

RECENT CHANGES TO:
THE STANDARD FORM AGREEMENT OF PURCHASE AND SALE
prepared by Erin O'Brien Edmonds

Recently, the Nova Scotia Real Estate Association amended the Standard Form of Agreement of Purchase and Sale which has been used in Nova Scotia. All local Real Estate Boards have now agreed to use the new Standard Form. Previously, there were variations of the form and different updates which were being used. My comments relate to changes to the Standard Form which has been used by the local Halifax-Dartmouth Real Estate Board for the past several years. You will find the new Agreement of Purchase and Sale in the Forms section of this binder.

1. FORMAT

The new agreement is now a two page format with the additional clauses to be added on page two. Each page is now initialled by both the Buyer and Seller. The parties are referred to as the "Buyer" and "Seller" rather than the "Vendor" and "Purchaser" throughout the Agreement and therefore I will use that terminology in my comments.

2. FROM THE TOP

The initial section of the new Agreement refers to the parties to the transaction. Both the Listing Broker and Cooperating Broker are named on the agreement. The old Agreement referred to the agents as the "Listing Company" and the "Selling Company". The reason behind this change is to reflect the position of Assumed Buyer Agency taken by the Nova Scotia Real Estate Association. There is another speaker dealing with that issue and therefore, I will not go into much detail about it. It is sufficient to say that a real estate agent will, in the majority of cases, be either a buyer's agent or a seller's agent except in limited cases where the agent will take on a limited dual agency role. By designating the agent who represents the buyer as the "Cooperating Broker", it is more clear that there are two separate agents who work together, in different capacities, to bring the deal together.

Walker Schurman Edmonds

3. FINANCING

Paragraph 1(b) is a financing clause which has been added as a standard printed condition. Since the vast majority of transactions include a financing clause, it only makes sense to add this clause as a preprinted one. Note that the date for arranging financing is a specific date versus a number of days from acceptance of the agreement. I can foresee a number of initialled changes to this date for those transactions which include counter offers. While the date may seem acceptable at the date of the offer, it may not be acceptable after further negotiations which delay final acceptance. Some solicitors have preferences for different wording of this clause, however, it has been used with success in many cases.

4. FIXTURES, CHATTELS AND LEASED EQUIPMENT

Paragraph 3 is a new one regarding fixtures and chattels. The paragraph is broken down into three separate paragraphs. Paragraph 3(a) deals with all fixtures and equipment attached to the property to remain and are included in the purchase price. Many agents and solicitors used to add this as a separate clause. While it may be obvious to solicitors that fixtures are part of the realty, we have all had problems with fixtures in our practice and it doesn't hurt to remind Sellers that these items must stay in place. There is a specific reference to leased equipment to paragraph 3(c).

Paragraph 3(b) deals with chattels. Hopefully, Sellers and Buyers will make the distinction between fixtures at chattels at an early stage in the transaction and prevent many problems at closing. There is a blank in the clause for the date of viewing the chattels which are to remain. The description of the chattels is required. The chattels are to be free from encumbrances and in working order on date of closing. This is a welcome clause. All too often, the stove, for example is not working on closing. The question is then, is there an implied warranty that the stove be in working order on closing? I think that most solicitors would agree that this is the case. However, if it is clear by the terms of the agreement, there is less for a Seller to argue about.

Paragraph 3(c) deals with leased equipment. The issue of whether a hot water heater or furnace is leased will be dealt with at the initial stages of the transaction. The information required is:

- 1) Whether leased equipment is to be removed, paid out or assumed;
- 2) A description of the leased equipment on the property;
- 3) Initials of buyer and seller are required beside the clause to place emphasis on this provision;

5. TENDER, FUNDS TO CLOSE

Paragraph 8 is the same as the old paragraph 7. Although this clause has not been changed, some solicitors are still not aware that a solicitor's trust cheque is an acceptable form of closing funds. There is no requirement that the solicitor's trust cheque must be certified. Presumably, then, one could not require a solicitor's trust cheque to be certified. This provision is welcomed by sole practitioners and small firms who are insulted by the request that the solicitor's trust cheque be certified. However, there may well be some circumstances when a solicitor's trust cheque should be certified. One example may be when funds are coming from a solicitor from another province.

6. PRECLOSING INSPECTION

Paragraph 9 deals with the Buyer's preclosing inspection. Now the Buyer has to provide reasonable notice to inspect. The previous clause required 24 hours advance notice. Often, the Buyers did not arrange the inspection that far in advance and Sellers could attempt to refuse the inspection. The question as to what is reasonable notice still remains to be answered. However, the Seller is aware that an inspection will be requested and I would think that this clause will cause less problems than the previous clause. The purpose of the inspection is "spelled out" for both parties. Hopefully, it will clarify for both parties the kind of objections which can be made at the preclosing inspection and eliminate those for which the Buyer cannot complain.

7. UREA FORMALDEHYDE FOAM INSULATION (UFFI) WARRANTY

The clause provides a warranty that there is no UFFI in the property. It should be noted however, that it does not say that there never was UFFI in the property. The second sentence in that clause reads:

"All warranties and representations contained in this agreement shall survive the closing unless otherwise stated in this agreement."

Although this sentence is attached to the UFFI clause, it does say all warranties. If you are acting for a Seller, be wary of this clause. When read in conjunction with paragraph 12 (regarding Property Condition Disclosure Statements), your Seller could be extending his/her liability to a significant degree. The intention of the Nova Scotia Real Estate Association by adding such a clause was to make all such warranties in the agreement survive the closing.

8. PROPERTY CONDITION DISCLOSURE STATEMENTS (PCDS)

A copy of a PCDS can be found in the Forms section of this Binder. A PCDS is a statement made by a Seller regarding the condition of the property. In that document, is the following statement:

"The information contained in this disclosure statement has been provided to the best of my knowledge."

However, paragraph 12 of the new agreement states:

"If a Property Condition Disclosure Statement is provided by the Seller, the Seller warrants it to be complete and current as of the date of acceptance and further agrees to advise the Buyer of any changes that occur in the condition of the property prior to closing."

When this clause is read together with the warranty sentence in paragraph 10, there is an argument that any statement made in the PCDS regarding the property will survive the closing. As we all

know, the Fraser-Reid vs. Droumtsekas (1979), 29 N.R. 425, case held that if an agreement is silent regarding warranties which survive the closing, one must look to the intentions of the parties. By the addition of the survival clause in paragraph 10 to all warranties, the Seller has exposed him/herself to a significantly greater degree of liability. If this is the case, it may have a large impact on the law of caveat emptor. If you are acting for a Seller, I would recommend that paragraph 10 be revised to read: "This warranty shall survive the closing". The result would be that only the UFFI warranty would survive the closing. In the alternative, paragraph 12 could be revised by deleting the reference to "warranty" and change the PCDS so that all information contained therein is to the Seller's best knowledge information and belief only with no reference to any warranty.

9. AGENCY RELATIONSHIP DISCLOSED

Paragraph 15 deals with the agency relationship. A brochure entitled "Working With a Real Estate Agent" must be distributed by the Real Estate Agent. A copy of the brochure has been distributed. As of January 1, 1995, the Canadian Real Estate Association (CREA) Standards of Practice, Article 3 requires that all members disclose, in writing to all parties to a transaction the existence of the member's agency relationship and the nature of service the member will be providing. The brochure describes the Agency Relationship, Limited Dual Agency and No Agency. The new agreement sets out the name of the Broker and Salesperson for both the Seller and the Buyer. In the situation where either the Broker is the same or the Salesperson is the same, the Buyer and Seller will be asked to consent in writing to a Limited Dual Agency Relationship. The date of the consent is a part of this paragraph. If there is no agency, only 15(a) or 15(b) will be filled in. Another speaker will be talking about the agency relationships and I will not deal with it further.

10. COUNTER OFFER REFERRED TO

Paragraph 19 is new in that the offer of the Buyer is signed by the Seller to acknowledge that the offer was read and understood but that a Counter Offer on a specific date was prepared. The purpose of this clause is to tie the Counter Offer into a specific. Sometimes we will see several offers and counters offers regarding the same property and parties. This clause will prevent mix up of offers and counter offers and prevent confusion.

11. SOLICITORS

The bottom of the agreement contains provision for solicitors for each of the parties and their phone and fax numbers rather than phone and address.

CONCLUSION

The Nova Scotia Real Estate Association and Halifax-Dartmouth Real Estate Board has indicated that it welcomes comments from the practicing Bar. Although there may be controversy regarding some of the new amendments, if we are aware of their effect, we can advise our clients and make amendments that we see fit on individual transactions.