

## **BUYING AND SELLING A HOME GUIDE**

This module provides an outline of the three stages of purchasing and selling a home: the creation of the Agreement of Purchase and Sale (APS), due diligence, and closing. It also provides an overview of the basic principles of contract law, and how they relate to the APS in the real estate context.

### **BUYING AND SELLING A HOME IN ONTARIO**

#### **Buying a home: Three Stage Process**

The process of buying a home involves three major stages: 1) the negotiation and signing of the Agreement of Purchase and Sale (APS); 2) due diligence; and 3) closing. These three stages also involve a money-transfer component. Although the closing is always the last stage, the other two stages are usually intermingled or in the reverse order.

#### **Stage One: Agreement of Purchase and Sale (APS)**

At this stage, the buyer (purchaser) normally submits an offer to purchase the home from the seller (vendor). In Ontario, an “Agreement of Purchase and Sale” (APS) is a legal contract that outlines the terms of the agreement between the buyer and the seller.

A contract is a promise between two or more parties (i.e., individuals or businesses). This promise is legally binding, meaning that there is a legal obligation to keep the promise. The promises that the parties make are called the “terms” of the contract, and they describe each party’s rights (i.e., what a party is entitled to from the other party) and obligations (i.e., what a party is required to do) according to the contract. Contract law sets out the principles that determine whether an agreement is a legally binding contract, or not. In any real estate transaction, general contract law applies. In a real estate transaction, time is of the essence. The importance of time is reflected in the APS, which requires that all time limits be strictly adhered to by the buyer and seller. For example, if the buyer has 10 days to obtain financing and does not do so within that time period, the deal may come to an end.

The APS is one of the most important contracts that a person will enter into during their lifetime and it is advisable that, before it is signed, it be reviewed by a lawyer. A lawyer can raise questions to ensure that important issues are canvassed before and properly documented or provided for in the APS. A lawyer can assist to de-mystify the process, which might otherwise be very unnerving for first time buyers and that the average person rarely undertakes.

#### **BUILDING BLOCKS OF A CONTRACT**

In order for an agreement to be considered a legal contract, there are some essential elements that must be present. There must be an intention to contract, an offer to contract, an acceptance of that offer, and consideration. In addition, the terms of the contract must be clear in order to be enforceable by a court.

1. **Intention to contract** – In order for a contract to be legal, the parties must have intended to create a legally binding relationship. A court will not, for example, enforce a casual agreement

between two people who agree to go shopping at 3 p.m. because there was no intention to have a legally binding contract. However, where the parties are entering into a business transaction, it may be easy to demonstrate that such an intention existed.

2. **Offer and Acceptance** – An offer is an invitation to enter into a contract. The offer outlines the terms of the contract and is made with the intention that it will become a binding agreement once accepted by the person to whom it is addressed. An acceptance of an offer is when the other party communicates his/her acceptance of the offer.
3. **Consideration** – Consideration is something of value delivered by one party to the other when making a contract. Typically, a deposit is included in the agreement of purchase and sale to constitute the consideration necessary to make the agreement binding. Legally, a seal (the little red sticker or seal, representing what used to be wax) constitutes consideration.
4. **Certainty of terms** – A valid contract must have clear terms that make sense to both parties. They must also be certain enough to be interpreted by a court should they need to be enforced.

In a real estate context, once the offer to purchase is accepted by the seller, the legal interest immediately shifts to the buyer. In this case the seller no longer has an insurable interest and the seller's insurance would no longer cover any loss. This would create dangerous situations pending the buyer getting insurance. That is why APS' generally provide that the seller remains liable for the value of the property right up until closing.

A contract is not enforceable unless there is consideration. Consideration means an exchange of something for the bargain. Typically, this is accomplished through the APS because it provides for a deposit to be paid by the buyer to the seller. The deposit is a "good faith" gesture that shows the seller that the buyer is serious and has the financial capacity to purchase the property. Additionally, the deposit represents a fair amount to protect the seller against a loss if the buyer does not hold up their side of the deal. If the buyer backs out of the deal without a valid legal reason, the deposit is "forfeited," meaning the seller gets to keep the money. The law allows the seller to keep the deposit money as compensation, or what is known as "damages." The seller may be entitled to compensation or damages when the buyer backs out of a deal because the buyer failed to complete his/her obligations under the legally binding contract that was created when the seller accepted the purchase offer.

The amount of the deposit is negotiable and can be any amount. When the deposit money is given, it is typically held "in trust" on behalf of the buyer by the seller's lawyer or real estate agent until the day of closing (i.e., the last step of the process). When closing occurs, the deposit amount is applied to the purchase price.

In a real estate transaction, the buyer also has rights. After the APS is signed, the seller cannot back out of the deal subject to certain conditions. If the seller tries to back out, the buyer has the option of getting a court order for damages, or an order that the seller must transfer the legal ownership of the property to the buyer and perform exactly what was promised in the APS. This concept of obtaining a court order to perform exactly what was promised in a legally binding contract is called "specific performance."

Most APSs have conditions. These are usually provisions that one of the parties wants, but cannot get (or confirm) prior to making or accepting the offer. For example, the seller might want to make the sale conditional on buying another home. Or, the buyer might want to make the offer conditional on selling their existing home. If the buyer tries to sell his/her home before making the offer on the new house they want to buy, the new house may be sold in the interim. Therefore, adding in a condition can guarantee the purchase of the new home while they work to sell their existing one. Such conditions can also apply for getting a mortgage, verifying the home's compliance with building regulations, and confirming that the buyer can do renovations or improvements on the new home after closing. There is really no limit to the number, or type, of conditions that parties can put in the APS. This is why it is very important for the parties to use clear language when making conditions, and setting out obligations as to who has to do what by which date, and including how the parties should communicate with each other to disclose whether conditions have been satisfied. Here is an example of a condition for financing:

*“The Purchaser (buyer) shall have 10 calendar days from the date of acceptance to advise the Vendor (seller) that it has satisfied itself that they can secure a mortgage on terms favourable to them to purchase the property, failing which the agreement shall be deemed to be at an end and all deposit monies returned.”*

Under the terms of this condition, if the buyer does satisfy itself but does not advise the seller within the 10 days, the APS is at an end and the seller is open to sell to someone else.

## **STAGE TWO: DUE DILIGENCE**

In order to purchase a property, the buyer must satisfy a number of matters, including:

**Getting a Mortgage:** Before looking into a property, many buyers consult their bank to get an idea of the amount of mortgage they could qualify for and at what terms. Some buyers shop around for a mortgage after they have an accepted offer to purchase a home, but this is not recommended.

**Conduct a Home Inspection of the Home:** A home is a significant investment and one would be wise to have the property thoroughly inspected by a qualified person to assess its strengths and weaknesses before committing to buy. Often, the APS includes the condition that the buyer must get a satisfactory inspection report after the APS is accepted in order to avoid the expense of an inspection if the APS is not accepted.

**Seek Insurance Availability:** As soon as a person finds a home they want to buy, they should consult with an insurance broker to ensure they can get insurance on the home (fire/damage and content insurance) at a reasonable cost and terms which are acceptable.

**Assess the Affordability of Any Prospective Work or Plans for the Property:** If the buyer has plans to make changes or renovate the home after closing, it would be wise to verify with authorities, like the city/municipality, if they can do the work and if they require any permits.

**Ensuring the Building is in Compliance with Regulations:** If the home was newly renovated, the buyer should verify that the work was completed with the necessary permits and all inspections and approvals were obtained. This could avoid potential situations where a renovated portion of the home must be redone or made compliant.

**Register for Services and Utilities:** Buyers should personally contact all utilities and service providers for the home to register with them and arrange for their billing preference.

**Pay the Down Payment Money:** Many times, buyers think they have enough money for the down payment, but will forget that they invested the money in a car or placed it in investments that they may not be able to withdraw from in a timely fashion or without penalties.

**Any Issues Which are Important to the Buyer or Which They Want to Confirm Before Closing**

**The Lawyer Acting for the Buyer Conducts Title and Off-title Searches and Other Inquiries to Ensure that the Buyer Will Get What They Contracted to Get.**

### **Bridge Financing**

Also, when selling a home and buying another, buyers will often want to use the value from their existing home to purchase the new home. This presents timing issues, as a person must sell their existing home to get the monies to buy the new home. If buying and selling happens on the same day, buyers should discuss this arrangement as soon as possible in the process, and ideally before signing any agreements. They may want to ask their bank for “bridge financing”, a loan which is repaid out of the proceeds of the sale, to avoid a delay in the purchase if the sale is delayed.

### **STAGE THREE: CLOSING**

On the date of closing, legal ownership and keys are transferred from the seller to the buyer, and the payment (either by certified cheque, bank draft or wire transfer) for the purchase price, minus the deposit amount is delivered from the buyer to the seller. This remaining balance typically consists of a ‘cash’ component in the form of the down payment from the buyer and a ‘loan’ component in the form of a mortgage by a mortgage lender (e.g., a bank).

A concept known as a “merger” happens on closing. A merger provides that, after the exchange of the money and keys, all parties are said to be satisfied with the deal and all rights merge. This prevents any party from later suing the other for things not delivered. In a real estate transaction, a lawyer can ensure their client has received everything they were promised in the contract, and if not, then to ask for it. For this reason, on closing, the parties will exchange “undertakings,” which is a promise to do something (e.g., readjust any amount if it is revealed that one of the parties should have paid it), after closing.

Charges for the property are allocated on closing between the buyer and seller. However, in some cases, the charges are assessed against one of the parties. For example, municipalities assess taxes against every property on an annual basis, and they do not adjust the amount of taxes

owed by the duration of ownership of one of the parties. On closing, the lawyer uses a document known as the “Statement of Adjustments” to adjust the amount owed by the parties.

The annual amount that is owed is calculated on a daily basis. Normally, charges on the closing date belong to the buyer, who becomes responsible for costs and benefits, if any. The seller is assessed for his/her share of the property taxes from January 1st to the day before closing of the same year. If the seller paid that year’s taxes to the municipality already, they are entitled to a credit for “overpayment” or the buyer is credited with an “underpayment.” If there is any rental equipment in the house (e.g., furnaces or water heaters), it must be identified in the APS for the buyer. This way, the buyer can choose to keep those rentals and continue to make the payments, or if not, then the seller must pay the outstanding balances.

When closing occurs, the seller must deliver what is called “vacant possession” to the buyer. The APS sets out that the seller has until 6:00 p.m. on the day of closing. This means that the parties’ lawyers must deliver the keys, money, documents, and register the transfer, commonly known as a “deed.” A deed transfers the legal ownership from the seller to the buyer. Most government registry offices where deeds are registered close by 5:00 p.m. – therefore, closing must occur before then.

The closing date is a negotiated term of the contract. Although the date must be on a business day when the government registry office is open to register the transfer and mortgage, the parties are free to choose:

- Any weekday to close (no holidays, though)
- The date on which possession of the property is to be exchanged between the buyer and seller
- The day on which legal title to the land is recorded in the name of the buyer

While many people prefer a closing date on the 1st, middle, or end of month and on Fridays, these are very busy times for all parties in the real estate transaction! Knowing this, it might be beneficial to opt for another day.

Time is crucial in real estate transactions. Therefore, it is important to explore all of your options and get into contact with the seller/buyer, lawyers, real estate agents, and other representatives and service companies earlier rather than later!

## **COSTS OF BUYING A HOME**

### **How is a purchase priced determined?**

In real estate, the purchase price is said to represent what a willing buyer will pay to a willing seller. This is subjective, however, because often sellers view their home as a castle!

Instead, the market dictates the price of the property:

- In a seller’s market, where there is little supply and many buyers, the price will generally be higher.

- In a buyer's market, where there is lots of supply and few buyers, the price will generally be lower.

### **How, then, does one determine the market price of a house?**

Many people hire an evaluator to give their professional opinion on the value of one's property. This is called an "appraisal." Also, real estate agents use their experience and market research to estimate the value of a particular property. It is important to remember that the purchase price is a negotiation between the seller and the buyer. Some people have a natural ability to negotiate, but many do not. Real estate agents and lawyers can assist with the negotiation process.

The APS typically deals with three types of property:

- Land
- Fixtures (i.e., things affixed to the land)
- Chattels (i.e., personal belongings)

The land is simply the parcel of real estate, which includes fixtures to the land. In law, it is a misconception to say, "We are buying a house." Instead, we buy land and the house is simply a fixture to the land. Personal property, also referred to as chattels, does not become affixed to land. A good example of this is furniture, which is not transferred with the land, unless specifically outlined in the APS. Paragraphs 1 and 2 provide space for the parties to specifically designate various items which would otherwise be considered fixtures, to be removed and kept by the sellers (e.g., lighting fixture in dining room) or a chattel, which is included in the purchase price to remain with the home and become the buyers (e.g., appliances). In theory, the parties should separately price the fixtures and chattels which are taxed at a different rate than real property (i.e., separate from the land). In practice, except in commercial transactions, the price of the chattels is included in the purchase price, without any breakdown.

### **Upfront Costs:**

The following is a list of common one-time, upfront costs involved in purchasing a home:

Buyers should prepare themselves for the cost of a real estate transaction. Generally, buyers should expect to pay 2-5% of their purchase price in additional costs.

#### **1. Down payment**

- The down payment is the amount of his/her own money that the buyer puts into the property. Part of the down payment is paid as the deposit when the offer to purchase is presented to the seller and the balance of the buyer's money is added at closing. The buyer provides his/her lawyer with all of the monies needed to close, other than the lender's funds. The monies paid to the lawyer include the balance of the down payment and the sums noted below.

#### **2. Legal fees and disbursements**

- Legal fees are what the lawyer is paid to act for the buyer. “Disbursements” are additional costs which lawyers will incur while completing the due diligence or registration processes on the buyer’s behalf. Examples of such costs include title and off-title search costs; cost of copies (e.g., house plans); registration costs; title insurance policy cost, etc.

**3. Real estate agent fees (if applicable)**

- Fees plus HST paid to the real estate agents. The seller typically pays his/her agent, who in turn paid the buyer’s agent their share.

**4. Closing adjustments to the purchase price**

- This could include municipal taxes, utility charges not separately assessed or rental charges if any for a furnace or other equipment or security service; oil tank; etc.

**5. Land transfer taxes (if applicable)**

- Purchasers in Ontario, as in most provinces, pay Land Transfer Tax (LTT) to the province on the value of the real property they purchased. The qualifications, exemptions, calculations and rebates are beyond the scope of this guide, however, generally purchasers pay provincial land transfer tax on the sliding scale below. The City of Toronto is the only municipality in Ontario with the right to assess its own LTT and it generally mirrors the provincial scheme. In Ontario, the tax is paid by the lawyer when he/she registers the transfer. In contrast, in Quebec, LTT is known as the “Welcome Tax” and the municipality will send a bill to the buyer after closing.
- The Ontario tax rate in effect since January 1, 2017:
  - amounts up to and including \$55,000: 0.5%
  - amounts exceeding \$55,000, up to and including \$250,000: 1.0%
  - amounts exceeding \$250,000, up to and including \$400,000: 1.5%
  - amounts exceeding \$400,000: 2.0%
  - amounts exceeding \$2,000,000, where the land contains one or two single family residences: 2.5%.

**6. Home inspection fee**

**7. Up-front mortgage costs**

- This could include application fees, processing fees, appraisal fees or mortgage insurance premiums if not included in monthly mortgage payments.

**8. Moving expenses/storage expenses**

**9. Hook-up costs (e.g., cable, gas, hydro, phone, internet, etc.)**

**10. Additional furniture, appliances, window coverings, tools**

**11. Repairs, improvements and other items needed on moving in; and**

**12. Other expenses (e.g., soil or water analysis, foundations, etc.).**

**Ongoing Costs**

The following is a list of typical ongoing costs involved in owning a home:

- 1. Mortgage payments**
- 2. Mortgage insurance (if required, and often included in mortgage payments)**
- 3. Mortgage life/disability insurance (optional)**
  - Most lenders will offer this and may require it. Although good coverage, it is generally best to get this type of insurance from a third party. Lender specific coverage will only cover the outstanding amount of the mortgage and therefore the value decreases as the mortgage is paid down. Third party insurance will maintain its original coverage value, while the premium under both remains constant.
- 4. Home/property insurance**
- 5. Utility charges (e.g., heat, electricity, water, sewer, gas, etc.)**
- 6. Telephone, internet, cable (same as when renting)**
- 7. Property taxes (which the lender may require be added to and paid with mortgage payments)**
- 8. School taxes (if paid separately from your property taxes, as in Quebec)**
- 9. Condominium fees (if applicable)**
- 10. Cleaning supplies/service (same as when renting)**
- 11. Repairs and maintenance (e.g., roof repairs, painting, plumbing, etc.)**
- 12. Other expenses (e.g., lawn service, snow removal, etc.).**

**FOR MORE INFORMATION**

If you have any questions arising from this guide or concerns which have not been addressed, please contact a lawyer in your area for consultation. You can locate a lawyer who deals with these matters by doing an internet search or by going to [lsrs.lsuc.on.ca/lsrs/](http://lsrs.lsuc.on.ca/lsrs/) or [www.titleplus.ca](http://www.titleplus.ca).