

# **Closing and Reporting the Commercial Real Estate Transaction**

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## **Introduction**

When acting on behalf of a client, whether as a purchaser or vendor of a commercial property, the goal is usually the same: close the transaction while fully protecting your client's legal and business interests.

To assist you in attaining this goal as the real estate clerk working on the transaction, this paper will address the following issues: (i) the preparation and use of the closing agenda, (ii) handling issues that arise on closing day, (iii) dealing with post-closing aspects of the transaction, and (iv) reporting the transaction to your client.

As a preliminary note, this paper is not intended to discuss the law applicable to a party's obligation to close, or refusal to close, a transaction. Rather, it is intended to provide practical advice on ways to deal with issues, routine and unanticipated, that arise during the transaction to assist you in advising your client.

This paper addresses the commercial real estate transaction after the agreement of purchase and sale has been signed, after the due diligence has been completed and after conditions have been waived. It is intended to guide you from the documentation stage through closing to the final report to your client.

There is no paper that can address the myriad of issues that may arise in the sale or purchase of commercial real estate; every client and transaction is different. The practice tips suggested in this paper are by no means the "right" solution for every issue in every

transaction; each issue needs to be addressed in the context of the deal. In addition, in many instances, some of the options outlined in this paper will simply not be available under the circumstances. This paper and my accompanying presentation are aimed at providing you with some guidance so that when issues arise (as they invariably do), you are prepared for, and able to respond to, the issue with some alternatives for your client.

### **The Closing Agenda**

From a real estate clerk's perspective, the closing agenda is one of the most important documents in completing the transaction. The closing agenda is your guide to the conditions that must be satisfied, the documents that need to be produced and exchanged between the parties and the checklist for all other items that need to be addressed for the transaction to close.

There are no rules as to what may be included in the closing agenda. The starting point in drafting the closing agenda is the agreement of purchase and sale. Once the agreement of purchase and sale (and any amendments thereto) has been signed by the parties and arrives on your desk, read it in its entirety and list every item that needs to be completed, or document that needs to be drafted, in connection with the transaction. In addition to those items that are specifically contemplated under the agreement of purchase and sale, also consult the supervising lawyer or use your previous experience in similar deals to list other documents or conditions that will be required in connection with the transaction. It is also advisable to list deposits that are to be paid by the purchaser.

For each item, determine the timeline within which the item is to be completed. Items will either be completed prior to closing, on closing or following closing. In some cases the agreement of purchase and sale will dictate when the item needs to be completed; in other instances, you have to make the determination as to when it is best completed. As a general rule, the earlier in the process that an item is completed, the better, as it is less likely to interfere with closing.

Every item should be listed in the closing agenda and responsibility should be allocated between the vendor and the purchaser, and the law firm or the client. It is a good idea to produce the draft closing agenda as early as possible and circulate it to both the other side and to your own client and then discuss every item on the agenda with each of those parties to ensure everyone knows which party is responsible for completing each item. The more thorough the closing agenda is, the better. At a minimum, the closing agenda should address: (i) the parties, including the names of the vendor and purchaser, and their individual representatives, (ii) the solicitors for each of the parties, (iii) any third parties that will be involved in the transaction (for example, mortgagees, third parties providing consents and any government agencies providing clearances for the transaction), (iv) the closing date, place of closing and time of closing, and (v) the number of copies of each document that needs to be delivered on closing.

Frequently, escrow conditions will be outlined in the closing agenda. You should exercise caution when relying upon these conditions, as you will want to ensure that they do not conflict with escrow conditions in any Document Registration Agreement and that the conditions make sense in terms of the specific transaction.

If you have a well-drafted closing agenda, it will simplify the transaction and will limit last-minute surprises.

### **Closing Day**

I clearly recall my disappointment as an articling student working on one of my first large commercial real estate deals. As a rookie, there was a sense of excitement and anticipation that came with the closing day. This excitement and anticipation was bluntly deflated on closing day when I met in the boardroom with opposing counsel, exchanged documents, received some cheques, sent the documents over to the Registry Office for registration and left the boardroom; it was very anti-climatic given the stress and hard

work that went into preparing for the closing. At the time, I did not appreciate that this very “boring” closing was a good thing – it was a symptom of a transaction that had been well run and a closing that had been effectively prepared for by all involved parties.

If your closing agenda has been drafted in a manner that addresses exactly what needs to occur for the deal to close, and the parties have considered and resolved all closing issues and documents prior to the closing day, your closing should run smoothly and there should be no (or at least limited) stress or panic associated with the closing.

Here are some of the key points to ensure that closing day runs smoothly:

1. **Documentation:** All of the closing documents should be negotiated and finalized prior to closing. You do not want to be negotiating documents on the day of closing (if possible) as the pending closing may limit your client’s bargaining position in connection with the documents if the client has no alternative to closing on that day. Completion of documents includes: (i) signing and dating of all documents, (ii) completion of the various “blanks” (for example, GST registration numbers, registered instrument numbers, addresses for service and fax numbers), and (iii) having an adequate number of copies of the documents available and executed at closing.
2. **Funds:** As a separate presentation has been made in connection with closing proceeds, this paper will not deal extensively with this issue. However, at a minimum, you should ensure: (i) funds are delivered as early as possible on the closing day (or prior to the closing day, if possible), (ii) funds from all parties are certified, and (iii) the names of payees, dates and amounts are all correct.
3. **Delivery of the Property:** Prior to closing, you should review what the agreement of purchase and sale states about the delivery of the property. Is

vacant possession to be provided? If so, ensure your client is aware of what this means. What chattels and fixtures are included and excluded? These issues can frequently give rise to post-closing disputes between the parties. If such disputes arise, it is recommended that you first consult with your client before getting into a protracted dispute with opposing counsel; sometimes the parties have discussed what chattels and fixtures were intended to stay or go, and, generally speaking, the parties will usually live with their own agreements on these issues irrespective of what the agreement of purchase and sale states. Are there tenancies being assumed? If so, have the tenants been given appropriate notice of the new ownership and directions regarding the payment of rent? Although the issue is less common in commercial transactions, ensure that your client knows what time vacant possession is to be provided on the closing date. And of course, know where the keys are.

4. **Registrations:** Whether the transaction is being completed electronically or under the paper-based system, real property documents can only be registered until 5:00 p.m. on the closing date. The agreement of purchase and sale will generally either contain escrow conditions or require that the parties' solicitors enter into a Document Registration Agreement to govern the release of funds and documents, and the registration of documents. Basically, escrow is a concept where documents or funds are delivered to another party (or its solicitor) to be held by such party until a condition has been satisfied, and to be released only once such condition has been satisfied. Escrow is a common component of real estate transactions. It is imperative that the terms of the escrow are clear between the parties. Where a purchaser is obtaining financing for the acquisition, the lender's counsel will usually request a three-party Document Registration Agreement (between the purchaser's solicitor, the vendor's solicitor and the lender's solicitor) to govern the release of documents, funds and completion of registrations.

5. **Undertakings:** The provision of an undertaking can be an effective tool to address some issues that arise on closing. An undertaking is an agreement by a party in favour of the other to complete (or often, to use its “best” or “reasonable” efforts to complete) the matter that is the subject of the undertaking within the timeframes and other parameters set out therein. An undertaking should always be done in writing and should be clear as to exactly what is being undertaken by the party providing the undertaking. It should be clear whether the undertaking is coming from the solicitor on behalf of his or her client, or from the solicitor personally; if being given on behalf of the client, the undertaking should state that it is given without personal liability to the solicitor. Subject to the comments regarding the *Rules of Professional Conduct* below, there is no rule as to what can or cannot be the subject of an undertaking; as long as a party or its solicitor is willing to provide the undertaking and the opposing party or its solicitor is willing to accept the undertaking, an undertaking can be used to address any issue. That having been said, careful consideration should be given to whether an undertaking should be provided or accepted to address an issue. Some of the factors to be considered in assessing whether to use an undertaking include:

- (i) Rule 5.01(3) of the Law Society of Upper Canada *Rules of Professional Conduct* states that a lawyer shall not permit a non-lawyer to give or accept an undertaking, except with the express authorization of the supervising lawyer;
- (ii) Rule 6.03(8) of the Law Society of Upper Canada *Rules of Professional Conduct* states that a lawyer should not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given;

- (iii) you should not give nor accept personal undertakings to discharge a private mortgage after closing; the discharge of a private mortgage should be delivered on closing;
- (iv) a “best efforts” undertaking is exactly that; a party must use its best efforts to complete the matter that is the subject of the undertaking. It is not a guarantee of completion. It is a compromise to your client’s position if you accept a best efforts undertaking is delivered in lieu of completion of the item on closing. If you are accepting this undertaking, attempt to state what “best efforts” entails, for example, a party must send a certain number of letters, a party must proceed promptly with an appeal, a party must retain a consultant to complete some work;
- (v) consider who is giving the undertaking: is it the party (i.e. vendor or purchaser) or the solicitor? You need to assess the likelihood of performance of the undertaking;
- (vi) pursuing undertakings after the transaction has closed can be costly and frustrating process; your client should be aware of the costs that will be incurred in following up on these items; and
- (vii) your client should be advised as to its recourse if the undertaking is not satisfied. Is your client prepared to sue for the satisfaction of an item?

6. **Indemnities:** In addition to the use of undertakings, consideration should be given to the provision of an indemnity to facilitate the completion of the transaction in appropriate circumstances. A party may agree to provide

an indemnity in favour of the other party in connection with an issue or risk of loss that may arise after closing. For example, an indemnity may be provided by a party in connection with environmental issues relating to a property if certain environmental remediation cannot occur prior to the closing date. Indemnities must be clearly drafted to define the scope of risk that is covered, the extent of loss covered, the length of time for which the indemnity is in effect and the party or parties that may claim under the indemnity. It is important to ensure that the party providing the indemnity has the financial covenant to satisfy any claims for which it is obligated to indemnify.

7. **Client Management:** The client management aspect of the transaction is extremely important; this is where your law firm can add significant value to the service you provide to your client. The completion of the transaction is always an important matter to your client, whether your client is a property developer who routinely buys and sells commercial properties or a client who is an individual selling the only retail plaza that he or she has owned for forty years to secure their retirement fund. In either case, it is important to “manage” or lead the client through the closing process. At a minimum, it is recommended that you: (i) explain to the client how closing works (document exchange, the movement of funds, registration of documents and release from escrow), (ii) advise the client of how, and if, they are involved on closing; for example: when do they attend to sign documents? Will there be an “in person” closing with some negotiation or do they need to be at the property for any reason?, and (iii) advise the client, in advance, of any issues that may impact on the scheduled completion of the transaction and explain the alternatives available if closing does not occur as planned. The more you explain the closing process to the client, the better your client will be able to respond to issues and provide instructions if any unanticipated issues arise on closing.

## **Post-Closing Matters**

Although the exchange of documents and funds, and the registration of real property documents is the “closing” of the transaction, it definitely is not the completion of the file from the clerk’s perspective.

In most transactions there are matters that were not, or could not be, completed on closing, however, they still need to be completed following closing in connection with the transaction. Your closing agenda should have a heading for “post-closing” items; this will be continually updated and will form your checklist for everything that needs to be completed before you can close the file. Some of the more common post-closing items include the following:

- (i) Mortgage discharges: For institutional mortgages, mortgage payout funds will generally be paid to the mortgagee on closing in accordance with a direction from the vendor and an undertaking from the vendor and its’ solicitor. Where the mortgagee is not “at the table” and registering the discharge on closing, it is necessary to follow up on these discharges and ensure they are registered. These discharges will need to be registered prior to any future conveyance of the property and it is much easier to obtain them from mortgagees as soon as possible after closing rather than chasing them at a later date.
  
- (ii) Delivery of third party notices and directions: Many documents delivered on closing are to be delivered by the purchaser to third parties following closing. These may include directions to tenants, directions to service contract providers, directions to municipalities regarding change of ownership and realty tax appeals and directions to utility providers regarding accounts.

It is the clerk's responsibility to ensure that these documents are delivered promptly following closing to the appropriate parties.

- (iii) Post-Closing Undertakings: As discussed above, you will need to pursue the satisfaction of any items that are the subject of an undertaking.

### **Reporting the Transaction**

Although the reporting letter is usually the final step in the transaction, and may not be completed until some time after the closing, it is important that you do not underestimate its importance.

The reporting letter is as important to the lawyer as it is the client. It serves as the lawyer's record of the transaction and it is usually your first reference source if you have to investigate any issue that arises in connection with the transaction in the future. In addition, the reporting letter is your last opportunity to address all items in the transaction.

From the lawyer's perspective, one of the most important components of the reporting letter is the confirmation of what services she or she did and did not perform on behalf of the client in connection with the transaction. This is particularly important where the client did not enter into a written retainer with the law firm. The reporting letter should specifically identify any unusual or important instructions that were received from your client.

The reporting letter should address the following items:

- (i) confirm the scope of your retainer and all instructions you received from the client;

- (ii) advise the client of when the deal was completed;
- (iii) reference the purchase agreement, and any amendments thereto, that governed the transaction;
- (iv) include with the report all of the documents that were obtained in connection with the transaction and provide a brief description of the purpose of the document; and
- (v) list all post-closing items that remain outstanding, and identify whether it is the law firm or the client that is to follow up on these outstanding items.

Although every transaction seems to be followed immediately by another, you should still attempt to deliver the reporting letter to your client in a timely manner. It is much easier to draft the reporting letter immediately following the transaction when it is fresh in your mind. In addition, the reporting letter is more useful to the client soon after closing than a year later, as issues arising in connection with the property and the transaction often occur soon after closing.

### **Conclusion**

Closing the deal is the goal of the law firm, the individual lawyer and the law clerk in every commercial real estate transaction. Your ability to deal with unanticipated transaction issues in an expeditious and cost effective manner, while protecting your client's interests, is one of the reasons why clients retain law firms. As the real estate clerk working on the file, you are responsible for the many specific details that need to be addressed to complete the transaction. Your role is integral to the service provided by your law firm, and a valued service within your law firm when

performed effectively. I hope that this paper provides some useful advice when dealing with the issues that arise in a transaction so that you, as law clerk, can effectively perform your role to ensure the client's goal of completing the transaction is attained.