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BUYING & SELLING REAL ESTATE

TABLE OF CONTENTS

1. The Contract
2. The Buyer
3. The Seller
4. The Lawyer
5. The Realtor
6. The Lender
7. The Hidden Costs
8. The New Home
9. The Acreage Home

1. THE CONTRACT

Every agreement involving real estate must be in writing to be legally enforceable.

This requirement extends not only to the basic terms of the contract such as description of the property, purchase price and possession date, but to all the details of the transaction. Often there are promises or representations made before the contract is signed that come into dispute at the time of the possession, therefore **get everything down in writing**. Also note that any changes or additions to the contract must be in writing with both parties initialing their acceptance. Remember the written contract must contain the entire agreement between the parties. So, if what you have bargained for is not written down in the contract, it may not, in a legal sense, exist.

Many people buying or selling real estate make use of preprinted form contracts. Local Real estate Boards prepare standard form contracts for use by licensed Real Estate Agents. Your realtor is familiar with the currently approved form of contract and will know how to fill in the details. Other companies that provide services for people selling property on their own such as Comfree have their own form of agreements which are generally fairly reliable. **Preprinted contracts available through stationers should, however be avoided by both the vendor and the purchaser as these contracts often do not contain important terms and warranties presently in use.** If you are completing a transaction without a realtor, you may wish to contact a lawyer to have a contract prepared or to have your own form of agreement reviewed. You may in any event, want to have

your lawyer's approval as a condition of the agreement. **It is important to remember that a Real estate Contract is more than just a form, once signed by both parties, it becomes an important and legally enforceable document.**

In order to better understand the Real Estate Contract, you may want to familiarize yourself with some of the following terms:

A) *Deposit*

Monies put up as a deposit stand as a guarantee of the purchaser's obligation to complete the transaction. If the purchaser fails to complete, then the deposit may be forfeit to the vendor (the vendor may also have the right to bring legal action against the purchaser in addition to keeping the deposit).

B) *Condition (conditions precedent)*

A condition is a term in an agreement which sets out a requirement that must be met before a contract comes into existence. *For example, a purchaser may sign a contract which is conditioned upon the obtaining mortgage financing. If the purchaser is unable to obtain financing, then the contract is void.*

C) *Representations*

A representation is a statement made by either the purchaser or the vendor to the other party before or at the time of making the contract which influences the other party to enter into the contract. *For example, the vendor may have indicated to the purchaser that there is a new hardwood floor underneath the carpeted areas.*

D) *Warranty*

A warranty is a term in an agreement which amounts to a promise that certain facts with respect to the property are true. *For example, most real estate contracts contain a warranty that improvements on the property meet with land use regulations.*

E) *Guarantee*

In every day usage the word "guarantee" is used interchangeably with the word "warranty." Strictly speaking, a "Guarantee" is a separate contract made in relation to the main contract in which a third party(the "Guarantor") guarantees that the things promised in the main contract will be done exactly as stated in the main contract. *For example, a Guarantor may guarantee that a builder will build a new home such that the home shall be*

free of defects for a period of five years. The builder may have warranted this in his contract with the purchaser but the other party has guaranteed that if the builder does not perform its obligation the guarantor will perform them.

F) *Closing Date*

The closing date is the date that all of the purchase price is paid to the vendor.

G) *Adjustment Date*

Adjustment date is the date that property taxes, rents (if any) and other charges related to the property are adjusted.(this is usually the same day as the Closing Date) This is usually calculated by the respective lawyers.

F) *Possession Date*

Possession date is the date that the purchasers are to take possession of the property. This is usually, but not necessarily, the same date as the closing and adjustment date.

2. THE BUYER

An agreement arises when one party (usually, but not necessarily, the purchaser) makes an offer and the other party (the vendor) accepts. Prior to a binding agreement taking place, however, anything can happen, as a purchaser there are some basic legal concepts to keep in mind when negotiating an agreement:

A) As indicated before, a representation amounts to an expressed or implied statement by one party that induces the other party to enter into a contract. A purchaser should be alert to what is being represented by the vendor both prior to and during the negotiation process. **It is not unusual for these representations to be verbal so make sure you have the vendor warrant these statements by committing them to writing in the contract.**

B) Do not be fooled into believing that you can rely on implied warranties (warranties that are read into the contract at a later date by the courts). The courts may not be all that sympathetic, particularly in cases involving used residences. The courts will take the position with used residential purchases that it's "buyer beware." **Again, the best course of action is to always**

have the representation made by the seller confirmed in writing in the contract.

- C) The number and kinds of representations and warranties that are made are as numerous and varied as the vendors and purchasers. Some of the more common warranties have been compiled by local real estate Boards and are contained in their standard Real estate Contract. You should not, however, limit yourself to the warranties contained in the printed form. If you feel it is important for the vendor to warrant something, have it written into the contract. Space can always be found in the contract or a schedule can be added. Ask your lawyer if the circumstances might require some additional warranties not found in the contract.
- D) Also keep in mind that **once the warranty is in the agreement, it may be up to you to confirm that the warranty is true unless the agreement states otherwise.** For example, in the case of a warranty concerning compliance with land use regulations, you may need to have a survey of the property completed and the survey reviewed by the local municipality in order to confirm that the property meets the Bylaws. (Note however the form of contract used by realtors usually makes it clear that these details are covered at the vendor's expense). In any event you should have *all* of the warranty items confirmed before the title to the property is registered in your name.
- E) Apart from representations and warranties, many contracts will contain conditions which must be completed before the agreement becomes legally binding (conditions precedent). If the conditions are not completed or are not waived by the party imposing the conditions, the agreement will be void. *Some examples of conditions commonly imposed by a purchaser are as follows:*
- i) subject to the sale of the purchaser's current property by a specified date;*
 - ii) subject to a new mortgage financing by a specified date;*
 - iii) subject to mechanical and structural inspection of the property by a specified date;*
 - iv) subject to the purchaser's lawyer's approval as to the form and content of the agreement by a specified date.*

Conditions may be placed in an agreement by either the vendor or purchaser, however, the party imposing such conditions is legally bound to make reasonable efforts to fulfill these conditions. Also keep in mind that if you are going to place a condition into a contract, then you may be obligated to inform the other party in writing as to what is happening with respect to the removal of the conditions. Failure to notify the other party within the required time may, in some cases, render the contract void and in other cases, it may obligate you to proceed with the contract (in some forms of contract (not commonly

used) the conditions are deemed to have been satisfied unless written notice to the contrary is delivered to the other party). In any case you should know what your obligations are under all of the terms and conditions of the contract.

3. THE SELLER

In the typical residential real estate transaction, **the vendor is selling the lot, the house and any other fixtures**. Generally speaking a fixture is anything that is affixed to the ground or anything which is nailed, screwed or otherwise permanently attached to what is affixed to the ground. Fixtures are distinguishable from chattels. Chattels are personal property that are not in any way affixed to the residence such as refrigerators, washers, dryers, etc. **The difficulty arise when one person's chattel becomes another person's fixture**, i.e. built-in dishwashers and stoves, hood fans, wall units, garden sheds, play houses and the like. The best rule in this regard is **"if in doubt then put it in the contract."** This rule, of course applies equally to both the seller and the buyer. The contract should clearly set out what chattels are being sold and should also state clearly what fixtures (or what might be considered fixtures) are not being sold.

Under *The Buyer* there is a brief discussion on conditions to a contract and the obligation to take reasonable steps to fulfill conditions. In this regard the seller should be wary of letting the time in which the buyer has to fulfil the conditions go on for too long, as this may effectively tie up the property from being sold to another buyer. Usually a few weeks is all that is required for buyers to complete their conditions. If the conditions cannot be removed within a short period of time, you may want to discuss alternative clauses in the agreement with your realtor or you lawyer so that your interests are protected.

Almost all contracts contain provisions for the buyers to pay a deposit. Monies put up as a deposit stand as a guarantee of the purchaser's obligation to complete the transaction. If all conditions to the contract are removed and the transaction falls through due to the buyer's fault, the deposit monies are forfeit to the seller (the seller may consider legal action against the purchaser in addition to keeping the deposit). From a practical point of view the seller should keep in mind the following questions when determining the amount of the deposit.

- **What is the value of the property?**

In most cases a deposit would not exceed 10 % of the value of the transaction, (the usual range is between 5% and 10%).

- **How far away is the possession date?**

If the possession date is six months away, you may want a little more assurance that the purchaser will proceed by way of obtaining a larger deposit.

- **Is there anything that gives you concern with the buyer's ability or desire to complete the transaction?**

If the buyers are ready to pay top dollar for the property you may want to make sure they will not change their mind.

4. THE LAWYER

Most people use a lawyer to assist in the completion of the purchase or sale of their property. For some reason, however, few people consult a lawyer before the contract is signed. **Before you sign, consider having the contract reviewed by a lawyer or at least have the contract made conditional upon your lawyer's review.** Usually the cost of having this contract reviewed by a lawyer is small or can be absorbed into the legal cost of the transaction.

Here are some factors to consider when choosing a lawyer:

- **How much real estate law does this lawyer do?**

Many lawyers do some real estate work. You may want to consider those who have real estate as a large part of their practice. In addition to experience, they usually have the staff and systems set up to do the job efficiently. Their fees can be more competitive too.

- **Will you meet with the lawyer?**

Do not use a firm that will have a conveyancing secretary or a paralegal meet with you to sign documents. You are paying for a lawyer, so insist that you have the lawyer meet with you at the time the documents are to be signed to answer questions and to review progress on the file.

- **Ask for an estimate of legal costs, but do not let legal fees be the sole reason for choosing a lawyer.**

Fees charged by lawyer are often not related to experience. Legal costs are broken up into "fees" (what the law firm makes), and "disbursements" (the out of pocket expenses paid on our behalf to complete the work). GST also attaches to fees and some disbursements.

Disbursements should not vary between lawyers so look to the legal fees when comparing costs. Once you have decided on a particular lawyer, you should receive an estimate of all legal costs.

- **Ask for recommendations from friends, relatives, realtors or bankers.**

Before deciding, however, you should meet or talk with the lawyer and form your own opinion as to how well the lawyer meets the requirements listed above.

5. THE REALTOR

Probably one of the first considerations when buying or selling real estate is what realtor or real estate company to use. Certainly reputation, track record and personal referrals are important considerations when making the decision as to who to hire to assist you, however, **you are well advised to educate yourself in advance with respect to the market place and your own requirements.**

When in the market to purchase a home, you may want to go through the following procedure before contacting a realtor. The first step is usually to determine what price range you can afford. This can be done by consulting a mortgage lending officer to determine the amount of mortgage available to you (most lending institutions have pre-approved mortgage packages, which allow you to hold a preset interest rate for a set period of time). Caution being pre-approved for a certain amount of a mortgage is not the same as being approved for the mortgage on the house that you intend to purchase. Banks will want to do an appraisal on the house that you intend to purchase, they may or may not agree to lend you the money you need for that property. You should not remove financing conditions in your purchase agreement until the bank has approved lending for that property. The second step is to realistically assess how much you want to spend, bearing in mind the effect the extra debt load will have on your present lifestyle. The third step is to make a list of desired locations and required features. Finally, present all of the above information to a realtor who you believe will be sensitive to the concerns most important to you.

Before listing a property, you may want to do a little research on your own to determine the strength of the market and the appropriate value of your home. Be realistic about the price. Setting a fair price at the outset usually results in the house being seen more often by more people and the likelihood of the sale being an expedient and painless procedure. A realtor will usually prepare a list of comparable properties in your neighborhood to help you determine the listing price.

When signing a listing agreement, make sure that the amount of the commission to be charged, plus GST, is clearly stated. The duration of the listing should also be set out clearly in the listing agreement. If you intend to sell the property privately, be aware that if a realtor introduces you to or otherwise connects you with a purchaser, the realtor may be legally entitled to claim a commission from you (this applies even in the case where there is no listing agreement or the listing agreement has expired).

6. THE LENDER

The first source that you should consult when considering purchasing a home is the mortgage lender. **The lending institution will conduct a review of your financial situation and provide you with an accurate assessment of what you can afford to borrow.** Most lenders will also provide a pre-approval for a mortgage and hold to a quote on the interest rate for a 60 to 90 day period. Once you know what you can afford, you can realistically assess what kind of house you need.

“Amortization period” and “mortgage term” are two terms that you will need to be familiar with when shopping for a mortgage. The amortization period for a mortgage is the time that it would take to repay the entire amount borrowed plus interest, at a set rate of interest (usually compounded semi-annually) and at a set payment schedule. As most people are interested in as low a monthly payments as possible, mortgage lenders will amortize the loan over a long period of time (25 years is common). The term of a mortgage is the period of time that the mortgage lender is prepared to commit to the interest rate and the other terms contained in the mortgage agreement. *For example, a lender may calculate the repayments of the mortgage over 25 years, but only be prepared to commit to the rate of interest for a six month term.* Generally speaking, the longer the term of the mortgage the higher the rate of interest will be. If the interest rates are or if it is uncertain as to whether or not the interest rate will go up or down, the best approach may be to go for a short term. If the interest rates are low, you may want to select a long term (particularly if the amount mortgaged is large).

Mortgages are also referred as “open term” or “closed term.” A mortgage that is open will allow the borrower to repay the entire balance any time before the end of the term. A closed mortgage requires the borrower to wait to the end of term to pay any more than the fixed payments schedule. The interest rate will also vary depending on whether or not the term is open or closed. Usually an open term mortgage has a higher rate of interest.

Keep in mind that if you have amortized the mortgage over a long period of time, you will be paying mostly interest for the first several years. If the term of the mortgage is long, then you may have to wait to be able to make extra payments directly on the principal amount. Many mortgages have a penalty for early prepayment on the principal. For this reason you should familiarize yourself with what prepayment privileges the mortgage lender is offering. A prepayment privilege allows you to make extra payments (over and above the payment schedule) which will go directly to paying down the mortgage principal. **Your financial situation may not always be as tight as it was when you first bought your house so the right to pay down some of the principal on the mortgage can save you considerable amounts of money in interest down the road.**

7. THE HIDDEN COSTS

There are a number of “other” costs associated with the purchase or sale of residential property. In order to avoid surprises, you should be aware of the following possible costs:

- **Property tax Adjustment**

If possession of the home is to take place early in the year, it is likely that the purchaser will have to pay all the property taxes when they become due (usually at the end of June). In this case the vendor may have to compensate the purchaser for the portion of the property taxes represent the period that the vendor occupied the home. Later in the year (after June 30th) the opposite situation can arise with the purchaser compensating the vendor for the taxes paid for the rest of the calendar year.

- **Costs Attendant to Setting up the Mortgage**

Some mortgage lenders charge a fee to apply for a mortgage. In almost all cases the mortgage lender will want a property appraisal done before granting the mortgage. Some lenders have mortgage renewal fees and other service charges. If your mortgage is for more than 75% of the value of the home there may be insurance fees to be paid through the Canada Mortgage and Housing Corporation. The bank may insist on you obtaining title insurance which can be an additional fee.

- **Cost of a Real Property Report and By-law Compliance Certificate**

Mortgage lenders have for some time now made it a requirement that a survey of the property by an Alberta Land Surveyor (a Real Property Report) be completed and that this survey be reviewed by the local municipality to confirm that the property and any improvements meet with the applicable land use regulations. The contract you sign should expressly state whose responsibility it is to obtain an up-to-date Real property Report. Most contracts make the cost to obtaining Real Property Reports and bylaw compliance the responsibility of the vendor. This should apply even if you are not buying by way of mortgage, because as a purchaser, you too should know that the property meets with applicable land use regulations.

Many vendors will try to have the purchaser accept title insurance in lieu of a Real Property Report and bylaw compliance. As a purchaser this is not in your interest and almost every case the purchaser should insist that the vendor provide a real Property Report and bylaw compliance as part of the transaction.

8. THE NEW HOME

Having a new home constructed can be an incredibly frustrating experience. Here are some ways to reduce problems:

Research the builder thoroughly. Check with the Better Business Bureau, and determine whether the builder is registered with the Alberta New Home Warranty Program or other private insurance program. It is now the law that builders and members of a new warranty program. This requirement can apply to individuals building their own homes as well. If you are researching your builder you should ask numerous people who have had homes built by them. Talk to your banker, realtor and lawyer.

Many builders have their own form of building contracts, so discuss the terms of the builder's contract with your banker and lawyer before you sign. Do not be inclined to sign the contract because the builder states that it is their "standard contract."

If you are negotiating the contract directly with builder, you should discuss the requirements of a holdback under the Builder's Lien Act. You should also discuss the possibility of having holdbacks for seasonal or other deficiencies. If the builder agrees to seasonal or deficiency holdbacks, then you should have this in the written agreement.

If the price seems too good to be true, then it may be. The new home construction industry is very competitive and builders are often tempted to do the work a little cheaper than their competitors. Having a builder who is prepared to work with little or no margin of profit may prove to be real trouble.

Make sure you have a clear understanding of the quantity and quality of interior finishes and fixtures. Changing these items after the contract is signed usually will result in extra charges.

Avoid using the same lawyer as the builder. Many builders will suggest that you use their lawyer. Some sales people will suggest that the builder will cover our legal fees and disbursements if you use their lawyer. Do not agree to this as you will soon discover that the builder's lawyer will not agree to act for you and as a results you have entered into a transaction completely unrepresented. If you contact an independent lawyer before you enter into an agreement with the builder you will be far better protected in the transaction. While sharing the services of one lawyer may seem cost effective, it can result in problems. If there are problems with the builder once the project starts, the builder's lawyer will have to quit acting for both, and you will be faced with the additional cost of hiring a new lawyer. **If the builder has included legal costs into the purchase price, ask for a credit towards the cost of your own independent lawyer.**

9. THE ACREAGE PROPERTY

Purchasing or selling rural property can pose some unique concerns. Here are a few points to keep in mind:

- If the property is undeveloped, make sure that you look on a map prepared by the Province or local Authority to confirm that the location matches the legal description (you would not be the first person to buy the wrong property).
- If you are not selling the crop that has been seeded on the property, you will have to have this in the contract along with the right of access to harvest the crop.
- Make sure that you have identified any special items that are not part of the sale and will be removed (portable grain bins, sheds, portable corrals, etc.).
- Make sure that if the property relies on well water, that the vendor represents in the contract that the water is potable and that they will provide a Certificate of Analysis confirming this before the possession date.
- If the property has a septic system and field, make sure the vendor represents in the contract that the septic system meets with the applicable land use by-laws and that it is in working order. The vendor should supply a certificate from the local municipality or a private contractor confirming all of the above prior to the closing date.
- If there are private telephone line charges, or other amortized local improvement charges, make sure that these charges are addressed in the contract, with the purchaser assuming the payments rather than the vendor paying out the cost in full. These charges are often poorly dealt with in the Real estate Purchase Agreement.
- Check with your accountant to confirm that there is no Goods and Services Tax (G.S.T.) to be paid with respect to the transaction. *Although GST may not be payable on other types of used residential property, the sale of rural and farm property is notorious for GST problems.*
- If you are buying a rural lot with the intention to build a residence, you may want to have the property tested for the quality of the well water and to have a soil test done to ensure that you will be able to build.