



OREA FORM 100 – RESIDENTIAL AGREEMENT OF PURCHASE AND SALE “APS”

Guidance for Real Estate Lawyers in Interpreting,
Applying and Working with OREA Form 100

Abstract

The Ontario Real Estate Association’s Form 100 - Agreement of Purchase and Sale - (“APS”) is the most common document used in residential real estate transactions in the Province of Ontario. Where the parties have engaged the services of real estate agents, Form 100 is used to reduce the essential terms of the parties’ agreement concerning the sale of residential real estate. The terms of the APS have become standardized through the use of Form 100 and the provisions contained within that document form the contract for the purchase and sale of real property.

Real Estate Practitioners in Ontario require a firm understanding of Form 100 to ensure, on behalf of clients, an understanding of the terms contained therein. Solicitors in real estate practice should also be familiar with Form 100’s intersection with various other documents exchanged by the parties in the leading up to the closing of a **residential real estate transaction** in any given case.

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OREA FORM 100 – THE STANDARD AGREEMENT OF PURCHASE AND SALE (“APS”) – A REVIEW OF KEY PROVISIONS AND CONNECTION TO STANDARD CLOSING DOCUMENTS

Ontario Real Estate Association (OREA) Form 100 is the “Agreement of Purchase and Sale”, often referred to as the “APS”. It is a standard form contract regularly used by realtors in arranging transactions for the purchase and sale of residential real estate. A solicitor’s receipt of Form 100 is usually the first document reviewed by him or her and this review is a critical aspect of the solicitor’s role when retained to carry out and complete a real estate transaction on behalf of either the seller of real estate or the buyer.

The use of OREA Form 100 is not a necessary condition to an otherwise valid and binding agreement for the purchase or sale of real property in Ontario and other forms of agreement may be used in the alternative. Alternative forms may be used so long as they contain the provisions necessary for the transfer of real property, provisions which have been instilled historically by the Common Law, the *Statute of Frauds* and the legal principles of the law of Vendors and Purchasers, reflected in part by the *Vendors and Purchasers Act*, R.S.O. 1990, c. V. 2.

The following Article will include an analysis of the following aspects of OREA’s Form 100 – Agreement of Purchase and Sale “APS”:

- i. A review and commentary of Form 100’s various provisions and their significance for real estate lawyers and their clients;
- ii. Details concerning recent legislative changes to statutes and regulations, as well as amendments to the Land Titles Act and Registry Act, within which interests in real property are recorded, and
- iii. Form 100’s intersection with other materials exchanged by the parties to a real estate transaction, such as correspondence, requisitions, undertakings and closing documents.

I. A Review of the Contents of OREA Form 100:

Part 1: Full Legal Names of the Parties – Worded expressly as “Buyer” and “Seller”:

OREA Form 100’s use is not restricted to individuals. Eligible parties may include: i) corporate or commercial entities, such as a numbered companies; ii) estate trustees – who’s duties include the disposition of real estate of a deceased pursuant to a grant of probate, and iii) a party named in the agreement by way of an assignment.

Practice Points:

- It is critically important for real estate lawyers to ascertain the full and proper legal names of the parties to the APS. A high level of attention is expected of real estate lawyers and the IVF requirements are heightened in the context of real estate practice. Full knowledge and proper and complete spelling of a client’s legal name(s) through reference to the client’s government-issued identification is to be confirmed by the solicitor in the normal course and records are to be retained in accordance with LSO By-Law 7.1 Part III “Client Identification and Verification Requirements”.
 - **When acting for a Buyer:** it is critical to ascertain the proper legal name(s) of the legal owner(s) of the Subject Property. This is confirmed with sufficient certainty by way of a review of the **Parcel Register** for the Subject Property. While the Parcel Register is available for purchase and download by a Teraview search, time and money may be saved if a request to the Seller’s solicitor for that document is made and provided by the latter. It is often the case that the Seller has already obtained a Parcel Register of the Subject Property at the time of the Seller original acquisition of the Subject Property. For your client’s benefit, this strategy will reduce the amount spent on title searching, which will be discussed in further detail below, although some time title searching services will include a current copy of the parcel register of the Subject Property

along with all other materials provided as part of the title search. If a title searcher is retained, it is important to specify that the parcel register pulled from Teraview be current and that the requested document “include deleteds” – i.e. that the parcel register reveal all instruments which were at one point in time registered on title but which have been otherwise deleted or discharged over time.

<p align="center"><i>Changes to the Rules Governing Eligible Purchasers as of January 1, 2023.</i></p>
<p><u>Legislative Development – Prohibition on the purchase of Residential Property by Non-Canadians Act, effective Jan. 1, 2023.</u></p> <p>As of January 1, 2023, <u>non-resident individuals</u> are prohibited from acquiring ownership of residential real property. This legislative change is a result the Federal <i>Prohibition on the Purchase of Real Property by Non-Canadians Act</i>. The statute is attached herewith and contains a number of exceptions of consequence to prospective purchasers.</p>
<p><u>The definition of “Non-Canadian”</u>, see Section 2 of the <i>Act</i>, is as follows:</p> <ul style="list-style-type: none"> a) an individual who is neither a Canadian citizen nor a person registered as an Indian under the <i>Indian Act</i> nor a permanent resident; b) a corporation that is incorporated otherwise than under the laws of Canada or a province; c) a corporation incorporated under the laws of Canada or province who shares are not listed on as stock exchange in Canada for which a designation under Section 262 of the <i>Income Tax Act</i> is in effect and that is controlled by a person referred to in paragraph (a) or (b), and, d) a prescribed person or entity.
<p><u>-The definition of “Permanent Resident”</u>, has the same meaning as in sub-section 2(1) of the <i>Immigration and Refugee Protection Act</i>.</p>
<p><u>-The General Prohibition of Section 4 of the Act</u>, holds as follows: “(1) Despite Section 34 of the <i>Citizenship Act</i>, it is prohibited by a non-Canadian to purchase, directly or indirectly, any residential property.” The <u>following exceptions</u> are as follows: i) Section 34(1) does not apply to a temporary resident within the meaning of the <i>Immigration and Refugee Protection Act</i> who satisfies prescribed conditions; ii) Section 34(2) does not apply to a “protected person within the meaning of Subsection 95(2) of that Act, and iii)</p>

an individual who is a non-Canadian and who purchases residential property in Canada with their spouse or common-law partner if the spouse or common law partner is a Canadian citizen, person registered as an Indian under the *Indian Act*, permanent resident or person referred to in paragraph (a) or (b); or iv) a person of a prescribed class of persons.

Part 2: Real Property – “the Subject Property”:

A solicitor’s initial review of the APS may reveal a **Legal Description** of the property, a description which is sometimes inserted into the document by the Seller or his or her realtor. While in certain cases the legal description provided is indeed accurate, the proper exercise of due diligence expected of a Buyer’s solicitor requires that a proper title search be ordered and reviewed. *The general rationale for the title search requirement is to ensure that the client purchaser is in fact purchasing the piece of property he or she has bargained for.* A title search, including a sub-search, will provide adequate assurance of same.

The legal description of the property is most accurately and reliably ascertained by way of a review of the **Parcel Register** of the Subject Property, once obtained by way of a method described in the preceding paragraph. While a review of the processes involved in reviewing a title search is beyond the scope of the current Commentary, a **Buyer’s Solicitor** must conduct a title search of the Subject Property in any case and a general overview of the review is herein described. A basic title search of the Subject Property, as mentioned, is conducted by way of a Teraview search, wherein the Property Identifier Number (PIN) for the property can be used as the search term to locate the relevant Parcel Register. The Seller’s names are also potential search terms, although some sellers may own multiple pieces of real property, with an additional issue arising where the name being searched is quite common.

A review of the Parcel Register should be done with proper attention and regard for all registered instruments confirmed in the parcel register. A proper review of the Subject Property’s parcel register will involve “pulling”/accessing and downloading from Teraview all registered instruments listed on the parcel register and this search is necessary for the buyer’s solicitor’s proper exercise of his or her due diligence.

The subject property is referenced in the APS through the use of the following identifiers:

- Municipal Address, Frontage and Legal Description:
 - The **Municipal Address** is stated in the manner in which it is known municipally and as it appears on the property's municipal tax statements. This is the street number, street name and street direction (if applicable).
 - **Frontage of the Property** is used to confirm the property's location as well as the Property's size. The latter requires knowledge of the width of the property expressed in Feet. Frontage is also used to confirm how the property's front yard is located vis-à-vis the street.
 - (i) Traditionally, the level of specificity used in expressing the size of the Subject Property is on a standard of "**more or less**". The "more or less" standard has a long history in jurisprudence in Ontario and some seminal cases on the matter can be found in the Reference section which accompanies' this document. Prior to the widespread use of title insurance, a **Survey** was often ordered and paid for by the Buyer, with the aim of ascertaining the property's dimensions with a higher degree of certainty than the "more or less" standard. In most cases, however, title insurance is used as an alternative to the procurement of a survey from a professional land surveyor. This is due in large part to the high price of obtaining a survey and the relative ease of obtaining a policy of title insurance.
 - **Legal Description** of the property is also found on the face of the Parcel Register and contains a significant amount of information on the Subject Property. Teraview allows for the retrieval of a "thumbnail description" which may display any registrations present on title to the Subject Property being purchased. The interpretation of a legal description is often a skill refined over time

and with some experience. Briefly, a legal description will contain abbreviated descriptors, some of the most common being:

- (a) **“S/T” – “Subject To”** – an Instrument Number will follow this descriptor. This is most common where the Subject Property is *Subject To* the terms of other registered instruments affecting the Subject Property.
 - (i) Instrument connected to the “S/T” descriptor may include encumbrances such as easements, rights of way, municipal or utilities easements, restrictive covenants, among others. Other registrations referenced by way the “Subject To” descriptor also include outstanding Writs of Execution, and Interests held in the property by adjoining owners. Where an S/T is uncovered in the subject property’s legal description, it is critical to use Teraview to retrieve the registered instrument for further analysis. If significant, the Buyer’s solicitor may make a request/requisition to the Seller’s solicitor that said registrations be deleted or that the legal description of the Subject Property be amended to exclude reference to the registration at issue. The latter option of amending the legal description is performed through an online service known as “OnLand” where an appropriate request for deletion or other amendment to a legal description may be made.
- (b) **“T/W” – “Together With”** – a legal description may also contain a T/W descriptor, which references a registered instrument. When this arises, it is equally important to pull/retrieve the registered instrument so that a review of said document may be performed to gauge its effect on the Subject Property.
- (c) **“AS IN”** – a legal descriptor which references a registered instrument such as a **registered plan of subdivision**, or **reference plan** wherein the subject property is described in

further detail. Instrument numbers referenced in connection with the “AS IN” found in the Subject Property’s legal description must be investigated by the Buyer’s solicitor to confirm particulars on the Subject Property’s metes and bounds, which are most often shown on a registered plan of subdivision or reference plan. The former plan is recognized by the presence of the letter “M” within its registration number (i.e. 78M-9311), while the latter reference plan features the letter “R” within its respective label (i.e. 65R-7832).

<i>Changes to the Definition of “Residential Property” as of January 1, 2023.</i>
<u>Legislative Development – Prohibition on the purchase of Residential Property by Non-Canadians Act, effective Jan. 1, 2023.</u>
<p><u>-The definition of “Residential Property”.</u> Section 2 of the <i>Act</i>, is broad in scope and includes: “...any real property or immovable, other than a prescribed real property or immovable, that is situated in Canada and that is either of:</p> <ul style="list-style-type: none"> -A detached house or similar building, containing not more than three dwelling units, together with that proportion of the appurtenances to the building and the land subjacent or immediately contiguous to the building that is reasonably necessary for its use and enjoyment as place of residence for individuals; and -A part of a building that is a semi-detached house, rowhouse unit, residential condominium unit or other similar premises that is, or is intended to be, a separate parcel or other division of real property or immovable owned, or intended to be owned, apart from any other unit in the building, together with that proportion of any common areas and other appurtenances to the building and the land subjacent or immediately contiguous to the building that is attributable to the house, unit or premises and that is reasonably necessary for its use and enjoyment as a place of residence for individuals, or -Any prescribed real property or immovable.”

Parts 3 and 4: Purchase Price and Buyer’s Deposit

These provisions of the Agreement of Purchase and Sale are relatively straightforward and are described succinctly on the face of the APS itself.

a) The **Purchase Price** ought to be drafted in both numbers and words, which ought to coincide without error.

b) The **Buyer's Deposit**, according to the bare terms of the APS, is submitted by the Buyer *Upon Acceptance* of the Agreement and is an amount held in trust by a designated "Deposit Holder". Also referred to as a "Good Faith Deposit" the Buyer's Deposit represents to the Seller that the Buyer is contracting in good faith and stands as security, for the Seller that the Buyer will carry out its obligations under the APS.

In practice, the Deposit Holder is most often the Seller's realtor or Listing brokerage, both of whom are required to hold the Buyer's deposit in a non-interest-bearing Real Estate Trust Account. Notwithstanding the relative simplicity of the Deposit provision, the Buyer and Seller have separate strategic concerns as they pertain to the amount and treatment of the Buyer's Deposit. These strategic concerns can be summarized briefly as follows:

Buyer's Interests	Seller's Interests
-Preference for a smaller deposit, although the amount of the Buyer's Deposit is applied to the purchase price on closing	-Preference for largest deposit obtainable, to decrease the propensity of default by the Buyer
In either case, the average amount of a Buyer's Deposit is within the range of 3% to 5% of the Purchase Price. If the amount of the deposit exceeds 15% of the Purchase Price, the deposit is then at risk of being deemed by the Courts as a <i>penalty</i> and in the case of litigation on this issue, a Court would likely grant to the Buyer the <u>remedy of relief from forfeiture</u> in the event of a breakdown in the APS.	

Section 1 "Irrevocability":

This section of the APS allows for a period of time within which both parties may conduct a review of APS prior to signing. Most importantly, this provision establishes a hard deadline by which the Parties are required to execute the APS, failing which

the Agreement will terminate and become null and void. The Buyer is then entitled to a refund of the deposit provided previously without interest.

Section 2 “Completion Date”:

The Completion Date is most commonly referred to as the “Closing Date” – the date upon which the transaction will be completed and title transferred from Seller to Buyer in exchange for the balance due on closing. Accompanying this provision is a warranty given by the Seller that vacant possession be handed to the Buyer on the day of closing along with the keys to the property. In practice this has been interpreted as the Seller’s duty to leave the property to the Buyer in a “broom swept” condition.

The following practical and conceptual issues arise in connection with Section 2 “Completion Date” of the APS:

- Time is of the Essence;
- The expectation imposed on both the Seller and Buyer to be “ready, willing and able to close” on the Completion Date, failing which the defaulting party becomes exposed to liability for its breach of the APS.
- **Extensions to the Completion Date** occur with regularity and are required by either party to the APS for multiple factors such as: i) the Buyer’s inability or delay in obtaining financing or a bridge loan pending the sale of the Buyer’s own property; ii) the Seller’s inability to provide vacant possession of the Subject Property due to delays in removing chattels and other items by the Completion Date, or iii) either Party’s preference for an extension due to changes in circumstances or a Party’s preference for an alternate closing date. The aforementioned factors motivating a Party to seek an extension to the Completion Date are not exhaustive and are unique to the particular circumstances present in a given transaction.
 - The need for an extension may be communicated by either party to the agreement and requires an “Amendment to the Agreement of Purchase and Sale”, which effectively “deletes” the existing Completion Date, which is substituted with a new date as agreed to by the parties. Such an extension should always be confirmed by the parties in writing and the alternate closing date should be specified with reference to the overarching principle that “Time is of the Essence”. Once such an extension has been reduced to writing, a new Completion Date for the transaction is thereby set and the parties’

respective obligations concerning the tender of funds and closing documents become due on the alternate Completion Date.¹

Section 3 “Notices”:

Section 3 is the first provision found on page 2 of the Agreement of Purchase and Sale. Simply, this section allows either party to insert either: i) its own contact information; ii) the contact information of their legal representatives or iii) the contact information of a the parties’ realtors. The Fax Numbers and E-mail Addresses inserted in the space provided in Section 3 are to be used by either party for the delivery/exchange of correspondence, notices, proposed amendments to the Agreement or any other alteration to the Schedules accompanying the Agreement.

Section 4 “Chattels Included”:

Section 4 provides room for the insertion of particulars concerning any Chattels to be included in the Agreement, Chattels which will be left behind by the Seller and given to the Buyer upon the latter’s acquisition of the Subject Property.

- A Warranty is included in Section 4 and is stated as follows: *“Unless otherwise stated in this Agreement or any Schedule thereto, Seller agrees to convey all fixtures and chattels in the Purchase Price free from all liens, encumbrances or claims affecting the said fixtures or chattels.”*

In practice, this gives rise to a Buyer’s solicitor’s obligation to properly ascertain whether the Chattels included in the Agreement are properly owned by the Seller and free from “liens, encumbrances or claims”. Common examples of Chattels included in the Agreement of Purchase and Sale are: i) washer and dryer; ii) fridge, stove and other kitchen items; iii) any other item included in the Agreement which does not fall under the definition of “Fixture”, discussed in the next paragraph.

The Buyer’s Solicitor’s obligations are those of due diligence and to ensure, either by way of a condition inserted in a closing document, or by way of a condition inserted in a Schedule to the Agreement, that all Chattels included are in “good working order”.² The Buyer’s Solicitor’s obligations of due diligence in connection with the Seller’s Chattels include the performance of a *Personal Property Security Act* Search, which will allow the Buyer’s Solicitor to ascertain whether the Chattels at issue are or have been used as collateral for a loan or whether the Seller’s Chattels are

¹ Donald Lamont, Q.C. “Lamont on Real Estate Conveyancing” (Toronto: Carswell, looseleaf).

² Francesco Giucciardo, “Real Estate Transactions”, University of Windsor Faculty of Law, 2002, page 3.

encumbered by a creditor's interest registered pursuant to the *Repair And Storage Lien Act*.

To determine whether a particular item included in the Agreement of Purchase and Sale qualifies as a Chattel, please see the ***References, Definitions and Precedents*** section attached to the current Document.

Section 5 “Fixtures Included”:

Fixtures, as they are defined in the ***References, Definitions and Precedents*** section accompanying the current Commentary, are immovable items attached to the Subject Property and include items such as: i) furnaces; ii) hot water tanks; iii) solar panels (if present) and other physical items attached to the Subject Property.

A Buyer's Solicitor's obligations of due diligence are similar to those described in Section 4 “Chattels Included”. It is common, upon a review of the Subject Property's Parcel Register, to uncover registrations connected to fixtures installed on the Subject Property. Most commonly, heating and HVAC companies for instance, register an instrument on title to the Subject Property in the form of a “Notice of Security Interest” (“NOSI”), which secures the owner's ongoing obligation to pay any costs owed in connection with the installation and continued use of a fixture described and referenced in the Notice of Security Interest. If present on the parcel register to the property, it is necessary that the Buyer's Solicitor retrieve that instrument by way of a request performed in Teraview.

- Notices of Security Interest (NOSIs) registered on title to the property require the Buyer's Solicitor's attention, and a Personal Property Security Act search should be performed in relation to any Fixtures referred to in the Registered Instrument.
- There has been a growing trend of Consumer Protection Act issues arising in relation to the registration of Notices of Security Interest (NOSIs), but these concerns will be articulated and described in more detail in a separate Commentary on that issue.

Section 6 “Rental Items”:

Section 6 of the Agreement of Purchase and Sale is found on page 2 of that document. The focus of Section 6 concerns items referred to in the above-described Sections 4 and 5 of the Agreement. It is often the case that the Seller is under the erroneous belief that he or she owns the Chattels or Fixtures listed in Sections 4 and 5. In many cases, however, a **Rental Agreement, Lease or Lease to Own Agreement** exists between the Seller and the HVAC or other company who originally supplied the Chattel or Fixture at issue.

- Of practical significance for both Parties to the Agreement of Purchase and Sale is the Assignment by the Seller to the Buyer of any rental agreement, lease or lease to own agreement.
- Both solicitors should arrange for the Assignment of any rental contracts of the Seller to the Buyer, through an Assumption Agreement.
- Deliveries to the Buyer of manuals, documentation, and warranty information on all rental items should be requisitioned by the Buyer's solicitor in the Buyer's solicitor's **requisition letter**.
- If all accounts pertaining to the rental item have been paid in full by the Seller, any registrations on title associated with the rental item should be discharged and otherwise deleted from the parcel register by the Seller's solicitor. The Buyer's solicitor should therefore request this from the Seller and be communicated to the Seller's solicitor in the form of a requisition made by the Buyer's solicitor. In these instances, a discharge of a Notice of Security Interest connected to the rental item should be undertaken by the Seller's solicitor and confirmed in a formal undertaking delivered to the Buyer on closing.

Section 7 "HST":

Section 7 of the OREA's Form 100 Agreement of Purchase and Sale is directed at the issue of HST, the applicability of HST and the allocation of responsibility for the payment and/or remittance of any HST found to apply to the Seller's disposition of the Subject Property. In the normal course, used residential real property will not be subject to HST and this provision will therefore be of little consequence to the parties.

Section 7 of the APS imposes an obligation on the Seller to certify, prior to the completion of the transaction, that the Subject Property's disposition does not attract the application of HST. This is to be confirmed in writing and is

Matters become complicated where the nature of the property itself and the Seller's current and past uses for the property contain a commercial component. Where the Subject Property has been used for commercial purposes as well as residential purposes, the Subject Property may be treated as a "mixed-use" property, in which case HST will apply in accordance with the *Excise Tax Act*. The Canada Revenue Agency has provided guidance concerning the parties' respective obligations where the disposition of the Subject Property gives rise to an application of the HST. Although a full discussion of this issue is beyond the scope of this Comment, the following points should be kept in mind by both solicitors to the transaction:

- a. Every sale of real estate is taxable and subject to the application of HST unless the Subject Property is found to be exempt pursuant to Schedule V, Part 1 of the *Excise Tax Act*.
- b. Where the Subject Property is non-exempt pursuant to the *Act*, the obligation to collect and remit the applicable HST rests with *Seller* in accordance with Section 165(1) of the *Act*. The Canada Revenue Agency will deem the HST to have been collected by the Seller regardless whether or not HST was in fact paid by the Buyer on closing. This is of great importance to Sellers, who are then obligated to remit/pay the applicable HST to the CRA.
 - i. It is for this reason that Section 7 of the OREA Form 100 Agreement of Purchase and Sale should be drafted in a manner in which the payment of HST is “**in addition to**” the purchase price.
- c. For various reasons, the parties are also free to draft the APS in a manner which treats any applicable amount of HST as “**included in**” the purchase price. Such an approach is expected where it is determined that the **Buyer is an HST Registrant**. In that case, the Seller is relieved from its obligations to collect and remit the applicable HST and the burden shifts to the Registrant Buyer to collect and remit the HST to the CRA following the Buyer’s “self-assessment”.³ The Registrant Buyer’s self-assessment must then be filed with the Canada Revenue Agency, at which time the Registrant Buyer will be eligible to offset its payment of the tax through the use of Input Tax Credits (ITCs).
 - I. **Accuracy, Proper Drafting and Open Communication** between the Buyer and Seller are of critical importance to properly ensure that the remittance and payment of any applicable HST is not done by both parties, which would result in a double payment to the Canada Revenue Agency.

³ October 6, 2022 “Thursday Tips with LAWPRO and TLA: Tips for Real Estate Lawyers” LawPro and Toronto Lawyers Association, Shawn Erker (Writer and Content Manager), p. 8.

- II. **The Seller's Solicitor** must confirm the Buyer's HST Registration status by way of a requisition drafted in connection thereto and an online search should be conducted to confirm the validity and accuracy of the HST Number provided by the Buyer.⁴ The **HST Registration Search** is performed online by imputing: a) the HST number provided by the Buyer; b) the Business Name which corresponds to the latter, and c) to verify the currency of the Buyer's registration status, the date of the online search should be contemporaneous to the Completion Date of the transaction.
- III. **The Seller's Solicitor** should also obtain from the Registrant Buyer a **Certificate and Indemnity** which contains: a) the Buyer's HST Registration Number; b) an obligation on the Buyer to self-assess with the CRA and remit any HST payable; c) the Buyer's acknowledgment that it will: "[...] indemnify the Seller against any HST, penalties, interest and/or costs which may be assessed against the seller as a result of the Buyer's failure to comply with the self-assessment requirements."⁵
- IV. Although beyond the scope of this Comment, accountants regularly recommend that the person: "[...] who signed the Agreement of Purchase and Sale is not acting as an agent or bare trustee; and confirmation that the purported principal / beneficial owner (if applicable) existed at the time the Agreement of Purchase and Sale was signed."⁶

⁴ October 6, 2022 "Thursday Tips with LAWPRO and TLA: Tips for Real Estate Lawyers" LawPro and Toronto Lawyers Association, Shawn Erker (Writer and Content Manager), p. 9.

⁵ November 17, 2020, "Self-Assessing and the HST (It's Not Just for COVID-19), The Six-Minute Real Estate Lawyer 2020, Tab 8, Alan Silverstein, p. 11.

⁶ November 17, 2020, "Self-Assessing and the HST (It's Not Just for COVID-19), The Six-Minute Real Estate Lawyer 2020, Tab 8, Alan Silverstein, p. 11.

- d. If it is known by the Seller or Buyer prior to the preparation and execution of OREA Form 100 Agreement of Purchase and Sale that the Subject Property is subject to the HST, an alternate form of APS (OREA Form 500) should be used by the parties in the of OREA Form 100. Where the property being sold is commercial or mixed use, **OREA's Form 500** should be used as the Agreement of Purchase and Sale.
- e. A great deal of litigation Sellers and Buyers following the close of transaction has arisen since the real estate market boom reached its peak in the years 2021 and 2022. Litigation concerning a party's obligation to collect and remit HST, declaratory relief sought by a party on the issue of exempt sales of property and the post-closing interpretation of the Agreement of Purchase and Sale have been prominent of several cases. Litigation of this sort arises as a result of either solicitor's lack of due diligence in the leading up to the close of a transaction. See the *References, Definitions and Additional Materials* section which is appended to this Comment.

Section 8 "Title Search", Section 9 "Future Use" and Section 10 "Title":

A full description of the title searching process, as well as a wholesome discussion of the process of communicating and responding to title requisitions are beyond the scope of this Comment. However, I will cite some of those title issues that real estate lawyers in Ontario might encounter regularly as well as those title issues which may give rise to unease and uncertainty among practitioners where the title issue uncovered is one of first impression for a practitioner. It is important to note at this stage that Section 8 of the APS informs other provisions of the Agreement, such as Section 9 ("Future Use"), Section 10 ("Title"), Section 11 ("Closing Arrangements") as well as Section 12 ("Documents and Discharge"), Section 15 ("Planning Act") and Section 23 ("UFFI").

i. Section 8 – Title Search:

"Title Searching & Conveyancing in Ontario" (Seventh Edition), which is authored by Margeurite E. Moore and published by Lexis Nexis, is an invaluable resource and

comprehensive manual speaking to the wide array of potential searches, as well as the practical issues they uncover – some of which will be encountered by readers with varying levels of frequency. The following is a list of title defects uncovered through on and off-title searches as well as sub-searches. Once a review of the title search is performed, the Buyer’s solicitor must determine the significance and impact of any encumbrances, registrations or title defects uncovered and which require deletion or discharge prior to the Completion Date. The manner in which a registration is deleted or discharged varies greatly based on the nature of the instrument at issue, the identity of the party who registered the instrument in the first instance, as well as the applicable practical and technical rules governing the system of electronic document registration. While it is true that the nature and type of the Subject Property informs the direction of a Solicitor’s title search, the following searches are standard and required in the great majority of cases:

- If the Subject Property remains registered in the ***Registry Act***, it is standard practice to perform a **40-year search of the chain of title**, in accordance with Subsection 112(1) of the *Registry Act*. That provision reads as follows:
 - “112(1) A person dealing with land shall not be required to show that the person is lawfully entitled to the land as owner thereof through a good and sufficient chain of title during a period greater than the forty years immediately preceding the day of such dealing, except in respect of a claim referred to in section 113(5).”
 - Any document registered within the 40-year period continues to affect the Subject Property. However, any right arising from a registered instrument expire 40 years from the date of registration unless the claimant register a notice of claim in a prescribed form pursuant to sections 111 and 113 of the *Registry Act*.⁷
- If the Subject Property is registered under the ***Land Titles Act (LTA)***, the results of a solicitor’s title search may be relied upon with a higher degree of confidence. This is due to the nature of the Land Title’s System and the

⁷Francesco Gucciardo, 2002 “Real Estate Transactions”, p. 24

System's guarantees concerning the accuracy and validity of registrations described in the Subject Property's parcel register. With certain exceptions found in Section 44 of the *Land Titles Act (LTA)*, the state of the Subject Property's title is **guaranteed** by the Land Titles system. The strength of the LTA's guarantees varies in accordance with the **Title Qualifier** ascribed to the Subject Property at the time of its conversion from the Registry System to the Land Titles System.

- In any case, and notwithstanding the Subject Property's title qualifier, a proper title search of a property converted and registered under the *LTA* does not require a review of the 40-year chain of title as is the case in the *Registry Act* system described above.
- For *LTA* Properties carrying the **LTCQ** "Land Titles Conversion Qualified" qualifier, a proper title search stems from a review of the Subject Property's parcel register, which may be located by way of a Teraview search employing the **Property Identification Number (PIN)**, which is number composed of nine (9) digits. The first five (5) digits of the pin identify the block while the remaining four (4) digits represent the property itself, as it sits on the relevant block.⁸ The Subject Property's parcel register should be purchased by the title searcher or Buyer's solicitor, and should include all active instruments as well as all deleted documents.
- The contents of a LTCQ Parcel Register, ordered to include active and inactive registrations are indicative of all prior dealings with the Subject Property, including the registration of discharge of mortgages, the possibility of prior corporate ownership, and a review of deleted instruments may also reveal transactional patterns indicative of **fraudulent activity**.⁹

⁸ Title Searching and Conveyancing in Ontario, Page 422

⁹ Title Searching and Conveyancing in Ontario, Page 424

- The Subject Property's parcel register may also reveal registrations connected to a Mortgage registered on title (known formally as a "**Charge/Mortgage**") as well as the presence of Security Interests held by secured creditors (known formally as "**Notices of Security Interest**"). The following section dealing with Requisitions will explain how solicitors confront these and other encumbrances on title as the practices used in communicating with secured creditors holding an interest in the Subject Property.
- Many law schools regularly emphasize the importance and essential nature of a proper ***Planning Act* search**. Prior to the registration of a deed/transfer of land, a solicitor must confirm that there are no outstanding violations or issues involving the *Planning Act*. Solicitors are relieved from doing a *Planning Act* search if the Subject Property is a) a condominium or b) located on a whole of lot or block on a registered plan of subdivision. A *Planning Act* search is also reduced in scope in cases where the deed/transfer to the current owner (the Seller) indicates that all three *Planning Act* statements were properly made at the time of the Seller's acquisition of the Subject Property. This is ascertained by reviewing the registered transfer/deed evincing the Seller's ownership of the Subject Property. In these cases, the Buyer's solicitor must only perform searches of the abutting lands from the date of the Seller's acquisition of the Subject Property to the present time.
 - Where the transfer/deed indicates instead that all three *Planning Act* statements were *not* made at the time of the Seller's acquisition, the Buyer's solicitor must only verify that the *Planning Act* statements made in the conveyance preceding

that made to the Seller, were properly made at that time instead.¹⁰

- In most cases, a title searcher, who specializes in the retrieval and analysis of title documents, is retained by the Buyer's solicitor to perform a title search of the Subject Property. These services regularly include the title searcher's review, comment and identification of the any outstanding *Planning Act* issues.
- As mentioned briefly in Section 2 of this Comment, which deals with the interpretation of a property's Legal Description, the Buyer's solicitor's is also required to retrieve and review all registered instruments, plans, easements, or other encumbrances referenced in the Subject Property's legal description as part of the solicitor's title searching obligations.
- A Buyer's solicitor's search should also confirm that the Subject Property is accessible, and that **legal access to and from the property** is clear and unrestricted.
- A Buyer's Solicitor is also tasked with performing **Execution Searches** which will uncover any Writs of Execution filed against the Seller(s) or those with same or similar names to the names of the Seller. Determining whether the individual(s) named in a Writ of Execution are one and the same as the individual(s) named as Sellers in the Agreement of Purchase and Sale involves an additional process to ensure that the transaction closes smoothly notwithstanding the presence of a Writ of Execution. It is important to keep in mind that Writs of Execution do not formally bind the land in cases where the Subject Property is registered in the Land Titles System. A writ of execution becomes an encumbrance only in cases where a Judgment Creditor has made a request to the Sherriff to file the Writ in the Land

¹⁰ 8th Annual Real Estate Law Summit, Law Society of Upper Canada, "How to Do a Proper *Planning Act* Search", Rosemary Genside, April 6, 2011, Tab 2, p. 3.

Titles System.¹¹Where a writ of execution has been filed in the Land Titles System by the sheriff, it will expire following the 6th anniversary of the writ's issuance, unless the judgment creditor files a renewal with the Sherriff. The general rule is that whenever a change of ownership of real property occurs, a search of Writs of Execution is performed automatically by the Teraview system. Please see the *References, Definitions and Additional Materials* section appended to this Comment for an excerpt of Ontario's Electronic Registration Procedures Guide, which outlines the rules and requirements for the lifting of Writs of Execution, and the processes applicable to the lifting of writs securing a judgment debt of \$50,000.00 or more. The excerpt provided also speaks to the processes employed by solicitors where either party to the transaction has the same or similar name to an individual named in a registered writ of execution. Teraview allows for the submission of an "Application to Delete Executions" and the *References, Definitions and Additional Materials* portion of this Comment will provide further information on the application process as well as the relevant law statements to be used in filing an application of this type.

- **Current Use:** Section 8 also allows for the insertion by the Seller of the Subject Property's current use. The Buyer's Solicitor's review of this provision and the stated Current Use of the Subject Property should be communicated to the client. A conversation with the client on the issue of the Subject Property's current use and current municipal zoning classification should take place prior to closing to ensure that the client's objectives concerning the use of the Subject Property do not run afoul of any municipal restrictions affecting the property.
- The Buyer's Solicitor should properly ascertain the objectives and intended uses for the Subject Property of his or her client(s)'s early on and upon being

¹¹ Document Registration Procedures Guide, page 127.

retained. If the Buyer(s)'s objectives concerning the use of the property do not align with the Current Use stated in the APS, the Buyer's Solicitor should correspond with all relevant municipal or regulatory authorities as soon as practicable, since a response from those entities may take a significant amount of time. The Buyer's Solicitor's inquiries in this area should be aimed at determining: "[...] the status of the property's compliance with laws that the authority is responsible for administering, which information will often only be released if the vendor authorizes it. A **Written Authorization** prepared by the Buyer's solicitor [...]"¹² and executed by the Seller should be one of Buyer's solicitor's first tasks upon being retained. Paragraph 8 imposes on the Seller an obligation to execute any authorizations required by the Buyer's solicitor in completing the above-referenced inquiries.

- Importantly, a Buyer's solicitor should not allow the Buyer to agree in advance to accept any restrictive covenants of which the Buyer has no details, because this may lead to problems for the Buyer's intended or future use of the property.

ii. **Section 9 – Future Use:**

As described above, the Buyer's solicitor should ascertain his or her client(s)'s intentions and objectives concerning the future use of the Subject Property early on and during initial discussions with the client(s).

iii. **Section 10 – Title:**

- The purpose and function of the title searching process described above is related directly to Section 10 of the APS, which affords to the Buyer the opportunity to determine whether "**Good Title**" is in fact being conveyed by the Seller in accordance with the Buyer's expectations. The concept of good title is a fundamental feature of the common law framework governing conveyances of real property and lead to the eventual legislative enactment of

¹² Real Estate Practice in Ontario 9th Edition, page 274.

the *Vendors and Purchasers Act*, which arose in Canadian jurisprudence in 1895. A current copy of that statute, which does not exceed 2 pages in length, is appended to the current Comment.

- OREA Form 100 does, however, require the Buyer to accept title subject to certain encumbrances and qualifications. These items are listed in subparagraphs (a) to (d) in Paragraph 10 of the APS.¹³ While the title qualifications accepted by the Buyer listed in Paragraph 10 are in most cases, aspects of minor importance, in certain circumstances, they may merit deletion or modification, and a Buyer's solicitor should be alert to this fact when preparing his or her Letter of Requisitions.¹⁴

Buyer's Solicitor's Requisitions – Overview and History

i. General Overview

Following the above-referenced Title Search, performed pursuant to Section 8 of the Agreement of Purchase and Sale, the Buyer's solicitor will now be in an informed position to submit to the Seller's solicitor a **Letter of Requisitions** on matters uncovered during the title search. Section 8 of the Agreement of Purchase and Sale imposes upon the Buyer's solicitor the obligation to submit inquiries to the Seller's solicitor as part of the former's obligations of **due diligence**. This provision (Section 8) of the Agreement of Purchase and Sale allows the parties to set a date/deadline – which is by default a period of thirty (30) days¹⁵, unless otherwise agreed to by the parties – within which the parties and their solicitors may conduct a title search of the Subject Property. The Seller's solicitor, who is under an obligation to adequately respond to the requisitions contained in the Letter of Requisitions prior to the aforementioned deadline, known as the **Requisition Date**, is a fundamental element of the transactional process: “[...] If a purchaser makes a valid requisition that the

¹³ Real Estate Practice in Ontario 9th Edition, page 274-275.

¹⁴ Real Estate Practice in Ontario 9th Edition, page 275.

¹⁵ Vendors and Purchasers Act, R.S.O. 1990, c. V. 2., Section 4 (b) and (c).

seller is unable or unwilling to remove and which the buyer will not waive, the OREA form stipulates that the agreement shall be at an end.”¹⁶

If the Buyer’s solicitor fails to submit his or her Requisition letter by the Requisition Date, the solicitor may only bring forward further requisitions following the Requisition Date if: a) the requisition raised is one centered on a “**matter of conveyancing**” or, b) the requisition raised is a matter “**going to the root of title**”.¹⁷ Discussed below in relation to the Buyer’s rescission of the Agreement of Purchase and Sale, requisitions are classified in three (3) classes. These classes generate provide a framework within which the Buyer may exercise his or her rights of rescission. The remedies available to a Buyer depend upon which class of requisition the Buyer’s claim to rescission is based.

See the *References, Definitions and Additional Materials* appended hereto, which contains a **precedent Letter of Requisitions**, which is used currently in Ontario real estate law practice. The Letter of Requisitions, is in essence: “[...] a statement of requirements for the completion of a real estate transaction. The requirements normally relate to the provisions of the agreement of purchase and sale, to matters of title, to zoning and municipal matters, and to the documentation needed to complete the transaction, a solicitor’s main objective in submitting requisitions is to *preserve and protect* his or her client’s rights under the agreement of purchase and sale.”¹⁸

To be discussed further below, the **manner and adequacy of the Seller’s responses** to those items requisitioned by the Buyer are closely related to the Buyer’s rights to **rescind the Agreement of Purchase and Sale**, which arise in the event the Seller cannot convey good title in a manner consistent with the warranties and conditions

¹⁶ Michael Brown, Associate, Merovitz Potechin LLP, “Requisitions – A General Refresher”, 26th Annual East Region Solicitors Conference Virtual Program Part 1: Real Estate, September 29, 2020, p. 3.

¹⁷ May 6, 2021, “Annotated Agreement of Purchase and Sale OREA Form 100”, The Annotated Residential Agreement of Purchase and Sale 2021, Law Society of Ontario, S. D’Alimonte, J. Lem, and B. McLellan, p. 42,

¹⁸ Weeks et al. v. Rosocha, 1983 CanLII 1788 (ONCA).

provided for in Section 10 of the APS and in the absence of a Waiver from the Buyer delivered to the Seller pursuant to Section 4 (c) of the *Act*.¹⁹

The **concept of Good Title** is a fundamental feature of the common law framework of the law governing conveyances of real property. The enactment of the *Vendors and Purchasers Act*, which has its roots in the common law dating back to the 1890s remains relevant and codifies the rights and obligations of the vendor and the purchaser in the context of a real estate transaction. The Supreme Court of Canada, as it then was in 1895, reaffirmed in *Armstrong v. Nason*, that: “[...] the authority to make a requisition is generally set out in the agreement of purchase and sale, it also arises from a long-established common-law rule that the vendor is required to confer on the purchaser a marketable title in fee simple.”²⁰ Stated differently, “good title” is one which “[...] a purchaser could be forced to take on an unwilling basis that is free of litigation or threats of litigation.”²¹ Following the modern adoption of **Title Insurance**, the definition of Good Title has been subject to various forms of interpretation, and the development of the concept of “**Marketable Title**”, has provided guidance in interpreting the meaning of Good Title. In the 1978 decision of *Holmes v. Graham*, the Ontario Court of Appeal stated the issues as follows: “A vendor must show a good title. This merchantable or a **marketable title**: one which at all times and under all circumstances can be forced upon an unwilling purchaser who is not compelled to take a title which would expose him to litigation or hazard: one which is free from litigation, palpable defects and grave doubts and couples a certainty of peaceful possession with a certainty that no flaw will appear to disturb its market value.”²²

¹⁹ Section 4(c) “Terms of agreement of sale and purchase”, *Vendors and Purchasers Act*, R.S.O. 1990, c. V. 2.

²⁰ *Armstrong v. Nason* (1895), 25 S.C.R. 263,

²¹ *Koffman et al. v. Fischtein et al.*, 1984 CanLII 1974 (ONSC).

²² *Holmes v. Graham*, 1978 CanLII 1438 (ONCA).

Section 8 also allows for the insertion of the Subject Property's current use. The use stated within the space provided in Section 8 informs the next paragraph, Paragraph 9 of the Agreement of Purchase and Sale, on Future Use.

Seller's Solicitor's Responses to Requisitions :

The practice of a sending requisitions to the Seller's solicitor and the Seller's Solicitor's obligations to provide a proper and timely response to the Buyer's requisitions is not new a creation and has been a standard feature underpinning the laws governing conveyances of real property and has been reflected in legislation such as the ***Vendors and Purchasers Act*** in Ontario. In *Phinny v. Macaulay* (2008) O.J. No. 3629 S.C.J., the requisitions process is characterized by the court as follows: "Requisitions are a dialogue between Vendor's and Purchaser's counsel to resolve title issues. However, notwithstanding this dialogue, the Vendor is obligated to deliver **Good Title** in accordance with the Purchase Agreement."²³

The **overarching principle of Good Faith** which governs the parties' contractual relationship and the parties' performance of the Agreement of Purchase and Sale is applicable during the title search and requisitions stage. It applies directly to the manner in which the Seller responds and ultimately handles the Buyer's requisitions. The contractual duties of good faith enunciated by the Supreme Court of Canada in the 2014 case of *Bhasin v. Hrynew* (2014) 3 SCR 494, have been found to apply equally to the conduct of the parties to an Agreement of Purchase and Sale as well as the parties' respective obligations in relation to the performance of the Agreement.²⁴

There are a few general principles governing the adequacy of a Seller's Solicitor's response to requisitions and generally, the Seller's responses are to be consistent with the above-referenced implied duties of good faith in contractual relations as well as the general rule that the Buyer is entitled to a conveyance of "good title" from the Seller in a given transaction. In *Phinny v. Macaulay*, for instance, the court emphasized

²³ In *Phinny v. Macaulay* (2008) O.J. No. 3629 S.C.J.

²⁴ 2336574 Ontario Inc. v 1559586 Ontario Inc., 2016 ONSC 2467 para. 24

that a Seller's solicitor's responses to a Buyer's requisitions should be made: a) in a timely manner and, b) should directly address the substantive issue raised by the particular requisition at hand.²⁵ Generally, the properly response of the Seller's solicitor's should not be taken lightly since those responses will form part of the subject matter considered by the Court in the event of litigation brought in connection to the transaction.²⁶

II. Buyer's Rescission of the Agreement of Purchase and Sale

In cases where a Seller is unable or unwilling to remove, remedy, satisfy insure over or otherwise rectify either of: a) an objection to title; b) an outstanding work order or deficiency notice; or c) the illegality of the property's use, and/or, d) the uninsurability of the property (in connection with policies of fire insurance), OREA Form 100 stipulates that the Agreement of Purchase and Sale may be rescinded by the Buyer.²⁷ As mentioned above, requisitions are classified into the following three-classes, depending on their type and subject matter:

- a) Requisitions on matters of title
- b) Requisitions on matters of conveyancing
- c) Requisitions on matters of contract

The class of requisition upon which a Buyer bases its claim to rescission of the APS informs the range of remedies available to it within the context of litigation.

²⁵ *Phinny v. Macaulay*, 2008 CanLII 47015 (ONSC)

²⁶ Michael Brown, Associate, Merovitz Potechin LLP, "Requisitions – A General Refresher", 26th Annual East Region Solicitors Conference Virtual Program Part 1: Real Estate, September 29, 2020, p. 1.

²⁷ Michael Brown, Associate, Merovitz Potechin LLP, "Requisitions – A General Refresher", 26th Annual East Region Solicitors Conference Virtual Program Part 1: Real Estate, September 29, 2020, p. 4.

References, Definitions and Additional Materials

This article will see ongoing and periodic updates and amendments and will cover all aspects and terms contained in the standard Agreement of Purchase and Sale for Residential Real Estate.

1. **FORM OF AGREEMENT OF PURCHASE AND SALE**
2. **SOLICITOR'S OBLIGATIONS RE: TITLE SEARCHING**
3. **LEGISLATIVE AMENDMENTS**
4. **WORKING GROUP ON LAWYER'S AND STANDARD CLOSING DOCUMENTS**
5. **TIME IS OF THE ESSENCE AND JUDICIAL INTERPRETATION OF OTHER TERMS**
6. **CHATTELS AND FIXTURES – DEFINITIONS**