



## 2009 Revisions to the Western Conveyancing Protocol (Manitoba)

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### Overview of the Protocol Project

The Conveyancing Practices Committee was responsible for developing the Manitoba version of the Western Law Societies Conveyancing Protocol (the "Protocol"), which was a joint initiative of the Law Societies of Manitoba, Saskatchewan, Alberta and British Columbia through the Western Law Societies Conveyancing Project.

The Law Society of Manitoba implemented the Protocol after the Benchers gave approval in principal in 1999 to the following changes in residential conveyancing practices recommended by the committee:

- permitting solicitors handling residential conveyances in accordance with the Protocol to disburse funds (both sale proceeds and mortgage proceeds) upon closing as opposed to waiting until transfer and mortgage documents had been registered in the Land Titles Office;
- authorizing solicitors to issue, on closing, and in accordance with the Protocol, a short form solicitor's opinion to lenders, with any errors or omissions arising from the issuance of this document responded to by the Law Society's Professional Liability Claims Fund; and
- amending Law Society practice directions to allow for this new process to be implemented

In 2000, the Protocol was approved by our insurer, the Canadian Lawyers Insurance Association and the Law Society's actuary. On December 6, 2000 the Benchers approved Practice Direction 00-02 to permit lawyers to close transactions using the Protocol effective February 15, 2001. The Protocol was implemented in British Columbia, Alberta and Saskatchewan at about the same time.

In developing the Protocol, the Law Society recognized the importance of adapting the delivery of legal services to meet the changing needs of institutional lender clients. The new closing procedures have offered efficiencies that are also safe because they leave intact the insurance comfort institutional lenders have long enjoyed when retaining lawyers. The Protocol permits a lawyer to issue a short form solicitor's opinion to a lender confirming that, in the lawyer's opinion, the mortgage can be funded and funds disbursed. On the date of closing, once the solicitor's opinion is issued by the lawyer, the mortgage funds are fully releasable. As always, the lawyer's professional liability insurance coverage stands behind the lawyer and responds to:

(i) any claims resulting from a loss to a purchaser due to an intervening registration which impairs the purchaser's title; and (ii) any claims resulting from a loss to a lender due either to an intervening registration that takes priority over the mortgage or to defects in matters of survey. The lawyer is still obligated to discuss with purchasers the importance of obtaining a building location certificate and zoning memorandum.

Soon after its implementation, the Protocol was adopted by most credit unions in Manitoba. Acceptance of the Protocol by the banks, however, took several years. Currently, the five major banks and most credit unions permit lawyers to close using the Protocol. But while the Protocol has been accepted and is used by most lawyers outside the City of Winnipeg, there has been resistance to its use within the City. This may be because it took the banks so long to accept the Protocol or simply due to inertia on the part of Winnipeg lawyers – it seems easier to do things the old way. In response, in late 2007, the Conveyancing Practices Committee struck a subcommittee for the purpose of reviewing the Protocol and recommending appropriate revisions that could improve its efficacy and facilitate its wider use by Manitoba practitioners and lenders.

With this memo is a revised version of the Protocol which highlights the results of that subcommittee's deliberations. On January 21, 2009, those recommendations were presented to the Conveyancing Practices Committee and approved by it.

### **Overview of the Protocol Revisions:**

#### 1. Deletion of the Power of Attorney Requirement

Formerly, the Protocol required the Lawyer to obtain the client's power of attorney, empowering the lawyer to correct defects in the document which would otherwise cause its rejection by the Land Titles Office. The approved power of attorney was either the short form Limited Power of Attorney, or the longer form enduring Power of Attorney as prescribed by *The Powers of Attorney Act (Manitoba)*.

The revised Protocol dispenses with the requirement to obtain the client's express power of attorney. On general principles of agency law, the lawyer has the client's implied authority to conduct the transaction in which the lawyer has been retained and to do all things incidental to that retainer. The current Corrections Policy of the Land Titles Office recognizes that implied authority, and allows the lawyer, as agent for the client, to correct the vast majority of document defects by way of correction letter.

There will be several benefits to making this change:

- The requirement to obtain the client's formal power of attorney, with its various execution formalities, has apparently been an impediment to the use of the Protocol for many Manitoba practitioners. By eliminating the power of attorney requirement, the lawyer's job is simplified: there is one fewer document to be prepared, explained to the client, and executed. As importantly, the cumbersome

requirement to have execution of the power of attorney witnessed by a third party notary public or commissioner for oaths is eliminated.

- Elimination of the power of attorney also removes the risk, or perception of risk, of the power of attorney instrument becoming a fraud tool at some future point.

Notwithstanding that neither the Saskatchewan nor Alberta Law Societies require lawyers to obtain any evidence of the client's authority under their counterparts of the Protocol, the Subcommittee concluded that the continued requirement of at least the client's acknowledgement of the lawyer's authority, is valuable and important. As indicated, lawyers have the implied authority to act on their client's behalf and to bind them to document alterations. However, there are advantages to underpinning the lawyer's implied or ostensible authority with written evidence of that authority, since some lawyers are uncomfortable making changes to their client's executed documents under the current LTO Corrections Policy, without that actual, written authority.

The revised Protocol requires that a statement be added to the prescribed Declaration as to Possession, phrased not as the conferring of a power of attorney but as acknowledgement of the existing agency and authority that the lawyer has under the retainer. The new paragraph 5 of the Declaration as to Possession is as follows:

*“My lawyers, \_\_\_\_\_, have my full authority to do all things required to complete this transaction, including the making of any necessary amendments to correct any document signed by me which is to be registered in the Land Titles Office.”*

By including the acknowledgment statement in the Declaration:

- i) lawyers will be called on to explain to clients the possible need to correct document defects, and thereby address the concerns of those clients who might be uncomfortable with their lawyers' agency or who misunderstand the nature of lawyers' irrevocable undertakings in the closing process;
- ii) there would be written evidence of the lawyer's authority, available to be shown to the LTO, the Court, the client, or others, if later required;
- iii) cautious lawyers may have increased confidence in their authority to make corrections to executed documents.

The effect of dispensing with the power of attorney has been discussed in detail with Manitoba Land Titles Office officials. Under its current Corrections Policy, the LTO has been prepared to rely on the ostensible authority of lawyers to correct their client's documents in almost every circumstance. However, there are a number of instances where the lawyer cannot fix document defects without the client's express power of attorney, the most significant being the giving of *The Homesteads Act* evidence or consent, whether by the maker of the instrument or the maker's spouse. The lack of *Homesteads Act* evidence continues to be a frequent cause of rejections by the Land

Titles Office. By virtue of Section 72(2) of *The Real Property Act*, it is impossible to craft an effective “power of attorney”, whether as a statement to be inserted in the Transfer or the Mortgage or as a separate instrument, unless it is to be witnessed by someone other than the named attorney. The prevailing view is that it is simply too cumbersome either to have another qualified witness on hand for every execution or to explain to the client why some other lawyer or staff person is to be given this unusual authority.

The solution to this dilemma also lies in the Declaration as to Possession. One of the required subjects to be included in the Schedule V Sample Declaration as to Possession is *The Homesteads Act* evidence set out in paragraph 2; in 2004, when the common-law partners amendments were introduced, that paragraph was expanded to show the various alternative forms of *Homesteads Act* evidence that might be applicable. When acting for a vendor, purchaser/mortgagor, or a mortgagor/mortgagee on a refinancing, it is a requirement under the Protocol that the client’s Declaration as to Possession be obtained. The Declaration satisfies the requirements of Section 5(1) of *The Homesteads Act*, which allows proof of marital and homestead status to be made by statutory declaration.

The Land Titles Office has confirmed that, where *The Homesteads Act* evidence is omitted from Box 7 of the Transfer or the Mortgage, that defect can be corrected by the lawyer producing and attaching to the Transfer or Mortgage the original Declaration as to Possession, containing the party’s own homestead evidence. In doing so, the lawyer-agent would not be purporting to give the evidence on behalf of the client-principal, but would simply be tendering the party’s own evidence and arranging to have it incorporated into the instrument.

To implement this change, two minor revisions to the Protocol have been made:

- i) The lawyer will need to keep on hand a registrable original of the Declaration. It is now a requirement to get two copies of the Declaration signed, and to have the document executed in compliance with Section 72 of *The Real Property Act* (that is, if execution of the document is not being witnessed by a lawyer or other Notary Public, then a Commissioner for Oaths must witness the Declaration and provide the required form of Affidavit of Subscribing Witness).
- ii) The declaration identifying the spouse or common-law partner with homestead rights has been expanded to link that spouse or common-law partner with the person who is consenting to the disposition in the Land Titles document. This additional phrase is part of the evidence required by *The Homesteads Act*.

The implied authority of lawyers, coupled with the client’s *The Homesteads Act* evidence in the Declaration as to Possession, will enable lawyers to correct substantially all defects in the Transfers and Mortgages submitted for registration under the Protocol.

## 2. Dealing with the Vendor's Final Water Account

As a result of recent changes implemented by the City of Winnipeg, most practitioners have developed new practices and trust conditions to deal with payment of the final water account. Complications have arisen from the fact that:

- i) in the name of compliance with privacy laws, the City will give little or no information to the purchaser's lawyer as to the status of the vendor's water account before closing; and
- ii) where the vendor has not, in recent past, submitted an actual water meter reading to the City, water account billings have been issued on the basis of an estimate. In some instances, particularly when there has been excessive water consumption (for example, when there has been a leak in the water line or a "grow-op" on the premises), actual water consumption may have exceeded that estimate very significantly. In the result, when the purchaser submits an actual meter reading after closing, the City may issue a final water account which far exceeds the funds which the vendor's lawyer has on hand to attend to its payment. Final water accounts of \$10,000.00 have been known to issue in such circumstances. There is presently no limit on the purchaser's liability for the vendor's unpaid water account.

One of the fundamental premises of the Protocol is that the sale proceeds are to be disbursed immediately after closing. To preserve that Protocol feature as much as possible, while protecting the purchaser against liability which is properly that of the vendor under the Offer to Purchase, the Protocol has been revised to prescribe the following:

- a) The vendor's lawyer is to confirm that an actual reading of the vendor's water meter has been submitted to the Municipality in the preceding month. It is recommended that the vendor be instructed bring the final water meter reading information to the lawyer when they meet to execute closing documents, and that that information be inserted and sworn in the Declaration as to Possession. If the last reading occurred more than one month previously, arrangements are then to be made to have the actual water meter reading submitted to the Municipality and to have the account for any excess water consumption issued and paid on or before the closing. This step will eliminate most of the risk of a "surprise" final water account due to estimated billings over a long interval.
- b) Responsibility to conduct the final water meter reading and to attend to payment of the final water account remains with the vendor and the vendor's lawyer. The Protocol does not mandate the hold-back of sale proceeds pending determination and payment of the final account, but rather it leaves with the vendor's lawyer the discretion to make whatever arrangements with the vendor-client may be appropriate in the circumstances. In some cases (for example, where the title is heavily encumbered or the property is tenanted), the prudent solicitor might hold back some

or all of the sale proceeds, pending receipt of confirmation from the City that the final account has been paid. More often than not, though, the solicitor would simply rely on the client's undertaking to pay the final account when it receives it from the City, reasonably believing that final account will be the nominal (and not "lienable") amount covering only the few days or weeks up to the Closing.

- (c) To reassure the cautious lawyer who might otherwise not be willing to release any funds in the face of even this small risk of personal liability, the Claims Fund has agreed to reduce the deductible from the usual \$5,000.00 amount to \$1,000.00 for claims arising out of unpaid water accounts under the Protocol.

The revised trust condition for dealing with the water account, then, is simply this:

*"[T]he Vendor's Lawyer will forthwith ensure payment of the final water account (if same represents a lienable amount), such account being based on a final actual reading taken on or about the Closing date."*

Note that the vendor's lawyer's liability to ensure payment of the water account is not limited to the extent of the sale proceeds remaining on hand after payment of the vendor's mortgage and realty taxes. The municipal water account lien is to be dealt with in the same manner as any other title encumbrance: it falls to the vendor's lawyer, with the client, to be prepared to discharge that liability in full, as they proceed into the closing.

### 3. Verification of the Client's Identity

In 2000 when the Protocol was originally drafted, the extent of the lawyer's obligation to verify the client's identity was unclear. At the time, there was no direct Manitoba authority that required the lawyer to examine the client's identification documents. Now though, there are a number of sources of specific rules, dictating the steps required to be taken by a lawyer to verify the identity of the client. The Law Society of Manitoba, along with its counterparts in other jurisdictions, has recently adopted the Federation of Law Societies' Rules on Client Identification and Verification. Federally-regulated financial institutions are subject to their own specific rules for verifying customer identity on the opening of new bank accounts, and those ID-verification obligations are routinely incorporated into the mortgagees' Instructions to Solicitors.

This is an emerging area of law, and the standard of care will no doubt continue to evolve. In any case, "know your client" will remain a basic tenet of fraud avoidance. With its advantage of allowing vendors immediate access to sale proceeds, the Protocol will be a tempting tool for the potential fraudster. Paragraphs D.4(c) and E.3(c) of the revised Protocol reflect the fact that the lawyer's due diligence obligations include verification of the identity of the client.

4. Stand-Alone Mortgage Refinancing Protocol

The original Protocol details the minimum responsibilities of lawyers in the context of a typical residential real estate transaction of purchase and sale involving a new mortgage financing. Part B of the Protocol confirms that the Protocol procedure may also be used on mortgage refinancings alone, in which case only those provisions relating to the mortgage or the mortgagee's requirements will apply.

For clarity on the question of which provisions of the Protocol apply on mortgage refinancings, the applicable provisions of Parts D and E have been excerpted and reproduced in a new Part F, as a stand-alone mortgage refinancing protocol.

5. Deletion of Sample Trust Condition for Potential Zoning Defects

Schedule III to the Protocol contains a sample trust letter which illustrates the manner in which the Memorandum of Trust Conditions (the Schedule II conditions) may be incorporated into trust letters. In its original form, the sample trust letter recited, by way of illustration, what was at the time the standard trust condition relating to the remedying of defects disclosed after closing by a new Building Location Certificate or Zoning Memorandum. Since that sample trust condition relates to amendment of the parties' contractual rights falling outside of the Protocol, and particularly since use of that trust condition is no longer the standard practice among the profession, that illustrative condition has been deleted from the Schedule III sample trust letter.

The Conveyancing Practices Committee believes that the Protocol revisions outlined above will simplify and improve the Protocol practices. It encourages the profession to adopt what increasing numbers of lawyers and lenders in Western Canada are finding to be a safe, efficient and better method of conveyancing residential property.