

TALES FROM THE TRENCHES™

BY BARRY C. MCGUIRE

October 2021

“FORECLOSURE TIMING TRAPS.”

When searching for the ideal piece of real estate to buy, properties in foreclosure can be an interesting place to look. Are you an investor looking for a new rental property? Or maybe you're a buyer looking for a dream home—or at least a property you can turn into your dream home. By considering foreclosures, you open up more options for yourself. Read on to learn more about how timing a foreclosure deal can be tricky.

Issues with Buying a Foreclosed Property

In Canada (and jurisdictions with similar laws), foreclosure is when someone defaults on their mortgage payments, and the lender takes control of the property. Lenders will try to sell the property to recuperate the mortgage money. Foreclosures are regulated differently by each Canadian province. These comments are on Alberta foreclosures, so make sure you check to see how it actually works in the area where you are buying. Here in Alberta, a Judicial Foreclosure is most common, which is when the Court gets involved with selling the property.

So, there are foreclosure properties to be had, and they might fit your requirements. Sometimes you are searching the bargain bin for badly treated properties without many redeeming qualities. Sometimes a foreclosure property is in great shape; the seller just can't make the payments.

But, here's the thing. Generally, the buying public has a rosy view of foreclosure purchases. Somehow, they think that foreclosures are a bargain or will be easier to buy. The reality is there is lots of demand for properties in foreclosure and prices are competitive, so it's not as easy as it might seem.

Judicial Foreclosures add another layer of complication. Buyers can't just roll up and convince the judge to sell for a sack of magic beans! Sometimes the issue isn't winning the foreclosure competition; it's actually closing the deal once the Court approves your offer to purchase. (Sometimes in Alberta called just the 'offer' or 'purchase contract,' it's more properly referred to as the 'real estate purchase contract,' but in other provinces it's often called the 'agreement of purchase and sale.')

Example of Timing in an Alberta Foreclosure Purchase

In a very recent foreclosure, my client fought hard, outbid three other buyers, and won the bid for what they thought would be an amazing property. The house had good bones, was in reasonably good shape, and was suitable for a secondary suite. The presiding Master in Chambers approved my clients unconditional offer on February 2 for a March 8 closing. (A Master is effectively a Judge that deals with repetitive, relatively non-controversial Court matters.)

Good timing, wouldn't you think? About five weeks to close. Financing all lined up, let's just close this deal!

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Here's what happened. The Master's February 2 approval, as usual, took the form of a Court Order. To be effective, that is to be the 'condition removal' that every lender needs, the Order has to be signed by the Master and filed at the courthouse.

Because of COVID there is an ultra-slow down at the courthouse. It took until March 4 for the Order to be filed and returned to the foreclosing lawyer. The filed Order is required to make the deal unconditional. 'Unconditional' is an important point. Why?

For every real estate deal, including foreclosures, no paperwork goes out to the buyer's and seller's lawyers until the deal is unconditional. You can understand why. Paperwork sent to the lawyers before deals are unconditional can lead to confusion. Files get opened, work is done, client's money is expended and then you get the news: "The buyer couldn't get financing; this deal is dead." Experience has shown that the only way to handle conditional real estate deals is to wait until they are actually unconditional.

All right, with that bit of explanation, and with this deal not being unconditional until March 4, only then did the listing realtor send out official real estate instructions. And, most importantly, only on Thursday March 4 was the mortgage broker able to tell the lender that the deal was unconditional and start finalizing the mortgage approval process. The mortgage broker was ready to go, had all the information from the buyer. But, only on March 4 would the lender start the mortgage application process.

So, there we are, this purchase is unconditional and ready to go on Thursday, March 4 for a Monday, March 8 closing, 1–2 days to close. Plus, my client lives out of province which always adds 2–3 days to the signing process. It didn't take long for me to say to myself that this deal is absolutely impossible to close by March 8.

I immediately got in touch with the foreclosing lawyer to explain the situation and to ask for an extension. I wanted three weeks, he wanted to give me seven days. Back-and-forth we went with agreement that we had seven days to firstly confirm that mortgage instructions had been issued. If we got those mortgage instructions, the foreclosure lawyer would likely cooperate with a further extension. That further extension would give us enough time to prepare the mortgage documentation, send it out of province, get it signed, and get back to our office.

Every lawyer probably handles these things differently, but my approach when I run into this or any other tight timing situation is to immediately get in touch with the other side, which is most often another lawyer. In this case the 'other side' or other party is the foreclosing lawyer representing the lender. As much as timing on this deal was giving everyone a lot of heartburn, I believed that the foreclosing lawyer wanted the deal to go ahead. After all, it's been a long slog for the foreclosing lawyer. First, in getting instructions from his lender, starting the legal foreclosure action, going through all the laborious processes that foreclosures take, finally getting into Court, sifting through the offers, and getting an offer accepted. That could have taken the foreclosure lawyer 6–12 months. At this point, he wants the deal to close. I want to make it easy for him to be cooperative and give us the time extensions we need. So, lots of communication, lots of explaining why the deal is going to close, and why they should listen to our extension requests. This approach generally brings good results where there isn't really much controversy over what will happen, just the amount of time it will take.

My buyer's mortgage broker did a great job and got us mortgage instructions before the seven-day period was up. I then negotiated a further extension with the foreclosure lawyer who, I have to say, was reasonably cooperative throughout the whole process. The deal closed 10 days later.

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LESSONS LEARNED:

1. Foreclosed Doesn't Mean Cheap or Easy!

Foreclosure properties are in demand and often sell at or near appraised value. They are still worth looking at, because it's a whole other market where you might find your ideal investment or home. Just manage your expectations.

2. Get an Unconditional Offer to Purchase

If your foreclosure bid 'wins,' and you are getting a bank mortgage, your lender needs what lenders need for every deal. That is, a final, unconditional real estate purchase contract, (offer to purchase). For a Judicial Foreclosure purchase, that final, unconditional offer to purchase is the signed, filed, Court Order approving your deal. As a buyer you have to understand that most lenders won't even start processing a mortgage application until there is that final, unconditional offer to purchase. As a realtor, you have to work very closely with your buyer's mortgage broker.

3. Prepare for Financing

Make sure you know what the likely lender requires. It may mean an appraisal up front. And, very important, a backup plan, either a private mortgage or cash purchase, needs to be discussed with your mortgage broker in case the Court/lawyer do not allow any extension. We had a backup plan, however it would have been an expensive option.

4. Plan for Delays

Currently, COVID is affecting everything, but all kind of issues can slow down a real estate deal. Everything can take longer than expected, including anything to do with Court process including foreclosures. As a realtor working through the foreclosure process, do your best to make your client, the Court, and the foreclosure lawyer aware of timing. Your client might have made an unconditional offer, but, if closing depends on financing, they need time.

5. Amend the Standard Purchase Contract

As a buyer or realtor involved in a foreclosure, make sure the Court and the foreclosure lawyer know that your buyer needs two weeks to close AFTER receipt of the signed, filed Court Order approving your client's purchase. Try to ask in your offer, or verbally if you are part of the Court application, for a clause like, "**this purchase will close 10 business days after buyer's receipt of approved, filed Court Order.**"

LET US HELP YOU BUY & SELL REAL ESTATE IN ALBERTA!

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