

## **Trust Conditions**

Prepared For: Legal Education Society of Alberta

*Running Your First Real Estate Transaction*

Presented by:

**Shelley Mabbott QC**

**Mabbott & Company**

**Cochrane, Alberta**

For Presentation In:

Edmonton – September 18, 2013

Calgary – September 25, 2013

## **TRUST CONDITIONS**

### **INTRODUCTION**

In any residential real estate transaction the completion of the transaction is facilitated by the tender of transfer documents by the Seller's lawyer to the Buyer's lawyer on specific trust conditions, and with specific undertakings given by the Seller's lawyer. The notion of face to face residential real estate closings where documents and money are exchanged on the completion day rarely occurs in Alberta. Therefore the trust conditions imposed and undertakings given are essential to the smooth closing of any purchase or sale.

### **THE TRUST LETTER**

The Trust Letter is the document prepared by the Seller's lawyer, which encloses the closing documentation and sets out the terms on which the documentation may be used by the Buyer's lawyer to facilitate the closing of the transaction. In addition the trust letter includes any undertakings required to be given by the Seller's lawyer. Closing documents normally include the following:

- A. Transfer of Land, executed by the Seller's;
- B. Statement of Adjustments;
- C. Real Property Report with evidence of municipal compliance, if the property being sold is not bare land, or a conventional condominium;
- D. A certificate of Insurance if the property is a condominium and the condominium corporation places the insurance;
- E. An Estoppel Certificate if the property is a condominium.

In addition there may be other documents delivered relating to the specifics of the transaction, and may include GST rebate forms for new housing, or documentation that confirms completion of a specific term of the contract.

Fundamental to the imposition of trust conditions and the giving of undertakings is the understanding that the trust letter sets out the terms on which the Buyer's lawyer can utilize the transfer and ensure that ultimately the title and any mortgage are registered in the Buyer's name and funds are released to the Seller's lawyer. In addition the trust letter sets out undertakings or action that the seller's lawyer must complete in order to ensure that the Buyers obtain title free and clear of any financial charges of the Seller's, as well as the terms on which any outstanding items that are to be delivered post closing. Trust conditions and undertakings must be reasonable,

consistent with the terms of the contract and be in writing. An undertaking is not enforceable if it is not given by a lawyer. Legal assistants or paralegals cannot give an undertaking. Ensure that all trust letters are signed by the lawyer, not the legal assistant or paralegal, otherwise the undertakings are not enforceable. Any amendments to the trust letter which amends the trust conditions, and or undertakings must be in writing and signed by the lawyer, or a lawyer within the firm.

### **Trust Conditions**

Clarity in drafting is key to trust conditions imposed by the Seller's lawyer. The trust conditions imposed direct and safeguard the seller's interests and the signed transfer of land until such time as the transaction has closed and the funds have been released to the Seller's solicitor for payment of any financial charges, or contractual obligations of the Seller, and ultimately after all obligations have been paid any equity is paid to the Sellers.

First and foremost the trust conditions must deliver the closing documents in trust that they may not be utilized in any manner unless and until the Buyer's lawyer is able to meet the trust conditions within the trust letter, and accepts the trust conditions and undertakings given. If the Buyer's lawyer cannot comply with the trust conditions or does not feel that the undertakings are complete or clear, it is incumbent on the Buyer's lawyer to contact the Seller's lawyer to advise of issues with the trust conditions or undertakings with a view to coming to an agreement of the trust conditions and or undertakings. If the lawyers cannot agree on the terms within a trust letter, the trust letter and closing documents must be returned to the Seller's lawyer. Trust letters must always be reviewed by the Seller's lawyer in detail, and direction given to the assistant regarding specific matters being dealt with in the trust letter. All undertakings and trust conditions must be reviewed and confirmed prior to signing by the Seller's lawyer. Do not rely on your assistant, review by the lawyer is absolutely essential. In addition review the trust letter immediately upon receipt, and deal with any issues to amend the trust conditions as soon as possible.

Trust conditions need to be tailored to the specifics of the transaction, and therefore there should never be one trust letter relied upon. Trust conditions for instance on a transaction where there is a mortgage being placed by the Buyer, vary greatly from a trust letter in a cash purchase. With the advent of the Protocol, the trust conditions a completely different set of actions and trust conditions are required. If acting for a Buyer or Seller the lawyer should examine the circumstances early on in the retainer to determine if a Protocol closing is possible, and should communicate same to the other lawyer.