

Working Group on Lawyers and Real Estate Ontario Standard Closing Documents

Rationale Document

The vast majority of residential real estate resale transactions in Ontario close pursuant to OREA Form 100, the Agreement of Purchase and Sale (“APS”), which has been in widespread use since January 1, 1996. The APS is now available to all lawyers under agreement with the Ontario Real Estate Association (“OREA”) (see www.lawyersworkinggroup.com). As the rights and obligations of vendors and purchasers are now standard across Ontario under the APS, the Working Group on Lawyers and Real Estate decided to review the standard closing documents already being used very successfully in Ottawa, Barrie, Cambridge, Hamilton, Lincoln/Welland and Windsor with a view to creating standard closing documents for all of Ontario. In drafting them, the Working Group wanted to end the repetitions in the old forms, and delete any statements, declarations and so on that the vendor is not obligated to give under the terms of the APS. The theory is that vendors, and their lawyers, should not be delivering anything that is not required under the APS, as doing so imports liabilities that are not required by the contract. Any purchaser who wants additional statements, declarations and so on may seek to contract for them at the time the APS is negotiated. The members of the Working Group are:

1. Bob Aaron of Toronto
2. Jill Anthony of Niagara
3. Clare Brunetta of Fort Frances
4. Mark Castle of Dundas
5. Paul Dixon of Hamilton
6. Gerry Dust of Ottawa
7. Diane England of Oshawa
8. Paul Fay of Kingston
9. George Gibson of Barrie
10. Robert Grant of Fergus
11. Claude Lacroix of Sudbury
12. Raymond G. Leclair of Toronto
13. Kim Little of London
14. Richard Parisien of Cornwall
15. Stephen Pearlstein of Toronto
16. Maurizio Romanin of Toronto
17. Jerry Udell of Windsor
18. Bradley Wright of Ottawa
19. Raymond Gouin of Ottawa

Resource persons:

20. Lori Swartz of Toronto
21. Hana Tariq, Student-at-law of Toronto
22. Gloria Enge, Student-at-law of Toronto

Documents: The following five documents were approved:

1. Vendor’s Closing Certificate
2. Purchaser’s Undertaking & Direction re Title
3. Lawyer’s Direction re Funds
4. Lawyer’s Undertaking
5. Lawyers’ Delayed Closing Escrow Agreement, if required

The documents were circulated for consultation to members of the real estate bar, and are available in their final versions at www.lawyersworkinggroup.com. LawyerDoneDeal (RealtiWeb) and Teranet (Conveyancer) have agreed to add them to their programs for use in Ontario.

Benefits of using standard closing documents:

1. Less paper, no repetition, and more efficiencies, as the content of the documents can easily be confirmed as being either unamended or modified;
2. Less time needed to negotiate the content of closing documents;
3. Adherence to province-wide standards;
4. Clients' rights and obligations are protected based on the APS;
5. Either party can easily prepare the documents for the other side; and
6. No need to delete inapplicable paragraphs as they are worded conditionally.

Resale Deals Only: These documents are intended for resales of existing residential properties, freehold or condominium. The documents are not intended for new home, commercial and other transactions, although they may be useful as checklists.

Terminology: The APS refers to "Buyer", "Seller" and "Lawyer". In the standard closing documents, the Working Group opted to continue using "Purchaser" and "Vendor" but changed "Solicitor" to "Lawyer". The words used in the documents reflect their meanings as defined in the APS or the Document Registration Agreement ("DRA") as applicable. For example, "Requisite Deliveries" are as defined in the DRA.

Headings: Each document has a heading which states:

"This Document is in the Form approved by the WORKING GROUP ON LAWYERS AND REAL ESTATE on DATE OF APPROVAL, except for clearly shown changes. Any changes not clearly shown are of no effect."

Thus, any changes that are required for any particular transaction can be made easily, provided they are made clear on the document such as by *handwritten text*, BLOCK CAPITALIZED LETTERS, underlining, **bolding** or by ~~striking out~~ so as to be clearly obvious to the reader. Whichever method is used should remain visible even if the document is scanned, photocopied or faxed (a different colour font or yellow highlighted text is not always visible and is not recommended).

Document 1: Vendor's Closing Certificate ("VCC"): In order to avoid having to tailor the VCC, all paragraphs simply refer to the terms of the APS, the Statement of Adjustments or other document, as appropriate.

- The VCC sets forth that all adjustments for municipal **property taxes** should be completed on the basis of and after all tax payment arrangements between the vendor and the city have been cancelled. It is the Vendor's obligation to arrange with the municipality to cancel the monthly payment arrangement.
- In reality, **fuel oil**, propane or condensed gas are usually filled on or about the closing day and payment often follows closing, even if the preference and the obligation in the APS would be to have both the filling and payment occur before

closing. This paragraph confirms that the filling and payment have been done or implies an undertaking to do so ASAP after closing. Note that a Purchaser who does not receive a fully paid tank could also require an adjustment to the Statement of Adjustment under the Undertaking to Readjust.

- Some counties have a practice whereby the Vendor's lawyer retains monies in trust for unpaid **utilities or other adjustments** if not paid by the Vendor within a reasonable time after closing. This practice is not universal and there is no legal obligation for it in the APS. Thus, the VCC is silent on this issue.
- To avoid the need to have clients return to the office to resign a **Direction re funds**, the VCC authorizes all payments to be made as directed by their lawyer.
- The APS does not resolve the treatment of **GST** and therefore information is required of the Vendor. The VCC sets out the used residential exemption which will be applicable in almost all cases.
- The VCC tracks the language of the Income Tax Act to establish **residency**. The APS does not require any documents required in a real estate transaction to be in the form of an affidavit. Even the residency confirmation requires only a certificate or statutory declaration upon which the Purchaser may rely. Paragraph 17 of the Vendor's Closing Certificate confirms that all statements being made have the same force and effect as if made under oath or affirmation. Nothing further is required.
- The **Planning Act** compliance paragraph has been retained where the lawyer is required to make inquiry in order to "sign" the Planning Act statements.
- The **Survey** paragraph has been retained where it would be useful or applicable.
- The rights of the parties are clearly defined in the APS and therefore there is no need to deal with **UFFI** again. Putting any UFFI provision in the closing documents raises the possibility of error and exposure to liability.
- The VCC does not contain a **Construction Lien** statement. The APS creates no obligation on the Vendor to provide the representation or to indemnify the Purchaser. Instead, Purchasers rely on the Vendor's representation and warranty in the APS that the title is free and clear and on the Purchaser's own building inspection.

Document 2: Purchaser's Undertaking and Direction re Title: The Purchaser's Undertaking mirrors the Vendor's undertaking in the VCC. As the APS does not usually set out the full legal name of the Purchasers, their date of birth or their manner of taking title, a Direction re Title is needed. See Section 67 of the *Land Titles Act* which states: "*no person, other than a corporation, may be shown as the registered owner of land or a charge unless the person is*

described by surname and by the first given name in full, followed by another given name, if any, in full.”
See also Section 48(2) of the *Registry Act*. As both the Undertaking and Direction would be used in all transactions, they have been combined in one document.

Document 3: Lawyer’s Direction re Funds: The APS provides that the Purchaser simply needs to tender on closing a bank draft or certified cheque from a Chartered Bank, Trust Company, Province of Ontario Savings Office, Credit Union or Caisse Populaire. However, due to Law Society rules for closing funds and the increasing incidents of fraud, the document provides that funds should be only by bank draft(s) or certified cheque(s) drawn on a lawyer’s trust account or other means agreed to by the lawyers. This reflects our long standing practice in dealing with closing funds and the Law Society’s rules, and permits flexibility were the individual lawyers are otherwise satisfied with the reliability of the funds they are to receive.

Document 5: Lawyers’ Delayed Closing Escrow Agreement: On the infrequent occasions when this document is needed, time is usually at a premium. This document has been prepared either to serve as proposed or as a checklist. Users should tailor the document as needed. With respect to **insurance**, the common law provides that the insurable interest of the parties changes once the APS is in place, with the insurance obligation changing from the Vendor to the Purchaser, notwithstanding no closing has taken place. The APS reverses this and requires the Vendor to maintain the insurance in trust for both parties. The **Escrow Agreement** (1) confirms the Vendor’s obligation to maintain the existing insurance, (2) confirms the Purchaser’s obligation to insure his/her contents from the date of possession until he/she becomes the owner and, (3) requires both parties to advise their respective brokers or insurance companies of the escrow closing.

Translation: The documents are available in English and French.

Schedule “A”

List standard documents used by certain jurisdictions

1. Documents – **Barrie**
 - A. Direction & Authorization to Waive Requirement for a Survey
 - B. Purchaser’s Direction & Undertaking
 - C. Vendor’s Declaration
 - D. Vendor’s Solicitor’s Undertaking
 - E. Vendor’s Undertaking & Bill of Sale
 - F. Vendor’s Direction/Vendor’s Solicitor’s Re-direction

2. Documents – **Cambridge**
 - A. Vendor’s Combined Declaration

3. Documents – **Hamilton**
 - A. Standard Sale Closing Document
 - B. Undertaking

4. Documents – **Lincoln & Welland**
 - A. Buyer’s Closing Certificate (includes Direction For Title & Undertaking to Readjust
 - B. Seller’s Closing Certificate
 - C. Seller’s Lawyer’s Redirection and Undertaking

5. Documents – **Ottawa (CCLA)**
 - A. Purchaser’s Undertaking
 - B. Direction re: Funds
 - C. Solicitor’s Undertaking
 - D. Vendor’s Closing Certificate

6. Documents – **Windsor (ELA)**
 - A. Declaration of Possession
 - B. Direction re: Funds
 - C. Escrow Agreement
 - D. Purchaser’s Undertaking
 - E. Solicitor’s Undertaking re: Discharges
 - F. Statutory Declaration
 - G. Vendor’s Closing Certificate and Undertaking