

Issues with Standard Forms to Buy and Sell

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In some quarters, there is a nostalgic wish for the old days of a “hand-shake” or “back of a napkin” deal. The world is different now.

In almost all real property sales, the purchaser submits a document called an Offer to Purchase to the seller. It outlines the terms on which the purchaser wants to buy the property. The seller can accept or reject the Offer or make a Counter-Offer with different terms. The Offer to Purchase or Counter-Offer, once accepted, is a *binding contract* between the parties.



Standard form Offers to Purchase are the norm. If they are prepared by a real estate agent, they will be on a set form with a fixed collection of standard terms. But reliance on a standard form, whether in real estate transactions or any other matter can lead to problems. The situation is even more dire if the parties rely on Google for what is supposedly a standard form. “One-size fits all,” unless you are looking at a baggy sweater, is rarely true – especially with real property transactions that may well be the largest financial transaction the seller or purchaser will be involved with in their lifetime.

There is an unfortunate assumption that buying and selling a house is a run-of-the-mill deal. With an average house price in Manitoba close to \$300,000, both parties should be wary of a cookie-cutter approach. This article will give some examples of why sometimes reliance on a standard form Offer to Purchase won't cut it. These are common situations that present additional considerations that need to be addressed before the Offer to Purchase is signed. They are by no means the only reasons to be wary of “one-size fits all”.

Mixed Use Farm and Residential

If you are purchasing a rural home where the title consists of a house/yard-site and farm land, there are additional factors that must be considered.

The first key consideration is the allocation of the purchase price between the house and the farm property, which is important for tax reasons. Residential real estate used as a principal residence is capital-gains exempt, but the farm land will not be. The seller and the purchaser have different objectives in determining how the purchase price will be allocated between the

residence and the farm land.

Another important consideration for tax purposes is that GST is payable on most commercial land. This will apply to the farm land. If the purchaser is not a GST registrant, the seller is required to collect GST on that portion of the purchase price allocated to the farm land. Purchasers that are not registered for GST should give careful consideration to whether they should register for GST prior to completing the purchase.

Standard form real estate Offers to Purchase do not allocate the purchase price nor deal with GST issues.

If the property has a sewage ejector, *prior to the sale* it must be decommissioned or a Certificate of Exemptions from Manitoba Sustainable Development must be obtained. If the purchaser does not insist proof that this has been done, he must decommission the ejector within 2 years and replace it with a much-more expensive Onsite Wastewater Management System.

Standard form real estate Offers to Purchase do not deal with sewage ejectors.

Some rural properties benefit from a “farm use” designation that results in a discounted property tax bill. But if the purchaser changes the use of the property after the purchase, the Municipality will claw-back *from the purchaser* all the discounts the seller received in the prior 5 years.

Standard form real estate Offers to Purchase do not deal with farm-use claw-backs.

Commercial Transactions

If the land is being acquired for use in a business, a prudent purchaser should ensure the Offer to Purchase is drafted to meet the his specific needs. Although there are standard form Offers to Purchase for commercial transactions, commercial purchases are even more likely to require individual tailoring to meet the purchaser’s needs. The purchaser will want to know that the land being purchased is fit for the intended purpose, that the Municipal Zoning laws will permit the use of the land for the purchaser’s intended purpose, that there are no potential environmental issues that will require expensive remediation – and the list goes on and on.

Offers to Purchase will contain statements that the seller makes based on his knowledge of the property. The purchaser will complete the purchase relying on those statement. These statements are known as **representations and warranties**. Representations and warranties are an essential part of the contract for all types of sale and purchase transactions.

Standard form Offers to Purchase for both residential and commercial real estate will contain

some representations and warranties. However, it is critical to the purchaser that the Offer requires the seller to make *all* necessary representations and warranties to protect the purchaser's interests. It is far too late for the purchaser to learn about those matters after he owns the property.

On the other side of the deal, the seller must make some representations and warranties if he wants to sell that property. However he should be careful that he is not promising anything he need not promise or that is stated in a way that attracts liability. For example, there is a world of difference between the statement “*To the best of my knowledge, the building complies with the Building Code*” and the statement “*The building complies with the Building Code*”. If a Code violation is discovered later, the seller is not responsible if he made the first statement and it was true – he really had no knowledge of any Code violation. However, the second statement would potentially make the seller liable for breach of contract. Such a statement, if false, may leave the seller on the hook for the cost of repairing the Code violation, even if he had no knowledge of it prior to the sale.

The Offer to Purchase, and especially the representations and warranties, should be drafted to meet the needs of the parties. If you consult with a lawyer after signing the Offer to Purchase, even though the deal has not yet closed, it will already be too late. Remember: an accepted Offer is a *binding contract*.

Hasty reliance on a standard form Offer to Purchase can result in a purchaser finding out after the seller's acceptance that certain terms in the Offer may cause problems. If this happens, unless conditions have been inserted to allow the purchaser to terminate his obligation to purchase, the purchaser will be compelled to complete the purchase upon the terms set out in the Offer.

Conditions are another important tool available to contracting parties. Until all conditions of sale are satisfied or waived, the sale cannot be concluded. Common conditions for the benefit of the purchaser include being approved for satisfactory financing to fund the purchase price, conducting a satisfactory inspection of the property, or having a window of time to perform any due diligence investigations on the target property that are desirable. Conditions are set out in the Offer to Purchase and must be complied with or satisfied prior to the date the purchase is scheduled to close. If a condition is not satisfied or waiver, the Offer to Purchase will be null and void.

Getting proper legal advice is always a prudent move in any significant transaction. But buying an active business, as opposed to a parcel of land, is far more complex. There is simply no standard form Offer to Purchase that can ensure both sides get what they bargained for. That can only happen with a properly-drawn Asset Purchase Agreement. If such a transaction is not documented correctly, both parties risk unintended and potentially disastrous tax, legal, and business liabilities. Fixing those later will be far more expensive than getting it done right in the first place.

Conclusion

Purchasing real estate is often more complicated than most people expect. Large sums of money are at risk and when the financial stakes are high, a friendly deal can quite quickly turn sour. Ultimately it is not just about getting the deal done, but making sure the deal is done properly. Standard forms provide convenience and might seem to make it easier to “get the paperwork done”. But if you don’t know exactly what obligations your standard form is placing upon you, or what it is not placing on the other party, it is a recipe for disaster.

From a purely economic perspective, getting advice before you are stuck in a binding contract can lead to savings in the long run. No matter what type of purchase or sale you are looking to undertake, the lawyers at Christianson TDS would be pleased to assist you.

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