

Deposit Submission



By Brian Madigan LL.B.

When is the deposit to be paid? To whom is it payable? When is the cheque to be cashed?

Although, the questions are all simple enough, there is a somewhat complex set of rules that apply.

The first matter under discussion is **when is the deposit submitted**. The standard form agreement of purchase and sale provides two alternatives:

- 1) herewith, and
- 2) upon acceptance.

The buyer elects between these two choices. **Herewith** is no longer commonplace unless we are considering a bidding war, in which case if you are submitting an Offer without the deposit you might as well forget any chance of being successful.

The second option is “**upon acceptance**”. This is now the most commonly selected option. Its own meaning is defined in the listing agreement specifically to mean within 24 hours of acceptance. The agreement says:

For the purposes of this Agreement, “Upon Acceptance” shall mean that the Buyer is required to deliver the deposit to the Deposit Holder within 24 hours of the acceptance of this Agreement.

The next issue under consideration is the cashing or deposit of the cheque.

So, you have to look at the Regulations under the *Real Estate and Business Brokers Act 2002*, and concerning the deposit it says:

Deposit within five business days

17. (1) If an amount of money comes into a brokerage’s hands in trust for another person in connection with the brokerage’s business, the brokerage shall deposit the amount in the trust account maintained under section 27 of the Act within five business days.

- (2) In subsection (1),
“business day” means a day that is not,
 - (a) Saturday, or

(b) a holiday within the meaning of subsection 29 (1) of the Interpretation Act.

Here, the time period is 5 business days, not just 5 days. Further, the time period commences when the money comes into the hands of the brokerage. In this regard, there are 3 separate conditions to be met:

- 1) the money must come into the hands of the brokerage,
- 2) it must be in trust, and
- 3) it must be for the benefit of another person.

If all three conditions are met, then the 5 business day period commences. Usually, #2 and #3 will be relatively straightforward. Condition #1 will be the only real issue under consideration.

The physical cheque might be delivered by the buyer's agent (with the Offer) and be in the possession of the listing agent. If it is provided in escrow pending the acceptance of the Offer by the vendor, then the 5 day period would not commence until after it has been released from escrow.

However, if it is not otherwise noted as to be held in escrow, then the delivery and possession of the physical cheque itself gives rise to the obligation to deposit the cheque. The time period starts upon receipt. That means that technically the deposit cheque may have to be deposited in the trust account prior to the seller having considered, accepted, or rejected the Offer. The Act does not say that an agreement is required to give rise to the obligation to deposit the cheque. The operative provision is "comes into the hands". That can occur before any actual agreement is reached.

And, while the purchaser may not wish to have his cheque cashed early, if there is no provision to have it held in escrow under the terms of the agreement, the simple wording under the standard agreement would require the deposit of the cheque into the trust account. The time limited for acceptance of the Offer is not relevant.

You will also notice that the provision says ".....within 5 business days...". It does not say "... wait until the very end of the 5 day period...".

Accordingly, a purchaser submitting a deposit cheque is at risk that the cheque will be cashed immediately. So, make sure the money is in the account, or put a clause in the agreement that the cheque is to be held in escrow until the agreement has been executed.

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