

Agreements of Purchase and Sale in the Time of COVID-19

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Due to the COVID-19 pandemic, the Federal government has lowered interest rates and some businesses are cautiously optimistic that the worst is over. In anticipation of Ontarians taking advantage of these rates to buy and sell real estate, brokers have prepared a list of COVID-19 recommended clauses to help buyers and sellers address concerns that pose potential roadblocks to closing. Unfortunately, many of these clauses, intended to clarify unexpected issues that might arise, are ambiguous, lack precision and could expose buyers and sellers to costly disputes between parties.

With land registration services remaining on Ontario's Essential Services list, real estate transactions can continue to close fully electronically. Rather than rely on COVID-19-specific clauses, we have compiled a few simple suggestions that we recommend buyers and sellers consider incorporating into their agreements of purchase and sale:

- **Irrevocable Date:** Where a corporate entity is a party to the transaction, choosing an irrevocable date that is far enough away will give the buyer/seller enough time to marshal the signatures from the requisite signing authorities, have the agreement returned and then sent over to the other side.
- **Conditional/ Due Diligence Periods:** Buyers should consider requesting due diligence periods longer than what is traditionally agreed to. With many people working remotely, many standard inquiries, specifically off-title searches, environmental site assessments, reliance letters and estoppel certificates, can take considerably longer to obtain. Agreeing to a longer due diligence period will allow buyers a better opportunity to be fully informed about the property before waiving due diligence conditions.
- **Closing Arrangements:** Adding a clause to the purchase agreement whereby the buyer and seller agree to the electronic execution of closing documents and the acceptances of PDF documents ensures that one party does not demand originals on closing. This avoids coordinating the signing and delivery of closing documents while maintaining physical distancing measures and leads to an overall smoother closing process. We are closely following the Law Society of Ontario's recommendations regarding the remote swearing of affidavits and similar documents.
- **Closing Date:** In addition to selecting a reasonable closing date that takes into account the current environment, the buyer and seller may want to add a clause to the purchase agreement agreeing from the outset to a potential extension(s) of the closing date, the circumstances that would permit an extension, and the notice required to do so. While extension timelines should be kept reasonable, given the present uncertainty, the ability to extend the closing date gives both the buyer and seller some form of flexibility to react to delays, changes in governmental protocols and more.

With a few simple considerations, buyers and sellers should feel confident in their ability to continue to complete real estate transactions in Ontario. Our lawyers are committed to assisting you so that your transaction can proceed as planned. While our office is still maintaining a "work from home" policy, our lawyers, conveyancers and staff remain fully accessible without disruption. We have full access to all our clients' working files, searches, documents and agreements. This includes our conveyancers who we rely on a great deal to identify and resolve difficult title issues. The WeirFoulds Commercial Real Estate Group is able to assist in any way

needed.

Even though we are working remotely, we continue to collaborate seamlessly with our other practice groups that we traditionally look to for their expertise in commercial real estate matters.

If you have any questions as to how COVID-19 may affect your ability to complete a real estate transaction, please contact a member of our Commercial Real Estate Group. We will be glad to assist you.

The information and comments herein are for the general information and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, please contact any of our lawyers for further guidance.

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Bradley McLellan has extensive experience in infrastructure and public projects, including procurement, risk allocation, public-private partnership arrangements, concession agreements, ground leases, design-build agreements and operation and management agreements. He also is a recognized expert in the purchase, sale and financing of commercial real estate.

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