

Working Group on Lawyers and Real Estate
Ontario Standard Closing Documents

Rationale Document
(Updated June 1, 2017 & February 28, 2019)

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 were:

Bob Aaron of Toronto
Clare Brunetta of Fort Frances
Paul Dixon of Hamilton
Diane England of Oshawa
George Gibson of Barrie
Claude Lacroix of Sudbury
Kim Little of London
Jerry Udell of Windsor
Raymond Gouin of Ottawa

Jill Anthony of Niagara
Mark Castle of Dundas
Gerry Dust of Ottawa
Paul Fay of Kingston
Robert Grant of Fergus
Richard Parisien of Cornwall
Maurizio Romanin of Toronto
Bradley Wright of Ottawa

Resources persons

Lori Swartz of Toronto
Gloria Enge, Student-at-law of
Toronto

Hana Tariq, 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

In 2019 a sixth document was added – Section 116 ITA Undertaking

The documents were circulated for consultation to members of the real estate bar, and are available in their final versions at www.lawyersworkinggroup.com and have been added to the RealtiWeb and The Conveyancer programs for use in Ontario.

The current and latest updated versions of the documents are dated February 28, 2019.

By unanimous resolution dated May 11, 2017, the Federation of Ontario Law Associations (FOLA) adopted these Working Group closing documents and encourages all real estate lawyers to incorporate them into their standard practice.

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 **HST** (formerly 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 **Planning Act** compliance paragraph has been deleted. The APS is conditional on compliance with the *Planning Act* and it is the lawyer's obligation to ensure there are no breaches. A statement or declaration by the Vendor in the VCC will not be helpful as the transaction will be without effect. Signing the *Planning Act* Statements in the Transfer is the recommended,, where applicable.
- 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.
- The VCC tracks the language of the *Income Tax Act*, R.S.C., 1985, c. 1 to establish residency. Section 116(5) of the *Income Tax Act* does not require a statutory declaration but imposes liability for the tax on the purchaser unless, after reasonable inquiry, the purchaser had no reason to believe that the non-resident person was not resident in Canada. It was originally felt that a statement in the VCC was sufficient to satisfy that obligation, however, as the APS contractually obligates the parties to exchange a statutory declaration, the VCC has been modified to be consistent with the APS.
- Paragraph 7 sets out a reminder for the Vendor to re-adjust any item of the Statement of Adjustment which is later found to be inaccurate. It also refers to the Purchaser providing a reciprocal undertaking. This is the effect of the inclusion of "E&OE" at the end of the Statement of Adjustment. The OSCD's Purchaser Undertaking & Direction re Title includes the reciprocal undertaking for the Purchaser. This provision was simply meant to be a reminder to both parties of their obligation to re-adjust, if necessary.

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, (a) if the person has a single name, but no surname or first given name, the person's single name; or (b) if the person does not have a single name, the person's surname and 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 previously provided 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. Since the 2017 version of the APS it provides that "Money shall be tendered with funds drawn on a layer's trust account in the form of a bank draft, certified cheque or wire transfer using the Large Value Transfer System."

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.

Document 6: Section 116 ITA Undertaking: This document is new as of 2019. Many issues arise in circumstances where the Vendor is not a resident and cannot produce a S.116 Certificate in time for the closing. The Act requires that the Purchaser withhold part of the closing funds to settle any taxes owing. Typically, for a person's personal residential real estate, 25% is the amount to be withheld but lawyers should be aware that this is not for all properties. Properties referred to in s. 116(5.2) require 50% to be withheld. This includes commercial properties, depreciable property and others. Please consult the section when thinking of accepting this undertaking. This document can be used as proposed or as a checklist.

Translation: The documents are available in English and French