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CHAPTER 11

CONTRACTS FOR REAL ESTATE TRANSACTIONS

Learning Objectives

After studying this chapter, a student should be able to:

- ☑ Apply the principles of contract law to listing agreements and contracts of purchase and sale
- ☑ Explain the requirement of writing in land contracts and the remedies available where this requirement is not met
- ☑ Explain the types of information required in a listing contract and how and when to verify it
- ☑ Describe the technical requirements of a contract of purchase and sale
- ☑ Explain how and why a vendor should be protected from conditions precedent in the contract of purchase and sale
- ☑ Explain how to properly remove a condition precedent from the contract of purchase and sale
- ☑ Discuss how to collect a deposit from a purchaser with minimum inconvenience to the purchaser and while protecting the vendor's interests
- ☑ Explain how and when a contract of purchase and sale may be assigned
- ☑ Apply the provisions of the *Competition Act*
- ☑ Prepare effectively for a negotiation
- ☑ Describe the behavioural principles and strategies for effective negotiations
- ☑ Assess the effectiveness of a negotiation using multiple criteria
- ☑ Identify and describe strategies for managing and reducing risk of litigation for professional activities

INTRODUCTION

The purpose of this chapter is to show how contract law applies to listing agreements and to contracts of purchase and sale. In residential transactions, both agreements are usually standard form contracts; however, in commercial transactions the contracts are usually prepared specifically for the particular transaction, often with the involvement of lawyers and accountants. For consistency, discussion in this chapter will focus on the standard forms. The real estate licensee's right to commission is dependent upon the preparation of enforceable listing agreements and contracts of purchase and sale. Familiarity with this chapter will help a licensee avoid some of the mistakes which can result in an unenforceable contract.

THE REQUIREMENT OF WRITING

At common law, contracts do not have to be in writing or recorded in any formal document in order to be valid and enforceable. They can be oral, or in some cases can be implied. Contracts that are not evidenced in writing may be more difficult to prove, but if they are proven, then the fact that they are not in writing will not usually affect their enforceability. A number of statutes have created exceptions to the common law rule that writing is not necessary. According to section 43 of the *Real Estate Services Rules* (the "Rules"), for example, unless waived by a prospective client, a brokerage must have a written service agreement to provide trading services to an owner of real estate. However, probably the most important exception is contained in section 59 of the *Law and Equity Act* which affects contracts dealing with land or the transfer of land. In short, it says that, in most cases, contracts dealing with real estate must be in writing in order to be enforceable.

Section 59 of the *Law and Equity Act*

The relevant portions of section 59 are set out below:

59 (2) This section does not apply to

(a) a contract to grant a lease of land for a term of 3 years or less, [or]

(b) a grant of a lease of land for a term of 3 years or less…[.]

(3) A contract respecting land or a disposition of land is not enforceable unless

(a) there is, in a writing signed by the party to be charged or by his agent, both an indication that it has been made and a reasonable indication of the subject matter, [or]

(b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or

(c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

(4) For the purposes of subsection (3)(b), an act of a party alleging a contract or disposition includes a payment or acceptance by him or on his behalf of a deposit or part payment of a purchase price.

(5) Where a court decides that an alleged gift or contract cannot be enforced, it may order either or both of

(a) restitution of a benefit received, and

(b) compensation for money spent in reliance on the gift or contract.

(7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

There are important elements in this section. Each will be discussed in turn.

- **Leases for three years or less.** Section 59 does not apply to leases or agreements to lease for a term of three years or less. Therefore, such contracts do not have to meet the requirements in section 59 to be enforceable.
- **Scope and requirements.** With two exceptions, contracts involving land (other than leases for three years or less) must be in writing to be enforceable. Note that the contract is not void, voidable, or illegal. The contract cannot be enforced but it may exist in law for some purposes.

Example

Sally Seller agrees in writing to sell Blackacre to Paul Purchaser for $75,000. Later in the week both Sally and Paul agree orally to call the deal off. Then Paul Purchaser decides that he wants to hold Sally Seller to the agreement and sues for specific performance. Purchaser cannot succeed if Seller can prove that they both orally agreed to cancel the written agreement. However, from a practical perspective and in order to avoid any dispute as to whether there was a cancellation of the agreement, Sally Seller and Paul Purchaser should have ensured the cancellation of the agreement was in writing.

The words "all contracts respecting land or a disposition of land" describe the vast majority of contracts that a licensee will encounter (including contracts of purchase and sale, listing agreements, and leases for terms exceeding three years). The written documents must indicate a contract, exactly what is involved, and must be signed "by the party to be charged." Note that these contracts are enforceable only as against the person signing the document. If only the purchaser's signature appeared, the vendor could enforce the contract but the purchaser would have to fall within one of the following exceptions before enforcing the contract.

Pepper's Produce Ltd. v. Medallion Realty Ltd., 2013 BCSC 2314

Under a limited dual agency agreement (which was permitted at that time), the listing licensee of a grocery business agreed to represent both the seller and the prospective buyer (the plaintiff). The written offer was made subject to approval from the business' landlord that the plaintiff could take over the existing lease or enter into a new one. The landlord allegedly verbally agreed to a new lease, and the licensee advised the plaintiff to remove the subject clause and proceed with the transaction.

When the landlord later refused to sign a written lease agreement prepared by the plaintiff's lawyer, the plaintiff refused to complete the deal. The Court found that the licensee had a duty to advise the plaintiff against removing the subject clause when he did, stating that "[the licensee] may have understood that [the principal of the plaintiff and the landlord] had verbally agreed to enter into a new lease. But as a realtor, [the licensee] knew or ought to have known that, if the lease was to be for a term of more than three years, only a written document would make the agreement binding." In this case, the licensee should have advised the plaintiff that a verbal agreement was insufficient and to refrain from removing the subject clause.

The first exception to the writing requirement is where the party seeking to enforce the contract can prove that the party denying it has acted in a way which indicates the existence of a contract. This can arise in two ways. First, where the party denying the contract has done some act that indicates the contract was made. Second, where the party denying the contract has agreed to an act by the other party which indicates the contract was made. Such actions can include the payment of a deposit or part of the price by the purchaser, or the acceptance of such amounts by the vendor. This is an example of "estoppel", where one party is prevented by law, or "estopped", from denying or speaking against their own deed.

The second exception is where the party seeking to enforce the contract has reasonably relied on the existence of a contract and in doing so has "changed their position", usually by spending money. If only the enforcement of the contract will prevent an unfair result, a court may enforce the contract.

Other relief. The Court has the power to provide a remedy to the party seeking to enforce the contract even if it finds the contract cannot be enforced. In such cases, the court may order restitution. For example, it could order a vendor to return a deposit to a purchaser. In addition, the court could order compensation for money spent. For example, the court could order a vendor to reimburse the purchaser for the legal fees the purchaser paid to have transfer documents prepared.

Incomplete contracts. A contract will not fail to satisfy the writing requirement merely for being incomplete. The written document may leave out a term or state a term incorrectly, but the contract may still be enforced by the court.

Examples

1. Sally Seller orally agrees to sell Whiteacre to Bob Buyer. Buyer sends a letter to Seller which says "I confirm we have agreed on the purchase and sale of Whiteacre. I will pay $50,000 for it. Signed Bob Buyer."

   Result: Seller can sue Buyer for specific performance if Buyer refuses to complete. Buyer cannot enforce the contract against Seller (if she refuses to complete) because she has not signed the document, nor has she accepted any payment or done any act which would make the agreement enforceable.

2. Sally Seller sends a reply saying: "Thank you for agreeing to buy my property for $50,000. Please forward the $50,000 by Wednesday. Signed Sally Seller."

   Result: Both parties can now enforce the contract.

3. Olga Owner and Randy Renter orally agreed that Renter would rent Owner's house for 5 years. Renter gave Owner a cheque for the sum of $800.00. Renter wrote on it: "First and last months' rent for 123 Spruce St., Vancouver, BC". Owner cashed the cheque.

   Result: The writing and signature on the cheque may be sufficient to enforce the contract against Renter. In addition, the payment of first and last months' rent by Renter and the cashing of the check by Owner, may make the contract enforceable against either party.

4. Sam Strata and Terri Tenant orally agree that Strata will lease his apartment to Tenant for 5 years, on condition that Strata will redecorate it. Strata spends $5,000 redecorating the suite under Tenant's direction. Tenant moves in but moves out again 3 months later, saying the oral contract is not enforceable.

   Result: Because Sam Strata has altered his position by spending the $5,000, he may be able to convince the court to enforce the contract against Tenant. However, if Tenant denies the contract, and the court cannot find sufficient evidence of the agreement to enforce it against Tenant, the court could still order compensation for the money Sam Strata has spent. For example, it might order Tenant to pay for some or all of the cost of the redecoration.

How does this relate to real estate practice? It means that all offers, acceptances, counter-offers and amendments should be in writing to ensure that there is no dispute over their enforceability.

T. L. G. v. K. M. G., 2019 BCSC 1236

In *K. M. G.*, the plaintiffs (parents of the defendant) sued their daughter over $110,000 they had provided for their daughter's purchase of a home in Colwood, British Columbia. Before the dispute arose, the family relationship was relatively normal and the parents had a history of providing monetary support to their children. In 2011, the parents advanced $110,000 to help their daughter purchase a home in Colwood for her use while she pursued graduate studies. The parents intended for this home to be an investment for themselves and they registered the home primarily in their daughter's name to avoid taxes. The breakdown of the parties' relationship occurred in 2016 when the parents informed their daughter of their wish to sell the Colwood home to help pay down their own mortgage. The daughter refused and stated that the Colwood home was her house and not theirs. She claimed that the $110,000 was a gift from her parents.

The Court ruled that the parents' claim of resulting trust succeeded as the daughter was unable to rebut the presumption of resulting trust. The doctrine of resulting trust presumes that any property or assets transferred gratuitously from the transferor to the transferee is held by the transferee in trust for the benefit of the transferor. The presumption can be rebutted by demonstrating that the transferor intended to gift the property or assets. The daughter failed to prove, on a balance of probabilities, that the funds received from her parents were a gift and were intended as such by them at the time of purchase. The Court further ruled that the daughter's claim of unjust enrichment failed as she did not prove, on a balance of probabilities, that there was a benefit to her parents, a corresponding deprivation to herself, and the absence of a juristic reason for the enrichment. On the contrary, she clearly profited from use of the home. Credibility was noted to be a significant factor in this case.

This case is important because it demonstrates the importance of documenting arrangements involving property, even when the arrangements are between family members. Parties should always have a legal agreement that specifies exactly what the parties intended in such a situation. If parties rely solely on the trust between family members to enforce agreements, things may go awry.

As a Licensee...

In addition to ensuring that contracts respecting land are written and signed, you should ensure that all contract signatures requiring witnesses are witnessed appropriately. Although witnessing signatures on contracts is not necessary for them to be legally binding, it is a recommended industry practice that is increasingly expected by financial institutions. A witness must be 19 years of age or older and must have actually seen the relevant party sign the document. This means that, regardless of whether a licensee recognizes the signature, it is not permissible for a licensee to witness the signature on a document where that document was faxed, emailed or otherwise delivered to the licensee with the party's signature already present.

Licensees have been disciplined for not complying with this basic rule. In one disciplinary case, a licensee received signed documents, including a listing contract, from his client. The licensee witnessed the signatures on these documents, despite having been absent when the client actually signed them. Consequently, the licensee was disciplined by the former Real Estate Council for breaching his duty to act with reasonable care and skill under section 3-4 of the Rules (now section 34 of the Rules) (2014 CanLII 33028 (BC REC)).

LISTING CONTRACTS

Description

A *listing agreement* is a contract between the vendor and a real estate brokerage. The brokerage promises to try to find a buyer and the vendor promises to pay a stated amount of commission if the brokerage is successful. Although the vendor(s) and brokerage remain the contracting parties in the British Columbia Real Estate Association's standard form listing agreement, Clause 7 of the agreement incorporates the system of Designated Agency – introduced in British Columbia in 2012 – into the standard form listing agreement. Under Designated Agency, while the contracting party is still the brokerage, the vendor agrees that the brokerage will appoint one or more specific licensees to act as the vendor's sole agent. As each Designated Agent acts as the sole agent of their respective client, Designated Agency eliminates the conflict that previously arose when two licensees in the same brokerage represented both the seller and the buyer in a transaction (discussed in greater detail in the Law of Agency chapter). A sample of the standard form listing agreement created by the BCREA is shown in Appendix 11.1. The purchaser is not a party to the listing agreement. As a result, the purchaser cannot rely on any of the terms in the listing contract. A purchaser may offer exactly the price and terms of the listing, but the vendor does not have to accept the offer. However, because a purchaser has been found who met the terms of the listing, the real estate licensee has discharged their obligation under the listing agreement and in most cases would be entitled to a commission.

listing agreements
a contract between an owner (seller) and a real estate brokerage whereby the brokerage agrees to try to find a purchaser for the listed property in return for the vendor paying a stipulated amount of commission should the brokerage be successful

To trigger the vendor's obligation to pay the commission, the licensee must produce a purchaser whose offer strictly complies with the terms of the listing agreement. In *Brian Fisher Realty Ltd. v. Emerald Park Lodge Ltd.*, [1975] 1 WWR 594 (BCSC), a property was listed for sale on an exclusive listing. The listing provided for a cash down payment of $30,000 with the balance of the total $140,000 sale price to be secured by vendor financing.

The licensee employed by Brian Fisher Realty Ltd. obtained an all cash offer to purchase the property for $140,000. The vendor refused to sell and the brokerage sued for the commission. The brokerage was unsuccessful. The court pointed out that the vendor's requirements set out in the listing must be met exactly. There may have been particular reasons why the vendor wished to finance a portion of the sale price and for this reason the court found that the vendor was not obliged to pay commission on the basis of the all-cash offer.

This is one of the reasons why it is important to fill out the listing contract details carefully. When vague terms such as: "Possession: to be arranged" are used on the listing contract, the listing contract may be unenforceable with respect to commission being paid.

Information Required for a Listing Contract

Many unenforceable contracts have resulted simply because a licensee was careless when taking information for a listing contract. It is essential that the listing contract accurately describes the property and is signed by all of the owners.

De Cotiis v. Hothi, 2018 BCSC 2271

In *Hothi*, the licensee listed his client's property for sale. After extensive negotiations with a potential buyer, the client verbally authorized his licensee to accept and initial on behalf of the client, a final purchase price of $1.25 million for the property. The client then decided that he wanted to back out of the deal, which resulted in a lawsuit initiated by the buyer. Around the same time, the licensee discovered that the client was not the registered owner of the property. Among other issues that were considered, the Court had to determine whether the client had the authority to sell the property on behalf of the registered owner, and also whether the licensee had authority to accept a contract on behalf of his client.

This case featured a very complicated set of facts. Fortunately for the licensee, the Court determined that the licensee was not negligent in accepting the contract on behalf of his client, and also that the client had authority to sell the property on behalf of the registered owner.

This case is important because it highlights the importance for licensees to conduct a title search at the early stages of listing a property to determine the registered owner of the property. If the registered owner is not the client who the licensee is dealing with, the licensee should request written documentation which grants the client the authority to sell the property on the registered owner's behalf. Section 23(2) of the *Land Title Act* sets out a presumption that the person named on title is the legal and beneficial owner. It may be that the person a licensee is dealing with has the authorization from the legal and beneficial owner of the property, but this should be confirmed in writing. This case also serves as a reminder that if a licensee is asked to sign a contract on behalf of their client, the licensee should ensure those instructions are in writing. This requirement is set out in section 5-3 of the Rules (now section 45 of the Rules). If a licensee is to act on verbal instructions, things may go awry.

As a Licensee...

There are some things the Courts always expect a licensee to check when listing a property for sale. These include the physical features of the property and its legal and financial characteristics. To help licensees avoid many of the common errors seen in claims against them, the Knowledge Base, "Acting for Sellers Checklist" has a non-exhaustive list of items that should be personally checked whenever a property is listed.

Most licensees wisely obtain a title search of the property being listed from the land title office. This permits them to confirm the accuracy of the information included in the listing contract.

A copy of the state of title is available for a nominal fee while a full search of the property is available from various land title search service organizations or through an online search service for a small fee. A call to the land title office or a brief consultation with a solicitor or notary public will familiarize you with the procedure to obtain the necessary information from the land title office. As well as identifying the registered owners, the title search will tell you whether the vendors have any charges registered against their property, e.g., a mortgage or right of way.

In the Ontario case, *Armitage v. Liptay*, 1977 CanLII 1190 (ONCA), a contract of purchase and sale provided for the purchase of an 80 acre development property. Before the sale completed, the purchaser discovered that the southerly 50 feet of the property, amounting in total to 7/8 of an acre, had been designated as a controlled access highway. The purchaser refused to complete. The vendor attempted to retain the $50,000 deposit. The court permitted the purchaser to recover the $50,000 deposit because the contract was unenforceable. If the representative had searched the title, the highway designation would have become immediately apparent and could have been provided for in the agreement between the vendor and the purchaser.

In *Price v. Malais*, 1982 CanLII 751 (BCSC), the BC Supreme Court considered a listing licensee's failure to conduct a search of the vendor's title. The listing licensee had presented an offer to purchase which contained a statement that the vendor would provide clear title to the property. The offer was accepted but the purchasers successfully backed out of the deal when they learned that there were two easements registered against the title to the property. The court held that the brokerage had breached its duty to the vendor in failing to mention the easements in the contract of purchase and sale, and in allowing the vendor to promise to deliver clear title when it was impossible for the vendor to do so.

A plan giving the dimensions of the property is available for inspection in the land title office and a photocopy of the plan is available for an additional charge. This plan cannot be used as a survey of the property. The property lines can only be determined by an official survey at a cost of approximately $300.00.

Frequently, licensees do not actually measure the property being sold and use the terms "approximately" or "more or less" when describing the property in the listing agreement. Invariably, the property ends up with the same description in the contract of purchase and sale. This can result in an unenforceable agreement as occurred in the case of *Bouskill v. Campea et al.*, 1976 CanLII 776 (ONCA) where the property was described as having a depth of 172 feet "more or less". The boundaries of the land were not marked in any way and the land proved to have a depth of 161 feet. The court held that the contract was not enforceable because the purchaser may have been considering a subdivision even though no such intention was disclosed to the vendor.

The outcome would have been very different if the property were fenced or marked in some other way based on its true depth. There are a number of cases that say that if you can see the property that is being conveyed to you then "what you see is what you get" even if the dimensions of the property had been incorrectly stated on a listing or in an advertisement. This is an important issue for a licensee as an error in description could result in the sale collapsing as well as professional discipline against the licensee.

ALERT

A representative's licence was suspended for 7 days as a result of his failure to check all information with respect to a property. As a result the purchasers did not receive what they believed they had purchased. The purchasers had been led to believe that a grove of trees and gravel driveway were located within the boundaries of the property being purchased. The grove and driveway were not.

(see: In the matter of a Hearing before the Real Estate Council held September 21, 1983)

A licensee who does not review the title of the listed property assumes the risks of liability to the purchaser, loss of commission, and professional discipline if a complaint is registered with BC Financial Services Authority (BCFSA).

In *Chand et al. v. Sabo Bros. Realty Ltd. et al.*, [1977] 2 WWR 264 (ABCA), a representative and brokerage were found liable to compensate a purchaser for damages resulting from an unenforceable contract of purchase and sale. The representative had not searched the title to the property and the court commented as follows:

> The defendants [representative and brokerage] say that they were aware of these requirements but accepted the word of the vendors without searching the title. Their evidence, supported by that of one [witness], a director and a former president of the Edmonton Real Estate Board, is to the effect that real estate agents do not usually search titles of property listed for sale unless they have doubt as to the vendor's ability to convey title.
>
> I must confess I have little sympathy for an agent who does not take the trouble to go to the land title office and obtain a search of the title of a property listed with him for sale. It is a simple matter to do and I think if agents do not do it they have only themselves to blame. There may be defects in title the owner does not know about (although such was not the case here) and it is an elementary precaution the agent should take for the protection of all persons concerned.
>
> It is recognized that a general practice of searching every title would place a burden on licensees but their failure to do so will occasionally place them in difficulties such as this. Having regard to the volume of business which they conduct, they may prefer to take a calculated risk. That is their decision, but they must be prepared to suffer the consequences. In the above case they provided the plaintiffs with an unenforceable agreement.

Disclosing Environmental Information to Prospective Buyers

As previously noted, when a brokerage enters into an agreement with a prospective seller, agreeing to attempt to sell the seller's property, the brokerage often uses a standard form listing agreement. This agreement includes information about the subject property, such as financial encumbrances, type of dwelling, size, and type of insulation. An information form accompanies the listing agreement and is used to compile additional information about the property. If the listing is being handled by a multiple listing service, this information will be given to the listing service and other brokerages will have access to it. Neither the standard form listing agreement nor the accompanying information form specifically provides for information respecting possible contamination. The information form, however, has a category where special concerns may be noted.

Potential buyers rely on information in the listing agreement when making an offer and licensees must be particularly careful when preparing the information for the listing. Some sellers know little about their property, especially if they have not lived on it, and may provide incomplete information about their property. Others may overlook problems or see only the good aspects of their property. Of course, licensees rely on their principals for much of the information which is published for prospective buyers, and whether a licensee can reasonably rely on the statements of their principal depends on the facts of a particular case. If there is a sound factual basis for suspecting that information from the seller is incorrect or misleading, the licensee has a duty to verify it. The licensee's duty to look for material defects in the subject property is illustrated in the case of *Jung v. Ip*. In that case, the listing licensee spent 15 minutes inspecting a property and gave information to the listing service that the property was in "move-in condition". The buyer relied on this information but after the sale discovered widespread termite infestation and sued for damages. The court found that the listing licensee's statement was made recklessly without care for whether or not it was true:

> I find that [the listing licensee] in fact did not know of the termite problem in the area at the time that the listing agreement was signed. I find that he ought to have known of the problem, which began as early as 1980, although it was not until 1985 that the Toronto Real Estate Board offered courses on the subject. [The sale was in 1984.] The [licensee] should have known that Gamble Avenue was in a heavily infested termite area and that there were problems in the East York area. The [licensee's] standard of performance is not to be admired and it fell below the normal practice of listing [licensees]. He is liable to the purchasers for 20 per cent of their damages.

The court suggested that licensees have a positive duty to be reasonably aware of historic or geographic factors which should alert them to specific problems. While the case did not deal with contaminated property, the lesson which can readily be inferred is that licensees will increasingly be expected to disclose, at least in general terms, which current and former industrial areas might be sources of contamination.

The duty to verify information can extend beyond the listing licensee. In *Jung v. Ip,* the court held that the employer of the listing licensee also has a duty to verify information used in a listing agreement, notwithstanding the practical difficulty in double-checking the employees' work. The court did not attempt to prescribe the specific nature of the employer's verification duty; it was significant that there was a complete absence of verification.

On the basis of *Jung v. Ip*, it seems that licensees should consider the following protective measures to both become familiar with possible contamination and to verify any statements made by a seller:

- become familiar with industrial areas associated with contamination and with known contaminated sites in one's area of business;
- keep information current with regular monitoring of sources such as the site registry;
- establish an office procedure for attempting to verify whether contamination exists for each listing independent of seller-originated disclosure.

These issues will be discussed further in this chapter under the topic of Risk Management for Licensees.

The Role of the *Competition Act*

The *Competition Act* is a federal statute designed to hold business actors accountable for misleading, deceptive, or anti-competitive practices. The *Competition Act* is administered and enforced by the Competition Bureau, an independent federal law enforcement agency that is headed by the Commissioner of Competition. While the *Competition Act* applies to all commercial activities, only the provisions most relevant to real estate licensees will be discussed in this chapter.

The *Competition Act* contains both criminal and civil prohibitions. Some offences (e.g., misleading advertising) are "dual track", meaning that they can be found in both the civil and criminal sections of the *Competition Act*. The *Competition Act* also permits private parties to sue for losses that result from conduct that is contrary to the *Competition Act*. In short, a single violation of the *Competition Act* could result in both a criminal record and civil liability for losses caused to injured parties.

For real estate licensees, the most relevant provisions are those that address agreements in restraint of trade (section 45 and 90.1) and misleading advertising (section 52 and 74.01). Sections 45 and 52 are the criminal versions of these offences, while sections 90.1 and 74.01 are civil offences. Licensees should also be familiar with the provisions against price maintenance, a civil offence found in section 76 of the *Competition Act*. Ignorance of the law is not a viable defence where a breach of the *Competition Act* is alleged. Accordingly, it is important that all licensees are aware of the *Competition Act* and the provisions discussed next.

Criminal Provisions

Agreements in Restraint of Trade

Section 45 of the *Competition Act* sets out a number of criminal conspiracy offences associated with agreements between competitors.

Section 45(1) and (2) provide that:

> Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product,
>
> is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

Under section 45, the Crown is neither required to prove that the agreement adversely affected competition in the market nor that the parties to the agreement took steps to implement the agreement. Furthermore, the Crown need not prove the existence of an express agreement in order to obtain a conviction; an implied agreement that can be inferred from circumstantial evidence is sufficient. However, as section 45 is a criminal offence, the Crown must prove the guilt of the accused "beyond a reasonable doubt". In general, the Competition Bureau has indicated that proceedings under section 45 are reserved for "true cartel-like behaviour", rather than for actions that are part of a larger, legitimate collaboration between competitors (however, such an agreement may still be reviewed under section 90.1, the civil provision that is discussed next).

In the real estate sales context, a breach of section 45 of the *Competition Act* would include agreements among licensees, real estate boards and others to:

- fix specific or minimum commission rates on real property transactions;
- allocate territories, markets or customers;
- fix the "split" between listing and selling licensees, or between the brokerage and the licensee;
- restrict the types of services offered by licensees such as:
  - for-sale-by-owner advertising or consulting services; and
  - owner home marketing services;
- prohibit the advertising of commission rates or otherwise attempt to control advertising activity;
- prohibit certain types of inducements to obtain listings or other forms of business;

- control the entry of licensees or firms into the real estate market; and
- set common fees for specific services.

The Canadian Real Estate Association (CREA) and other real estate organizations have emphasized that the local real estate boards must make no effort to set commission rates or splits. Each firm must be free to set rates and splits independently. Moreover, under the *Competition Act*, it is illegal for individual representatives or managing brokers of different real estate firms to get together to agree upon rates or splits, except where discussions involve the commission split on a particular sale.

ALERT

Both the Competition Bureau and CREA have made it clear that licensees, brokerages, and boards must be particularly careful when sharing information with competitors. Exchanging information about pricing forecasts, marketing plans or business strategies, for example, could give a court the grounds to infer an implied agreement that is in violation of section 45.

Misleading Advertising/Deceptive Practices

Another criminal provision of great relevance to the real estate business is section 52(1), which deals with false or misleading advertising. Section 52(1) states that:

> No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product [including real estate or real estate services] or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

If prosecuted as an indictable offence, a conviction is punishable by a fine in any amount at the discretion of the court and/or up to a maximum of fourteen years in prison. If prosecuted as a summary offence, the maximum penalty is a fine of $200,000 and/or up to one year in jail.

In determining whether the representation is "false or misleading in a material respect" the courts will employ a two-step test. First, the court will consider both the literal meaning and the "general impression" that is conveyed to consumers by the representation. When assessing the "general impression" of the advertisement, the court will consider the nature of the intended audience, the medium of communication used, and any disclaimers that are present. Second, the court will determine whether this impression is misleading in a material respect. To do this, the court will consider whether the representation would have a real effect upon an ordinary consumer's buying decision. There is no need to prove that an individual consumer or group of consumers was actually misled. However, "mere puffery" (e.g., claiming that product X is 'the best in the world') is not sufficient to constitute a material misrepresentation. Similarly, a minor misstatement (e.g., understating the size of a back yard by 4 square feet) would not likely be considered a material misrepresentation.

The general impression test is particularly important where the oral or written statements in the representation are literally true but the visual portion may create a false impression (e.g., a picture depicting a different model of the advertised product). For example, in one case, an advertisement contained an illustration of one model of house and indicated a specific price. The ad was held to have violated the *Competition Act* when it was established that, while houses were available at the advertised price, the illustrated model was more expensive. Similarly, in an Ontario case, a developer depicted a particular model of house and represented: "From $75,995...12 7/8% mortgage". The firm was convicted when the Court found that the illustrated model was unavailable at the advertised price and the mortgage rate did not apply to models carrying the $75,995 price tag.

It should be noted that the forms of advertising covered by section 52 are extremely broad, including representations "by any means whatsoever". This means that representations in print, oral, and digital form, including those posted to social media websites, are all subject to the *Competition Act*. Licensees must be careful to ensure that the literal meaning and the general impression conveyed by all representations, in whatever form, are accurate. In some cases, this may mean that disclaimers or other qualifications are required.

As with all criminal offences, the Crown has a burden of proving a violation of section 52 "beyond a reasonable doubt". In this case, that includes proving that the accused made the false representations knowingly or recklessly. Because of this requirement, the accused may escape liability under section 52 if they honestly believed that the representations or advertisements were not false or misleading and that they exercised due diligence in making sure that was the case.

Examples

Checkerboard Realty Ltd. and its representative were convicted of an offence under section 52(1) for advertising a house for sale by means of a listing that stated the exterior dimensions to be 1032 square feet when in fact the house was 60.79 square feet smaller than advertised. The listing contained incorrect information and the listing brokerage was at fault for failing to verify the information.

A brokerage in Ontario convicted of an offence under section 52(1)(a) in 1981 for representing 83 acres of property listed for sale as being "industrial" when in fact it was zoned for agricultural use and the municipality had no immediate plans for re-zoning the area. The listing brokerage had failed to verify the accuracy of the zoning information and the company received a criminal conviction and a fine of $5,000.

Civil Provisions

As mentioned above, the *Competition Act* contains both civil and criminal offences. On application by the Commissioner of Competition, civilly reviewable matters may be adjudicated by the Competition Tribunal, an independent adjudicative body. The Tribunal may make a remedial order where the offender is prohibited from performing the contravening conduct, or it may require an offender to take any other action determined appropriate. Unlike the criminal provisions discussed above, finding a violation of a civil offence only requires proof on a "balance of probabilities", which is a lower burden of proof than "beyond a reasonable doubt". In other words, the Tribunal must be convinced that it is more likely than not that an alleged violation occurred.

Agreements Between Competitors

Some agreements between competitors may not be violations of the criminal provisions in section 45, but may nevertheless substantially lessen or prevent competition in a market. Upon application by the Commissioner, such agreements are reviewed by the Competition Tribunal under section 90.1, which reads, in part, as follows:

> 90.1(1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement – whether existing or proposed – between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order
>
> (a) prohibiting any person – whether or not a party to the agreement or arrangement – from doing anything under the agreement or arrangement; or
>
> (b) requiring any person – whether or not a party to the agreement or arrangement – with the consent of that person and the Commissioner, to take any other action.

Unlike the sanctions imposed for criminal agreements under section 45, there are no penalties of fines or imprisonment under section 90.1. Rather, the Tribunal has broad discretion to make orders to remedy the offensive conduct. Additionally, contrary to its criminal counterpart, section 90.1 requires proof that the agreement substantially lessens or prevents competition in the marketplace, or is likely to do so. The Competition Bureau has indicated that proceedings under section 90.1 will not likely be initiated unless the parties to the agreement hold a considerable amount of market power. For this reason, section 90.1 is more likely to be a concern for real estate brokerages, boards, and associations, rather than for licensees acting in an individual capacity. However, licensees should recall that section 45 has no such threshold and that criminal proceedings may well be initiated against individual licensees for agreements with competitors that violate the *Competition Act*.

Misleading Advertising/Deceptive Practices

The civil provision contained in section 74.01 is substantially similar to the criminal section concerning misleading advertising (section 52, discussed above). Under section 74.01, the representation must be misleading in a material respect, but there is no requirement to prove that the deceptive practices were made knowingly or recklessly. For this reason, most misleading advertising cases will proceed under this section. Under 74.01, the court may order a person to stop the activity, publish a notice, and/or pay an administrative monetary penalty. On the first occurrence, individuals are liable to a maximum penalty of $750,000 and corporations are liable to a maximum penalty of $10,000,000. These penalties increase for subsequent offences. Courts may also make restitutionary orders, whereby they order offenders to compensate consumers who suffered losses because of the deceptive practices.

Price Maintenance

Section 76 of the *Competition Act* makes it a civil offence to discourage the reduction of prices, place upward pressure on prices, or discriminate against someone because of their low pricing policy, by means of threat, promise or agreement. Upon application by the Competition Bureau, allegations under section 76 are reviewed by the Competition Tribunal, which may make an order prohibiting the offender from continuing the offensive conduct or requiring them to accept any person as a customer. Such an order will only be made if "the conduct has had, is having or is likely to have an adverse effect on competition in a market." The Competition Bureau has indicated that the creation or maintenance of market power is an important consideration when determining whether the conduct has had an adverse effect on competition.

The situations in which section 76 of the *Competition Act* would be applicable in the real estate industry would include, but are not limited to, the following circumstances:

- one or more brokerages "directly or indirectly" seeking to either have a rival brokerage raise its commission rates or not reduce them below a certain level;
- a real estate board refusing to accept listings in its MLS® operation because a brokerage's commission rate is below a certain level;
- a media outlet refusing to accept certain advertisements because a brokerage's commission rate is below a certain level; and
- a real estate board imposing regulations on its members designed to limit price competition.

Sale Above Advertised Price

Section 74.05 provides that the sale or rental of a product or service above the price at which it has been advertised during the period and in the market to which the advertisement relates is reviewable conduct. In 1999, an amendment to this section was added which excludes from this offence "the supply of a product by or on behalf of a person who is not engaged in the business of dealing in that product". This exempts those licensees in the real estate industry who advertise the sale of a house on behalf of its owner. This amendment eliminated a conflict with provincial real estate legislation and Board rules which require representatives and brokers to get the best price they can for their vendors' property.

It should be noted that a licensee selling for a developer or construction company is not exempted from section 74.05 because they are not selling the houses "on behalf of a person who is not engaged in the business of dealing in that product". A developer is a person engaged in the business of dealing in the product of new houses.

ALERT

The Canadian Real Estate Association, in its brochure "Real Estate Competition Guide", has identified the following three basic rules that sum up the effect of the *Competition Act* on the real estate industry and its licensees:

- Don't collude. Make independent business decisions without discussion or consultation with competitors.
- Don't discriminate against or refuse to do business with competitors or other persons because of their pricing policies.
- Don't mislead the public in your advertising.

Describing Existing Financing on the Listing Contract

In some cases, a mortgage registered against the vendor's title can be assumed by the purchaser. Mortgage assumptions are attractive when:

- current interest rates are higher than the interest rate on the vendor's mortgage, so the purchaser would benefit by taking over the existing mortgage; and/or
- there is a substantial pay-out penalty, so the vendor may prefer to have the mortgage assumed rather than pay it out.

At the time the listing is taken, it is important to confirm the details of the existing mortgage with the lending institution, including outstanding balance, interest rate, payment, term, date, pay-out penalty, and assumability. If, for example, a licensee relies on the vendor's guess of the outstanding balance and provides in the contract of purchase and sale that the purchaser is to assume a first mortgage of approximately $20,000 and it turns out that only $19,000 is owing, the purchaser will probably have the option not to complete. Further, the licensee will not be entitled to a commission because a court will find that the contract is either void for uncertainty or that the financial details of the transaction have been misrepresented to the purchaser.

Details of an assumable mortgage are only one type of information which should be gathered. It is the obligation of the licensee to confirm details with an outside source such as the city hall, the local assessment authority, or the mortgage lender. Examples of information which can be confirmed are: the age of the building, lot size, and zoning. It is no defence for a real estate licensee to say "the vendor gave me this information" if the licensee could have checked the accuracy of the information with an outside source.

Protection of Personal Information

Privacy protection regulations in the private sector came into force on January 1, 2004, requiring every business and non-profit organization, including real estate offices, in British Columbia to adhere to new standards and practices for protecting the privacy of personal information kept by them. Similar legislation applies across Canada, either through provincial statute or under the federal *Personal Information Protection and Electronic Documents Act* (the "PIPEDA").

The privacy legislation requires organizations to:

- collect, use and disclose the personal information of their clients and customers according to specific rules;
- ensure adequate policies and procedures are in place to protect personal information as the law requires; and
- create internal processes to handle inquiries, complaints and requests from people for access to their own information.

A breach of these requirements can lead to penalties of up to $100,000, as well as damages.

Information collected by licensees in the course of a real estate transaction is subject to the requirements of PIPEDA. Accordingly, licensees should take care to follow the ten privacy principles set out in PIPEDA. In general, the ten privacy principles detail how to collect and use personal information, and they can be summarized as follows:

1. Identify the purposes for which the personal information is needed and collected. Ask: is the purpose reasonable?
2. Limit the collection of personal information. Ask: is the information necessary for the stated purpose?
3. Disclose the purposes for the collection and get consent. Consent may be written, oral or implicit.
4. Limit the use and relate the disclosure to the identified purposes. For new uses, get new consent.

In order to ensure that appropriate disclosure is made to clients and customers, the British Columbia Real Estate Association has prepared phrases for their various standard forms, including the listing agreement (Appendix 11.1, clause 11), and the standard form contract of purchase and sale (Appendix 11.2, clause 19). However, licensees must take care to make the appropriate disclosures in any situation in which personal information is being collected, and in particular in circumstances where the standard forms have not been utilized.

CONTRACT OF PURCHASE AND SALE

contract of purchase and sale a contract of purchase or sale of land which contains the obligations of the vendor and purchaser with respect to the purchase and sale

The standard form of contract in British Columbia is called a "*Contract of Purchase and Sale*". Prior to 1987 it was referred to as an "interim agreement" leading some purchasers to believe it was not a binding contract. See Appendix 11.2 for a sample of the standard form Contract of Purchase and Sale.

The British Columbia Real Estate Association and the Canadian Bar Association (BC Branch) created the standard form contract to help licensees consistently write legally effective agreements for the purchase and sale of residential real estate. From time to time, the Associations revise the standard form contract to keep pace with new developments. For example, the system of Designated Agency was introduced in BC in 2012. The most recent standard form contract incorporates the system of Designated Agency in Clause 21, "Agency Disclosure", to reflect the fact that the seller(s) and buyer(s) have an agency relationship with the Designated Agent(s), who is/are licensed in relation to a brokerage. Designated Agency is discussed in the Law of Agency chapter. A licensee should always use the most up to date version of the standard form contract.

A standard form of contract provides many benefits. It ensures that no legal fundamentals are overlooked. In addition, there are situations where the common law dictates certain legal consequences unless the parties agree otherwise. The standard form contract anticipates some of those situations by using language that avoids the default consequences at common law. For example, many years ago the courts of equity held that beneficial ownership of the property passes to the buyer when the parties enter a binding contract of purchase and sale (*Lysaght v. Edwards* (1876), 2 Ch D 499). From the date the contract becomes binding, this means that any damage to the property is the buyer's responsibility unless the parties agree otherwise. The standard form contract expressly addresses this problem in Clause 16:

> 16. RISK: All buildings on the Property and all other items included in the purchase and sale will be, and remain, at the risk of the Seller until 12:01 am on the Completion Date. After that time, the Property and all included items will be at the risk of the Buyer.

And in Clause 8,

> 8. VIEWED: The Property and all included items will be in substantially the same condition at the Possession Date as when viewed by the Buyer on _____ yr. _____ (Adjustment Date).

The risk clause (Clause 16) can also prevent the finding of frustration (discussed in Chapter 10: "The Law of Contract") in a circumstance where the property is destroyed (i.e., the property is burned down). Recall that frustration can only occur when an event not contemplated in the contract make the contract fundamentally different than originally intended. Therefore, destruction of the property prior to the closing date remains the responsibility of the seller, even if the cause of the destruction was out of their control.

A licensee should not encourage a seller or buyer to strike out, or otherwise alter any of the pre-printed wording in the standard form of contract without first obtaining legal advice. The standard contract of purchase and sale was thoughtfully prepared by the BCREA and Canadian Bar Association and involved input from key individuals in the industry. Alterations to the standard contract may result in unintended consequences.

The licensee must ensure that every party, or the party's duly authorized legal representative, signs the contract of purchase and sale. When the terms or conditions of the contract are continued on an addendum page, all of the parties, or their respective representatives, must also execute the addendum. Under the old *Statute of Frauds*, if the contract of purchase and sale was continued on another form, it had to be incorporated by reference into the original agreement in order to comply with that statute. Until we know more about the effect of section 59 of the *Law and Equity Act*, this practice is still recommended. This may be done by numbering each page of the contract, including the addendum, out of the total number of pages; for instance, the addendum might be numbered "Page 5 of 5".

Technical Requirements for an Enforceable Agreement

One of the licensee's most important functions is to prepare an enforceable contract of purchase and sale that reflects the agreement between the seller and buyer. From a technical perspective, there are many considerations to take into account.

The most obvious requirement is that the agreement can be read. Unless your writing is very legible, the contract of purchase and sale and any amendments or schedules to it should be printed. A typed agreement reduces the possibility of a misunderstanding by the parties or other people involved in the conveyancing of the property.

Next, all the essential ingredients of the contract must be sufficiently certain. Among the features that must be stated with certainty are the three P's: the parties, the property and the price.

Names and Occupations of the Parties

The formal transfer documents in the conveyance must include the full names and occupations of the purchasers. It is a good idea to obtain this information and write it in the contract of purchase and sale for use later by the conveyancing lawyer or notary. It is also a good idea to ask how the purchasers want to hold title to the property (i.e., as tenants in common or as joint tenants). While these instructions can always be changed before the transfer is finalized, it is wise to raise the question with the purchasers at the time the contract of purchase and sale is prepared. If nothing is said, British Columbia courts will usually presume a tenancy in common. A licensee will be expected to explain the differences between these two concepts. Licensees will not however, be expected to advise their clients as to which method of ownership should be chosen.

Where there is a court-ordered sale, as in a foreclosure proceeding, the court-approved purchaser is not changeable without another application for further court approval and amendment of the original court order. This is an expensive process which can be avoided by exercising reasonable care when completing the contract of purchase and sale.

On January 1, 2023, the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the "Act") and its regulations came into force. The Act bans the purchase of residential real estate by non-Canadians until January 1, 2025. While licensees should never provide advice relating to whether the ban applies to a specific buyer or property, all licensees need to be aware of the key aspects of the ban. Anyone who assists a non-Canadian in directly or indirectly purchasing any residential property (e.g., real estate licensees, lawyers, and notaries) is guilty of an offence and could be liable to a fine of not more than $10,000. As such, licensees should discuss the ban with clients that are not Canadian citizens and ensure they obtain the appropriate advice as to whether the ban applies to them.

Section 4 of the Act prohibits a "non-Canadian" from purchasing, directly or indirectly, residential property. The definition of "non-Canadian" is complex but is generally:

- an individual who is not:
  - a Canadian citizen;
  - an Indian under the *Indian Act*;
  - a permanent resident;
- a corporation that is not incorporated under the laws of Canada or a province;
- a corporation that is incorporated under the laws of Canada or a province but is controlled by a non-Canadian (with control being defined as (1) direct or indirect ownership of shares or ownership interests representing 10% or more of the value of equity or voting rights; or (2) *de facto* control); and
- another entity, such as a partnership, that (1) is not formed under the laws of Canada or a province; or (2) is formed under the laws of Canada or a province but is controlled by a non-Canadian.

There is an exclusion from the ban for temporary residents if they are international students, work permit holders, or refugees. For international students, they must have filed income tax returns in Canada for the last five years and must have been physically present in Canada for at least 244 days in each of those years. The international student cannot purchase more than one residential property, and the property must not

exceed a purchase price of $500,000. For work permit holders, they must have 183 days or more of validity remaining on their work permit or work authorization on the date of purchase of a residential property. Similar to international students, work permit holders cannot purchase more than one residential property, but there is no limit on the purchase price for the property.

There are also exemptions for certain estate, family law, trust, secured lending, and property development scenarios, including: the acquisition of an interest or real right resulting from death, divorce, separation, or a gift; the rental of a dwelling unit to a tenant for its own occupancy; the transfer of residential property under the terms of a trust that was created prior to the coming into force of the Act; a transfer resulting from the exercise of a security interest or secured right by a secured creditor; and the acquisition of residential property for the purposes of development.

The Act applies to "residential property", which generally includes detached houses, semi-detached houses, rowhouses, and residential strata units. There are some exclusions, however, such as detached houses with four or more dwelling units and non-strata apartment buildings. Further, the Act only applies if the property is located within a census agglomeration ("CA") or a census metropolitan area ("CMA"). CA and CMA are terms that are defined by Statistics Canada, and most municipalities of 10,000 residents or more are included within a CA or a CMA. Licensees can access a Statistics Canada list of CAs and CMAs, if in doubt. This list is subject to change due to changes in population and local government organization. Notably, land that does not contain any habitable dwelling, that is zoned for residential use or mixed use, and that is located within a CA or CMA, is not captured by the definition of "residential property", and so can be purchased by non-Canadians.

The Act sets out significant penalties for non-compliance. Section 6(1) of the Act states that every non-Canadian, as well as any other person who counsels, induces, aids, or abets or even attempts to counsel, induce, aid or abet a non-Canadian to purchase a residential property in Canada is guilty of an offence and liable on summary conviction to a fine of not more than $10,000. As mentioned earlier, the activities of real estate licensees could fall within this section, along with lawyers, notaries, and other professional advisors. Licensees could also be disciplined by BCFSA for their role in a breach of the Act.

While the sale of a residential property to a non-Canadian may be in breach of the Act, the sale may still be valid at law, and as such, a court may order that the residential property be sold. A court, however, would have the discretion to make other orders that it considers necessary, such as ordering that, on the sale of the property, the non-Canadian cannot recover more than what they paid for the property (i.e., the non-Canadian cannot profit from the court ordered sale of their property).

Licensees should consult with their brokerage as to whether their brokerage has any specific policies for ensuring that its licensees, who work with buyers who are not Canadian citizens, are not unknowingly assisting those buyers to breach the Act.

Finally, recall that British Columbia imposes an additional property transfer tax (commonly known as the Foreign Buyers' Tax) of 20% of the purchase price for residential real property purchases within certain areas of the province. Because of differing definitions of "residential property" (and other key terms) and differing sets of exclusions, it may be possible for someone to be able to purchase residential real estate without breaching the Act, and still be required to pay the Foreign Buyers' Tax. Such cases may be rare, and buyers who may be caught by the ban or tax should consult a tax professional for further advice.

Description of the Property Being Sold

A contract of purchase and sale must contain a complete and accurate description of the property to be sold. There are two descriptions: the street address (which is also known as the "civic address") and the legal description. The contract may be void for uncertainty if the description is inadequate. Problems often arise when only part of a piece of land is being sold, or when chattels are included with real property.

When the purchaser is buying a piece of property that has not yet been subdivided from a larger parcel, the specific property being purchased should be described by "metes and bounds". A metes and bounds description is an informal description based on unsurveyed measurement. It should include written reference to some clear landmarks. A sketch should be attached outlining the parcel's dimensions, and its location with reference to known landmarks, for example, roads, water courses, or existing buildings.

In an earlier chapter, the distinction between chattels and fixtures was introduced. It was pointed out that where doubt exists about whether an item is a chattel or a fixture, an express term should be included in the contract of purchase and sale.

A special problem arises where chattels are involved in the sale of a business. The sale of an apartment building, a farm, or a business normally involves both personal property and real property. The question inevitably arises, "What is included in the sale?" In the sale of a business, it is best to take an inventory of all the personal property to be included, and attach it as a schedule to the contract of purchase and sale. At the same time, if any chattels are not included, it is likely a good practice to reference them specifically in the contract.

Description of the Price and Related Financing

The contract of purchase and sale must describe the purchase price and related financing arrangements with certainty. *Block Bros. Realty Ltd. v. Occidental Hotel Ltd.*, [1971] 3 WWR 51 (BCCA) illustrates what can happen if a licensee fails to clearly state the purchase price and financing arrangements. A contract of purchase and sale was entered into by the vendors and prospective purchasers of a hotel in Nanaimo, BC. The purchasers agreed to pay one-half the purchase price in cash. The contract went on to state: "Balance by mortgage and/or agreement for sale at $4,100.00 per month at 7 percent P.I."

Mortgages and agreements for sale are both discussed in detail in Chapter 15: "Introduction to Mortgage Law". However, to understand this case, an introduction is needed now. When a purchaser wants to buy real property but does not have enough money to pay cash, they must obtain financing. There are two major ways in which this can be done: mortgage or agreement for sale.

In a mortgage, the purchaser obtains a loan for some portion of the purchase price. Upon completion of the contract of purchase and sale the purchaser becomes the "owner" of the property subject to a charge, for the mortgage's value, against the title. If the purchaser does not make the required loan payments, the lender can eventually take over the property. In an agreement for sale, the vendor "lends" the purchaser some portion of the purchase price but remains the owner of the property. The purchaser repays this amount to the vendor, usually by instalments over three to five years. The vendor transfers title to the purchaser when the entire amount has been repaid.

Because these two methods of financing are very different, the contract in the *Occidental Hotel* case was not clear. The vendors took the position that they were not bound by the contract of purchase and sale and refused to complete.

The prospective purchasers commenced an action for damages and/or specific performance and the real estate brokerage commenced an action for commission. Both actions were based on the failure of the vendor to comply with the contract. Unfortunately for both, the British Columbia Court of Appeal found that the agreement was not a binding contract and the vendor was not bound to sell, nor to pay a real estate commission. The finding in this case shows that the courts do not recognize "a contract to enter into a contract". In other words, to have a binding contract, there must be consensus on all essential terms at the time the agreement is made. As the parties had not decided how the balance would be paid (mortgage? agreement for sale?) there was no contract.

Many of the problems associated with unclear or vague wording can be overcome by using the clauses and phrases published in BCFSA's Knowledge Base which is accessible online. In addition to many useful, practical considerations for your real estate practice, the Knowledge Base contains a collection of clauses that have been reviewed by experienced real estate practitioners and lawyers.

The three cases on the following pages illustrate some contracts that were found to be unenforceable. You should familiarize yourself with these brief examples so that you can avoid similar errors in your future contract drafting. You may wish to reread the cases after you have completed the chapters on mortgage law and mortgage financing.

Buyers v. Begg, [1952] 1 DLR 313 (BCCA)

A purchaser signed an interim agreement (now called a contract of purchase and sale) whereby, in addition to a cash deposit and further cash payment, the purchaser was to pay the balance on terms. The terms were as follows:

> $50 per month including interest at 6%. Vendor has the privilege of mortgaging his interest giving precedence over agreement for sale; purchaser to assume cost of mortgage.
>
> Purchaser to have the privilege of paying off the difference between cash payment and mortgage at any time without notice or bonus.

There was also a clause which stated that an agreement for sale "under the usual terms" was to be entered.

Before the stated completion date, the purchaser backed out of the contract and sued to recover the deposit. The court allowed the recovery, stating that the contract was too vague to be enforceable.

The court first focused on the lack of clarity as to the prospective mortgage's duration, payment method, or any remedies available to the mortgagee upon default. As well, the court noted that there are no "usual" terms for an agreement for sale, especially given the unusual terms of this contract.

Given the unusual method of buying and selling the land, the court said that no "meeting of the minds" (and therefore no contract) could have occurred where the form and substance of an agreement for sale was so vague. Licensees should be clear and precise when drafting contracts, especially the financing description.

Jackson v. Macaulay Nicolls Maitland & Co. Ltd., [1942] 2 WWR 373 (BCCA)

A vendor and purchaser entered into an interim agreement (now called a contract of purchase and sale) whereby, after paying a deposit, the purchaser was to assume an existing mortgage as part of the purchase price. The purchaser was to pay the balance by cash. In fact there was no mortgage, the vendor had only a "right to purchase" under an agreement for sale. The licensee was apparently unclear as to the difference between the two, or had simply made an error. After the error was discovered and before the stated completion date, the purchaser backed out of the deal and sued to recover the deposit.

First, the court agreed with the purchaser that there was no binding contract. The court refused to imply an agreement where there was a mistake of such an essential term.

Second, the court allowed the purchaser to recover the deposit. Various reasons, including innocent misrepresentation, were given but the court basically affirmed the principle that a deposit is always recoverable where there is no binding contract. Where there is not a binding contract, the parties always have a right to back out of negotiations. To deny recovery of the deposit would have forced the purchaser to continue negotiations.

Arnold Nemetz Engineering Ltd. v. Tobien, [1971] 4 WWR 373 (BCCA)

A purchaser and vendor signed an interim agreement (contract of purchase and sale) whereby in addition to a cash payment (including deposit), the purchaser was to pay:

> ...the balance...by A/S at 8 1/2% interest P.I. over 10 years with a pay up clause after 5 years.

The court accepted that "P.I." meant principal and interest and that "A/S" meant agreement for sale. (However, licensees should spell these terms out; courts will not always be so liberal.)

The vendor refused to complete, owing to a disagreement over a minor term of the contract and the purchaser sued for specific performance. The court, finding the contract too vague to be enforceable, rejected the purchaser's claim and also disallowed the vendor's agents from collecting commission.

The court initially cited the legal principle that "a deed shall never be void where the words may be applied to any extent to make it good." In other words, while the court will not create a contract, it will try its best to attach meaning to the words in the written agreement. A court is interested in enforcing what it finds to be the mutual intentions of the parties.

In this case, the court was not able to attach any meaning to the written document, focusing mainly on:

- there was no way to ascertain on what basis interest was calculated. "P.I.," coupled with "over 10 years" implied instalments, but was the interest to be calculated per annum? per 6 months? some other time period?
- assuming that instalments were intended, there was no way to ascertain whether they were to be paid monthly, annually, bi-annually, or otherwise. Of course a court could insert some reasonable interval but it could not be inferred from the wording and therefore could not reflect any agreement by the parties.

As a final note, the court rejected the purchaser's argument that there was some agreement during negotiations that instalments were to be monthly. Courts are reluctant to allow evidence of negotiations since the parties' positions often change. The written contract is the ultimate evidence of the parties' agreement, and a court will look to it for guidance.

The Home Buyer Rescission Period

The enforceability of the contract of purchase and sale can also be affected by legislation. Effective January 1, 2023, buyers of "residential real property" will have a right to rescind, or cancel, their contract of purchase and sale within three business days of entering into the contract. However, exercising this right will result in the buyer having to pay the seller a fee of 0.25% of the purchase price. The rescission right is contained in section 42 of the *Property Law Act*, with the details of this right being set out in the *Home Buyer Rescission Period Regulation*. The period of time that buyers have to rescind their contracts of purchase and sale (i.e., three business days) is referred to as the Home Buyer Rescission Period ("HBRP"). It is important to note that the HBRP cannot be waived by the parties to the contract.

According to the BC government, the HBRP, the first of its kind in Canada, protects people looking to buy a home from being pressured into high-risk sales. A high-risk sale is one where, because of intense competition to purchase the particular property, buyers feel pressured to make offers at inflated prices without typical conditions precedent (or subjects) that provide some level of buyer protection. The government stated that the HBRP will "give homebuyers an opportunity to take important steps, such as securing financing or arranging home inspections, as they prepare to make one of their biggest financial decisions."

Purchases Subject to the Home Buyer Rescission Period

The HBRP applies to contracts of purchase and sale of "residential real property", which is defined as a detached house, a semi-detached house, a townhouse, an apartment in a duplex or other multi-unit dwelling, a residential strata lot, a manufactured home that is affixed to land, and a cooperative interest that includes a right of use or occupation of a dwelling. There are also some exclusions from this definition, including residential real property that is located on leased land, a leasehold interest in residential real property, residential real property that is sold at auction, and residential real property that is sold under a court order or the supervision of a court (for example, through foreclosure proceedings). Further, the HBRP does not apply to contracts of purchase and sale for "development units" that are subject to the *Real Estate Development Marketing Act* (the "REDMA"). Recall from Chapter 2: "The *Real Estate Services Act*" that buyers of such units have a seven-day rescission right.

If there is ever a question about whether the HBRP applies to a particular property or transaction, a licensee should consult with their managing broker.

Length of the Home Buyer Rescission Period

The HBRP is three business days. A business day is defined as a day other than a Saturday or holiday (in B.C.'s *Interpretation Act*, "holiday" includes days such as Sunday, Christmas Day, Good Friday and Easter Monday, Canada Day, Victoria Day, British Columbia Day, Labour Day, National Day for Truth and Reconciliation, Remembrance Day, Family Day, New Year's Day, and December 26th).

The HBRP begins to run on the business day following the date the acceptance to the offer to purchase the property is signed. A notice of rescission must be made within the three business days that follow the date of acceptance. For example, if the offer was accepted on Monday, July 3, the buyer would have until the end of Thursday, July 6 to rescind the contract. If the offer was accepted on Thursday, July 6, the buyer would have until the end of Tuesday, July 11 to rescind the contract.

How to Exercise the Notice of Rescission under the Home Buyer Rescission Period

A buyer can exercise their right of rescission under the HBRP by serving a written notice of the rescission on the seller on any day within the HBRP. The notice of rescission must contain:

- the address, the parcel identifier, or a description of the property;
- the name and signature of the buyer;
- the name of each of the seller in the contract; and
- the date that the right of rescission is being exercised.

There is no mandatory form for a notice of rescission; however, BCFSA has created an optional form for buyers to use. Furthermore, BCREA has also created a form entitled Notice of Rescission Residential Real Property that can be used.

There are three ways to serve a seller with a notice of rescission under the HBRP:

1. **Registered Mail:** The notice must be sent to the address of the seller as set out in the contract of purchase and sale, and it will be deemed to be delivered when it is sent.
2. **Fax:** The notice must be transmitted to the fax number for the seller as set out in the contract of purchase and sale, and it will be deemed to be delivered when the fax is transmitted.
3. **Email:** The notice must be transmitted with a requested read receipt to the email address for the seller as set out in the contract of purchase and sale, and it will be deemed to be delivered when the email is transmitted.

Fee Payable When the Right of Rescission is Exercised

If the buyer exercises their right of rescission under the HBRP, the buyer must promptly pay to the seller an amount that is equal to 0.25% of the purchase price. In other words, for every $100,000 in purchase price, the amount payable is $250. For a purchase price of $1,000,000, the amount payable would be $2,500.

A Licensee's Role with Respect to the Home Buyer Rescission Period

Licensees involved in the sale of residential real estate that is applicable to the HBRP have a number of obligations.

First, licensees who provide trading services to consumers must obtain the informed consent of that consumer prior to providing them with trading services. In most cases, informed consent must be obtained through the delivery of a Disclosure of Representation in Trading Services form to the consumer. However, delivery is not enough – the licensee must ensure that the consumer understands the contents of this form, which may require them to walk the consumer through the form itself and answer any questions as they arise. The Disclosure of Representation in Trading Services form includes information about the right of rescission and the HBRP, meaning that licensees should ensure that the consumer understands this right at this stage of the relationship. That said, licensees must be very cautious when providing the Disclosure of Representation in Trading Services form to unrepresented parties. Licensees have a duty to provide the Disclosure of Representation in Trading Services form to unrepresented parties in a real estate transaction, however, licensees must not give any advice to the unrepresented party about the contents of the form (including the HBRP). Licensees can only provide the unrepresented party with factual information about the Disclosure of Representation in Trading Services form, not advice. Licensees who give advice to unrepresented parties risk creating unintended implied agency relationships with those parties. If an unrepresented party wants advice about the HBRP, the licensee should tell the unrepresented party to obtain their own advisor because the licensee is not acting for them in the transaction. By contrast, when dealing with their own client, licensees must not only deliver the Disclosure of Representation in Trading Services form to their client, but also provide their client advice and explanations about the contents of the form, including the HBRP.

However, licensees' disclosure obligations with respect to the HBRP do not end with the delivery and explanation of the Disclosure of Representation in Trading Services form at the beginning of the agency relationship. The second obligation of licensees (under section 57.1 of the Rules) is to make additional disclosure about the HBRP, to buyers and sellers of residential real property, at the time that offers are being exchanged. To be specific, licensees must provide section 57.1 disclosure to buyers and sellers at the following times:

- for buyers' licensees, the disclosure must be made to the buyer when the licensee prepares an offer to acquire residential real property on behalf of the buyer; and
- for seller's licensees, the disclosure must be made to the seller when the licensee presents an offer to acquire residential real property to the seller.

Licensees can satisfy their disclosure obligations under section 57.1 of the Rules in one of two ways. First, licensees can use BCFSA's Disclosure of the Buyer's Right of Rescission form. Second, if the licensee is using the standard form Contract of Purchase and Sale, the required disclosure is contained within the contract itself (see Appendix 11.2), so no additional disclosure is required. Regardless of which method is used to fulfil one's disclosure obligations under section 57.1, the disclosure must be fully explained to the client. The disclosure includes the following information about the right of rescission:

- the fact that the right of rescission cannot be waived;
- the period during which the right of rescission may be exercised;

- the calculation of the dollar amount that the buyer must pay to the seller for exercising the right of rescission and when and how that amount must be paid;
- the requirement to return to the buyer any remainder of a deposit after the rescission fee is paid to the seller from the deposit; and
- the exemptions to the right of rescission.

Third, if the licensee's brokerage is holding a deposit under the contract of purchase and sale in its trust account, and the contract is rescinded by the buyer within the HBRP, the brokerage must:

- pay to the seller the amount payable by the buyer to rescind the contract (i.e., 0.25% of the purchase price); and
- promptly pay to the buyer the remainder of the deposit.

Fourth, notices of rescission under the HBRP that are prepared by or on behalf of the brokerage and served on the seller, or are received by the brokerage, are trading records, meaning that a representative or associate broker must ensure that they provide them to their managing broker, and the brokerage must retain them for a period of at least seven years. Brokerages are required to report on rescission notices in their annual brokerage activity reports.

Licensees must be diligent in carrying out their duties with respect to the HBRP. A licensee who breaches their obligations with respect to the HBRP is deemed to have committed professional misconduct under the *Real Estate Services Act* (the "RESA"), and may therefore be subject to professional discipline, as outlined in Chapter 2.

Protection of Personal Information

As discussed previously in this chapter, personal information that is gathered by licensees from Sellers and Buyers (such as that described in the above sections) is now protected by legislation. This protection requires licensees to obtain the informed consent of their clients and customers to the gathering and use of personal information. Clause 19 of the standard form contract of purchase and sale now includes a detailed disclosure of the possible uses of the Buyer's and Seller's information:

19. PERSONAL INFORMATION: The Buyer and the Seller hereby consent to the collection, use and disclosure by the Brokerages and by the managing broker(s), associate broker(s) and representative(s) of those Brokerages (collectively the "Licensee(s)") described in Section 21, the real estate boards of which those Brokerages and Licensees are members and, if the Property is listed on a Multiple Listing Service®, the real estate board that operates the Multiple Listing Service®, of personal information about the Buyer and the Seller:

A. for all purposes consistent with the transaction contemplated herein:
B. if the Property is listed on a Multiple Listing Service®, for the purpose of the compilation, retention and publication by the real estate board that operates the Multiple Listing Service® and other real estate boards of any statistics including historical Multiple Listing Service® data for use by persons authorized to use the Multiple Listing Service® of that real estate board and other real estate boards;
C. for enforcing codes of professional conduct and ethics for members of real estate boards; and
D. for the purposes (and to the recipients) described in the brochure published by the British Columbia Real Estate Association entitled *Privacy Notice and Consent*.

The personal information provided by the Buyer and Seller may be stored on databases outside Canada, in which case it would be subject to the laws of the jurisdiction in which it is located.

Note that by signing the contract, the Buyer and Seller consent to the use of their personal information for the purposes described.

condition
a fundamental term of a contract, a breach of which allows the injured party to terminate the contract and/or sue for damages or specific performance

Terms and Conditions

The standard form contract of purchase and sale consists of terms and, in most cases, conditions. The meaning of the word condition varies according to its context. The word "*condition*" may refer to an essential term in a contract, or to a subject clause, as explained next. A "term" is a promise that forms part of

the contract. The standard form contract contains certain pre-printed terms and allows the parties to add additional terms to their agreement. For instance, Clause 1 of the standard contract is a term setting out the purchase price that the buyer promises to pay and the seller promises to accept:

> 1. PURCHASE PRICE: The purchase price of the Property will be _____ DOLLARS $ _____ (Purchase Price).

Once we identify a statement as a term of a contract, we must decide its importance and effect. If the parties regard the term as vital to the contract, it is an essential term. Historically, the common law used the word "condition" to describe an essential term. Breach of an essential term (historically called breach of condition) entitles the innocent party to treat the contract at an end and, if certain criteria are met, to sue for damages.

On the other hand, if the parties consider the term as subsidiary, rather than vital, we may informally call it a minor term. Historically, the common law calls a minor term a *warranty*. Breach of a minor term (called a breach of warranty) entitles the injured party to sue for damages if certain criteria are met. The breach does not, however, relieve any party from performing their obligations under the contract.

warranty
a subsidiary term of a contract, a breach of which allows the injured party to sue for damages but does not allow them to terminate the contract

Deposit

Clause 2 of the standard form contract of purchase and sale is a term that deserves special attention. Clause 2 provides, in part,

> 2. DEPOSIT: A deposit of $ _____ which will form part of the Purchase Price, will be paid within 24 hours of acceptance unless agreed as follows: _____. All monies paid pursuant to this section (Deposit) will be paid in accordance with section 10 or by uncertified cheque except as otherwise set out in this section 2 and will be delivered in trust to _____ and held in trust in accordance with the provisions of the *Real Estate Services Act*. In the event the Buyer fails to pay the Deposit as required by this Contract, the Seller may, at the Seller's option, terminate this Contract.

The standard contract treats the *deposit* provision as a condition (that is, an essential term), since the buyer's failure to comply with the deposit requirements entitles the seller to terminate the contract.

Some people wrongly believe that there is no binding contract unless a deposit is paid when the offer is made. This is untrue. The three main requirements for a contract are offer, acceptance, and consideration. *Consideration* is something done or promised to be done by one party in return for something done or promised to be done by another party. In a contract of purchase and sale there is an exchange of promises. The vendor promises to convey title to the property to the purchaser on the completion date and the purchaser promises to pay the purchase price to the vendor on the same date. The exchange of promises serves as the consideration, not the deposit. Instead, the deposit is good faith money. If the buyer defaults, the buyer may forfeit their deposit.

deposit
an amount deposited with the brokerage by the purchaser when an offer to purchase is made

consideration
the legal term for the reason which induces a party to enter into a contract. Consideration may be in the form of a right, interest, profit or benefit accruing to one party. It may also be in the form of an agreement not to do something, or loss suffered by the other

Stakeholder Obligations. As mentioned in an earlier chapter, a real estate brokerage usually holds the deposit until the transaction is completed. A licensee who takes a deposit from a buyer should explain to the buyer how RESA governs deposits. When a brokerage holds a deposit, section 28 of RESA makes the brokerage a stakeholder:

> 28 (1) Subject to subsection (3), this section applies to money held or received in respect of a trade in real estate for which there is an agreement between the parties for the acquisition and disposition of the real estate.

(2) If the brokerage holds the money in a brokerage trust account, then, despite any rule of law to the contrary, the brokerage holds that money as a stakeholder and not as agent for one of the parties to the trade in real estate,

(a) unless or until the parties agree otherwise in writing, or

(b) unless or until circumstances established by the regulations apply.

(3) This section does not apply to the following:

(a) rents or payments under an option to purchase, if collected on a periodic and regular basis;

(b) security deposits and pet damage deposits paid by tenants under the *Residential Tenancy Act*;

(c) payments prescribed by regulation.

As a stakeholder, the brokerage holds the deposit on behalf of all the parties to the contract, rather than for the buyer only. In general terms, the brokerage, as stakeholder, may not release the deposit unless:

- the buyer rescinds the contract of purchase and sale within the three business day Home Buyer Rescission Period set out in the *Property Law Act* for purchases of "residential real property";
- all parties to the transaction sign a release; or
- the brokerage pays the money into court.

Recall that if the buyer rescinds their contract of purchase and sale within the Home Buyer Rescission Period and a deposit is being held by the brokerage in its trust account, the brokerage is permitted to:

- use the deposit funds to pay the seller the rescission fee payable by the buyer in the amount of 0.25% of the purchase price of the property; and
- pay the remainder of the deposit funds back to the buyer.

A written release is not required in this case.

With respect to a release, a brokerage should prepare it once it becomes apparent that the real estate transaction will not complete. The release serves multiple functions, as it creates a written record that makes it clear that the parties have agreed that the contract has come to an end and have identified whom the deposit is payable to. The release, therefore, becomes an important risk management tool.

The intent of the written release required by section 30(2)(b) is to ensure that the parties have agreed about the disbursement **at the time the deposit is to be released**. Much can change between when two parties enter into a contract of purchase and sale and when the contract collapses. From the brokerage's perspective, if one of the parties will not sign the release, that should serve as a red flag that there may be a difference of opinion as to who is entitled to the deposit. Even if the terms of the contract seem clear there may be adverse claims that require legal interpretation.

If the parties are not prepared to come to that agreement, section 33 of RESA allows the brokerage to make application to the Supreme Court for an order for payment of the money into court. Section 30(2)(a) allows a brokerage to pay money into court under section 33. Sometimes advising the parties this is the only option available to the brokerage if the parties are not able to come to an agreement is just the sort of encouragement the parties need to break their stalemate. The Knowledge Base, "Deposit Guidelines" recommends that brokerages seek legal advice when a release will not be signed by all parties to the transaction.

Since a stakeholder requires the consent of every party before releasing the deposit, a licensee should never tell a buyer that, "the buyer will *automatically* get back the deposit if the deal does not proceed." If, for example, the seller refuses to release the deposit, then the brokerage, as a stakeholder, cannot *automatically* pay the deposit out of trust to the buyer, who will no doubt be upset that things did not go as expected!

In addition, it is a mistake to think that the stakeholder provisions do not apply to a cheque that the brokerage has not yet deposited in the licensee's statutory trust account.

ALERT

In a complaint to the former Real Estate Council, the seller accepted the buyer's offer following which the buyer promptly dropped off his deposit cheque at the licensee's office. A short time later, the buyer returned and said he had stopped payment on the cheque and demanded his cheque back. Since the licensee had not yet deposited the cheque into the brokerage's trust account, the licensee returned the cheque to the buyer without first obtaining a release signed by the parties to the transaction.

In its reasons for the decision, the Real Estate Council pointed out (this complaint was decided under the provisions of the repealed *Real Estate Act*, and thus the old terminology; however, the principles are applicable under the current RESA):

Pursuant to Section 59 of the *Real Estate Act* [now section 28 of RESA], once the agent receives a deposit it becomes a stakeholder over the funds and not as an agent for one of the parties to the transaction. The agent can then only return the deposit to one of the parties to the transaction by express agreement between the parties.

If the buyer advises the agent that he has stopped payment or intends to stop payment on the deposit cheque before it has been deposited, the agent should advise the buyer that it is obligated under the *Real Estate Act* to deposit the cheque as soon as possible. In this situation the agent must deposit the cheque and then inform the seller or the seller's agent of the situation without delay. The seller should also be advised by his/her agent to obtain legal advice as to their position vis-à-vis the buyer.

What if the deposit cheque is returned for non-sufficient funds? BCFSA provides the following guidance:

When a deposit is not received within the time frame required by a contract, licensees must immediately notify their managing broker, who in turn must ensure that all parties to the contract are immediately notified. This procedure also applies when a deposit cheque is returned as Not Sufficient Funds (NSF).

Source: BCFSA Knowledge Base: *Report from Council* Newsletter, April 2018

Provided the seller agrees, it is permissible to contact the buyer and to allow the buyer a very short period of time within which to provide a certified cheque, bank draft or money order. Where the deposit money is not replaced, the seller must be fully advised of the situation and advised to obtain legal advice as to their position with regards to the buyer.

Lily Joyce Lee v. Nelson Skalbania (1987), Supreme Court of British Columbia

This case illustrates the principles that guide the vendor's right to keep a deposit should the purchaser fail to complete.

The purchaser entered into a contract of purchase and sale with the vendor. The purchase price was $975,000, including a $50,000 deposit. The completion date was approximately two months after the contract for purchase and sale had been entered into and it was stipulated that "time was of the essence". The purchaser was unable to gather the required funds by the completion date, and requested an extension. The vendor granted a one-day extension but reaffirmed that "time was of the essence". When the purchaser was still unable to complete on the extended date, the vendor entered another agreement to sell the property to a third party. The purchase price in that contract was $31,000 higher than under the contract between the purchaser and vendor.

The purchaser sued to recover his $50,000 deposit. He argued that the vendor should not be allowed to keep the money since the purchaser's failure to complete had actually allowed the vendor to realize a profit. The court rejected the purchaser's argument and allowed the vendor to keep the deposit. The principals to be drawn from this case can be summarized as follows:

- the "rule of thumb" for real estate deposits is 5% to 10% of the total purchase price;
- under section 24 of the *Law and Equity Act* the court does have the power to relieve against penalties and forfeitures (a court may classify a deposit as a penalty or forfeiture) but will only do so if the sum is not a reasonable pre-estimate of damages and it would be unconscionable to allow the vendor to keep it (in this case the deposit was well within the "rule of thumb" and there was no evidence that it would be unconscionable if the vendor was allowed to keep it);
- the reasonableness of the sum is to be judged as of the time the contract is entered. This means that any increase in the property's value is irrelevant in determining reasonableness. The vendor assumes the risk that damages will be higher than the deposit and the purchaser takes the risk that the deposit will be lower than actual damages;
- the court focused, especially with the extension agreement, on the words "time is of the essence". Although these words may not be determinative, they should always be included in agreements and extensions.

The only time that a cheque may be returned to a purchaser without the consent of another party is where the deposit is not payable in respect of the trade in real estate. For example, where an offer is received with a deposit after banking hours and the seller rejects the offer before the banks reopen, the cheque may be returned intact to the purchaser. Once the offer is refused, the only person who has any right to the cheque is the purchaser who initially provided the cheque to the licensee. Where, however, a deposit is payable under a real estate transaction, it must be deposited into the brokerage's trust account immediately. Section 27 of RESA requires a brokerage to promptly pay into the brokerage trust account all money held or received from, for or on behalf of a principal in relation to real estate services. Licensees are required to "promptly" pay to their employing brokerage all money held or received from, for or on behalf of a principal in relation to real estate services, including referral fees.

A purchaser sometimes asks that the deposit be held by their lawyer. The stakeholder provisions in RESA only bind persons licensed under RESA. In contrast to a licensee, the purchaser's lawyer is not a stakeholder under RESA. Unless the lawyer has given a commitment to the vendor to hold the deposit as a stakeholder, the lawyer could return the deposit to the purchaser without first consulting the vendor. A deposit placed with the purchaser's solicitor does not provide any security for the vendor unless the solicitor first undertakes to hold the deposit as a stakeholder.

As a Licensee...

While the standard form Contract of Purchase and Sale states that interest generated by the deposit is to be held in trust in accordance with RESA (which means that the interest is to be paid to the Real Estate Foundation, as discussed in Chapter 2), a buyer or seller may want to earn the interest generated by the deposit, especially where the amount is substantial or where the deposit will be held by the brokerage for a long period of time (i.e., where the completion date is far into the future).

A party's right to the interest generated by the deposit depends on the contract of purchase and sale. If the parties agree to either the buyer or seller receiving the interest generated by the deposit, the following clause could be inserted as an addendum to the standard form Contract of Purchase and Sale:

Deposit to Bear Interest Clause

This deposit is to be placed in an interest-bearing trust account with interest accruing to the benefit of the [select either Buyer or Seller].

The open-ended wording of "an interest-bearing trust account" allows for flexibility in selecting the type of interest-earning vehicle. Examples include term deposits and guaranteed investment certificates of various lengths of time. However, licensees should discuss the risks and benefits with their clients prior to inserting the clause. For example, certain investments cannot be redeemed prior to their maturity date, or can only be redeemed early with a penalty; therefore, this will impact the ability of the parties to change the completion date. Licensees should be aware that, in low-interest rate environments, the interest generated by a deposit may be outweighed by the required administrative time and costs needed to administer a separate trust account. Due to these factors, newer licensees are encouraged to speak with their managing broker if this issue arises.

Licensees should also be familiar with their brokerage's policy with respect to interest on trust deposits (e.g., minimum amounts), since providing this service represents additional statutory and administrative duties. For example, section 29(3) of RESA requires the deposit to be held in a separate trust account maintained by the brokerage for the principal, as opposed to holding it in the brokerage's general trust account.

Source: "*Clauses*" *section in BCFSA's Knowledge Base, found online.*

Warranties

A warranty may be express or implied. In a suitable case, a court may employ a concept called a collateral warranty. An express warranty is one that is explicitly stated in the contract. For instance, a seller may expressly warrant in a contract that the roof is new or that the property does not contain urea formaldehyde insulation. Alternatively, a warranty may be implied, even though it is not explicitly stated in the contract. In rare cases, a court may imply a term that was not expressly set out, but which, in the court's view, the parties must necessarily have intended to include.

In other cases, the law implies a term of the contract, either at common law or by statute. For instance, at common law, if a builder promises to build a house for the buyer, it is an implied term of the contract that

the work will be done in a good and workmanlike manner, with proper materials, and that the house will be reasonably fit for human habitation when complete (*Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 KB 113). Sometimes legislation implies a warranty. For example, in British Columbia, where an individual who is not a licensed residential builder constructs their own new home, and then sells it, the *Homeowner Protection Act* implies a 10-year warranty by the seller to the buyer that the home is reasonably fit for habitation, has been constructed with good quality materials, and was designed and constructed with ordinary competence.

A collateral warranty is one associated with, but outside of, a particular agreement. Anger and Honsberger, two Canadian scholars, explain the concept of a collateral warranty, as follows:

> As an alternative to an action in tort for negligent misrepresentation, or in circumstances where such an action does not lie, the plaintiff may be able to succeed in an action for breach of a collateral warranty. In effect, what happens is that a misrepresentation is classified as a collateral contract. In order to be able to find a remedy on this basis, however, it must be shown that the warranty was given in circumstances where it must be said to have been collateral to the main contract and as part consideration therefore.[1]

A party alleging a collateral warranty must establish the usual ingredients of any contract, including consideration, certainty of terms, and the intention to enter into a binding agreement. In a collateral warranty, the courts typically say that the consideration "paid" by the party to whom the promise is made is found in that person's promise to enter the main agreement. With regard to proving intention, Professor Fridman, a leading academic writer, says, in part:

> What this means is that the statement purporting to be the contractual promise in a collateral contract must amount to more than a broad, general inducement to enter into the main contract, or even a representation … The statement must constitute a definite, contractual undertaking, a binding promise meant to be taken seriously by the party to whom it is made, and intended to have such effect by the party who made the statement.[2]

It is especially important for a licensee who represents a buyer to protect the buyer by recording every assurance by the seller upon which the buyer wishes to rely after completion. The licensee should record the assurance in the form of an express warranty in the contract of purchase and sale. For instance, if the seller assures the buyer that the roof is in excellent condition, write:

> The Seller warrants that the roof is in excellent condition.

A licensee should never assume that in the absence of a written record of the seller's assurances, a court will imply a warranty, or interpret a representation by the seller as a collateral warranty.

Why Written Warranties Are Necessary

Warranties are necessary to preserve a party's right to sue after the sale completes.

Clause 18 of the standard contract of purchase and sale says, in part:

> 18. REPRESENTATIONS & WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale. (Emphasis added)

Clause 18 is designed, in part, with the doctrine of merger in mind. This clause preserves the right of a party to sue on certain assurances written into the contract after the deal completes, despite the doctrine of merger.

The Doctrine of Merger

After the completion of a real estate conveyance, the doctrine of merger severely limits the remedies available to the parties.

The doctrine of merger developed in an age when a seller carried out a contract for the sale and purchase of land by executing a contract under seal (called a "deed") by which the seller conveyed title to the buyer. A deed typically described the property and set out various promises by the seller to the buyer.

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[1] Anger and Honsberger, *Law of Real Property*, ed. by Oosterhoff, A.H. and Rayner, W.B. 2nd ed., Vol. 2. Aurora, Canada Law Book, 1985 at p. 1222.

[2] Fridman, G.H.L. 1994. *The Law of Contract* (Student Edition), 3rd ed. Carswell Thomson: Scarborough.p. 509.

In our statutory land title system, however, we no longer use a deed to convey title. Instead, every transfer of a freehold estate must be in the prescribed form and on a single page. A seller who today executes a prescribed transfer form is deemed to promise the buyer, among other things, that:

- the seller has the right to convey title to the land;
- the buyer will have quiet possession;
- the title is free from *encumbrances*;
- the seller will sign all necessary further documents;
- upon request, the seller will produce documents that support the seller's title; and
- the seller releases any claim in the land.

encumbrance
an encumbrance is a judgment, mortgage, lien, Crown debt, or other claim to or on land less than a fee simple. An encumbrance functions to encumber (i.e., restrict or burden) title to the property against which it is registered

With a few exceptions, the doctrine of merger provides that, upon completion of a contract for purchase and the sale of land by delivery of a deed (or, in the case of British Columbia, delivery of a transfer form), the agreement and the parties' rights under it are merged in the conveyance so that they can no longer rely on the terms of any contract preceding delivery of the deed, but must look to the deed itself for any remedy.

Anger and Honsberger describe the rationale for the doctrine of merger this way:

> The doctrine is based upon sound policy, namely, that there be finality and certainty in business affairs. It would be unfair to allow a party to seek to set aside the transaction or to obtain damages for an indefinite period after closing. Thus, in general, a purchaser must satisfy [themselves] by appropriate searches that [they are] obtaining what the contract entitles [them] to, that is, marketable title and whatever else the contract may provide for. The purchaser, "if [they are] to be wise … must be wise in time, and [they] cannot be wise in time unless [they object] before [they complete] the contract."[3]

This means that once the contract is executed by delivery of the deed (or, in British Columbia, the transfer form), the parties' remedies may be severely curtailed.

There are, however, some exceptions to the doctrine of merger. A convenient, and much quoted list is found in *Di Cenzo Construction Co. Ltd. v. Glassco*, 1978 CanLII 1472 (ONCA):

> After the closing of the transaction, a purchaser is generally restricted to the covenants, conditions and warranties set forth in the conveyance. Apart from the conveyance, relief can only be obtained in the case of (1) fraud, (2) a mutual mistake resulting in a total failure of consideration or a deficiency in the land conveyed amounting to an error in substantialibus, (3) a contractual condition, or (4) a warranty collateral to the contract which survives the closing … Apart from these exceptional cases caveat emptor applies.

We can also add to this list of exceptions an innocent misrepresentation that amounts to *error in substantialibus*, and any warranties created by statute.

The term *error in substantialibus* means more than substantial error. It means there was a misrepresentation, or a mistake, about some fundamental aspect of the thing sold. It is a fundamental error that goes to the actual identity, or character, of the thing sold.

For example, in *Bouzane v. Murphy* (2000), 36 RPR (3d) 136 (PEI SC), the seller was a widow whose late husband used to make all of the house repairs. Before he died, the husband repaired the roof. After her husband's death, the seller decided to sell the house. When the listing licensee asked about the roof, the seller said the roof was new. The seller honestly believed that her late husband had replaced the whole roof. The listing licensee recorded the presence of a new roof in the listing information and told the buyer that the roof was new. In fact, the seller's husband only replaced the front half of the roof. The shingles on the back end of the roof were clearly older than those on the front.

The buyer purchased the house. The contract of purchase and sale did not provide for any inspection, nor did it contain any warranty about the roof. The buyer testified that she did not inspect the roof because she took the word of the listing licensee. The buyer sued the seller for the cost of repairs to the roof, being apparently the cost to upgrade the older portion to new condition.

The Prince Edward Island Supreme Court dismissed the buyer's claim. The court found that the seller made an honest mistake when she told her listing licensee there was a new roof. This was an innocent misrepresentation.

[3] Supra, note 3 at p. 1214

The doctrine of merger prohibits any claim for innocent misrepresentation, unless the misrepresentation amounts to an *error in substantialiabus*, as described above. The court found that this misrepresentation was not an *error in substantialibus*.

The court also pointed out the effect of the absence of any express warranty about the roof in the contract:

> In the case of a newly constructed house, there can be an implied warranty as to the quality of the house. However in the case of an older home, a warranty must be expressed as a term of the agreement of purchase and sale. In this case, there is no term of the agreement of purchase and sale to the effect that the (seller) gave a warranty that the entire roof was new. The only document which refers to "new roof" is the MLS® listing, and there is no evidence that this document is attached to and forms part of the agreement of purchase and sale. Because I find there was no express warranty in the agreement of purchase and sale to the effect the entire roof was new, there can be no finding of a breach of contract and no damages in that respect.

This reasoning also explains why, in British Columbia, it is in the buyer's best interests to incorporate a Property Disclosure Statement (PDS) into the standard contract. It is recommended in BCFSA's Knowledge Base that a licensee attach the PDS to the contract and use the following clause to incorporate the PDS into the contract:

> The attached Property Disclosure Statement dated (date) is incorporated into and forms part of this contract.

If the PDS is not available before the offer is written, the following subject clause is recommended by BCFSA's Knowledge Base:

> Subject to the Buyer obtaining and being satisfied, on or before (date), with a Property Disclosure Statement with respect to the Property.
>
> This condition is for the sole benefit of the Buyer.
>
> If this condition is satisfied or waived, the Property Disclosure Statement will be incorporated into and form part of this Contract.

By making a PDS part of the standard contract, the buyer can treat the statements in the PDS as warranties, the breach of which enables the buyer (by virtue of clause 18 of the standard form contract) to disregard the doctrine of merger and sue for damages. If the PDS is not part of the contract, the buyer cannot sue the seller for inaccuracies in the PDS unless the buyer can fit the claim within one of the exceptions to merger, such as fraud, or a mistake or an innocent misrepresentation that amounts to *error in substantialibus*, or a warranty collateral to the main contract.

The case of *Ferland v. Groenwegen*, 2001 SKQB 291, illustrates the value of incorporating the representations in a PDS into the contract. A rural property contained two wells. When the buyer first viewed the property, she asked the seller whether there was enough water. The seller answered there had been no problem "since the new well". In the PDS, the sellers advised that they were not aware of any problems with the quality or quantity of well water.

The contract of purchase and sale contained wording that made the PDS part of the contract. A licensee wrote the contract and we can reasonably assume that the contract contained language similar to the wording in Clause 18, described above.

After the buyers purchased the property, they experienced water shortages. When the buyer contacted the sellers about the problem, the sellers said they had experienced similar difficulties when they lived on the property. The sellers maintained, however, that they completed the PDS in good faith without any intent to mislead. The sellers genuinely believed that these difficulties did not constitute a water quantity problem. Ultimately, the buyers fixed the problem by installing a new well for approximately $7,295. The buyers sued the sellers for damages in Small Claims Court to recover the cost of the new well. Although the Small Claims Court dismissed the buyers' claim, the Saskatchewan Court of Queen's Bench reversed that decision on appeal.

The appellate court found that the property had an unusual water system that suffered from water quantity problems from time to time. When the sellers completed the PDS, they never mentioned the unusual nature of the water system. Instead, the PDS gave the buyers the impression there were no water problems. Since water quantity was important to the buyers, they relied on the information in the PDS. The appellate court believed the sellers' assertion that they never intended to mislead the buyers. Nevertheless, the answers in the PDS were misleading. Standing alone, the information in the PDS amounted to an innocent

misrepresentation. The doctrine of merger prohibits a claim for misrepresentation after completion unless it amounts to *error in substantialibus*, which would likely not apply in this situation.

In this case, however, the court found, in effect, that by incorporating the PDS into the contract, the statements in the PDS became warranties under the contract. Despite the sellers' good intentions, their information was incorrect. In the circumstances, there was a breach of warranty and the doctrine of merger did not apply. The court awarded $5,000 in damages to the buyers, representing the maximum monetary award in Small Claims Court in Saskatchewan.

In summary, the doctrine of merger tells a buyer, "Do your homework, and if you intend to rely on any assurances, put them in writing in the standard contract, because if you don't, you will not be able to sue the seller after the deal completes, except in special circumstances." A buyer can avoid the consequences of merger by inserting a warranty in the standard contract, in which case clause 18 stipulates that the warranty will survive completion. Alternatively, the buyer can avoid merger if they can prove the existence of a collateral warranty that the parties intended to survive completion.

Of these alternatives, an express, written warranty in the standard contract is clearly better because it is much easier to prove. A licensee representing a buyer best protects their client by ensuring that every assurance upon which the buyer intends to rely is warranted, in writing, in the standard form contract.

Deficiencies

A buyer who discovers a deficiency in the property before completion must respond quickly. When considering the doctrine of merger, there is an important distinction between executory and executed agreements. A party may always bring a claim for innocent misrepresentation while a contract is *executory* (i.e., between contract formation and completion). If successful, the claimant may obtain rescission.

If, however, the parties have *executed* the contract by completing the transaction, the doctrine of merger severely curtails the buyer's remedies, including any claim for innocent misrepresentation. This means that if a buyer discovers a deficiency before completion, and the buyer wishes to set aside the contract for innocent misrepresentation, the buyer must assert their claim promptly. For example, in *Olszewski v. Trapman* (2000), 35 RPR (3d) 316 (ONSC), the buyer wished to buy land to build a 16,000 square foot home. When the buyer first viewed the property, there were no fences, survey markers or any other obvious boundaries on the property. The listing licensee told the buyer that the property was a "2 acre lot". The buyer then entered a contract of purchase and sale to buy the property for $1.11 million dollars and paid a $100,000 deposit. The contract described the property as having a frontage of "As per survey" and being "Approximately 1.5 acres in area." The seller agreed in the contract to deliver a copy of an existing survey to the buyer, which never occurred because the seller did not have one. When the seller failed to deliver a survey, the buyer ordered one. The surveyor reported that the property only contained 1.15 acres, representing approximately .35 acres less than the 1.5 acres promised in the contract. In view of zoning restrictions, the buyer concluded that that the maximum permissible size of a home on a 1.15 acre lot would be only 5,009 square feet. The buyer refused to complete. When the seller failed to return the deposit, the buyer sued for rescission.

In *Olszewski*, the court allowed the buyer's claim, rescinded the transaction, and ordered the seller to return the deposit. Although the seller apparently made an honest mistake, the seller innocently misrepresented the size of the property. Since the buyer did not complete the transaction, the doctrine of merger did not apply and the buyer could sue for rescission for innocent misrepresentation without having to show that the seller's misstatement amounted to *error in substantialibus*. A buyer who discovers a deficiency in the property before completion should promptly obtain legal advice from a lawyer versed in real estate matters. If the buyer elects to complete the transaction, the doctrine of merger may severely restrict the buyer's remedies after completion.

Remuneration

There are occasions when a licensee should include a statement about the licensee's remuneration in the contract of purchase and sale. By having the parties to the contract acknowledge the licensee's compensation, the licensee better insures that all parties are aware of the licensee's financial interest in the transaction. Generally speaking, there are at least two sources of a licensee's duty to disclose information about the licensee's compensation; the law governing *fiduciaries* and sections 54 and 56 of the Rules (discussed in detail in the following chapter).

fiduciary
a person who holds a position of trust with respect to someone else and is obliged, by virtue of the relationship of trust, to act solely in the other person's benefit

Chapter 12: "Law of Agency" explains the fundamentals of agency law, including the fiduciary obligations of an agent. A fiduciary is someone who, because of their position, must look out completely for the interests of someone else. When a licensee represents a client, the licensee serves the client in a fiduciary capacity. A fiduciary may only take a reward for their services with the client's knowledge and consent. In addition, a fiduciary must disclose everything relevant known to the fiduciary which might influence the judgment of the client about the transaction. Suppose, for example, that the seller has instructed the listing licensee to offer a $1,000 bonus to the selling licensee, being the licensee working with the buyer. Although most buyers expect the licensees to receive a share of commission, a buyer would not likely expect the selling licensee to receive a special bonus over and above that licensee's share of commission. What if the listing licensee also represents the buyer? In that case, the licensee must tell the buyer about the bonus. To record that the licensee has informed the buyer about the bonus, the licensee may insert a clause in the contract, as follows,

> Seller and Buyer acknowledge that upon completion the Seller will pay a selling bonus of $1,000 to (name of licensee) over and above the gross commission payable by the Seller.

If a dispute erupts 10 years later in which the buyer claims that no one told the buyer that the buyer's licensee took an extra $1,000 payment in the transaction, the contract serves as evidence to the contrary.

Note that recording a licensee's compensation in the contract of purchase and sale does not enable the licensee to sue on that contract to recover the amount due to the licensee. As a general rule, only the parties to a contract may sue to enforce it. This is called privity of contract. Where a contract of purchase and sale acknowledges a licensee's entitlement to certain compensation, the only persons who may sue to enforce that contract are the parties to it, being the seller and buyer. The licensee cannot sue based on the contract because the licensee is not a party to it.

Builders Liens

As discussed in Chapter 4: "The Subdivision of Land and Title Registration in British Columbia", the *Builders Lien Act* (the "BLA") allows contractors, subcontractors, and material suppliers who supply labour, services, or materials to an improvement to register liens for any unpaid amounts against title to the land where the improvement is located.

builders lien
a claim registered against the title to land by a contractor, subcontractor, or worker with respect to a debt arising from labour, services, or materials supplied to that land

Because *builders liens* attach to the land, an owner may be liable to a lien claimant under the BLA, despite the fact that the owner had no direct dealings with the lien claimant. This type of situation can arise, for example, where liens are filed by subcontractors engaged by the owner's contractor. An owner may limit their liability to the subcontractor lien claimants by complying with their holdback obligations under the BLA. Under the BLA, an owner who engages a contractor for a construction project, must hold back 10% of each payment made to the contractor. If the owner complies with the holdback requirements under the BLA, the owner's liability to the subcontractors is limited to the amount of the 10% holdback. Assuming that no lien claims are made, the 10% holdback can be released to the contractor following the expiration of the holdback period (i.e., at the end of 55 days after certain "trigger dates" specified in the BLA).

Another situation that can give rise to an owner being liable to a lien claimant with whom they have had no direct dealings is where the owner has acquired title to a newly improved property and liens are filed

following the transfer of title but within the lien filing period (the lien filing period was discussed in Chapter 4). As with the case of subcontractor liens, a holdback can be used to limit liability in these circumstances. Subject to the one exception relating to strata properties described later, where a buyer purchases a newly built property, or the property contains recent renovations, a licensee acting for a buyer must ensure that appropriate contractual provisions are made to protect their client. If the property is newly built or recently renovated, the following clause is recommended in BCFSA's Knowledge Base:

In recognition of the Buyer's potential liability under section 35 of the *Builders Lien Act,* the Buyer's Conveyancer will hold back from the sale proceeds an amount equal to 10% of the purchase price of the improvements (the "Holdback"):

1. for 55 days after the date of issuance of the certificate of completion; or
2. where there is no certificate of completion, for 55 days after the later of:
    1. the date the head contract is completed, abandoned, or terminated; or
    2. the date the occupancy permit is issued

(the "Holdback Period").

The Buyer and the Seller agree that the purchase price of the improvements for the purposes of section 35 of the *Builders Lien Act* is $(amount). On the expiry of the Holdback Period, the Buyer's Conveyancer will release the Holdback to the Seller; however, if any liens under the *Builders Lien Act* have been filed against title to the Property with respect to the improvements, then the Buyer's Conveyancer may:

1. continue to retain a portion of the Holdback equal to the amount of those lien(s) until receiving satisfactory evidence from the Seller that the liens have been discharged from the title to the Property: or
2. pay that portion of the Holdback into court under section 23 of the *Builders Lien Act.*

The exception referred to earlier is the purchase of a strata lot from an owner developer. No holdback clause is necessary because legislation makes the holdback mandatory. Section 88(2) of the *Strata Property Act* provides that, despite any other Act or agreement to the contrary, the buyer of a strata lot from an owner developer must retain a holdback in the amount set out in the regulations. The buyer must retain the holdback until the earlier of the last date for filing a lien claim, or 55 days after the strata lot is conveyed to the buyer. Section 5.2 of the *Strata Property Regulation* sets the mandatory holdback amount at "7% of the gross purchase price". A licensee who acts for the buyer in the purchase of the strata unit from the owner developer should inform the buyer that the lawyer or notary who represents the buyer will hold back the necessary funds from the purchase price in the conveyance. Note that the purpose of the holdback is to limit the buyer's liability to lien claimants under the BLA. The licensee should emphasize that the holdback is not intended to allow the buyer to unilaterally keep a portion of the purchase price as a set-off if there are deficiencies in the strata lot or delays in the owner developer's construction.

As a Licensee...

In addition to builders liens filed on an owner's strata lot as a result of repairs or improvements done to the strata lot itself, liens can also be filed if the strata corporation hires contractors to work on common property. The unpaid contractor, subcontractor, or worker may file a builders lien against the title of all the strata lots and the entire amount of the lien will be shown as the lien amount on each strata lot. This impacts an owner's ability to re-finance or sell the strata lot because a lien is a financial charge; therefore, until discharged, the owner does not have "clear title". To remove a lien, the owner can either pay their unit entitlement share into court or work out a solution with the unpaid contractor, subcontractor, or worker by holding the amount in a lawyer's trust account.

Norfolk v. Aikens, 1989 CanLII 245 (BCCA)

In very basic terms, the standard form contract of purchase and sale provides that upon completion of the transaction, the vendor will provide title to the property in return for payment of the purchase price. In the past, this meant that the vendor was able to demand the cash proceeds of the sale before giving a registrable transfer to the purchaser – even where the purchaser was obtaining part of their purchase funds by mortgaging the property. Because a lender would not make the mortgage proceeds available until after the transfer and mortgage were registered, the purchaser would have to attempt to arrange interim financing until registration occurred.

Conversely, where a vendor had a mortgage which had to be discharged according to the contract of purchase and sale, the purchaser was able to insist that the vendor pay it out and remove it from title before the purchaser paid the balance of the purchase price. The vendor would then have to borrow the money to pay off the mortgage, rather than being able to use the sale proceeds.

To avoid these problems and to allow for a smooth transfer of title, the standard form contract of purchase and sale allows the registration of the transfer and mortgage documents to take place on the basis of exchanged conveyancers' undertakings. This provision has come to be known as "Norfolk & Aikens", after a 1990 court decision in British Columbia which was decided upon this point. Clause 13 (Buyer Financing) and Clause 14 (Clearing Title) of the standard form contract contain the Norfolk & Aikens wording.

Conditions Precedent and Subsequent

condition precedent
legal term for a "subject to" clause. In contract law, a condition precedent calls for the happening of some event or the performance of some act before the contract shall be binding upon the parties

condition subsequent
a condition or event, the occurrence of which will discharge the principal obligations of a party to the contract

Licensees most frequently use the word "condition" to describe a subject clause. An agreement with a subject clause is a conditional agreement; that is, an agreement whose operation depends on a contingent event that is not certain to occur. In the law of contract, a subject clause may be a *condition precedent* or a *condition subsequent*.

The phrase "condition precedent" describes a condition that must occur before a party is liable to perform their principal obligations under the contract. For example, a buyer may need to confirm mortgage financing before committing to the purchase. In that situation, a licensee representing the buyer will typically use the following subject clause recommended in the "Clauses" section of the Knowledge Base:

> Subject to the contract for the sale of the Buyer's property at (address) becoming unconditional on or before (date). This condition is for the sole benefit of the Buyer.

The phrase condition subsequent describes a condition whose occurrence will bring the principal obligations of a party to the contract to an end. For instance, the deposit provisions of the standard contract of purchase and sale say, in part:

> 2. DEPOSIT: A deposit of $ _____ which will form part of the Purchase Price, will be paid **within 24 hours of acceptance** unless agreed as follows: _____. All monies paid pursuant to this section (Deposit) will be paid in accordance with section 10 or by uncertified cheque except as otherwise set out in this section 2 and will be delivered in trust to _____ and held in trust in accordance with the provisions of the *Real Estate Services Act*. In the event the Buyer fails to pay the Deposit as required by this Contract, the Seller may, at the Seller's option, terminate this Contract. (Emphasis added)
>
> *The licensee must write the terms with respect to the deposit in the blank space provided in clause 2. For example, in a contract with a subject to new first mortgage clause as described previously, the licensee might write, "The buyer must pay an initial deposit of $5,000 within 48 hours of acceptance of this offer. The buyer will increase the deposit to $25,000 immediately upon removal of the subject clause (subject to a first mortgage)."*

In other words, if the buyer defaults on any of the buyer's deposit obligations, the seller may choose to terminate the contract.

The standard form contract of purchase and sale anticipates that the parties to the agreement may wish to use one or more subject clauses. The standard form contract says, in part, in Clause 3:

> 3. TERMS AND CONDITIONS: The purchase and sale of the Property includes the following terms and is subject to the following conditions:
>
> *(The document then provides a blank space in which the licensee may write any additional terms beyond those in the pre-printed wording, plus any subject clauses, in accordance with the licensee's instructions. Alternatively, the licensee may use the blank space to refer the reader to another document that is attached to and forms part of the contract and which contains the additional terms and any subject clauses; for example, "See attached Addendum which forms part of this contract").*
>
> Each condition, if so indicated, is for the sole benefit of the party indicated. Unless each condition is waived or declared fulfilled by written notice given by the benefiting party to the other party on or before the date specified for each condition, this Contract will be terminated thereupon and the Deposit returnable in accordance with the *Real Estate Services Act*.

ALERT

Conditions precedent (or subjects) can be used to help protect a licensee's clients from the impacts of climate change on properties. As a result of increased risks of natural disasters due to climate change, the number of properties considered high(er) risk may increase. For instance, more properties may become difficult to insure, resulting in difficulty obtaining mortgage loans for the purchase of such properties. Also, more properties may have section 219 covenants registered on their titles, which describe the potential for flooding or geotechnical events and can specify standards of construction and include geotechnical reports outlining requirements for mitigating risks. Trading services licensees can help protect their clients from these impacts of climate change by drafting conditions precedent in contracts of purchase and sale that allow the buyer to obtain an adequate home insurance quote or adequate home insurance. For example, a licensee representing the buyer will typically use the following subject clause recommended in the "Clauses" section of the Knowledge Base:

> Subject to the Buyer obtaining approval, on or before (date), from a licensed insurer for property (including fire) and liability insurance for the Property on terms and at rates satisfactory to the Buyer. This condition is for the sole benefit of the Buyer.

Licensees can also protect their clients by including conditions precedent that make the contracts of purchase and sale conditional upon further due diligence by a professional(s), such as a lawyer or geotechnical engineer. A professional can then provide advice specific to a client's transaction. For example, with respect to legal advice, a licensee will typically use the following subject clause recommended in the "Clauses" section of the Knowledge Base:

> Subject to the Seller/Buyer obtaining, on or before (date), legal advice satisfactory to the Seller/Buyer concerning (define applicable legal issue, e.g., easement, builders lien, financing). This condition is for the sole benefit of the Seller/Buyer.

As a Licensee…

As mentioned, buyers sometimes experience significant pressure and intense competition while purchasing particular properties. In these high-risk transactions, buyers may feel pressured to make offers at inflated prices and without appropriate conditions precedent (or subjects) which may create tremendous risk for buyers. When buyers are considering submitting subject-free offers, licensees must explain the risks so that the client can make informed decisions. It is always prudent to have a written record of that discussion. Many licensees do this by sending an email to their buyer client and having them agree to proceed in a reply email. Should issues arise down the road, there will be documentation showing that the client's interest was put first, and the client was provided all the information they needed to make an informed decision.

Removing a Subject Clause

To remove a subject clause, a party must deliver written notice to every other party on or before the subject removal deadline. Verbal notice is not sufficient because the standard form contract requires, "written notice given by the benefiting party to the other party on or before the specified date …."

The standard form contract anticipates that a party will remove a subject clause by declaring it fulfilled or by waiving it. When the requirements for satisfying a condition are met, we say it is fulfilled. For instance, suppose a contract for the purchase of a residential property contains the following subject clause from the Knowledge Base:

> Subject to the Buyer on or before (date), at the Buyer's expense, obtaining and approving an inspection report against any defects whose cumulative cost of repair exceeds (select a monetary value) and which reasonably may adversely affect the property's use or value, by (date).
>
> This condition is for the sole benefit of the Buyer.

If the property inspector reports that everything is fine, the buyer can declare the subject clause fulfilled. On the other hand, if the buyer decides to proceed with their purchase without any inspection, the buyer may waive the subject clause.

ALERT

Licensees should be aware that as of March 31, 2009, home inspectors practicing in British Columbia are required to be licensed under the *Business Practices and Consumer Protection Act* (the "BPCPA"). To become licensed, home inspectors must be insured and maintain affiliation with a designated professional organization. The BPCPA will assess qualifications and issue licenses for home inspectors, as well as receive and respond to consumer complaints, and monitor compliance with the regulatory regime through inspections and enforcement. Clients seeking an independent inspection should be alerted to this change. Moreover, where a licensee is referring a home inspector to their client, the licensee should verify that the home inspector is licensed. The licensee may satisfy this prerequisite by asking to see the wallet-sized licence that is issued to regulated home inspectors by the BPCPA.

The Effect of a Subject Clause That Is Too Subjective

As discussed in Chapter 10, and above, a contract signifies the common intention of the parties to be legally bound by their respective obligations. If the parties have not expressed those obligations with sufficient clarity, there is no contract because there does not yet exist the necessary common intention to be bound by definite obligations. The law requires all of the terms and conditions of a contract to be sufficiently clear. The law does not enforce arrangements whose essential terms or conditions are uncertain.

The ideal subject clause is one whose criteria are so clear that the whole world may easily know whether the criteria for satisfying that clause are met. To determine the certainty of a subject clause, the courts often consider whether the criteria for satisfying the subject clause are subjective or objective. A subjective criterion is one that depends on the personal view of the individual who decides it. In contrast, an objective criterion is one that depends on an external event. The more subjective the wording of a subject clause, the more likely a court will find the clause to be uncertain.

The leading statement of the law in this area is found in the dissenting judgment of Mr. Justice Lambert in *Wiebe v. Bobsien*, 1985 CanLII 142 (BCCA). In that case, Mr. Justice Lambert compared the different results that occur depending upon whether a subject clause is subjective, objective, or partly subjective and partly objective. First, he described the consequence of using a subjective subject clause:

> Each "condition precedent" case must be considered on its own facts. As (the trial judge) indicated, some conditions precedent are so imprecise, or depend so entirely on the subjective state of mind of the purchaser, that the contract process must still be regarded as at the offer stage. An example would be "subject to the approval of the president of the corporate purchaser." (Emphasis added)

This means that if a subject clause is wholly subjective (sometimes called a "whim and fancy" clause), the court may view the arrangement, in law, as nothing more than an offer by the seller that the buyer may accept by removing the subject clause. In other words, even though there was an initial offer, followed by an acceptance, and the document is called a "contract of purchase and sale", the arrangement, in law, is nothing more than an offer until the subject clause is removed.

As a Licensee...

In drafting "Subject to" clauses you should know that the more opportunity your clause gives to a purchaser to get out of the contract, the greater will be the risk of a court finding that there is no binding contract.

When one party has the SOLE DISCRETION over whether or not to proceed with the sale, a binding contract does not exist.

Next, Mr. Justice Lambert explained what happens when the subject clause is objective:

> In other cases, the condition precedent is clear, precise and objective. In those cases, a contract is completed; neither party can withdraw; but performance is held in suspense until the parties know whether the objective condition precedent is fulfilled. An example would be "subject to John Smith being elected as Mayor in the municipal election on 15 October of this year."

If the subject clause is objective, a contract comes into existence as soon as the offer is accepted. The obligation to carry out the contract to completion is suspended until the subject clause is removed.

Where a subject clause is sufficiently objective so that a contract exists, the law implies as a term of the contract that the party with the benefit of the subject clause will act fairly, honestly and in good faith to satisfy the subject clause. For example, suppose that the seller and buyer sign a standard form contract of purchase and sale which contains a subject clause that makes the contract subject to the buyer obtaining a new first mortgage, along the lines described above. Suppose also that the buyer paid a $10,000 deposit upon entering the contract. Since the subject clause in this example is sufficiently objective, we may conclude that a contract exists, but that performance is suspended pending subject removal. If the buyer fails to use their best efforts to obtain a new mortgage and remove the subject clause, the buyer will be in breach of the implied term of the agreement requiring the buyer to act in good faith and the seller will be entitled to retain the deposit on account of damages.

Finally, Mr. Justice Lambert described the result when a subject clause is partly subjective and partly objective:

> But there is a third class of condition precedent. Into that class fall the types of conditions which are partly subjective and partly objective. An example would be "subject to planning department approval of the attached plan of sub-division". This looks objective, but it differs from a truly objective condition in that someone has to solicit the approval of the planning department. Perhaps some persuasion of the planning department will be required. Can the purchaser prevent the condition from being fulfilled by refusing to present the plan of sub-division to the planning department? This type of case has been dealt with by implying a term that the purchaser will take all reasonable steps to cause the plan to be presented to the planning department, and will, at the proper time and in the proper way, take all reasonable steps to have the plan approved by the planning department.
>
> The law in relation to implying terms in an agreement is no different in relation to conditions precedent than it is for other terms of an agreement. Business contracts should not be permitted to fail over an omission that the parties would immediately have corrected if the parties had noticed the omission at the time the contract was made. And we have the "business efficacy" test and the "officious bystander" test to guide us. In the example I have given, it is clear that business efficacy requires that someone must present the plan of sub-division to the planning department, and the officious bystander test would be met by both parties answering the hypothetical question of the hypothetical onlooker, as to who will present the plan, by saying: "Of course the purchaser will do it."
>
> But there are cases that fall in this third class of condition precedent where it will not be possible to imply the missing term, and the agreement will fail for uncertainty. In those cases the court can not write a contract for the parties.

Where a subject clause is partly subjective and partly objective, the court must determine whether its features are objective enough to constitute a contract. If, on the other hand, the clause is predominantly subjective, then the arrangement will amount to nothing more, in law, than an offer which the buyer may accept by removing the subject clause.

A licensee should make every subject clause as objective as possible. The following example illustrates what can happen if a subject clause is too subjective.

In *Murray McDermid Holdings Ltd. v. Thater*, 1982 CanLII 686, the seller accepted the corporate buyer's offer of $68,000. The contract was subject, in part, to:

> purchase price and terms approved by Murray McDermid (the corporate buyer's president) on or before July 12, 1979…

Shortly afterwards, a second buyer offered to pay $85,000 (USD) for the property. At that point, the seller sent a message to the first buyer to cancel their arrangement so the seller could deal with the second buyer. Shortly afterwards, the first buyer purported to remove its subject clause. Later, the first buyer sued for specific performance.

In *Murray McDermid*, the court dismissed the first buyer's claim. Given the wholly subjective nature of the subject clause, this was not, in law, an enforceable contract. Rather, in law, things never proceeded beyond the offer stage with the first buyer. Until the corporate president gave his approval, the agreement stood as a bare offer by the seller. Bearing in mind the general rule that an offer may be revoked anytime before

acceptance, the seller in this case was entitled to revoke the offer any time before that approval was given. The seller in this case revoked in time.

The lesson is clear. If a buyer's representative uses a wholly subjective subject clause (e.g., "subject to the approval of the president of the corporate purchaser"), the licensee risks a situation where the seller may be legally entitled to cancel the deal (or, in law, to revoke the seller's offer) before the buyer removes the subject clause.

Whether an Option Exists

Sometimes, one hears licensees say words to the effect that a whim and fancy clause creates an option in favour of the buyer. In most cases, this view is mistaken.

An option is a legally enforceable agreement by which a seller promises the buyer to keep an offer open for acceptance until a specified time. In other words, an option is a contract by which a seller promises to make an offer irrevocable. The British Columbia Real Estate Guide provides a useful definition of an option:

> Where consideration is provided for leaving the offer open, the transaction is known as an option. In essence, it consists of two contracts, one the agreement regarding the offer, the second the contract arising if that offer is accepted.[4]

Alternatively, a seal may serve as a substitute for consideration in an option contract.

In a case with an uncertain subject clause, and where the seller backs out of the deal by cancelling it before the buyer has removed the uncertain subject clause, a buyer may argue that there is an option that prevents the seller from revoking the seller's offer. In *Mark 7 Developments Ltd. v. Peace Holdings Ltd.*, 1991 CanLII 252 (BCCA), the British Columbia Court of Appeal makes plain that before an option may exist, there must be separate consideration, or an agreement under seal, like any other contract.

In *Mark 7*, the interim agreement was subject to the buyer examining various documents, including certain leases and financial statements. The subject clause said, in part, that the buyer would,

> ...indicate in writing whether (the documents) are acceptable to the purchaser on or before February 17th, 1989. The purchaser may be arbitrary in his acceptance of these. This condition is for the sole benefit of the purchaser and can be unilaterally waived by the purchaser in his sole discretion.

The Court of Appeal applied the law governing subjective subject clauses and found, in part, that:

> (The subject clause) provides for the purchaser to indicate by February 17, 1989, whether the leases, financial statements and list of fixtures are acceptable to the purchaser". It further provides "the purchaser may be arbitrary in his acceptance of these". Those conditions precedent are manifestly dependent upon the subjective state of mind of the purchaser and, as such, they fall into the first category referred by Lambert J.A. (in *Wiebe v. Bobsien*). They precluded the interim agreement from coming into existence as a binding agreement. It remained a standing offer by the (seller) to sell the property to the (buyer) revocable at the will of the (seller) prior to acceptance by the (buyer). (Emphasis added)

In *Mark 7*, the buyer argued, in the alternative, that if their arrangement was a standing offer by the seller to sell, which the buyer could accept by removing the subject clause, then there was an option by which the seller was bound not to revoke that offer before the subject removal deadline. The buyer claimed that when the buyer paid its deposit under the arrangement, the deposit constituted the consideration for the seller's obligation to keep the offer open. The Court of Appeal disagreed and cited the following remarks of the trial judge in the *Murray McDermid* case:

> I would add that, while the transaction may have the appearance of an option, it cannot be a true option if given neither under seal nor for consideration. There was no seal in the present instance, and the "deposit" money could not be consideration. The intended vendor was entitled to the deposit either as part payment, in the event of sale, or by forfeiture, in the event of default in completion; but there could be neither sale nor obligation to complete unless and until the intended purchaser said "I approve".

In a transaction with a subjective subject clause, the buyer's representative may better protect the buyer by recording the presence of separate consideration for the seller's promise to refrain from cancelling the arrangement before the subject removal deadline.

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[4] *British Columbia Real Estate Guide*, looseleaf, student ed., North York, CCH Canada Limited, 2000 at s. 3055.

Alternatively, a licensee may record the presence of a seal to support the seller's promise to refrain from cancelling the arrangement and, as this is generally the intention of the parties, the standard form contract of purchase and sale now includes the following wording:

22. **ACCEPTANCE IRREVOCABLE:** (Buyer and Seller):

BUYER'S INITIALS SEAL

SELLER'S INITIALS SEAL

The Seller and the Buyer specifically confirm that this Contract of Purchase and Sale, whether executed and sealed by hand or by digital or electronic signature and seal, or otherwise, is hereby executed under seal, which is evidenced by each of the Buyer and the Seller making the deliberate, intentional and conscious act of inserting their initials (whether by hand or electronically in the appropriate space provided beside this Section 22. The parties intend that the act of inserting their initials as set out above is to have the same effect as if this Contract of Purchase and Sale had been physically sealed by wax, stamp, embossing, sticker or any other manner. It is agreed and understood that, without limiting the foregoing, the Seller's acceptance is irrevocable including without limitation during the period prior to the date specified for the Buyer to either:

A. fulfill or waive the terms and conditions herein contained; and/or
B. exercise any option(s) herein contained.

Finally, note Mr. Justice Lambert's observation in *Wiebe* that, "Each condition precedent case must be considered on its own facts." Merely because a clause is too subjective in one contract does not necessarily make it so in a different document, and vice versa. For this reason, a licensee should never advise a seller, for instance, that the uncertainty of a particular subject clause permits the seller to cancel the deal before the buyer delivers notice of subject removal. Rather, the licensee must advise a party that wishes to abandon a deal in these circumstances to first seek legal advice from a lawyer experienced in real estate matters.

True Conditions Precedent

Quite apart from any concerns about the subjective nature of a subject clause, our common law also distinguishes between a true condition precedent and an ordinary condition precedent.

At common law, a true condition precedent is a condition that is wholly dependent on the will, or actions, of someone who is not a party to the contract. Most significantly, no party may unilaterally waive a true condition precedent. Until the event that constitutes the true condition precedent occurs, there is no right to compel any party to perform the contract. For instance, in the leading case of *Turney v. Zhilka*, 1959 CanLII 12 (SCC), the buyer agreed to purchase approximately 60 acres out of a 65 acre farm in Toronto for $17,000. The contract was subject, among other things, to the local village council adding the land to the village. The seller wanted to get out of the deal and claimed that because the village council had not yet added the land to the village, the contract was terminated. The buyer responded by waiving the condition requiring the village council to add the land to the village. When the seller refused to complete the sale, the buyer sued for specific performance. The Supreme Court of Canada found that the subject clause was a true condition precedent because it was entirely dependent on the action of the village council. Since it was a true condition precedent, the court reasoned that the buyer could not unilaterally waive the condition.

In 1978, the province amended the *Law and Equity Act* to override the common law rule preventing the unilateral waiver of a true condition precedent. Section 54 of the *Law and Equity Act* provides:

> 54. If the performance of a contract is suspended until the fulfillment of a condition precedent, a party to the contract may waive the fulfillment of the condition precedent, even if the fulfilment of the condition precedent is dependent on the will or actions of a person who is not a party to the contract if
>
> (a) the condition precedent benefits only that party to the contract,
>
> (b) the contract is capable of being performed without fulfillment of the condition precedent, and
>
> (c) where a time is stipulated for fulfillment of the condition precedent, the waiver is made before the time stipulated, and where a time is not stipulated for fulfillment of the condition precedent, the waiver is made within a reasonable time.

Note how Clause 3 of the standard form contract of purchase and sale anticipates section 54 of the *Law and Equity Act*. Clause 3, which is quoted above, says in part, that:

> Each condition, if so indicated, is for the sole benefit of the party indicated.

A review of the subject clauses recommended in the Knowledge Base reveals a consistent practice of stating for whose benefit each subject clause is written. For example, this financing clause provides:

> Subject to a new first mortgage being made available to the Buyer on or before (date), in the amount of $(amount) at an interest rate not to exceed _____% per annum calculated (select either half-yearly or monthly), not in advance, with a _____-year amortization period, _____-year term and repayable in blended payments of approximately $ (amount) per month including principal and interest (plus 1/12 of the annual taxes, if required by the mortgagee).
>
> This condition is for the sole benefit of the Buyer.

To the extent that this financing clause depends on the acts or will of the lender, this clause may be a true condition precedent. At common law, the buyer cannot remove this subject clause by waiving it if it is a true condition precedent. The buyer can only remove the subject clause by declaring it fulfilled if someone actually makes a mortgage available to the buyer in compliance with the requirements of the subject clause. By virtue of section 54 of the *Law and Equity Act*, the presence of the words indicating that the clause is for the sole benefit of the buyer allows the buyer to waive the subject clause, thereby overriding the common law rule.

Protecting the Seller

There are at least three ways to protect the seller when a condition precedent is being included in the contract of purchase and sale: prequalification of the purchaser, time limit on satisfaction of condition precedent, and the use of a time clause.

Prequalification of the Purchaser

First, it is the job of the licensee to make sure the purchaser has the financial ability to complete the transaction. The process of investigating the purchaser's financial situation in advance is called "prequalification." Many banks and credit unions offer a service called "Preapproval." They will qualify the purchaser and supply them with a written statement of the amount of loan that they would be willing to make and often, a guaranteed interest rate for 60 to 90 days. The licensee can take a copy of this information and then be assured of the purchaser's financing capability.

Time Limit on Satisfaction of Condition Precedent

Second, the licensee should provide a specific time within which the condition must be removed from the contract of purchase and sale. Where the condition relates to the purchaser arranging new financing, a reasonable period of time should be provided for the purchaser. What is a reasonable time depends on the location of the property and the type of financing involved. A purchaser can obtain financing more quickly if they select a financial institution that has an office in the locality and personnel in that office with authority to make a decision on the purchaser's application. There is enough competition between the various financial institutions that a decision will usually be available within a week. If the agreed date for removal of the condition precedent arrives and the new mortgage has not yet been approved, the licensee should review the progress with the purchaser and the financial institution. If it appears that the required financing will be approved within a reasonable period of time, the vendor should be kept informed and given the opportunity to extend the time limit.

The Use of a Time Clause

Sometimes merely providing for a date by which the condition precedent must be satisfied is not enough. For example, when the condition precedent provides that the purchaser's obligations are subject to the purchaser being able to sell property owned by the purchaser, the vendor will have difficulty predicting whether the

time clause
a clause contained in a contract for purchase or resale of land which allows a party to invoke a time period in which a condition precedent must be removed. A failure to remove the condition precedent within the time period would result in the termination of the contract

purchaser will be able to proceed. Is the purchaser's property attractive to the market? Is it reasonably priced? The licensee should not advise the vendor to accept such an offer unless some further protection is provided for the vendor. One method of protection is through the use of a so-called "72-hour clause" or "*time clause*." This is the third way to protect a vendor from a condition precedent. A time clause is a clause that gives the vendor the right to demand that the purchaser remove a condition precedent earlier than at first expected. The notice invoking the time clause is a separate document from the contract of purchase and sale and is not an amendment to a contract.

The right to invoke a time clause arises only upon the vendor receiving another offer after entering the original contract of purchase and sale. If there is a 72-hour clause in the original contract of purchase and sale, the vendor can notify the purchaser to remove the condition precedent within the next 72 hours or the contract terminates. The time period does not have to be 72 hours; a different period may be negotiated. The vendor will generally want a short period of time and the purchaser will generally want a longer one.

FIGURE 11.1: Time Clause

Sale of the Buyer's Property, with Time Clause

Subject to the Buyer entering into an unconditional agreement to sell the Buyer's property at

_____(address)_____ on or before _____(date)___.

However, the Seller may, (select either "at any time" or "upon receipt of another acceptable offer") deliver a written notice to the Buyer or to (name of his or her representing real estate company) requiring the Buyer to remove all conditions from the contract within ___(number) hours of the delivery of the notice, not to include Sundays and statutory holidays. If the Buyer fails to waive or satisfy all of the conditions before expiry of the notice period this Contract will terminate and the Deposit will be returnable in accordance with the *Real Estate Services Act*.

Source: "*Clauses*" *section in the Knowledge Base, found online*

Whenever you recommend that a vendor accept an offer which contains a condition precedent, you are effectively taking the vendor's property off the market. Certainly you can write back-up offers, but this ties up the second purchaser and in most cases is not a realistic alternative. Before you allow a vendor to accept an offer which contains a condition precedent, you should give your honest opinion, based on the information available, as to the likelihood of the condition being satisfied. Especially where many purchasers are interested in the vendor's property, or if the vendor wants the quickest sale, a time clause enables the vendor to retain control over the transaction.

There is no doubt that in some cases a licensee would be negligent if they advised the vendor to accept an offer which was subject to the satisfaction of a condition, unless the licensee also advised that a time clause be included. Under these circumstances it could be argued that the time clause is in fact in the interest of the purchaser, because the vendor would not accept the offer without it.

Example

On July 1, Pete Purchaser makes an offer to purchase Vi Vendor's home "subject to Pete Purchaser selling his property at 123 Main Street, Kelowna, British Columbia by August 31." The completion of the contract is set for September 30. The contract includes a "72-hour clause." On July 20, Vi Vendor receives another offer to purchase her home. The second offer is for the same price as Pete's, but there are no "subject" clauses in it. The completion date is August 31. Vi invokes her "72-hour clause", by giving Pete Purchaser notice to remove his condition precedent within the next 72 hours, or lose the deal. Vi accepts the second offer "subject to the Vendor ceasing to be obligated in any way under the previously accepted Contract of Purchase and Sale by (date)." Pete is unable to remove his condition precedent within the 72 hours. Consequently, he loses his rights under the contract, and Vi is able to complete the second purchase.

Amending a Contract of Purchase and Sale

If an offer is accepted but one of the parties later wants to change the contract of purchase and sale, the licensee who represents the party seeking an amendment must exercise caution. Re-opening negotiations may be interpreted as a breach of the existing contract. A licensee who seeks an amendment on behalf of a party must first confirm with the other parties that any discussions about the proposed change will not terminate the existing contract. During the ensuing discussion over the proposed amendment, the licensee

must emphasize to all parties that the original contract of purchase and sale remains binding on them until any amendment is finalized. This means, for example, that in the meantime the discussions themselves do not relieve any party from performing an obligation that falls due under the existing contract.

An amendment constitutes a contract to change an existing contract. Since the amendment itself amounts to a contract, there must be fresh consideration or a seal in support of it. An amendment made without new consideration, or a seal, is unenforceable because it is a gratuitous promise.

Note that Clause 12 of the standard form contract stipulates that time is of the essence. This means that performance of the agreement on time is an essential term of the contract. For instance, if the buyer fails to pay the purchase price on time, the seller may treat the contract at an end and keep the deposit on account of damages and without prejudice to the seller's other remedies. It is fairly common for the parties to a contract of purchase and sale to amend their contract by altering dates, for example, by changing the date for completion, adjustment, possession or for the removal of a subject clause. Where the original contract stipulates that time is of the essence, and the parties subsequently amend their contract, the law presumes that time remains of the essence in the amended contract unless the circumstances make it unjust to do so.[5] To avoid disputes, whenever a licensee amends a contract, the licensee should always record in the amendment that all other terms and conditions of the contract remain the same and that time remains of the essence.

Every party to the agreement must expressly approve any amendment to it. Once all parties have agreed on the exact nature of the amendment, it must be put into writing and signed by all parties to the original contract of purchase and sale. When all the parties have signed the amendment, the licensee must without delay deliver a copy of the amendment to each party.

A sample amendment form is found in Figure 11.2:

FIGURE 11.2: Contract of Purchase and Sale Amendment

DATE _____

Re: Address _____

Legal _____

Further to the Contract of Purchase and Sale dated _____

Made between _____ as Seller, and

_____ as Buyer and

covering the above mentioned property, the undersigned hereby agree as follows:

_____

_____

_____

All other terms and conditions contained in the said Contract of Purchase and Sale remain the same and in full force and effect.

_____ _____ Seal

Witness Buyer

_____ _____ Seal

Witness Seller

Assigning a Contract of Purchase and Sale

As was explained in the previous chapter, a party to a contract can assign away benefits under that contract to a third party. Sometimes, a buyer of property will assign their rights under a contract of purchase and sale before completion. As mentioned in Chapter 2 and Chapter 10, section 8.2 of the *Real Estate Services Regulation* (the "Regulation") applies in all transactions where a licensee is acting for the seller and/or the prospective buyer of real estate (except where the contract is for the sale of a development unit by a developer under REDMA). Section 8.2 states that in these situations, a licensee must include the following terms (the "Standard Assignment Terms") in the contract of purchase and sale of real estate (an offer to purchase) unless they have been advised otherwise in writing by their client:

1. this contract must not be assigned without the written consent of the seller; and
2. the seller is entitled to any profit resulting from an assignment of the contract by the buyer or any subsequent assignee.

[5] See, for example, *Salama Enterprises (1988) Inc. v. Grewal* 1992 Can LII 4035 (BCCA)

Section 8.2 was put in place to provide notification and protection to sellers in situations where a buyer purchases a property, only to reassign the contract to a new buyer for a higher price, without the seller's knowledge. The requirements in section 8.2 only apply to contracts prepared by licensees and they apply to both residential and commercial properties. Furthermore, if a contract of purchase and sale prepared by a licensee does not include the above provisions, the contract must be presented along with a Notice to Seller Regarding Assignment Terms (the "Notice Form"), which explains the lack of the Standard Assignment Terms and a recommendation to seek independent professional advice. If there is a situation in which an unrepresented buyer presents an offer without the terms listed above, there is no requirement on either the buyer or the seller's licensee to provide the Notice Form to the seller; however, the licensee representing the seller must notify their client:

- that the offer does not contain the Standard Terms;
- whether the contract may be assigned; and
- if the contract can be assigned, any conditions in the contract on the right of assignment of the contract and whether the seller is entitled to any profit resulting from an assignment of the contract.

As long as the requirements of section 8.2 are met, assignments are permissible provided that they do not prejudice the rights of the seller and the contract does not prohibit assignment.

Example

A seller has agreed to sell her property to a buyer. Before doing so, she verified the financial status of the buyer to determine if he had good credit for a vendor take-back mortgage (i.e., a seller defers payment of a certain portion of the purchase price which the buyer will pay over time in the form of mortgage payments with interest (discussed in further detail in Chapter 15)). If the buyer assigned the agreement to a new purchaser who did not have a strong credit rating, this could prejudice the seller's interests.

The Knowledge Base article, "Assignment Guidelines", indicates that in preparing an offer where the assignment of the contract of purchase and sale is contemplated, the licensee should not use clauses such as "and/or nominee" or "and/or assignee" to describe the buyer. Arguments could be made that contracts containing such phrases in the description of the buyer are unenforceable due to uncertainty in the identity of the buyer. This principle was established in *Dunbar v. Dayson Holdings Ltd.*, 1976 CarswellBC 1181.

A real estate licensee owes a fiduciary duty (discussed in Chapter 12) to a seller for whom they are working, and included in this duty is the obligation to disclose all information relating to the seller's sale transaction. If a real estate licensee knows that a contract of purchase and sale which they have presented to the seller is likely to be assigned (or "flipped") by the buyer to a third party for an increased purchase price, the licensee is obliged to inform the seller of this fact. A failure to do so could result in a finding of breach of fiduciary duty.

Condo and Strata Assignment Integrity Register (CSAIR)

Because many residential strata development units are marketed (and sold) even before construction begins, there is often a significant amount of time between the date that the purchase agreement is entered into, and the date the purchase of the unit completes. During such time, due to changes in personal circumstances or the desire to earn a profit, buyers may seek to assign their purchase agreement to another buyer, prior to completion. Such assignments are normally completed through an assignment agreement made between the original buyer (as assignor), and the new buyer of the strata lot (as assignee). Through terms contained within their purchase agreements, developers can choose whether to allow assignments of their purchase agreements. Sometimes, the assignor may have to pay a fee to the developer in order to receive consent to the assignment. Despite that fee, the original buyer may nonetheless realize a profit by assigning the purchase agreement. In a rising market where the price of residential units are increasing as time passes, the new buyer of the strata lot may be willing to pay the original buyer a substantial premium to receive the assignment of their purchase agreement.

Created by the provincial government, the Condo and Strata Assignment Integrity Register ("CSAIR") is a database that records the assignment of purchase agreements for residential strata lots in British Columbia. Implemented through new provisions of REDMA and its regulations, developers that have entered into

purchase agreements of residential strata lots, whether they be pre-sale (also known as pre-construction) lots or completed lots, are required to collect comprehensive information about any assignment of those agreements, and report it to the CSAIR.

CSAIR reporting only applies to development properties with 5 or more residential strata lots. Strata lots zoned and used for industrial or commercial purposes, bare land strata lots, and development property that does not consist of strata lots are generally exempt. Specifically, CSAIR reporting applies to assignments of residential strata lots where there is:

- an assignment of the entire agreement or a partial assignment (e.g., a buyer assigning a half (50%) interest in a purchase contract);
- any subsequent assignment (i.e., an assignee further assigning the agreement to another person); and
- an assignment of a lease agreement where the term of the lease is for 3 years or more.

As a Licensee...

You may recall that section 8.2 of the Regulation requires licensees to include standard assignment terms in contracts of purchase and sale of real estate, unless they have been advised otherwise in writing by their client. However, recall also that section 8.2 of the Regulation does not apply to contracts for the sale of a development unit by a developer under REDMA. The requirements of section 8.2 are discussed in greater detail in Chapter 12.

Purchase Agreement Requirements

If a developer decides to permit assignments of their purchase agreements, REDMA requires the following to be included within the purchase agreements that are used:

- a term requiring the prior consent of the developer before any assignment;
- a notice that, prior to providing consent to an assignment, the developer will be required to collect information and records from the proposed parties to the assignment agreement; and
- a term requiring all proposed parties to the assignment agreement give the developer certain information and records.

If a developer does not permit assignments, they are required to disclose this fact in the disclosure statement that is provided to each buyer.

Information Collection Requirements

Information Relating to the Proposed Parties to the Assignment

The information developers are required to collect from the proposed parties to an assignment agreement (i.e., both the assignor and the assignee) is comprehensive. Organized by the type of party to the assignment agreement, the information collected varies depending on whether the party is an individual, a corporation, a trustee acting on behalf of a trust, or a partner or partners acting on behalf of a partnership. For example, if a proposed party is an individual, the developer must collect their full legal name, date of birth, citizenship, residency, tax identifiers (Social Insurance Number or Individual Tax Number), principal residence, and contact information (address, phone number, and email address). If a proposed party is a corporation, the developer must collect its name, 9 digit business number, address, and contact person regarding the assignment.

Information Relating to the Assignment Agreement

Prior to consenting to an assignment, developers must also collect a variety of information relating to the purchase agreement and the proposed assignment agreement, including information about the strata lot in question, the purchase price of the strata lot, the dates of the agreements and the consent, the assignment fee paid to the developer, and the amount payable to the assignor for the assignment, among other things. Developers are also required to keep a copy of the written and signed assignment agreement in their records.

Developer Reporting Requirements

The assignment information collected by developers is periodically reported to the CSAIR online, through an online portal managed by the Land Title and Survey Authority. Simply speaking, developers must file quarterly reports starting from the date of the first executed purchase agreement to the date that the strata plan is filed. These reports must be filed even if no assignments took place during a quarter. A cumulative report on any assignments that have taken place is required when the strata plan is filed. Finally, annual reports are required until the developer has transferred title to all of the strata lots in the development property or another specified event occurs (e.g., at the end of the 6th calendar year after the strata plan is deposited, the development property ceases to be developed, or the development property is sold to another developer).

Information Sharing

The purpose of the CSAIR is to collect comprehensive information about assignments of residential strata lots and those involved in the assignment of such strata lots. This information may be shared by the provincial government with the Canada Revenue Agency ("CRA"). The CRA may use this information to compare against the tax return of the assignor to ensure appropriate taxes are being paid. In addition, the information will also be used by the provincial government to assess the appropriate amount of property transfer tax to be paid. Any amounts or fees paid by an assignee to an assignor and/or the developer in respect of the assignment must be included with the purchase price for property transfer tax purposes.

As a Licensee...

The CSAIR's information collection and reporting obligations are centred on developers. However, knowledge and understanding of the CSAIR requirements is applicable to all licensees, not just those who act for developers. Licensees acting for purchasers, assignors, or assignees of developers' residential strata lots also need to have an awareness of their clients' obligations.

A prospective buyer considering the purchase of a residential strata lot from a developer may have questions or require clarification on the possibility of assignments of the purchase agreement. Licensees representing such a buyer should ensure that their client fully understands the impact of CSAIR on their interests. For example, this buyer needs to know whether assignments are permitted by the developer. If not, the buyer needs to be aware that they will be locked into their purchase until completion.

If assignments are allowed, the buyer needs to be aware of any assignment fees required by the developer. The buyer will also need to understand that the developer is required to collect certain information about them, and any assignees, prior to providing its consent to an assignment. The same is true if a licensee is representing a client who is looking to receive an assignment of a purchase agreement. If the required information about the assignee is not provided to the developer, the developer cannot consent to the assignment. These assignees may themselves later seek to further assign the purchase agreement to another person. Not every potential assignor or assignee will be comfortable with the required disclosure of information. As such, this may limit the marketability of an assignment of such a purchase agreement.

For licensees who act for a developer, they must be able to explain to unrepresented parties whether the developer allows assignments and what the developer requires in order to provide consent, such as fees and the CSAIR requirements. Note that besides the CSAIR requirements, there are additional required disclosures when dealing with unrepresented parties that are imposed by Section 55 of the Rules. These requirements are discussed in greater detail in Chapter 12.

EFFECTIVE CONTRACT NEGOTIATION

The real estate licensee's role is dependent upon the preparation of enforceable contracts – listing agreements and contracts of purchase and sale in the trading services sector. The terms of these contracts are determined through negotiation. Accordingly, successful professionals in the real estate industry have to be successful negotiators. Solid negotiation skills are critical for handling all aspects of real estate transactions on behalf of your clients. Indeed, your clients will select your services in part because of your ability to effectively negotiate their interests. In addition, negotiation skills are important for working with all those in your professional life, whether it be your administrative staff, your partners, your webpage designer, or a developer you are working with.

If you are like most people, you have actually been negotiating, to some degree, all of your life. Through trial and error and a dose of common sense, you have probably acquired numerous negotiation skills that

work for you. Experience is extremely necessary and valuable, and you may already be a very successful negotiator. However, trial and error is a relatively slow, and occasionally faulty, way to acquire new negotiation skills. The following materials will help you to efficiently and systematically boost your negotiation skills by describing specific behaviour techniques that have been proven to work from years of accumulated negotiation research. So whether you are a novice or experienced negotiator, the following paragraphs will push you toward more effective negotiation strategies.

We will begin by examining the nature of effective negotiations and how we judge the effectiveness of a negotiation. Next, we will explore a particular perspective or mindset toward negotiations that research shows leads to the best negotiation outcomes. Following this, you will learn about specific behavioural strategies to consider while preparing, executing, and ending a negotiation of any kind. We will conclude by discussing several additional considerations, including how to avoid and respond to some common negative negotiation behaviours, and how to assess the effectiveness of a negotiation.

The Nature of Effective Negotiations

What is an effective negotiation? How do we know if we were successful in a particular negotiation? These are important questions you must be able to answer before you can improve your negotiation skills.

Negotiation experts agree there are several important criteria for determining whether or not a negotiation is a successful one. The first criterion is the efficiency of the negotiation. As you know, negotiations can vary dramatically in terms of how long they take to resolve, and how much effort both parties expend in the process. Sometimes the time and effort invested in a negotiation makes sense, given the importance of the negotiation or the achieved outcomes. Other times, however, that quantity of time and effort is out of step with the nature and importance of what is being negotiated. Effective negotiations utilize the least necessary time and resources.

Another criterion by which to judge the effectiveness of a negotiation is the extent to which both parties are satisfied at its conclusion. In many ways, this sense of satisfaction is entirely subjective – only the person who ends up with a particular outcome can judge its value to them personally. An outcome that satisfies one person might not satisfy another. Parties can be satisfied with the negotiated terms of the agreement but sometimes, they can also be satisfied with walking away from the table without an agreement when necessary. In that sense, sometimes a negotiation that is not resolved can be considered a successful one.

A third factor to consider is the extent to which the negotiation does not leave wasted resources on the table. As you will learn later on, successful negotiations involve finding creative ways by which to divide a set of goods so that the value of the goods is fully realized or utilized.

Negotiation Approaches

So how can you become a more effective negotiator? It requires both a change in perspective or approach, as well as a change in behaviour. Let us look first at this new approach, which will then be the basis for the behavioural strategies.

The naïve or inexperienced negotiator will typically hold a "distributive perspective" about negotiations. Such a perspective involves viewing the negotiation as a conflict, with one winner and one loser. With this view, the negotiation involves parties entrenched in opposing positions, sitting at opposite ends of the table, arguing and defending against one another in a show of who has the most power, until they compromise down to one agreed upon solution. Typically, this orientation occurs because the negotiators fixate on opposing positions around a single issue, such as price, and engage in a tug of war because in such a situation, one negotiator's gain is the other's loss.

In contrast, expert negotiators tend to approach negotiations from a "win-win" or "integrative perspective", where "integrative" refers to the potential for the various interests to be combined to create a more valuable outcome for all parties. With such an outlook, the negotiator focuses less on their particular position on a single issue, and more on the underlying interests and needs of both parties. The parties attack the problem facing them, not one another. Viewing the negotiation as joint creative problem solving rather than head-to-head conflict with one winner and one loser, the negotiators are able to explore ways by which to creatively divide up resources so that both party's needs are fully met. This mindset has nothing to do with being nice, or generous. Rather, it involves recognition that successful negotiations have to address all party's needs, not just those of the party with the most will. The adoption of this mindset leads to behaviours that

ultimately produce the most optimal negotiations: ones that are efficient, that lead to better outcomes and satisfaction for the parties, and enhance the relationship in the process.

Now consideration can be given to the behaviours and strategies that emanate from this integrative perspective. Specifically, you can apply this approach to each component of the negotiation process: preparation, communication and exchange. Each of these components will be addressed in turn next.

Preparation Principles

The single best thing you can do to improve your negotiation effectiveness is to prepare. Most people do not prepare at all for their negotiations, or if they do, they prepare inadequately. Preparation involves not only thinking about the negotiation before going to the table, but also systematically gathering information and making key decisions. Following are the questions to ask yourself the next time you plan to negotiate.

What are the Issues?

A good place for you to start your preparation is to list all the issues that will or could be negotiated. Some issues may be obvious, such as price, closing date and subjects. However, it is equally important to consider additional issues that might otherwise be overlooked, such as particular repairs, special financing or storage. The goal here is to increase the resources to be traded around before you worry about how to divide up the resources between you and your negotiation partner. Why? Because the more issues you have to negotiate between you, the easier it will be to reach an agreement. The farther away you will be from a zero-sum game, going back and forth on a single issue. Now this might seem counterintuitive; after all, more issues makes things more complex. But more issues also allow for more creative solutions, and the greater the possibility that everyone's needs will be met.

So how can you expand the issues? First, ask yourself what else would you like to have in the final outcome, if you could have anything that you want. It does not hurt to ask – you may or may not get them in the agreement, but it expands the possibilities. Second, what items do you think the other party might like to have? Of particular interest are those things that you believe the other party will value that cost you little or nothing to give away, but that you can trade for things you do value.

What are the Interests?

In a typical negotiation, parties tend to focus on their positions, a particular stance of what they state they want on a given issue, of what they believe is the ideal solution they must have. For example, a particular closing date or price. In contrast, interests are what motivate the parties to take a particular position or be set on a particular solution. It is the reason why the parties take the stance or position that they do: Why must they close by June 17th or why must the property be subject to septic installation? These interests reflect negotiators' needs, desires, dreams, fears, and concerns. For every interest, there are typically numerous positions that can satisfy it. For example, the fear of carrying two mortgages can be addressed with taking a position that the closing date has to be far in the future, or by an agreement whereby the sale is subject to getting financing or a bridge loan.

When negotiating, both negotiators will take a particular position on a given issue, but it is vital to know why each party is taking the positions they are taking; to know the underlying interests that drive them to their stated position. Later in this chapter we will elaborate on why a focus on interests in the negotiation process is so important. For now, at the stage of preparation, it is critical to think very clearly about your own interests and also to guess those of the other party, before you sit down to negotiate.

How do you identify the underlying interests of the parties before negotiating? Answering these questions will lead you down the right path:

- Why does your client want what they say they want?
- Why is the other party likely to ask for what they will likely ask for?
- Why might you be unwilling to accept the terms the other negotiator is likely to put forth?
- What will your client be worried about?
- What will the other party be worried about?
- What are the consequences to the other party of accepting the terms that you request?

Keep in mind two facts about interests. First, each party to a negotiation usually has multiple interests, not just one. Also if there are multiple parties involved on one side of the negotiation table, they do not necessarily have the same interests. For example, one spouse may be particularly concerned about value; the other may wish to just get the real estate search over with. Second, the most powerful interests are often basic human needs such as self-esteem, control and security. These needs are not often talked about or acknowledged by the person who holds them, yet they may ultimately explain much of their attitude and behaviour in the negotiation process.

What are the Priorities?

After determining the various issues on the table, you have to decide how important each issue is to you or your client, and to the other party. What are the most critical issues to you? What might be the deal breakers for the other party? On what issues will there be wiggle room? And what issues are you willing to give up on in order to get the things that are really important to you or your client? Likewise, what do you foresee as the most and least important issues to the other side?

Determining priorities of the parties is critical for several reasons. First, you must enter the negotiation with a true understanding that you will have to give something up in order to get what you value. If you are able to enter into the negotiation and get every issue exactly as you like, well it is unlikely to be a true negotiation. (If you are in the fortunate position to have that degree of power, you needn't pretend to negotiate, you can just take!)

However, once you come to realize that negotiation has to involve trade-offs, it is important to consciously and carefully determine what you are willing to give on in order to get that which really matters to you based on your interests. This is one reason why knowing your real interests (or your client's) is important.

Determining both parties' priorities is also critical because effective negotiations do not revolve around convincing arguments and persuasion, but around creative exchanges that maximize each party's interests. The creative exchange that leads to satisfying solutions cannot take place if you do not do your homework and enter the negotiation with a clear understanding of the potential trade offs for you and your negotiation partner.

What are Some Possible Solutions?

Before going to the negotiation table, consider as many possible inventive solutions, involving all the issues you have considered, that can be combined to make both parties satisfied. Even if a particular solution will not work, bringing it to light may spark other possible solutions that will work. The more possibilities for both of you to consider, the more likely one of those possibilities will satisfy everyone's needs.

We often underestimate the importance of this task before negotiating. We tend to only worry about solutions during the negotiation, and not before. We tend to think there must be just one solution to our negotiation, perhaps a split down the middle between each party's positions, with each giving up half of what they want. Sometimes we cannot fully appreciate that ultimately, both negotiators' needs can be met; a negotiation needn't be a zero-sum game where the only solution is a compromise down the middle. We sometimes err in believing that only our own needs are our concern. The truth is that negotiated settlements occur only when both parties are satisfied. Therefore, it only slows down the negotiation to ignore the other negotiator's interests instead of considering all interests simultaneously.

How can we come up with potential creative solutions that can satisfy both negotiators? Make time to generate possible solutions, ideally before the negotiation even takes place. Look for potential shared interests – things that both negotiators would like as part of the solution. Also use a brainstorming technique. This involves creating as many varied and outlandish ideas as possible. It also involves separating the creation of ideas from the judging of the ideas. Do not judge too soon – put all ideas down on paper. Only when all ideas are down can you consider the merit of each one.

Consider Objective Standards

Too often we will attempt to seek a negotiated agreement that is based on the relative power of each party's will, with the strongest or most stubborn party winning the most. A more constructive approach is to focus less on what each party wants, and more on identifying and agreeing upon some objective standard by which to find an acceptable solution. That objective standard of fairness could take many forms, depending upon the nature of what is being negotiated. Examples of standards might include expert opinions, market standard, cost of replacement, depreciated book value, competitive price, or the law.

What are Your Alternatives?

Before going to the negotiation table, be very clear what your next best alternative is to reaching agreement with the other party. If for some reason, you have to walk away from the table without a solution in hand, what will you end up with? You will always have an alternative. What becomes important here is to have the best alternative you can create before you negotiate and to be conscious of that alternative.

Why is it so important to know what your alternatives are? Such alternatives represent your next best scenario, your back up plans to a given negotiation. A strong back up plan keeps you calm, collected, confident, and powerful – and it prevents you from appearing desperate. A desperate negotiator is likely to be exploited. An understanding of your best alternative is also important because it helps you to know the point at which you should walk away from the negotiation. This will be discussed in more detail in the next section.

Before negotiating, seek to cultivate one or two solid alternatives. Start with a generated list of possible alternatives, develop some into viable alternatives (do your homework to make sure they are feasible), and choose one that seems like your best. For example, suppose you are hiring some staff and you are negotiating the terms of an employment offer with someone you would like to hire. Your various alternatives to not resolving this negotiation with this new hire might include not hiring anyone but continuing to do the work yourself, outsourcing the work to an agency, or hiring someone else you interviewed. After weighing the pros and cons of each, you may decide your next best alternative is to hire the other person you interviewed if this negotiation falls through.

Keep in mind several points about alternatives. First, although your alternatives will give you a sense of your power, the amount of power you actually possess will depend on the relative strength of the other negotiator's alternatives. Thus, the one with the better alternatives tends to have more clout in the negotiation. Second, alternatives are about perception. This is why some negotiators will try to convince you they have strong alternatives when none exist; and why we might be reluctant to share our true alternatives when they are not strong. Finally, be careful not to lump your alternatives together, to trick yourself into thinking that if you walk away from the negotiation, you will end up with all parts of the various alternatives when in fact you will only get one of your alternatives.

Know Your Resistance Point

Your resistance point is your bottom line. It is the point you will not cross and at which you will walk away from the table and toward your best alternative. For example, in assisting a buyer in purchasing a home or service, the buyer's resistance point may be dictated by the maximum they have to spend, or determined by the price of comparable properties or services they are considering in the same location.

Why is it important to know your resistance point before you negotiate? First, it stops you from making an irrational or emotional decision to carry forth with a negotiation that is not in your or your client's best interest. People have a tendency to continue in a negotiation even when it may not be rational to do so. It may be because their emotions, ego, or a sense of competition takes over. Or perhaps it is because they have already invested so much time and effort, that it is difficult to walk away. In such cases, people are prone to agree to things they might not have otherwise agreed to if these factors were not present. To protect yourself from falling into this trap, you need to create some boundaries before you get involved in the negotiation. This will allow you to walk away with confidence when it comes to the point where you should walk away.

Set a High Goal

Keep in mind that your resistance point is the worse-case scenario. Although you will reach a deal provided the negotiated settlement is at or above your resistance point, you certainly do not want to focus your attention on that resistance point! As you can imagine, if you fixate too much on your resistance point, that is exactly where you will end up.

To counter the influence of a focus on your resistance point, and to maximize your performance in the negotiation, it is critical that you establish an aspiration target before you negotiate. This is your ideal, your best-case scenario. Much research on goal setting demonstrates that having a challenging, specific goal leads to much higher performance than unchallenging or general goals. To illustrate, a salesperson who sets a target to try to sell a particular item for a specific high but realistic price, will tend to negotiate a better agreement than a salesperson who does not have such a specific high target in mind. This is not to suggest that if you set such a target, you will obtain it – it is merely a goal to focus on, not necessarily achieve. However, by

setting an aspiration target during the preparation phase, you will focus your attention and energy in that higher direction and will very likely get closer to that goal than had you not set it.

These principles covered so far, regarding the preparation phase of the negotiation, will continue to be central in the negotiation itself. In addition, there are a number of additional principles to be taken into account in the negotiation phase. These principles can be loosely grouped into the key components of a negotiation: principles that apply to the exchange component, principles pertaining to the communication component, and principles related to the relationship component of a negotiation. Though these categories may provide a useful framework for remembering them, keep in mind that all of these principles must be taken into account throughout the negotiation.

Exchange Principles

Effective negotiation, as briefly mentioned earlier, is not so much about persuasion and influence as it is about the creative generation and exchange of possible resources between negotiators with different needs and interests. There are several important considerations that will facilitate this exchange process.

Focus on Interests

It is critical to focus the negotiation on interests, not positions. As previously noted, positions are the verbally stated desires on a particular issue. Less experienced negotiators will tend to focus on positions, insisting they cannot move from the stance they have taken. The problem with this approach is it does not allow much room for movement, with each party locked into opposing positions. The more energy negotiators put into stating and defending their positions, the more they tend to become entrenched in them. This cuts off the opportunity for both parties to consider other positions, one that are as good, or better, than the one they are fixated on.

One way to avoid getting trapped in opposing positions is to focus the negotiation around the underlying interests of the parties involved. When you look underneath stated positions to the interest motivating it, creative solutions emerge. It is usually only by focusing on the true underlying desires and needs of each party that creative solutions abound. Fortunately, for every interest there are usually several or in some cases, numerous positions that can fulfill it.

As already discussed, it is important to seek out as much information as you can about your own and the other party's interests before you negotiate, however you should continue this exploration during the negotiation process as well. How do you get at underlying interests during the negotiation? First, if you share your underlying interests with your negotiation partner, often they will reciprocate. Talk openly about your own interests. Spend less time talking about what you want, and more time about why you want what you want. Be respectful of their interests and convey that you understand them. Second, consider putting forth a choice of possible solutions composed of different combinations of the issues and find out which one they prefer and infer interests through their preferences. Finally, use the direct approach and simply ask why they want what they want. By taking the focus off positions and putting it onto interests, you may find that each of your needs are not at all incompatible and that with some creativity and brainstorming, you come up with solutions that make both of you content.

Packaging and Trading Off

It is natural and common to proceed in a negotiation issue by issue, tackling one problem at a time. Often parties negotiate the easier issues first, leaving the difficult ones until the end. However, considerable research demonstrates that more optimal solutions are reached when parties do not go issue by issue but rather when they package and trade multiple issues simultaneously.

There are several benefits to packaging issues simultaneously. First, by putting forward a package of issues as a proposal, and countering with a different proposal, both parties can express their interests without revealing too much information to the other party. Second, and more importantly, packaging allows for more creative problem solving. The more issues you combine, the more possible solutions there are.

Focus on Objective Standards

Ideally, you will agree first on principles or those objective standards, before arriving at a solution. Thus, rather than argue about what price one is willing to pay or not willing to sell for, the parties can debate the

standard by which they will come to agree on the real value of the property. Frame your discussions, when possible, around a joint search for finding the best objective standard; in other words, talk about figuring out how to determine a fair price on a piece of property rather than argue about which price is the fair one. If the other party puts forth a number, ask them how they arrived at that number, how did they know it was the correct one, or what principles underlie their calculation.

Strategic Concessions

A concession is putting forth an offer that concedes your prior position somewhat. Of course a negotiation can only proceed to the extent that both parties are willing to make concessions where necessary. It is very important however, that these concessions occur in a relatively reciprocal fashion; that is, that each party takes turns in making concessions. This suggests that if you put forth a concession or place an alternative solution on the table, however small, it should be met by a comparable gesture on the part of the other negotiator. Although these norms are obvious, it is not uncommon for one party to engage in several consecutive concessions rather than wait for the other party to also concede. Sometimes one will make multiple concessions, or step into the role of putting forth repeated offers, ideas and solutions, simply to avoid silence, to make the other party happy, or to keep the negotiation going. Remember to avoid this pattern if it is your tendency. By making repeated concessions or one proposal after another, without expecting the other negotiator to follow with similar behaviour, you merely reinforce the other party to hold tight and not participate.

Principles of Communication

Creative exchange and problem solving can only occur with sufficient and effective communication between the negotiators. We can now examine some critical aspects of communication that are essential for integrative negotiations.

Listen Actively

Too often we think if we talk more or better, we'll get our way. In fact, the better solutions are ones that come from real listening. It allows you to hear what the other party really wants and values – the necessary information you need to find solutions that work for both of you. In addition, when you listen well, the other party feels heard and respected and they are going to be that much more comfortable sharing information with you and working towards a mutually agreeable solution.

Pay close attention to what the other party is saying. Focus on what the other side is telling you rather than on what you want to say next. Ask the other party for clarification or additional explanation when you are not certain you follow their point. When seeking clarification, be sure the tone and manner is genuinely inquisitive and concerned, rather than critical. Finally, paraphrase the other side's main points to ensure you have heard them correctly and to provide an opportunity for them to correct your misperceptions.

Relationship Principles

An additional set of principles for effective negotiations involves how you manage your relationship and interpersonal connection with the other party.

Firm but Conciliatory

Be firm with your interests but flexible in your positions. If you have prepared well, you will know what your interests are and the importance they hold to you. Two negotiators who are clear and firm about their interests can often push a negotiation to the most creative and satisfying solutions. Keep in mind however that many different positions may meet your interests. So stay open minded to different ways of viewing the problem at hand, and to different ways to come to a solution that might work for everyone.

In addition, be firm with your interests but easy with your interpersonal approach. Be likeable. Be polite. Avoid blaming, accusing, and making personal attacks. Listen to the other party, show courtesy and respect. Find opportunities to genuinely compliment the other party or to express appreciation. Emphasize your concern with getting the other negotiator's needs met as well as your own. You can be sensitive to the other's feelings, attitudes and perspectives while at the same time remaining committed to your interests.

Perspective Taking

Where possible, put yourself in the shoes of the other party and attempt to see the situation the way that they see it. You need not agree with their perspective, but only understand it. Why? Because understanding your own perspective and their perspective at the same time will lead you to the potential solutions that will make you both happy. Remember, both parties have to like the solution in order for the negotiation to end and so it is counterproductive to ignore the other half of the interests involved in the negotiation.

Another advantage of seeing the situation through the eyes of the other party is that you can propose solutions in a way that will appear to be consistent with their values, making them more comfortable agreeing with your proposal. People want to save face, avoid appearing weak, and avoid appearing to change their minds. Thus, the other negotiator is more likely to agree to solutions that make them feel like they won. The more you know about how the other side sees things, the more likely you can put forth solutions that give the other side that sense of winning.

Dirty Tactics

On occasion you may encounter negotiation tricks or dirty tactics used by the other party. It is important to recognize these tricks when they occur so you can respond appropriately. Common responses to such tactics are to either respond in kind, or just put up with it. As you might guess, neither of these responses is the best method.

A more effective approach to dealing with dirty tactics is to do the following. First, recognize the tactic being used and explicitly raise the issue with the other party. Often just naming it out loud is enough to stop it. However, it may also be necessary to question it and argue against it. In doing so, apply many of the same principles you have learned about communication for negotiations in general. Be factual, do not personally attack the other party, remain non-emotional, and focus on the problem (in this case, the dirty tactic) with an eye toward a mutual resolution. In more extreme cases you may have to decide to take a break, suggesting that you resume the negotiation only when such behaviour stops. This more drastic technique can be useful because it does the opposite of what the party using the dirty tactic is hoping to achieve. Now we can turn to a discussion of a few common questionable tactics so that you can recognize them when they occur.

False Authority

This technique involves one party feigning authority to make a decision, agreeing to a solution, but later returning to the table to say someone else – a partner, a boss, a spouse – will not agree to the deal. Sometimes this is related to the use of a "good-guy/bad-guy" routine whereby the individual you negotiate with is the "good guy" and the "bad guy" is in the backroom unwilling to yield. To avoid this trap, it is important from the outset to clarify who you are negotiating with – and only to negotiate with the person who has the ability and discretion to commit to a negotiated outcome. Barring this option, it is important to clarify that any tentative agreement is entirely open to both parties walking away until those with authority agree to the outcome. In other words, you will sleep on the offer and get back to them.

Eleventh Hour Throw In

On occasion one party will, just before the deal is signed, ask to add just one more item. Knowing the negotiation is close to settled, and there is a deep desire to conclude the deal, they hope this "one little thing" will be thrown in for good measure. One way to offset this problem is to simply know that it is a common occurrence and be prepared for it. Second, if they want an additional "thing" added to the solution, you must ask for something in return for it; in other words, reopen the negotiation.

Deception

Deception is not only inappropriate, but in many instances may also be illegal. Nevertheless, some negotiators cross the line into such behaviour. The defence against deception is to not rely on or assume the other party is being honest. Issues of importance should not rely on the other party's word or integrity, but upon verification of the facts and/or other assurances of future action. For example, one would not make a purchase of land with the intent to log it based upon the word of a seller that it is permissible. Rather, one would rely on an objective authority such as opinion or permit by the relevant regulatory body.

Stress

On occasion a negotiator will attempt to put undue stress on the other party in order to move the negotiation to their advantage. The form this tactic takes may vary. It might be as simple as creating unnecessary time pressures, making the threat that another buyer is putting in an offer, or it might involve holding the negotiation in an unfavourable location. Ask yourself if you are feeling stressed and regardless of how you came into that situation, suggest alternative arrangements to reduce that stress.

Negative Emotions

Some parties use threats, negative emotions or other forms of psychological warfare to win their negotiation. When confronted with such tactics, your response should be twofold. One, directly point out the questionable behaviour and two, suggest that the negotiation take a break until such times as that behaviour is no longer present. To do otherwise, to continue with the negotiation facing these intrusions, one merely reinforces the other party to continue their tricks. However, by calling a time out, it takes away the reward for such behaviour and usually puts the parties back into a better frame of mind after the break.

Additional Considerations

To this point we have discussed numerous strategies that will hopefully push you toward more effective negotiations; principles to consider within the preparation, communication, exchange and relationship components of a negotiation. There are several additional considerations to effective negotiation, each of which will be discussed next.

Time is an Asset

Do not underestimate the power of time and deadlines on your negotiation process. The party with the most amount of time to burn is typically the party with the upper hand. If you have time constraints, you are at a disadvantage because it adds pressure to reach an agreement that you might otherwise not agree to, it takes away time to find more optimal solutions, it makes the negotiation more heated and less rational, and it may convey desperation. So, it is important for you to fully appreciate the importance of having time on your side, giving you the luxury to choose when or where to negotiate.

Anchoring Effect

The anchoring effect is a psychological phenomenon whereby the first number put on the table – be it a list price, an offer, an appraisal value – "anchors" the negotiation around that initial number because negotiators make insufficient adjustments away from that number. To illustrate, when reading a list price for a condo, a potential buyer will tend to consider an offer in terms of how much away from that list price they can go, rather than making an offer dependent solely upon what they believe is its value. Knowing the power of the anchoring effect can work to your advantage in two ways. First, it is important to recognize it so you don't fall prey to it yourself. How you do so is by ignoring that initial number and focusing upon some other standard to counterbalance the power of that initial number. Second, you can use your knowledge of the anchoring effect to bias negotiations in your favour. When possible, come up with an anchor that sets the tone for the rest of the negotiation.

Conclusion

Becoming an effective negotiator is an important and achievable goal for real estate licensees, and you have learned numerous principles to consider en route to improving your negotiation effectiveness. Improvement in your skills will come about through the adoption of the "integrative negotiation" mindset and through the adoption of specific negotiation principles. The goal of this material has been to introduce you to this mindset and principles, a mindset and principles that research has shown to truly enhance negotiation effectiveness. Keep in mind however that it is not enough to read about negotiations – you also have to internalize and practice what you've read in order for it to be useful to you. In your upcoming negotiations, sit down with paper and pen and prepare your negotiations thoroughly and methodically. After each negotiation, analyze what you did well, what you did not do well, or what you forgot to do, and make notes on what you will try to do differently next time.

RISK MANAGEMENT FOR LICENSEES

Introduction

As consumer expectations of the professionals they turn to for advice continue to grow, so will the risk of litigation. It seems to be a fact of life that professionals, be they doctors, lawyers or real estate licensees, face an increasing risk of being sued as a result of their day to day professional activities. Hardly a day goes by without the Real Estate Errors and Omissions Insurance Corporation being notified by a licensee of a work-related law suit. Even where these law suits prove to be groundless, they are stressful, time consuming and expensive to defend. However, even though the risk of litigation is inescapable for a professional in our society and cannot be eliminated, there are three steps which a real estate licensee can consciously take to manage the risk: shifting the risk; anticipating the risk; and, controlling the risk.

Risk Shifting

The goal of risk shifting is to move the risk of loss from your shoulders to those of someone who is better positioned to take the risk. Here are some ways in which that can be done:

Insurance

The most common method of shifting risk is by buying insurance. Then the risk of financial loss is shifted to the insurer. Of course, all licensees already have Errors and Omissions insurance by virtue of the Indemnity Plan. However, while the Indemnity Plan's coverage may be sufficient both in terms of the $1,000,000 limit and the broadness of the coverage for the majority of licensees, some licensees involved, for example, in large commercial transactions may feel that the $1,000,000 limit is inadequate. Similarly, some licensees may be concerned about the Indemnity Plan's exclusion of prior acts coverage or coverage for property management. Licensees can buy this coverage through private insurers and ought to analyze their own particular situation to see whether or not it is required.

Consider Referring Certain Work Out

Another approach, for example, to the exclusion in the Indemnity Plan in regard to property management would be for those agencies which do very little property management work to shift the risk by adopting a policy of referring it out to other agencies which may specialize in that area. This might be a more cost effective approach to managing the risk resulting from doing property management than buying additional insurance.

The Property Disclosure Statement

When obtaining a listing it is prudent to also obtain a signed disclosure statement from the vendor describing the property for sale, thus to a certain extent shifting the risk of misrepresentation to the vendor.

A Property Disclosure Statement (PDS) was developed by the British Columbia Real Estate Association and introduced, on a voluntary basis, in 1992 (see sample, Appendix 11.3). It was adopted by most real estate boards in British Columbia, and, as of September 1, 1993 the PDS became mandatory for all MLS® residential listings. The PDS is intended to promote full communication between vendors and purchasers in real estate transactions. Full communication should result in purchasers paying, and vendors receiving, a fair price for the property, with the purchasers having as much information as possible concerning their new property. Full disclosure should also reduce the frequency of litigation concerning real estate transactions because such litigation is often the result of a misunderstanding or lack of information at the time of the purchase. Finally, the PDS provides a written record which enables vendors to establish what information they disclosed and purchasers to establish what information was withheld, at the time of the making of the contract of purchase and sale.

Advantages of the Property Disclosure Statement

From the vendor's perspective, the PDS will assist in the vendor's review of the condition of their property. It provides a written record of the representations made or not made to the purchaser. A completed disclosure statement will reduce the risk of a misunderstanding with the purchaser and will, in many cases, eliminate the purchaser's frequent complaint that a particular problem was not disclosed prior to entering into the

contract of purchase and sale. Vendors should consider each question carefully to ensure that all relevant information concerning each point has been included in the disclosure statement.

From the purchaser's point of view, the PDS will provide some basic information from the person most familiar with the property – the vendor. This information may not be readily apparent to the purchaser upon a casual inspection. The information on the disclosure statement covers some common problem areas and gives the purchaser a list of points to consider during an inspection of the property. The disclosure statement will, therefore, assist purchasers in deciding which property to purchase.

ALERT

Licensees who act for buyers should caution their clients that questions on the PDS worded "Are you aware..." refer only to the present tense. A negative answer does not mean that there has not been a problem in the past or that a past problem will not recur.

Buyers should be advised to obtain an independent inspection, even if a PDS exists and is incorporated into the contract.

Source: *Report From Council*, January 2000

Finally, from the point of view of the licensee, the disclosure statement will assist you in your function of communicating information between a vendor and a purchaser. When there is a problem with a real estate transaction, the purchaser may later claim misrepresentation or that information was improperly withheld, whereas the vendor may claim reliance on the licensee to have provided the purchaser with the necessary information. The licensee is often caught in the middle. Many such claims can be avoided if the vendor is encouraged to take care in providing to the purchaser a properly completed disclosure statement. The questions on the disclosure statement will assist the licensee in reviewing all relevant aspects of the property at the time the property is listed for sale and will ensure that all parties involved in the transaction have the same information.

How to Use the Property Disclosure Statement

The PDS should be completed by the vendor at the time a property is listed for sale. Prospective purchasers will want to review the disclosure statement prior to making an offer or, in the alternative, will make an offer subject to receiving and approving a disclosure statement within a specified time.

Vendors should respond directly to the questions and add clearly worded comments, as required, to describe their property. Of course, it is not sufficient for a licensee simply to take everything the vendor says at face value. Those items which can be checked with, for example, a municipal office, ought to be checked. In addition, if the licensee is aware of information which raises questions as to the accuracy of the vendor's statement, there is a duty on the licensee to investigate further and check out the accuracy of the statement. Purchasers, for their own part, should read the disclosure statement carefully and request additional information or arrange independent inspections where necessary.

It should be noted that while most purchasers and vendors will want to make the PDS part of their contract of purchase and sale, it does not form a part of the contract unless so agreed by the parties. To accomplish this, a clause must be inserted in the contract of purchase and sale to this effect. The Professional Standards Manual suggests the following wording for such a clause:

The attached Property Disclosure Statement, dated (date) 20__, is incorporated into and forms part of this contract.

Where the PDS is prepared respecting a strata lot, the disclosure should be limited to the owner's unit only, and should not include a statement regarding the common property. The Real Estate Board of Greater Vancouver suggests the following limitation:

> Answers on this disclosure statement relate only to the strata unit which is the subject of this transaction.

FIGURE 11.3: The Property Disclosure Statement

As of September 1, 1993, the PDS became mandatory for all MLS® residential listings. The following is reproduced with the permission of the Real Estate Board of Greater Vancouver.

Answers to the most commonly asked questions about the PDS

What should I do if the sellers don't want to complete a PDS?
Explain that a signed PDS must be submitted for all residential listings on MLS®. If the sellers do not wish to complete the information part of the form, tell them to draw a line through it and sign at the bottom, thus acknowledging they have been given an opportunity to complete it.

What are the consequences if the sellers refuse to sign a PDS althogether?
The listing will be rejected by MLS®. All residential listings must be accompanied by a signed PDS.

In the case of multiple owners should each registered owner sign the PDS?
Yes, each registered owner should sign the form to avoid any future conflict.

Should a new PDS be completed if there is a change in any of the disclosed information during the listing period?
Yes. The PDS may eventually form part of the Contract of Purchase & Sale; therefore, all information must be current.

What if the sellers do not understand some of the form's terminology, ie. the word "encroachment?"
You should try to explain to the sellers anything they don't understand about the PDS. If after such explanation the sellers are still not understanding, then have them consult others (i.e. lawyer, interpreter etc.). Sellers should never sign a document they don't understand.

What should I do if I suspect the sellers have answered a question incorrectly?
Advise the sellers of the need for accuracy as the PDS will be relied upon by the buyers and may eventually form a part of the Contract of Purchase and Sale. When in doubt of an answer, you, the REALTOR®, are obliged to investigate further through such means as Land Title Office and City Hall.

Could the sellers be at a greater disadvantage in a potential lawsuit if they disclose an addition or alteration made without a permit than if they hadn't disclosed?
No, but the sellers could be held to have made a fraudulent misrepresentation by not disclosing unauthorized changes if the buyers suffer any damages.

What if the sellers have no real knowledge of the property, ie. an absentee owner?
If the sellers have never seen the property or have no real knowledge of it, they must draw a line through the form and sign it at the bottom. Sellers can make a notation in the comments section explaining why the form has not been completed.

Will the PDS automatically become part of the Contract of Purchase & Sale?
No, if the parties wish it to become a part of the Contract of Purchase & Sale, the PDS must be joined to the Contract of Purchase and Sale as described on the back of the form.

Is the PDS mandatory on MLS® for residential properties only?
Yes. Any property which is listed on MLS® utilizing the Residential Data Input Form must be accompanied by a PDS at the time of submission to the Board.

Does the PDS eliminate the need for property inspections?
No, the PDS is just the first step in acquiring information about a property; property inspections should continue to be encouraged.

How does the PDS protect all parties to a transaction?
Representations by the sellers about the condition of the property will be clearly set out on the form which should eliminate unfounded after-sale claims of misrepresentation from buyers; the buyers are provided with information about the home they know nothing about and, for REALTORS®, it shifts much of the risk onto parties to the transaction.

If the PDS has been joined to the Contract of Purchase & Sale does it become a warranty that survives the contract?
Yes, all answers are representations valid as of the date of disclosure.

As a Licensee...

With the legalization of recreational cannabis, disclosure relating to the growth of cannabis on a property has become increasingly important. Cannabis growers often modify the heating and electrical systems in buildings, which can increase risks for fire and electrocution. Furthermore, given the conditions required to grow cannabis, the potential for mould growth increases in a property that has been used to grow cannabis. As a result, it can be more difficult and more expensive to insure a property that has been used to grow cannabis. Consequently, prospective purchasers typically want to know whether a property has been used to grow cannabis. Section 4: "General" of the sample Property Disclosure Statement included as Appendix 11.3 asks the following question: "Are you aware if the Premises have been used to grow cannabis (other than as permitted by law) or to manufacture illegal substances?" It is important that licensees acting for sellers advise their clients to accurately and honestly reply to this question when completing the Property Disclosure Statement.

Third Party Experts

When a licensee is asked a technical question, for example in regard to the structural soundness of the foundation of a building, licensees should not hesitate to shift the risk by recommending that the purchaser retain the services of someone expert in that area. Incidentally, the prudent way to recommend such an expert is by suggesting several alternatives and allowing purchasers to make their own choices.

Risk Anticipation

Avoiding Purchaser's Remorse

Unfortunately, it is not an uncommon experience for purchasers to experience some disappointment once they actually take possession of their new house. While it may not be obvious on the surface, there is an important emotional dimension involved in the purchase of a house. Often purchasers have unrealistic expectations, and when these expectations are frustrated litigation can sometimes be the result. The goal of the licensee should be to anticipate this potential purchaser's remorse by making efforts to assist the purchaser in having realistic expectations, at least as far as the services the purchaser can expect to receive from the licensee. To begin with, the licensee should be clear as to who is their principal in the transaction. It would assist the purchaser to have realistic expectations of the licensee if the purchaser understood that the licensee had certain obligations or duties to the vendor. In addition, the licensee should clarify to the purchaser that their role is primarily that of a marketing specialist and that licensees are not competent to give opinions on such subjects as, for example, the structural soundness of buildings. Licensees should also take advantage of the list of information regarding transactions that is provided as part of the standard form contract of purchase and sale. While this information does not form a part of the contract terms, it can help the parties to the transaction understand the process. If the purchaser has realistic expectations of the licensee and the licensee lives up to those expectations, there is less likelihood that an attack of purchaser's remorse will lead to the licensee being sued.

Document Disclosures and Disclaimers

It is not enough simply to make disclosure to a purchaser, or suggest a third party expert in response to a purchaser's questions, or to give an opinion with a disclaimer accompanying it unless the licensee documents what they have done. The licensee must anticipate the situation they will be in when a disgruntled consumer commences a lawsuit. It is entirely likely that the licensee's recollection of what happened in regard to the particular deal which results in the lawsuit will be vague. The consumer, of course, will claim to remember everything vividly. A court faced with choosing between that clear evidence and the vague recollections of the licensee will inevitably choose the evidence of the consumer unless the licensee has documentation to support their evidence. Therefore the licensee should be careful to document disclosures and disclaimers, preferably by sending a brief letter to the party involved or by making careful notes of the conversation and keeping them on file.

In addition, it is especially important in a heated market to properly document your listing appraisal of a property in order to be in a position later to refute allegations that the property was undersold.

Avail Yourself of Others' Experience

There are few problems a licensee will encounter in selling real estate that have not been encountered by others previously. A licensee should not hesitate to seek the advice of others more experienced, perhaps beginning with the office manager.

A licensee can also anticipate and avoid possible problems by keeping available and frequently referring to the Professional Standards Manual and other publications in the industry which contain, for example, precedent wordings for clauses to be used in contracts of purchase and sale.

Continuing Education

In order to be better able to anticipate potential problems and new sources of risk, a licensee needs to anticipate developments in the real estate industry. One of the best ways to do this is by attending continuing education courses.

Risk Control

While the first two steps in managing the risk of litigation are taken before a problem arises, the purpose of risk control is to deal with the problem once it exists, thereby preventing it from becoming more serious than it need be.

Procedures and Policies

Each agency should have in place its own procedures and policies for dealing with consumer complaints as they arise. An important aspect of this is a centralized reporting procedure, usually involving the office manager, who should be made aware as soon as the licensee receives a complaint. By involving the manager, a fresh point of view in regard to the problem is obtained as well as the manager's experience in having dealt with similar problems in the past. It is important that complaints be handled sensitively, no matter how frivolous or ill founded they may appear to be.

Avoid Litigation Flashpoint

Having procedures and policies which enable problems to be identified early also assists in enabling the agency to deal with the problem before it heats up to the litigation flashpoint. Often a simple explanation or clarification at an early stage will defuse a problem which will only grow worse if the consumer is met with indifference or, even worse, rudeness. In cases where there is a serious problem which cannot be readily resolved, early attention to the matter will enable the agency to properly assess the litigation risk it presents and to commence gathering evidence that will be required in the event litigation cannot be avoided.

Environmental Risk Management

The *Environmental Management Act* does not expressly set out what a licensee should or should not do in real estate transactions. The legislation focuses on owners and operators. But this does not mean that licensees can ignore the legislation, and those who disregard the new legislation will increase their risk of being sued by sellers and buyers under the common law of agency, contract and negligence law.

Disclosing Environmental Information to the Client

While attempting to sell a property, a licensee may discover a potential contamination problem. For example, they may find that a property was a former dump site or that a property has an abandoned underground tank. Although the temptation exists not to disclose this bad news to the seller in order to keep the property value as high as possible, the licensee has a duty to convey to the seller/principal any information which could influence the principal's judgement respecting the subject property. A prudent seller needs to know about the presence of toxic problems, in part to avoid future litigation and liability. If the seller is later sued by the buyer of property that is found to be contaminated and the licensee did not disclose the problem to the seller, the seller may claim against the licensee for fraudulent non-disclosure of the contamination.

Drafting Agreements

The licensee's duties include drafting legally enforceable documents. Since there are no provisions relating to contamination problems in the standard form contract of purchase and sale of residential property, sellers and buyers may ask licensees to draft and insert such protective provisions into the agreement. In commercial real estate transactions, lawyers are more likely to be responsible for drafting the agreements, however, when faced with issues regarding these provisions, licensees should recognize the inherent difficulties of drafting clauses to deal with contamination problems. Without thorough and sometimes costly research, it can be difficult or impossible to know which substances might be present. Site-specific knowledge is critical because the courts will not provide relief to the buyer where the seller warrants against the presence of one toxic substance but another is later found.

A broadly worded warranty that "no toxic substances exist" is also problematic because the definition of "toxic" is fraught with scientific uncertainty. Toxicity depends on a host of factors such as the species exposed, the duration of exposure, and the presence of other chemicals. There is no commonly accepted list of substances that a court necessarily would find to be "toxic". Therefore, the prudent course of action for licensees is to take all reasonable steps to determine the extent of possible contamination and then to apply professional judgement in drafting the agreement. As discussed next, applying professional judgement includes seeking other professional advice.

Documenting Due Diligence

When disclosure of environmental concerns becomes necessary, licensees should make sure to document those disclosures in writing. Licensees might also consider providing written advice to their clients about environmental concerns in general and about the nature of potential liabilities which may arise under environmental laws in connection with the ownership and operation of real estate. As usual, any such advice should be qualified with a warning that the licensee is not an environmental expert, and a recommendation that the client consult with environmental specialists for advice specific to the transaction.

Seeking Other Professional Advice

Part of a licensee's professional judgement is in recognizing when other professional expertise is required. For example, a well-intentioned licensee might convey information in a technically inaccurate way, causing others to misinterpret the information. Agreements which address serious or complex technical matters should be referred to legal and environmental professionals for advice. An ounce of professional prevention is worth a pound of litigation "cure".

Of course, licensees do not have a duty to conduct a full-blown environmental assessment of every property. They do, however, have a professional duty to recommend that steps be taken to assess potential risk through qualified environmental consultants and counsel, as appropriate to the circumstances. In addition, the licensee should inform the parties of any potential environmental problem (such as the known or suspected use of asbestos in the construction of the building) which were noticed during an inspection. While the licensee's professional duties do not include giving legal advice, they should understand and alert, in general terms, the parties of the potential liabilities which they may face under the environmental laws, and where appropriate, refer the client to legal counsel for further assistance. In practice, prudent licensees assist in negotiating the essential terms of the transaction, including how potential environmental liabilities might be allocated between the parties, and legal counsel become more involved in complex negotiations.

Conclusion

It is one of the happy coincidences in life that a licensee doing everything possible to reduce exposure to the risk of litigation will also be doing their job in a thorough and professional manner. While errors and omissions insurance has an important role to play in the risk management process, the program cannot survive an endlessly increasing number of claims. At the end of the day the ultimate responsibility for risk management rests with the individual licensee. It will be the success or failure of the individual licensee in managing risk, coupled with the industry's efforts at continuing education, which will determine the long-term viability of self-insurance as a means of protecting licensees from financial loss resulting from errors or omissions.

SUMMARY

One of the heaviest responsibilities of a real estate licensee is to do everything possible to ensure that the contract between the vendor and purchaser is enforceable. An unenforceable contract always harms at least one of the parties, as well as the licensee who loses the commission. Of course a licensee need not have complete knowledge of contract law but familiarity with the basic principles is necessary for a successful practice.

APPENDIX 11.1
Sample Listing Contract

MULTIPLE LISTING CONTRACT

MULTIPLE LISTING SERVICE® MLS® OFFICE USE ONLY

DATE _____ LISTING MLS® NO _____

BETWEEN: _____ OWNER(S) ("SELLER")
_____ OWNER(S) ("SELLER")
_____ OWNER(S) ("SELLER")
_____ UNIT ADDRESS
_____ CITY PROV PC
_____ TELEPHONE NUMBER CELL NUMBER

AND: _____ ("LISTING BROKERAGE")
_____ UNIT ADDRESS
_____ CITY PROV PC
_____ TELEPHONE NUMBER CELL NUMBER

1. LISTING AUTHORITY AND TERM:

A. The Seller hereby lists exclusively with the Listing Brokerage the property described in Clause 2 ("Property") from _____ (Effective Date) until 11:59 pm on _____ (Expiry Date) unless renewed in writing.
MONTH DAY YEAR — MONTH DAY YEAR

B. The Seller hereby:
(i) authorizes the Listing Brokerage to obtain information concerning the Property from any person, corporation or governmental authority, including any mortgagee and British Columbia Assessment, and to share this information with other parties, including members of any real estate board;
(ii) authorizes the Listing Brokerage to advertise the Property and to show it to prospective buyers during reasonable hours;
(iii) restricts the advertising of the Property to the Listing Brokerage only except where the advertising of the Property by other members of the real estate board of which the Listing Brokerage is a member (hereinafter referred to as the "Board") or any other real estate board has been permitted by the Listing Brokerage;
(iv) agrees to allow the Listing Brokerage to place "For Sale" and "Sold" signs upon the Property; and
(v) agrees to allow Cooperating Brokerages (as hereinafter defined) and, with the written consent of the Seller, a sub-agent of the Listing Brokerage ("Sub-Agent") to show the Property to prospective buyers.

2. PROPERTY:
_____ UNIT NO. HOUSE NO. STREET NAME STREET TYPE STREET DIRECTION
_____ CITY/TOWN/MUNICIPALITY POSTAL CODE
_____ PID OTHER PID(S)

INITIALS

APPENDIX 11.1, *continued*
Sample Listing Contract

PROPERTY ADDRESS

LEGAL DESCRIPTION

3. TERMS OF SALE: _____
LISTING PRICE TERMS

4. LISTING SERVICE AND COOPERATING BROKERAGES: The Seller authorizes the Listing Brokerage:

A. To list the Property with the Multiple Listing Service® of the Board and any other real estate board that the Listing Brokerage selects and has access to and to cooperate with brokerages (which may include the Listing Brokerage) and their designated agents (other than the Designated Agent) acting for a prospective buyer ("Cooperating Brokerages");

B. To publish in the Multiple Listing Service® of the Board, the Multiple Listing Service® of any other real estate board, Internet, or anywhere else that the Listing Brokerage selects and has access to, and to share with other parties, including British Columbia Assessment, the information contained in this Contract, the information contained in the Data Input Form and the Seller's Property Disclosure Statement, if applicable, and the sale price of the Property once an unconditional accepted offer exists; and

C. To make agency disclosures required of the Listing Brokerage.

5. LISTING BROKERAGE'S REMUNERATION:

A. The Seller agrees to pay the Listing Brokerage a gross commission equal to the amount set out in Clause 5D, in accordance with this Clause 5, if:

(i) a legally enforceable contract of sale between the Seller and a Buyer is entered into during the term of this Contract; or

(ii) a legally enforceable contract of sale between the Seller and a Buyer who is introduced to the Property or to the Seller, by the Listing Brokerage, the Designated Agent (as hereinafter defined), a Sub-Agent, a Cooperating Brokerage or any other person including the Seller during the term of this Contract is entered into:

(a) within sixty (60) days after the expiration of the term of this Contract; or

(b) any time after the period described in (a) where the efforts of the Listing Brokerage, the Designated Agent (as hereinafter defined), the Sub-Agent or the Cooperating Brokerage were an effective cause;

provided, however, that no such commission is payable if the Property is listed with another licensed brokerage after the expiration of the term of this Contract and sold during the term of that listing contract;

except, in the case of (i) or (ii), if the Property is "residential real property" (as defined in the *Home Buyer Rescission Period Regulation*) that is not exempt and the buyer has exercised their right of rescission set out in Section 42 of the *Property Law Act* within the prescribed period and in the prescribed manner for doing so in which case no remuneration will be payable by the Seller; or

(iii) an offer to purchase is obtained from a prospective buyer during the term of this Contract who is ready, willing and able to pay the Listing Price and agrees to the other terms of this Contract, even if the Seller refuses to sign the offer to purchase.

B. The Seller will pay the remuneration due to the Listing Brokerage under this Clause 5 on the earlier of the date the sale is completed, or the completion date, or where no contract of sale has been entered into seven (7) days after written demand by the Listing Brokerage.

INITIALS

APPENDIX 11.1, *continued*
Sample Listing Contract

C. The Seller agrees that, to assist in obtaining a buyer for the Property, the Listing Brokerage will offer to Cooperating Brokerages and Sub-Agents a portion of the Listing Brokerage's commission.

D. (i) Upon the occurrence of an event described in Clauses 5A(i), 5A(ii) or 5A(iii), the Seller will pay remuneration to the Listing Brokerage of an amount equal to:

_____

_____

of the sale price of the Property, plus applicable Goods and Services Tax and other applicable tax in respect of the commission (commission + tax = remuneration).

(ii) If there is a Cooperating Brokerage, the Listing Brokerage will pay to the Cooperating Brokerage, from the remuneration paid to the Listing Brokerage by the Seller pursuant to Clause 5D(i), an amount equal to:

_____

_____

of the sale price of the Property, plus applicable Goods and Services Tax and other applicable tax in respect of the commission; and the Listing Brokerage will retain, from the remuneration paid to the Listing Brokerage by the Seller pursuant to Clause 5D(i), an amount equal to:

_____

_____

of the sale price of the Property, plus applicable Goods and Services Tax and other applicable tax in respect of the commission.

(iii) If there is no Cooperating Brokerage, the Listing Brokerage will retain the entire amount of the remuneration paid by the Seller pursuant to Clause 5D(i), being an amount equal to:

_____

_____

of the sale price of the Property, plus applicable Goods and Services Tax and other applicable tax in respect of the commission.

E. The Listing Brokerage and the Designated Agent will advise the Seller of any remuneration, other than described in this Clause 5, to be received by the Listing Brokerage in respect of the Property.

6. ASSIGNMENT OF REMUNERATION: The Seller hereby irrevocably:

A. Assigns to the Listing Brokerage from the proceeds of sale of the Property, the amount of remuneration due to the Listing Brokerage and authorizes the Listing Brokerage to retain from the deposit monies the amount of the Listing Brokerage's remuneration;

B. Acknowledges that the Listing Brokerage may assign to a Cooperating Brokerage, a Sub-Agent or both of them all or part of the remuneration due to the Listing Brokerage; and

C. Directs, or agrees to sign such documents as may be required by the Listing Brokerage irrevocably directing a Lawyer or Notary Public acting for the Seller or a buyer, to pay the remuneration due to the Listing Brokerage, or the net amount remaining after the deposit monies held in trust have been credited against the remuneration due to the Listing Brokerage, to the Listing Brokerage a Sub-Agent, and a Cooperating Brokerage, where applicable, by separate cheques to the Listing Brokerage, the Sub-Agent and the Cooperating Brokerage.

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APPENDIX 11.1, *continued*
Sample Listing Contract

PROPERTY ADDRESS

7. DESIGNATED AGENCY:

A. Subject to Clause 7C(iii) the Listing Brokerage designates _____

_____

(the "Designated Agent") to act as the sole agent of the Seller in respect of the Property and will designate one or more licensees of the Listing Brokerage to act as the sole agents of all buyers and other sellers also represented by the Listing Brokerage. If for any reason the license of the Designated Agent (or where the Designated Agent is comprised of more than one licensee, the licenses of all of those licensees) is suspended, cancelled or becomes inoperative under the *Real Estate Services Act* or the Designated Agent (or where the Designated Agent is comprised of more than one licensee, all of those licensees) is temporarily unavailable or ceases to be engaged by the Listing Brokerage, the Listing Brokerage will designate another licensee of the Listing Brokerage to act as the sole agent of the Seller;

B. The Designated Agent will not disclose to other licensees, including licensees of the Listing Brokerage who represent buyers or other sellers, any confidential information of the Seller obtained through the Designated Agent's agency relationship with the Seller unless authorized by the Seller or required by law.

C. The Seller agrees that:
   (i) subject to (iii) an agency relationship will exist only with the Designated Agent;
   (ii) information obtained by the Designated Agent through the Designated Agent's agency relationship with the Seller will not be attributed to the Listing Brokerage or to other licensees of the Listing Brokerage who represent buyers or other sellers;
   (iii) the Listing Brokerage's agency relationship is limited to listing the Property with the Multiple Listing Service® of the Board and any other real estate board that the Listing Brokerage selects and has access to; and
   (iv) for the purposes of Clauses 1B, and 4, the term Listing Brokerage shall include the Designated Agent.

8. THE DESIGNATED AGENT WILL:

A. Act as the agent of only the Seller with respect to the Property;
B. Provide information about the Property to Sub-Agents and Cooperating Brokerages;
C. Subject to Clause 9A use reasonable commercial efforts to market the Property and to promote the interests of the Seller;
D. At the earliest reasonable opportunity, advise any buyer interested in the Property that the Designated Agent is the agent of the Seller;
E. Fulfill the duties set out in
   (i) Real Estate Services Rule 30, except as modified or made inapplicable by agreement between the Listing Brokerage and the Seller, and
   (ii) Real Estate Services Rule 33 and 34;
F. Obey all lawful instructions of the Seller that are consistent with the Real Estate Services Act, the Real Estate Services Rules, the REALTOR® Code and all applicable Rules and Bylaws of the real estate board or association including related Regulation and Policies;

9. THE LISTING BROKERAGE AGREES:

A. That the services set out in Schedule "A" will be provided. Where the Listing Brokerage and the Designated Agent have chosen or agreed not to provide services to the Seller other than submitting the listing for posting with the Multiple Listing Services® of the Board and any other real estate board that the Listing Brokerage selects and has access to, Schedule "A" may include modifications to Clauses 5A, 5B, 6A, 6B, 6C, 8B, 8C, 8D, 8E, 10A, 10C, 10D, 10F and 10G;

INITIALS

APPENDIX 11.1, *continued*
Sample Listing Contract

B. To monitor and supervise the activities of the Designated Agent to ensure compliance by the Designated Agent with the provisions of this Contract and with the Listing Brokerage's policies and procedures governing designated agents;
C. Not to disclose confidential information of the Seller to any person unless authorized by the Seller or required by law;
D. To treat the interests of the Seller and all buyers and other sellers also represented by the Listing Brokerage in an even handed, objective and impartial manner; and
E. To hold all monies received by the Listing Brokerage in trust in accordance with the *Real Estate Services Act*.

10. THE SELLER AGREES:

A. To promptly advise the Designated Agent of, and refer to the Designated Agent, all inquiries for the purchase of the Property, and to deliver to the Designated Agent all offers to purchase which may be received during the term of this exclusive Contract or arising by reason of it;
B. That the Seller has the authority to sell the Property and to enter into this Contract;
C. That the Seller will disclose to the Designated Agent all third party claims and interests in the Property known to the Seller;
D. That the Seller will disclose to the Designated Agent all material latent defects affecting the Property known to the Seller and that the Designated Agent may provide that information to prospective buyers;
E. That all information provided to the Listing Brokerage and the Designated Agent by the Seller is and will be accurate to the best of the Seller's knowledge;
F. That the Seller will immediately advise the Designated Agent of any material changes in the physical condition or status of the Property or the information provided by the Seller;
G. That the Seller will provide the Designated Agent with all information necessary for the listing and marketing of the Property;
H. That the Designated Agent is being retained solely to provide real estate services and not as a lawyer, tax advisor, lender, certified appraiser, surveyor, structural engineer, home inspector or other professional service provider; and
I. That the Property is not currently the subject of any other exclusive listing contract.

11. THE SELLER ACKNOWLEDGES AND AGREES THAT:

A. The information relating to the Property may be disclosed to persons interested in the Property including prospective buyers, agents of prospective buyers, appraisers, financial institutions, governments and governmental departments and agencies;
B. The duties set out in Real Estate Services Rule 30 apply only to the Designated Agent and do not apply to any other licensees of the Listing Brokerage who represent buyers or other sellers and, subject to Clauses 9B, 9C and 9D, do not apply to the Listing Brokerage.
C. The Listing Brokerage or the Designated Agent may provide trading services to, have agency relationships with or be engaged by other sellers, or have agency relationships with or be engaged by buyers, unless doing so would constitute a dual agency that is not permitted by Part 5 of the Real Estate Services Rules;
D. In the case that the provision of trading services to the Seller contemplated hereby and the provision of trading services to a buyer or another seller constitutes or becomes a dual agency that is not permitted by Part 5 of the Real Estate Services Rules, the Seller acknowledges and agrees that the Listing Brokerage and the Designated Agent, as applicable, must comply with Real Estate Services Rule 65 and may be required to cease providing certain trading services to the Seller;

INITIALS

APPENDIX 11.1, *continued*
Sample Listing Contract

E. Despite Real Estate Services Rule 30(f), the Listing Brokerage and the Designated Agent will not be required to disclose to the Seller confidential information obtained through any agency relationship; and
F. A Seller, who is a non-resident of Canada, must comply with the *Income Tax Act* of Canada before the sale of the Seller's property can be completed.

12. CONFLICTS OF INTEREST:

A. If the Designated Agent's provision of trading services to the Seller in respect of the Property and a buyer with whom the Designated Agent has an agency relationship would constitute a dual agency that is not permitted by Part 5 of the Real Estate Services Rules, the Designated Agent may request consent from the Seller and such buyer to continue to represent either the Seller or such buyer in respect of the Property and terminate their agency relationship with the other party. In such case, the Designated Agent will present such buyer and the Seller with a written agreement in compliance with Section 65 of the Real Estate Services Rules (the "Consent Agreement"). Notwithstanding anything else in this Contract, if the Seller and such buyer consent to the Designated Agent continuing to act for one of them, and terminating the agency relationship with the other, in respect of the Property and they execute the Consent Agreement, the parties hereto agree as follows:
   (i) if the Designated Agent ceases to act as agent of such buyer, the Seller acknowledges and agrees that the Designated Agent may otherwise in the future act as agent for such buyer in respect of property other than the Property;
   (ii) if the Designated Agent ceases to act as agent of the Seller in respect of the Property, subject to Part 5 of the Real Estate Services Rules, the Listing Brokerage may designate another licensee of the Listing Brokerage to act as the Designated Agent of the Seller hereunder or if the Listing Brokerage is unable to or does not designate another licensee of the Listing Brokerage, the Listing Brokerage may refer the Seller to another brokerage for representation in respect of the Property; provided that, the Seller will not be obligated to accept such referral; and
   (iii) if the Designated Agent ceases to act as the agent of the Seller in respect of the Property, the parties acknowledge that:
      (a) the Designated Agent's agency with the Seller will terminate and the Designated Agent will no longer have any duties to the Seller as agent of the Seller, whether under this Contract, under the Real Estate Services Rules (other than their duties of confidentiality under Rule 30(e)) or otherwise; and
      (b) the Listing Brokerage and the Designated Agent will be permitted by the terms of the Consent Agreement and the Real Estate Services Rules to continue to represent such buyer.

13. COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION:

A. The Seller hereby consents to the collection, use and disclosure by the Listing Brokerage and by the managing broker(s), associate broker(s) and representative(s) of the Listing Brokerage (collectively the "Licensee") noted below, the Board and any other real estate board, of personal information about the Seller:
   (i) for all purposes consistent with the listing, marketing and selling of the Property;
   (ii) for placement in the database of the Multiple Listing Service® of the Board and of any other real estate board that the Listing Brokerage selects and has access to;
   (iii) for the purpose of the Board and other real estate boards marketing the Property in any medium including but not limited to posting the personal information on publicly accessible websites and distributing the personal information to any persons including the public, members of the Board, members of other real estate boards governments and governmental departments and agencies, appraisers and others;

INITIALS

APPENDIX 11.1, *continued*
Sample Listing Contract

(iv) for compilation, retention and publication by the Board and other real estate boards of any statistics including historical Multiple Listing Service® data for use by persons authorized to use the Multiple Listing Service® of the Board and other real estate boards;
(v) for enforcing codes of professional conduct and ethics for members of the Board and other real estate boards;
(vi) for all other purposes authorized in this Contract including but not limited to those described in Clauses 1B, 4A, 4B, 8B and 11A; and
(vi) for the purposes (and to the recipients) described in the British Columbia Real Estate Association's Privacy Notice and Consent form.

B. The personal information provided by the Seller may be stored on databases outside Canada, in which case it would be subject to the laws of the jurisdiction in which it is located.

14. TERMINATION: The Listing Brokerage and the Seller agree that:

A. Without prejudice to the acquired rights of the Seller or the Listing Brokerage, including without limitation the rights and obligations under Clause 5, this Contract will terminate:
(i) upon the expiration of the term of this Contract as specified in Clause 1A;
(ii) upon an earlier date than that specified in Clause 1A if mutually agreed to by the Seller and the Listing Brokerage in writing;
(iii) upon a completed sale of the Property prior to the expiration of the term of this Contract;
(iv) immediately if the Listing Brokerage's licence is suspended, cancelled or rendered inoperative under the *Real Estate Services Act*;
(v) upon the bankruptcy or insolvency of the Listing Brokerage or if it is in receivership; and
(vi) if the Listing Brokerage and the Designated Agent are unable to continue to provide trading services to the Seller as a result of Part 5 of the Real Estate Services Rules.

B. Immediately upon the termination of this Contract the Listing Brokerage and the Designated Agent will:
(i) remove the Property as an active listing of the Multiple Listing Service® of the Board and any other real estate board that the Listing Brokerage has selected;
(ii) cease all marketing activities on behalf of the Seller;
(iii) remove all signs from the Property; and
(iv) if requested by the Seller, return all documents and other materials provided by the Seller.

15. MISCELLANEOUS PROVISIONS:

A. "Sale" includes an exchange and "sale price" includes the value of property exchanged.
B. The "term" of this Contract includes the period of any written extension.
C. Interpretation of this Contract and all matters concerning its enforcement by the parties shall be governed by the laws of the Province of British Columbia.
D. The parties acknowledge that this Contract fully sets out the terms of the agreement between them.
E. This Contract shall be binding upon and benefit not only the parties but also their respective heirs, executors, administrators, successors and assigns.
F. "Property" may include a leasehold interest, a business and the goodwill and assets of it, an interest, partnership or share in a business or in the goodwill and assets of it, or a manufactured home, plus any other property designated by the Seller in the Data Input Form or addendum attached.
G. In consideration of the Board or any other real estate board disseminating information about the Property, the Seller and Listing Brokerage each assign to the Board or other real estate board all their rights and interests in and to the information related to the Property contained in this Contract, including all copyright, rights ancillary to copyright and all other proprietary rights.

INITIALS

APPENDIX 11.1, *continued*
Sample Listing Contract

PROPERTY ADDRESS

16. COUNTERPARTS: The parties agree that this Listing Contract and any amendments or attachments thereto may be executed in counterparts by the parties and delivered originally or by facsimile, email, or other means of electronic transmission. Each such counterpart when so executed and delivered is deemed to be an original and all such counterparts of a relevant document taken together shall constitute one and the same relevant document as though the signatures of all the parties were upon the same document.

17. ENTIRE AGREEMENT – THIS LISTING CONTRACT MEANS AND INCLUDES THIS AGREEMENT AND THE SELLER'S PROPERTY DISCLOSURE STATEMENT (WHEN ATTACHED AND SIGNED BY THE SELLER): Seller acknowledges having read and understood this Contract; that it accurately describes the agreement with the Listing Brokerage; and that a copy of it has been received by the Seller this date. Where the Seller is comprised of more than one party, the obligations under this Contract of each and every party comprising the Seller shall be joint and several.

SIGNED, SEALED & DELIVERED THIS _____ DAY OF _____ YR. _____.

The Seller declares their residency:

RESIDENT OF CANADA [ ][ ][ ] NON-RESIDENT OF CANADA [ ][ ][ ] as defined under the *Income Tax Act*.
INITIALS INITIALS

_____ SEAL	_____ SEAL	_____ SEAL
SELLER'S SIGNATURE	SELLER'S SIGNATURE	SELLER'S SIGNATURE
_____	_____	_____
WITNESS	WITNESS	WITNESS

_____ SEAL	_____ SEAL
PER: MANAGING BROKER'S SIGNATURE/AUTHORIZED SIGNATORY	DESIGNATED AGENT'S SIGNATURE
_____	_____
LISTING BROKERAGE (PRINT)	DESIGNATED AGENT'S NAME (PRINT NAME)

*PREC represents Personal Real Estate Corporation

APPENDIX 11.1, *continued*
Sample Listing Contract

PROPERTY ADDRESS

MULTIPLE LISTING CONTRACT SCHEDULE "A"

INITIALS

APPENDIX 11.2
Contract of Purchase and Sale

INFORMATION ABOUT THE CONTRACT OF PURCHASE AND SALE
RESIDENTIAL

THIS INFORMATION IS INCLUDED FOR THE ASSISTANCE OF THE PARTIES ONLY. IT DOES NOT FORM PART OF THE CONTRACT AND SHOULD NOT AFFECT THE PROPER INTERPRETATION OF ANY OF ITS TERMS.

1. **CONTRACT:** This document, when signed by both parties, is a legally binding contract. READ IT CAREFULLY. The parties should ensure that everything that is agreed to is in writing.

   Notwithstanding the foregoing, under Section 42 of the *Property Law Act* a purchaser of "residential real property" (as defined in the *Home Buyer Rescission Period Regulation*) that is not exempt may rescind (cancel) the Contract of Purchase and Sale by serving written notice to the seller within the prescribed period after the date that the acceptance of the offer is signed. If the buyer exercises their right of rescission within the prescribed time and in the prescribed manner, this Contract of Purchase and Sale will be of no further force and effect, except for provisions relating to payment of the deposits, if any.

2. **DEPOSIT(S):** In the *Real Estate Services Act*, under Section 28 it requires that money held by a brokerage in respect of a real estate transaction for which there is an agreement between the parties for the acquisition and disposition of the real estate be held by the brokerage as a stakeholder. The money is held for the real estate transaction and not on behalf of one of the parties. If a party does not remove one or more conditions, the brokerage requires the written agreement of both parties in order to release the deposit. If both parties do not sign the authorization to release the deposit, then the parties will have to apply to court for a determination of the deposit issue.

   Notwithstanding the foregoing, if the buyer exercises their rescission rights under Section 42 of the *Property Law Act* and a deposit has been paid to the seller or the seller's brokerage or anyone else, the prescribed amount that the buyer is required to pay in connection with the exercise of their rescission right will be paid to the seller from the deposit and the balance, if any, will be paid to the buyer without any further direction or agreement of the parties.

3. **COMPLETION:** (Section 4) Unless the parties are prepared to meet at the Land Title Office and exchange title documents for the purchase price, it is, in every case, advisable for the completion of the sale to take place in the following sequence:

   (a) The buyer pays the purchase price or down payment in trust to the buyer's lawyer or notary (who should advise the buyer of the exact amount required) several days before the completion date and the buyer signs the documents.
   (b) The buyer's lawyer or notary prepares the documents and forwards them for signature to the seller's lawyer or notary who returns the documents to the buyer's lawyer or notary.
   (c) The buyer's lawyer or notary then attends to the deposit of the signed title documents (and any mortgages) in the appropriate Land Title Office.
   (d) The buyer's lawyer or notary releases the sale proceeds at the buyer's lawyer's or notary's office.

   Since the seller is entitled to the seller's proceeds on the completion date, and since the sequence described above takes a day or more, it is strongly recommended that the buyer deposits the money and the signed documents at least two days before the completion date, or at the request of the conveyancer, and that the seller delivers the signed transfer documents no later than the morning of the day before the completion date.

   While it is possible to have a Saturday completion date using the Land Title Office's electronic filing system, parties are strongly encouraged not to schedule a Saturday completion date as it will restrict their access to fewer lawyers or notaries who operate on Saturdays; lenders will generally not fund new mortgages on Saturdays; lenders with existing mortgages may not accept payouts on Saturdays; and other offices necessary as part of the closing process may not be open.

4. **POSSESSION:** (Section 5) The buyer should make arrangements through the REALTORS® for obtaining possession. The seller will not generally let the buyer move in before the seller has received the sale proceeds. Where residential tenants are involved, buyers and sellers should consult the *Residential Tenancy Act.*

5. **TITLE:** (Section 9) It is up to the buyer to satisfy the buyer on matters of zoning or building or use restrictions, toxic or environmental hazards, encroachments on or by the property and any encumbrances which are staying on title before becoming legally bound. It is up to the seller to specify in the contract if there are any encumbrances, other than those listed in section 9, which are staying on title before becoming legally bound. If you as the buyer are taking

APPENDIX 11.2, *continued*
Contract of Purchase and Sale

INFORMATION ABOUT THE CONTRACT OF PURCHASE AND SALE
RESIDENTIAL (continued)

out a mortgage, make sure that title, zoning and building restrictions are all acceptable to your mortgage company. In certain circumstances, the mortgage company could refuse to advance funds. If you as the seller are allowing the buyer to assume your mortgage, you may still be responsible for payment of the mortgage, unless arrangements are made with your mortgage company.

6. **CUSTOMARY COSTS:** (Section 15) In particular circumstances there may be additional costs, but the following costs are applicable in most circumstances:

Costs to be Borne by the Seller	Costs to be Borne by the Buyer	
Lawyer or notary Fees and Expenses: – attending to execution documents	Lawyer or notary Fees and Expenses: – searching title, – drafting documents.	Fire Insurance Premium.
Costs of clearing title, including: – investigating title, – discharge fees charged by encumbrance holders, – prepayment penalties.	Land Title Registration fees.	Sales Tax (if applicable).
Real Estate Commission (plus GST).	Survey Certificate (if required).	Property Transfer Tax.
Goods and Services Tax (if applicable).	Costs of Mortgage, including: – mortgage company's lawyer/notary, – appraisal (if applicable), – Land Title Registration fees.	Goods and Services Tax (if applicable).

In addition to the above costs there maybe financial adjustments between the seller and the buyer pursuant to section 6 and additional taxes payable by one or more of the parties in respect of the property or the transaction contemplated hereby (eg. Empty Home Tax and Speculation Tax).

7. **CLOSING MATTERS:** The closing documents referred to in Sections 11, 11A and 11B of this contract will, in most cases, be prepared by the buyer's lawyer or notary and provided to the seller's lawyer or notary for review and approval. Once settled, the lawyers/notaries will arrange for execution by the parties and delivery on or prior to the completion date. The matters addressed in the closing documents referred to in sections 11A and 11B will assist the lawyers/notaries as they finalize and attend to various closing matters arising in connection with the purchase and sale contemplated by this contract.
8. **RISK:** (Section 16) The buyer should arrange for insurance to be effective as of 12:01 am on the completion date.
9. **FORM OF CONTRACT:** This Contract of Purchase and Sale is designed primarily for the purchase and sale of freehold residences. If your transaction involves: a house or other building under construction, a lease, a business, an assignment, other special circumstances (including the acquisition of land situated on a First Nations reserve), additional provisions, not contained in this form, may be needed, and professional advice should be obtained. In some instances, a Contract of Purchase and Sale specifically related to these circumstances may be available. Please check with your REALTOR® or legal professional for more information. A Property Disclosure Statement completed by the seller may be available.
10. **REALTOR® Code, Article 11:** A REALTOR® shall not buy or sell, or attempt to buy or sell an interest in property either directly or indirectly for himself or herself, any member of his or her immediate family, or any entity in which the REALTOR® has a financial interest, without making the REALTOR®'s position known to the buyer or seller in writing. Among the obligations included in Section 53 of the Real Estate Services Rules: If a licensee acquires, directly or indirectly, or disposes of real estate, or if the licensee assists an associate in acquiring, directly or indirectly, or disposing of real estate, the licensee must make a disclosure in writing to the opposite party before entering into any agreement for the acquisition or disposition of the real estate.
11. **RESIDENCY:** When completing their residency and citizenship status, the buyer and the seller should confirm their residency and citizenship status and the tax implications thereof with their lawyer/accountant.
12. **AGENCY DISCLOSURE:** (Section 21) All designated agents with whom the seller or the buyer has an agency relationship should be listed. If additional space is required, list the additional designated agents on an addendum to the Contract of Purchase and Sale.

APPENDIX 11.2, *continued*
Contract of Purchase and Sale

BCrea British Columbia Real Estate Association
THE CANADIAN BAR ASSOCIATION British Columbia Branch

PAGE 1 of _____ PAGES

CONTRACT OF PURCHASE AND SALE

BROKERAGE: _____ DATE: _____
ADDRESS: _____ PHONE: _____
PREPARED BY: _____ MLS® NO: _____

BUYER: _____ SELLER: _____
BUYER: _____ SELLER: _____
BUYER: _____ SELLER: _____
ADDRESS: _____ ADDRESS: _____
_____ _____
_____ PC: _____ _____ PC: _____

This may not be the Seller's address for the purpose of giving notice to exercise the Rescission Right. See address in Section 26.

PROPERTY:

_____
UNIT NO. ADDRESS OF PROPERTY

_____
CITY/TOWN/MUNICIPALITY POSTAL CODE

_____
PID OTHER PID(S)

LEGAL DESCRIPTION

The Buyer agrees to purchase the Property from the Seller on the following terms and subject to the following conditions:

1. **PURCHASE PRICE:** The Purchase Price of the Property will be $_____
_____
_____
_____
_____DOLLARS (Purchase Price).
If the Property is "residential real property" (as defined in the *Home Buyer Rescission Period Regulation*) that is not exempt from the Rescission Right (as defined below) and the Buyer exercises the Rescission Right the amount payable by the Buyer to the Seller will be $ _____
_____
_____
_____(Rescission Amount). The foregoing Rescission Amount is set out herein for notice purposes only and, to the extent there is an inconsistency between the foregoing sentence and the Home Buyer Rescission Period Regulation, the latter will govern and prevail. The parties acknowledge and agree that if the Buyer exercises the Rescission Right, the Buyer will pay (or cause to be paid) the Rescission Amount to the Seller promptly and in any event within 14 days after the Buyer exercises the Rescission Right.

BUYER'S INITIALS SELLER'S INITIALS

APPENDIX 11.2, *continued*
Contract of Purchase and Sale

2. **DEPOSIT:** A deposit of $_____ which will form part of the Purchase Price, will be paid **within 24 hours of acceptance** unless agreed as follows: _____
_____
_____

All monies paid pursuant to this Section (Deposit) will be paid in accordance with Section 10 or by uncertified cheque except as otherwise set out in this Section 2 and will be delivered in trust to _____ _____ and held in trust in accordance with the provisions of the *Real Estate Services Act.* In the event the Buyer fails to pay the Deposit as required by this Contract, the Seller may, at the Seller's option, terminate this Contract. The party who receives the Deposit is authorized to pay all or any portion of the Deposit to the Buyer's or Seller's conveyancer (the "Conveyancer") without further written direction of the Buyer or Seller, provided that:

A. the Conveyancer is a Lawyer or Notary;
B. such money is to be held in trust by the Conveyancer as stakeholder pursuant to the provisions of the *Real Estate Services Act* pending the completion of the transaction and not on behalf of any of the principals to the transaction; and
C. if the sale does not complete, the money should be returned to such party as stakeholder or paid into Court.

The parties acknowledge and agree that if the Buyer exercises the Rescission Right within the prescribed period and in the prescribed manner and the Deposit has been paid by the Buyer, the prescribed amount that the Buyer is required to pay in connection with the exercise of the Rescission Right will be paid to the Seller from the Deposit and the balance of the Deposit, if any, will be paid to the Buyer, all without any further direction or agreement of the parties. If the Deposit is less than the prescribed amount required to be paid by the Buyer, the Buyer must promptly pay the shortfall to the Seller in accordance with the *Home Buyer Rescission Period Regulation* and this Contract of Purchase and Sale.

3. **TERMS AND CONDITIONS:** The purchase and sale of the Property includes the following terms and is subject to the following conditions:

Each condition, if so indicated is for the sole benefit of the party indicated. Unless each condition is waived or declared fulfilled by written notice given by the benefiting party to the other party on or before the date specified for each condition, this Contract will be terminated thereupon and the Deposit returnable in accordance with the *Real Estate Services Act.*

BUYER'S INITIALS

SELLER'S INITIALS

APPENDIX 11.2, *continued*
Contract of Purchase and Sale

_____PAGE 3 of _____ PAGES

PROPERTY ADDRESS

4. **COMPLETION:** The sale will be completed on _____, yr._____ (Completion Date) at the appropriate Land Title Office.

5. **POSSESSION:** The Buyer will have vacant possession of the Property at _____ o'clock _____m. on _____, yr._____ (Possession Date) or, subject to the following existing tenancies, if any:
_____

6. **ADJUSTMENTS:** The Buyer will assume and pay all taxes, rates, local improvement assessments, fuel utilities and other charges from, and including, the date set for adjustments, and all adjustments both incoming and outgoing of whatsoever nature will be made as of _____, yr._____ (Adjustment Date).

7. **INCLUDED ITEMS:** The Purchase Price includes any buildings, improvements, fixtures, appurtenances and attachments thereto, and all blinds, awnings, screen doors and windows, curtain rods, tracks and valances, fixed mirrors, fixed carpeting, electric, plumbing, heating and air conditioning fixtures and all appurtenances and attachments thereto as viewed by the Buyer at the date of inspection, INCLUDING:
_____
_____
_____
_____
BUT EXCLUDING: _____
_____
_____

8. **VIEWED:** The Property and all included items will be in substantially the same condition at the Possession Date as when viewed by the Buyer on _____, yr._____

9. **TITLE:** Free and clear of all encumbrances except subsisting conditions, provisos, restrictions exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown, registered or pending restrictive covenants and rights-of-way in favour of utilities and public authorities, existing tenancies set out in Section 5, if any, and except as otherwise set out herein.

10. **TENDER:** Tender or payment of monies by the Buyer to the Seller will be by certified cheque, bank draft, wire transfer or Lawyer's/Notary's or real estate brokerage's trust cheque.

11. **DOCUMENTS:** All documents required to give effect to this Contract will be delivered in registrable form where necessary and will be lodged for registration in the appropriate Land Title Office by 4 pm on the Completion Date.

11A. **SELLER'S PARTICULARS AND RESIDENCY:** The Seller shall deliver to the Buyer on or before the Completion Date a statutory declaration of the Seller containing:
   A. particulars regarding the Seller that are required to be included in the Buyer's Property Transfer Tax Return to be filed in connection with the completion of the transaction contemplated by this Contract (and the Seller hereby consents to the Buyer inserting such particulars on such return);
   B. a declaration regarding the Vancouver Vacancy By-Law for residential properties located in the City of Vancouver; and

BUYER'S INITIALS

SELLER'S INITIALS

APPENDIX 11.2, *continued*
Contract of Purchase and Sale

C. if the Seller is not a non-resident of Canada as described in the non-residency provisions of the *Income Tax Act*, confirmation that the Seller is not then, and on the Completion Date will not be, a non-resident of Canada. If on the Completion Date the Seller is a non-resident of Canada as described in the residency provisions of the *Income Tax Act*, the Buyer shall be entitled to hold back from the Purchase Price the amount provided for under Section 116 of the *Income Tax Act*.

11B. **GST CERTIFICATE:** If the transaction contemplated by this Contract is exempt from the payment of Goods and Services Tax ("GST"), the Seller shall execute and deliver to the Buyer on or before the Completion Date, an appropriate GST exemption certificate to relieve the parties of their obligations to pay, collect and remit GST in respect of the transaction. If the transaction contemplated by this Contract is not exempt from the payment of GST, the Seller and the Buyer shall execute and deliver to the other party on or before the Completion Date an appropriate GST certificate in respect of the transaction.

12. **TIME:** Time will be of the essence hereof, and unless the balance of the payment is paid and such formal agreements to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be non-refundable and absolutely forfeited to the Seller, subject to the provisions under the *Real Estate Services Act,* on account of damages, without prejudice to the Seller's other remedies.

13. **BUYER FINANCING:** If the Buyer is relying upon a new mortgage to finance the Purchase Price, the Buyer, while still required to pay the Purchase Price on the Completion Date, may wait to pay the Purchase Price to the Seller until after the transfer and new mortgage documents have been lodged for registration in the appropriate Land Title Office, but only if, before such lodging, the Buyer has:
    A. made available for tender to the Seller that portion of the Purchase Price not secured by the new mortgage, and
    B. fulfilled all the new mortgagee's conditions for funding except lodging the mortgage for registration, and
    C. made available to the Seller, a Lawyer's or Notary's undertaking to pay the Purchase Price upon the lodging of the transfer and new mortgage documents and the advance by the mortgagee of the mortgage proceeds pursuant to the Canadian Bar Association (BC Branch) (Real Property Section) standard undertakings (the "CBA Standard Undertakings").

14. **CLEARING TITLE:** If the Seller has existing financial charges to be cleared from title, the Seller, while still required to clear such charges, may wait to pay and discharge existing financial charges until immediately after receipt of the Purchase Price, but in this event, the Seller agrees that payment of the Purchase Price shall be made by the Buyer's Lawyer or Notary to the Seller's Lawyer or Notary, on the CBA Standard Undertakings to pay out and discharge the financial charges, and remit the balance, if any, to the Seller.

15. **COSTS:** The Buyer will bear all costs of the conveyance and, if applicable, any costs related to arranging a mortgage and the Seller will bear all costs of clearing title.

16. **RISK:** All buildings on the Property and all other items included in the purchase and sale will be, and remain, at the risk of the Seller until 12:01 am on the Completion Date. After that time, the Property and all included items will be at the risk of the Buyer.

17. **PLURAL:** In this Contract, any reference to a party includes that party's heirs, executors, administrators, successors and assigns; singular includes plural and masculine includes feminine.

BUYER'S INITIALS

SELLER'S INITIALS

APPENDIX 11.2, *continued*
Contract of Purchase and Sale

18. **REPRESENTATIONS AND WARRANTIES:** There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

19. **PERSONAL INFORMATION:** The Buyer and the Seller hereby consent to the collection, use and disclosure by the Brokerages and by the Managing Broker(s), Associate Broker(s) and representative(s) of those Brokerages (collectively the "Designated Agent(s)") described in Section 21, the real estate boards of which those Brokerages and Licensees are members and, if the Property is listed on a Multiple Listing Service®, the real estate board that operates the Multiple Listing Service®, of personal information about the Buyer and the Seller:

    A. for all purposes consistent with the transaction contemplated herein;
    B. if the Property is listed on a Multiple Listing Service®, for the purpose of the compilation, retention and publication by the real estate board that operates the Multiple Listing Service® and other real estate boards of any statistics including historical Multiple Listing Service® data for use by persons authorized to use the Multiple Listing Service® of that real estate board and other real estate boards;
    C. for enforcing codes of professional conduct and ethics for members of real estate boards; and
    D. for the purposes (and to the recipients) described in the British Columbia Real Estate Association's Privacy Notice and Consent form.

    The personal information provided by the Buyer and Seller may be stored on databases outside Canada, in which case it would be subject to the laws of the jurisdiction in which it is located.

20. **ASSIGNMENT OF REMUNERATION:** The Buyer and the Seller agree that the Seller's authorization and instruction set out in Section 26(c) below is a confirmation of the equitable assignment by the Seller in the listing contract and is notice of the equitable assignment to anyone acting on behalf of the Buyer or Seller.

20A. **RESTRICTION ON ASSIGNMENT OF CONTRACT:** The Buyer and the Seller agree that this Contract:

    A. must not be assigned without the written consent of the Seller; and
    B. the Seller is entitled to any profit resulting from an assignment of the Contract by the Buyer or any subsequent assignee.

21. **AGENCY DISCLOSURE:** The Seller and the Buyer acknowledge and confirm as follows (initial appropriate box(es) and complete details as applicable):

INITIALS

A. The Seller acknowledges having received, read and understood the BC Financial Services Authority (BCFSA) form entitled *"Disclosure of Representation in Trading Services"* and hereby confirms that the Seller has an agency relationship with _____
DESIGNATED AGENT(S)

_____

who is/are licensed in relation to _____
BROKERAGE

INITIALS

B. The Buyer acknowledges having received, read and understood the BCFSA form entitled *"Disclosure of Representation in Trading Services"* and hereby confirms that the Buyer has an agency relationship with _____
DESIGNATED AGENT(S)

_____

who is/are licensed in relation to _____
BROKERAGE

BUYER'S INITIALS

SELLER'S INITIALS

APPENDIX 11.2, *continued*
Contract of Purchase and Sale

INITIALS

C. The Seller and the Buyer each acknowledge having received, read and understood the BCFSA form entitled *"Disclosure of Risks Associated with Dual Agency"* and hereby confirm that they each consent to a dual agency relationship with _____ DESIGNATED AGENT(S) who is/are licensed in relation to _____ BROKERAGE having signed a dual agency agreement with such Designated Agent(s) dated _____.

INITIALS

D. If only (A) has been completed, the Buyer acknowledges having received, read and understood the BCFSA form *"Disclosure of Risks to Unrepresented Parties"* from the Seller's agent listed in (A) and hereby confirms that the Buyer has no agency relationship.

INITIALS

E. If only (B) has been completed, the Seller acknowledges having received, read and understood the BCFSA form *"Disclosure of Risks to Unrepresented Parties"* from the Buyer's agent listed in (B) and hereby confirms that the Seller has no agency relationship.

22. **ACCEPTANCE IRREVOCABLE** (Buyer and Seller):

BUYER'S INITIALS SEAL

SELLER'S INITIALS SEAL

The Seller and the Buyer specifically confirm that this Contract of Purchase and Sale, whether executed and sealed by hand or by digital or electronic signature and seal, or otherwise, is hereby executed under seal, which is evidenced by each of the Buyer and the Seller making the deliberate, intentional and conscious act of inserting their initials (whether by hand or electronically) in the appropriate space provided beside this Section 22. The parties intend that the act of inserting their initials as set out above is to have the same effect as if this Contract of Purchase and Sale had been physically sealed by wax, stamp, embossing, sticker or any other manner. It is agreed and understood that, without limiting the foregoing, the Seller's acceptance is irrevocable including without limitation during the period prior to the date specified for the Buyer to either:

A. fulfill or waive the terms and conditions herein contained; and/or
B. exercise any option(s) herein contained.

23. **DISCLOSURE OF BUYER'S RESCISSION RIGHT:** The Seller and the Buyer hereby acknowledge that, unless the Property is exempt from the Rescission Right, the Buyer is entitled pursuant to Section 42(1) of the *Property Law Act* (British Columbia) to rescind (cancel) this Contract of Purchase and Sale by serving written notice of the rescission on the Seller within the prescribed period and in the prescribed manner (the "Rescission Right") and the parties hereby acknowledge the following:

A. the Buyer cannot waive the Rescission Right;
B. the Rescission Right may only be exercised by the Buyer giving notice on any day within three (3) business days (being any day other than a Saturday, a Sunday or a holiday in British Columbia) after the Final Acceptance Date (defined below);
C. if the Buyer exercises the Rescission Right, the Buyer must promptly pay to the Seller the Rescission Amount, being 0.25% of the Purchase Price, as calculated and set out in Section 1 of this Contract of Purchase and Sale.

BUYER'S INITIALS

SELLER'S INITIALS

APPENDIX 11.2, *continued*
Contract of Purchase and Sale

D. If the Buyer has paid a Deposit, the Rescission Amount will be promptly paid from the Deposit and the balance of the Deposit, if any, will be paid to the Buyer, all without any further direction or agreement of the parties. If the Deposit is less than the Rescission Amount, the Buyer will be required to pay the shortfall; and

E. the following are exempt from the Rescission Right:
   (i) residential real property that is located on leased lands;
   (ii) a leasehold interest in residential real property;
   (iii) residential real property that is sold at auction;
   (iv) residential real property that is sold under a court order or the supervision of the court; and
   (v) a Contract of Purchase and Sale to which Section 21 of the *Real Estate Development Marketing Act* applies.

The Buyer and the Seller each acknowledge that the foregoing constitutes disclosure made pursuant to Section 57.1 of the Real Estate Services Rules.

BUYER'S INITIALS SELLER'S INITIALS

24. **THIS IS A LEGAL DOCUMENT. READ THIS ENTIRE DOCUMENT AND INFORMATION PAGE BEFORE YOU SIGN.**

25. **COUNTERPARTS:** The parties agree that this Contract of Purchase and Sale and any amendments or attachments thereto may be executed in counterparts by the parties and delivered originally or by facsimile, email, or other means of electronic transmission. Each such counterpart when so executed and delivered is deemed to be an original and all such counterparts of a relevant document taken together shall constitute one and the same relevant document as though the signatures of all the parties were upon the same document.

26. **OFFER:** This offer, or counter-offer, will be open for acceptance until _____ o'clock _____m. on _____ day of _____ yr. _____ (unless withdrawn in writing with notification to the other party of such revocation prior to notification of its acceptance), and upon acceptance of the offer, or counter-offer, by accepting in writing and notifying the other party of such acceptance, there will be a binding Contract of Purchase and Sale on the terms and conditions set forth.

If the Buyer is an individual, the Buyer declares that they are a Canadian citizen or a permanent resident as defined in the *Immigration and Refugee Protection Act*:

YES INITIALS NO INITIALS

_____ SEAL	_____ SEAL	_____ SEAL
BUYER	BUYER	BUYER
_____	_____	_____
PRINT NAME	PRINT NAME	PRINT NAME
_____	_____	_____
WITNESS	WITNESS	WITNESS

BUYER'S INITIALS SELLER'S INITIALS

APPENDIX 11.2, *continued*
Contract of Purchase and Sale

27. **ACCEPTANCE:** The Seller:

A. hereby accepts the above offer and agrees to complete the sale upon the terms and conditions set out above,
B. agrees to pay a commission as per the Listing Contract, and
C. authorizes and instructs the Buyer and anyone acting on behalf of the Buyer or Seller to pay the commission out of the proceeds of sale and forward copies of the Seller's Statement of Adjustments to the Cooperating/Listing Brokerage, as requested forthwith after Completion.

Seller's acceptance is dated this _____ day of _____ yr. _____.

The Seller declares their residency as defined under the *Income Tax Act*:

RESIDENT OF CANADA [ ][ ][ ] INITIALS NON-RESIDENT OF CANADA [ ][ ][ ] INITIALS

_____ SEAL	_____ SEAL	_____ SEAL
SELLER	SELLER	SELLER
_____	_____	_____
PRINT NAME	PRINT NAME	PRINT NAME
_____	_____	_____
WITNESS	WITNESS	WITNESS

NOTICE FOR BUYER'S RESCISSION RIGHT: If the Buyer is entitled to exercise the Rescission Right, the Seller's (or the Seller's appointee's) mailing address, email address and/or fax number for notice of rescission is as follows:

Attention: _____

Address: _____

Email: _____ Fax: _____

Any notice of rescission given by the Buyer will be deemed to have been delivered on the day it was sent if delivered in accordance with the *Home Buyer Rescission Period Regulation*.

The date of acceptance of this Contract is _____ (the "**Final Acceptance Date**") being the date that the last party executed and delivered this Contract and, if applicable, based on the foregoing the date by which the Buyer must exercise the Rescission Right is _____.

The foregoing sentence is not a term of the Contract and is included for notice purposes only and, to the extent there is an inconsistency between the foregoing and the *Home Buyer Rescission Period Regulation* and the latter will govern and prevail.

*PREC represents Personal Real Estate Corporation

BC2057 REV. NOV 2023

APPENDIX 11.3
Property Disclosure Statement

INFORMATION ABOUT THE PROPERTY DISCLOSURE STATEMENT
RESIDENTIAL

THIS INFORMATION IS INCLUDED FOR THE ASSISTANCE OF THE PARTIES ONLY. IT DOES NOT FORM PART OF THE PROPERTY DISCLOSURE STATEMENT.

EFFECT OF THE PROPERTY DISCLOSURE STATEMENT

The Property Disclosure Statement will not form part of the Contract of Purchase and Sale unless so agreed by the buyer and the seller. This can be accomplished by inserting the following wording in the Contract of Purchase and Sale:

"The attached Property Disclosure Statement dated (date)
is incorporated into and forms part of this contract."

ANSWERS MUST BE COMPLETE AND ACCURATE

The Property Disclosure Statement is designed, in part, to protect the seller by establishing that all relevant information concerning the premises has been provided to the buyer. It is important that the seller not answer "do not know" or "does not apply" if, in fact, the seller knows the answer. An answer must provide all relevant information known to the seller. In deciding what requires disclosure, the seller should consider whether the seller would want the information if the seller was a potential buyer of the premises.

BUYER MUST STILL MAKE THE BUYER'S OWN INQUIRIES

The buyer must still make the buyer's own inquiries after receiving the Property Disclosure Statement. Each question and answer must be considered, keeping in mind that the seller's knowledge of the premises may be incomplete. Additional information can be requested from the seller or from an independent source such as the Municipality or Regional District. The buyer can hire an independent, licensed inspector or other professional to examine the premises and/or improvements to determine whether defects exist and to provide an estimate of the cost of repairing problems that have been identified on the Property Disclosure Statement or on an inspection report.

FOUR IMPORTANT CONSIDERATIONS

1. The seller is legally responsible for the accuracy of the information which appears on the Property Disclosure Statement. Not only must the answers be correct, but they must be complete. The buyer will rely on this information when the buyer contracts to purchase the premises. Even if the Property Disclosure Statement is not incorporated into the Contract of Purchase and Sale, the seller will still be responsible for the accuracy of the information on the Property Disclosure Statement if it caused the buyer to agree to buy the property.

2. The buyer must still make the buyer's own inquiries concerning the premises in addition to reviewing a Property Disclosure Statement, recognizing that, in some cases, it may not be possible to claim against the seller, if the seller cannot be found or is insolvent.

3. Anyone who is assisting the seller to complete a Property Disclosure Statement should take care to see that the seller understands each question and that the seller's answer is complete. It is recommended that the seller complete the Property Disclosure Statement in the seller's own writing to avoid any misunderstanding.

4. If any party to the transaction does not understand the English language, consider obtaining competent translation assistance to avoid any misunderstanding.

APPENDIX 11.3, *continued*
Property Disclosure Statement

PROPERTY DISCLOSURE STATEMENT
RESIDENTIAL

Date of disclosure: _____

The following is a statement made by the Seller concerning the premises located at:

ADDRESS: **(the "Premises")**

THE SELLER IS RESPONSIBLE for the accuracy of the answers on this Property Disclosure Statement and where uncertain should reply "Do Not Know." This Property Disclosure Statement constitutes a representation under any Contract of Purchase and Sale if so agreed, in writing, by the Seller and the Buyer.	THE SELLER SHOULD INITIAL THE APPROPRIATE REPLIES.			
	YES	**NO**	**DO NOT KNOW**	**DOES NOT APPLY**
1. LAND				
A. Are you aware of any encroachments, unregistered easements or unregistered rights-of-way?				
B. Are you aware of any existing tenancies, written or oral?				
C. Are you aware of any past or present underground oil storage tank(s) on the Premises?				
D. Is there a survey certificate available?				
E. Are you aware of any current or pending local improvement levies/ charges?				
F. Have you received any other notice or claim affecting the Premises from any person or public body?				
2. SERVICES				
A. Please indicate the water system(s) the Premises use: ☐ A water provider supplies my water (e.g., local government, private utility ☐ I have a private groundwater system (e.g., well) ☐ Water is diverted from a surface water source (e.g., creek or lake) ☐ Not connected Other _____				
B. If you indicated in 2.A. that the Premises have a private groundwater or private surface water system, you may require a water licence issued by the provincial government.				
(i) Do you have a water licence for the Premises already?				
(ii) Have you applied for a water licence and are awaiting response?				
C. Are you aware of any problems with the water system?				
D. Are records available regarding the quality of the water available (such as geochemistry and bacteriological quality, water treatment installation/maintenance records)?				

BUYER'S INITIALS

SELLER'S INITIALS

APPENDIX 11.3, *continued*
Property Disclosure Statement

DATE OF DISCLOSURE

ADDRESS:

2. SERVICES (continued)	**YES**	**NO**	**DO NOT KNOW**	**DOES NOT APPLY**
E. Are records available regarding the quantity of the water available (such as pumping test or flow tests)?				
F. Indicate the sanitary sewer system the Premises are connected to: ☐ Municipal ☐ Community ☐ Septic ☐ Lagoon ☐ Not Connected Other_____				
G. Are you aware of any problems with the sanitary sewer system?				
H. Are there any current service contracts; (i.e., septic removal or maintenance)?				
I. If the system is septic or lagoon and installed after May 31, 2005, are maintenance records available?				

3. BUILDING

A. To the best of your knowledge, are the exterior walls insulated?				
B. To the best of your knowledge, is the ceiling insulated?				
C. To the best of your knowledge, have the Premises ever contained any asbestos products?				
D. Has a final building inspection been approved or a final occupancy permit been obtained?				
E. Has the fireplace, fireplace insert, or wood stove installation been approved: (i) ☐ by local authorities? (ii) ☐ by a WETT certified inspector?				
F. Are you aware of any infestation or unrepaired damage by insects, rodents or bats?				
G. Are you aware of any structural problems with any of the buildings?				
H. Are you aware of any additions or alterations made in the last 60 days?				
I. Are you aware of any additions or alterations made without a required permit and final inspection; e.g., building, electrical, gas, etc.?				
J. Are you aware of any problems with the heating and/or central air conditioning system?				
K. Are you aware of any moisture and/or water problems in the walls, basement or crawl space?				
L. Are you aware of any damage due to wind, fire or water?				

BUYER'S INITIALS

SELLER'S INITIALS

APPENDIX 11.3, *continued*
Property Disclosure Statement

DATE OF DISCLOSURE

ADDRESS:

3. BUILDING (continued)	**YES**	**NO**	**DO NOT KNOW**	**DOES NOT APPLY**
M. Are you aware of any roof leakage or unrepaired roof damage? (Age of roof if known: _____ years)				
N. Are you aware of any problems with the electrical or gas system?				
O. Are you aware of any problems with the plumbing system?				
P. Are you aware of any problems with the swimming pool and/or hot tub?				
Q. Do the Premises contain unauthorized accommodation?				
R. Are there any equipment leases or service contracts; e.g., security systems, water purification, etc?				
S. Were these Premises constructed by an "owner builder," as defined in the *Homeowner Protection Act,* within the last 10 years? (If so, attach required Owner Builder Disclosure Notice.)				
T. Are these Premises covered by home warranty insurance under the *Homeowner Protection Act*?				
U. Is there a current "EnerGuide for Houses" rating number available for these premises? (i) If yes, what is the rating number? _____ (ii) When was the energy assessment report prepared? _____ (DD/MM/YYYY)				
V. To the best of your knowledge, has the premises been tested for radon? (i) If yes, was the most recent test: ☐short term or ☐long term (more than 90 days) Level: _____ ☐bq/m3 ☐pCi/L on _____ date of test (DD/MM/YYY)				
W. Is there a radon mitigation system on the Premises?				
(i) If yes, are you aware of any problems or deficiencies with the radon mitigation system?				

4. GENERAL

A. Are you aware if the Premises have been used to grow cannabis (other than as permitted by law) or to manufacture illegal substances?				
B. Are you aware of any latent defect in respect of the Premises? *For the purposes of this question, "latent defect" means a defect that cannot be discerned through a reasonable inspection of the Premises that renders the Premises: (a) dangerous or potentially dangerous to occupants; or (b) unfit for habitation.*				

BUYER'S INITIALS

SELLER'S INITIALS

APPENDIX 11.3, *continued*
Property Disclosure Statement

DATE OF DISCLOSURE

ADDRESS:

4. GENERAL (continued)	**YES**	**NO**	**DO NOT KNOW**	**DOES NOT APPLY**
C. Are you aware of any existing or proposed heritage restrictions affecting the Premises (including the Premises being designated as a "heritage site" or as having "heritage value" under the *Heritage Conservation Act* or municipal legislation)?				
D. Are you aware of any existing or proposed archaeological restrictions affecting the Premises (including the Premises being designated as an archaeological site or as having archaeological value under applicable law)?				

5. ADDITIONAL COMMENTS AND/OR EXPLANATIONS (Use additional pages if necessary)

The Seller states that the information provided is true, based on the Seller's current actual knowledge as of the date on page 1. Any important changes to this information made known to the Seller will be disclosed by the Seller to the Buyer prior to closing. The Seller acknowledges and agrees that a copy of this Property Disclosure Statement may be given to a prospective Buyer.

PLEASE READ THE INFORMATION PAGE BEFORE SIGNING.

_____ _____ _____

SELLER(S) SELLER(S) SELLER(S)

The Buyer acknowledges that the Buyer has received, read and understood a signed copy of this Property Disclosure Statement from the Seller or the Seller's brokerage on the _____ day of _____ yr _____.

The prudent Buyer will use this Property Disclosure Statement as the starting point for the Buyer's own inquiries.

The Buyer is urged to carefully inspect the Premises and, if desired, to have the Premises inspected by a licensed inspection service of the Buyer's choice.

The Buyer acknowledges that all measurements are approximate.

_____ _____ _____

BUYER(S) BUYER(S) BUYER(S)

The Seller and the Buyer understand that neither the Listing nor Selling Brokerages or their Managing Brokers, Associate Brokers or Representatives warrant or guarantee the information provided about the Premises.

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