

SELLING: THE OFFER TO PURCHASE

We will assist you with this process as it can become very complicated.

The offer to purchase is a written contract setting out the terms under which the buyer agrees to buy. Upon acceptance by the seller, it forms a legally binding contract subject to the terms and conditions stated in the document.

The offer to purchase is, in most circumstances, an imposing pre-printed form. Great care should still be taken to ensure all that it outlines. Once the contract is in writing, a verbal explanation of what was meant, intended or understood, cannot be added, even in a court of law.

It is often believed that a printed contract cannot be altered. That is not so. Printing a contract is only for the convenience of the user. If the buyer does not agree with all that is preprinted it can be altered by deleting parts or amending it when the offer is initially prepared. When changes are made on the form, all parties should initial each change.

Three Options To Consider:

The agent representing the buyer will write up the offer to purchase and submit it to you for consideration. You then have the liberty to do one of the following:

- i.** Accept the offer: signing it in the form that is presented without alteration; or
- ii.** Reject the offer outright; or
- iii.** Counter-offer, by varying some term in the offer to purchase and sending it back to the prospective purchaser for approval. The purchaser can then choose to accept, reject or re-write a new offer with a different price and/or terms.

The Deposit

The deposit serves two purposes:

- i.** It is part payment of the purchase price, which is the consideration for the sale and is, as such, one of the legal requirements for a contract.
- ii.** It is a guarantee of performance.

The deposit is generally paid to the listing agent's company and held in trust, pending completion of the transaction. After the transaction has been completed, the deposit is turned over to the seller as part of the purchase price.

The seller is entitled to keep the deposit if the purchaser is at fault for not completing the transaction, therefore the larger the deposit, the more appealing it is to a potential seller.

Conditions in an Offer to Purchase

There may be a condition ("subject to" clause) in the offer to purchase. If there is, there is not a firm contract for purchase and sale until that condition has been fulfilled or been waived by the party for whose benefit it was included.

The purchaser is entitled to terminate the agreement if the conditions to purchase have not been met. Some possible conditions that may be included in an offer are:

that a satisfactory home inspection report be provided.

that a well water test indicates water meets the minimum safety standards for drinking water in Canada.

that a Seller's Property Disclosure Statement is acceptable by the purchaser.

What will be included in the purchase of a home.

Fixtures are automatically included in the price of the home unless otherwise stated.

Fixtures are non-movable items such as attached wall to wall carpeting, built-in appliances, curtain rods or built in cabinets.

Chattels are not automatically included.

Chattels are moveable items such as fridges, stoves, dishwashers that are not built in, curtains, loose laid carpeting and area rugs. If the purchaser wishes to include chattels in the purchase price, these items will be mentioned specifically in the offer to purchase as being included.

Sellers Property Condition Statement (SPCS)

Use Of The Seller's Property Condition Statement Is Voluntary

The SPCS has been introduced to Manitoba on a voluntary basis. The form itself makes it very clear that while the completion of this form is not mandatory, it does identify several areas of importance to prospective purchasers and provides clarification which is beneficial to all parties to a real estate transaction.

The Legal Ramifications Of The Use Of The Form

While on the one hand the Latin maxim of Caveat Emptor (let the buyer beware) still applies to real estate transactions, the courts have gone to great lengths to provide remedies to disgruntled buyers if they have been victims of a material misrepresentation or a lack of disclosure of a defect which is not easily discovered upon a normal inspection. It may well be true that the SPCS may reallocate legal responsibilities of sellers and buyers in that the sellers will now be making additional written representations which they might not have otherwise made. As a result, if you are concerned about completing the SPCS you are advised to consider getting legal or other professional advice prior to signing the form.

What Is the Seller's Property Condition Statement?

The SPCS is a detailed, in-depth disclosure of a property's defects or lack of defects. In completing the form, the onus is on the seller to tell the truth about a property. Disclosing material information about a property for sale is not a new concept. The duty to tell the truth has always been with us in the various forms such as listing agreements we complete. It doesn't take much imagination to understand that buyers rely very heavily on material representations about the property they are looking to purchase as their home. It also comes as no surprise liability claims made by buyers surround allegations of misrepresentation of some material fact and result in monetary damages.

Whenever we, as your agents, or you provide information about a property to potential buyers, we are exposed to the possibility of a lawsuit. Courts have extended our duty to include the disclosure to purchasers of any knowledge that I have about latent or material defects in a property.

A seller can greatly minimize the risk of being made a party to, or being found liable in, a misrepresentation lawsuit by encouraging, where appropriate, buyers to seek their own professional opinion or advice in the investigation of specific components of a property. Clearly, another very good way to avoid liability is to use the SPCS.

Benefits Of Using The Seller's Property Condition Statement

The SPCS assists in reviewing the condition your property. It is a very helpful checklist which will allow you to avoid inadvertent or innocent failure to disclose a material fact for which you later could be liable. Use of the form will encourage you to thoroughly investigate your property and remind you that if defects exist they can be properly disclosed and/or repaired. If disclosed, the form can then act as a solid defense to litigation because the buyer will have purchased the property knowing of the defect or will be negligent on their own part for not having read the information in the statement.

The form only requires you to disclose knowledge you have about your property at a given point in time. You do not warrant or guarantee the future condition of the property. However, the form does remind that you must inform the buyers of any important changes to the information noted in the form which might occur between the time the form is completed and the possession date.

An example of how the statement can protect you is found in a recent court case from the jurisdiction using a similar disclosure form. The seller had completed a disclosure statement indicating that the sewer line had to be cleaned out annually because of tree roots growing in to the line. The disclosure statement was not included with the Offer to Purchase but was provided separately to the purchaser. After the first summer of occupancy, a sewer back up caused damage to the property. The buyer sued the realtor and seller for allegedly failing to disclose this defect. The written disclosure statement proved this information had in fact been disclosed to the purchaser and as a result the case was dismissed.

A conscientiously completed SPCS will increase the attractiveness of your property and will reduce the risk of a subsequent complaint. For the selling home-owner, truthful answers will provide a defense to an action by a purchaser who alleges that misrepresentations were made by the seller or by the seller's agent acting with the authority of the seller.

To see a copy of the SPCS go to
http://www.realestatemanitoba.com/property_disclosure_statement_june2011.pdf

The Property Inspection

If you have included a home inspection as a condition in the offer this entitles you to have a professional home inspection company do a thorough inspection of the home you are in the process of purchasing. A home inspector will check the exterior, interior, structural system, roof, plumbing, electrical, heating and air conditioning systems, insulation and ventilation, fireplaces and solid fuel burning appliances as well as pools and hot tubs.

The Buyer's REALTOR® will set a time for the inspection and attend the inspection which will usually take 3-4 hours of time. Often the inspector will want to meet with a buyer as soon as the inspection has been completed to go over the written report. The report will provide an evaluation of the areas inspected and will offer recommendations for repairs and maintenance that should be done immediately or in the future. The cost starts at around \$400 for a basic inspection and the price will go higher depending on the size of the home and the complexity of the inspection.

Home inspectors will not advise you whether or not to purchase a home. The information they provide will inform you if the home has any of the following the potential issues that could prove to be costly in the future if not addressed.

Damp Basement:

Mildew odour is often the first indication of dampness in the basement. The inspector will examine the walls where possible and evaluate if there are any serious concerns.

Poorly Installed/ Defective Plumbing:

In older homes, plumbing problems and defects are very commonly found. The inspector will do a thorough inspection of the plumbing system to search for any concerns.

Older/ Poorly-Functioning Heating and Cooling Systems:

Heating/ cooling systems that are older or haven't been properly maintained can pose serious safety and health problems. An inspector will determine the age of your furnace and, if it is over the average life span of a furnace (15-20 years), may suggest you replace it. If your heating system is a forced air gas system, the heat exchanger will be examined very closely, as any cracks can result in the leak of poisonous carbon monoxide gas.

Older/ Unsafe Electrical System:

In older homes, it is common to find undersized services, aluminum wiring, knob-and-tub wiring, or insufficient/ badly-renovated distribution systems. Poorly rated electrical systems may pose a fire hazard.

Older/ Leaking Roof:

An asphalt roof will last an average of 15 to 20 years. Leaks through the roof could be a sign of physical deterioration of the asphalt shingles caused by aging, or could indicate mechanical damage caused by any number of factors, such as a heavy storm.

Minor Structural Problems:

Common in older homes, these problems range from cracked plaster to small shifts in the foundation. While this variety of problem isn't large enough to cause any real catastrophe, they should be taken care of before they grow.

Poor Ventilation:

Unvented bathrooms and cooking areas can become breeding areas for mold and fungus, which, in turn, lead to air quality issues throughout the house, triggering allergic reactions. Mold may additionally cause damage to plaster and window frames. These problems should be identified and taken care of before any permanent damage is caused.

Air Leakage:

A cold, drafty home can be the result of any number of problems, such as ill-fitting doors, aged caulking, low-quality weather strips, or poor attic seals. This nature of repair can usually be taken care of easily and inexpensively.

Security Features:

An inspector will look at the standard security features that protect your home, such as the types of lock on the doors/ windows/ patio doors, and the smoke or carbon monoxide detectors and where they're located throughout the home.

Drainage/ Grading Problems:

This may be the most common problem found by home inspectors, and is a widespread catalyst of damp and mildewed basements. Solutions to this problem may range from the installation of new gutters and downspouts, to re-grading the lawn and surrounding property in order to direct water away from the house.