The Law Society of Manitoba

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REAL ESTATE

Chapter 2

Conveyancing Practice: Residential

May 2020

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A. PURCHASE AGREEMENTS

1. Making the Contract

Contracts of purchase and sale of land are formed by a process of offer and acceptance. The buyer prepares an offer to purchase. It is delivered to the seller. If the seller accepts the offer to purchase as is and that acceptance is communicated to the buyer, then a binding contract of purchase and sale is created between them. If the seller alters the buyer's original offer before accepting it or if the seller imposes any conditions or terms on the acceptance then that becomes a counter-offer by the seller to the buyer. The buyer's original offer is deemed to be rejected. If the buyer accepts the new terms introduced by the seller in the seller's counter-offer, then a contract is created between them.

The contract is formed at the time the seller communicates their final acceptance of the buyer's offer to the buyer, or if the seller has made a counter-offer, then the contract is formed at the time the buyer communicates their final acceptance of the seller's counter-offer to the seller.

The communication of acceptance may be made by any method reasonably required by the offeror. Communication of unconditional acceptance may be made to the buyer directly or to the buyer's agent. However, communication of acceptance by the seller to the seller's agent alone is not sufficient except for the rare circumstance where the agent is representing both the buyer and the seller.

Until acceptance is communicated to the buyer, the buyer may withdraw the offer by notice of withdrawal given to the seller or to the seller's real estate agent. Acceptance in writing will ordinarily be required for an offer to purchase or sale that was made in writing through a real estate agent.

The rules about communication and acceptance equally apply, mutatis mutandis, to counter-offers made by a seller to a buyer.

2. Statutory Requirements

Agreements for the sale of land that otherwise comply with the common law rules of contract may still fail to be binding contracts for the sale of the land or may be voidable because it fails to comply with a relevant statutory provision or its enforceability is negatively affected by a statutory provision.

Conveyancing lawyers must be aware of all the technical legal requirements of a contract to be able to address them in a timely fashion when consulted, whether before the contract is made or after an apparent contract is made but prior to the completion of the contract. Some relevant statutory provisions include:

a) *The Homesteads Act*

The Homesteads Act, C.C.S.M. c. H80 provides that the spouse or common-law partner (*defined as persons who have co-habited in a conjugal relationship for at least 3 years or have registered as a common-law couple with the Vital Statistics Agency*) of an owner of property that meets the definition of "homestead" set out in the Act has a life estate interest in that property. A person may have only one homestead at a time and that is typically the family home. As well under the Act only one spouse or common-law partner at a time may have rights in a homestead.

Because the spouse or common-law partner of an owner of a homestead has a life estate interest in that homestead, any disposition (*disposition is defined in the statute to include a sale, a mortgage and other listed actions*) by an owner of their homestead during their lifetime is prohibited without the owner's spouse or common-law partner's prior written consent in a prescribed form. The consent must include the owner's spouse or common-law partner's written acknowledgment (made apart from the owner) that the spouse or common-law partner is aware of their rights under *The Homestead Act*, and is not being compelled to consent to the disposition (*s. 9(4)*).

The statutory prohibition against disposition by the owner without the consent and acknowledgment of the spouse or common-law partner has certain exceptions.

The consent of the owner's spouse or common-law partner is not required if:

- the disposition is in favour of the owner's spouse or common-law partner (see *s. 4(b)*);
- the spouse or common-law partner has released all homestead rights in favour of the owner under *section 11* (see *s. 4(c)*);
- the spouse or common-law partner is a party to the disposition as co-owner (see *s. 4(d)*);
- the homestead has ceased to be a homestead by virtue of the spouse or common-law partner consenting in writing to a change of homestead according to *section 7* (see *s. 4(a)*);
- a court order dispenses with the requirement for the consent of the spouse or common-law partner under *section 10* (see *s. 4(e)*).

If the owner is dead, the surviving spouse or common-law partner may consent to a disposition of their life interest in the homestead by the executor of the owner's estate (*s. 22(1)*). The prescribed form of consent and an affidavit of execution by a witness is required (*s. 22(2)*).

Remember, if a homestead is the subject of the offer to purchase agreement, the required consent to disposition of a homestead and acknowledgement must be provided, and until it is provided, an offer to purchase may be voided by either buyer or seller.

b) *The City of Winnipeg Charter* and *The Planning Act* (Part 8) Subdivision Controls

The Planning Act, C.C.S.M. c. P80 *section 121(1)* and *The City of Winnipeg Charter*, S.M. 2002, c. 39 *section 263(1)* provide that the district registrar shall not accept for registration any instrument, such as a transfer of land, that has the effect of, or which may have the effect of, subdividing a parcel of land, unless that subdivision has been approved by the planning authority. In other words, a parcel of land may not be severed from another parcel of land which is described in a certificate of title, unless that subdivision is approved by the planning authorities, or it fits into one of the exceptions specified in either *section 121(2)* of *The Planning Act* or *section 263(3)* of *The City of Winnipeg Charter*.

c) *The Law of Property Act*

Unless an executor or administrator of an estate is authorized by the terms of a will to do so, no sale agreed to and no option to sell granted by an estate is valid unless the requirements of *section 17.7(2)* of *The Law of Property Act*, C.C.S.M. c. L90 are met.

Section 17.7(2) provides that where (a) minors or mentally disordered persons are beneficially interested as heirs or devisees; or (b) there are contingent interests or interests not yet vested under a will; or (c) the heirs or persons beneficially interested are not yet determined; or (d) the adult heirs or devisees do not concur in the sale, and there are no debts, the sale is not valid unless it is made with the approval of a Queen's Bench judge.

d) *The Corporations Act*

A buyer of land from a corporation may rely on the signature of an officer or director of the corporation to the contract without requiring proof of enactment of a director's resolution or special resolution of the shareholders authorizing the sale.

It is up to the solicitor acting for a corporate seller to ensure that the formalities required by the articles, by-laws or *The Corporations Act*, C.C.S.M. c. C225 are met to avoid both liability on the part of officers who bind the corporation to the agreement for sale of land, and liability on the part of the solicitor representing the seller corporation. In the applicable transaction, the seller's solicitor must be sure that the requirements of *section 183(3)* of *The Corporations Act* (requiring the approval of the shareholders where substantially all of the property of a corporation is being sold) are met.

e) *The Real Estate Brokers Act*

Where a real estate broker, salesperson or associate of a broker is to be a party to an agreement for sale of land whether as seller or buyer, *section 19* of *The Real Estate Brokers Act*, C.C.S.M. c. R20 requires disclosure to the other party of the fact that such party is in the real estate business. If the realtor is the buyer the disclosure must be in the sale agreement under *section 19(13)*. If the disclosure by the realtor is not made

as required, the other party has the right to rescind the transaction within 30 days of learning the truth as provided under *section 19(6)* and *section 19(10)*.

The schedules to *Regulation 56/88R* to *The Real Estate Brokers Act* contain both French and English versions of the forms necessary for a conveyancing practice, including:

- the residential form of offer to purchase including *The Homesteads Act* consent to disposition and acknowledgement and the property disclosure statement for a residential purchase;
- the form of offer for use in purchasing a completed unit in a registered Condominium project under *The Condominium Act*, C.C.S.M. c. C170 including *The Homesteads Act* consent to disposition and acknowledgement;
- the assumption of Mortgage(s) Schedule to be assumed by the Buyer;
- a general purpose offer to purchase schedule;
- a seller's Statements under *The Homesteads Act*;
- fees payable under *The Real Estate Brokers Act*; and
- a surety bond form.

*Note that *The Real Estate Brokers Act* is to be repealed by *The Real Estate Services Act,* S.M. 2015, c. 45, *section 89* on a date to be fixed by proclamation. *The Real Estate Services Act* is not yet in force as of the date of this revision of this chapter (May 2020).*

3. Main Components of the Offer to Purchase

The offer to purchase agreement, once accepted by both parties, sets out the bargain made between the seller and buyer of a piece of real property. It is a binding contract for the purchase and sale of real property and creates legal rights and obligations for the parties to the agreement.

Often the terms of the agreement will have been negotiated and agreed to before a lawyer is retained to act for either party. If this is the case, the conveyancing lawyer's first obligation is to become familiar with the terms of the existing offer to purchase agreement at the earliest opportunity. If a lawyer wants to suggest any changes, any deviations from the initial contract will have to be explained to and approved by the client and no changes can be made to the offer to purchase agreement until the other side confirms their agreement to those changes. Any changes to the initial agreement must be done in a timely fashion.

Read every new client's offer to purchase agreement carefully, as each agreement is unique to the parties involved and will contain terms that require your attention as solicitor for one of the parties. The standard offer to purchase residential property is found as Schedule A to *Regulation 56/88R* of *The Real Estate Brokers Act*.

Clause 11(e)(iii)(A) of the standard form residential *offer to purchase* states:

> *anything not included in writing in this agreement will have no force or effect whatsoever*.

Therefore the parties each have a strong argument that any contractual right must be contained in the offer to purchase, and that trust conditions should not be added to expand on the express provisions in the contract.

Neither party's lawyer has a unilateral right to demand an action or to impose a trust condition that goes beyond what the contract provides. However, nothing prevents lawyers from negotiating certain wording to try to clarify or better define the contract to achieve a fair result.

For example, the buyer's lawyer has the right to propose to the seller's lawyer that the buyer will close the transaction provided that some method is agreed to that better ensures that the seller has or will meet the seller's legal obligations. This may include a pre-inspection or a holdback.

The basic promises of the offer to purchase agreement – seller to deliver clear title and buyer to pay the purchase price – can have many and varied particulars, as is made clear in the following discussion of the terms of the offer to purchase.

a) Parties to the Contract

The buyer should address the offer to the registered owner of the land and wants the offer accepted by the registered owner so that the agreement gives the buyer an enforceable equitable interest in the land.

Contrast that with the situation where the offer to purchase agreement is accepted by an agent acting on behalf of the registered owner. If the agent is later established to have acted without authority, the buyer will have a good claim against the agent for damages for breach of warranty of authority, but the buyer will not have an enforceable interest in the land.

Similarly, if the seller is not yet the registered owner of the land (*typical with contractors in new construction situations, or with investors "flipping" a property, or where the land is being transferred to the seller by a former co-owner in a separation or divorce situation*), the buyer must be aware that the buyer's ability to acquire title will be contingent on the seller's ability to convey title. The buyer would be safer to wait until the seller is confirmed as the registered owner, but often the buyer wants to proceed and trusts that the seller will become the registered owner before the agreement between the buyer and the seller has to be completed. A buyer in that situation needs to make a judgment call as to the reliability of the seller and the risk that the buyer is willing to assume.

In situations where the buyer knows that the registered owner of the land is a person of unsound mind, the buyer will have to establish that the offer to purchase agreement was fair and reasonable and was made with that seller during a lucid interval. If the seller's affairs are under the charge of a court appointed committee, the transaction will have to be with the committee, and court approval may be required. If the agent of a seller signs the agreement under the authority of a power of attorney at a time when the seller is mentally incompetent, the power of attorney

will be valid only if it expressly provides that it will remain in force notwithstanding the subsequent mental incapacity of the seller and is witnessed by a proper witness as set out in *The Powers of Attorney Act,* C.C.S.M. c. P97 (a lawyer, for instance). This authority may be terminated or suspended upon the Public Trustee or a committee being appointed as provided in *section 13* of *The Powers of Attorney Act.*

Note as well that *section 23* of *The Homesteads Act* permits a person under a power of attorney to execute a consent or release under *The Homesteads Act* on behalf of a spouse or common-law partner but, if the attorney is the other spouse or common-law partner, such consent or release is not valid. Further, based on case law, the Land Titles Office will not permit one spouse or common-law partner to give a homestead release on behalf of the other spouse or common-law partner for property jointly owned by them when the property is homestead property.

The seller has a vital interest in the solvency of the buyer. Once an offer to purchase is accepted, the buyer acquires an equitable interest in the land and may file a caveat against the title to the land. The land ceases to be available for sale to others and if the transaction fails to close there may be further delays and damage to the seller due to litigation over the aborted sale. The seller will therefore have a vital interest in establishing the reliability of the buyer before accepting an offer, especially if the purchase price is going to be satisfied in part by an indebtedness back to the seller after closing. If that indebtedness is secured by a mortgage, this is commonly referred to as a seller/vendor take-back mortgage.

The most usual way of securing the position of the seller is to require that the buyer provides a sufficiently large deposit to cover the worst foreseeable contingency. *Section 11(c)* of the *offer to purchase* form prescribed under *Regulation 56/88R* to *The Real Estate Brokers Act* includes the provision that where the buyer is the Defaulting Party, the seller is entitled to retain the buyer's deposit but the seller is not restricted from exercising any other remedies which the seller may have, including the right to claim damages from the buyer that the seller sustains in excess of the deposit.

A buyer may limit their liability under an offer to purchase by:

- submitting the offer in the name of a limited liability corporation;
- indicating that the offer is being submitted by the offeror on behalf of a corporation to be incorporated, e.g., "I, John Jones, of the City of Winnipeg, in Manitoba, Manager, on behalf of a corporation to be incorporated, do hereby offer to purchase…";
- specifically stipulating in the offer that in the event of default in any of the offeror's obligations under the agreement the seller's sole recourse will be to retain the deposit or other purchase monies paid and that the offeror will have no other liability to the seller; and

- specifically stipulating in the offer that the buyer may nominate a new buyer to take its place and stead and be released of all obligations as a result.

The buyer may wish to reserve the right to have the seller convey the land to some other party on closing. The Winnipeg Real Estate Board commercial form of sale agreement has a clause that provides:

> *The Buyer shall have the right to nominate in writing any person, firm or corporation, including a limited company to be hereinafter incorporated, to take title to the Property in its place and stead; and in such event each and every of the Buyer's covenants, representations and warranties herein contained shall be assumed and discharged by such nominee. Provided further the Buyer shall not be released from the obligation of the Buyer under the Offer until Possession Date of this Offer.*

If the seller is to carry a mortgage back as part of the transaction, the nominee clause should go on to stipulate that the offeror or some other responsible person will guarantee the mortgage.

For the sake of brevity, buyers sometimes attempt to include a nominee clause by drawing their offer in words to the following effect: "I, John Jones, and /or nominee, do hereby offer to purchase…" This particular technique should be avoided as the courts have held such agreements to be void for uncertainty of parties. The problem of uncertainty can be avoided entirely by avoiding a reference to "nominee" in describing the buyer.

b) Description of Property and Provisions as to Title

i. Identifying the Property

The offer to purchase must contain a description of the land sufficient to identify it. The municipal street address is often given and the legal description and title number are related to such address by municipal assessment records. Care is necessary, however, as there are times that a street address may be associated with more or less land than one or the other party to the transaction may have believed to be part of the transaction. Often it is advisable to include in the description, as an alternative to reciting the same information in separate conditions, the details of any features of the property that are important to the buyer, such as lot size, frontage size on a particular street, number of apartments in a multi-unit residential property, and so on.

ii. Chattels and Fixtures

Paragraph 1(b) of the residential *offer to purchase* says: *"All goods and chattels which are not fixtures shall be excluded excepting for the following which are included:_____."*

The law relating to fixtures will determine when chattels used in connection with real estate become fixtures and are therefore transferred with the land

and when the chattels retain their identity as chattels and are not transferred with the land.

Determining whether a particular chattel has become a fixture can be a difficult process. Modern conveyancing practice is to help the buyer and seller avoid the question related to fixtures by listing in the agreement anything moveable that is included in the sale (e.g. washer, dryer or other items that could be chattels) and by listing any item that is to be excluded from the sale (e.g. chandelier or other items that might otherwise be categorized as fixtures). If any items that might be categorized as fixtures are rented, such as a hot water tank, this should be mentioned in the offer along with the buyer's obligation to assume the rental. If the fact that a fixture is rented is not mentioned, the seller might be compelled to purchase and supply the item as part of the sale of the land. See section 5(b) of The Seller's Promises as to Title and Ownership in the prescribed form of *offer to purchase* set out in *Regulation 56/88R* to *The Real Estate Brokers Act*.

iii. Provisions as to Title

At common law, in the absence of an express provision in an agreement for sale of land, a buyer acquires a right to receive a good title in fee simple to the land which is the subject of the sale. However, if the buyer has knowledge at the time of entering into the offer that the seller's title is affected by some flaw which is not in the seller's power to remove, the right to receive good title may be displaced. The buyer can order and pay for a copy of the seller's Status of Title to view the legal description and current encumbrances.

The buyer's common law rights may be displaced by express provisions in the agreement dealing with title. In modern conveyancing practice it is usual for forms of offers to purchase to deal expressly with all important aspects of a sale transaction and thus provide a checklist of provisions to be considered by a seller and buyer in arriving at an agreement. However, it is important to ensure that this is indeed the case, especially in private sales of residential property.

The form of agreement prescribed under *Regulation 56/88R* (Form 1 Schedule A) of *The Real Estate Brokers Act* has the following provision in clause 5 regarding the Seller's promises as to the title:

SELLER'S PROMISES AS TO TITLE AND OWNERSHIP

5. The Seller promises that at the time of possession:

(a) The property will not be subject to any mortgage, encumbrance or other interest which is registered against the title to the Property or which is valid or enforceable against the Property without being so registered ("Claim"), excepting only for the following:

(i) any mortgage herein agreed to be assumed as part of the purchase price;

(ii) any private or public building or use restriction caveat with which the Property complies;

(iii) any easement, the existence of which is apparent on inspection of the Property;

(iv) any public utility caveat protecting a right-of-way for a service to which the Property is connected;

(v) any Claim which it is the Seller's responsibility hereunder to remove as a condition of closing;

(vi) any Claim which may be caused by or is the responsibility of the Buyer; and

(vii) (insert any other exceptions, including tenancies).

Clause 5 requires the seller to disclose to the buyer any Claim against the title that is not listed as an exception in paragraphs i-vii of this clause. Some common examples that must be disclosed by the seller include an easement that is not apparent on inspection or any encroachment or any lease. Many sellers have run afoul of these provisions by agreeing to sell a property although it has encumbrances that are not exceptions. Often the seller was unaware of the obligation to disclose or forgot that such interests existed. To protect against this problem, it is prudent to order either a Status of Title or a Record of Title via Land Titles Online prior to the seller accepting an offer to purchase so that you can review the registered encumbrances with the seller and explain about disclosing interests against the property that are not exceptions (See also *s. 58(1)* of *The Real Property* Act for a list of interests that need not be registered against title and you must make other inquiries – discussed below under unregistered interests in land and the Declaration as to Possession).

From the buyer's point of view, if the buyer requires any change in use or structures, appropriate additional conditions must be added to the agreement to allow the buyer to investigate the suitability of the land for such changed purposes. The time frame needed for those investigations, commonly referred to as a due diligence period, should be specified in the offer to purchase.

c) Payment of Purchase Price

i. The Deposit

The deposit is that part of the purchase price which the buyer agrees to put at risk when committing to purchase the property.

While a deposit is not required in order to make a binding contract of purchase and sale of real estate, it is in the interest of the seller to require a substantial deposit in relation to the purchase price. It is similarly in the best interest of the buyer to limit the amount of deposit in light of the reality that real estate brokers will not easily return a deposit if the buyer cannot fulfil a condition, but the seller refuses to consent to return of the deposit.

If a deposit is paid and the buyer completes all obligations under the agreement then the deposit will be credited against the purchase price. If the contract is terminated by reason of the buyer's default then the seller will usually be allowed to keep the full deposit if it was a reasonable pre-estimate of damages. In case law, if the deposit is found to be merely a penalty for the buyer's default then the amount of the deposit must not be unconscionable.

What happens to the deposit in the case of default depends on what is stated in the offer so it is important to set out the exact particulars of the parties' intentions regarding the deposit. In particular, the offer should state what the parties intend to happen to the deposit in the case of default, the amount of the deposit, whether or not there will be interest on the deposit, who holds the deposit and whether the forfeiture of the deposit precludes further remedies by either party. Otherwise the matter may be disputed by the parties and, if not settled, will have to be determined in court. Note that the statutory form of *offer to purchase* in Manitoba found in *Regulation 56/88R* (Form 1 Schedule A) of *The Real Estate Brokers Act* specifies what happens to the deposit and the seller's rights to further remedies.

It is not uncommon for courts to uphold the forfeiture of a deposit of up to 10% of the purchase price. Ten percent is the usual guideline, but this determination will depend on the state of the real estate market at the time of the breach. The courts will also enforce a covenant to pay a deposit which was not yet paid at the time of the cancellation of the contract through the buyer's default (See *Mowatt v. Paton* (1982), 16 Man.R. (2d) 23 (Q.B. at paragraph 10 citing *De Palma v. Runnymede Iron & Steel Co,* [1950] 1 D.L.R. 557 (Ont. C.A.) [in CanLII at *1949 CanLII 73 (ON CA)*] where a purchaser reneged on the purchase of steel. The deposit of $2,500.00 was held to be forfeited. In *Clark & Lewis v. Montreal Trust Company*, [1977] 2 W.W.R. 34, [in CanLII at *Clark v. Montreal Trust Company*, 1976 CanLII 224 (BC SC)] purchasers agreed to buy a parcel of land for $575,000.00 with $2,000.00 down, $48,000.00 on acceptance of the offer and the balance on closing. Macfarlane, J. looked at the surrounding circumstances to determine the true character of the payment. He found that the payment of $50,000.00 was intended "to bind the transaction and to guarantee performance". He declined to find the forfeiture as a penalty or as unconscionable. He noted that the $50,000.00 was less than ten per cent of the purchase price."

Of course, if a deposit is paid before an agreement is reached between buyer and seller, and no agreement is reached, the buyer will be entitled to return of the deposit.

ii. Balance of Purchase Price

There are an infinite variety of arrangements possible for the payment of the balance of the purchase price. Some of the more common are:

- **All Cash on Date of Possession**
- **Part of the Cash from a Mortgage to be Arranged by Buyer**

In connection with this arrangement, the statutory form of *offer to purchase* prescribed under *Regulation 56/88R* (Form 1 Schedule A) of *The Real Estate Brokers Act* provides at 2(b):

> *If part of the purchase price is to be paid from the proceeds of a new mortgage, payment of that amount may be delayed by the time required for registration of the mortgage to be completed by the Land Titles Office and reported to the mortgagee and, if so, that amount shall bear interest payable to the Seller at the same rate as the new mortgage until paid. The Seller shall have a lien and charge against the Property for the unpaid portion of the purchase price (with interest as aforementioned).*

In the absence of this provision permitting delay by the buyer, the buyer would have to arrange interim financing of the portion of the purchase price to be satisfied out of the mortgage proceeds so that the buyer can pay the seller in full on the closing date. This is necessary because traditionally the mortgage lender will not advance the money until the lender has confirmation that the mortgage is registered against the title. Registration takes a few days to be completed at the Land Titles Office.

With the above provision in 2(b) the seller is protected during the period between the date the seller gives up possession and provides the transfer of the title and the date that the buyer receives and then pays the mortgage proceeds to the seller. The protection to the seller is an unpaid seller's lien explicitly conferred by contract law in the offer. If, for some reason, the mortgage is not advanced, the seller's lien may allow the seller to resell the property to raise the balance of money and interest. As the remedy for the seller is resale, the seller has an interest in receiving an adequate amount of cash before parting with title and possession. A seller who is concerned about the buyer's proposed financing should insist in the sale agreement on receiving all cash on closing, leaving it to the buyer to arrange interim financing or to ensure that any mortgage advance is made prior to closing.

The offer should set out the terms of financing expected by the buyer if the sale is to be conditional upon the buyer being able to arrange financing. This will preclude the seller from being able to argue that the buyer breached an undertaking by not accepting more onerous financing, if the buyer seeks to withdraw for lack of financing. In order to avoid this argument many financing conditions are left to be at the sole satisfaction of the buyer.

In 2001 the *Western Law Societies' Conveyancing Protocol* [Protocol] was developed as a joint initiative of the Law Societies of Manitoba, Saskatchewan, Alberta and British Columbia. The project was mandated to respond to the

many changes in the residential conveyancing and financing marketplace at the time. The Protocol was last updated in 2009. The Protocol allows the release of Mortgage proceeds and other purchase funds on closing, and enables lawyers acting for the mortgage lender to satisfy the lender's security requirements without obtaining a current Building Location Certificate. Under the Protocol, the mortgage lender relies on representations by their lawyer to advance the funds to the buyer to pay the seller in full on the closing date in exchange for the transfer of land and possession. The necessary documentation is then registered in the Property Registry immediately on closing; the registration must be done promptly to prevent the registration of any intervening claim that might impair the buyer's title. Conveyancing lawyers who want to close a deal based on the Protocol must get the agreement of all parties and must follow the protocol exactly. The details of the Protocol and the necessary forms are posted on the Law Society of Manitoba website.

More recently, Title Insurance companies have started operating in Manitoba and some conveyancing lawyers recommend that their client pay for title insurance that permits the mortgage lender to pay the mortgage proceeds to the buyer in full on the date of closing. The best title insurance should protect the buyer from an intervening registration in the Property Registry or a defect in the survey of the land that was previously unknown. Be aware that the Title insurance is a contract and you should be careful to review the details of what will be covered by the insurance of the particular company before recommending it to your client. There are many problems that may arise that are not covered by title insurance and you must review the risks with your client so that they can make an informed decision.

iii. Purchase Price to be Satisfied in Part by Assumption of Existing Mortgage

Mortgage assumptions, once very common, are rare today. In a mortgage assumption, the buyer assumes the legal liability to pay the seller's mortgage that is secured against the land and the amount of the mortgage is deducted from the purchase price. The seller may or may not be released from the obligation to pay the mortgage – note the mortgage lender must agree to this – and any balance is paid by the purchaser to the seller on closing. All material terms of the mortgage should be spelled out with exact precision. The clause can allow some tolerance in the amount of the mortgage to be assumed. The allowable parameters should be stated. The monthly payments, rate of interest, including compounding period, and due dates should be stated with precision. If there is an obligation to prepay 1/12th of the taxes monthly this must be stated, along with any other unusual features, such as prepayment privileges or payable on sale clause. If the terms of the actual mortgage deviate from what is expressed in the offer the buyer may avoid the transaction or obtain compensation. To avoid this problem, it is sometimes

advisable for the seller to annex a registered copy of the mortgage that the buyer will be assuming to the offer.

It should be noted that upon assumption of the mortgage:

- the seller will continue to be liable to the mortgagee for any default of the buyer and any subsequent buyer unless the seller obtains a release from the mortgagee; and
- the buyer becomes directly liable to the mortgagee, upon registration of the transfer of land, by virtue of the implied covenant under *section 77* of *The Real Property Act* unless this implied covenant is expressly negated by the transfer of land.

The person who transfers an estate in land that is subject to a "residential" mortgage may find relief from liability under the mortgage in *sections 77.2* and *77.3* of *The Real Property Act*.

iv. Purchase Price May Be Satisfied in Part by Mortgage (First, Second, etc.) Back to Seller

All of the relevant terms and security documents should be described in detail in the sale agreement for two reasons:

- seller will only be entitled to get what the agreement stipulates, in terms of payments, interest and security;
- if any essential terms are left out (other than the rate of interest, which by *section 3* the *Interest Act,* R.S.C., 1985, c. I-15 is 5% per annum if no rate is fixed by the agreement or by law) the agreement may be rendered void for uncertainty.

If the mortgage is a second charge and the buyer is arranging a new mortgage, it is in the seller's interest to know and stipulate in the agreement all of the relevant terms of the first mortgage

v. Adjustments

Section 34 of *The Law of Property Act* provides:

> *Every contract for sale and purchase of land shall, unless otherwise stipulated, be deemed to provide that taxes, local improvement rates, insurance premiums, rents and interest shall be adjusted as of the date of closing.*

Offer to purchase agreements usually stipulate that the date for adjustments will coincide with the date of possession, but the parties may negotiate some other arrangement.

It is usual for buyers to place their own insurance rather than assume the insurance of the seller. See the statutory form of *offer to purchase* prescribed

under *Regulation 56/88R* (Form 1 Schedule A) of *The Real Estate Brokers Act* clause 11(b)(ii):

> *The Buyer shall not be bound to assume, nor the Seller to transfer, any policy of insurance on the Property.*

If the seller is to carry a mortgage back the contract should specify whether the adjustments, including the adjustment required if the balance owing on any mortgage to be assumed differs from the amount stated in the agreement, are to be reflected in the cash payment or in the amount of the mortgage back. For practical reasons it is preferable that adjustments be in cash, because the mortgage back must be prepared well in advance of closing, whereas adjustments may not be settled until shortly before closing.

d) Risk, Possession and Time of Essence

i. Risk of Damage

At common law, upon the making of a binding contract of sale of land the risk of damage to the property passed to the buyer notwithstanding the fact that the property remained in the possession of the seller and the sale had not closed. The only exception was where the damage was caused by the seller's negligence or failure to maintain the property. Because that result is not in accordance with the ordinary expectations of seller and buyer, a provision to the following effect is inserted in the statutory form of *offer to purchase* prescribed under *Regulation 56/88R* (Form 1 Schedule A) of *The Real Estate Brokers Act* at section 11(b)(i):

> *The Property until the time of possession shall remain at the risk and responsibility of the Seller. If the Property suffers substantial damage which is not repaired before the time of possession to substantially the same condition it was in prior to the damage occurring, the Buyer may terminate this agreement.*

ii. Possession and Residential Tenancies

Unless there is an express arrangement to the contrary, the seller is not obliged to deliver possession to the buyer until the buyer has paid the purchase price. The buyer is not obliged to take possession and pay until the seller is in a position to give good title. The obligation of the seller in delivering possession is to deliver vacant possession that is free of tenancies and other physical interference with the buyer's use and occupation of the property, unless otherwise stipulated in the agreement.

It is risky for the seller to undertake to deliver vacant possession of tenanted property. The date for possession must be on or after a date for which the seller can lawfully terminate the tenancy. If the tenancy is not terminated or the tenant over holds, the seller could be liable to the buyer for damages or

could have the transaction terminated while possibly still being liable for the payment of real estate commission. Another risk for the seller is where a buyer does not close although the seller has already given notice to the tenant to vacate. In that situation, the seller will be left with empty premises.

In connection with residential tenancies there are statutory obstacles to terminating tenancies under *The Residential Tenancies Act*, C.C.S.M. c. R119, *sections 21* and *94 to 102* and the *Residential Tenancies Regulation 71/2010* section 12. The following tenant rights are examples of the statutory rules relating to tenants that must be taken into account in drafting the offer to purchase.

If a tenant fails to pay the rent or a tenant services charge within three days after it is due, the landlord may give the tenant a notice on the prescribed form signed by the landlord and containing the information set out in *section 95.1(2).* Under *section 96* the landlord is entitled to give the tenant notice of termination for causes other than failure to pay. In some circumstances the landlord is not required to give the tenant an opportunity to remedy the contravention (*s. 96(4)*).

If the landlord terminates the tenancy under *section 98(1)* because the landlord is selling to a buyer who intends to occupy or have a permitted relative as set out in the section occupy the rental unit and the buyer has requested that the tenancy be terminated, there are termination notice rules under *section 98(2)*. One of those rules that may interfere with a buyer's intent is that when a landlord gives a notice to terminate a tenancy during a school year (September 1 to June 30 of the following year) to a tenant who resides with a child who is attending a school reasonably accessible to the unit, the landlord may not require the tenant to vacate the unit until the end of the school year (*s. 98(2)* 3. Tenant with school-aged child).

A conveyancing lawyer must be familiar with all of the statutory rules under *The Residential Tenancies Act* and regulations if dealing with a buyer or seller of a residential property that is subject to an existing tenancy.

iii. Time is of the Essence

A clause about time being of the essence is usually found in an agreement for the sale of land. It indicates that the parties have agreed that the time when the transaction closes is an essential element of the transaction. The effect of the clause is that if one party fails to perform an obligation within a deadline imposed by the agreement, the other party (if not also in default) may elect either to terminate the agreement without giving a further opportunity to perform and pursue available remedies, or to keep the contract alive and enforce performance (see s. 11(e)(i) of the statutory *offer to purchase* form in *Regulation 56/88R* (Form 1 Schedule A) of *The Real Estate Brokers Act*).

e) Conditional Contracts

A conditional contract is one in which the performance of the contractual obligations on one or both sides depends upon one or both sides meeting some specified condition or conditions. Conditions can and do take many forms. They might not spell out the consequences of failing to fulfill the condition or they might spell out the consequences in precise detail. Conditions may be precedent in form and therefore must be met before the contract promise is binding on the parties. Conditions may be subsequent in form and if the condition happens it ends the obligation to perform the conditional promise.

It is very common for purchase agreements to contain conditions (subject clauses) which must either be fulfilled or waived before the buyer is bound to complete the contract.

Buyers have various reasons for proposing conditions. Some common reasons for a buyer to impose a condition on the offer to purchase the property include:

- the buyer may have to arrange for financing before being able to buy the property;
- the buyer may not be able to purchase the property unless they first sell their own house;
- the buyer may want a property inspection;
- the buyer may want to examine the terms of any leases on the property;
- the buyer may want to rezone the property;
- the buyer may need to be able to acquire other adjacent or nearby property in addition.

Of course, the seller does not have to accept such conditions. The seller may respond to a conditional offer by submitting a counter-offer which requires the buyer to remove the proposed conditions, perhaps because the seller does not want to take the property off the market without knowing that it is definitely sold. Alternatively, it may be practical for the seller to agree to the buyer's conditions subject to the buyer's acceptance of a counter-offer that includes a condition that the seller be free to sell to another buyer. Most commonly, that type of condition in a seller's counter-offer includes some phrase such as *"the seller is free to sell to another buyer if an unconditional bona fide offer is received, by giving the first buyer notice of such offer and 48 hours within which to withdraw the conditions".* This is referred to as a *"48 hour clause"* in the real estate business even if the period is less or more than 48 hours. If the first buyer is unwilling to withdraw the conditions and unable to meet them in time, then that first buyer's deal is terminated and the seller is free to accept the second buyer's offer.

In any event, many negotiations do result in conditional contracts so the legal implications have to be considered.

There are three types of terms that may be implied in a conditional contract if they are not expressly included:

i. Good Faith Doctrine

By this doctrine the courts require the parties to a conditional contract to deal in good faith with the conditions and to use their best efforts to carry out their respective obligations. Where those obligations are not clearly spelled out, the courts will draw inferences from the circumstances and will look to the subsequent conduct of the parties as evidence of their obligations. Note also, that the statutory form of *offer to purchase* in *Regulation 56/88R* (Form 1 Schedule A) of *The Real Estate Brokers Act* contains a provision in paragraph 10(a) which requires a party to exercise reasonable efforts to fulfill a condition. This is the clause most sellers rely on when refusing to consent to the broker returning the buyer's deposit to the buyer. Paragraph 10(a) essentially embodies the common law doctrine of good faith.

ii. Notice

Where a contract is conditional on the happening of an event, the courts will imply an obligation to give notice of the happening of the event if it is necessary to do so to give efficacy to the contract (e.g., the event is a matter which lies peculiarly in the knowledge of the other party to the contract or depends on an option to be exercised by one party). The problem of whether notice of termination of the contract or notice of continuation of the contract is what is called for has been dealt with in several cases.

iii. Waiver

The question sometimes arises in a conditional sale whether the buyer can waive a condition which has failed and proceed with the transaction. If the question of waiver is not expressly dealt with in the agreement, the court will imply a right of waiver in favour of the party for whose benefit the condition was provided, unless the condition is found to be a "true condition precedent." A true condition precedent is one on which the existence of the contract, as opposed to its performance, depends. Waiver is not possible where the condition is a condition precedent, as the contract no longer exists. There is no clear rationale between those cases that have held conditions to be waivable and those that have held conditions to be "true conditions precedent" and not waivable. The *offer to purchase* form in *Regulation 56/88R* (Form 1 Schedule A) *The Real Estate Brokers Act* attempts to avoid this problem by including clause 10(d):

> *The party benefited by a condition may waive fulfillment of that condition, provided that such party does so in writing before the end of the time within which such condition is to be fulfilled. If the benefited party does not so waive and does not give notice of fulfillment with respect to such condition, then such condition will be deemed to be not fulfilled. Any*

written waiver or notification with respect to any condition for the benefit of the Buyer may be given to either the Seller or the Listing Broker and any written waiver or notification with respect to any condition for the benefit of the Seller may be given to either the Buyer or the Selling Broker.

f) Caveat Emptor, Merger and Warranties

The principle of *caveat emptor* places the onus on the buyer of real estate to determine the quality or quantity of the land purchased or its suitability for the buyer's purpose

The decision in *Fitzhenry v. Vaccaro,* 2009 MBQB 97 (CanLII) [*Fitzhenry*] reviews the law dealing with the application of the doctrine of caveat emptor in Manitoba, negligent and fraudulent misrepresentation, patent and latent defects, and the plaintiff's onus to prove fraudulent intent. The buyer's obligation to inspect includes the obligation to make inquiry (*Fitzhenry at paragraph 69*), *Fitzhenry* acknowledges that caveat emptor is alive and well in Manitoba at paragraph 75:

> *[75] In Kemp v. Leshchyshyn (1997), 70 A.C.W.S. (3d) 738 (Man. Q.B.), [1997] M.J. No. 180 (QL), Hamilton J. (as she then was) stated at paragraph 6:*
>
> *The defendants rely on the doctrine of "caveat emptor". This legal principle is still applicable in Manitoba and applies to used home purchase transactions. This doctrine stands for the proposition "buyer beware". In other words, a buyer purchases at his or her own risk. The buyer is responsible for investigating the property or obtaining appropriate warranties from the seller. The defendants also rely on the express disclaimers in the offer referred to above. The doctrine of caveat emptor will not protect a seller who has made fraudulent misrepresentations by act or omission. If there is no deceit by the seller, then the purchaser has no remedy unless there was a warranty from the seller. (Underlining added)*

The exceptions to this principle are:

- any representation or warranty that forms part of the sale agreement or is additional to it;
- the right of rescission before the agreement is executed for innocent or fraudulent misrepresentation;
- the right to damages before and after closing for negligent or fraudulent misrepresentation;
- the right to rescission after closing for fraudulent misrepresentation, error in substantialibus, and mistake;
- in the case of new construction on the sale of the property with work to be completed, there is an implied warranty that the construction has been carried out with proper workmanship and materials. This implied warranty does not

extend to the sale of a newly constructed building that has no further work to be done by the seller (*Fraser-Reid v. Droumtsekas* (1979), 103 D.L.R. (3d) 385 (S.C.C.), 1979 CanLII 55 (SCC), [1980] 1 SCR 720.

Fitzhenry at paragraphs 72 – 73 discusses latent and patent defects:

> *[72] In* ***Cardwell v. Perthen****, 2006 BCSC 333, [2006] B.C.J. No. 455 (QL), the British Columbia Supreme Court considered the question of the vendors' liability to a purchaser of a residence for negligence and negligent misrepresentation relating to renovations done to a house prior to sale by the defendant. At paragraph 122 the court stated:*
>
> *The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine. Patent defects are those that can be discovered* ***by conducting a reasonable inspection and making reasonable inquiries about the property****. The authorities provide some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the distinction between latent and patent defects. In general, there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nonetheless be patent if it would have been discoverable upon a reasonable inspection by a qualified person. (Underlining added)*
>
> *. . .*
>
> *[73] At paragraph 127, the court states:*
>
> *Latent defects – being ones which are not discoverable by observation and reasonable inquiry – are treated differently. A vendor who is aware of and fails to disclose and/or conceals or makes non-innocent misrepresentations with regard to a latent defect may well become liable to the purchaser for damages suffered as a result of that latent defect. This principle is sound because, unlike a patent defect, a latent defect is not discoverable by a purchaser on appropriate inquiries and inspection and thus, as a matter of fairness in the commercial transaction, the obligation to disclose and to not misrepresent will rest with the party who knows about the deficiency.*

Where the defects have been actively concealed by the seller or where there is a serious defect known to the seller who fails to disclose it to the buyer in circumstances that the court finds amount to a half-truth in other representations, the seller can be held liable for misrepresentation and even fraudulent misrepresentation.

Fitzhenry at paragraph 87:

> *[87] In* ***Paton v. Little****, 2003 SKQB 43, [2003] S.J. No. 65 (QL), Wimmer J. of the Saskatchewan Court of Queen's Bench dealt with a situation where the vendors had signed a property disclosure statement which provided that they were not aware of any structural defects or any moisture and/or water in the*

basement. The trial judge found that the vendor had answered the question on the property disclosure statement incorrectly and that he was well aware of structural defects to the foundation wall and had experienced some prior basement water seepage. This amounted to a misrepresentation giving rise to damages in favour of the plaintiffs in the amount of $60,000.00 being the value of the repairs necessary to address the foundation defects.

Fitzhenry reviews many prior decisions dealing with the application of the doctrine of caveat emptor, negligent and fraudulent misrepresentation, patent and latent defects, and the plaintiff's onus to prove fraudulent intent. But see also *Gronau v. Schlamp Investments Ltd.; Canada Trust Co., Third Party,* 1974 CanLII 1295 (MB QB) in which the seller deliberately concealed a serious crack in the wall of the building with a temporary patch and the court found there was an error "in substantialibus"; *Cherris v. Bosa Dev. et al.,* 2001 BCSC 228 (CanLII) dealing with a claim by the estate of a deceased purchaser of a penthouse condominium that the residence was uninhabitable without extensive improvements due to the purchaser's inability to keep the premises from heating to an uncomfortably high temperature; *Tuttahs v. Maciak* (1980), 6 Man.R. (2d) 52 (Man. Q.B.), in which the seller was silent regarding the water supply to the restaurant usually smelling of gasoline.

In order to shore up the seller's ability to rely on the caveat emptor doctrine, agreements for sale of land usually include a waiver of reliance provision. The *offer to purchase* form in *Regulation 56/88R* (Form 1 Schedule A) of *The Real Estate Brokers Act* provides at clauses 11(e)(iii) and (iv):

(iii) This agreement contains all of the promises, agreements, representations, warranties and terms between the parties relating to the transaction hereby contemplated, and:

(A) anything not included in writing in this agreement will have no force or effect whatsoever;

(B) any amendments made to this agreement will have no force or effect whatsoever unless it is in writing and signed by each of the parties hereto;

(C) in making this Offer, the Buyer relies entirely on the Buyer's personal inspection of the Property and the Seller's promises contained (and only those contained) in this Offer.

(iv) The Seller's promises contained in this agreement which the Seller and Buyer agree will survive and continue in effect after the closing of this transaction are paragraphs 4(a)(iii), 5(b), 5(c) and 6. Any exception or any additional promise intended to survive closing are as follows (if none, state "none"):_____.

The purpose of these clauses is to compel the buyer to disclose any representations made by or on behalf of the seller on which the buyer claims to rely or to forego reliance on such representations as a condition of making the purchase.

If effective, these clauses will deprive the buyer of the opportunity to rescind on the ground of innocent misrepresentation or to sue for damages for negligent misrepresentation after closing. These clauses have no effect in the case of fraudulent misrepresentation or error *in substantialibus*.

The courts will not hold this waiver of reliance clause against a buyer to whom an innocent or negligent misrepresentation has been made inducing the contract unless the buyer had constructive notice by having independent legal advice before signing the agreement or actual notice of the clause.

Another important concept related to the principle of caveat emptor is the doctrine of merger. The law is fully reviewed in the decision of Beard, J. (as she then was) in *Warriner v. Kiamil,* 1998 CanLII 28137 (MB QB) starting at para. 9 quoting Oosterhoff and Rayner in their text Anger and Honsberger Law of Real Property, volume 2 (Aurora: Canada Law Book Inc., 1985) at pp 1214-1230.

> *1. After closing, the doctrine of merger may apply.*
>
> *2. The doctrine of merger is that upon the completion of an agreement for the sale of land, the agreement and the parties' rights thereunder are merged in the deed of conveyance, so that after closing they can no longer rely on the terms of the contract…*
>
> *3. The purpose of the doctrine of merger is to bring finality and certainty to [the transaction]…*

Accordingly, the buyer's right of recourse for breach of such "preliminary agreements and understandings related to the sale" otherwise called mere representations is extinguished once title is conveyed to the buyer unless the buyer can prove that the terms were "independent covenants or collateral stipulations", otherwise called collateral warranties.

The rule regarding merger is not applicable to collateral warranties on the basis that the warranties were not intended by the parties to be incorporated into the conveyance of the property, but were to survive the closing. The argument is that delivery and acceptance of the conveyance in such circumstances is merely part performance of the obligations of the seller under the contract. Whether a statement is a mere representation that merges with the conveyance or it is a collateral warranty that is not extinguished by merger is a question dependent upon the intentions of the parties.

It is a common feature of "mere representations" held to merge with the conveyance that they relate to facts that could have been ascertained by routine inquiry. On the other hand, the clearest case of a warranty that does not merge with the conveyance occurs where the contract expressly provides that the warranty is intended to survive the closing of the transaction. The courts may also infer such an intention from the circumstances. Warranties and similar contractual terms usually occur in sales of revenue or commercial property.

The statutory *offer to purchase* form in *Regulation 56/88R* (Form1 Schedule A) of *The Real Estate Brokers Act* was amended in 2011 to include provisions which clearly identify a buyer's right to ask the seller for a property disclosure statement. If the seller agrees to provide a property disclosure statement, then the representations contained in the property disclosure statement will be incorporated into the agreement and may be used by the parties as the basis for establishing liability if they are found to be untrue, inaccurate or misleading. The provision of a property disclosure statement will affect the seller's right to rely on the doctrine of caveat emptor (*Krawchuk v. Scherbak,* 2011 ONCA 352 (CanLII)).

g) Condominiums

An offer for the purchase of a condominium is significantly different than an offer to purchase a house. When buying a condominium, reference must be made to *The Condominium Act* and its regulations. In particular:

- Condominium transactions have a significantly greater disclosure requirement, as set out in *section 51* of the Act, requiring the seller to provide specified documentation and to fill out a disclosure form.
- A 7 day cooling off period allows buyers time to review all the required disclosure documents and, if they wish, to cancel the transaction.

Additional differences in condominium purchase and sale transactions are found in *The Condominium Act* and discussed in the Condominiums chapter of these materials. Counsel for the parties to a condominium transaction must understand the distinctions before advising on a sale or purchase.

4. Options, Rights of First Refusal and Pre-emptive Rights of Sale

Options, Rights of First Refusal and Pre-emptive rights of sale are typical to Commercial Transactions.

a) What is an Option?

Generally speaking, an offer may be withdrawn at any time before it has been accepted by the offeree. However, if consideration has been paid by the offeree to the offeror to hold the offer open for acceptance, the offer may not be withdrawn. A contract to hold open an offer for acceptance constitutes an option, under which the offeror is bound, but the offeree is not.

The option may be granted to the offeree to purchase land, in which case the owner is bound to sell if the offeree accepts the offer. Alternatively, the option may be granted by the offeror as an intending buyer to an owner, giving the owner the option to sell to the offeror, if he or she should elect to do so.

An **option to purchase** gives the option holder (the optionee – usually a buyer who wants to purchase the property) the right but not the obligation to purchase land. The option holder provides consideration to the owner of the property, but the option holder maintains control over when and whether to exercise the option. Immediately upon the owner granting the option, an equitable interest in the land is created for the optionee (the option holder). That equitable interest permits the optionee to compel a conveyance of the property if certain events solely within the optionee's control occur. In sum, the optionee has an equitable interest in the land, contingent on the optionee's election to exercise the option. Because an option to purchase creates an interest in land, it is specifically enforceable at the time the option is granted.

Contrast the option to purchase with a **right of first refusal** which is a commitment by the owner of land to give the holder of the right of first refusal the first chance to buy the land should the owner decide to sell. Typically, where a land owner is prepared to accept an offer to purchase from a third party, the holder of the right of first refusal will be given an opportunity to match the third party offer; or, when an owner of land decides to sell and fixes the sale price, the holder of the right of first refusal will be given the first chance to buy at the fixed price. In these typical right of first refusal scenarios, the owner has an unfettered discretion whether to sell and when to sell.

> *[23] Importantly, the right of first refusal is a personal right. It does not create an immediate interest in land. Thus, it is not immediately enforceable by an action for specific performance. If, however, an owner of land receives an offer to purchase that the owner is prepared to accept, then the right of first refusal is converted into an option to purchase. At that point, the holder of the right of first refusal has an interest in the land, which can be specifically enforced…*
>
> *(c) Summary*
>
> *[24] As the discussion above shows, the jurisprudence establishes that options to purchase create immediate interests in land; rights of first refusal do not. Options to purchase are specifically enforceable; rights of first refusal are not…*

2123201 Ontario Inc. v. Israel Estate, 2016 ONCA 409 (CanLII), para. 22-23.

A valid grant of option to purchase creates an equitable interest in the land and a caveat can be registered on the title based on the option.

The option agreement must be directed to two separate aspects of the transaction.

The first is the option itself. The price to be paid for the option and for any extensions, the period limited for acceptance (i.e. exercise), the manner of acceptance, any agreed rights of the parties during the option period, etc. All these features must be set out in accurate detail. Remember that the offer is to be held open for acceptance for a stated period, and that this aspect of the contract must be outlined.

The second aspect is the sale transaction that is the subject of the option. The actual sale agreement must also be set out in full detail, and it will be as varied in its detail as there are varieties of properties and circumstances to be dealt with. The omission of material details will abort the agreement.

If a grant of option is not under seal, or if it is not supported by payment of a lawful consideration, it constitutes a naked offer that may be withdrawn. The sale price of the land is not a consideration paid for the grant of the option. The option consideration must be separate and distinct and must be paid.

It is, however, lawful to provide that any monies paid as consideration for the grant of the option may, if the option is accepted, be applied as payment on account of the purchase price payable for the property.

The conditions of an option must be strictly complied with or the optionee may lose rights.

Therefore, carefully note the terms of the document dealing with acceptance and ask the following questions:

- How is acceptance to be communicated? By personal service, ordinary mail, registered mail, fax, e-mail?
- When is it effective? On mailing, delivery, or receipt?

Be sure that you act accordingly and on time. If the time expires before effective acceptance, the option is lost. Actual communication is effective; therefore, when you are concerned about time, communicate acceptance as stipulated, and by personal service. Be sure to establish the necessary proof of acknowledgement or affidavit.

b) Practical Uses of Options to Purchase

A person may wish to purchase land only if certain requirements can be satisfied, such as the availability of funds, the existence of appropriate zoning, the acquisition of other lands to assemble a building site, the arranging of a joint venture, partnership or co-ownership, or the investigation of the suitability of the site for building purposes. An option to purchase land is an appropriate device in such cases.

Another method is an agreement for sale that is subject to conditions and this method is commonly used.

The option, however, has certain advantages over the conditional agreement of sale.

- The option need not articulate a complicated statement of conditions; the period during which the option subsists constitutes effective control of the relationship between the parties.
- The parties need not concern themselves as to whether the conditions have or have not been satisfied. The buyer need not be concerned whether he or she has attempted in good faith to satisfy the conditions.

- If the option is not accepted (exercised) within the time limited for its acceptance, the right lapses. The landowner need not then be concerned about remaining tied to an agreement of sale.
- The price paid for the option is clearly dealt with and remains the property of the grantor if the option is not exercised. This is also the case where a series of payments as option price (or for extensions of the option period) are paid. However, where such payments might be required under a conditional agreement of sale that is subsequently avoided, questions may arise as to the buyer's right to have them refunded.

The option, then, will usually be found to be the simpler and cleaner form for the transaction.

c) Right of First Refusal to Purchase

A right of first refusal is not an option to purchase. It is a personal covenant and is not an interest in land. Therefore a right of first refusal cannot support the filing of a caveat. It is entirely a contractual right between the owner and the other party. A right of first refusal is a covenant by the owner not to accept an offer to purchase or enter into an agreement of sale without first offering it to the holder of the right of first refusal on the same terms.

Typically, where a land owner is prepared to accept an offer to purchase from a third party, the holder of the right of first refusal will first be given an opportunity to match the third party's offer. In these typical right of first refusal scenarios, the owner has an unfettered discretion whether to sell and when to sell. Put another way, a right of first refusal is a contract between the holder of the right of first refusal and the land owner/seller that permits the holder of the right of first refusal to buy the seller's property in preference to and in place of any other buyer. If the seller never sells, the holder of the right of first refusal will not be able to exercise the right of first refusal. The seller only agrees that before the seller accepts the offer of a bona fide third party buyer, the seller will first offer the opportunity to the holder of the right of first refusal to buy the property on the same terms. It is entirely a contractual right between the seller and the holder of the right of first refusal. It does not create an interest in the seller's land.

A right of first refusal contract must be carefully drawn in order to serve its intended purpose. For example, what if the seller receives an offer from an interested buyer where part of the consideration consists of the transfer of other property owned by the interested buyer? In that event, how might the holder of the right of first refusal agree to buy on the same terms as the offer? Should the covenant permit such an offer?

Consider whether the owner "must" ("shall") sell to the third party offeror if the right of first refusal is not exercised, or whether the owner simply "may" sell. From the holder of the right of first refusal's point of view, a mandatory directive such as "must"

is often preferable, so that the owner will not be able to test the holder of the right of first refusal by giving notice of "questionable" offers of a higher price that are unlikely to proceed.

When drafting the terms from the owner's point of view, consider whether the identity of the third party offeror should be disclosed to the holder of the right of first refusal when the other full details of the offer are communicated. If the price is higher but the identity of the third party offeror is not disclosed, the holder of the first refusal would not be able to try to strike a direct bargain with the third party offeror.

The specific terms of the right of first refusal contract will depend upon the circumstances of each case but drafters should consider various possibilities when drafting the covenant.

The right of first refusal (which is not an interest in land) becomes an option to purchase (which is an interest in land that can be protected by a caveat on the land) when the property is listed for sale and the vendor receives an offer. The prompt filing of a carefully drafted caveat will be effective in conferring priority to the holder of the option to purchase's rights against that of a buyer. It is important to file a caveat to ensure that the holder of the option to purchase will have priority over any third party offer to the owner if the owner ignores the holder and enters an agreement with the third party buyer. Otherwise the buyer could gain priority over the holder by filing a caveat first.

Caveats claiming a right of first refusal have in the past been accepted for registration by the district registrar of the Land Titles office. However, in *Kadyschuk v. Sawchuk*, 2006 MBCA 18 (CanLII) the Manitoba Court of Appeal confirmed that a right of first refusal is not an interest in land, and only becomes one upon the receipt of an offer to purchase by the registered owner (an event that may never occur). The court ruled that agreements containing only conditional interests, instruments that might at some future time and upon the happening of a future conditional event, do not create an interest in land capable of supporting the registration of a caveat.

d) Pre-emptive Right to Sell

An owner may be willing to grant an option to an interested buyer (who becomes the option holder or optionee) but will want to retain a right to sell during the option period. This may occur because the price in the option is not large, or the market may be active and the owner may feel a better purchase price might be offered by someone else, or simply because the owner is willing to give the option only as an accommodation to the interested buyer but wants to keep a right to sell on better terms if the opportunity arises during the option period. In such cases, the owner may be able to negotiate with the interested buyer who wants the option and get a "pre-emptive right" of sale included in the option agreement in favour of the owner. A sample pre-emptive right of sale clause is found at the end of this chapter.

Be careful in your drafting not to confuse a pre-emptive sale right with the option holder's right to exercise the option. It must be made clear that the option holder's right to accept the option shall be suspended once the owner gives notice of another offer that the owner wants to accept. In effect the option holder must either match this communicated offer, or risk losing the option if the owner accepts the other offer. Like the caution in drafting a right of first refusal, consider whether the owner shall or only may sell to the offeror.

B. OPENING A CONVEYANCING FILE

This section includes a list of the tasks related to opening a conveyancing file. It is not exhaustive but an attempt has been made to list the major tasks. You must always use your own judgement when using any list and this is no exception. It is suggested that you review it and adapt it as you deem necessary.

1. First Tasks

An offer to purchase often arrives at your office from a real estate broker based on the client's statement that you will represent the client on the matter. Sometimes you will know about it in advance; sometimes it will be a surprise. Occasionally a potential client will send the offer to purchase to you to review before it has become an accepted contract. Before agreeing to act for the client you must

a) Check for Conflict of Interest

Determine whether there is a conflict of interest that may preclude you from acting. Check Rule 3.4 of the Code *of Professional Conduct.* See also the section on Conflict of Interest in the chapter on *The Legal Profession* under Professional Responsibility in the Lawyer Resources webpages.

b) Check for Unconscionability

If there is an unrepresented party, determine whether there is any inequality of bargaining power (due to disparity in commercial experience, intelligence or otherwise) and the possibility of an improvident bargain. If so, advise the client that the client (if there is a conflict) or the other party (if the transaction is potentially unconscionable) must have independent representation. Do not act further until such independent representation is arranged.

c) Check for Any Illegality

If the transaction is in furtherance of an illegal object (e.g. sham agreements, documents to be backdated, mortgagee to be fooled) do not act further unless the offending aspects are eliminated.

2. Contact the Client

If you have determined that you can act for the client, then contact the client and review the terms of the offer to purchase with the client. If you have the chance to give some legal advice before the contract is created, do so. If the offer to purchase form has been accepted, review it to determine if a contract has been created. Check that the contract reflects the client's understanding of what is to happen.

Keep in mind that different clients will have different levels of knowledge. First time home buyers will require a much more detailed approach.

a) Acting for Buyer

Some common steps if acting for Buyer:

- Obtain name, address, phone number, etc. of client.
- Ask how the client will take title (usually dependent on mortgagee's requirements) – explain the difference between joint tenancy, tenancy in common or any other relevant legal holdings to be sure the client understands the options and confirms the choice.
- Full legal names, occupation, nature of tenancy.
- Discuss how the client proposes to fund the transaction. If a mortgage is required, explain the steps involved; often the mortgagee will have sent you instructions as well – review the mortgage terms and explain your role to the client.
- Have a preliminary discussion with the client about the other expenses involved. Most first-time home buyers are surprised at the amount required of them over and above the purchase price.
    i. Give an estimate of the legal fees the firm will charge and the expected disbursement costs. These amounts can be estimated by creating a standard form that sets out the usual expected disbursements.
    ii. Explain and discuss the amount payable for Land Title fees, including land transfer tax, search fees for title and taxes, the potential cost of a BLC (building location certificate) needed to obtain a zoning certificate and/or title insurance, as well as the various options for closing with your recommendation about the best process for this client's transaction.
    iii. Explain that separate fees are charged for preparing and registering a transfer and for preparing and registering a mortgage and those are the buyer's responsibility as well.
    iv. If they will have a mortgage, they will be required to obtain insurance on the property.
    v. They should be advised whether or not they will be responsible for paying the property taxes in the year of the purchase and how that will be adjusted in the purchase price.
    vi. Determine how all the fees and expenses will be paid.
- Explain closing options and ask how and when the closing money is to be arranged.
- Ask about the client's expectations regarding the timing of taking possession; ensure expectations regarding chattels and fixtures are reflected in the offer to purchase contract.
- Discuss BLC and zoning and/or title insurance with client- explain the risks and benefits of the options.

- When acting for a buyer, discuss the issue of obtaining a new BLC immediately upon receiving a copy of the offer. While the seller may have an existing BLC, it may be several years old and not depict the property in its current state (e.g., a new garage was constructed subsequent to the date of the BLC). Even if the buyer advises that it accurately depicts the property upon examination of the seller's BLC, there may have been changes made to adjacent properties which would not be shown on the seller's BLC (e.g., neighbour's garage encroaches onto seller's property).
- In order to confirm to both the buyer and a mortgagee that there are no encroachments onto or by the subject property, you will require a new BLC. In addition, it is the City of Winnipeg Zoning Department policy that a zoning memorandum cannot be obtained without an original BLC that is not more than a year old. A zoning memorandum provides important protection against liability for Building Code violations and open permits.
- While some mortgagees require a new BLC and a zoning memorandum as a condition of the loan, many mortgagees will accept either the new BLC and zoning memorandum or title insurance that protects the mortgagee's interest. The buyer then has the option to choose one or the other or both. Title insurance is less expensive than obtaining a new BLC, but a BLC and zoning memo have many advantages for a new home owner that should be canvassed so that the buyer is able to make an informed decision. There are times that the most prudent action is to obtain a new BLC and zoning memo for certain purposes, and title insurance for other purposes. Practitioners must not fall into the trap of seeing these as either/or choices. While there are some over-lapping aspects, each have separate protection and title insurance goes far beyond BLC issue protections. There are exceptions, but as a general rule, for those who insist on making an either/or choice, it may be more dangerous to forgo a title insurance policy than to forgo a new BLC and zoning memo.
- In rare cases, a mortgagee may not require either a BLC and zoning memo or title insurance. In this case it is important to review the advantages of each and the dangers and liabilities that could arise by having neither, and let the buyer make the decision. If the buyer declines both, be sure to obtain a waiver indicating that the consequences have been fully explained and understood and that the buyer will bear full responsibility for any problems that arise.
- It's important that practitioners know that a new BLC without a zoning memorandum leaves the buyer exposed to the real risk of open permits and Building Code violations which are increasingly problematic.
- When acting for a buyer, advise your client to insure the property by buying a fire insurance policy and review the client's new obligations as a mortgagor and the timing of the placement of the insurance. Impress upon the buyer in writing the importance of immediately seeking advice from an insurance agent and give the client a copy of the offer to purchase agreement to show the agent. Advise the

client about the obligation to make the insurance first loss payable to a mortgagee, if applicable. Getting the property insured is a task that should be left to the client - don't do it yourself in the ordinary course.;

- Order the Status of Title, review it for the legal description and any associated plan and registered interests.

b) Acting for Seller

Some common steps if acting for Seller:

- Obtain name, address, phone number, etc. of client.
- Ascertain what title documents, tax bills, BLC, zoning memo and other relevant documentation that the client has and arrange for all documents to be delivered to you.
- Review title, including the legal descriptions, and especially any charges/encumbrances that need to be paid out as a result of sale.
- While it may be difficult at this stage to state precisely the amount of cash that will be available to the seller, the solicitor should have a preliminary discussion with the client as to an estimate of the expected legal fees and disbursements, and how they will be paid. These amounts can be estimated by creating a standard form that sets out the usual expected disbursements.
- They should be advised whether or not they will be responsible for payment of the property taxes in the year of the sale and how that will be adjusted in the purchase price.
- Calculate equity and discuss payouts with the client.
- Review insurance. Question the seller about insurance coverage immediately after discussing your retainer. Stress the importance of the seller carrying insurance on the subject property to full insurable value until such time as the transaction is completed and the seller has been paid in full. But remember that you are not the insurance expert and advise the seller to confer with an insurance consultant. Confirm this in writing. Prudence would also suggest a follow-up reminder.
- Explain the closing procedure and how the monies are to be dealt with, and obtain written instructions to invest sale proceeds while held in trust.
- Set a date when the client will attend to execute the necessary closing documents.

c) General Tips

At the time that you meet with the client, whether the buyer or the seller, these are a few tips that should be done at that time.

- Diarize important dates.

- Formulate a more detailed checklist of things to be done for this particular transaction.
- Program searches.
- Record all instructions in writing, especially as to any changes to the terms of the agreement authorized by the client.
- If funds are to be disbursed to anyone other than the client then written authorization of all clients interested in the funds signed by them must be obtained and retained on file by the solicitor.
- Identify what role you will take in ensuring that conditions of the agreement are met before closing. In many instances the agent or client will take responsibility to fulfill the conditions. In such cases you should diarize deadlines and keep track of whether they are being met or whether extensions are needed.
- If you are not satisfied on reasonable grounds that a condition is being dealt with either by the agent or the client you have a professional duty to warn the client in a meaningful and timely manner of the implications of closing the transaction without satisfying the condition.

C. SEARCHES

1. Online User Guides and Training Materials

In conveyancing work, you will be dealing with the *Land Titles Online* eRegistration system so you may find it helpful to check the *Teranet Titles Online User Guide* (in pdf format online) if you have questions relating to its procedures. There is also a *Manitoba Land Titles Guide Revision 65 - May 2020* (the most recent available at this writing) which states that it is prepared "to provide users of the Manitoba Land Titles System with assistance in certain areas where we see our clients having difficulty". Teranet also has other *written and video training materials* for using Land Titles Online.

2. Land Titles Office Searches

a) Searching Title under the Torrens System

The Torrens system of title holding (which accounts for more than 85% of the settled land in the province) is governed by the provisions of *The Real Property Act.* Each parcel of land will have one or more titles recording all registered interests in that parcel. There may also be one or more parcels of land included in a title. Each instrument registered against land is given a serial number (commonly referred to as a registration number) to signify priority of registration with the later number in sequence being later in priority.

Titles appear either in paper or electronic form. All titles created after 1988 in the Winnipeg Land Titles Office are electronic titles, but paper titles were still being created in the rural Land Titles Offices until the late 1990s.

On paper titles, memorials showing instruments must not only indicate the priority number but must have the signature of a district registrar to denote completion of registration. Otherwise, the memorial is, at most, a warning of a registration in progress or of a rejected registration.

The registration of many instruments, including transfers of land, requests, transmissions and court vesting orders, will result in the cancellation of issued titles and the issuance of new titles. On occasion, however, a change of ownership may simply be endorsed on an existing title pursuant to authority given to the district registrar under *sections 52(4)* and *52(5)* of *The Real Property Act.* This procedure has been used in the past to cut down on the time required to process the transfer of paper titles.

The Land Titles Office no longer issues a duplicate title to the registered owner of land which is free of a registered mortgage. The registered owner whose duplicate title is not on file in the Land Titles Office must return the duplicate title to the Land Titles Office to register any further dealings with the land such as a transfer or a mortgage.

When using the process of electronic registration (*eRegistration*) the solicitor may make a copy of the duplicate title, destroy it, and provide the Land Titles Office with an affidavit of destroyed title. Otherwise, where a duplicate certificate of title has issued and cannot be located, the registered owner must file an affidavit of lost title, affirming that it was not given as security for a loan.

A solicitor must never rely on the duplicate title for an up-to-date title search, as there may be instruments that were registered against the title after the issuance of the duplicate title.

To search either paper or electronic titles you must know the current title number or land description or search for properties owned by individual or corporate names. Information relating to title numbers or land descriptions can be obtained from the tax bill for the property or from the City of Winnipeg assessment department (city properties) or local municipal office (rural properties). Properties outside of the City of Winnipeg can also be searched on-line at the *Property Assessment website*.

i. Paper Titles

It is important to remember that Paper Titles are not currently searchable online. They may be searched by submitting a Service Request form to the Land Titles Office.

ii. Electronic Status of Title and Record of Title

You can obtain either a Status of Title or a Record of Title via *Land Titles Online*. The Status of Title gives details of the current active charges only. The Record of Title gives a complete record of all registrations, whether active or inactive, as in the case of the old paper title, but contains less detail regarding those registrations.

iii. Unregistered Interests in Land – section 58(1) of *The Real Property Act* and the Declaration as to Possession

Searches of a title and the registered encumbrances against that title will generally disclose most interests in the underlying land. Many instruments are required to be registered against title to be effective. The land mentioned in a certificate of title can also be subject to a number of interests that need not be registered against title and no particulars of these will be found on title. These exceptions are set out in *section 58(1)* of *The Real Property Act*. As there is no registration in the land titles office, the only way to find out about these interests is to make other enquiries, sometimes by searching a municipal or government office and sometimes by getting the seller of the property to make representations in addition to those set out in the offer to purchase. The practice has developed in Manitoba for sellers to make statements by declaration that address certain off-title matters arising primarily from section 58(1) of *The Real Property Act*. The declaration has become known as the declaration as to possession.

While the form of declaration as to possession is not prescribed anywhere, and as a result there are a number of variables, there are certain common representations that address one or more of the *section 58(1)* exceptions. For instance, paragraphs 3, 4 and 5 of the sample declaration in the precedents to this chapter address the exceptions set out in paragraphs (c), (d), (e), (h) and (l) of section 58(1). Paragraph 5 of the sample declaration, in particular, contains a number of important representations. While there is no law requiring a seller to make these statements, many are terms of the contract, expressed or implied, and the provision of a comprehensive declaration as to possession will, in many cases, facilitate the closing of the sale transaction.

Apart from getting the seller to provide a declaration as to possession on closing, there are a number of off-title searches that can provide valuable information. Depending on the nature of the real property and its location, searches in various municipal and provincial registries can disclose limitations on highway access, construction close to navigable streams, outstanding work orders for environmental, health, fire or building by-law non-compliance and other zoning, use and development issues. Some of these are discussed in more detail in later sections. While some of these concerns do not strictly relate to title, many refer to use restrictions and how land can be used and these concerns may affect a property's value or marketability.

Finally, land transactions often involve items of personalty as well. Even where the personalty may be a fixture, third parties might have claims against title, so it is common to request that the seller make statements relating to any items of personal property that form part of the purchase transaction. These statements can often conveniently be added to the declaration as to possession or can be verified in some cases by enquiries made of the utility companies or searching in the *Personal Property Registry*. The nature of the property involved will determine whether and when you will do these searches.

b) Old System Search

Although it is rare, there are still some properties under the Old System and those properties require extra diligence. The Old System refers to land that is governed by *The Registry Act*, C.C.S.M. c R50, and for which no title has been issued. Land is conveyed in the Old System by deed.

When searching land under the old system, a registrar's abstract may be requisitioned using a Service Request Form. This is a certified copy of the entries in the abstract book in the Land Titles Office. The entries appear in order of time of registration and not date; for example, the grant from the Crown may not have been registered until after a series of deeds and mortgages. You will be required to sort them into order so that you can see the chain of title from the grant to the present owner. Quite often it will be found that there is a deed missing which is required to complete the chain

of title. The information contained in a registrar's abstract is of a limited nature. Generally, there is no mention made of reservations in a grant or deed. Sometimes the land is shown as part of a lot or quarter section. The registrar takes no responsibility for the validity of any deed or mortgage, but simply checks for execution and affidavit of witness. For these reasons the documents in the chain must be examined for legal sufficiency and for land description and reservations. A recommended best practice for a solicitor would be to make a Real Property Application to bring the land under the new system and obtain a guaranteed title as part of the closing.

c) Searching Documents Other Than Titles

To have a complete title search it is often necessary to examine the actual instruments registered against a title or plan by obtaining certified copies of those instruments (e.g. mortgages, caveats, development agreements, builders' liens). The document may have been microfilmed or converted into PDF, and the original may not be available for inspection. Where a document has been registered electronically, *The Electronic Commerce and Information Act*, C.C.S.M. c. E55 provides that the original is the electronic copy.

In all cases, a copy ordered from the Land Titles Office is certified, whether obtained electronically or in paper.

The legal description on the title will often refer to a plan registered at the land titles office. To confirm the nature of the property boundary, a copy of the plan should be ordered and reviewed with the client. Copies of plans may be ordered electronically through *Land Titles Online*.

i. Mortgages

1) Mortgages to be Assumed

The mortgagor is the person who is borrowing the money from the mortgagee which is usually a financial institution but may be another person. The mortgage is the contract between the mortgagor and the mortgagee. On the sale of property, sometimes the terms of the mortgage registered against the property are attractive to the buyer so, if the mortgagee and the seller-mortgagor agree, the buyer can buy the property and pay the seller an equivalent portion of the sale price by assuming the seller's obligations under the mortgage. The buyer becomes the new mortgagor and the mortgagee remains the same.

If the buyer will assume the seller's mortgage under the terms of the sale contract between them, the solicitor will need a statement from the mortgagee setting out the terms and balance of the mortgage owing for assumption purposes. The mortgage and any registered amending agreement should be examined in conjunction with the mortgage statement issued for assumption purposes by the mortgagee. If there is an unregistered amending

agreement this should be obtained as it will modify the rights of the mortgagee and may explain any discrepancy in the mortgage as registered.

In particular, the buyer's solicitor is responsible to the buyer to confirm that the balance of the mortgage to be assumed, including the repayment terms, interest, and maturity date are as bargained for in the agreement for sale and that there are no additional provisions inconsistent with to the agreement. The seller's solicitor should check these points as well to assure that the seller will be able to close.

If you are the buyer's solicitor and you find a discrepancy between the mortgage to be assumed and the terms of the sales agreement, you should immediately notify and warn the buyer and obtain instructions. The buyer might accept the discrepancy, or may ask you to ask the seller to arrange an amendment to the mortgage terms failing which a claim for compensation may be made or the buyer may refuse to close. If the buyer does not raise the problem until after closing, the buyer's right against the seller will be lost but the buyer may have a damage claim against you if you failed to carry out these duties in your role as the solicitor.

If you are the seller's solicitor and you find a discrepancy, you should warn the seller of possible problems on closing and obtain instructions. You should also notify your client of any demands made by the buyer's solicitor. If a problem of this sort is identified and addressed promptly, it may be possible through negotiations between seller, buyer and possibly mortgagee to resolve it without resorting to litigation.

2) Mortgages to be Discharged

As part of the printed form, most sales agreements require the seller to give the buyer clear title apart from any mortgages to be assumed. This provision has been held to entitle the buyer to insist that all mortgages that are not being assumed be discharged before closing or alternatively that on closing the seller tender a discharge of such mortgage to the buyer. In some circumstances, buyers have successfully escaped the obligation to close by insisting on their strict right to have the discharge of the mortgage document and refusing to accept the seller's solicitor's undertaking to pay off and discharge such mortgages out of the closing monies. (Note there is a discussion of solicitor undertakings in the Professional Responsibility Resources under *The Legal Profession* chapter on the Law Society Education Centre website.)

However, in Manitoba, usually a solicitor's undertaking to pay off and discharge the mortgage is accepted on closing because of the cooperative conveyancing practice here (see section on CLOSING below). The buyer's solicitor must explain the procedure about undertakings and the risks to the buyer before closing and get the buyer's instruction and approval to close on

undertakings. If the buyer's solicitor has not explained the risks and does not get instructions to close on the basis of solicitors' undertakings, then the buyer's solicitor might be held liable for damages to the buyer for accepting and closing on undertakings without authority rather than insisting upon the buyer's legal rights. Of course, this only becomes an issue if the seller's solicitor breaches the undertaking to pay off and discharge the mortgage for example.

Both solicitors should be satisfied that there is a clear source of money to satisfy the undertakings (the most obvious source being the sale proceeds), and also that such money will be under the control of the seller's solicitor. As an added precaution the buyer's solicitor may require that the transfer of land, which will be registered subject to the mortgage to be discharged, will have a clause added negating the implied covenant under *section 77* of *The Real Property Act.*

> ***Implied covenants in transfer***
> *77 In every instrument transferring land for which a certificate of title has been issued subject to a mortgage or encumbrance, there shall be implied, unless otherwise expressed, the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity, or rent charge secured by the mortgage or encumbrance, at the rate and at the time specified in the instrument creating it, will be bound by every other covenant, term and condition in the mortgage or encumbrance, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured thereby, and from and against liability in respect of every other covenant, term and condition therein contained or, under this Act, implied on the part of the transferor.*

Note that this requirement is not the norm in current practice.

The procedure for obtaining a discharge of mortgage is discussed in Chapter 3 Mortgages. In order for a mortgage to be discharged, the terms must be clear that the mortgage is open for repayment or the seller-mortgagor must negotiate such an arrangement with the mortgagee before the time of sale. If there is no such provision or agreement the seller will not be able to force the mortgagee to give a discharge of the mortgage (except by provoking the mortgagee to commence mortgage sale proceedings and thereby triggering a right to pay the mortgage off in full – see the Practice Area Fundamentals on the Law Society Education Centre under *Real Estate Chapter 3 Mortgages*) and the sale will not be able to proceed as originally contemplated. If the seller cannot discharge the mortgage for this reason the buyer will have to refuse to close or the sale will have to be renegotiated with terms that permit the problem mortgage to remain on title.

ii. Certificates of Judgment

A certificate of judgment issued by a Manitoba court or by the Federal Court of Canada may be registered against specific land pursuant to *section 2* of *The Judgments Act,* C.C.S.M. c. J10. If properly registered it gives the judgment creditor a charge on the land as of the date of registration, with the eventual right to sell the land for non-payment. The forms required are:

- Certificate of judgment being *Schedule A* to *The Judgments Act*; and
- Land Titles *Form 21 - Registration of Judgment, Lien or Order*.

The certificate of judgment differs from a mortgage in three respects:

- Consent of the spouse or common-law partner is not required to register the certificate of judgment on a title to a homestead.
- Although the priority provisions of *The Real Property Act* govern the rights of the judgment creditor who has the registered certificate of judgment against others with later registered encumbrances or claims to the land, the judgment creditor who has the registered certificate of judgment is not a secured creditor because of the provisions of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 notwithstanding the registration, unless, in exceptional circumstances, the judgment itself declares the security; (See *s. 70(1)* of the *Bankruptcy and Insolvency Act*).
- Under *section 21* of *The Judgments* Act upon registration of an order of a judge, a certificate of judgement that is registered may be vacated or partially vacated by the district registrar or may be postponed to allow registration of another encumbrance in appropriate circumstances.

Upon the closing of a real estate transaction the certificate of judgment may be dealt with as follows:

- It may be discharged by registering a discharge in prescribed form executed by the judgment creditor either in exchange for payment or other mutually satisfactory consideration.
- The judgment creditor might issue a part discharge for partial payment or other consideration if other land is also charged with the judgment.
- The judgment creditor might execute a postponement of the judgment to some other instrument being registered (e.g. to allow a mortgage to be advanced or renewed without payment of the judgment).

If the cooperation of the judgment creditor is not available for any reason or if the propriety of the registration of the certificate of judgment is open to challenge several procedures are available to remove the registered judgment as an obstruction to a real estate closing.

1) Bona Fide Prior Sale

Where the judgment debtor made a bona fide sale or agreement for sale or option to purchase that subsisted before the certificate of judgment was registered against the land, under *section 10 of The Judgments Act* the certificate of judgment does not form a lien on the land even if it was registered before the closing was completed. Nevertheless, the process is not automatic, as the seller's lawyer still needs to take action to remove the judgment from the title. The district registrar has jurisdiction to resolve this issue under *section 74* of *The Real Property Act* prior to registration of the transfer of land, but may defer to the courts.

If the seller claims under *section10* of *The Judgments Act* that a transfer of land for a bona fide sale has priority over a registered certificate of judgment, and the seller wants to ask the district registrar to resolve the issue under *section 74* of *The Real Property* Act the seller must apply by filing a request/transmission form asking that a thirty day notice be issued to the judgment creditor to remove the certificate of judgment. Where the instrument to be removed is a caveat or a judgment, the district registrar will not issue the thirty day notice automatically or as a matter of right. Prior to issuing the notice the registrar must be satisfied that the applicant seller has a *prima facie* right to have the judgment removed.

Accordingly, in addition to requesting the notice, the applicant seller must provide evidence in the form of a statement or series of statements advising why the caveat or judgment is not properly registered against the title. The evidence can be an affidavit setting out the facts and including a copy of the sale agreement. Upon being satisfied that it is appropriate to issue a thirty day notice, the district registrar will prepare and forward the notice to the applicant seller under *section 75(12)* of *The Real Property Act*. It is the applicant seller's responsibility to serve the thirty day notice as directed on the judgment creditor.

Once service of the thirty-day notice has been made and the time period specified in the notice has passed without any action having been taken by the judgment creditor, the applicant seller must file a second request and include proof of service. Upon receipt of such a properly completed request, with appropriate evidence and where no action has been taken by the judgment creditor, the district registrar will remove the registered certificate of judgment from the title.

However, the district registrar will not remove the judgment through the thirty day notice process where appropriate proof of court proceedings has been filed with them. If the judgment creditor disputes the seller's claimed priority, the creditor will file an application in court under *section 21*of *The Judgments Act* to have the question of priority resolved in court. The creditor will file a

pending litigation order or other satisfactory proof of the court proceedings in Land Titles, and the district registrar will have to defer the decision to the court.

2) A Judgment Registered Against the Wrong Person or Paid Off

An application under *section 74* of *The Real Property Act* could be an inexpensive alternative in any case for example, where the judgment has been registered against the wrong person, or has been paid off.

3) An Insolvent Seller

An insolvent seller may also be successful in having a certificate of judgment discharged in favour of the transfer of land. If the seller's insolvency is such that the successful transfer of the property will not produce enough sale proceeds to pay the claim of the judgment creditor (usually because there are prior registrations that are entitled to the entire sale proceeds), the insolvent seller can ask the court to order that the certificate of judgment be discharged or postponed under *section 21(1)* of *The Judgments Act* so that the sale and the proposed distribution of the sale proceeds can be carried out. That section gives the court a wide discretion to discharge a certificate of judgment in whole or in part on any reasonable ground and for any reasonable purpose, including the sale of property. (See *Meadowbrook v. Winnipeg Gas* (1981), 9 Man.R. (2d) 324 (CoCt) at paragraphs 10-11 [available in vLex in Library Resources behind the Member's Portal]).

For further information on these land titles processes, see the *Land Titles Guide* on its *website*.

4) Judgments Vacated or Postponed by Court Order

The court has jurisdiction under *section 21* of *The Judgments Act* to vacate or postpone judgments on application by any interested party.

iii. Other Statutory Liens against Title

1) *The Manitoba Assistance Act* and *The Social Allowances Act*

Under *The Manitoba Assistance Act*, C.C.S.M. c. A150 (formerly *The Employment and Income Assistance Act* C.C.S.M. c. E98), the minister may cause to be registered in any Land Titles Office in the province a statement that when registered forms a lien in the amount of allowances paid to or for a person to cover the principal portion or any part of that principal portion of any instalment of a mortgage payment, or arrears (or part arrears) of real property taxes or cost of building repairs defined in the regulations as major repairs, or assistance payments paid in error, or assistance payments made because of the neglect or failure of another person to comply with a law or court order to maintain or to contribute to the maintenance of the recipient of the assistance payments.

In practice the solicitor should contact the governmental agency holding the lien. Often such agencies will cooperate in postponing their rights on reasonable terms to allow transactions to be completed. Otherwise, you, as the solicitor, can deal with these liens in a manner analogous to the procedures outlined above for dealing with certificates of judgment.

2) Lapsed Liens under FORMER Acts

Liens registered under certain former acts (*The Health and Public Welfare Act*, *The Mental Diseases Act* and Hospital Aid liens) have now lapsed, and will be removed on request.

3) *The Legal Aid Manitoba Act* Liens

Similarly, *section 17.1* of *The Legal Aid Manitoba* Act, C.C.S.M. c. L105 provides that Legal Aid Manitoba may register in the Land Titles Office a statement that forms a lien and charge on land in which the recipient of legal aid holds an interest. That lien and charge against the land is registered for an amount equal to the cost of the legal aid provided to the recipient.

iv. Caveats

A caveat serves as a notice on the title that the caveator claims to hold an interest or estate in that land. A registered caveat prevents any disposition of the land unless the new instrument is expressed to be subject to the caveator's claim.

Caveats are commonly registered on title and are used to give notice of:

- leasehold interests including mineral leases;
- unregistered transfers of land;
- unregistered mortgages;
- purchase agreements and options to purchase;
- easements or other rights running with the land;
- restrictive covenants on land use - (building restrictions).

Easements and building restrictions are often registered against land by caveat. Those caveats and the restrictions of which they give notice expire automatically (50 years after the filing of the caveat in the case of building restrictions pursuant to *s. 159* of *The Real Property Act*).

Usually the sale agreement expressly or impliedly obligates the buyer to accept such restrictions if the existing improvements on the property being purchased comply. The solicitor should examine the relevant restrictions (and the plan, if any, referred to in many utility easement caveats), and by comparing them with the BLC and discussing the matter with the buyer,

determine whether the existing use of the property conflicts with the restrictions.

Such registered restrictions, if unexpired, should be reported promptly by the buyer's solicitor to the buyer so that the buyer can make any valid objection in a timely fashion. If the buyer is obliged to accept such restrictions the lawyer acting for the buyer must explain the restrictions to the buyer and include the explanation in a written report provided after closing. This will prevent the buyer from dealing with the property in future in a manner inconsistent with the restrictions through ignorance. If the buyer is not properly informed at the time of purchasing the property, the buyer may have cause to sue their solicitor for the ensuing damage.

If the property is found not to comply with the building restriction there are several possible actions available to the buyer before closing:

- If the terms of the contract permit, the buyer may refuse to close and terminate the contract.
- The buyer may call upon the seller to remedy the problem by altering the property if that is practical, or by having the restriction removed.
- A building restriction caveat may be discharged by the municipal board pursuant to *section 104 The Municipal Board Act*, C.C.S.M. c. M240.
- Alternatively, a caveat may be discharged by the caveator at any time (*s. 157(1)* of *The Real Property Act*) unless it is a development scheme or building restriction caveat, in which case the owners of all lands affected must approve the discharge first (*s. 157(3)* of *The Real Property Act*).
- A subsequent owner of land that is subject to a caveat may discharge the caveat (*s. 157(4)* of *The Real Property Act*).
- If a building restriction agreement is expressly limited by time, the caveat giving notice of that agreement may be vacated after the time of termination in the building restriction agreement (*s. 157(5)* of *The Real Property Act*).
- Sometimes if the breach of the building restriction is minor or where it is a common occurrence in the neighbourhood or where the property complies with current zoning standards and the restriction is obsolete, a buyer may choose to accept the property as is after having the alternatives explained notwithstanding the breach of the restriction.

If the caveat gives notice of a financial interest, it can be dealt with in a manner analogous to other encumbrances. In such case a discharge of the caveat executed by or on behalf of the caveator pursuant to *sections 157(1) or (2)* of *The Real Property Act* may be provided or the caveat may be discharged by court order under *sections 163-165* of *The Real Property Act*.

If the caveat gives notice of an interest in the property that competes with the buyer's interest (for example, an agreement for sale or option to purchase), the buyer should insist that the seller remove the caveat before closing. If the caveat is not removed, the buyer's rights will be subject to the prior claim of the caveator under *section 155* of *The Real Property Act*.

v. Super-priority of Government Deemed Trusts

The *Excise Tax Act (Canada)*, R.S.C., 1985, c. E-15 (the "Act") creates a deemed trust in favour of the Crown with respect to GST amounts collected. The Act also extends this deemed trust to the property of the tax debtor, including property held by secure creditors, like mortgagees. That means that if a borrower has unremitted GST/HST that accrued before a mortgage is registered, CRA will look to that lender to ensure that tax debts are paid.

A recent judgement (April 2020) by The Federal Court of Appeal in *Toronto-Dominion Bank v. Canada,* 2020 FCA 80 (CanLII) confirmed that the lender is required to pay to the Canada Revenue Agency (CRA) proceeds for unremitted GST out of the monies the lender received as repayment from a borrower upon the discharge of the mortgage. Note that CRA demanded payment from the bank after the mortgage was already discharged

Excerpts below are from *Lenders Beware: Post-Discharge Obligations for a Borrower's HST/GST Debt*, a commentary about the case by real estate lawyer Matthew Wilson, Siskinds LLP posted on CanLII on May 11, 2020 and the commentary explains the decision:

> *The Court noted that Parliament had amended the relevant section of the Act to give absolute priority to the deemed trust over secured creditors and to extend the scope of the deemed trust to include property of the debtor and property held by any secured creditor. Based on its interpretation of the provisions, the Court found that Parliament intended to grant priority to the deemed trust in respect of the property that is also subject to a security interest.*
>
> *The purpose of the provision is to protect the collection of unremitted GST/HST.*
>
> . . .
>
> *Therefore, when the Bank granted the Borrower a line of credit and mortgage and took security over the Borrower's property, a deemed trust arose in favour of the Crown to the extent of the tax debt. When the Borrower sold the property, the Bank was statutorily obligated to remit the proceeds it received to the Receiver General.*
>
> *The Court did note that the super priority normally given to the deemed trust provision of the Act does not survive bankruptcy under the*

> *Bankruptcy and Insolvency Act (Canada),* nor does it apply to arrangements under the *Companies' Creditors Arrangement Act (Canada).* Effectively this means that a secured lender would likely be in a better position if a borrower goes bankrupt, at least as it relates to unremitted GST/HST.
>
> The Court also noted that lenders who advance funds and take security before a borrower fails to remit GST/HST are protected by subsection 222(4) of the Act. This provision provides that the deemed trust will not override certain "prescribed security interests", which is generally interpreted as including a mortgage on a borrower's property before the borrower fails to remit GST/HST.
>
> . . .
>
> The Court found that no triggering event is required to bring the deemed trust into operation. It was further held that the Federal Court did not err by finding that the bona fide purchaser for value defence is not available to secured creditors such as the Bank.
>
> Finally, the Court outlined the following potential options for secured lenders to manage the risk posed by deemed trusts: "identify higher risk borrowers (which might include persons operating sole proprietorships), require borrowers to give evidence of tax compliance, or require borrowers to provide authorization to allow the lender to verify with the Canada Revenue Agency whether there are outstanding GST liabilities then known to the Agency."

Title Insurance companies have offered coverage for losses due to these super priority government deemed trusts that were accrued prior to the insurance policy date, and unknown to the lender. Generally that coverage was only valid up until the policy ends upon the discharge of the mortgage. Since the Federal Court of Appeal's decision in *Toronto-Dominion Bank v. Canada*, 2020 FCA 80 (CanLII), clients can check with their title insurer for an endorsement for lenders that provides coverage for loss from the covered super priority government deemed trusts even after the insured mortgage has been discharged.

However, lawyers and lenders should continue to conduct their normal due diligence regarding borrower remittances.

vi. Builders' Liens

According to *The Builders' Liens Act of Manitoba,* C.C.S.M. c. B91 any person who does any work or provides any services or supplies any materials to be used in performance of a contract or sub-contract for any owner, contractor or sub-contractor has a lien for the value of the work, services or materials that

attaches to the interest of the owner of the land and to the land. That lien is called a builders' lien.

Builders' liens that are registered against title need special attention in conveyancing practice. Mortgagees cannot safely advance monies under their mortgage and buyers cannot safely advance monies to the seller in payment of the purchase price if any builders' lien is registered against the title at the time the payment is made by the mortgagee or buyer.

With other claims like a prior mortgage or a certificate of judgment, the solicitors can agree to set aside monies to cover the amount claimed and proceed with the closing on that basis. However, a registered builders' lien has a unique feature that makes it essential that it be discharged before any monies are advanced by the mortgagee or the buyer.

One registered builders' lien serves like a placeholder for all unregistered builders' liens for work in progress. That registered builders' lien "shelters" all unregistered liens for work in progress and **gives them the same priority** as the registered builders' lien. That priority operates even if the other builders' liens are registered after the mortgage monies are advanced or the purchase price is paid to the seller.

Therefore, as long as a builders' lien remains registered on title, there is no reliable way of knowing the amount of any other unregistered builders' lien claims that might also take priority. You, as the solicitor, cannot determine how much money should be set aside to satisfy the possible builders' liens if **any** builders' lien is registered on the title. The buyer and mortgagee must insist on the discharge of any builders' lien before advancing money because only when the registered builders' lien is discharged and removed from title is its sheltering effect for unregistered builders' liens eliminated. The money should not be advanced unless there are no registered builders' liens on title.

To be safe, the conveyancing solicitor must do a special search on the title before advancing any money when a registered builders' lien exists.

1) About After 3 PM Searches

The current land titles process assigns a serial registration number to every document at the date and time it is registered. That registration number determines the priority of claims among competing interests.

The process means that there is some risk that a regular search of the title on a day will not show a builders' lien that has just been registered at the land titles office but is not yet examined and accepted and entered on title because there may be a gap of time between the registration of the builders' lien and its appearance on the title. That gap of time has the potential to negatively affect those who advance money if they cannot determine whether there are

any registrations that are not showing up on the title but might take priority over their interest.

Registrations (of any type, including liens) are permitted to be made in the Land Titles Office up to but not after 3:00 p.m. each business day, pursuant to *section 2* of *Land Titles Office Regulation 74/2014* of *The Real Property Act*. Immediately after 3:00 p.m. each day, the Land Titles Office generates a list of liens regardless of registration date which have been entered in the register but remain unaccepted. This list may be accessed through *Land Titles Online*, by logging in, selecting Search and Order, then Instruments, then Builders' Liens List. The Unaccepted Builders' Lien List is available as a pdf for download free of charge.

That is why the competent conveyancing solicitor always conducts an "after 3 pm search" immediately before advancing funds to see if there are any interests registered but not yet appearing on the relevant title that would have priority to the solicitor's client's interests.

The after 3 pm search for builders' liens will involve searching the Unaccepted Builders' Liens List on Land Titles Online where registered builders' liens are listed until they can be examined and accepted.

The Unaccepted Builders' Lien list will display each lien by registration number, the registered owner of the land described in the lien and date presented for registration. A Status of Instrument may be ordered to display further information including the lien claimant, the amount of the claim, the presenter of the lien claim, the address for service of the lien claimant and the title number affected by the claim for lien.

Liens filed against land pursuant to *The Builders' Liens Act* may be removed from the title in five ways (the section references here are to *The Builders' Liens Act*):

1) By registration of a discharge of lien executed by the lien claimant (*s. 55(1)*).
2) A request in prescribed form may be registered requesting removal of the memorial of lien by reason of lapse if more than two years have elapsed since the lien was registered and no certificate of pending litigation is registered within the two years against the title evidencing that legal proceedings have been commenced to enforce the lien (*s. 49(2)*).
3) An application for a Thirty Day Notice may be made by filing a request/transmission form. The district registrar will prepare and forward the Notice to the applicant, and it is the applicant's responsibility to serve the notice as directed. If the lien claimant does not commence proceedings in court and file a certificate of pending litigation in the Land Titles Office within 30 days, a request to lapse the caveat may be registered with evidence of service, and the district will vacate the registration of the lien

(*ss. 50(1) and (2)*). More information on this process can be found in the *Land Titles Guide page 63 (pdf)* one of the Available Resources on the *Land Titles website*.

4) The court, under *section 55(2)*, may order a lien to be vacated on payment into court or provision of security of an amount equivalent to the holdback required for the particular contract or subcontract in respect of which the lien is filed, plus any monies payable under that contract, but not yet paid.

5) The court, under *section 55(3)*, may order that the registration of a lien be vacated upon any grounds other than those mentioned in *section 55(2).* This section would be utilized to remove liens that have clearly been filed out of time or against the wrong property.

The 7½% to be withheld by the owner cannot be used for this purpose unless the time has come for release of the holdback (*s. 56(2)* and *s. 27(4)*).

vii. Fixture and Crop Notices

A creditor holding a security interest in fixtures installed in real property or crops growing on land or in payments under a lease may register a notice in the Land Titles Office against the land. The notice is the form of a request that sets out the particulars of the personal property interest claimed (*s. 49* of *The Personal Property Security Act,* C.C.S.M. c. P35). These are commonly called fixture filings. Such notices may be removed from the title by registering a discharge.

Fixture notices registered in the Land Titles Office expire on the date specified unless a renewal notice is registered in the Land Titles Office before the expiration date. The district registrar of the Land Titles Office can remove registrations that expire or are discharged upon registration of a request to lapse (*s. 49(6)* of *The Personal Property Security Act*).

The fixture notice does not give the creditor security against the entire land for what is owing. Rather it protects the creditor against loss of its security interest in the fixture or crops coupled with the right to remove the fixture or crops under the conditions set out in *sections 36 and 37* of *The Personal Property Security Act*. The priority rules as between the registered owner, mortgagee, and creditor are also dealt with under those sections.

These provisions came into effect on September 5, 2000 and replace former provisions (as to fixtures).

Fixtures notices filed under the old *Act* may be attacked as being invalid and the court may order a discharge on that ground. The pre-reform legislation will govern.

Section 49 sets out the rules for disputing fixture notices.

d) Land Titles Online

Land Titles Online allows users to order, view and download titles, instruments and plans that are registered with the Land Titles Office. More specifically, the system allows users to view a status of title, record of title, status of instrument, copies of documents, and copies of plans.

The Land Titles Online Users Guide version 4.00 updated 2020-06-29 (the most recent PDF version as of this writing) is written to provide first time users with detailed instructions on how to work through the online system. *The Manitoba Land Titles Guide Revision 65 – May 2020* (the most recent PDF version as of this writing) is written to provide users of the Manitoba Land Titles System with assistance in certain areas where the system sees clients having difficulty.

You can find the most recent versions of the guides as well as other written and video materials in the *Land Titles Training Materials* on the Teranet website.

3. Zoning

a) Obtaining a Zoning Memorandum

i. Zoning Bylaws

The use of land and the structures permitted on land are regulated under zoning by-laws enacted by municipalities under the authority of *The Planning Act*. Among other requirements, a zoning bylaw prescribes the permitted and conditional uses of land and buildings and the location and form of buildings in each zone of a set area in a municipality. [A list of things that may be regulated by a zoning bylaw can be found in *The Planning Act s. 71(3)*]. For example, an owner of a livestock operation would be subject to a zoning bylaw regulation that would prescribe the maximum number of animal units that have been approved for their operation. Zoning bylaws cannot include regulations that discriminate against a person or limit a person's fundamental freedoms. A zoning bylaw, for example, could not outright prohibit places of worship (it may, however, prescribe the specific zones where such uses may occur and include regulations for these buildings based on land use concerns like size and location).

ii. Zoning Memoranda

Any person with an interest in a building, parcel of land, or operation involving the use of land can apply to a planning district or municipality for a zoning memorandum that states whether or not the building, parcel, use, or intensity of use appears to conform with the zoning bylaw (*The Planning Act s. 85*). For example, that owner of the livestock operation mentioned above could benefit from obtaining a zoning memorandum that states in writing that the operation conforms to the bylaw requirement setting the maximum number of animal units that have been approved for their operation.

A zoning memorandum provides important information for a buyer about any Building Code violations or open permits. For example, if there is an encroachment onto public property, current City of Winnipeg policy is to refuse to issue a zoning memorandum until an encroachment licence is applied for and granted. The City of Winnipeg charges annual fees in lieu of taxes for such licences and the fee is added to the annual realty tax bill.

iii. Certificate of Non-Conformity

A certificate of non-conformity is a particular type of zoning memorandum that states in writing that a landowner has a building, land use, or parcel of land that was lawfully in existence before a new zoning bylaw was adopted (*The Planning Act s. 87*).

When a municipality (or planning district) adopts a new zoning bylaw or amends a zoning bylaw, the permitted uses and bulk requirements for a particular parcel of land may change. If a building, a parcel of land, the use of land, or intensity of a use of land was lawfully existing before the adoption of the new zoning bylaw and now does not conform to the regulations in the new zoning bylaw, it is called a lawfully existing nonconformity. As proof that they have a lawfully existing non-conformity, landowners may apply for a Certificate of Non-Conformity (which is usually part of a zoning memorandum) (*The Planning Act s. 87*).

Lawfully existing non-conformities are considered legal and can continue indefinitely, provided the use is not intensified or changed to another non-conforming use (*The Planning Act s. 86*, *s. 90(1)*). If a landowner wants to increase the intensity of an existing non-conforming use or make repairs or additions on a non-conforming building, the landowner may apply for a variance (other than a variance to increase the number of animal units in a nonconforming livestock operation) (*The Planning Act s. 92(1)*).

The owner may continue to use the land for any use approved under the previous zoning bylaw and construct or alter a building on the land as long as all other requirements (including height and required yards) are met (*The Planning Act s. 90(2)*). Additional regulations for lawfully existing non-conformities—including rules for buildings that were under construction when a new zoning bylaw was adopted or nonconforming buildings that get damaged—are found in (*The Planning Act ss. 86-93*).

iv. How to Get a Zoning Memorandum

The most common method for conducting a zoning search is to submit a building location certificate along with the prescribed fee to the municipal authority in order to obtain a zoning memorandum stating that the property conforms to the siting requirements in a zoning bylaw.

It is the City of Winnipeg Zoning Department policy that a zoning memorandum cannot be obtained without a surveyor's original building location certificate that is not more than a year old. For detail about the survey and the building location certificate, see below under the heading Survey.

b) Development Permits and Zoning Letters

The City of Winnipeg zoning memoranda contains the following warning:

> *This zoning memorandum is not a confirmation of any permitted use of land. The only confirmation of a permitted use of land is a development permit issued by the Planning, Property and Development Department.*

As well a zoning letter ("use confirmation letter") may be ordered from the zoning department confirming a permitted use for the property in general terms. Lawyers handling purchases that are not single-family residences must consider counselling their buyers as to the importance of obtaining a use confirmation letter prior to closing.

c) The Scope of the Zoning Search

The scope of the zoning search that the conveyancing solicitor conducts is partly dictated by the terms of the sale agreement and partly by the instructions of the client. Zoning is not a matter that will impede the transfer of title except to the extent that the agreement makes it so. A buyer must be warned that the right to object to zoning problems may be lost after closing by the doctrine of merger (explained above).

The search may reveal that a use or structure is permitted as a non-conforming use or structure by virtue of having been there prior to the enactment of the zoning by-laws. In such a case the term of the sale agreement may be satisfied. However, the buyer's solicitor should bring to the attention of the client that the right to maintain the non-conforming use or structure may be lost by virtue of the provisions of *The City of Winnipeg Charter* and *The Planning Act*.

4. Survey

a) What is a Survey and Building Location Certificate

i. Survey

Prepared by a Manitoba Land Surveyor, a survey is the accurate mathematical measurement of land and improvements and it depicts the direction and length of the boundaries, the nature and position of the boundary monuments and the areas of quarter sections or other parcels of land laid out (surveyed by a Manitoba Land Surveyor and approved by the Director of Surveys).

ii. Building Location Certificate

A Surveyor's Building Location Certificate (BLC) consists of (1) the Certification, and (2) the Survey. This certificate is based on an examination of the site by a land surveyor authorized to practice under *The Land Surveyors Act,* R.S.M. 1987, c. L60 and provides the following information:

- It identifies the land, including the shape and size of same, as described in the title with its municipal address and street location.
- It identifies visible structures on or near the property and provides sufficient dimensions to facilitate a determination of compliance with zoning.
- It offers an opinion as to encroachments and may give notice of situations where the use of the land does not appear to be consistent with the title to the surface.

The Certification includes the names of the registered owners, the Certificate of Title number and name of the Land Titles Office where the title is registered, a legal description of the property, the identification of any caveats, encumbrances, or encroachments onto the property or by the property, and the date of the survey of the property. The Certification is signed and sealed by the Manitoba Land Surveyor preparing the report.

iii. Staking and Building Location Certificate

Survey monuments, which are iron bars or posts secured on the land, are not placed at the corners of the property when a Manitoba Land Surveyor prepares a Building Location Certificate If the client wants monuments to be secured on the property and identified on the survey of the property you must request a Staking and Building Location Certificate. •

A request for the staking or pinning of the property made at the same time as the building location certificate is requested may be beneficial if fencing, landscaping or other improvements are anticipated.

b) How to get a Surveyor's Building Location Certificate (BLC)

The past practice was for the buyer's solicitor to request and the seller's solicitor to provide the existing survey or building location certificate (BLC) held by the seller. If the seller did not have a survey or BLC, it was possible that one could be found in the file of a mortgagee or former mortgagee. If there were no obvious errors in the existing BLC, or new buildings added to the property since the date of the BLC, it could be used to procure a zoning memorandum.

However several years ago the City of Winnipeg Zoning Department changed its policy. Now, the department requires a BLC that is less than one year old if a buyer wants a zoning memorandum from the city to confirm zoning compliance. Therefore,

unless an existing BLC meets that requirement, a solicitor acting for the buyer must recommend that the buyer obtain a new BLC in order to get a zoning memorandum.

Without a zoning memorandum it will not be possible for the solicitor to give an opinion on the status of the property regarding encroachments or zoning to the buyer or the mortgagee.

When acting for a buyer, discuss the issue of obtaining a new survey immediately upon receiving a copy of the offer. An estimate of the cost of a BLC should be obtained. This is particularly so in rural areas, where the cost of a BLC may be substantial. While the seller may have an existing BLC, it may be several years old and not depict the property in its current state (e.g., a new garage was constructed after the date of the BLC). Even if the buyer advises that it accurately depicts the property upon examination of the seller's BLC, there may have been changes made to adjacent properties after the date of the existing BLC that would not be shown on the seller's BLC (e.g., neighbour built a garage after the seller's existing BLC was created and the garage eaves encroach onto seller's property).

If the transaction is being financed by a mortgage loan from a financial institution, a BLC may be required by the lender. Most lenders will allow a buyer to obtain title insurance as an alternative to getting a new BLC and zoning memorandum.

In the situation where there is a lender who will accept a BLC and zoning memorandum OR title insurance, the buyer's solicitor must identify the pros and cons of a BLC with a zoning memorandum and/or title insurance and make recommendations to the client. The client has to make the final decision of course. Record all instructions from the client on this decision in writing on the file, and preferably signed by the client before proceeding either way. Remind the client of their instructions and the implications of their decision again in the reporting letter.

c) Why get a Surveyor's Certificate

The surveyor's certificate is one of the instruments by which a solicitor assists a client in determining whether the client is getting what was bargained for on the closing of a real estate transaction.

On the basis of this certificate the solicitor can determine prior to closing whether the property being conveyed complies with the requirements of the sale agreement in the following respects:

- identity and location;
- encroachments;
- zoning - as to setbacks and to some extent as to structure.

Once the solicitor gets the BLC, the solicitor should evaluate the information on it against the requirements of the contract and the results of other searches. Ask the client if a provided BLC accurately depicts all buildings that exist on the property in

case some building was added (like a garage) or structural changes were made (like an addition to the house) after the BLC was made that would render the BLC incomplete as a means of protection. In such a case the buyer may want to make a personal inspection of the property. If indicated, a new BLC should be ordered even if the BLC provided is less than a year old.

Whether it is a new or a current provided BLC, the BLC should be shown to the client and the client's approval in writing should be obtained before the solicitor uses it for any purpose. Once the client has confirmed that the BLC is accurate and the client has approved it, the solicitor sends a copy of the BLC to the municipality to check for zoning requirements and order a zoning memorandum.

d) Encroachments Revealed by the Surveyor's Certificate

If the BLC reveals an encroachment, either from the subject property onto adjoining property, or by adjoining properties onto the subject property, then the buyer's solicitor must report the situation to the buyer prior to closing and obtain instructions. These instructions should also be recorded in the file in writing and preferably signed by the client.

i. Possible Remedies or Other Options

If the encroachment is minor, the buyer may choose to ignore it, and thereby avoid a confrontation with either the seller or the neighbour. Minor encroachments include eaves (which can be cut off if absolutely necessary) and fences (which can be moved). However, the encroachment of a permanent structure is more serious and should not be overlooked. If the encroachment is accepted, its existence and the client's instructions should be reduced to writing and signed by the client and then also reported in the solicitor's final report. The client should be warned to mention the encroachment in any further listing or other dealing with the property.

If the sale agreement requires the property to be free of all encroachments, the buyer may choose to rescind the whole deal. However, if the encroachment is very minor and not material the buyer may not be permitted to rescind. See *LeMesurier et al. v. Andrus,* 1986 CanLII 2623 (ON CA) leave to appeal to SCC refused, 20027 (December 18, 1986) where the "private drive to the West of the property" as described in the agreement was not wholly within the lot line, but encroached on the neighbour's lot by one-third to three-quarters of a foot. The sellers were able to obtain a quitclaim for part of the encroachment and moved the curb bounding the driveway, so that it was then totally within the lot line for the rest of the encroachment. In the result, the driveway was narrowed slightly for part of its length, but not so much as to impede traffic, and the sellers were unable to convey an area of 12.09 sq. ft. The shortfall amounted to a discrepancy of 0.16% of the total property. The buyer rescinded. Because on an objective test the sellers could convey substantially what the buyer contracted for, the buyer could not use the

standard title clause to repudiate in those circumstances and her reliance upon it was found to be capricious and arbitrary. If the sellers had not already resold the property to mitigate their losses, at most the buyer would have been entitled to a small abatement of the purchase price. The court held the buyer was not entitled to rescind and had to pay damages and costs to the seller.

If the encroachment is onto privately held property, the buyer may call upon the seller to obtain an encroachment agreement with an easement and right-of-way that runs with the land in writing from the adjoining property owner. Easements can be registered in one of two ways; they can be registered pursuant to *section 76* of *The Real Property Act,* or they can be registered by way of caveat. Where the interest claimed in a caveat is based upon an easement, and the easement is not a statutory easement (as detailed in *s. 111* of *The Real Property Act*) the caveat must contain the legal description of both the dominant and servient lands. Section 111 caveats do not require dominant lands. These caveats are typically registered by the Crown, a municipality, Hydro, MTS, or a similar agency, for the supply of some service – water, electricity, etc.

Each method of registration has its own requirements. For more information on these requirements check the Teranet website for *Land Titles Training Materials*.

If a caveat based on the easement is registered on the title, future buyers of the adjoining property would then be aware of the registered agreement. The seller might have to pay money to negotiate an encroachment agreement.

If the encroachment is onto public property, a licence for encroachment may be more readily available from the municipality. The municipality will charge an annual fee for the licence and the fee will be added to the property taxes. The amount of the fee will be dependent on the extent of the encroachment. The license fee is essentially in lieu of additional property taxes that would be attributable if the owner owned the greater amount of the land being used by the encroachment.

If a private encroachment agreement and easement cannot be negotiated, a court application may be made for an easement or for transfer of the land encroached upon, pursuant to *The Law of Property Act* *section 27* (Relief of persons making improvements under mistake of title) or *section 28* (Encroachments on adjoining land).

e) Title Insurance

In circumstances where a lender will agree to accept title insurance in lieu of a BLC, be aware that the policy of title insurance in favour of the lender will not also insure the buyer or the seller. For example, in *Lewis v First Canadian Title,* 2015 ABQB 726 (CanLII), the primary issue in the case was whether an uninsured owner had coverage under their lender's title insurance policy. When acting on the purchase of a property, a buyer's lawyer purchased only a lender's policy as instructed by the lender and the buyer declined to pay for a Homeowner Policy for the property. A judgment against the former owner of the property for about $21,000 was registered against the property during the gap between the buyer's possession and the accepted registration of the transfer of land and the new mortgage. First Canadian Title did not immediately step in and pay out the $21,000 judgment to put the insured lender into first priority because there was no loss at the time.

For the most part, if a mortgage is in good standing, a lender does not have a loss as a result of a risk covered under a policy. It is only if and when the loan goes into default that a lender stands to lose as a result of the covered risk. Further, only in those circumstances when the property's value is insufficient to pay the amount outstanding on the loan, the costs of sale and the amount (using this example) to payout the intervening encumbrance will the insurer pay out a claim.

Without their own title insurance policy to cover their loss the buyers submitted a claim to First Canadian Title under the lender's policy. Not surprisingly the court held that the buyers were trying to "place a square peg in a round hole" and held that the mortgagee's lender policy offered no coverage to the buyers.

When considering title insurance, a buyer might choose the title insurance option for the property (an owner's policy) that will insure the buyer for certain defects that might have been exposed had a new BLC and zoning memorandum been ordered. It is important to understand that the title insurance coverage is more limited in in some ways, and more comprehensive in other ways.

A particularly useful reason to use title insurance is to protect against building permit violations, which have become a common problem in some municipalities including the City of Winnipeg. A new zoning memorandum is generally not the right tool for that purpose.

5. Taxes

a) Priority Accorded Real Property Taxes

The annual real property taxes levied against privately owned land in Manitoba are the subject of a lien against the land that has priority over the rights of the owners, any subsequent buyer and all encumbrancers even though it is not registered against the title.

Therefore, in connection with any real estate transaction it is usually necessary to determine what real estate taxes have been levied and to what extent taxes are outstanding, so that adjustments between the buyer and the seller can be made.

b) Determining the Status of Real Property Taxes

The status of real property taxes can be determined in several ways:

i. By phone

In limited cases, by telephoning the municipality. In most cases, however, a municipality will require a written request together with payment of the applicable search fee.

ii. By Computer Search

By computer search of the City of Winnipeg database or other municipal databases that may be available.

iii. Tax Bills

From tax bills (receipted or not receipted) or memoranda issued by the municipality. This source is reliable as to the amount of taxes levied for the year and may therefore generally be relied on for adjustment purposes. However, the municipality is not bound by the information contained in such statements, particularly as to arrears.

iv. Tax Certificates

From a tax certificate issued by the municipality. To obtain a tax certificate in most municipalities, you can write to the municipal office, providing a full legal description of the property and enclosing the fee. Some cities have online service. For example, in Winnipeg the service fees and the link to the online tax information subscription service (for law firms) are found on the *Assessment and Taxation Department webpages*. In Brandon, the real property taxes and assessment information can be found *online here* and a tax certificate can be ordered *online here*.

The information in the tax certificate is binding on the municipality except as to assessments to be issued on new construction and unpaid monies owing to the municipality which may be, but have not yet been, added to the tax roll. Examples of the latter are local improvement levies, unpaid water utility accounts, work orders performed by the municipality after default by the owner (e.g., weed clearing, demolition of unsafe structures). To search the excluded items, where such search is indicated, further inquiry at the appropriate department of the municipal office should be made (e.g., local improvements, assessment, water utility, building inspections).

A tax certificate is the safest way to confirm the status of payment of levied taxes.

6. Utilities

a) Hydro (or Other Providers) Loans and Rentals

Manitoba Hydro no longer accepts or responds to requests from solicitors involved in property transactions concerning potential loan balances or rental equipment charges related to the property. Since January 22, 2018, Manitoba Hydro communicates such information directly to its customers. The concept of ownership is important here. There is a fundamental distinction between improvements or equipment that are owned by the homeowner and merely financed with Hydro or some other supplier (e.g. Reliance Equipment Finance), versus equipment that is owned by Hydro or another supplier and is rented to the homeowner. In the former case, unless Hydro or the supplier have registered on title or in the *Personal Property Registry*, they do not have the right to retrieve the equipment and indeed, they will pursue the seller for payment the same as any creditor. In the latter case (rental equipment), Hydro or the supplier that owns the equipment will continue to bill for the use of the equipment on the utility bill or otherwise, and has a right to the equipment they own.

The standard offer to purchase has a clause that deals with finance or rental equipment. There can be risk both ways.

A risk to a seller is that in some cases, the agreement is negotiated on the basis that the buyer agrees to assume any such contract. That is a problem with finance or home improvement contracts because the contract between the seller and the provider does not allow the debt to be assumed, and the seller continues to be responsible and will need to pay the creditor. This, can of course, provide a windfall to the buyer and an unexpected liability to the seller.

On the other hand, a risk to a buyer is where the offer to purchase represents that all fixtures and equipment are owned but it turns out that there are items on a rental contract. If that is not detected by the buyer's lawyer a buyer may end up with an unexpected liability for rental items. Actions that solicitors can take include (i) advising clients to contact Manitoba Hydro directly to provide notice of ownership changes and enquire about rentals, (ii) searching with well-known providers such as Reliance and (iii) recommending title insurance. If the buyer's solicitor determines that the sale agreement has been breached, the buyer's solicitor can call upon the seller before closing to purchase the equipment and provide clear title or to pay off any liens if registered.

b) Water and Waste Accounts

The Law Society offers an annual Hot Topics in Real Estate program and the issue of outstanding water bills is an issue that has been identified as a problem for conveyancing practice for several years. Unpaid water accounts are a matter that must be addressed in advance of closing because if the seller has an unpaid water

account the municipality will add the amount to the property tax bill and it may become a buyer's problem. The buyer's solicitor must insist on confirmation of both a final water reading from the seller and payment of the final water account. Depending on the method of closing being used, the buyer would require verification on closing or an appropriate holdback in trust to secure payment of the final water account so that the buyer's tax bill would not have the seller's unpaid water account added to it by the municipality after closing.

i. The Problem with Conflicting Readings

Buyers' solicitors must be aware that some exceptionally large water bills (e.g. $90,000, $35,000, 28,000) have been added to unsuspecting buyers' property taxes in the past. Even a substantial holdback will not do much for the buyer in that scenario.

The City Water and Waste Department has said that an intractable problem it encounters with closing accounts and with issuing final water bills stems from the situation where a seller on a real estate sale does not take a reading of the water meter at all or takes a reading well before the closing and possession date, and the buyer, therefore, does not agree with that meter reading at the time of closing. If there is a large gap between the seller's and the buyer's water meter readings, the Water and Waste Department will never be able to reconcile the discrepancy. In that case, arguments relating to requests to close the account are more or less inevitable and beyond the capacity of the City Water and Waste Department to resolve.

ii. A Recommendation

It is recommended that lawyers advise their clients to each take a smartphone photograph of the water meter reading on the date of closing and possession so that they can agree on a final reading. Then the request to close out the water account and obtain the final billing can proceed without problems.

iii. Getting Information through Lawyer Gateway

Until very recently, it was difficult for a buyer's lawyer to get information about whether there was an outstanding water bill that had been added to the taxes or to other circumstances that might signal risk for a buyer.

With the assistance of Legal Data Resources (Manitoba) Corporation (*LDRC*), a lawyer who acts for the property owner or, more importantly, the buyer, can now get access to confidential information about water accounts by subscribing for the applicable service through LDRC. Lawyers in Winnipeg can check the water account through *Lawyer Gateway* which is a web-based information service provided to subscribers via Legal Data Resources Corporation (LDRC) for water utility bills in Winnipeg. The terms of the City of Winnipeg Utility Balance Database Subscription Form describes the terms of a

lawyer's access to and use of this information, including the prohibition against packaging any data retrieved from the database for resale.

Information relating to the meter readings and the water account for any particular property is confidential information which belongs to the owner of the property. Access to the water accounts is only properly available to a lawyer who has the property owner's authorization. On a purchase and sale transaction, the buyer's lawyer should have the property owner's consent to access such information on behalf of the buyer before attempting a water account search. Consent can be express, whether written or verbal, or implied. The City of Winnipeg has stated that the City does not require lawyers to obtain any particular form of consent, so that issue is left up to the lawyers involved.

iv. News as of October 2020

The City of Winnipeg Water and Waste Department has been working on an enhanced system for real estate closings in terms of water accounts, and particularly on an enhancement to permit lawyers to close out a Seller client's water account as part of that process (if so desired), so that a final water bill can be obtained and paid and the Seller will be free of further water bill obligations. One complication of the water account closeout process was the method of delivery for a final water bill following the delivery to the City Water and Waste Department of a request to close a Seller's water account.

The Water and Waste Department has now updated its *Lawyer Gateway Portal* to deal with final water bill delivery, and wants to roll out that update and has presented a preview of the new features to users so they will be familiar with the updated system before that system goes live. Representatives of many firms attended the webinar in early November and feedback is being used by the Water and Waste Department to make some final changes.

The updated system is set to go live after December 11, 2020.

7. Additional Municipal Searches

a) Work Orders

Municipalities may have a variety of regulations other than zoning regulations that affect the condition of buildings for fire, health, safety, and general building code requirements. These requirements may be enforced through

- the issuance of work orders;
- the prosecution of the owner for not performing the work order;
- the closing down of the premises by the municipality;
- the doing of the work order by the municipality and the adding of the cost to the tax roll; or

- the demolition of the property by the municipality at the expense of the owner.

Furthermore, by-laws may be enacted from time to time requiring the upgrading of properties which previously complied with existing regulations either by way of work orders to be issued on a property by property basis or by provision of general application.

The question of whether there are outstanding work orders or notices may be searched by inquiry at the municipality or provincial agency. Even where there are no work orders, inspections may be requested and given to ascertain compliance. The client may need to engage professionals such as architects and engineers for more in-depth investigations.

The solicitor's responsibility for such searches will be governed in part by the terms of the purchase and sale agreement and in part by the instructions received from the client.

In the absence of an express term of the agreement dealing with work orders or compliance with building standards the buyer may have no recourse against the seller if a violation is found to exist. Nevertheless, the more prudent course for the solicitor would be either to search for work orders in the case of rental or commercial properties or warn the client to make inquiries before closing. If a serious problem is discovered before closing, the client may be able to avoid completing the transaction or negotiate some other solution.

Additional regulations which can be searched through the municipality include:

b) Riverbeds and Land by Waterways

The City of Winnipeg Waterway By-law No. 5888/92, which regulates development of the riverbed and lands extending 106.7 m (350 ft.) on each side of the Red, Assiniboine, Seine and LaSalle rivers and the creek bed and lands extending 76.2 m (250 ft.) on each side of Bunn's, Omand's, Sturgeon and Truro creeks.

c) Land Abutting Provincial Roads

Property abutting on provincial roads will have set back requirements enacted under *The Transportation Infrastructure Act*, C.C.S.M. c. T147 (proclaimed in force March 1, 2019, it replaces both *The Highways Protection Act*, and *The Highways and Transportation Act* and its stated purpose is that it "modernizes the legislation for constructing and managing provincial transportation infrastructure. It eliminates the Highway Traffic Board and transfers jurisdiction over provincial highways to the government. It also sets out the authority and obligations of the department in relation to airports, docks and ferries".)

d) Land near Airports

Property near airports may have height restrictions under the *Aeronautics Act* (Canada), R.S.C., 1985, c. A-2 and, in Winnipeg, under the *Airport Vicinity Protection Area Secondary Plan (Primary By-law 6378/94 including all amendments*).

D. PREPARING FOR CLOSING

Consider the agreement, the results of searches, and the instructions from your client. Determine what is required from the other side to complete.

In most agreements delivery of possession, transfer of title, and payment are concurrent conditions but a precise agenda for closing is seldom spelled out in the agreement. In order to arrange for an orderly closing the solicitors should make their requirements known to each other in advance in writing.

The fundamental legal requirement is that each party be ready to carry out their part of the bargain on closing day; the seller must be able to convey title and possession in accordance with the agreement and deliver duly executed conveyances and supporting assurances and the buyer must be prepared to pay for the property.

1. The Statement of Adjustments

Prior to closing, the seller's solicitor prepares a statement of adjustments and forwards it to the buyer's solicitor. This statement identifies the balance due on closing.

The statement of adjustments prepared by the seller's solicitor contains two columns of figures. One column contains the amounts to be paid by the buyer, that is, the purchase price and any adjustments in favour of the seller (e.g., prepaid taxes, GST, mortgagee's tax account credit, etc.). The other column indicates how the purchase monies are to be paid (e.g., deposit, assumption of mortgage, mortgage back to seller, adjustments to be charged to seller).

a) Illustration

As an example (meant to illustrate various adjustments, not to be representative of a typical transaction), assume that it is February 2021, and the buyer, Bonny Barrier, entered into an agreement to purchase 3 Carver Street in Winnipeg from the seller, Sofia Semple. The possession date is April 1, 2021. The purchase price is $270,000.00 which Ms Barrier plans to pay by:

- arranging a new first mortgage with Reliable Credit Union for $200,000.00;
- assuming the $35,000 existing mortgage on the property with the Bank of Manitoba; and
- arranging a third mortgage back to the seller, Ms Semple for $20,000.00. Ms Barrier plans to pay the balance of the purchase price of $20,000 plus all adjustments out of her own savings on closing date.

For the purposes of this illustration, we assume that the Bank of Manitoba as the existing first mortgagee has agreed to postpone its mortgage in favour of Reliable Credit Union so that the credit union will become the new first mortgagee and the Bank of Manitoba will become second in priority. The 2021 property taxes of

$2,867.98 have not been paid and will be due on June 30, 2021. Ms Barrier, the buyer will assume the seller, Ms Semple's TIPP.

You, acting for Ms Barrier have received the following statement from the mortgagee, the Bank of Manitoba:

Mortgage Statement Bank of Montreal – for Assumption Purposes Only (*see notes)

☒ Assumption Purposes (not for discharge)
☐ Discharge Purposes
☐ Information Purposes

Statement Preparation Date:	December 18, 2020
Effective Date:	April 1, 2021
Re:	Mortgage No. 28673
Mortgagor:	Sofia Mariola Semple
Mortgaged Property:	3 Carver Street, Winnipeg, Manitoba R3C 0L0
Interest Rate:	2.30% calculated semi-annually not in advance
Monthly Instalment (p. & i.):	$153.51(*a)
Tax Instalment:	N/A – mortgagor pays own taxes
Maturity Date:	June 1, 2022

This statement is correct only if all payments due to and including the requested closing date(b) have been made and honoured and is subject to the correction of any errors or omissions. Should the mortgage be in arrears, the "Principal Balance" will be as at the due date of the last paid instalment. All taxes and other charges paid by us from time of preparation to the closing date and not indicated on this statement are the responsibility of the mortgagor.

Principal Balance:	$35,000.00(*c)
Accrued Interest:	N/A
Interest Penalty:	
Tax Account Balance(*d):	N/A
Balance as at Effective Date:	***$35,000.00***

E. & O.E.(*b) Should funds be received for discharge after the Effective Date, interest @ $2.21 per day must be added up to and including the date of receipt.

Example of a Statement of Adjustments Prepared by Seller's Lawyer (*see notes)

Sale of: 3 Carver Street **Sold by:** Sofia Mariola Semple **Sold to:** Bonny Doreen Barrier **As of:** April 1, 2021	[*Credit to buyer*]	[*Owed to seller*]
To Purchase Price		$270,000.00(*1)
By Deposit	$ 1,000.00(*2)	
By Assumption of existing mortgage in favour of Bank of Manitoba (based on April 1 instalment having been paid by Vendor)	35,000.00(*3)	
By unpaid 2021 taxes of $2,567.98 (estimate based on 2020 taxes) Credit Purchaser 91 days.	638.48(*4)	
By Credit to Vendor for January, February, March and April 2021 TIPP instalments of $214 each		856.00(*5)
By Mortgage back to Vendor to be prepared and registered at Purchaser's cost	20,000.00(*6)	
By Balance due to Vendor on closing	214,217.52(*7)	
TOTALS:	**$270,856.00**(*8)	**$270,856.00**(*8)
E & OE(*9)	**STATEMENT PREPARED BY: VENDOR'S LAWYER**	

b) Notes about Some of the Important Features of the Statement of Adjustments

(1) The information as to the purchase price is derived from the signed sale agreement. Check whether there is a counter offer at the end of the agreement. Make sure to use the final agreed price.

(2) The amount of the deposit is set out in the sale agreement, but confirmation that it has been paid should be obtained from either the agent or the seller.

(3) This information is obtained from a statement issued by and obtained from the mortgagee for assumption of mortgage purposes. The following are the salient features of the sample mortgage statement set out before the Statement of Adjustments in this example:

(a) This portion of the assumption statement confirms the important payment terms of the mortgage on which the statement is based. These should be checked against the terms of the mortgage as registered and the sale agreement and any discrepancies dealt with before the statement is accepted for adjustment purposes.

(b)&(c) This portion of the statement sets out the assumptions on which the statement has been prepared. The most important assumption to be confirmed independently of the statement is the fact that <u>all payments up to the statement date have in fact been made.</u> In this case, the monthly instalments of principal and interest ("p. & i.") are $153.51. The calculated mortgage balance of $35,000.00 which the purchaser will take responsibility for paying is based on the assumption set out in the statement that the seller will have paid the April 1 instalment. Because the statement was prepared in December, it was unknown whether all instalments up to and including April 1, 2021, will be made by the seller. Before closing and finalizing the adjustments, the solicitors should verify that the payments have been made. The seller's solicitor may verify this by asking the seller, while the buyer's lawyer will want confirmation from the mortgagee. Confirmation of the payment of all amounts up to the date of closing should also be included in the seller's declaration as to possession.

If the April 1 or any other instalments have not been paid on closing, further credits could be given to the buyer if the buyer assumes this obligation.

(d) Some mortgagees maintain a tax account and require the mortgagor to make monthly payments on account of the taxes along with the principal and interest instalments. If this were the case in this sample, the mortgage statement would show a balance including accrued interest. Any credit balance would be charged as a debit to the buyer on the statement of adjustments as an additional charge because when the taxes are due, the mortgagee will apply the balance in the tax account for the buyer's benefit. If

there were a debit balance in the tax account (perhaps because the mortgagee had advanced a portion of the taxes on the seller's behalf as there was not enough in the tax account to cover the taxes) the buyer would get a credit on the statement of adjustments because the buyer will be responsible for repaying the amount of the debit to the mortgagee.

If the mortgage statement indicates that the mortgagee maintains a tax account and pays taxes to the municipality, the buyer's lawyer should verify this by checking with the municipality.

Additional charges may have been added to the statement by the mortgagee. If so, these would be for the seller to challenge.

If the closing falls on a date other than a normal instalment due date, an additional entry for accrued interest will be indicated on the mortgage statement. It should always be kept in mind that the interest on a mortgage accrues daily and the balance owing on the mortgage will change from day to day.

Finally, the seller's lawyer should always provide a copy of the mortgage statement to the seller for review. The mortgagee may have made an error in calculation or may have charged items to the mortgage account that should not have been charged to the mortgagor. If the mortgagor cannot comment on whether the balance is correct, it may be in order to have an independent calculation done, either by a service provider or by using one of the many mortgage calculators available on the Internet or through installed software.

(4) The taxes are adjusted as between buyer and seller depending on whether the closing date falls before or after the tax due date (the date varies from municipality to municipality). In Winnipeg, taxes for the calendar year are due on June 30, so a closing date of April 1 will require an adjustment in favour of the buyer as the buyer will be responsible for the taxes on their due date. The number of days in the year that the seller owns the property is calculated and the taxes are then apportioned between the buyer and the seller. Because the City of Winnipeg normally does not issue its tax bills until early May, the actual taxes for the year of adjustment will not be known. On the sample statement of adjustments, the previous year's taxes were used as the basis for calculation. Some lawyers will add an amount for the estimated increase in taxes while others will reserve the right to re-adjust once the taxes are actually assessed, particularly in the case of commercial properties or other properties having a large tax bill.

Where the closing date is after the tax due date of June 30 or after a date that the seller or its lender submitted payment in full to the tax authority, the buyer will be required to reimburse the seller for the buyer's share of the calendar year's taxes, assuming that the taxes have been paid. If the taxes have not been paid, the buyer may close on the basis that the buyer will pay the taxes and penalties, in which case the appropriate credit to the buyer should be shown.

If the seller is a resident homeowner, there may be a property or education tax credit shown on the tax bill as a credit. If the buyer will be entitled to the same tax credit, the taxes can be adjusted based on the net amount. If the buyer will not be entitled to the tax credit, the adjustment should be on the gross amount and the difference should be refunded to the *Manitoba Tax Assistance Office*. The lawyers should co-operate and decide how the excess tax credit should be dealt with.

(5) The City of Winnipeg and certain other cities and municipalities have a *tax instalment payment program* (TIPP) whereby, instead of paying the entire year's taxes in one instalment on or before the tax due date, a taxpayer can arrange to have monthly debits automatically withdrawn from a bank account. In order to participate, the taxpayer should enroll before the middle of December in a year and the automatic debits, based on 1/12 of the estimated taxes for the next year, will begin on January 1. Once the taxes are actually known, there is a mid-year adjustment in the amount of the monthly debit, usually effective July 1 in Winnipeg. In effect, because approximately one-half of the taxes are prepaid, the City of Winnipeg waives the penalties that would otherwise be levied on the one-half of the taxes that are not paid on the due date.

If a property is sold mid-year, before the due date of the taxes, the *TIPP* will not refund the amounts prepaid, but will credit these against the tax bill when it does fall due. The buyer enjoys the benefit of this, so there should be an adjustment in the seller's favour. The buyer can then continue with the TIPP (by making the appropriate arrangements with the City of Winnipeg) or can pay the balance of the year's taxes owing and then revert to paying once annually.

If the property is sold after the tax due date, the *TIPP* will allow the buyer to continue with the instalment payments by "assuming" the seller's TIPP account. If the buyer chooses not to do this, the entire balance of the year's taxes (after crediting the amount of the TIPP instalments) will be due. In this case, there would be no adjustment for the TIPP (although the normal tax adjustment as set out in paragraph 4 above would still be made) and the seller's solicitor will pay the balance of the taxes owing out of the sale proceeds.

Both buyer's and seller's solicitor will want to make sure that the adjustments are correct by checking with the TIPP office (i.e., the *City of Winnipeg Tax Department*, or the appropriate other city or municipality).

(6) Where a portion of the purchase price is to be satisfied by a mortgage back to the seller, this should be shown on the statement of adjustments. If there is an agreement that the seller is paying a part of the cost of preparing or registering the mortgage, this could be the subject of further adjustment.

(7) This figure represents the net cash to be paid on closing by the buyer. If the sale agreement provides that part of the purchase monies are to be paid by way of a mortgage arranged by the buyer on the subject property, the fact that part of the cash

proceeds is coming from a mortgage is not usually disclosed on the statement of adjustments.

(8) Both columns are totaled to ensure that they balance (i.e. have the same totals). If they don't balance there are one or more errors to be corrected. If they do balance the adjustments might still be incorrect if items have been placed in the wrong columns.

(9) To allow for correction of errors before or after closing, "E. & O. E." (errors and omissions excepted), a *Hedley Byrne* disclaimer is added.

2. Statement of Estimated Closing Costs

Well in advance of closing when possible, the buyer's solicitor should prepare a statement of the estimated total cash required on closing (the budget sheet) for the client. This statement will include the cash required by the statement of adjustments, he anticipated mortgage costs and deductions by the mortgagee, and the solicitor's estimated fees and disbursements for the transaction. The function of this statement is to allow the buyer to arrange to have the necessary funds available in advance of closing and to avoid unpleasant surprises to the buyer or the solicitor on or after closing. If the parties are planning to close using the old-style closing where the mortgage proceeds are not advanced until the buyer's solicitor can confirm to the mortgagee that the mortgage has been properly registered in the Land Titles Office, then the budget sheet for the buyer-client should also include an estimated amount to pay for the interest payable to the seller for any delay in payment of the mortgage proceeds.

It should be noted that where the transaction involves a mortgage loan advanced by a third party lender and the purchase is closed partly on the basis of such financing, in addition to the expected mortgage advance in the estimated statement the following expenses should also be pre-estimated:

- Mortgagee legal costs to be paid out of the mortgage proceeds (if separate from buyer's legal fees).
- Any monies (e.g. inspection, CMHC insurance premiums or interest to the interest adjustment date (IAD)) to be deducted by the mortgagee, if applicable. The mortgage instructions will likely indicate the amounts the mortgagee will hold. In this example there are no default insurance premiums withheld but for demonstration purposes this example is closing under the old style of closing and the mortgagee is withholding 10 days of interest to cover the mortgage interest for the period between the projected date of the proposed advance and the date of the interest adjustment date stated in the mortgage.
- Interest payable to the seller on the delayed mortgage proceeds between the date of closing and the estimated date of advance (again because this example assumes the parties are using the old style closing where the mortgage proceeds will not be advanced until after the buyer's lawyer confirms to the mortgagee that

the mortgage is properly registered in the Land Titles Office according to the instructions from the mortgagee).

The amount for the last item will depend on the speed at which the Land Titles Office completes registrations. This may vary from a day or two up to a week at times depending on the type of registration and whether the documents require corrections after they are submitted to Land Titles. (See *Manitoba Land Titles Correction Policy Version 3.3*). The standard under an old style closing has been to collect 30 days' worth of interest from the buyer-client, which is usually ample, and then to return the surplus to the buyer-client at the time of reporting.

If parties are closing using the *Western Law Societies' Conveyancing Protocol* or the more recent New Closing Protocol where the buyer pays the seller the complete adjusted purchase price on closing, there will not be interest adjustments for the period between closing and registration of the buyer's mortgage because the mortgage proceeds are advanced before registration so they are fully available on closing date.

See below for details about the *Western Law Societies' Conveyancing Protocol* and the New Closing Protocol.

3. Arranging for Payment by the Buyer

a) Cash

The cash portion of the purchase monies is to be paid to the seller's solicitor on closing and might be required to be held in trust until a certificate of title issues to the buyer. This will be determined by the closing method agreed to by the solicitors and their clients. If the cash is coming from the concurrent sale of the buyer's property, the buyer will have to arrange for interim financing of this portion of the purchase price so that the solicitor will be able to pay over the cash on closing. This is commonly referred to as bridge financing.

The cash payable by the buyer on closing should be paid by the buyer providing their solicitor with a certified cheque or bank draft payable to the solicitor's firm. The solicitor will deposit the monies into the law firm's trust account and issue a trust cheque payable to the seller's solicitor on closing. Remember that no trust cheque can be drawn on your trust account unless the funds are confirmed as received in the trust account. The buyer's solicitor will be able to attach trust conditions to the trust cheque and documents to be delivered to the seller's solicitor.

b) Mortgage Loan

If there is a loan from a third party, the buyer's solicitor should check the loan commitment to make sure all conditions are satisfied before closing or are reasonably under control. The solicitor should then arrange for the client to attend in advance of the closing date to deliver the monies required on closing and to execute all required documents.

These documents to be signed by the buyer usually consist of a mortgage, a declaration as to possession in favour of the mortgage lender and an order to pay directed to the buyer's solicitor and the mortgagee authorizing the advance and disbursement of the mortgage proceeds to the buyer's solicitor's firm.

The seller will retain an unpaid seller's lien as a charge against the property in priority to the buyer and any creditor of the buyer. It is good, if rare, practice for the seller's solicitor to protect the priority of the unpaid seller's lien by requiring the buyer's solicitor to register the seller's lien caveat signed by the solicitor on behalf of the seller, in series with transfer of land and prior to the mortgage. The seller's solicitor undertakes to withdraw the caveat after full payment and pays the cost of registering and withdrawing the caveat and obtains a new certificate of status for the mortgagee. The seller should be covered by a mortgage clause under the buyer's insurance until the seller is paid in full.

c) Mortgage Back to the Seller

The buyer's solicitor should prepare the mortgage back to seller and submit it to the seller's solicitor for approval. The buyer must execute the mortgage before closing. Unless there is an express agreement between the parties stating otherwise, the current practice is for the buyer to pay for all costs of preparing and registering the mortgage, the theory being that the mortgage back to seller is almost always an accommodation to the buyer to make the transaction proceed that a seller would otherwise avoid if possible.

4. Ensuring Delivery of Possession by the Seller

a) When Vacant Possession is Given

If the agreement provides that the seller will give the buyer vacant possession then the seller must deliver the keys or access codes to the premises to the buyer on the date of possession. This is usually arranged between their respective solicitors with the cooperation of the real estate agent if one is involved in the agreement.

The seller's solicitor should not release possession to the buyer prematurely. Technically the buyer is usually not entitled to possession of the property until the entire purchase monies have been paid or provided for by way of fully executed and registerable documents. That means that the buyer should not be given the keys and permitted to take possession of the property before 12:01 am on the date of possession. If the buyer is given possession in advance and then won't or can't pay what is owing, the seller may be put to considerable expense to regain possession. As well, the buyer's fire insurance coverage will not start until the closing date so any damage caused by the buyer will not be covered by that insurance.

If the seller asks about giving the buyer advance possession, the seller's solicitor should warn the seller of the possible negative consequences. When closing under the NCP or WLCP the monies and keys are exchanged prior to closing date but the

keys can be provided subject to the trust condition that they not be released to the buyer until 12:01 on the possession date.

b) Possession of Tenanted Premises

The seller gives the buyer possession of tenanted premises by delivering notices to the tenants, prepared and executed by the seller, informing them of the sale and directing the tenant to make all future rent payments to the buyer.

The buyer will assume the rights and obligations of the seller (including possibly, liability for causes of action already accruing before closing) with respect to the tenants of the property sold.

In the case of residential tenancies this liability will include the obligation to refund to tenants and former tenants excess rents (for up to 2 years prior to change of landlord - per *s. 52* of *The Residential Tenancies Act,* C.C.S.M. c. R119) collected by former owners and security deposits including its accrued interest that were received by former owners.

The following steps should therefore be taken by the buyer or buyer's solicitor on closing if there are tenancies involved:

1) Inspect the leases; have the seller deliver executed copies.
2) Have the seller certify in the declaration as to possession and assignment of the leases that all terms have been disclosed and that the leases are in good standing; have the seller certify all particulars of verbal tenancies in the declaration as to possession.
3) The buyer should interview tenants, if practical, and obtain tenant confirmation of tenancy terms or get written confirmation from each tenant.
4) In commercial tenancies, ask for an estoppel certificate from each tenant, and require it on closing, if the contract permits.
5) For residential tenancies, check the rent history to make sure that the rents are not in excess of the amounts allowed under *The Residential Tenancies Act*, S.M. 1990-91, c.11 and *regulations* and under the former Residential Rent Regulation Act, R.S.M. 1987, c. R118 and regulations, and check the rent register at the office of the *Director of Residential Tenancies*. Determine if any appeals are pending; obtain a warranty and an indemnity on closing from the seller, if the contract permits.
6) Have the seller certify all security deposits and accrued interest in the declaration as to possession and adjust for them on the statement of adjustments.

7) Check with the *Residential Tenancies Branch* as to whether there are any unresolved residential landlord and tenant disputes that might affect the buyer.

8) Exclude any rent arrears to be collected by the seller from the assignment of leases.

9) Check the seller's records to verify all representations if the offer to purchase permits.

10) Obtain an expense history to enable the buyer to deal with future rental appeals on residential tenancies.

11) Receive an indemnity from the seller concerning any future claims by tenants for matters that occurred or arose prior to possession if the offer to purchase permits it.

12) On closing obtain the notices to tenants signed by the seller directing payment of rents to the buyer.

13) In residential tenancies, notify the tenants of security deposits and interest paid over by the seller or that the seller claims that no security deposit has been paid.

5. Preparing Documents for Registration

It is the seller's responsibility to prepare and sign the necessary documents required to deliver title as contracted. These necessary documents include a transfer of land and a declaration as to possession. If there are tenants on the property who will remain there, the seller's copies of the leases and assignments of leases must be prepared. Once executed by the seller, the documents must be provided to the buyer's solicitor for completion and registration, usually under some formal trust conditions. Often the solicitors for the parties will discuss any unusual trust conditions that they are proposing and work out agreements ahead of closing if possible so that there is no delay caused by unexpected trust conditions.

a) Forms Prescribed Under the Regulations

Documents presented for registration in the Land Titles Office must comply with the forms approved by the Registrar-General pursuant to *The Real Property Act.*

The principal forms are;

i. transfer-used in the case of a transfer of land;

ii. request/transmission;

iii. mortgage (of land or of a mortgage – see Practice Area Fundamentals/Real Estate on LSM Education Centre webpage for chapter on Mortgages);

iv. caveat;

v. discharge (for mortgage, caveat, or other instrument).

The forms and instructions can be found on the *Land Titles Office website*.

The forms of some specialized documents are found in other statutes, for example:

- builders' liens (see *The Builders' Liens Act*);
- homestead notice, homestead release (see *The Homesteads Act*); and
- certificate of judgment (see *The Judgments Act)*. This form must be attached to a "Registration of Judgment, Lien or Order", form number 21.

b) Completing LTO Documents

The Property Registry has developed "smart forms" for some of the common forms and those have *online user guides and video tutorials*. The forms do not include instructions for their completion on the forms themselves. All of the information required by each form should be provided unless the information is irrelevant to the particular transaction. Because the forms are generally for multiple uses, not all parts of each form are necessarily relevant in every transaction. Sections in multi-purpose forms that are not applicable need not be completed so you must carefully read each form.

Schedules are not permitted for smart forms, and the boxes on the forms expand to allow for sufficient space for you to enter necessary information.

For "non-smart" forms, if there is insufficient space in the form for the information to be provided, the information can be provided in an attached schedule signed by the party signing the form and identified on the form and attachment by a letter - e.g. "A", "B" etc. The schedule can be used for additional names of parties, lengthy legal descriptions or even signatures.

Names of parties should be set out in full (no initials unless the initial is part of the legal name). The name of the registered owner should be set out exactly as it appears in the title. If there has been a legal deviation from the name on the title (for example if there was a change of name on marriage or change of corporate name), evidence of the change should be supplied with the form in the additional evidence box on the signature page with any appropriate attachment (e.g. marriage certificate, articles of amendment).

Legal descriptions should follow the wording in the title. If a parcel is being subdivided, consult a surveyor or the surveys department of the Land Titles Office for the correct wording.

The "address for service" part of the document is very important, as the address given is used for sending notices under *The Real Property Act* and is also the address to which municipal authorities will send mail such as property tax bills. Where a change of address for service is desired, a request form may be registered giving the new address.

c) Homestead Evidence

Homestead evidence by individuals provided in a transfer of land or mortgage can vary but usually takes one of the following forms:

i. I have no spouse or common-law partner. No other person has acquired Homestead rights in the within land during my ownership;

ii. the within land is not Homestead property;

iii. my co-transferor/co-mortgagor is my spouse or common-law partner and has Homestead rights in the within land;

iv. the person consenting to this disposition is my spouse or common-law partner and has Homestead rights in the within land; or

v. I have never had a spouse or common-law partner.

In the case of smart forms, the form provides a selection of appropriate homestead statements in the signature page for individuals. The available options vary depending on the content provided in the smart form.

d) The Mechanics of Execution

The Land Titles Document Witnessing Rules for all documents signed after December 4, 2011 can be found online in the *Land Titles Training Materials* in the Land Titles Guide Schedule VIII.

i. Special Forms of Jurat

Section 64(4) of *The Manitoba Evidence Act*, C.C.S.M. c. E150 deals with special forms of jurats. This is best placed in the additional evidence box on the signature page.

SPECIAL FORMS OF JURAT

64(4)

Where a person who has sworn or affirmed an affidavit or made a statutory declaration is incapable of reading the affidavit or declaration or is incapable of writing his or her name, or swore or affirmed the affidavit or made the declaration through an interpreter, or where an affidavit or declaration is severally sworn, affirmed, or made, by two or more deponents or declarants, the person before whom the affidavit or declaration was sworn, affirmed, or made, may make use of that one of the forms of jurat hereinafter set out that is relevant to the case:

FORM OF JURAT — INCAPABLE OF READING AFFIDAVIT OR DECLARATION

Sworn (affirmed or declared) before me at the of , in the of , this day of , 19 , having first been read over and explained by me to the deponent (or declarant) who, being incapable of reading

the contents of the affidavit or declaration, appeared to understand the same and (choose one)

(a) signed his/her signature in my presence; or

(b) made his/her mark in my presence; or

(c) verbally indicated his/her understanding of same.

A Commissioner for Oaths, Notary Public, etc.

FORM OF JURAT — TWO OR MORE DEPONENTS OR DECLARANTS

Severally sworn (affirmed or declared) before me at the of , in the of , this day of , 19 .

A Commissioner for Oaths, Notary Public, etc.

FORM OF JURAT — PERSON INCAPABLE OF WRITING NAME

Severally sworn (affirmed or declared) before me at the of , in the of , this day of , 19 by the deponent (or declarant) who, being incapable of writing his/her name (choose one)

(a) made his/her mark in my presence; or

(b) verbally indicated his/her understanding of the affidavit or declaration.

A Commissioner for Oaths, Notary Public, etc.

FORM OF JURAT — INTERPRETER USED

Sworn (affirmed or declared) before me at the of , in the of , this day of , 19 , through the interpretation of , of the of , in the of , the said having been first sworn truly and faithfully to interpret the contents of this affidavit (affirmation or declaration) to the deponent (or declarant), and truly and faithfully to interpret the oath about to be administered to him (or declaration about to be taken by him).

A Commissioner for Oaths, Notary Public, etc.

ii. Corporate Execution

A corporation may register a document at a Land Titles Office that was executed by a director or an officer of the corporation (i.e. the president, vice-president, treasurer or secretary of the corporation) by an attorney under a power of attorney or by any employee of the corporation regardless of their job title so long as the document contains an express statement to the effect that they have been authorized by the corporation to execute the instrument. In such cases the following statement should be inserted: *"I am an employee of the corporation and have authority to bind the same"* and the Land Titles Office will rely on the apparent authority of the corporation.

If a smart form is being used this statement is automatically inserted on a corporate signature page, where "employee" is selected.

Any person who is an attorney for a corporation under a power of attorney may sign but must explicitly state that they are signing pursuant to a power of attorney. A notarial copy of the power of attorney must be attached or filed in series, if not already on deposit at the Land Titles Office. Where it is on deposit, the registration number assigned to it must be specified at the time of execution in the document. Note however, that this is not to be used for internal powers of attorney. Land Titles does not monitor powers of attorney that appoint officers, directors or employees of the corporation to sign on their behalf. The use of a power of attorney should only be referenced where the corporation is appointing someone outside of their corporation to act on their behalf.

As a result of changes in 2011 to *The Real Property Act,* corporate executions can no longer be accompanied only by a corporate seal but must be witnessed in the same way as documents executed by individuals.

The rules regarding corporate execution generally apply to the signing of caveats except that caveats may also be signed by a solicitor or agent of the caveator. This person does not need to be an employee of the corporation.

The rule allowing a caveat that was signed on behalf of a corporation by a solicitor/agent to be discharged by that solicitor/agent continues to apply as it has to these documents.

The rules regarding corporate execution generally apply to the signing of requests except that request may also be signed by a solicitor and agent on behalf of the corporation. This person does not need to be an employee of the corporation.

The rules regarding corporate execution generally apply to the signing of personal property security notices, with the same comments as above for caveats or requests.

iii. Witnessing Execution of Documents

Transfers and mortgages executed in Canada must be witnessed by a practising lawyer, except as set out in *sections 72.5* and *72.7* of *The Real Property Act.* For a discussion of the lawyer's obligation when witnessing the execution of a transfer or mortgage see the *LSM Education Centre Practice Resources* for the Practice Management chapter on **Retainers**.

Caveats, builders' liens, judgments, legal aid statements, *Personal Property Security Act* Notices, notice of exercising power of sale, requests and transmissions do not require a witness in order to be registrable.

Other documents may be witnessed by a practising lawyer, but also may be witnessed by a competent adult who swears an Affidavit of Subscribing Witness before a person authorized by *sections 62* and *63* of *The Manitoba Evidence Act*. That witness must attest to the identity and age of the person whose signature they witnessed. Please review *section 72* of *The Real Property* Act for requirements for the witnessing of documents executed outside of Canada.

These rules apply to "new system" documents. For "old system" documents (Registry Act) and Real Property Applications, a corporate seal may be used or the document may be witnessed by a person who must complete an Affidavit of Witness.

iv. COVID-19 and Video Witnessing

1) Can I Witness Transfers by Video Conference?

The Registrar-General of the LTO has issued a Directive and three extensions of the Directive as of the writing of these materials which permits video witnessing of documents as a temporary accommodation in response to COVID-19. The *news update webpages on Teranetmanitoba.ca* list the most current directives and notices from the Registrar-General

2020.09.28	*Third Extension of Directive on Witnessing documents under The Real Property Act during COVID-19 Pandemic*
2020.07.14	*Second Extension of Directive on Witnessing documents under The Real Property Act during COVID-19 Pandemic*
2020.06.26	*Temporary Rules for Auction Sales - Rules for Mortgage Sale and Foreclosure Proceedings under The Real Property Act*
2020.05.15	*Directive on Witnessing documents under The Real Property Act and Temporary Suspension Order under The Emergency Measures Act*
2020.05.14	*Extension of Directive on Witnessing documents under The Real Property Act during COVID-19 Pandemic*

2020.04.20	*Approval of Video Witnessing Certificate (Form 32)*
2020.04.01	*Witnessing documents under The Real Property Act during COVID-19 Pandemic*
2020.03.20	*Mandatory use of eRegistration during COVID-19 Pandemic*

2) Can I Witness my Client's Oath or Homesteads Declaration or Declaration as to Possession by Video Conference?

However, the R-G's Directive did not apply to oaths or affirmations governed by *The Manitoba Evidence Act* or forms under *The Homesteads Act*.

The Manitoba government, by an Order in Council under *The Emergency Measures Act*, C.C.S.M. C. E80, made an Order re the Temporary Suspension of In-Person Commissioning and Witnessing Provisions (renewed to March 30, 2021 as of this writing). The order affects the commissioning and witnessing provisions of *The Manitoba Evidence Act*, *The Homesteads Act*, *The Powers of Attorney Act*, and *The Real Property Act* as well as *The Health Care Directives Act*, C.C.S.M. c. H27 and *The Wills Act*, C.C.S.M. c. W150 to permit witnessing using video conference technology.

The Schedule to the order sets out the specific steps to follow when witnessing using videoconferencing under the order and lawyers must be familiar with the order during its operation.

6. Extensions of Time

On occasion one of the parties, either seller or buyer, is not in a position to close on the date fixed for closing. As most contracts of purchase and sale contain a clause making time of the essence, the party who is ready to close is entitled to treat the other party who is not in a position to close as being in breach of the contract and may elect either to affirm or to cancel the sale (assuming the party electing is not also in default). If election to cancel the sale is made, then the party not in default may seek damages or forfeiture of deposit unless otherwise precluded from doing so by the contract.

Where the party not in default has been asked by the other party and is willing to grant an extension of time the following points should be considered:

- The solicitor for the party does not personally have the authority to grant the extension unless previously given such authority by the client. The solicitor must consult with and obtain instructions from the client, preferably in writing.

- If the extension of time is to a new fixed date, it is preferable when confirming the extension to indicate at the same time that time is to remain of the essence. While a court in the absence of that stipulation may imply that time was to remain of the essence, by so stipulating expressly when confirming the extension, any doubt on the subject is eliminated. The extension might be worded:

  > *We confirm that the date for closing is extended from December 1, 2020 to December 15, 2020 and time will remain of the essence in all respects.*

- If the extension of time is for an indefinite period due to lack of certainty as to when the closing can be completed (for example one party may be waiting for a necessary document and not know exactly when or whether it will be received), then time will cease to be of the essence and instead it is implied that the parties will close the transaction within a reasonable time.
- Once time is no longer of the essence, neither party can cancel the transaction without first warning the other party and fixing a new deadline which is reasonable in the circumstances. Such action would reinstate the time is of the essence rule. If a party seeks to terminate the transaction on the basis that a reasonable time has elapsed, without giving such a warning, that party will be treated as having committed the default.

7. Typical Timing Problems

a) Zoning Memoranda

On occasion, and when ordered, zoning memoranda from the City of Winnipeg or other municipality are not available to the solicitor for the buyer on closing date, due to late ordering or insufficient time between the signing of the offer and the closing date. Where the buyer is obtaining mortgage financing, not knowing whether the zoning memorandum will be clear poses a problem for both parties, as the mortgagee will not advance funds except against a clear zoning memorandum if that was a condition of the mortgage loan. This is a situation where the buyer and lender might have to rely on title insurance to close on time.

The buyer's solicitor in these circumstances may attempt to tender the closing monies on a trust condition such as follows:

> *. . . on condition that you will supply a surveyor's certificate to our office that will enable our office to obtain a zoning memorandum from the City of Winnipeg that will confirm that the subject property complies with all relevant zoning regulations as to yards and alignments. Should there be any difficulty in our obtaining such a clear zoning memorandum, you will make any application necessary, and bear any and all costs involved to obtain a zoning variance, encroachment licence or tolerance.*

The seller's solicitor should not accept such a trust condition without obtaining the client's consent after explaining the possible dangers. It is possible that there might be an infraction that cannot be cured by a zoning variation because the variation is

refused. No zoning memorandum will issue unless major alterations to the property are made.

In addition, in imposing this trust condition the buyer's solicitor is surrendering the buyer's right to rescind the transaction if there is an encroachment or zoning problem discovered after closing. These circumstances can result in a buyer or a lender being left without a remedy. Such a risk may be reasonable for the buyer to take if there are grounds to believe that there are no zoning infractions (e.g., an available BLC shows ample clearances), but the client's authority should be sought by both solicitors before imposing or accepting this trust condition.

Indeed, **usually sellers' solicitors will not accept any such trust condition** and the buyer and lender are then forced to rely on title insurance if the transaction is to close on time.

The option to obtain title insurance is often a preferable course of action to imposing or accepting such trust conditions.

If a clear zoning memorandum is required for the transaction but is not yet available, it may be preferable to defer the closing, if possible, or to close "in escrow" (i.e., registration of documents and delivery of actual possession is deferred until a clear zoning memorandum is obtained).

Alternatively, if actual possession and occupancy is given to the buyer pending the outcome of the application for the clear zoning memorandum, the seller's solicitor should not agree to return the purchase monies unless possession of the premises is restored to the seller free of damage in the event that a clear zoning memorandum is not obtainable. In these situations, the solicitors might come to an agreed upon holdback, although that practice is largely fading and can be dangerous for both parties. A buyer who has opted for title insurance may be willing to waive the requirement for a zoning memorandum, but the lawyer acting in such a situation should review the title insurance policy carefully to ensure the client will be protected and must discuss the matter in detail with the client before agreeing to waive any rights.

b) Mortgage Commitment Deadlines and Land Titles Registration Delays

Most mortgage commitments obtained by buyers contain a deadline for advancement of funds. After expiry of the deadline the mortgagee may refuse to advance or may require a change in the interest rate. When a holdup occurs in the Land Titles Office (due, for example, to deficiencies in documents submitted), "turn-around time" for completion of registrations may extend beyond the mortgage commitment deadline. Other events can also carry the advancement of funds beyond the commitment date.

In times of falling interest rates the delay may work to the buyer's advantage, as the buyer may be given a lower interest rate.

However, in times of rising interest rates, the buyer's solicitor may anticipate the problem by seeking an extension of the deadline for advance of funds from the mortgagee before the commitment date. If an extension cannot be obtained, the old practice of mortgage lenders advancing funds to the solicitor to hold in trust is largely extinct. Therefore, the only other option to hold the rate is to obtain title insurance to obtain an advance of funds. However, before you can properly title insure the transaction, the transfer of land and mortgage must have been executed and submitted to Land Titles or be available for submission forthwith. There are times that an interest rate commitment simply cannot be held. The buyers' lawyer should ensure that such circumstances are not due to the lawyer's own poor planning, faulty documentation completion or other actions.

E. CLOSING PROCEDURES

There are three common closing procedures in use in Manitoba;

- the "traditional" closing;
- the *Western Law Societies' Conveyancing Protocol* (the Protocol); and
- a practitioner-designed New Closing Practice (NCP) [see details below under NCP].

All three closing procedures use trust conditions and they are discussed in more detail in sections below and sample forms and precedents for the different closings can be found in the Precedents and Forms to this chapter.

To minimize the time required to negotiate, well before closing the solicitors should agree on the closing procedure they will use for the transaction and anticipate any unusual trust conditions and discuss them with the other solicitor.

1. Exchange of Money and Possession

The exchange of money, title conveyance and possession can take place at a formal meeting between the parties on closing day. This is rare. Usually, the exchange takes place through correspondence and deliveries before or on the closing date between the solicitors for the parties.

Each solicitor protects the interests of their client by obtaining appropriate undertakings from the other solicitor using trust conditions before finally parting with documents, money or keys.

2. Imposing Trust Conditions

Trust conditions are intended as a cooperative means to close real estate deals. However, some lawyers still see them as a negotiating exercise - an opportunity to improve their client's position beyond what the contract allows. Beware of sharp practice and do not impose or accept trust conditions that are unreasonable.

The system of closing real estate transactions in the province of Manitoba has been described as a "cooperative conveyancing system."

Under the traditional closing procedure, rather than tendering all documents and funds required to close on the date of closing, the seller's and buyer's solicitors exchange documents and funds on trust conditions that certain incomplete matters (the registration of title documents, discharge of prior mortgages and so on) are to be completed by the respective solicitors following the date of closing.

Under the *Protocol* and the NCP all documents are prepared in advance and funds requested so that on the date of closing or shortly thereafter the proceeds of sale can be released to the seller.

The efficiency of this cooperative system is of obvious benefit to the solicitors involved and as a result also of benefit to sellers and buyers as well. To the Manitoba real estate practitioner, therefore, the use of solicitors' undertakings is critical.

A solicitor who is not prepared to accept trust conditions imposed by the other side must either return what was sent, unused and unaltered, or negotiate a modification of the trust conditions and confirm the agreed modification in writing before using any documents or items sent.

Cross-trust conditions cannot be imposed without the consent of the other solicitor. Thus, where one solicitor is willing to accept documents on conditions, but wants to impose further trust conditions on the other solicitor, the other solicitor must first agree to the additional trust condition terms and confirm their agreement in writing.

A solicitor should not accept any trust conditions that the solicitor is not reasonably certain of being able to personally perform and should not ask another solicitor to accept any trust conditions that cannot reasonably be accepted.

The ground rules for trust conditions are set out in Section 7.2 of the *Code of Professional Conduct*.

> ***Undertakings and Trust Conditions***
>
> ***7.2-11*** *A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.*
>
> ***Commentary***
>
> *[1] Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the seller" does not relieve the lawyer giving the undertaking of personal responsibility.*
>
> *[2] Trust conditions should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party.*
>
> *[3] The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper*

for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions.

[4] If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.

[5] Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them.

[6] Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or corporation, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers.

[7] A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with these rules.

In view of the strict professional obligations surrounding trust conditions that are imposed by the courts, the *Code of Conduct*, the operation of the Land Titles Offices and the restrictions in the offer to purchase form used in Manitoba, it is imperative that solicitors conducting a real estate practice in the province of Manitoba take great care in the settlement of trust conditions between them. The cooperative nature of the practice between solicitors must be carefully nurtured and protected so that the rights and interests of buyers and sellers of real property are protected and real estate transactions are completed in an efficient and economic manner by the solicitors acting on their behalf.

Because trust conditions cannot be accepted if they cannot be fulfilled *ab initio* and as a result of the differing circumstances in each real estate transaction, trust conditions must be considered in view of each transaction's specialized facts and circumstances and carefully amended to precisely address such particular sets of facts.

It is prudent to have a checklist of areas to be dealt with and covered by trust conditions and draft forms of trust conditions which might be used to cover such matters can be helpful as starting precedents in the finalization of trust conditions and undertakings for each transaction.

Samples of possible buyer's and seller's trust conditions are found in the precedents to this chapter. They are set out with the express caveat that they are not exhaustive and must be

treated as mere samples and starting points for the negotiation and drafting of the appropriate trust conditions required in the particular fact situations.

Trust conditions imposed by lawyers must be consistent with standard practice and with 11(d)(ii) of the statutory offer to purchase form. A lawyer's right to impose a trust condition flows from 11(d)(ii) of the offer which states:

> *11(d)(ii) In closing this transaction, the Seller's solicitor and the Buyer's solicitor may by agreement exchange trust conditions and undertakings to carry out the intention of the Seller and the Buyer.*

The traditional practice allows for certain well-established and well-accepted trust conditions that relate to title matters, and which, by implication, are authorized by sellers and buyers pursuant to 11(d)(ii) of the statutory offer to purchase form. But when it comes to physical matters, standard practice and trust conditions mostly do not assist. Only trust conditions that are consistent with the purchase contract are acceptable. Trust conditions must be within the authority given to lawyers under 11(d)(ii) of the statutory offer to purchase form. They must also comply with the rules set out in chapter 7 of the *Code of Professional Conduct*.

Both the *Protocol* and the NCP include suggestions for appropriate trust conditions to use with their procedures.

3. Registering Documents

a) The Registration Details Application (RDA)

As of April, 2018, practising solicitors are required to use the *eRegistration system* at Land Titles. On March 20, 2020, it also included all other clients who submit more than 10 documents per year to the Land Titles Office.

For most solicitors, the rules applying to eRegistration will be the only ones of relevance. However, occasional users of Land Titles may still register the old manual way depending on volume of registrations, etc. As some solicitors might occasionally find themselves advising clients or otherwise dealing with manual registrations, both methods are discussed.

i. Manual Registration

Documents presented for registration at the Land Titles Office the "old way" (manually by paper) must be accompanied with:

- a duly completed registration details application (RDA) form;
- payment of the required registration fees.

ii. eRegistration

Documents presented for registration at Land Titles electronically by way of eRegistration are handled differently. The best way to understand the eRegistration system is to review the comprehensive written and video

materials provided by Teranet Manitoba in the *Land Titles Training Materials* online.

In eRegistration, there is a registration order page that allows the ordering of the documents for the series, and a submission details page that allows the selection of payment method: deposit account or electronic funds transfer. Check the *Land Titles training materials online* for the eRegistration User Guide, Smart forms and training videos.

The order of the listing of the documents in the registration order page (eRegistration) or on the RDA form (manual registration) affects "series" registration.

Accordingly the documents to be registered should be listed in the desired series order. If more than one document of the same type is being registered (for example, two mortgages), additional identifying information should be provided (for example, mortgagee name or amount) so that the correct order of documents is unambiguously referred to in the registration order page or the RDA form.

Generally all information requested by the form should be provided if applicable. Some important points to note:

- All current applicable title numbers must be supplied on the RDA form.
- In the case of eRegistration, if documents are rejected an eNotification will be sent to you setting out the reasons.
- In the case of manual registration, a copy of the RDA form will be returned to you setting out the reason.
- When the necessary corrections have been made and the documents are re-registered, the copy indicating the reasons for rejection should be returned to the Land Titles Office with the new RDA form.
- If an exemption from land transfer tax is claimed in the transfer of land, the exemption claim should be indicated as appropriate.

iii. Series Registration

Section 66(3) of *The Real Property Act* provides:

> *Where two or more documents are marked as being registered or filed in series and one of the documents is unfit for registration or filing, all documents registered or filed in the series shall be deemed to be unfit for registration or filing.*

When a solicitor presents two or more documents for registration relating to the same transaction they must be presented in the order of the intended priority of the documents and they should each be identified as being registered in series so that the rejection of one will result in rejection of all and

thereby avoid a possible breach of trust conditions on the use of the documents.

For example, suppose the transaction being registered is a transfer of land from seller to buyer and a mortgage back from the buyer to the seller which is intended to be a first mortgage.

In that situation, the mortgage cannot be registered ahead of the transfer of land. If it is, the mortgage will be rejected because until there is a transfer of land to the buyer, the named buyer-mortgagor will not have a registered interest in the land to which the mortgage can apply.

If the transfer of land is filed after the mortgage, it will not be rejected and the land will be transferred to the buyer free of any mortgage, unless the mortgage and the transfer of land are registered in the right order and identified as being registered or filed in series.

The damage can be repaired only if no new interests are registered against the land in the interval of time between the registration of the transfer of land and the re-registration of the mortgage. If the damage cannot be so repaired, and some interest against the land was registered in the time it takes to re-register the mortgage, the solicitor who failed to register the documents in the correct order and marked as being in series will have breached both the obligation to the client and the trust condition from the other solicitor.

The problem described above can be prevented by registering the documents in the correct order (i.e., transfer first, mortgage second) and by listing both documents in the correct order on the registration order page or the RDA form. Then, if the mortgage is rejected for some reason, the transfer of land will also be rejected and the damage described above will be avoided.

b) The Registration Process

Priority of a registered document is determined by a serial number assigned to the document in the early stages of registration. (*s. 64* of *The Real Property Act*). Once registered, documents move through four stages to final acceptance:

i. Entered

At this initial stage the serial number is assigned and the fact that the registration is in progress is recorded on the title. The registration number will be displayed on the eReceipt, as well as in the eRegistration Workspace.

ii. Verified

This stage is reached when it is being examined by the land titles office.

iii. Acceptance Pending

At this stage, the final examination of both the document and any created title(s) has been completed by land titles staff. However, prior to being accepted, the electronic system will check for any potential document conflicts and for errors or inconsistencies. This check takes place overnight. If the document fails the overnight check, it will remain in "acceptance pending" until the error is corrected.

iv. Accepted

At this point the overnight processing has taken place and the document has had its status changed automatically from "acceptance pending" to "accepted". Upon completion of the registration of documents the land titles electronic system will automatically generate a confirmatory notice. Upon acceptance of a series, the system will generate a status of title for each active title either created by, or affected by, the series, which will be emailed to the solicitor who registered the document(s).

c) Land Titles Office Fees and Land Transfer Tax

One of the major disbursements incurred in the course of a real estate transaction are the fees payable to Teranet Manitoba to file the necessary documents in the appropriate Land Titles Office and the land transfer taxes. The *Land Titles Office fee schedule* and the *land transfer tax calculator* are available online.

The Land Titles Office fees are prescribed under The Real Property Act *Land Titles Fees Regulation 71/2014*. Land Titles Office fees are charged on a flat rate basis.

By operation of *The Tax Administration and Miscellaneous Taxes Act*, C.C.S.M. c. T2, land transfer tax is assessed whenever a transfer of land or of an interest in land is registered at land titles. Land transfer tax is collected by the land titles offices on behalf of the Province of Manitoba. The formula for calculating the land transfer tax is set out in *section 112* of *The Tax Administration and Miscellaneous Taxes Act*. It is a sliding scale tax, increasing in amount based on the fair market value of the land being transferred. Fair market value is defined in the Act as the value of the land as a whole at the time the transfer is tendered for registration at land titles, and not the value of the land at the time of the agreement for sale. *The Tax Administration and Miscellaneous Taxes Act* requires land transfer tax be paid on all transfers of land unless there is a specific exemption available.

The exemptions from the payment of land transfer tax are set out in *sections 113* and *114* of *The Tax Administration and Miscellaneous Taxes Act*.

Where a fractional interest is being transferred, the tax is calculated for the property as a whole and the transferee pays the resulting fraction of the tax for the whole.

The eRegistration system will automatically calculate the fees and land transfer tax payable based on the documents uploaded, including any land transfer tax, so it is important that this information be correct in the Transfer of land form.

d) Correction of Land Titles Documents

The Land Titles Office has developed the *Manitoba Land Titles Correction Policy* (version 3.3 as of the last review of these materials) to permit correction of errors, omissions or mistakes in documents submitted for registration as long as the correction does not change the substance of the document. Corrections can come in the form of a letter, a properly completed Form 30 Correction to Statutory Evidence, a piece of supplementary evidence or an affidavit or statutory declaration.

Unless sworn evidence is required, most errors and omissions in documents can be corrected by way of a letter or email.

Unless the policy provides otherwise, these letters:

- Must be from a barrister or solicitor entitled to practise in Canada.
- Must be signed by that lawyer.
- May be sent in by fax or email without any need for the original to follow.
- Must contain certain minimum elements:
    1. A clear statement of the correction to be made.
    2. A statement that the person signing the letter has the complete authority to make the change.
    3. A statement that the change to the document is a correction of an error and is not a change in the substance of the document.

A correction email can be submitted in place of a correction letter provided it is from the person entitled to make the correction (for example, not from that person's paralegal, assistant or secretary), it contains all of the language that would be required in a correction letter, and it contains the name, position, and contact particulars of the sender. Unlike a correction letter, the email does not need a signature.

Note that errors in the "mortgaging" clause in a mortgage or in the "transferring" clause of a transfer cannot be corrected by way of letter as such changes are deemed to be changes of substance and re-execution is required.

Form 30, Correction to Statutory Evidence, was developed to allow clients to correct evidence that is insufficient, missing or incorrect, including affidavits and statutory declarations, evidence under *The Homesteads Act*, fair market value and tax exemption evidence under *The Tax Administration and Miscellaneous Taxes Act*, and evidence under *The Farm Lands Ownership Act*, C.C.S.M. c. F35.

Form 30 must be signed by the person with personal knowledge (the person required to provide the evidence that is in need of correction), but does not need to be witnessed. Form 30 must be accompanied by a letter from the party submitting it, identifying the document that it pertains to and the evidence that is being amended or corrected.

The smart forms, which include the transfer and mortgage, cannot be altered after they are locked for signature. Any changes will require either that the form must be unlocked and then re-signed, or the Correction Policy must be followed. No changes may be made on the face of the form as this will result in incorrect information being auto-populated into the eRegistration system.

In the case of paper forms, where it is evident that alterations have been made to a transfer or a mortgage and such changes have not been initialed by all of the parties to the document, the Land Titles office will nonetheless accept the document for registration if the document is submitted for registration together with a letter confirming the alterations were made prior to execution. If the lawyer is unable to submit such a letter (usually because the changes were made after execution), a lawyer's letter may be submitted confirming the clients and the other party's lawyer have consented to the alterations.

The Land Titles Correction Policy can be found in the *Land Titles Training Materials* online.

4. Post-Closing

a) The Buyer's Solicitor

After closing, the buyer's solicitor must:

i. Comply with the accepted trust conditions.

ii. Register the transfer of land, seller's caveat and mortgage(s); register all documents "in series" so that if one is rejected, all will be rejected.

iii. Release the keys to the buyer, deliver Notice to Tenants to client for service on tenants.

iv. Report to mortgagee and requisition mortgage proceeds, pay balance of monies and interest, forward to seller copy of the registered mortgage back; obtain and file discharge of seller's lien caveat.

v. Make sure mortgagor's insurance has a mortgage clause.

vi. Make confirmatory searches - title, taxes, final payments by seller (mortgage, water bill).

vii. Order a copy of the mortgage from Land Titles Online and provide it to the buyer and mortgagee if not already done.

viii. Report on title to client and mortgagee, if applicable and issue statement of account to client.

b) The Seller's Solicitor

Once closing has been completed, the seller's solicitor should proceed to:

i. Invest monies in a trust daily interest savings account or term deposit if worthwhile, until they can be disbursed.

ii. Instruct the client to terminate payments on any mortgage assumed by the buyer; instruct the bank to stop automatic withdrawals from seller, if any.

iii. When the trust conditions are satisfied, obtain confirmation of that fact from the other solicitor and disburse monies according to the client's instructions or in compliance with the trust conditions:

1) pay off encumbrances and discharge them;
2) pay taxes;
3) pay commission;
4) satisfy any other direction in Direction to Pay.

iv. Where there is a mortgage back to seller check the Status of Title for correct priorities and check the insurance policy for correct loss payable and mortgage clause.

v. Invoice the client, forward the net proceeds and report; fees and disbursements are transferred from trust account to general account only after the invoice has been rendered to the client.

When a mortgage that was registered by a financial institution is being discharged, that institution will normally prepare a discharge in the form required by the Land Titles Office and either submit it for registration directly or provide it to the seller's solicitor for registration. However, if the seller's solicitor is required to prepare the discharge, the solicitor should determine whether it is a full discharge (i.e. being discharged from all affected titles) or partial (i.e. being discharged from part of a title, or from one or more titles but will remain on other titles). All discharges must identify all of the affected title(s). For a partial discharge, the legal description of the affected lands must be set out, but no legal description is required for a full discharge.

F. WESTERN LAW SOCIETIES' CONVEYANCING PROTOCOL

The preceding materials generally describe the traditional process for closing a purchase and sale transaction. Since February 15, 2001, Manitoba lawyers and their clients have had the option of closing their transactions on a slightly different basis, following the procedures outlined in the *Western Law Societies' Conveyancing Protocol* (commonly called the "Protocol"). The full details of the Protocol are found on the *LSM Education Centre Practice Resources Practice Area Fundamentals under Real Estate* and should be reviewed before being used.

The *Protocol* is a joint initiative of the Law Societies of Manitoba, Saskatchewan, Alberta and British Columbia, in response to a number of changes in the residential conveyancing and financing marketplace. The Protocol introduces new conveyancing practices that are designed to provide better service for sellers, buyers and mortgagees. The fundamental distinctions of a Protocol closing are these:

1. The lawyer's report to the mortgagee is delivered on or just before the closing date, and consists of a short and standard form "Solicitor's Opinion." The Solicitor's Opinion represents a simple "green light" to the lender that it is safe to fund, and so can eliminate the need for the lengthy reports and copies of documents which lenders have traditionally required.

2. Mortgage proceeds and the balance of the purchase monies can be advanced through the lawyers' offices and out to the seller's order on the closing date. This can reduce or eliminate the seller's need for interim financing, and allows for earlier payment of realtors' commissions and other obligations of the seller.

3. Lawyers can satisfy the security requirements of mortgagees without obtaining a current Building Location Certificate and Zoning Memorandum.

The *Protocol* itemizes all the essential searches and investigations the lawyer must make, in order to avoid any risk of intervening registrations which could impair the buyer's title or the mortgage's priority after the funds have been released, and to identify whatever encroachments or other survey defects may be known.

The *Practice Direction 00-02: Conveyancing Practices under the Western Law Societies' Conveyancing Protocol (Manitoba)* was approved by the Benchers in 2000 and updated in 2015. The excerpt below explains the insurance coverage when using the *Protocol*:

> *The existing professional liability insurance coverage afforded to all members will respond to:*
> 1. *claims resulting from actual loss to a purchaser due to an intervening registration which impairs the purchaser's title; and*
> 2. *claims resulting from actual loss to a mortgagee:*

1. *due to an intervening registration which takes priority over the mortgage; or*
2. *due to a survey defect which was unknown at the date of advance but which would have been disclosed by an up-to-date building location certificate or zoning memorandum.*

In any of the above occurrences, where a claim is paid by the Professional Liability Claims Fund:

1. *no deductible will be payable by the member; and*
2. *the payment will not be considered as a "Paid Claim" for purposes of future surcharges or graduated deductibles,*

provided that the member has adhered to the practices prescribed by the Protocol. The usual insurance implications will apply to a claim arising from any other error or omission.

Non-Protocol Closing

Where members do not use the Protocol when completing a real estate transaction, the prudent practice for members to follow is not to release sale proceeds, regardless of the terms of any applicable trust conditions, until such time as title to the property being transferred has issued in the name of the purchaser and all other trust conditions imposed by the purchaser's solicitor have been fulfilled, excepting only for conditions which the vendor's solicitor can fulfill by payment out of the sale proceeds themselves. This is subject to the explicit terms of the offer to purchase contract between the parties to the transaction which could, conceivably, require funds to be released before title has issued.

The deductible obligations of the member under the governing policy of professional liability insurance will apply to any claim made against the member arising from a non-Protocol closing.

Note that the *Protocol* is not a comprehensive statement of the lawyer's duties, despite the substantial overlap between *the Protocol* and the traditional conveyancing routine. All steps otherwise required to meet current conveyancing practice standards must still be taken. Refer to Parts A, B, and C of the *Protocol* for an overview of the *Protocol*'s structure and intended use.

The *Protocol* has been approved by the Law Societies and has been sanctioned for use throughout Western Canada (albeit with some variations between provinces). Lawyers still require the informed consent and agreement of their buyer and seller clients In order to close on the basis of the *Protocol*. Also, the reporting and funding requirements of the *Protocol* must be understood and approved by the mortgage lender. To avoid last minute complications, the parties and their lawyers need to discuss and agree early on whether the closing is to be in accordance with the *Protocol*, so that all parties are aware of their closing obligations in time to prepare for them.

G. THE NEW CLOSING PRACTICE (NCP)

Since 2017, some conveyancing lawyers in Winnipeg have been trying to organize their conveyancing practices cooperatively by agreeing to use a standard closing procedure they are calling the New Closing Practice or NCP. The NCP permits the payout of the monies on or shortly after closing and limits the liability of a seller's lawyer regarding unpaid water utility accounts.

1. The Traditional Closing Practice

For many years, the drawing down of the mortgage proceeds has been done by buyers' lawyers upon confirmation of the successful completion of all registrations in the LTO. The time between the closing date and the confirmation date of the successfully registered mortgage is called the "registration gap". The availability of e-registration at the LTO has substantially reduced the length of the registration gap that existed under the paper system unless documents are rejected for errors or require correction for omissions.

Release of sale proceeds was delayed by the registration gap and fulfillment of all trust conditions imposed on closing. Because unpaid municipal water utility accounts can be added to a property tax bill, the unpaid account had to be adjusted between the buyer and the seller. Sellers' lawyers were routinely put under trust conditions to ensure that any outstanding water accounts were paid from the sale proceeds before they were released.

2. The Protocol Closing and Utility Accounts

Release of sale proceeds on closing or shortly after closing under the *Western Law Societies' Conveyancing Protocol* is done using the sample trust letters approved by the *Protocol*. Delayed *Protocol* closings make an allowance for mortgage monies to be paid, if not on possession date, soon thereafter.

The *Protocol* trust condition letters impose the obligation on a seller's lawyer to "arrange for payment of the final water account either by the Vendor directly or by the Vendor's Lawyer from the sale proceeds". The *Protocol* also provides that

> *Where a claim is paid by the Professional Liability Claims Fund as a result of a Vendor's failure to attend to payment of the final water account:*
>
> *(a) the deductible payable by the insured Lawyer will be reduced to $1,000.00; and*
>
> *(b) the payment will not be considered as a "Paid Claim" for purposes of future surcharges or graduated deductibles,*
>
> *provided that the Lawyer has adhered to the practices prescribed by the Protocol.*

3. The NCP and Water Accounts

The NCP involves payment of monies on or soon after possession as well as a fundamental change in the way Manitoba lawyers deal with water accounts. The NCP Trust conditions would require all monies to be tendered on possession or shortly after using Title insurance

gap coverage or closing under the *Protocol* to access mortgage funds. The money will be paid out when received rather than held in trust pending the completion of all LTO registrations. Either the gap coverage under title insurance or the provisions of the *Protocol* would be used to protect the buyer from registration gap issues.

However, unlike the traditional closing or the *Protocol* closing, the NCP trust conditions contemplate that lawyers will have no role in ensuring that water bills are paid before paying out moneys. The NCP focuses on the release of sale proceeds on or shortly after closing date by using title insurance gap coverage that includes coverage for unpaid water accounts. By requiring "title insurer-approved written undertakings to pay or to readjust" from both seller and buyer and by setting a limit on holdbacks for payment of water accounts, the NCP moves the liability for unpaid water accounts to title insurers rather than seller's lawyers. The lawyers rely on the client's title insurance "gap coverage" to allow the money to flow on possession or soon after and if there is a problem with the registration of the documents related to the registration gap, the title insurance will cover any losses. Buyers' lawyers must explain to buyers who close on the basis of the NCP that if they do receive notice of water arrears belonging to a seller, their claim is made under their title insurance coverage and not against the lawyer or a private claim against the seller. It does mean that before proceeding to close under the NCP, lawyers have the title insurer confirm that the client's coverage includes payment for unpaid water accounts. Buyers who choose not to purchase title insurance but still choose to close under the NCP would retain only their contractual right against the seller for protection. Trust conditions regarding payment of water accounts would no longer be imposed or accepted by lawyers.

Note that registered lawyers are now permitted access to City water accounts under *Lawyer Gateway* of the City of Winnipeg Water and Waste department. See more information above under the section on Searches – Utilities - Water and Waste Accounts.

4. Benefits of the NCP

Under the NCP the majority of purchases of residential property can be closed in one stage and sellers can rely on mortgage payout statements provided as of the date of closing because the money can be paid out sooner. This is not about eliminating bridge financing which may still be required but it gives sellers the assurance that if their money is not available on possession date, it will be available within days rather than weeks after possession date which could happen under the traditional closing.

5. Required Documents for the NCP

If your client is willing to close on the basis of the NCP, you will find NCP sample letters with the suggested trust conditions and the sample voluntary water account warnings included in the Forms and Precedents to this chapter. Any lawyer may use and adapt the trust letters and documents for the specific situation, but the NCP contemplates that changes will be the exception rather than the rule. The NCP suggested trust conditions were not drafted with new construction or power of sale transactions in mind, so those situations will require more customized trust conditions.

For lawyers who use the former *Conveyancer* software, now referred to as *Unity*, the web-based version, the NCP trust letters and documents are part of *Unity* which software also includes a method for users to identify outstanding taxes in order to dovetail with the trust conditions.

The NCP also requires the provision of signed Undertakings from each of the parties to survive the closing (and suggests a "standard form" – see Precedents and Forms for this chapter) and a declaration of residency, or a section 116 Compliance Certificate.

The NCP trust conditions require lawyers to use their "best efforts" to correct documents when necessary, and "reasonable efforts" to collect shortfalls of interest from the buyer. Best efforts is considered a higher standard than reasonable efforts under the NCP.

The NCP documents define a "private lender" as anyone who is not a government or a lending client as defined in 3.4-13 of the Code of Professional Conduct. This identifies with certainty the identity of the lender who must supply the discharge or advance the mortgage prior to closing.

6. Differences from Protocol or Traditional Closing

a) Trust Conditions

The NCP standardized trust conditions to be used on the average residential closing are intended to reduce the number and type of trust conditions imposed on closing. In most cases this will mean that under the NCP, surveys, zoning memos, condo status certificates, City of Winnipeg searches, etc. must be obtained before closing. Outstanding building permits should be dealt with before closing, not left to trust conditions. The lawyers who devised the NCP argued that conveyancing lawyers have come to rely too much on trust conditions as a substitute for completing due diligence in a timely way, or for going ahead with unresolved issues and closing using complex and detailed trust conditions that often ended up being challenged. Instead, under the NCP parties would be advised to delay possession until contentious issues can be resolved or until due diligence can be completed rather than rely on trust conditions.

b) Confirmation of Buyer Possession Not Required

Confirmation that the buyer did receive possession is not required before the seller's lawyer releases funds. However, notice that the buyer could not receive possession does require holdup of funds if they are still with the seller's lawyer. This is meant for the catastrophic situation (for example, where the house has burned down, or been extensively damaged between sale and possession date) or the more mundane situation where the property is not vacant (assuming it was to be) or keys were not provided. The seller's lawyer is not required to immediately return the funds to purchaser's lawyer but is merely required not to release them to the seller until the issue is resolved within a reasonable time. This may not protect the buyer who delays taking possession and buyer's lawyers can forewarn buyers that the money may be

paid out as early as possession date, so they (or someone on their behalf) are best advised to go to the property as soon as they can upon taking possession.

c) Express Permission to Release Keys Not Required

Express permission to release Keys from a seller's lawyer is not required under the NCP trust conditions so it is possible under the NCP for the buyer's lawyer to assume the risk of releasing Keys to buyers at the time they attend at the lawyer's office to sign the documentation before closing. Although the seller's lawyer will not yet have received the buyer's lawyer's trust letter with funds and trust conditions at that time, the NCP allows the buyer's lawyer to release Keys before the funds and trust letter are forwarded to the seller's lawyer. In doing so, the buyer's lawyer is deemed to accept the seller's lawyer's trust conditions, and, more importantly, the buyer's lawyer is then restricted to imposing only trust conditions that the seller's lawyer will accept. Control over the buyer's lawyer's trust conditions is essentially given to the seller's lawyer if the buyer's lawyer releases Keys before closing.

The NCP also suggests that the buyer's lawyer should have the buyers sign a written undertaking not to use Keys prior to the time set out on the date of possession as stated in the offer to purchase.

To release Keys to the buyer before the possession date, the buyer's lawyer must have a high comfort level with the seller's lawyer and be completely confident that the seller's lawyer will accept the trust conditions the buyer's lawyer wants to impose. If the buyer's lawyer's planned trust conditions are the standard NCP trust conditions, such confidence can be well-founded, but if there are amendments or additional trust conditions, the buyers' lawyer needs to be very careful before releasing Keys to buyers before closing. In those situations, it is recommended that the buyer's lawyer fax or email a draft trust letter to the seller's lawyer in advance to get the seller's lawyer's approval of the buyer's lawyer's trust conditions before Keys are released to the buyer.

d) Buyer's Lawyer's Obligation if Close Without Advance of Funds

The NCP is designed to encourage more "cash" closings where the mortgage monies have been tendered as of closing, but there is still allowance under the NCP for mortgage monies to follow later. This allowance reflects the standard right that a buyer has under paragraph 2(b) of the statutory offer to purchase form that allows mortgage funds to be delayed.

When closing with mortgage funds still not advanced, the buyer's lawyer would be obliged to confirm that there are no circumstances known to the buyer's lawyer that would cause the lender to refuse to advance funds. If the buyers' lawyer actually knows that the buyer is newly unemployed, or the property was a grow-op, or has good reason to suspect those circumstances, or the lawyer is aware of any other circumstances that would cause the lender to not advance the mortgage funds, then the buyer's lawyer would need to disclose the issue before closing. If the buyer

refuses to authorize the lawyer to disclose the specifics, the lawyer would still be duty bound not to accept the trust condition ("I'm sorry lawyer acting for Seller…I am not authorized to tell you why, however, I cannot accept the trust condition, reasonable and proper as it is). At that point, it might be best for the buyer's lawyer to seek a mortgage advance (or, as appropriate, instructions from the lender) to determine if closing was even possible.

e) Reduce Risks of Claims Under Gap Coverage

Lawyers will still have to do careful advance review of transfer, mortgage or other documents being filed at LTO to prevent rejection for such obvious errors as bad homestead evidence or prevent the need for correction letters for simple oversights such as missing information in forms or missing supplementary documents required (e.g. Power of Attorney, Probate, Condo forms). Such precautions will also reduce the risk of having to make a claim under gap coverage. As well, before releasing sale proceeds under a closing using title insurance gap coverage, the seller's lawyer must do an updated search at LTO.

f) Title Insurance for Unpaid Water Accounts

If the client chooses to purchase title insurance, the lawyer must advise the client to take the necessary step of submitting a water reading on the date of possession or very shortly thereafter, to ensure that the policy will cover unpaid water accounts accruing up to the policy date. Be aware that in cases where a water bill is issued based on a reading that is late (i.e. after the possession date/policy date) the title insurers may reserve the right to pro-rate or otherwise determine how much of the unpaid bill would relate to the period before the policy date. Clients should find out in advance if a reading that is one or two days late will cause any issue.

g) Holdback for Unpaid Water Accounts

For buyers' lawyers who do not wish to entrust water coverage to title insurance, the NCP recommends that seller's lawyers no longer accept unlimited obligations to pay final water bills. Under normal circumstances for standard sales, the NCP recommends that an acceptable trust condition would require a maximum holdback of $1,000, or the net sale proceeds, whichever is less. Alternate arrangements can of course be made on a case-by-case basis but the NCP recommends that larger holdbacks be required only in limited circumstances for transactions where the buyer's lawyer has reason to believe there is a "high risk" that the water bill will be both unpaid and very large (e.g. a revenue property, vacant property, suspected grow-op, etc).

7. Winnipeg Water Accounts Online Information

The City of Winnipeg has established *Lawyer Gateway* to give online access to Water and Waste Department accounts to law offices in Manitoba and their staff who have signed an agreement with the *Legal Data Resources (Manitoba) Corporation (LDRC).*

Lawyer Gateway includes real time utility account balances. Account adjustments may take several days to process once the Water and Waste Department receives the necessary information (e.g. meter readings). You will be able to see two years' history of the searches you performed. Lawyer Gateway is mobile-friendly. You can use all the same features as on a standard desktop or laptop computer on most commonly available mobile devices.

Information relating to the meter readings and the water account for any particular property is confidential information which belongs to the owner of the property. Access to the water accounts is only properly available to a lawyer who has the property owner's authorization. On a purchase and sale transaction, the buyer's lawyer should have the property owner's consent to access such information on behalf of the buyer before attempting a water account search. Consent can be express, whether written or verbal, or implied. The City of Winnipeg has stated that the City does not require lawyers to obtain any particular form of consent, so that issue is left up to the lawyers involved.

Be sure you have the property owner's consent to access the information before proceeding. See the section on Searches – Utilities – Water and Waste Accounts above for more information about getting information about the property owner's account balances.