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ACQUIRING AND DISPOSING OF INTERESTS IN LAND

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I. INTRODUCTION

This paper is intended to be a summary of key legal issues concerning the purchase and sale of land by local governments. We will be reviewing the major clauses in a purchase and sale agreement. Please be advised that this is a general overview and, in our experience, every property transaction has some unique detail. Please do not hesitate to get legal advice for property transactions.

II. TITLE

British Columbia has a land title system administered by the Land Title and Survey Authority. The Land Title and Survey Authority operates three land title offices: one in Victoria (responsible for Vancouver Island), New Westminster (responsible for the Lower Mainland and the North) and Kamloops (responsible for Kamloops and Nelson). Prior to buying or selling land, it is imperative that a local government, or its solicitor, review the title search for the land to be bought or sold so that the local government understands what it is selling or acquiring.

A title search provides a great deal of information about the legal status, or state of title, of a property, including the identity of the owner, the location of the property, and whether any financial charges, such as mortgages, or encumbrances such as easements, are registered against title to the property.

Some important things to look out for when reviewing a title search include:

- Name of the registered owner: Ensure that the registered owner's name is accurately spelled. If the registered owner's name was not entered correctly, or has changed since title was created, documents will need to be submitted to the land title office to correct spelling of the owner's name prior to completion of transfer of the property. If your local government has changed its formal name, by letters patent or otherwise, since owning the property, please ensure that a name change document is filed prior to the closing date.

- Plans: The legal description on the title search will indicate the survey plan that depicts the boundaries of the property. The plan should be reviewed to verify the location and boundaries of the property.

- Duplicate certificate of title: Duplicate certificates of title are sometimes issued by land title offices. Title to a property cannot be transferred if a duplicate certificate of title is in circulation. If a title search shows that a duplicate certificate of title has been issued, the duplicate certificate must be located and

returned to the land title office prior to or concurrently with closing of the transaction.

- Possibility of Reverter: A possibility of reverter restricts the use of land to certain purposes. If the land is used for a purpose contrary to the terms of the possibility of reverter then the entity holding the possibility of reverter has a right to require title to the land to "revert" to the holder.

- Agricultural Land Reserve: Title searches do not definitively indicate whether a parcel is within the agricultural land reserve. Instead title searches show that land "may" be in the agricultural land reserve and confirmation of the reserve status of the land must be sought from the Agricultural Land Commission. Where land is within the agricultural land reserve, its permitted uses are restricted in accordance with the *Agricultural Land Commission Act* and associated regulations.

- Liens, Charges and Encumbrances: There are numerous kinds of liens, charges and encumbrances that may be registered against title, such as mortgages, assignments of rent, builders' liens, restrictive covenants, easements, statutory rights of way and leases. If you see liens, charges or encumbrance on title, it is important to review them and understand how they affect the manner in which the land in question may be used. When purchasing or selling land, it is common for buyers and sellers to negotiate for the removal of certain charges prior to transfer of title.

These are just a few of the issues that may arise after reviewing a title search. If you are in doubt as to how to interpret a title search, you should seek advice from a lawyer.

III. NOTICE OF DISPOSITION

This is an issue that applies only where a local government is disposing of land or improvements. Notice is not required where a local government is acquiring land or improvements. The requirement to publish a notice of disposition is set out at section 26 of the *Community Charter* and section 187 of the *Local Government Act*. It is important to note that, by virtue of the *Interpretation Act*, the word "dispose" includes not only the transfer of fee simple title to land or improvements, but also leases. Therefore a notice of disposition needs to be published where a local government leases land or an improvement as landlord.

The notice of disposition must include a description of the property to be disposed, the nature of the disposition and, if applicable, the term of the disposition (for example where the property is to be leased). Where the land or improvement will be made available to the public, the process by which the land or improvement may be acquired must be included. Where the land or improvement will not be made available to the public, the notice must set out the

identity of the person acquiring the property and the consideration received by the local government. Note that, in the case of regional districts, land must be made available to the public except in certain circumstance (section 186 of the *Local Government Act*).

A notice of disposition must be published in accordance with section 94 of the *Community Charter*. This requirement applies to both municipalities and regional districts. Typically this is done by posting the notice in the public notice posting places of the local government and publishing the notice once a week for two consecutive weeks in a local newspaper. Note that section 94 of the *Community Charter* permits certain exceptions to this practice.

It is necessary to fully publish the notice of disposition *before* disposition of the land or improvement in question. To avoid any disputes as to whether the notice was published in time, it is prudent to fully publish the notice (i.e. for at least two consecutive weeks) prior to council or a board resolving to dispose of the land or improvement.

IV. ASSISTANCE

Local governments are prohibited from granting assistance to businesses (section 25 of the *Community Charter* and section 182 of the *Local Government Act*). Assistance includes the disposition of the land or improvement for less than market value. Recall that leases are a form of disposition. Therefore, in addition to being prohibited from selling land or an improvement for less than market value, a local government may not lease land or an improvement to a business for less than market value.

There is no definitive way of determining the market value of a property. In the past, courts have shown some flexibility in allowing local governments to approximate market value provided a reasonable amount of due diligence has been conducted. For example, a court has allowed a municipality to use assessed value as a basis for determining market value of a property (*Miller v. Salmon Arm*, 2005 BCCA 253). This may be sufficient in certain circumstances but it is not a practice that should be used across the board. The best form of due diligence is to obtain an appraisal. This is especially prudent where the property is of a nature such that market value is difficult to ascertain, or where the disposition is likely to be subject to public scrutiny.

Note that in certain non-business circumstances local governments are permitted to provide assistance. The various exceptions are too detailed to discuss in this paper, but if an exception applies notice of the assistance must be published before the assistance is provided.

V. COUNCIL RESOLUTION TO BUY OR SELL PROPERTY

It is recommended that local government staff obtain a resolution from their council or board before selling local government property. A separate resolution to purchase property may not be required in a particular transaction, if authority has been specifically delegated to staff.

VI. ANATOMY OF A PURCHASE AND SALE AGREEMENT

Agreements concerning the transfer of land are commonly referred to as purchase and sale agreements. These agreements are governed principally by contract law, and some statutes.

A. Offer and Acceptance

In contract law, the negotiation process is broken down into offer and acceptance. A contract is considered to have been consummated once an offer has been accepted. In the case of land transactions, an offer is typically made where a party provides the other party with a complete copy of a purchase and sale agreement. The offer is generally considered to be accepted by the parties' execution of the agreement.

Contract law textbooks are full of interesting cases testing the boundaries of offer and acceptance as legal theories. For the purposes of this paper, there are a few salient points in relation to offer and acceptance. First, not every communication between a buyer and seller of land is an offer. In contract law, communications preliminary to the offer stage are called invitations to treat. Second, where a counter-offer is made, the original offer is considered to have been rejected and is no longer open for acceptance. Third, acceptance must be communicated on time in order to be binding. For example, if an offer is stated to be open for acceptance for seven days, then the offer is considered to have lapsed after the seventh day and is no longer open for acceptance after the seventh day.

B. Consideration

In order to be binding, a contract must be supported by consideration. In broad terms, consideration means that each party to a contract must give something, or promise to give something, in order for a contract to binding. Usually nominal consideration is sufficient, for example the provision of one dollar by one party to the other party. In the case of purchase and sale agreements, usually the promise by the buyer to purchase the land, and the promise by the seller to sell the land, satisfies the requirement for mutual consideration. However, there are certain instances where it is not obvious that a promise has been supported by consideration or it is prudent to provide evidence of the payment of consideration (see the discussion on subjective conditions precedent below). When in doubt, it does not hurt for a party to pay nominal consideration to the other party.

C. Amendment after Acceptance

Unless otherwise provided in advance, an agreement may be modified after acceptance by mutual consent. It is prudent to evidence the amendment in writing.

D. Requirement for Writing

Section 59 of the *Law and Equity Act* contemplates that a contract respecting the disposition of land may be enforceable even though it is not in writing. Despite the wording of section 59 of the *Law and Equity Act*, it is always recommended that purchase and sale agreements be written given the amounts of money usually at stake. A purely verbal purchase and sale agreement is vulnerable to challenge and, depending on the circumstances, may not be enforceable.

E. Certainty of Terms: "The 3 Ps"

In addition to offer and acceptance and consideration, certainty of terms is a prerequisite to formation of a binding contract, that is, the terms of an agreement must be sufficiently certain in order for an agreement to be binding. In commercial agreements the core terms typically concern the nature of the good or service to be provided and the price to be paid in return for the good or service. In the case of land, the core terms that must be sufficiently certain are referred to as the "3 Ps": the parties, the property and the price.

1. Parties

The parties to a purchase and sale agreement are the buyer and the seller of the land. Usually this is not difficult to determine, at least in respect of the seller, who should be the registered owner shown on the title search to the property. However, there are a number of ways in which identification of the parties can be complicated.

Corporate parties (including societies) present some challenges. The existence of the corporation must be verified by conducting a corporate search. In some cases, eager business people will start conducting business in the name of their company before the incorporation documents have been fully registered. If, for some reason, the incorporation documents are not properly completed or fully registered, then the corporation will not have been created and there is a strong risk any putative agreement with the "corporation" will not be binding.

A more common risk when contracting with corporate entities is that not all corporate filings, such as annual reports, have been filed on time. Where filings have not been completed in time, the corporation will be designated as "not in good standing" by the corporate registrar. If a corporation has failed to file annual reports for two consecutive years, the corporation is at risk of being dissolved. It is possible for a dissolved corporation to be revived within a certain amount of time, however, so long as the corporation is in a dissolved state, any agreements with the dissolved corporation are not enforceable. Moreover, where a corporate landowner has been dissolved for at least two years, there is a risk of the land "escheating" (i.e., being transferred) to the Crown. If you are dealing with land that has escheated or may be at risk of escheating, you should seek legal advice.

(a) The Seller

As discussed above, when buying or selling land it is crucial to check obtain a title search before drafting a purchase and sale agreement. It is very important to make sure the seller's name on the purchase and sale agreement matches the name of the registered owner shown on the title search. For example, a title search may reveal that the property is jointly owned but only one of the owners has signed the purchase and sale agreement. In that case, the buyer should have both co-owners sign the purchase and sale agreement, or obtain confirmation that the signing owner has authority to bind all owners and that all owners will sign the conveyancing documents.

Care is also required where the property is owned in trust. Where the property is owned in trust, it is prudent to obtain, in addition to the trustee's signature, confirmation that the beneficial owner of the property agrees to the transfer of the property and to execute the conveyancing documents.

(b) Assignment

The legal rights to a contract may be assignable to a third party. In real estate, it is not uncommon for a buyer to wish to assign his or her rights under a purchase and sale agreement to another party. Unless the purchase and sale agreement expressly prohibits assignment of the agreement, a buyer is usually entitled to assign his or her interest to a third party.

The terms of assignment are governed by an assignment agreement between the buyer (as assignor) and the third party (as assignee). There are a number of issues to consider when drafting an assignment agreement, not the least of which is dealing with whether the assignor will continue to be liable under the purchase and sale agreement. If you are considering entering into an assignment agreement (whether as assignor or assignee) we suggest you seek legal advice.

2. Property

In order to be enforceable, a purchase and sale agreement must be certain as to the property to be transferred. This is best accomplished by setting out the legal description of the property, including parcel identifier number (if one exists), in the purchase and sale agreement. Make sure to double check that the legal description shown in the purchase and sale agreement matches the legal description on the title search for the property. The civic address may also be included in the purchase and sale agreement but care should be taken to make sure it corresponds to the property's legal description. Out of an abundance of caution, staff may wish to pull a copy of the plan that created the property parcel from the land title office to be absolutely sure that the local government is describing the correct piece of property.

3. Price

The third element of a purchase and sale agreement that must be certain is the price. This includes making clear which party will be responsible for paying HST (or GST), if it is a taxable transaction. It also includes setting out how the purchase price will be paid, for example, whether a deposit will be paid and, if so, when further payments will be made.

(a) Payment

The purchase price should be paid by certified cheque, bank draft or lawyer's or notary's trust cheque. Payment in cash should always be avoided.

VII. CONDITIONS PRECEDENT

A condition precedent is defined as an "act or event, other than the lapse of time, that must exist or occur before a duty to perform something promised arises" (*Black's Law Dictionary*, 9th ed. (2009) at 334). Usually conditions precedent allow the buyer to do or obtain something prior to being bound to complete the transaction. In real estate transactions, common conditions precedent include obtaining financing, obtaining a permit from an authority, completing sale of another property and obtaining a satisfactory property inspection. Conditions precedent are commonly referred to as "subject to" clauses, as in "the transaction is subject to the buyer obtaining financing."

Some conditions precedent are stated to be "mutual" meaning that the condition is of mutual benefit to both parties and that the transaction is not to proceed unless the condition is satisfied. Other conditions precedent are stated to be for the benefit of one party or the other. For example, if a condition precedent is "for the benefit of the buyer" then the buyer is entitled to insist on fulfillment of the condition before completing the transaction, or may waive fulfillment of the condition as a requirement for completion. Note that a party entitled to the benefit of a condition precedent must act in good faith and use reasonable efforts to satisfy the condition. For example, where completion is subject to rezoning, the party obtaining the benefit of the condition must make reasonable efforts to obtain the rezoning; the party may not give up seeking rezoning if the deal is no longer attractive.

The legal theory behind conditions precedent is that performance of the agreement is held in suspension until such time as the condition has been satisfied. If the condition has not been satisfied then the agreement comes to an end. With some conditions precedent it is straightforward to determine whether the condition has been satisfied. For example, if a condition precedent states "the purchase and sale of the property is subject to the buyer obtaining a building permit on or before July 1, 2011" it is easy to determine whether the condition has been satisfied: either the buyer has obtained a permit on or before July 1st or not. Conditions precedent that are contingent on the occurrence of some event that is objectively verifiable are referred to as objective conditions precedent.

This is in contrast to subjective conditions precedent, which require the exercise of discretion by a party in order to be considered satisfied, or allow a party to "indulge a whim, fancy, like or dislike in deciding whether or not to complete" the transaction (V. Di Castri, The Law of Seller and Buyer). A typical example of a subjective condition precedent is: "subject to the buyer obtaining satisfactory financing". The reference to "satisfactory" means that the buyer need not be obligated to proceed with the transaction if he or she obtains financing on any terms—it must be financing that is satisfactory to the buyer.

Courts have treated purchase and sale agreements containing subjective conditions precedent as non-binding because they are inherently vague. In the absence of some objective standard that sets out when a person should be considered "satisfied" that a condition has been fulfilled, it is impossible to say whether the deal will or should go ahead. Therefore the legal theory is that a purchase and sale agreement containing a subjective condition precedent is nothing more than a revocable offer by the seller (*Murray McDermid Holdings Ltd. v. Thater* (1982), 42 B.C.L.R. 119 (S.C.). The significance of this is that you may have an agreement you assumed is binding but is not in fact binding and the other party may be able to walk away from the deal without penalty.

Lawyers typically deal with subjective conditions precedent by characterizing the purchase and sale agreement as an option to purchase held by the buyer. An option is an irrevocable offer. Under the terms of the option, the seller is obligated to keep his or her offer open until the deadline for satisfaction of the subjective condition precedent. In order to create an option to purchase, the buyer must pay non-refundable consideration to the seller; often this is nominal consideration such as one dollar, but it may be more.

Finally, when or if a condition precedent has been satisfied or waived, it is important to ensure that satisfaction or waiver of the condition is communicated to the other party in accordance with the terms of the purchase and sale agreement. A purchase and sale agreement should include language dealing with how notice of satisfaction or waiver is to be communicated, and the consequences if satisfaction or waiver is not communicated, such as automatic termination of the agreement.

VIII. REPRESENTATIONS AND WARRANTIES

A. Generally

During the course of the negotiations, the seller (or the seller's agent) may make certain statements of fact ("representations") or promises of the truth of those facts ("warranties"). The legal remedies for a claim of breach of representation or warranty are complex, and beyond the scope of this paper. Sellers, understandably, wish to say as little as possible about the quality of the property and should only make representations about the property that the seller knows are true. While a seller has no statutory duty to warn a buyer about a physical defect in the property, the seller may nonetheless have a legal duty, under the common law, to

warn the buyer of a latent (that is, hidden) defect. A good summation of the law in this area is contained in *44601 B.C. Ltd. v. Ashcroft (Village)* [1998] B.C.J. 1964 (S.C.):

> Where a buyer knows of a latent defect but fails to disclose it to a buyer, the seller may be held liable for fraudulent misrepresentation. But there is no duty for a seller to disclose a patent defect. Patent defects are those which are discoverable by conducting a reasonable investigation of the premises and making reasonable inquiries. In the case of patent defects, the rule of caveat emptor strictly applies. Furthermore, buyers will be held to a fairly high standard of inspection.

For example, in the residential real estate market, real estate agents began using a sheet called a "property disclosure statement" in 1991. The property disclosure statement is a table of "yes/no/don't know" boxes for various latent building issues, such as moisture penetration, mold, infestations, and foundation failure. While there is no statutory requirement that a seller actually make the representations and warranties contained on that sheet, they are often filled out by sellers who do not take the time to assess their knowledge of problems with the property, to the sellers' detriment. Seller representations on property disclosure sheets can form the foundation of a successful claim of liability against the seller if a court determines that the statements induced the buyer to sign the purchase and sale agreement, or are considered collateral warranties. After 20 years of judicial interpretation, the degree of seller liability for statements on these sheets is inconsistent and a bit unpredictable, but it is clear that if a seller fills out the sheet, the seller can be financially responsible for defects the seller failed to fully disclose.

For these reasons, when a local government is a seller of property, it should exercise great care when making any representation or warranty, whether in the text of the purchase and sale agreement, through a supplemental property disclosure statement, or even verbally. In every case where a local government proposes to sell land that is known or suspected to have latent defects, such as environmental contamination, the local government ought to seek legal advice regarding its duty to disclose that defect.

1. "As-is, where-is"

The seller's ideal position would be to sell the property with no warranties or representations with respect to the property (indicated as "as-is, where-is" in the purchase and sale agreement). The rule of *caveat emptor* will apply to that transaction, except if there is fraudulent misrepresentation on the part of the seller regarding a latent defect, or where there is a substantial error relating to the property between the parties.

2. Survival of representations and warranties

Without any expression of the parties' intention in the purchase and sale agreement, representations and warranties relating to property title "merge" (expire) when the transfer of property is completed, leaving the buyer without recourse against the seller after the closing date. However, the Supreme Court of Canada has said that there is no presumption of merger, so each case needs to be looked at on its merits. Merger does not apply to fraudulent misrepresentation.

Having said this, any warranty or representation that is important to the buyer should be included in the purchase and sale agreement and specifically stated to survive the completion of the property transaction. From the seller's perspective, the seller should consider each representation and warranty requested by the buyer, and limit the seller's representations and warranties to those within the seller's knowledge and belief.

B. Environmental matters

All parties to a land transaction should turn their minds to the potential environmental quality of the land at issue, and consider closely the purchase price and whether any or certain environmental representations and warranties need to be included in the purchase and sale agreement.

If the purchase and sale agreement is silent as to environmental representations and warranties, the *Environmental Management Act* governs, and makes all past and present owners and occupiers potentially liable for the consequences of contamination, subject to a few exceptions. However, if contamination is found and remediation required of all past and present owners, the provincial Director of Waste Management is required to take into consideration agreements between those owners before making a remediation order distributing costs between them. This is one important reason for addressing this issue directly in the purchase and sale agreement.

The process of negotiating and drafting the environmental representations, warranties and terms in purchase and sale agreement is an exercise in allocating risk between the seller and the buyer.

From a seller's perspective, some risk management strategies are:

- sell the property "as-is, where-is", so long as the seller has no actual knowledge or suspicion that the property is contaminated.
- expressly not give any representations or warranties as to the state of the property.

- make the buyer solely responsible for environmental investigation and testing before the closing date.

- make the buyer solely responsible for all contamination caused or occurring both before and after the closing date (presumably, the purchase price will reflect this allocation of responsibility).

From a buyer's perspective, some risk management strategies are:

- get a site profile from the seller and any environmental studies of the property in the seller's possession. (Note that the *EMA* requires a seller to provide a site profile to the buyer if the seller is selling property that the seller knows or reasonably should know was used at any time for a prescribed industrial or commercial purpose or other prescribed purpose listed in the Contaminated Sites Regulation).

- get representations and warranties from the seller regarding the historical uses of the property, the current uses of the property and the current condition of the property.

- make the seller financially responsible for remediation of all contamination caused or occurring before the closing date.

IX. TAXES AND OTHER COSTS

A. GST/HST

Harmonized Sales Tax has both a federal and provincial component, and the current rate in BC is 12%. Since the referendum earlier this year rejecting the HST model, the Province is preparing the transition from the HST model back to the split GST/PST model, which will have some tax calculation effects on property transactions, although the exact details have not been announced yet. For the purpose of this section, we will deal with combined HST and the split GST/PST models together in general terms.

This tax needs to be considered during every transaction. When the buyer is a local government, the transaction is exempt from GST/HST. However, when a local government is selling property, GST/HST may apply. If GST/HST is payable, the local government must collect it unless the buyer is registered for GST/HST purposes. A handy rule of thumb is to collect GST/HST from a buyer who is an individual, and to get a warranty of GST/HST payment from a buyer who is a company.

Before signing a purchase and sale agreement, a buyer should determine whether GST/HST will be payable and whether the negotiated price includes GST/HST or not. Certificates regarding GST/HST warranties should be provided for in the purchase and sale agreement. Also consider

including any representations or warranties given by the seller in relation to whether GST/HST is payable and who will pay in the event of improper tax calculation.

B. PTT

The buyer is responsible for paying property transfer tax (PTT) on every property transaction. The property transfer tax rate, in an arm's length transaction, is usually 1% on the first $200,000 of the purchase price and 2% on the balance of the purchase price. Local governments are generally exempt from paying PTT.

The PTT return is a statutory form that needs to be prepared by buyer's lawyer/notary and signed by buyer. Even if the local government is exempt, a PTT return must be submitted to the Land Title Office at the same time as the Form A transfer document.

C. Property Taxes

Generally, buyers of property should expect to pay an addition to the purchase price for their share of the current year's property taxes. This amount is usually shown in the statement of adjustments circulated between parties for signature before closing.

Since land owned by a local government is tax-exempt, when a local government is selling land, there will be no current year taxation to adjust. We suggest adding as a term to the purchase and sale agreement that the buyer will pay, as an addition to the purchase price, a specific sum in lieu of taxes.

D. Other Costs

The purchase and sale agreement should make the buyer responsible for paying all conveyancing costs, PTT and its own legal fees. If a local government is the seller in a transaction, consider building into the purchase price an amount for the local government's legal, advertising and other fees.

X. DEPOSITS

Both parties should consider whether a deposit should be part of the purchase and sale agreement. Historically, the buyer usually tendered an amount, no more than 10% of the purchase price, which may be retained by the seller if the buyer fails to complete the transaction. Courts often viewed a larger amount of deposit as a penalty, which the seller could not retain unless it was a genuine pre-estimate of the seller's damages if the deal did not close. For this reason, in BC it is still recommended that a deposit not be more than 10% of the purchase price.

If there is a deposit, the purchase and sale agreement should specify the amount of the deposit, who will hold the deposit pending actual transfer, and for whose benefit interest earned on the

deposit funds will accrue. The parties must also consider how the deposit is to be treated in the event of a default by the buyer. Usually, if the buyer defaults, the purchase and sale agreement will stipulate that the seller may, at its option, retain the deposit on account of damages, without prejudice to the seller's other remedies.

XI. CLOSING

The purchase and sale agreement will usually set out the method and timeline (the 'roadmap') for making the monetary transfer and land title registration happen on the same day. The day that the money is exchanged and the land title registration occurs is known as "closing" or "completion".

The purchase and sale agreement should always say that "time is of the essence" meaning that the closing date of the transaction and any other timelines in the purchase and sale agreement are a fundamental part of the purchase and sale agreement and that all time limits must be strictly complied with. The failure of a party to perform on time will constitute a breach of the purchase and sale agreement, giving the other party the right to pursue his/her remedies immediately except in restricted circumstances in which it would be unjust or inequitable. Old court cases have held that the time limit for completion is 3:00 pm on the completion date (the time the land title office closes). Now that the land title office has mandated e-filing for simple transfers, it is possible that the 3:00 pm deadline no longer applies, effectively extending completion time to 8:00 pm. If, by words or conduct, a party waives the requirement for strict compliance with time limits, then time will no longer be of the essence and the other party will have a "reasonable time" to perform their end of the contract.

A. Closing Documents

The purchase and sale agreement will list all the documents to be signed and exchanged by the parties to finalize the transaction. The most important document is the transfer document, known as the Form A Transfer, which is signed by seller. The Form A Transfer identifies the full legal name of the buyer, the buyer's mailing address, and the PID and legal description of the property to be transferred.

Other closing documents that need to be prepared and signed are:

- Statement of adjustments. This is a tabulation of the final amount to be paid from the buyer to the seller, having regard to adjustments to the purchase price for deposit, property taxes, utilities, etc.

- Warranties for payment of taxation. One example is a warranty for payment of GST/HST by a buyer who is registered for GST/HST purposes, promising that the buyer will remit the tax payable directly to the Canada Revenue Agency. Another example is a certificate/warranty as to residency under the *Income Tax Act* for non-resident withholding tax. This is needed where the seller is not or

may not be a Canadian resident for income tax purposes. A non-resident seller needs to get a s. 116 clearance certificate from the federal government with respect to taxable capital gains that exceed allowance capital losses resulting from the sale, otherwise the buyer is responsible for payment to the Canada Revenue Agency of the amount that the seller should have paid.

- Any other agreements that need to be registered at the land title office, such as rights of first refusal, options to purchase, covenants, etc.

- Any other agreements that are not registered at the land title office, such as general assignments of existing leases, and bills of sale for significant personal property identified in the purchase and sale agreement.

- PTT form signed by the buyer.

To avoid uncertainty and pre-closing disagreements over the form of the closing documents, warranties and agreements should either be attached as schedules to the purchase and sale agreement or described in sufficient detail.

B. Undertakings

Our closing method is unique to BC and places a high degree of reliance on lawyers and notaries and the land title system. The key element in making this work is the exchange of undertakings between the buyer's and seller's counsel. Closing undertakings explain the documentation that must be tendered at the closing, the method of payment of the purchase price, and the mechanics of registering the closing documents at the land title office.

There is a set of "common" or "usual" undertakings that are used in BC to provide certainty and predictability for two basic purposes in real estate transactions:

- to settle the immediate matters of the delivery or exchange of documents, the registration of documents, and the payment of money necessary to complete the transaction; and

- to return the parties to their original position or otherwise deal with contingencies if the transaction is not satisfactorily completed.

If an undertaking is breached, legal action may be taken against the lawyer/notary by the party to whom the undertaking was given. This solemn nature of undertakings provides the foundation for smooth real estate transactions.

XII. USE OF REAL ESTATE AGENTS

Some local governments use real estate agents, rather than staff, to negotiate purchase and sale agreements. Some points to remember if your local government is working with a real estate agent:

- Remember that real estate agents will hold deposits as stakeholders. Often their commissions are taken straight out of the deposit.
- The MLS listing is not a sufficient notice of disposition for the requirements of the *Community Charter*.
- Local governments should beware of "dual agency" relationships where a real estate agent is working for both the seller and the buyer, as practical difficulties can arise with confidentiality of information and the fiduciary obligations of one real estate agent to two principals.

XIII. CONCLUSION

When in doubt about any of these matters in acquiring and selling property, consider getting legal advice. There are many subcategories of property that have special rules and closing procedures, such as strata property and newly-built housing (new home warranties, HST/GST implications), that are not discussed in this paper.

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