

PART B: HOW TO USE THE PROTOCOL

1. APPLICATION OF THE PROTOCOL

The Protocol details the minimum responsibilities of Lawyers in the context of a typical residential real estate transaction which involves a new mortgage financing.

The Protocol only applies to transactions or financings involving existing residential properties under the Torrens land titles system, including condominium units and multi-family dwellings containing four or fewer units. The Protocol **does not apply** to:

- (a) properties the title to which has not been brought under the provisions of *The Real Property Act (Manitoba)*;
- (b) properties newly-constructed or substantially renovated in the immediately preceding 40-day period;
- (c) transactions involving the registration of a plan of subdivision;
- (d) commercial properties, farmlands, or multi-family dwellings containing more than four units; or
- (e) transactions in which, by the terms of the parties' agreement, the Protocol closing procedure would be inappropriate.

The nature of each particular transaction and the specific instructions received from the client will govern the lawyer's duty. Lawyers are advised to obtain confirmation of instructions in every case.

Where a purchase transaction does not involve mortgage financing, the Protocol Closing procedure may still be used. In such circumstances, those Protocol provisions relating to the Purchaser's Mortgage or the requirements of the Purchaser's Mortgagee may simply be disregarded. Conversely, the Protocol procedure may be used on mortgage refinancings, in which case only those provisions relating to the Mortgage or the Mortgagee's requirements (as detailed in Part F) will apply.

2. SCOPE OF THE PROTOCOL

This Protocol prescribes the essential conditions precedent to the issuance of a Solicitor's Opinion and the release of mortgage proceeds or other purchase funds before registrations. Its focus is on practice and procedure, rather than on substantive law. It is not intended and should not be read as a comprehensive statement of the duties of a Lawyer when acting on the purchase, mortgage or sale of residential real estate. All steps otherwise required to meet current conveyancing practice standards (except to the extent inconsistent with the Protocol) must still be taken.

3. STRUCTURE OF THE PROTOCOL

The essential substance of this Protocol is contained in Part D (pages 10 to 17) and Part E (pages 18 to 27), which detail the steps to be taken by each of the Vendor's Lawyer and the Purchaser's Lawyer, respectively, in the context of a Closing under the Protocol. Parts D and E operate independently of one another; that is, the Lawyer acting for one party to a residential transaction need only refer to one of the Parts for a complete account of that Lawyer's obligations under the Protocol. Provisions relevant to both Lawyers (for example, due diligence investigations to be conducted on behalf of each party, and trust conditions to be imposed and accepted by the respective Lawyers) are contained in each of those Parts. Part F details the steps (excerpted from Parts D and E) to be taken by the Lawyer acting on a Mortgage refinancing alone.

Parts D, E and F prescribe the minimum standards of conveyancing practice for transactions which are to involve the issuance of the Solicitor's Opinion and the release of Mortgage proceeds or other purchase funds before registrations. Again, those sections are not exhaustive accounts of a conveyancing Lawyer's duties to a Vendor, a Purchaser or a Mortgagee. The Lawyer still owes the broader duties of care defined by the standards of prudent practice, the scope of the retainer and the instructions of the client.

Part C contains definitions of all capitalized terms used in this Protocol.

Following Parts A to F are six Schedules, which contain the forms of various documents contemplated under the Protocol.

Schedule I is the Solicitor's Opinion. This is a prescribed form and must not be modified, except as contemplated in the document.

Schedule II consists of a Memorandum of Trust Conditions, which is designed to simplify the process of settling Lawyers' trust conditions and undertakings on a Protocol Closing. The Memorandum of Trust Conditions (or select conditions from it) may be incorporated by reference into the Lawyer's trust letter, thereby minimizing the Lawyers' disagreements over trust conditions. Schedule III contains sample trust conditions which illustrate the manner in which the Memorandum of Trust Conditions may be incorporated into trust letters.

The remaining Schedules comprise the following:

- Schedule IV: Sample Powers of Attorney (formerly but no longer a requirement under the Protocol)
- Schedule V: Sample Declaration as to Possession
- Schedule VI: Sample Acknowledgement (for use when a current Building Location Certificate and Zoning Memorandum are not being obtained)

As indicated, these documents are sample precedents only, and may be customized to suit the circumstances of the transaction. Note, though, that variations from these scheduled forms must still conform to the essence of the documents contemplated by the Protocol. The Declaration as to Possession, in particular, requires that certain representations "or comparable variations

thereof” be included in every Declaration delivered under the Protocol. Likewise, whatever the form of trust conditions imposed and accepted by a Lawyer on a Protocol Closing, the substance of those conditions should reflect the requirements set out in the Protocol.