

## ACCEPTED OFFERS AND BACKUP OFFERS

**Summary:** Any proposed amendment to an original accepted offer, when there is a backup contract in place, should be approached with caution. Some changes to the original agreement could arguably be of such a character that, if agreed to, would result in the “seller ceasing to be obligated under the previously accepted contract of purchase and sale.” For example, a change to the price, or the parties, could fall into this category. In circumstances where there is a backup contract in place, and a seller or a buyer under the original contract seeks to change the terms of that contract, the seller’s agent and the buyer’s agent should recommend their respective clients seek legal advice on the proposed change. [*Real Estate Act* Rules s.41(b)]

*This Information Bulletin is based on a **Legal Update** article written by Greg Blanchard of the law firm of Whitelaw Twining in the May 2009 Issue of **Risk Report**, a publication of the Real Estate Errors and Omissions Insurance Corporation of British Columbia. The Real Estate Council of Alberta would like to express its appreciation to the corporation and Greg Blanchard for allowing RECA to use their article in this Information Bulletin.*

This article discusses the situation where there is an accepted offer to purchase property, a backup offer for the same property, and the parties to the accepted offer agree to change that contract. This was the background of the recent Provincial Court of British Columbia decision in *Wright v. Hamster*.

The claimants made an offer to purchase the defendant’s property that was subject to the collapse or non-completion of an earlier accepted offer, which was in turn subject to financing by a certain date. The parties to the first contract subsequently agreed to extend the time to remove the subject to financing clause. The deal completed pursuant to the first contract.

The claimants took the position that the defendants had, by agreeing to extend the time for removal of the subject to financing clause, collapsed the first contract.

In considering this question, the Court referred to the British Columbia Court of Appeal decision in *B.D. Management Ltd. v. Tajico Holdings Ltd.*, which dealt with a similar fact situation. The backup offer in the *B.D. Management* case was:

“Subject to the non-completion or collapse of the offer to purchase from N. on or before November 25, 1983 that had been accepted by the vendor.”

The seller and N. had agreed in writing to increase the amount of the deposit by \$25,000 and to extend the completion date. The purchaser under the backup offer claimed that these amendments constituted a collapse or non-completion of the agreement between N. and the seller.

The Court found that the amendments in question were “all of a character which affirm and do not reject the original contract” and concluded that the parties “did nothing other

than to amend a contract in certain non-fundamental details while affirming the continuing existence of that contract.”

The Court in the *Wright* case concluded the amendment at issue in that case was “not of a character which rejects the original (Pollard) deal, but is of a character which affirms it.” It was “an amendment to a still subsisting agreement.”

In both of these decisions the Court dealt with a backup offer which was subject to the “non-completion or collapse” of the earlier accepted offer. The question remains, what would be appropriate wording for this type of clause? It is interesting to note the *Licensee Practice Manual*, 6th Edition, 2006 (Published by the Real Estate Council of British Columbia) recommends different wording for this type of subject clause in a backup offer. The suggested wording is:

“Subject to the Seller ceasing to be obligated in any way under the previously accepted Contract of Purchase and Sale on the subject property by \_\_\_\_ (date). This condition is for the sole benefit of the Seller.”

Whether or not this wording is, in substance, materially different than the wording of the subject clauses in the *Wright* and *B.D. Management* cases is not certain. However, any proposed amendment to an original accepted offer when there is a backup contract in place should be approached with caution. Some changes to the original agreement could arguably be of such a character that, if agreed to, would result in the “seller ceasing to be obligated under the previously accepted contract of purchase and sale.” For example, a change to the price, or the parties, could fall into this category.

### Practice Tip

In circumstances where there is a backup contract in place, and a seller or a buyer under the original contract seeks to change the terms of that contract, the seller’s agent and the buyer’s agent should recommend their respective clients seek legal advice on the proposed change.

There is always a risk the change may end the original contract, thus putting the backup contract in first place. The seller may be put in the unfortunate situation of having agreed to sell the property to two different buyers. It would be wrong for an industry member to conclude the *Hamster* and *B.D. Management* decisions stand for the proposition that **any** change to an original contract will not cause its collapse.