

A Practical Guide To Mortgage Assumptions and Due-On-Sale Clauses

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1. Introduction

The object of this paper is to briefly update the law with respect to 'due-on-sale' clauses, to highlight and review some of the clauses used by a few of the major lending institutions in Alberta, and to finally, review and comment upon a few practice considerations from the viewpoint of the market and to discuss where Alberta's lending institutions appear to be headed.

2. Due-on-sale Clauses (An Update)

Due-on-sale clauses are a contractual term in virtually all mortgages in the province of Alberta. The provision provides the lender with a contractual right to call the loan in the event the mortgagor transfers the property. The most common condition we see in today's clause is the lender's right to call the loan in the event a transfer occurs without the lender's written consent. The form of the written consent is often contractually qualified to the extent that the lender may withhold its consent arbitrarily¹. Traditionally, lenders included the clause as a mechanism to control their security by contractually ensuring that, if there is a transfer, it is to a credit-worthy low risk assignee. It was also used to hedge against rising interest rates. Despite the variety of different types of clauses used today by lending institutions, in these low interest times, preservation of security is the motivating factor for including the clause in a mortgage document.

The well known and often cited decision of *Royal Bank of Canada v. Freeborn*² is still the leading decision in Alberta. In brief, the plaintiff Bank sought to enforce a 'due-on sale' clause. The land in question had been sold to the Defendant without the written consent of the Bank and without execution by the Defendant of an Assumption Agreement. The clause reads as follows:

¹ See: Alberta Treasury Branch residential mortgage, due-on sale clause

² (1974) AJ No. 118 Alberta Supreme Court, Turcott J. ("Freeborn") est. short form