's taxes. The BC Branch of the Canadian Bar Association, Real Property Section, has determined the following shall be usual practice for tax adjustments unless otherwise agreed by the parties in the contract:

e.g. Current year taxes $1600

- where taxes are not yet assessed, a 5% increase shall be added to the previous year's taxes for adjustment purposes
  adjustment date is March 31- seller's share is $1600+$80=$1680 x 90/365=$414.26 – buyer pays taxes when due

Return to Index

- where the taxes are paid for the current year, taxes should be adjusted on the amount actually paid
  adjustment date is July 31 – buyer's share is $1600x154/365=$675.07

- where taxes have not been paid for the current year and where the buyer intends to live in the property and has not claimed a home owner grant for the current year, and the seller lived in the property and would have been able to claim a HOG for the current year had she not sold the property, the adjustment should be based on net taxes
  adjustment date is March 31 – seller's share $1680-$470x90/365=$298.36

- where taxes have not been paid for the current year and where both the buyer AND the seller would be entitled to the increased home owner grant if both were claiming grants on different properties, the taxes should be adjusted net of the increased grant
  adjustment date is March 31 – seller's share $1680-$740x90/365=$231.78

- where taxes have not been paid for the current year and where either the buyer OR the seller would not be entitled to the increased home owner grant if both were claiming grants on different properties, taxes should be adjusted on taxes net of the lower home owner grant amount
  adjustment date is March 31 – seller's share $1680-$470x90/365=$298.36

- where the taxes have not been paid for the current year and where the buyer is an incorporated company or the buyer is an investor who would not be entitled to claim a home owner grant at all for the property, the taxes should be adjusted on the gross amount unless the seller is in a position to claim the grant prior to closing, in which case, taxes should be adjusted on the amount actually paid.
  adjustment date is March 31 – seller's share $1680x90/365=$414.25

The municipal tax search should also state whether any local improvement taxes or similar charges have been established or are in the process of being established, for the property. If there is no statement on the search about these matters, further inquiries may have to be made.

Best practice dictates:

- that you obtain a written tax search and do not rely on verbal searches

Bylaw Compliance

In a residential conveyance, the buyer's notary normally does not perform searches with respect to bylaw compliance, although some mortgage lenders require that these investigations be carried out. If you are not going to conduct such a search, the client should be informed.

Return to Index

Environmental Searches

All property owners are open to environmental liability. The most difficult form of liability for you and your clients to deal with effectively is potential liability for as-yet undiscovered contamination. The potential exists in every property, but it is impossible to eliminate that risk no matter how much investigation is done.

So, it is important for you to advise your client of the potential risk and the legal position of purchasers who will become responsible for a site under Part 4 of the Environmental Management Act. The risk of liability for property owners has increased significantly in recent years. The presence of contamination may severely affect the value of the property and may make redevelopment and financing difficult. It is unusual for environmental searches to be carried out in the purchase of residential properties. However, past or present use of the property, the location of the property, or any other circumstances may indicate possible contamination or other potential environmental hazard. You should raise the possibility of environmental liability and seek instructions from the purchaser with respect to conducting an environmental investigation. If the client instructs you not to perform any such searches, those instructions should be confirmed in your retainer letter. (Form 1)

For more information on environmental searches, refer to the Continuing Legal Education, British Columbia Real Estate Practice Manual.

Heritage Searches

The possibility of an unregistered heritage designation exists only in rare cases involving residential property. Though active investigations need not be made in every case, note that certain local governments have designations in place that may impede or restrict future use or development of the property. A building may be designated under heritage legislation or bylaws, or simply "flagged" in the municipal records for future heritage consideration. In either case, there will not necessarily be a notation on title to this effect. If the age or other special features of a building raise any suspicions or concerns a but heritage status, an inquiry should be made at the appropriate municipal office.

Encroachments

In most cases, encroachments will become evident if a lender requires a survey certificate. However, in seller financed or assumed mortgage transactions, where title insurance is obtained such a certificate may not be required and it may be impossible for the buyer's notary to determine physically if there are encroachments. The buyer should be advised of the consequences of not having a survey done and that a survey certificate should be obtained if there is any doubt as to encroachments or compliance with local government setback requirements and, if any event, in order to ensure that the size of the property is as expected.

If the survey reveals that municipal setback requirements have not been complied with, a "comfort letter" from the municipality indicating that no action is contemplated is usually sufficient to satisfy the lender's requirements. A survey previously made by the seller

Return to Index

may be acceptable to the lender if accompanied by the seller's statutory declaration that no alterations have been made to the structures since the date of the survey. The existing survey must be tendered to the lender early enough to allow a new survey to be commissioned if the existing one does not satisfy the lender's requirements. The surveyor who prepared the existing certificate may claim copyright in the survey certificate and this should be addressed when considering using a certificate in such circumstances.

Notary's Opinion Protocol

As an alternative to a survey or title insurance, Royal Bank of Canada now allows Notaries to close mortgage transactions using the Opinion Protocol. For the moment, this protocol applies **only to Royal Bank of Canada mortgages.**

The **primary purpose of the protocol** is to allow you to advise the lender in a residential mortgage transaction that the lender does not need an up-to-date building location survey before it can fund a loan secured by a mortgage, provided no known building location defects exist.

The protocol describes:

- the effect of a protocol opinion;
- the loan transactions that quality for the protocol; and
- the requirements that must be met for a Notary to issue a protocol opinion.

Effect of Protocol

Provided your file is compliant, your opinion satisfies the lender that a current building location survey need not be obtained.

If a building location defect exists that would have been disclosed by a standard building location survey done prior to the advancement of the mortgage funds, The Society's insurance fund is available to cover the bank's loss.

What Constitutes a Compliant File?

You will have complied with the protocol if your Master File contains the following.

1. A fully completed checklist (Form 13)
2. Copy of existing survey and declaration of seller (in a purchase matter) or borrower (in a refinance matter) OR a signed waiver of your advice to obtain a new survey (Form 14)
3. Copies of nonfinancial charges OR a signed waiver regarding nonfinancial charges (Form 15)
4. Copy of your Site Location Certificate (Form 16)
5. Copies of any other documents you consider necessary to the protocol.

Return to Index

Checklist

The Protocol Checklist must be used in every file where you intend to give this opinion. A number of checklists have been drafted for various transaction situations.

- Acting for both lender and borrower
- Refinance
- New purchase
- Acting for lender only

Review the checklists and protocol declarations and opinions carefully before implementing the protocol in your office.

It is imperative that your staff understand:

- the limitations of the opinion;
- the due diligence; and
- reporting requirements that must be met in each and every instance.

The precedents for the protocol have been included in the Society's Pro-Convey software program and are posted on the BC Notaries' Private Website.

General Procedure

1. Review the checklist to determine the nature of the transaction and the requirements that apply.

2. Review RBC's mortgage instructions. Ensure they have been fully met. If the lender has accepted any qualifications regarding the loan—other than a known building location defect, you must confirm the lender's instructions in your usual fashion before the mortgage funds are released.

3. Obtain and review all easements, rights of way, or similar charges on title and review them with the borrower. If the borrower refuses to authorize you to obtain copies of these charges—or allows copies to be obtained but refuses to authorize you to review them, you must confirm in writing the borrower's refusal and your advice to the borrower regarding the risk of that refusal. You are then relieved of the obligation to obtain and review these charges.

4. Ask the borrower if a building location survey is available. If it is, obtain and review it. Have the borrower sign a declaration that nothing has changed since the last time a building location survey was prepared.

5. If a survey is not available, ask the borrower to sign a declaration that he or she is unaware of any survey-related problems.

Return to Index

6. Where the borrower is also a **purchaser**, ask the seller, through his or her lawyer or Notary, to provide: a survey, if one is available; and a statutory declaration that nothing has changed since the last time a building location survey was prepared. Append that document to the seller's provided survey.

If no building location survey is available, ask the seller to provide a statutory declaration that he or she is unaware of any survey-related problem.

7. Where the transaction is a **purchase**, recommend that the borrower obtain an up-to-date building location survey, explaining that without a survey, the borrower has no specific assurances as to the location of the buildings in relation to the lot boundaries; the impact of any constraints on building location such as easements; and rights of way or the dimensions of the property or the buildings.

If the borrower does not wish to obtain a building location survey, you must document your advice to the borrower as to the advantages of a survey and the fact that, in the event of an unknown building location defect, only the lender benefits from your protocol opinion.

8. Where you act for the **lender** only:

    - Ask the borrower, through his or her lawyer or Notary, for an existing survey. Once you receive it, review it.

    - Ask the borrower, through his or her lawyer or Notary, to sign a declaration that nothing has changed since the last time a survey was prepared.

    - If no survey exists, ask the borrower to sign a declaration stating that he or she is unaware of any survey-related problems.

If all these steps have been carried out **without discovery** of a building location defect, you may close, using the protocol opinion.

If your due diligence **does uncover** a building location defect, either from a review of an existing survey or through your review of the public documents, you must advise your client(s) of the defect and obtain instructions on how to proceed.

If the lender is still prepared to advance the mortgage funds, you must prepare and deliver to the lender a protocol opinion qualified as to known building location defects—BEFORE releasing the mortgage funds. Your qualified opinion must

- describe the known defect;
- state that it may impair the lender's security; and
- confirm the lender's instructions to fund the mortgage despite the known defect.

If the lender suffers an actual loss from the known defect, the lender bears the loss.

Return to Index

- Each member is personally responsible
- to adhere to these procedures; and
- to ensure that his or her file contains copies of all documents and checklists and that the file confirms that the procedures outlined above have been followed.

Protocol Opinion Retention Policy

The current file retention policy DOES NOT cover protocol opinions.

Accordingly, members must keep a SEPARATE Site Location Certificate Master File, either in paper form or electronically, for all protocol opinions and backup documentation—because title defects have a longer limitation period than regular conveyance files.

Compliance with the requirements of the protocol is an auditable activity. It will be inspected by Practice Inspectors and reported to The Society. Practice Inspectors will be asking you to produce your Site Location Certificate Master File for review.

The Notary Opinion Protocol is an important value added service for notaries. Although the requirements appear to be onerous, they aren't. They are routine steps that a prudent practitioner would take when acting for a lender and buyer. If you carefully review all protocol precedents and then review them with your conveyance staff, there is no reason you should not utilize the protocol when the need for a survey or title insurance arises with respect to RBC.

Seller's Marital Status

If the title search indicates that title is in the name of one party and the buyer knows that the seller is married, the buyer should be asked whether he or she knows anything of the status of the seller's marriage. If the buyer has knowledge of a marital dispute, consider obtaining the buyer's instructions to request the seller's spouse's written consent to the sale. This will ensure that there has not been a triggering event under s. 56 of the *Family Relations Act*. If title is held by both spouses but the contract of purchase and sale has been signed by only one spouse, it is unlikely that a valid contract exists unless the contracting spouse has some other authorizing power (such as a valid Power of Attorney).

Corporate Sellers

A corporate seller need not provide a buyer with a directors' resolution confirming approval of the sale except in uncommon circumstances in which a company's articles preclude the sale of land without a resolution. A buyer is entitled to rely on the binding effect of the original agreement and on the proof of execution on the transfer (the "officer certification"). Some inquiry should be made, however, as to whether the sale constitutes a sale of substantially all of the assets of the company, which requires a special resolution of members. The seller's corporate lawyer should satisfy you with an opinion or by providing a certified copy of the members' resolution. If there is uncertainty as to the signing officers and their authority, a company search may provide more information, or a statutory declaration could be obtained from one of the officers of the company.

Return to Index

Best practice dictates:

- that where the seller is a company, you conduct a company search at the corporate registry to ensure that the corporate seller is in good standing (and that the land has not escheated to the Crown)

Insurance

The buyer should be advised to arrange for insurance coverage and to determine the lender's requirements. The lender's insurance requirements are usually well documented. In most cases, it is sufficient to obtain a binder or cover note confirming that insurance has been placed and specifying the insured, the property coverage, the insurer, and the loss payee. A binder can usually be issued in a day or two by a broker. However, if a certified copy of the policy is required, adequate time should be allowed to obtain this. A "standard mortgage" clause usually is required by the lender in order to ensure that any mishap caused by the owner's negligence is insured and to avoid the consequence of any misrepresentation by the owner. Mortgage lenders usually require that insurance coverage be effective on the completion date. Accordingly, the buyer should be advised to arrange for insurance from, and including, the completion date (if mortgage financing is involved).

Strata lots are insured in the name of the strata corporation. Evidence of insurance usually is in the form of a rider to the master policy showing the owner and the lender as a loss payee for the specified strata lot. The owner of the strata lot is not named as an insured but as the person entitled to share in proceeds of the insurance in proportion to his or her interest upon destruction. The strata corporation's requirement to maintain general liability insurance is also set out in the Strata Property Act (s. 150).

For lending purposes, a "cover note" is all that should be required from the strata corporation with respect to insurance. The buyer, however, should be advised to obtain separate contents insurance for the strata lot and for any additional improvements to the unit. Many condominium projects in BC consist of bare land strata lots created by filing a strata plan which delineates only the lot lines and not buildings or other structures. In these cases, the premises are simply built as an improvement and the strata corporation is not obligated to obtain and maintain insurance on the buildings. In that case, the client should be alerted to the need for full property (fire) insurance identical to single family residential coverage. In many cases, the strata corporation does, in fact, obtain and maintain insurance as agent of the individual owners, however, this must be investigated as there should then be evidence of the strata corporation's authority to do so in the bylaws and the strata corporation should provide a true copy of the policy to the buyer.

For duplexes, the owners of both sides of the building usually share a common insurance policy and simply "split" the premium. If this is the case, the name of the insurance broker must be obtained and the annual premium adjusted between the buyer and the seller.

Return to Index

Closing Documents

This part describes the form, content, and method of execution of documents commonly required in real estate transactions.

Except where a document is a required form under a statute, all the documents should be used as a guide only and modified where necessary to reflect the particular transaction.

There are two methods of registration: paper forms registered manually, in person or by an agent; and electronic registration, enabling authorized users to submit land title instruments through BCOnline for registration at a land title office. The electronic forms are produced at Forms 17, 18, 19, and 20.

The Land Title and Survey Authority of BC (LTSA) is responsible for land title registration matters. Cheques for land title services must be made payable to "Land Title and Survey Authority of British Columbia".

For instructions on how to complete the paper and electronic forms, see the Land Title Transfer Forms Guidebook (the "Green Book"). BCOnline (www.bconline.gov.bc.ca) also provides a link to the electronic filing manual and electronic filing online tutorial.

Who Prepares Conveyancing Documents

The standard form contract of purchase and sale provides that the buyer must bear all costs of the conveyance. The rules for preparation of documents are:

- if the cost of conveyance is to be borne by the buyer, the buyer must prepare the transfer and the vendor must be ready to execute it;
- if the contract doesn't address the issue, the common law rule will apply and the seller will be responsible for preparing the transfer documents.

Usual Documents

The usual documents required for a conveyance transaction are:

1. Form A, Freehold Transfer (for fee simply transfers), or
2. Form C, Assignment of Lease (for leasehold transfers)
3. Property Transfer Tax Return (General, First Time Home Buyer, or Electronic)
4. Form B, Mortgage, Part 1 (if there is a mortgage)
5. Buyer's Statement of Adjustments
6. Seller's Statement of Adjustments

Return to Index

7. Trust Reconciliation
8. GST Certificate (inquiry under the *Goods & Services Tax Act*)
9. Declaration of Canadian residency (*Income Tax Act*)
10. Letter of undertaking
11. Strata Property Act Form F Certificate (if Strata)

Statements of Adjustments

Statements of adjustments serve three primary purposes: they define and calculate necessary financial matters to be adjusted; they may confirm the method of payment of the purchase price; and they provide for disbursement of the sale proceeds.

The purchase contract usually provides for the adjustment of financial benefits and obligations relating to the property (the "payables and prepaids") as of a specified adjustment date. The calculation of adjustments on an aggregate basis determines the net sale proceeds payable to the seller on closing.

The statement also provides for the method of payment of the purchase price by the buyer to the seller. In addition to cash (of which the deposit usually forms a part), the following credits in favour of the buyer may be included:

- Outstanding balance under an assumed mortgage
- The principal amount of a mortgage back to the seller
- The net proceeds of new financing arranged by the buyer

Other matters adjusted include:

- Strata maintenance fees
- Deposits (if not paid to the realtor)
- Property taxes
- Municipal utility rates for water, sewer, garbage & recycling
- Tenant rental fees and security deposits

The Statement of Adjustments also provides for disbursement of the sale proceeds to the seller and third parties such as:

- Real estate commission
- Outstanding strata maintenance fees
- Outstanding property taxes

For the buyer, the Statement normally also allows for collection of:

Return to Index

- Property Transfer Tax
- Goods and Services Tax
- Legal fees, disbursements and taxes

General Principles

The general principle of closing adjustments is that it is the responsibility of each party to pay for the expenses incurred during the period of that party's ownership of the property.

Adjustment Date

The purchase contract normally provides for an adjustment date, the date on which the responsibility for payment of the items changes from the seller to the buyer. The standard form real estate contract states that "The Buyer will assume and pay all taxes…from…and including, the date set for adjustments…" Accordingly, the buyer pays all expenses for the property from and including the adjustment date (except for mortgage assumption amounts which are adjusted as of the closing date. This will be discussed again later). If the contract is unclear as to when the adjustment date is, and if the closing date is the end of one month or the first day of the next month, it is reasonable to assume that the parties intended that the seller be responsible for all payments up to and including the last day of the month. This should be confirmed with both parties however.

Mortgage Assumption Adjustments

If the buyer is assuming the seller's existing mortgage, he or she needs to know the effective date of the assumption. The purchase contract normally does not include this information.

If the effective mortgage assumption date is not specified in the purchase contract, there is a difference of opinion in the legal community as to the effective date of assumption. Some are of the view that the mortgage assumption should be treated just like any other adjustment because it relates to the use and enjoyment and also to the income-earning capacity of the property, so the balance owing under the mortgage should be determined as of the adjustment date. The prevailing view, however, is that because the assumption of existing financing is part of the method for financing the purchase by the buyer, the mortgage should be adjusted on the date that the purchase price is required to be paid to the seller – the closing date. The Vancouver Real Property Section of the Canadian Bar Association has decided that standard procedure shall be that where the contract or the parties have not specified a date for assumption, the mortgage balance, interest and payments should be adjusted as of the closing date rather than the adjustment date.

The exact mortgage balance for assumption purposes must be obtained in writing from the lender as part of your information gathering process. The following matters should be considered:

Return to Index

- Where the interest on a mortgage being assumed is a floating rate, a confirming statement must be received on the closing date and the balance readjusted, if necessary
- Where the balance outstanding is subject to the seller's last mortgage payment "being honoured by the bank", confirmation that the payment has cleared must be received on the closing date or a holdback should be negotiated until the payment has cleared
- Remember that interest included in mortgage payments is paid in arrears. If the adjusted date of the assumption is the last day of the month, then the buyer would be required to make the next payment due on the first day of the next month. Adjusting for mortgage payments on mortgage assumptions is always very confusing to conveyancers. The bank expects to receive payments in order and without exception, so it is important to determine when the last payment was made and who will make the next payment and whether an adjustment needs to be paid with respect to it

  Example

  Principal balance as at June 1 (after payment) *$181,110.00*

  Mortgage Payment due July 1st *$ 1,500.00*

  Interest Rate 7%

  Assumption Date is July 28

  Calculation to determine per diem rate: $181,110. x 7% /365 = $34.73

  $34.73 x 27 days

  Debit Seller $181,110 principal

  Debit seller 27 days interest from July 1st to 27th - $937.71

  Purchaser to make July 1st payment of $1,000

  In this example the adjusted balance would be $81,110.00. The purchaser would be required to pay $1,500 for the July 1st mortgage payment and the interest portion of the payment would have to be adjusted to "pay" the buyer the seller's "share" of the interest from June 1st to July 27th (the day before the assumption date) — $937.71. If the payments are made more frequently than monthly, you would determine the per diem rate — $181,110 x 7% / 365 = $34.73 x the number of days since the seller's last payment date up to the day before the assumption date.

If the lender collects property taxes as part of the payment, the buyer will have to "buy back" the property tax credit from the seller, meaning that the buyer will have to be debited and the seller credited with the amount in the property tax account as advised by the lender.

Often, a lender will charge an "assumption fee" and, unless the parties have agreed otherwise, this amount should be collected from the buyer and paid to the bank on closing.

Return to Index

When ordering your assumption statement, you should, on behalf of the buyer, require the lender to confirm the following information in writing:

1. consent to the sale and assumption if there is a "due on sale" clause contained in the mortgage;
2. that the mortgage is in good standing and that there are no defaults or arrears;
3. that the mortgage registered in the land title office is the entire agreement and has not been modified;
4. the per diem interest rate (see above);
5. the insurance requirements;
6. details of any collateral security; and
7. the tax account status.

If required by the agreement between the parties, you should ask the lender to confirm that it has qualified the buyer to assume the mortgage and that a release of the seller's personal covenant will be available to the seller upon request pursuant to Section 24, *Property Law Act*.

Property Taxes

Property tax adjustments are discussed earlier in this manual.

Notes

Notes to the statement of adjustments are often a matter of contention between the parties. Notes should be restricted to matters that relate exclusively to the adjustments made and should involve only:

1. methods used to calculate specific adjustments
2. explanations about verification of specific adjustments
3. methods used to arrange re-adjustments after closing where adjustments were made based on estimations
4. arrangements about agreed holdback monies; and
5. payments to third parties and each notary or lawyer's responsibility for those payments.

The notes should reflect the agreement that the parties have made and should not be used to amend the deal (by adding warranties, covenants, and agreements) unless the seller and the buyer have previously expressly agreed to the amendments. A seller is entitled to refuse to sign a statement of adjustments that contains additional covenants; but if the buyer subsequently waives the requirement to sign the statement, the seller is not entitled to refuse to complete. If additional terms have been approved by both parties, it may be more convenient to include them in the notes to the statement of adjustments rather than to prepare a separate agreement amending the original purchase contract. In

Return to Index

those circumstances however, either consideration should be provided for or the statement adjustments should be signed under seal.

Holdbacks

In general, holdbacks are used to secure obligations of the seller either to the purchaser or to third parties. A holdback must be agreed upon by the parties; the buyer cannot arbitrarily decide to hold back funds. Unfortunately, insurance claims and complaints arise because the parties have not adequately set out the circumstances under which the holdback can be released.

Best practice dictates:

- that you deal with a holdback matter as a separate retainer and charge separate fees accordingly
- that the agreement regarding the holdback set out the following:
  - the purpose of the holdback
  - the period in which it will be held
  - who will hold the funds (the seller's notary or the buyer's notary)
  - whether the holdback funds should be invested
  - who is entitled to the interest
  - what happens if the holdback period expires and the matter has not be dealt with

The most common reasons for holdbacks are:

- security for mortgage payments that haven't cleared
- security for strata special assessments
- security for strata maintenance fees that haven't cleared
- builders' liens
- deficiencies (where the improvement is brand new or recently renovated)
- security for utility payments to be billed after closing (municipal metered water readings)
- non-resident withholding (discussed earlier in this manual)

Trust Reconciliation

In every real estate transaction, or any transaction involving client trust funds, it is important that you prepare a "cash in/cash out" statement to reconcile the funds received in, and disbursed out, of your trust account. The purpose behind preparing such a statement is to determine, with certainty, that sufficient cash will be available to complete the transaction.

Return to Index

Best practice dictates:

- That you prepare a trust reconciliation statement before closing a conveyance transaction

The importance of preparing a trust reconciliation statement cannot be overemphasized; it is not safe to rely on the statements of adjustments because they can balance when the cash in/cash out statement indicates a shortfall. Statements of Adjustments are often amended by the parties before signing and it is simply too easy for you to rely on the wrong version of the statements. An in/out statement serves as a quick, accurate reference on closing date to ensure that cheques are issued in the proper amount, and it is a good checklist of financial receipts and payments.

Errors and Omissions Excepted

The expression "errors and omissions excepted" (E. & O. E) is a phrase frequently appended to accounts in order to excuse slight or innocent mistakes or oversights. Statements of Adjustments usually contain an E. & O. E. provision. The effect of this qualification is to permit or require the parties to correct minor mistakes or oversights on the basis of the purchase agreement, and to preclude either of the parties from arguing that the statement of adjustments was the final basis for the closing adjustments. The E. & O. E. qualification will not exonerate you from liability for a loss arising out of your own negligence in preparing a statement of adjustments.

Return to Index

Undertakings

Rule 10 deals with undertakings:

10.01 *An undertaking is a written or implied absolute and irrevocable covenant and commitment to act without fail upon certain circumstances, facts, deeds or evidence. [Except in the most unusual and unforeseen circumstances (such as alleged fraud) the justification for which rests upon the member.]*

10.02 *A Member is personally responsible for undertakings given and for the breach of any undertaking given by them, notwithstanding that the Member may carry on practice under a name that does not set out the Member's name specifically. An undertaking given by a Member can be released or altered only by the recipient of that undertaking. Consent to amend must be received in writing.*

10.03 *A Member giving an uncertified trust check is undertaking that such check will be paid by the member.*

10.04 *In general, where a Member acting for a purchaser of real property accepts the purchase money in trust and receives a registerable conveyance from the vendor or the vendor's agent in favour of the Member's client as contemplated by the parties, then the Member is deemed to have undertaken to pay unconditionally the purchase* ***money*** *to the vendor or the vendor's agent upon* ***completion of registration****.*

The Society's Principles for Ethical and Professional Conduct (PEPC) deals with undertakings in section 10.

10. *Members should unconditionally honour any undertakings they give, any trust they accept and any trust cheque they authorize.*

See also: *Duty to the Notarial Profession (Section 11) and Responsibility to other Practitioners (Section 9) in PEPC.*

Although conveyancers have been using undertakings to close real estate transactions for many years, it wasn't until relatively recently that this practice was incorporated in the real estate Contract of Purchase and Sale. The changes to the contract were prompted by the British Columbia Court of Appeal decision in the 1989 case of *Norfolk v. Aikens*. In that case, the British Columbia Court of Appeal refused to uphold an order of specific performance in favour of a buyer on the grounds that the buyer was not "ready, willing, and able" to complete the transaction. The buyer, Mr. Norfolk, depended on mortgage financing to complete the purchase of Ms. Aiken's property. The standard form Contract of Purchase and Sale (prior to March 1999) that the parties' agents used indicated that the parties had agreed to "cash for clear title." The court stated that the undertakings provided by the buyer's solicitor were not authorized by the contract and therefore were not binding on the

Return to Index

seller. Since the buyer had only received mortgage approval, and not the mortgage funds, he had no cash with which to complete the transaction and so lost his claim for specific performance.

The Court of Appeal criticized the accepted practice established by conveyancers of exchanging undertakings to close transactions as a deviation from the terms of the Contract of Purchase and Sale as it existed at that time. The Court of Appeal stated that there had to be an express agreement between the parties as to how the closing would be performed and in the absence of such an agreement they were obligated to follow the terms of the Contract.

The *Norfolk v. Aikens* decision has therefore resulted in the practice of including the two specific clauses in the Contract of Purchase and Sale reproduced in Form 21, wherein the parties agree that the transaction will be completed in reliance on their conveyancer's undertakings. The undertakings are referred to in clauses 13 (Buyer Financing) and 14 (Clearing Title) (commonly referred to as the *"Norfolk Aikens"* clauses).

There are a couple of issues that you should be aware of with respect to clauses 13 and 14 in the contract of Purchase and Sale:

▲ Clause 13 obliges the seller's Notary or lawyer to pay and **discharge** registered financial charges (mortgages, agreements for sale, tax liens, builders liens). The discharge documents must be executed by the holder of the financial charge, a person or institution over which a Notary or lawyer has no control. A Notary or lawyer should not undertake to do anything beyond their control, such as discharge a financial charge. The first paragraph puts a seller's Notary or lawyer in the position of giving an undertaking which she may not be able to perform. A chargeholder may refuse or simply neglect to execute a discharge document or execute a form of discharge unregistrable in the Land Title Office. Such a situation will put the seller in breach of her contract as well as put the Notary or lawyer in breach of an undertaking.

▲ Clause 14 obliges the buyer to pay the purchase price under the three listed conditions, but does not require a satisfactory post-registration title search be received by the buyer's Notary or lawyer. Practically speaking, the lender's Notary or lawyer will not permit mortgage funds to be released until such a search has been done and shows all documents registered or pending and in the proper sequence on title (fee simple transfer followed by first and any subsequent mortgages). As there is no provision in the clause for this search and the waiting period which precedes it to be done, there is some possibility of a breach of undertaking to promptly release funds on the happening of the three listed events.

The solution to these potential problems is dealt with by letters of undertaking between sellers' and buyers' Notaries or lawyers. Conveyancers have agreed to use the Canadian Bar Association Standard Undertakings (Form 22). **Use of the CBA Standard Undertakings is mandatory under the terms of the Contract of Purchase and Sale.** Failure to use them may expose you and your client to potential liability. For that reason, you should always reference them when corresponding with the other conveyancer when sending closing documents or purchase funds (Form 23).

Return to Index

In developing and considering the 2003 version of the CBA Standard Real Estate Undertakings, one of the issues raised was what specific obligations you have where you are obliged to use "diligent and commercially reasonable efforts" to obtain the Discharge from the Existing Financial Chargeholders. After much consultation, the Section resolved that the obligation to use "diligent and commercially reasonable efforts" meant the following:

1. That the Seller's Lawyer/Notary will make payment to the appropriate office of the Existing Financial Chargeholder.

2. That if the Seller's Lawyer/Notary has not obtained a discharge within 30 days of the Completion Date, the Seller's Lawyer/Notary will contact the Existing Financial Chargeholder and inquire as to the reasons for the delay and press the Existing Chargeholder to provide the Seller's Lawyer/;Notary with the Discharge.

3. That if the Seller's Lawyer/Notary is not provided with the Discharge within 60 days of the Completion Date, the Seller's Lawyer/Notary will report the fact on their Society's Mortgage Discharge Clearance Center.

4. That if the Seller's Lawyer/Notary is not provided with the Discharge within 60 days of the Completion Date and has not received a status report from the Lender on when it might be issued, the Seller's Lawyer/Notary will report the fact to the Buyer's Lawyer/ Notary and to the Seller confirming that the Seller's Lawyer/Notary has used "diligent and commercially reasonable efforts" to obtain the Discharge, without success.

5. The obligation of the Seller's Lawyer/Notary to use their diligent and commercially reasonable efforts does not require the Seller's Lawyer/Notary to commence a court action against the Existing Financial Chargeholder unless the Seller's Lawyer/Notary has obtained instructions from their client to do so at their client's expense. The obligation to provide title clear of the Existing Charge is an obligation of the Seller and not the Seller's Lawyer/Notary. The obligation of the Seller's Lawyer/Notary to use their diligent and commercially reasonable efforts, does not in any way diminish the ultimate obligation of the Seller.

Best practice dictates:

- That you close real estate transactions on the CBA undertakings in accordance with the standard form contract of purchase and sale at clauses 13 and 14.

It is professionally irresponsible (and may be a breach of contract) to reduce or simplify the difficulty or the complexity of your function at the expense of the client's best interests. Therefore, it is the responsibility of every notary, whether giving or accepting an undertaking, to be satisfied that the proposed undertaking addresses the client's risk, and addresses the terms imposed by the contract, in sufficient scope and detail, regardless of whether the undertaking conforms with the CBA standard undertakings or some other common or usual model.

Return to Index

The sanctity of undertakings is the cornerstone of the legal profession. If you use them properly, undertakings can expedite and simplify your client's transactions. When you use them improperly or carelessly, however, they can lead to the loss of your credibility and reputation and harm the notary profession generally.

Purpose of an undertaking

Undertakings serve two basic purposes in real estate transactions:

to settle the immediate matters of delivery or exchange of documents; registration of documents; and the payment of money necessary to complete the transaction; and

1. to deal with contingencies if the transaction is not satisfactorily completed.

2. Undertakings can be written or implied.

Who can give an undertaking?

The value of undertakings lies in the professional sanctions established to enforce those undertakings. Accordingly, undertakings should be given only by lawyers or notaries, and letters containing undertakings can only be signed by lawyer or notaries.

Who can release an undertaking?

As set out in PEPC, an undertaking given by a notary can only be released or altered by the latter and not by his client. If you give an undertaking to another notary, only that notary can release you from it, or alter or amend it - not your client, or his client, or anyone else.

Return to Index

When The Deal Is Collapsing

Although land is a unique commodity, contracts for the purchase and sale of land are governed by general contract principles. At the same time, the nature of land and its relatively high cost and emotional investment create practical considerations with respect to contracts for the purchase and sale of land which may not arise in other types of contracts. The need to maintain a centralized land title office, the need of purchasers to arrange financing, and the need of vendors and purchasers to make arrangements to move their families at the time of completion all lead to delays between the time of execution and the time of performance of an agreement for the purchase and sale of land.

Many things can happen between the time a contract is executed and the time that it is fully performed. Market prices can rise or fall dramatically, creating an incentive for either the seller or the buyer to search for a reason to avoid the agreement. One of the party's financial circumstances might change. The buyer may obtain new information about the property, potentially leading to allegations of misrepresentation. For any one of a number of reasons and at various stages in the transaction, questions can arise about whether, and how, a contract of purchase and sale can be enforced. The purpose of this section is to address the most common of those questions.

Common Contractual Terms

The Contract of Purchase and Sale manual should be reviewed for a discussion on forms created by the Canadian Real Estate Association. You should be familiar with the terms commonly contained in these forms of contract. The need for familiarity with those terms is especially important when the relationship between the buyer and the seller becomes adversarial. Whether or not an adversarial relationship develops, you should study the contract of purchase and sale carefully and should not rely upon the Society hotline or the Society lawyers in that regard.

Some important terms commonly included in standard form contracts can be summarized as follows:

1. time is of the essence (paragraph 12)

2. the place for completion is the appropriate land title office (paragraph 11)

3. the purchaser shall bear all costs of the conveyance (paragraph 15)

4. the vendor must provide clear title except in the case of stated exceptions (paragraph 9); and

5. payment of monies by the purchaser to the vendor shall be by certified cheque, bank draft, cash, or lawyers' or notaries' trust cheque (paragraph 10).

Return to Index

In addition, provisions that are frequently incorporated into the agreement allow the purchaser to pay the purchase price to a lawyer or notary on undertakings that permit the vendor to use the purchase price to discharge financial charges and that permit the purchaser to register new charges to secure lender financing. In the absence of such a term, on the completion date, the vendor must be in a position to clear all financial encumbrance without first receiving the purchase price. The buyer, as well, must be in a position to pay the purchase price before registering a mortgage securing lender financing. (See *Norfolk v. Aikens)* See paragraphs 13 and 14 of the standard form contract of purchase and sale for this agreement.

Implied Terms

In the absence of a contrary intention expressed in the contract, certain terms are implied at common law. Some important implied terms are:

1. completion must occur before the land title office closes on the completion date

2. if the contract requires the purchaser to bear the cost of conveyance and if title is in the seller's name, the purchaser must prepare the transfer document and submit it to the seller for execution

3. if title is in the name of a party other than the seller, the seller must prepare the transfer and ensure that it is executed

4. if the contract does not require the buyer to pay the cost of the conveyance, the seller must prepare and execute the transfer document

5. title is not clear merely because encumbrances have been paid. At a minimum, there must be a registrable discharge at the time of closing

6. in the case of a new incomplete house, the work has been and will be completed in a good and workmanlike manner with standard or better materials

Under the *Homeowner Protection Act*, all new construction either has home warranty insurance, or an implied statutory remedy.

Return to Index

Breach

If one party repudiates a contract, the other has a choice:

1. he or she may accept the repudiation. If that happens, both parties are relieved from the obligation of completing, but the innocent party is entitled to claim damages for repudiation; or

2. he or she may decline to accept the repudiation, thereby keeping the contract alive in all respects for both parties (*Norfolk v. Aikens*) and possibly expanding the choice of remedies available to include specific performance.

Some contracts of purchase and sale contain terms that must be performed before the completion date. For example, a term may exist that requires the purchaser to increase the amount of the deposit 30 days before the date fixed for completion. If a fundamental term of that nature is breached and the innocent party accepts the repudiation and communicates that acceptance before any obligation arises for the innocent party to perform, then the issue of the innocent party's readiness, willingness, and ability to complete is irrelevant.

If the breach occurs at the time of completion, the innocent party should assume that he or she must plead and prove that he or she was ready, willing, and able to complete at the time of closing. This applies whether the innocent party intends to accept the repudiation or to keep the contract alive and seek specific performance. A party's failure to plead and prove that he or she was ready, willing and able to complete may result in a finding that the party was not an "innocent party" but that both parties were in essential default. In that case, the contract still subsists but time is no longer of the essence. Either party can, by giving reasonable notice, designate a completion date and reinstate the requirement that time is of the essence. If no party acts within a reasonable time to preserve the contract, the contract lapses.

Best practice dictates:

- The *Notaries Act* does not allow you to give legal advice once a breach has occurred. Any suggestion that the other party is repudiating should lead you to immediately advise your client to seek legal advice. If your client is the one considering repudiation, you should insist that your client seek legal advice before giving you instructions to repudiate.

Return to Index

Anticipatory Breach

If one party to a contract of purchase and sale expresses an intention not to complete, the other party is immediately entitled to treat him or her as being in default. For example, if the purchaser's lawyer informs the vendor's notary before the completion date that:

1. the purchaser does not intend to complete the transaction;

2. the purchaser definitely will be unable to complete the transaction;

3. the purchaser takes the position there is no enforceable contract; or

4. the purchaser takes the position that a breach committed by the seller has excused the purchaser from the obligation to perform;

the seller may elect to treat these statements as amounting to a repudiation of the contract. It is at this point that you must refer your seller to a lawyer so that the seller's rights under the contract are protected despite the purchaser's repudiation and to protect your client from an inadvertent acceptance of the repudiation. Inaction or delay on your part could defeat the seller's remedies under the contract. If the seller (the innocent party) elects to keep the contract alive, he or she must take care to establish that he or she is ready, willing, and able to complete at the time fixed for completion. A failure to do so creates the risk that both parties will be in essential default at the time of completion, with the result that time is no longer of the essence. If the seller (the innocent party) has not accepted the repudiation and keeps the contract alive, there is the risk that the defaulting party will change his or her mind and seek to perform the contract, which would then put the contract back in good stead. The result may be that the party which began as the "innocent party" will be in essential default and the other party will not, depending on the circumstances.

Return to Index

Tender

Many believe that if one party has made it clear that it will not complete, it is not necessary for the other party to go through the formal step of offering the necessary documents or consideration. It is prudent practice, however, to tender performance on behalf of a client in every case, except in the case where there has clearly been a repudiation and acceptance of the repudiation before the completion date. There are numerous good reasons for this practice. First, the conduct, or statements of intention upon which the innocent party relies, might not amount to a repudiation. Second, the repudiating party may change his or her position and perform. Third, by tendering, the innocent party will create excellent evidence that he or she was ready, willing, and able to perform that the repudiating party was not ready, willing, and able to perform. Finally, the analysis and preparation that an innocent party must go through to prepare to tender might reveal problems in his or her position that can be remedied before the completion date.

Since you cannot provide your client with legal advice with respect to his rights or obligations in a repudiation situation, you should tender to preserve your client's rights so that he or she can obtain the necessary advice and act on it. By doing nothing or by waiting too long, you can perhaps inadvertently influence the position of your client in a way that your client would not intend.

How and What to Tender

A proper tender merely involves the offer by the tendering party to perform all of his or her obligations under the contract on the completion date in exchange for performance by the other party. The tendering party should ensure that all necessary documents have been executed and that all required funds are available on the completion date. A complete tender includes the actual presentation of the required documents and funds to the other party.

If the other party is represented by a lawyer or notary, the usual practice is to deliver a letter of tender and copies of the accompanying documents or funds to that lawyer or notary on appropriate undertakings to ensure that they will not be used unless the other party performs his or her part of the bargain. Care must be taken however, to ensure that the undertakings conform to the terms of the contract.

If the other party is not represented by a lawyer or notary, the performance of the tender is more difficult. If there is no confirmation that the other party is represented by a lawyer or notary, you should arrange to serve the defaulting party personally.

Return to Index

Best practice dictates:

- Tendering is only effective if it is done correctly. Any notary finding his or her client in a position where tender may be required should immediately contact a lawyer, preferably the client's lawyer, for tender assistance. When in doubt, contact the Society's hotline for advice on your best course of action.

Caveats and Certificates of Pending Litigation

When the transaction collapses, the seller may attempt to sell the property to someone other than the original buyer. The prospect of a sale at a better price may be what inspires the seller to attempt to avoid the contact in the first place. The seller may also attempt to mortgage or otherwise encumber the property. Such dealings could prevent or hinder a claim by the original buyer for specific performance.

To prevent that from happening, the buyer may file a prescribed form of caveat against the property under the *Land Title Act*, ss. 282 and 286. If the buyer commences an action for specific performance, the buyer may file a certificate of pending litigation either in lieu of or after filing a caveat.

Best practice dictates:

- While there is nothing in the *Notaries Act* that prevents a notary from filing a caveat on behalf of a client, notaries cannot file a CPL. Both of these remedies require great care and experience and you should not attempt registration of a caveat unless specifically authorized by your client and you are guided by an experienced lawyer.

Return to Index