

Be Safe or Be Sued and Closing Procedures

Non-Resident Transactions

- Use a lawyer or notary who uses the Electronic Filing Service (EFS) so that documents that can be emailed to the overseas Buyer or Seller for execution – then emailed or faxed signed copies can be used for registration on the Completion Date
- Failing EFS – or as well - obtain A Power of Attorney – but if the Buyer will need financing check with the Lender to see if they will accept a Power of Attorney executed overseas (HSBC & TD Canada won't because of a high incidence of fraud)
- If the Buyer needs financing be aware that non-residents are usually restricted to a 65% loan-to-value (LTV) - they may also need to use a private lender because of inadequate (from a Canadian perspective) income verification – exception: a US Buyer who does business at a Canadian bank branch in the USA might get 75-80% LTV
- Up to ten days may be required to have wired funds clear the Buyer's bank account – a lawyer or notary will require a bank draft from a Canadian financial institution to complete
- Non-resident Sellers face a 25% withholding tax on sales – to avoid a prolonged holdback period have the Seller's accountant should file the income tax return for the sale prior to the Completion Date so that a clearance certificate on or before the Completion – be aware , there is a 10-20% penalty for late tax return late filings so hire an accountant!!!

Property Transfer Tax (PTT)

- PTT is 1% on the first \$200,000 of market value - 2% on balance
- first time home buyers are exempt from all or part of the PTT:
 1. if property cost \$425,000 or less (fully exempt)
 2. if property cost between \$425,001 to \$450,000 (partial exemption – see tax forms)
 3. if Buyer has never owned property anywhere in the world and has never received a first time home buyers PTT exemption before
 4. regardless of whether the purchase is all-cash or financed (NEW)
 5. if the Buyer is a Canadian Citizen, or a permanent resident as determined by Immigration Canada, has lived in British Columbia for 12 consecutive months immediately before the Completion Date or has filed 2 income tax returns as a British Columbia resident during the 6 years before the same date
 6. provided that if the property is re-sold or transferred within a year of purchase the PTT exemption will be voided

GST

Buyers and Sellers need to deal with the following GST issues in most real estate transactions involving new residential and commercial properties. Where both ownership and possession are transferred on or after January 1, 2008, the following rules apply:

- the 7% GST rate will apply* to the total sale price where a written agreement was entered into on or before May 2, 2006
- the 6% GST rate will apply* to the total sale price where a written agreement is entered into on or before October 30, 2007, but after May 2, 2006.
- (In both of these circumstances, the purchaser will be entitled to file a claim directly with the Canada Revenue Agency (CRA) to be paid a "Transitional Rebate" that reflects the GST rate reduction to 5%, net of any corresponding "New Housing Rebate" adjustment - The purchaser must complete a separate application for the GST Transitional Rebate and submit it to the Summerside Tax Centre – the Buyer must find the money for the full GST rate and wait two months for a refund)
- the 5% GST rate will apply to all other transactions
- in addition, where a Buyer is purchasing a property valued at \$350,000 or less, for use as a residence a GST New Housing Rebate of 36% of the GST ordinarily payable may be obtained (if property is between \$350,000 and \$450,000 a partial rebate can be obtained) – check with the builder/developer whether the 36% reduction will be assigned to the Seller, if so, the Buyer will not have to pay 36% of the GST on the Completion Date
- A certificate by a Seller that a transaction is exempt means that the Seller becomes liable on a reassessment for GST plus interest and penalty
- If the Seller has not given a certificate, the Seller can invoice and recover GST from the Buyer after closing.
- The responsibility to determine if GST is owing on a transaction is that of the Seller (and his realtor?) alone and not the Buyer
- the Seller is not required to collect GST when the Seller is a non-resident or if the Buyer is registered for GST - in either situation the Seller should not collect GST since the Buyer will still be liable for tax and to self-assess
- to avoid collecting and remitting GST, the Seller must obtain proof of purchaser's G.S.T. registration number before closing and confirm the number on the CRA website

Powers of Attorney

- For financing – check with bank if OK for use with mortgage transaction – see above
- grantor must be alive, attorney must be an adult with capacity
- POA must not be springing, restricted or expired
- attorney can't transfer property to self unless POA expressly permits it
- must be registered in LTO prior to executing land title office documents

Committeeships's

- cumbersome, expensive, may cause family dissent, may delay closing
- requires consent of family, consent of Public Trustee, affidavits from two doctors treating patient, one must be a specialist qualified to conduct a standard mental assessment of patient
- must be spoken to before a Chambers judge and may be opposed by other family members (GET A POA)
- requires \$2-3,000.00 and about two months lead-time to process

Estates

- with a will you obtain a Grant of Probate – the will and the appointment of the executors is “proved”
- without a will you obtain Letters of Administration with family/beneficiaries agreeing to selection of one or administrators
- no functional difference between the two types of estates
- typically takes two to three months to obtain probate or letters of administration
- probate can be obtained in less than 3 weeks if lawyer can make case for urgent necessity, longer for administration
- when a Seller or Buyer dies before completion the contract becomes part of the rights and obligations of the deceased’s estate and the executor or administrator will normally complete the transaction after a delay

Capacity Issues

- must understand property being transferred, charges on title, reasons for transfer
- aging parents may be influenced by whichever child is in their company at the time and may seek to appease all their children
- no reason to transfer title from parents to children as estate planning exercise since this only avoids 1.4% probate fees and may trigger substantial capital gains

Title Searches

- don't rely on MLS legal description taken from the tax roll – often wrong or outdated -- use the PID to order BC Online search which will reveal legal notations (airport, ALR, flood plain) charges, reservations, CPLs, builders liens, covenants, building schemes, restrictive covenants, easements, rights-of-way or duplicate titles outstanding

Closings

- please organize back-to-back transactions so they close on subsequent days (with possession and adjustment dates occurring the day after Completion Date)
- best to schedule closings on Thursdays to permit the Seller to receive money on Friday and to allow the Buyer to have the weekend to move

- escrowed closings (like those of Polygon) can be useful solutions
- non-closings have to be avoided by the lawyer communicating possible delays to realtors so they can adjust the contract for a delayed close – if lawyers handle the problem their professional guidelines more or less require them to take formal positions in preparation for possible litigation which can destroy the goodwill between parties
- if the property is destroyed by fire the seller has an insurance claim (the property remains at the Seller's risk before Completion) and the buyer has the option to rescind the contract since it is no longer in the condition as viewed by the Buyer, however the Buyer can ignore this if he is essentially buying the property for a building lot

Assignments

- a Buyer may assign any contract to any other person without the consent of the Seller unless the Contract expressly restricts an assignment (see Disclosure Statements for new construction contracts)
- a Buyer remains obligated to the Seller if the Buyer's assignee defaults unless the Seller has accepted the performance of the new assignee in place of the original Buyer's
- New multiple option assignment contract is very good for most flip-type assignments (topic for a more advanced discussion)

Avoiding Litigation

- if clients suffer a loss while being served by a lawyer, mortgage or real estate professional, the client's litigator will pursue such parties because they are known to have deep pockets and/or carry insurance
- a judge often reaches a determination as to which party could easily afford to compensate the client for the loss and then tries to justify it by making a finding of negligence or breach of contract
- when asked to choose between two contradictory versions of the truth, the judge will often side with the sympathetic victim so the onus is on the professional to make notes, have disclosures signed, recommend independent legal advice, obtain waivers, and to provide the client with all possible information possible
- make recommendation that client to speak to lawyers if problem occurs (make it in writing, fax or email);
- a notary is like a midwife, they provide a perfectly good service – but if the unexpected happens you'll need a doctor -- fast