

Deposits: More than One!



By **Brian Madigan LL.B.**

From time to time, an agreement will call for more than one deposit. This is quite common with new home purchases. The house is not built and the builder will request some progress payments by way of increased deposits over time.

Purchasers of new homes should be aware that only the first \$20,000 deposit is insured by Tarion (the Ontario Home Warranty Plan). Any further deposits are at risk.

The same situation may arise in the case of a resale property. Here, the entire deposit in most cases will be held by the brokerage and will insured. A larger deposit is usually negotiated when there is a longer closing, or a further deposit may be necessary if the purchaser is short of funds at the time of the negotiations.

So, **when are the deposits to be paid** and under what conditions?

Actually, this is somewhat more problematic. So, let's break this down into the **basic elements**:

- 1) **possession** of the physical cheque,
- 2) **delivery** of the cheque, and
- 3) **cashing** of the cheque.

The Act only deals with the matter of cashing the cheque. The broker has 5 business days. The Act does not deal with the issue of the contractual obligation to provide one or more deposits as between the parties.

The standard form agreement of purchase and sale prepared by the Ontario Real Estate Association (OREA) provides two alternatives with respect to the initial deposit, "herewith" or "upon acceptance". It defines upon acceptance to mean "within 24 hours".

But, that's really not the end of it, the parties could provide:

- 1) \$10,000 after acceptance, and
- 2) \$20,000 after the removal of the conditions.

In these two situations, the Act would require that the broker deposit the two cheques within 5 business days. Now, that doesn't start until the broker gets them. The obligation under the Act is to cash the cheque. Don't hold onto it, or put it in a file! Cash it and you have 5 business days to do it.

It's not up to the broker to start interpreting the agreement between the parties as to who is entitled to the money. If the deposit comes into the hands of the broker and it is for the benefit of another person, then the clock starts running. So, if there is a \$10,000 cheque and a \$20,000 cheque, they both have to be cashed by the broker within 5 business days in order to comply with the Act. Because that is exactly what the Act says to do! I agree, that is a little odd, but I didn't draft the Act.

The next circumstance, is to ensure if you are the purchaser that the brokerage firm holding the deposits in trust doesn't get your money until the appropriate time. If you don't have \$30,000 in your account, don't give them both cheques. Or, postdate the second cheque, and specify that the second cheque is to be deposited only "after the removal of the conditions".

Another exception is a situation where the broker might have physical possession of the cheque, but it is to be held subject to some specific arrangements. It may be in escrow, with "delivery" of the cheque to the broker to be conditional upon some future event or time. This needs to be spelled out precisely.

An interesting wrinkle is that the time of payment of the second deposit is not defined. The OREA form says "24 hours", after acceptance, but there is no clause in the agreement dealing with the time of delivery of the second deposit. The vendor does not get to walk away from the agreement; it is a simple breach of contract. If you need any specific remedies, then you will have to add them.

Now, remember, the parties are free to negotiate whatever they want in a real estate transaction. *The Real Estate and Business Brokers Act* is designed to regulate the industry.

Ordinarily, there are 5 business days to cash the cheque, and the status of the Offer, Counter-Offer, Agreement are not relevant.

If you don't like this, then **delay the delivery of the cheque** by:

- 1) **not giving it** until it's due,
- 2) **postdating** it, or
- 3) making it subject to an **escrow** condition.

When you make it subject to an escrow condition, the brokerage may have physical possession of the cheque but you have not really “delivered” the cheque in a legal sense. Delivery takes place later either at the time specified or the occurrence of the specified event.

The problem that often arises is that these “escrow conditions” are never discussed, never specified and never reduced to writing. And, while they seem fair and straightforward, the brokerage firm is nevertheless obligated to comply with the Act. So, if you don’t write it down, you better have your \$30,000 ready!

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