

TITLE CLAUSES (ADDITIONAL PERMITTED ENCUMBRANCES) New Clauses Guide

INTRODUCTION

BCREA has created new title clauses that can be included in the Contract of Purchase and Sale (CPS) to clarify other title notations, charges and encumbrances, not captured in Section 9 of the CPS, that will remain on title after the completion.

Section 9 of the standard form Contract of Purchase and Sale provides that the title will be:

Free and clear of all encumbrances except subsisting conditions, provisos, restrictions exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown, registered or pending restrictive covenants and rights-of-way in favour of utilities and public authorities, existing tenancies set out in Section 5, if any, and except as otherwise set out herein.

The effect of Section 9 is that the seller must make arrangements to discharge any encumbrances not specifically listed in Section 9 or otherwise accepted by the buyer. This is how the buyer ensures it is getting an unencumbered interest in the property.

It's important to understand that additional exceptions to Section 9 may be needed in some situations. While it provides some automatic exceptions to the seller's obligation to deliver clear title (for example: crown and utility charges do not need to be discharged at closing), it does not provide exceptions for charges that are not listed. These could include private easements, building schemes, ordinary restrictive covenants, among others.

Often Realtors will insert an additional provision in the CPS that requires the seller to discharge all "financial" charges but permits all "non-financial" charges to remain as an exception to Section 9. The problem, however, is that there is no clear definition of financial and non-financial charges as any charge against the property would likely have some financial impact. If there are charges that a buyer is willing to accept on title (or charges that a seller is not willing or in a position to have discharged), the best practice would be to specifically include these charges in the CPS – in some cases this may be a long list; however, both buyers and sellers should be aware of the charges that are on title.

The following clauses have been developed by BCREA with the intent that they be added to the CPS in addition to Section 9 to clarify the parties' agreement with respect to other notations, charges and encumbrances not listed as exceptions in Section 9 that will remain on title after completion. It may not apply in all situations and REALTORS® should always review a property's title with their clients in order to determine what notations, charges and encumbrances should remain on, and which should be discharged from the title, after completion of the purchase and sale contemplated by the CPS.

1. Attaching a copy of the title to the Contract.

The first sample clause provides a way for the parties to attach a copy of the property's title to the CPS. Including this clause and attaching the title allows both parties to acknowledge the title as at the date the contract is signed and provide a reference.

The Buyer and the Seller acknowledge that a copy of the title of the Property is attached to this Contract.

2. Specifying additional notations, charges and encumbrances to remain on title after closing.

The second sample clause provides two ways Realtors can insert additional exceptions to Clause 9 into the CPS.

Option A provides a base structure in which Realtors can type out a list of additional notices, charges and encumbrances that can the parties agree will remain on title after closing.

Option B has a similar effect, except it provides for a copy of the title to be attached to the CPS and clearly marked up to show notations, charges and encumbrances that will remain on title after closing.

In both cases, notations, charges and encumbrances not excluded by Section 9 or the additional clause will have to be discharged by the seller on or prior to closing.

A. EITHER: The parties may specifically list the notations, charges and encumbrances to remain on title as follows:

The Buyer and the Seller agree that, in addition to the excepted charges and encumbrances set out in Section 9 of the Contract, the following notations, charges and encumbrances will not be discharged upon completion of the purchase and sale contemplated by this Contract:

1. *[List other notations, charges and encumbrances to remain on title];*
2. *[...]; and*
3. *[...].*

B. OR: Alternatively, an attached title may be noted to indicate which charges remain and which are to be discharged and the following language can be inserted:

The Buyer and the Seller agree that the Seller will cause all charges and encumbrances not expressly (a) indicated to remain on title as shown on the attached copy of the title for the Property or (b) in Section 9 of this Contract, to be discharged on or prior to the Completion Date or to be discharged in accordance with Clause 14 of this Contract.

The foregoing clauses can also be used in conjunction with a Buyer's subject clause that provides that the Buyer's obligation to complete the purchase of the Property is subject to the Buyer approving the title for the Property and all charges and encumbrances listed thereon. Upon waiver of such condition, the Buyer would agree to acquire the Property subject to the charges and encumbrances indicated in Section 9 and either Clause 2A or 2B above, as applicable.

FREQUENTLY ASKED QUESTIONS

Are these clauses mandatory?

No. BCREA has created these sample clauses to assist Realtors when preparing a CPS when they want to attach a copy of the title and/or provide for an exception to the Title provisions in the CPS.

Could Clause 1 be used on its own as standalone clause or does it have to be used in conjunction with either Clause 2A or Clause 2B?

Each of the Clauses can be used on their own or in conjunction with the others.

Realtors often attach a copy of the title to the CPS for reference; however, they do not always include a clause acknowledging it. Clause 1 provides that acknowledgement and ties the attached title into the CPS. This clause does not alter the CPS' terms; but it does provide a reference to the attached title.

If the parties have agreed to an exception to the title provisions contained in the CPS that should be documented then the Realtor should insert either Clause 2A or Clause 2B to specify the specific charges and encumbrances that will remain on title in addition to those set out in the title provisions of the CPS.

Should I use Clause 2A or Clause 2B to document additional notations, charges and encumbrances that are to remain on title after completion?

Both clauses can be used to document the parties' agreement as to notations, charges and encumbrances not contemplated by Section 9 of the CPS that can remain on title after completion – which one that is used is up to the Realtor preparing the CPS.

In some cases it will be easy simply to list the additional notations, charges and encumbrances that will remain on title after completion. In these cases Clause 2A can be used.

In other cases there may be a large number of notations, charges and encumbrances so it may make sense to attach a clearly marked-up copy of the title indicating which of them (in addition to those set out in Section 9 of the CPS) will remain. Clause 2B would therefore be used.

Regardless of which clause is used, Realtors should carefully review the title and the notations, charges and encumbrances that will remain on title after completion with their clients. If a client has any uncertainty about the effects or implications of a notation, charge or encumbrance that will remain on title after completion they should be advised to obtain legal advice.

BUSINESS PRACTICE CONSIDERATIONS/GUIDANCE

Working With Buyers

Realtors working with Buyers are expected to obtain a title search and review it with their clients. Where a title contains title notations, the buyer's Realtor may wish to obtain the title notations to help ensure the buyer understands the implications.

A buyer's Realtor should identify if the seller's title contains any notations, charges and encumbrances that are not excluded by Section 9's list of exceptions and discuss the implications with the Buyer.

If a buyer wishes to purchase a property containing additional notations, charges and encumbrances, with the buyer's informed consent, the buyer's Realtor may expand the list of exceptions to include the relevant charge as an agreed exception to clear title.

Remember a buyer must be made aware of all notations, charges and encumbrances that will remain on title after closing and their potential effects. This is particularly important for charges that would normally be discharged at closing.

Titles are complex, so to ensure that the buyer is aware of the implications of all notations, charges and encumbrances that will remain on title after closing, they should be advised, as appropriate, to seek legal advice in advance of writing the offer or to make obtaining legal advice regarding the title a condition of the offer.

Working With Sellers

Realtors working with sellers are expected to obtain a title search for properties they are listing for sale.

Real estate boards may also have rules or regulations related to title searches. As such, you should ensure that you are aware of any requirements of your real estate board.

Where a title contains title notations, listing Realtors may wish to consider obtaining the title notations to help ensure they understand the implications.

A listing Relator must identify all notations, charges and encumbrances on the seller's title that the seller is not able to or not prepared to discharge at closing (to the extent those notations, charges and encumbrances are not already captured by Section 9's list of exceptions), and add wording in the contract to provide that they will remain on title after closing as an agreed exception to clear title.

When a seller's title contains notations, charges and encumbrances not listed in Section 9 that the seller is not able to or not prepared to discharge at closing, a listing agent may want to take a proactive approach by informing the buyer's agent in advance, so that they will have the opportunity to address them in their offer.

If the seller wishes to accept an offer that requires the seller to discharge notations, charges and encumbrances that it is not prepared or not able to discharge_(for example a building scheme), the Realtor should urge the seller to seek legal advice before accepting the offer.

The seller should be advised as to what might happen if they ignore the agent's guidance, while confirming all of these communications in writing. By addressing the title and exceptions with the buyer's Realtor in advance, it may help to minimize this risk.

Titles are complex, so to ensure that the seller is aware of their obligations and is capable of fulfilling the terms of the contract, they should be advised, as appropriate, to seek legal advice.

WHERE TO FIND THIS CLAUSE

The clause is available through WEBForms® when you search the following:

- Title - Attaching Copy of Title to Contract
- Title - Listing Permitted Encumbrances to Remain Post-Closing
- Title - Identifying Permitted Encumbrances to Remain Post-Closing on Attached Title

You can insert these clauses into your Contract of Purchase and Sale or onto an Addendum, here are the instructions to help you: [Inserting a Clause into a Form](#) .

You may also add them to your personal clauses, so that they are easy to locate. You can find the tutorial on creating a personal clause here: [creating a personal clause](#).

RELATED PROFESSIONAL DEVELOPMENT

[Electronic Title Searching](#) This course helps REALTORS® ensure that they are dealing with the person(s) who has/have the right to sell the property; that the property is accurately described; and that all pertinent information, with respect to the title and registered encumbrances, is communicated to prospective buyers so that they are not misled.

OTHER RESOURCES

Legally Speaking Article #507: [The Section 9 Trap](#)