

In *Argo Ventures Inc. v. Choi*, 2020 BCCA 17, the appellants entered into a binding contract of purchase and sale with a non-refundable deposit due within 10 business days. After the contract was signed, the appellants decided to not complete the purchase and did not pay the deposit when due. The court held that a seller can sue for the amount of an unpaid deposit that is due and owing at the time the seller accepts the buyer's repudiation of the contract.

In *Hundley v. Garnier*, 2012 BCCA 199, leave to appeal refused 2012 CanLII 64747 (SCC), the court considered the provisions of a standard form purchase agreement relating to the payment of deposit monies. The contract provided that the deposit, which would form part of the purchase price, would be delivered to a third party, who would hold the funds in trust as a stakeholder under the *Real Estate Services Act*, and not as an agent for either party. There was another provision (clause 10) in the contract providing that tender or payment of monies from the buyer to the seller would be by certified cheque, bank draft, cash, or lawyer's/notary's trust cheque. The appellants contended that the respondent's delivery of the deposit monies in the form of a personal cheque failed to comply with the tendering provisions of clause 10, and was also improperly paid because the cheque did not indicate that the monies were "in trust". In rejecting these arguments, the court concluded at paras. 36 and 37 that clause 10 did not apply to the payment of deposits. The buyer did not deliver its deposit to the seller or to an agent of the seller. The contract was clear that the deposit was to be paid to a stakeholder who was the agent of neither party. Accordingly, the stakeholder was entitled to accept a personal cheque, and the terms of the contract made it clear that the stakeholder was to hold the deposit in trust.

For a discussion of whether to consider forfeiture of the deposit as liquidated damages or penalty, see "Return of the Deposit by the Vendor" and "Claim to the Deposit by the Vendor", both in chapter 12.

I. NEW CRA REQUIREMENTS FOR DEPOSITS HELD IN INTEREST-EARNING TRUST ACCOUNTS [§3.22]

Beginning in the 2024 tax year, new trust reporting rules under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) apply for T3 Trust Income Tax and Information Returns and establish new reporting requirements for trust accounts. The changes are intended to provide Canada Revenue Agency with certain beneficial ownership

information in order to allow it to better assess the tax liability of trusts and their beneficiaries. Under the new rules, all express trusts, including bare trust arrangements and non-resident trusts, are required to file a T3 return and report additional information pertaining to the identity of all trustees, beneficiaries, and settlors, as well as each person who can exert control or override trustee decisions regarding the trust's allocation of income or capital. Accordingly, deposit funds held in a trust account are subject to the new filing and reporting requirements unless any of the following exemptions apply:

- the funds are held in a general pooled trust account and not invested;
- the trust has existed for less than three months at the end of the taxation year; or
- the trust holds assets of \$50,000 or less throughout the taxation year.

As a result, in order to comply with these new requirements, practitioners who hold deposits in trust in interest-bearing accounts in connection with purchase and sale transactions will need to institute additional procedures with respect to deposits to be held and invested by law firms and additionally, should consider whether, in order to facilitate compliance with the new reporting obligations and to avoid issues such as conflict of interest, it is necessary to update forms of purchase and sale contract that they use.

Where a deposit paid pursuant to a contract of purchase and sale is to be held by the vendor's solicitors in trust in an interest-bearing account pursuant to the contract, the solicitors should consider obtaining, at the time the contract is signed, a certificate or other documentation provided by the purchaser in the form required by the vendor or its solicitors in order to comply with the reporting requirements of the Canada Revenue Agency in connection with the interest earned on the deposit. Practitioners should consider including provisions in the purchase and sale contract for:

- the purchaser's consent to the collection, use, and disclosure of personal information contained in the contract and otherwise collected by or on behalf of the vendor for the purpose of investing the deposit, including providing personal information to the financial institution as required for reporting interest earned on the deposit in accordance with applicable laws and to Canada Revenue Agency in order to comply with the "Additional Reporting—Trusts" requirements under the *Income Tax Act* and

related regulations, rules, and policies (as may be amended from time to time);

- the purchaser's agreement to provide to the vendor and its solicitors any additional personal or other information required to comply with such requirements and acknowledgment that its consent applies to any such personal information.

The vendor's solicitors should also consider including in the contract the acknowledgment and agreement of the vendor and purchaser that, until the purchaser's certificate is received, the deposit will be held in a non-interest bearing trust account, and that the vendor's solicitors may deduct from any interest earned on the deposit a reasonable fee (plus applicable taxes) to reimburse the vendor's solicitors for costs to be incurred relating to any income tax filings required to be made in respect of interest earned on the deposit.

For more information, see www.canada.ca/en/revenue-agency/news/newsroom/tax-tips/tax-tips-2024/bare-trusts-exempt-from-trust-reporting-requirements-2023.html.

C. PAYMENT OF BALANCE OF PURCHASE PRICE UPON COMPLETION [§3.23]

The purchase contract may specify one or a combination of the following methods of payment on the completion date:

- (1) cash;
- (2) new mortgage;
- (3) assumption of vendor's financing;
- (4) vendor financing by way of vendor take-back mortgage or agreement for sale.

I. CASH [§3.24]

The Contract of Purchase and Sale permits payment by certified cheque, bank draft, wire transfer, or a lawyer's, notary's, or real estate brokerage's trust cheque. The right of any party to pay the purchase price in cash should be avoided. For information on requirements under proceeds of crime legislation, see "Licensees and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act" in chapter 2. For information on the Large Value Transfer System used for