TALES FROM THE TRENCHES™
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BIG CHANGES TO THE STANDARD AREA CONTRACT

September 2016 (with mild tweaks in July of 2017) brought numerous and meaningful changes to the existing 2014 residential purchase documentation approved by the Alberta Real Estate Association (AREA). These changes affected both the Residential Purchase Contract used for all homes and houses and the Residential Resale Condominium Property Purchase Contract, used for condominiums. Existing wording has been modified and new wording added. As we go through our commentary, we will refer to the contracts as the 2014 contract and the 2017 contract.

20 years ago, the standard real estate purchases contract was one page and completely inadequate. AREA, with the help of the Multiple Listing Service, started a consultation process and spent a ton of money completely revamping the standard contract. Since that time regular revisions have been made, always with a view to making the contract better. Overall, we believe the changes are improvements in a continual improvement process that AREA has driven for near 20 years.

The results are improved contracts, schedules, addenda and notices. Buyers, sellers and realtors are all served well by this ongoing consultation process, which aims at better disclosure and plainer English for contracts that produce a clearer, more precise buying and selling experience. While I don't expect you to be a lawyer, I do encourage you to read every scrap of legal paper that is put in front of you. Yes, it's the standard contract, but the versions of the contract before this version were also the standard contract and things have changed. Read your documentation two or three times. Ask questions.

Our most successful clients never sign anything blindly; they know what's in their contracts. Your best bet is to read this Tale along with copies of the 2014 and 2017 contracts. Ask your realtor for a copy. If you can't get the 2014 contract, then at least read this handout along with the 2017 contract.

Alright, let's get on to commenting on changes to the contract documentation. We'll start with the Residential Purchase Contract for homes/houses. Separate comments will be made for condominiums. Some changes are of more interest to buyers and some more to sellers. Some should interest buyers and sellers equally. As we go through the changes, we will make supplementary comments on what is more important for whom.

1. **Purchase Price Details: 2.1**
   The new 2017 AREA purchase contract replaces the old 2014 financial details clause that talked about deposits, assumption of mortgage, new financing, seller financing, and other value. The new clause 2.1 shows purchase price only. Clauses 4.3 and 4.4 deal with the initial deposit and additional deposits. Everything regarding new financing, assuming mortgages, seller financing, and other value has disappeared. According to AREA, the rationale for this change is that the portions regarding assuming mortgages, seller financing, and other value were rarely used. A buyer getting new financing is common but that required the buyer to insert principal amounts, interest rates, and other mortgage details that they weren't sure about or that changed. This was a confusing clause.

Now, if buyers are getting new financing, it's up to them to get their own new financing. The contract deals with their deposit(s) and the purchase price and the rest of the money is up to the buyer. This change is not a big deal but it changes the look of 20 years of previous contracts.

Should one of those rare situations show up where there is consideration of assuming a mortgage or seller financing or other value, then use the new financing schedule to provide details.

Vacant Possession: 2.3
The 2014 contract said that the seller would give the buyer vacant possession, "***subject to the rights of existing tenants, if any.***" The seller's obligation in 2017 is to provide vacant possession to the buyer. If there are tenants and the buyer is accepting the tenants, then the contract should be amended to show that the buyer will be taking over the existing tenancy or tenancies.

If the buyer is accepting a tenant or tenants, there is a brand-new tenancy schedule where the seller discloses the details of the to-be-assumed tenancies. If the seller promises vacant possession but there is a tenant at the time of possession, then the seller attracts liability for his failure to provide the buyer what he promised.

Seller and buyer should work together to ensure that the appropriate notice has been given to the tenant with sufficient time pursuant to the *Residential Tenancies Act* and or the lease(s) that are in effect. Buyers might want to require the seller as a term of the contract to provide a copy of the Notice to Tenant.

Buyers might further want to speak with the tenants to make sure they have the notice and that they intend to leave. Yes, if a tenant doesn't leave when they are supposed to, the seller has liability but that might require court action which is always time-consuming, stressful, and potentially expensive for both parties. Better to work on the practicalities of making sure the appropriate notice documentation has been given which the tenant acknowledges. Watch for any signs that they might be thinking of staying on when they should be leaving.

State of Property: 2.4
"***The seller represents and warrants*** that on Completion Day, the Property will be in substantially the same condition as when this contract was accepted and ***the attached and unattached goods will be in normal working order***."

Comments: the additional words make it clear that the seller is representing and warranting the state of the property and the attached and unattached goods. This is a big change; previously the attached and unattached goods were not mentioned at all and the seller's statements were not an enforceable representation and warranty that survives the closing. See s.6 for other seller representations and warranties.

2. **General Terms: 3.1(a-m)**
Usually the kinds of things dealt with in this clause are what people referred to as "boilerplate" clauses

and found at the end of contracts. 2017 emphasizes the importance of these things by moving them to the first page of the contract. This is an extensive clause.
Specifically:

i. 3.1(d) clarifies the definition of 'Business Day' and specifically notes that Business Day includes all hours of the day.

ii. 3.1(f) strengthens the seller's obligation to disclose 'Material Latent Defects'. 2014 read, "***except as otherwise disclosed, the Seller is not aware of any defects that are not visible and that may render the Property dangerous or potentially dangerous to occupants or unfit for habitation***."

Contrast this with 2017 3.1 (f) which reads, "***the seller will disclose known Material Latent Defects. Material Latent Defect means a defect in the Property that is not discoverable through a reasonable inspection and that will affect the use or value of the Property.***" There are at least three major changes in this changed clause.

Firstly, the word "defects" in 2014 is replaced by "Material Latent Defect" which is more precise and reflective of how courts look at this issue.

Secondly, "… ***Defects that are not visible***…" in 2014 is replaced by "… ***A defect in the Property that is not discoverable through a reasonable inspection…***"

Thirdly, the words "… ***may render the Property dangerous or potentially dangerous to occupants or unfit for habitation.***" are replaced by "… ***that will affect the use or value of the Property.***" Using the words "***dangerous or potentially dangerous***" in 2014 and adding that extra portion regarding "***unfit for habitation***" was too restrictive and subjective. It allowed sellers to make their own judgment about the meaning of "***dangerous.***" A defect that affects the use or value of the property is more encompassing and less subjective. Sellers should think carefully about agreeing to this general term.

iii. 3.1 (g) for 2017 states, "***the seller and buyer are each responsible for completing their own diligence and will assume all risks if they do not.***" While the clause refers to seller and buyer, this clause is really aimed at buyers. The seller might provide information but even if he does, it is up to the buyer to confirm to his own satisfaction. For example, the classic situation would be a seller saying a property is 1200 ft². The property turns out to be only 1060 ft², too bad for the buyer, he should have checked. Similarly, if the seller says the property is zoned for secondary suites and it turns out there is no zoning, then that is on the buyer. They should have done a further check with the municipality to confirm zoning.

iv. 3.1(h) is interesting. This clause requires the seller to put some effort into knowing and understanding the actual facts behind his representations and warranties contained in clause 6. Sellers often sign contracts without really considering their representations and warranties and then try to explain away later why those representations and warranties were not true.

This clause says that the seller will actually review his real property report, title to the property and registrations against that title along with determining his non-resident status for income tax purposes, determine dower rights, and actually do other research to be able to give informed representations and warranties. It's tougher on the seller, but better for the buyer, if the deal goes sideways.

3. **Deposits: 4.5**

a. **Failure to Pay Deposits**: this is a brand-new section found in clause 4.5 of the 2016 Alberta Real Estate Purchase Contract. Here is what the clause says: "***If the buyer fails to pay a deposit, by the agreed date, the seller may void this contract at the seller's option by giving the buyer written notice.***"

b. The new 2017 contract added these words: ***"The seller's option expires when the seller accepts a deposit, even if late."***

Comments: The first change aims at certainty of deposits. The second change allows the buyer to still provide a deposit as long as the seller has not voided the contract. On balance, 2017 is probably a good change, as it would allow a buyer to keep the contract alive, especially if they were only a little late and the seller really didn't object.

And, there is a brand-new one-page notice that assists the seller in voiding the contract. This change was put in place to get rid of uncertainty. When a buyer failed to pay a deposit, sellers were uncomfortable and uncertain if a contract would close. Deposits are often referred to as 'good faith money.'

The theory is that, the bigger the deposit, the more serious the buyer. Now, especially in multiple offer situations, buyers who try and win the bidding process by putting up bigger deposits have more pressure to actually pay those deposits.

c. **Release of Deposits: 4.8**
The old 2014 Alberta real estate purchase contract allowed buyers and sellers to argue whether deposits should be released. If there was no agreement the money went into a lawyer's trust account and the fight was on. The new AREA purchase contract does away with this uncertainty. Now, in any of the numerous situations where deposits might be returned, deposits will be returned to the buyer or seller, as the case may be, without notice to the other party. Buyers and sellers still retain all the remedies they might have at law to pursue the other party.

d. Trustee Liability: 4.9
"***A trustee acting under this section will not be liable to the seller or the buyer for any loss arising from the disbursement of the deposits."***

Comments: This clause was in the September 2016 version but **is gone** from July 2017. I thought this was an excellent clause from my perspective of a lawyer who sometimes holds deposits as trustee or is on one side or another fighting to keep or have deposits returned. No trustee likes to be the arbiter of who is right or who is wrong in deposit return arguments. I'm not aware of the backgrounder on this but I would've preferred to keep the clause from 2016 in the July 2017 version.

e. **Encroachments: 6(1)(e)(i):**
I'm not going to repeat the whole lengthy clause here. The difference between September 2016 and July 2017 is to clarify that, if they are to be allowed, private encroachments must be registered on the title. Public encroachments must have a written agreement but need not be registered. Encroachments are always trouble for sellers. Review carefully with your lawyer **before** you sign your contract. Amend the contract if required.

4. **Disclosure**: Permits and Notices: **6(1)(g)**
This is a brand-new section in the new 2016 Alberta real estate purchase contract. According to clause **6.1(g)** the seller must disclose whether he has received notices regarding the property from any government authority and whether he knows about any lack of permits for any development on the property. This representation and warranty survives the closing.

For 2017: Known government notices and known lack of permits are now described ***as "… Government… Notices… and lack of permits… known to the seller…"***

Comments: The previous phrasing was awkward. The change makes it clear that the issue is government notices and lack of permits that the seller knows about.

5. **Dower**: **7.1** Dower or Dower Rights refer to the requirement of Alberta legislation, (the Dower Act), that a non-title spouse consent to the sale of a property. So, if a titleholder is married, (not common-law), but on title by him/herself and if either of the spouses have ever lived in the property at any time since their marriage, the nontitle spouse has what they call 'Dower Rights.' The nontitle spouse has the 'right' to not give their consent and thus stop the sale. Clause 7 in the 2016 Alberta real estate contract makes Dower Consent a condition.

Previous contract versions only suggested that Dower Rights be considered and dealt with. Now, if the seller does not provide the Dower Consent from the nontitle spouse, the buyer can void the contract. This is a similar procedure to the seller's right to void the contract if a buyer doesn't pay deposits in a timely manner, (see paragraph 4 above). And, there is a specific one-page notice form for the seller to use in voiding the contract should the Dower Consent not be provided. Under clause 18 there is also a separate place for a non-title spouse to sign accepting the offer. This doesn't do away with the requirement of Dower Consent but makes it clear that Dower must be dealt with.

The July 2017 version adds these words: "***The buyer's option expires when the seller delivers the Dower Consent and Acknowledgment form, even if delivered late."***

Comments: it looks like the reasoning for the addition of this clause is similar to that surrounding the deposit clause where the buyer can deliver deposit money late as long as the seller has not exercised his void option. Here the seller can deliver the Dower consent late as long as the buyer has not exercised his void option. Both the deposit and Dower changes are corrective and allow contracts to proceed with certainty as long as timelines are observed.

6. **Conditions: 8.1(b)**
Now makes it clear that buyer and seller will each pay for the costs related to their own conditions. Occasionally some condition satisfaction situations resulted in one party claiming against the other, so this change should eliminate that potential dispute.

7. **Home Inspection: 8.2(b)**
Not too long ago, anyone could hang out their shingle and call himself or herself a home inspector. Now, home inspectors must be licensed in Alberta. The new Alberta real estate purchase contract in clause 8.2 (b) requires inspections to be done by a licensed home inspector. No more having your brother-in-law the carpenter, or your grandpa who used to build houses, be your inspector. You are still allowed to do other diligence such as a furnace inspections or a sewer camera inspection.

8. **Payment of Purchase Price**: **10.3**:
September 2016 read, "the buyer will pay the Purchase Price by lawyers trust cheque, bank draft ***or electronic transfer."*** July 2017 deletes "***or electronic transfer."***

Comments: No background on this change, although I suspect that some lawyers objected to being obligated to accept an electronic transfer as those transfers are sometimes difficult to verify and can be subject to fraud. Perhaps some unrepresented sellers did not want to be obligated to accept an electronic transfer.

9. **Notice of rejection:**
This is an un-numbered clause appearing right after 18. Previously, if an offer or counteroffer had been made, there was no mechanism in the contract itself for one party to advise the other that they were not accepting the offer/counteroffer. Parties would wait until a conditional time had passed without removing or waiving conditions, which automatically voided the contract. Or they would have to use an addendum and create their own words to say they were not accepting the offer/counteroffer.

This sometimes lead to unreasonable time delays where parties wanted to simply say they were moving forward but found it difficult to do that in the old contractual process. The new 2017 AREA purchase contract makes this easy by adding words at the very end of the contract on page 6.

"The following is for information purposes and has no effect on the contract's terms:
REJECTION
I do not accept this offer/counteroffer. No counter offer is being made.
Signature and date"

Nice and neat, timely and tidy. If one party doesn't like deal, they reject and the contract is over.

10. **Removal of property inspection schedule:**
The 2014 AREA purchase contract had a property inspection clause. The very subjective clause read as follows: ***"This contract is subject to the Buyer's approval of a property inspection."***

Using this clause gave the buyer the option of using the Property Inspection Schedule. The schedule, if used, added some terms to this condition around how the buyer could refuse to waive the condition. Those terms were:

a. If the inspection revealed details not acceptable to the buyer. This was a unilateral clause allowing the buyer to reject the inspection for any reason. Careful or suspicious sellers saw this as an, "out" clause for a buyer. If the buyer doesn't like the color of the paint or the lino in the kitchen that's all he needs to get out of the deal.

b. The defects revealed exceeded a percentage of the purchase price, or;

c. The defects revealed exceeded a dollar figure

This clause caused a ton of problems:

a. before property inspectors were licensed, they often gave the buyer a quotation to fix the problem. Now inspectors can't do that as part of their licensing regulations. If an inspector identifies difficulties buyers now have to get independent quotations. This results in a long condition period, which no one likes.

b. Buyers and sellers would fight about quotes. Sellers thought buyers often got quotes that were outside the percentage or dollar figure allowed just to get out of the contract.

c. The old Property Inspection Schedule required the buyer to give the seller a copy of the inspection report if the buyer did not remove conditions. However, the property inspectors' regulations and insurance coverage often prohibited the buyer from providing their report to anyone else.

d. Some sellers didn't like getting a bad inspection report that obligated them to then reveal material latent defects to their next buyer

Although the Property Inspection Schedule is not part of the current set of forms, buyers can still add their own financial or other restrictions on any property inspection condition. Buyers and sellers must take care that they don't re-create the problems raised by the old Property Inspection Schedule.

11. **Miscellaneous changes**:

    a. **Final Signing**:
    the 2014 AREA real estate purchase contract had a 'Final Signing' section that had its own clause and indicated which party was the last person to sign. Experience with the 2014 contract led to confusion about when legal obligations under the contract actually began or if the final signing clause was even actually part of the contract.

    Basic contract law says that legal obligations begin when acceptance of a contract is communicated to the other party. To clean this up the 2016 and 2017 AREA purchase contracts deleted the Final Signing clause. The relevant words are as follows: ***"The legal obligations in this contract begin when the accepted contract is delivered in person or sent by fax or email…"***

    b. **Email acceptance**:
    The words, "or email" are added to improve the 2014 AREA contract which only allowed personal or faxed delivery of documents. As much as documents could and were being delivered by email, the 2017 AREA purchase contract now specifically references email.

    c. **Clean ups**:
    The 2017 AREA real estate purchase contract revisions made it longer than the 2014 AREA contract version. To keep the contract within the previous six-page limit, some information with respect to the buyer, the seller, and their representatives has been eliminated. This information is not contractual and is easily obtainable from other sources.

12. **Condominiums**:
    overall the 2017 AREA contract entitled, 'Residential Purchase Contract For Resale Condominium Property' follows exactly the format of the 2017 AREA Residential Purchase Contract. The only adjustments are for issues specific to condominiums. Some of those issues are:

    a. **Property description**:
    Clause 1.1 of the new 2017 AREA condominium contract is much clearer when describing what units are coming with the purchase. Condominiums always include a titled unit to the living space but then can also include parking spaces and storage spaces. Those spaces can be either titled or if they are not titled they can be assigned or leased. The new set up makes the parties look more clearly at what is actually coming with the purchase and avoids situations where buyers and sellers 'forget' to deal with parking or storage spaces.

    b. **Condominium documents**:
    Sellers still have to provide the buyer with condominium documentation as set out in paragraph 8.2 of the new AREA condominium contract. The addition to the 2017 AREA contract is that if the seller does not provide documentation, the buyer can in section 8.2 (iii) exercise an option to obtain

the condominium documentation him or herself. If the buyer chooses that option then in the very next sub-clause the buyer has the right to extend the condition date to a date past when the seller was to supply the documentation. Much better for the buyer.

c. **Cost of condominium documents**:
Previously in the 2014 AREA condominium contract, if a buyer obtained and paid for the condominium documentation because the seller wouldn't or didn't, the buyer could set off those costs against the purchase price. There was no other buyer remedy to recover costs. This left the buyer who did not waive conditions with no way to recover the sometimes very substantial costs and complexity of obtaining condominium documentation. With the 2017 AREA condominium contract, the buyer can now invoice the seller with a 30-day payment requirement. Note: a buyer might still have to chase the seller to pay.

d. **Condominium fees/contributions**:
Clause 9.2 varies the 2014 AREA contract, which required the seller to state the condominium fees in the contract. Sometimes after signing the contract and stating the fee, Condominium Corporations would levy a new fee thus making the seller statement incorrect. Clause 9.2 now adds the words, "***To the best of the seller's knowledge and to be verified by the buyer***" and then there is a space for the seller to insert the monthly contribution/fee for any titled or nontitle units. This leaves on the buyers the ultimate responsibility for determining the actual required contributions and fees for all title the nontitle units.

e. **Special Assessments**:
Responsibility for special assessments is dealt with in both the 2014 AREA real estate purchase contract in clause 4.7 and in clause 10.4 of the new 2016 AREA residential purchase contract for resale condominium property. Both clauses state that the seller is responsible where the Condominium Corporation has passed a resolution prior to 12 noon on the completion date implementing a special assessment. However, there are three differences between the two almost similar clauses:

   i. The 2017 contract deletes these words, "***Unless the Buyer and the Seller otherwise agree in writing***…" Now the clause begins with "***Regardless of when a resolution is passed***…" Buyer and seller could still agree in writing that the clause might not apply but the 2016 clause attempts to eliminate any discussion by simply saying who has what responsibility when.

   ii. The 2014 contract refers to a "special resolution" where the 2017 AREA condominium contract refers only to a "resolution." This change ensures that the special assessment will be by resolution but eliminates the issue of buyers and sellers trying to guess whether the bylaws of a particular Condominium Corporation require a 'resolution' or 'special resolution.' As long as the special assessment is resolved, the responsibilities are as indicated in the clause.

iii. Lastly, the 2017 AREA residential purchase contract for resale condominium property includes the word, "levied" in reference to a special assessment.

In other words, a Condominium Corporation might have resolved to implement a special assessment but for the seller to be responsible for a special assessment resolved prior to noon on the completion day, the Condominium Corporation has to actually have levied which means they have given official notice to owners of the special assessment and its terms of payment. This is a subtle but important change in responsibility for special assessments. And, it's a great illustration of why new contracts need to be read in detail. It's a one-word change that could mean a **huge difference** to both buyers and sellers when the special assessment is $60,000.

Conclusion:

Overall the new 2017 AREA Residential purchase contract and its sister form for condominiums are an improvement over the 2014 area contracts.

- The 2017 contract is much more a plain-English contract. The contract is in tune with, and flows much more with, how contracts are read, negotiated, signed, and implemented. Confusing wording and unnecessary wording have been eliminated.
- There is generally more space for additional signatures and terms.
- Due diligence for both buyer and seller is emphasized both with respect to responsibility and timing, and cost is clarified.

The 2017 AREA contracts are strongly recommended for use by buyers and sellers with a further strong recommendation that all parties read the contracts a number of times and get a thorough explanation from both the realtors and their lawyers where required.