

Question 13 - Statement of Adjustments

The Statement of Adjustments is an important document in a real estate transaction. It sets out the adjustments to the purchase price between the vendor and purchaser.

1. Who prepares the Statement of Adjustments (SofA)?

Results:

98% of respondents indicated that the vendor's lawyer prepares the Statement of Adjustments.

Working Group (WG) Comment:

The WG agrees that the vendor's lawyer should prepare the SofA. They are the party that has most of the information that is required to complete the document. However, if a purchaser's lawyer has not received the SofA in time or when the purchaser is expecting it, the purchaser's lawyer can create a draft SofA to give their client some comfort as to the funds required for closing. The vendor's lawyer should prepare and send the SofA to the purchaser's lawyer as soon as possible.

2. When you receive a Statement of Adjustments (SofA) from the other side, you?

Results:

The respondents indicated that:

- a. 77% of them review it and compare it to the Agreement of Purchase and Sale (APS) and for items known arising from the transaction;
- b. 21% prepare their own SofA using their transaction software program; and
- c. 2% recalculate the numbers provided by the other side using a spreadsheet program or a calculator.

WG Comment:

Since most SofAs are now prepared using software, there is likely little need to recalculate but it remains an obligation on the purchaser's lawyer to review the SofA to ensure it only includes the items to be adjusted and that the correct numbers are used for the adjustment. As the APS governs the transaction and sets out the parties' obligations, it should also be reviewed to ensure matters out of the ordinary have not been stipulated. Confirmation of the source of the information for the numbers used in the SofA should be discussed with the client in order that they fully appreciate the significance of the adjustments. This is a good opportunity to manage your risk and

confirm if original source documentation was obtained (i.e. a tax certificate) to avoid later disappointments or disagreements at a later date. Not getting source confirmation can be a way to proceed but it raises reputational risks when an error is later discovered and the clients are told their lawyer did not do their work properly. There is a benefit to having the discussion with clients and documenting it. As always, document all discussions with your clients.

3. When do you typically prepare and deliver the Statement of Adjustments?

Results:

The respondents indicated they deliver the SofA as follows:

- a. 44% within 10 days of the closing date;
- b. 33% within 5 days of the closing date;
- c. 2% within 2 days of the closing date; and
- d. 21% as soon as they have the relevant information or for other similar reasons.

WG Comment:

The WG encourages everyone to deliver the SofA to the other side as soon as possible. Cooperation is encouraged as you will sometimes be on the receiving end. Purchasers need the information and timely delivery assists our colleagues to help manage their client's stress. The WG recognizes that delivery is dependent on the information that is required to complete the SofA, so we encourage vendor's lawyers to collect the information from their clients as soon as possible.

4. How do you prepare your statement of adjustments?

Results:

- a. 79% of respondents use real estate transaction software
- b. 9% of respondents prepare it manually
- c. 7% of respondents use a computer spreadsheet program

WG Comment:

The WG expected that most lawyers are now using software to complete their transactions and so would use it to generate the SofA as well. The WG encourages real estate practitioners to automate their practice as much as they can to become more efficient, freeing up time to focus on a full review and supervision of all aspects of the transaction to ensure the client is properly protected and served.

5. Do you email the Statement of Adjustments to your clients prior to your closing meeting?

Results:

- a. 77% of respondents indicated they send the SofA to client.
- b. 23% do not.

WG Comment:

Transactions are a hectic and unnerving time for clients, who may only go through this exercise once in their life or a number of years apart. The amount of information clients receive and the speed with which they must process it is difficult for many clients. The WG encourages all real estate lawyers to send a copy of the SofA to clients prior to the meeting to allow them to review and digest the information and come to the meeting more prepared with specific questions or a better understanding.

6. Do you email the Statement of Funds to your clients prior to your closing meeting?

Results:

- a. 91% of respondents do send the Statement of Funds to their clients.

WG Comment:

Transactions are a hectic and unnerving time for clients, who may only go through this exercise once in their life or a number of years apart. The amount of information clients receive and the speed with which they must process it is difficult for many clients. The WG encourages all real estate lawyers to send a copy of the Statement of Funds to clients prior to the meeting to allow them to review and digest the information and come to the meeting more prepared with specific questions or a better understanding.

7. When asked who in the office typically reviews the SofA received from the other side respondents indicated that:

Results:

- a. 81% of the time the lawyer responsible for the file does.
- b. 47% of the time the real estate clerk does.
- c. 4% of the time the legal assistant does.
- d. 2% of the time the junior lawyer does.

WG Comment:

This was a multiple-choice question. The WG is encouraged by these results as it interprets them as meaning that multiple individuals review the SofA - more eyes means less chance of error. Also encouraging is the majority of respondents indicated the lawyer responsible for the file does the review. This is a critical part of the transaction and clients should be assured that their lawyer has lent their expertise and attention to this aspect of the transaction.

8. How is the amount of fuel in an oil/propane tank adjusted?

Results:

- a. 84% provide an adjustment for a full tank
- b. 9% provide an adjustment for the partial amount in the tank
- c. 2% provide an adjustment for an empty tank

WG Comment:

Most respondents indicated that the norm is to adjust for a full tank and have the vendor confirm that they had the tank filled or arranged for it to be done around the closing date, unless the APS has indicated otherwise. The WG agrees that this is the conventional way and it should be explained to clients.

9. When asked how they confirmed the amount of fuel in an oil/propane tank, the respondents indicated:

Results:

- a. 60% require proof of payment of a full tank (top off receipt)
- b. 12% call the supplier to confirm the last fill up
- c. 2% rely on the vendor's information that the tank is full, partial or empty
- d. 2% obtain a statutory declaration from the vendor
- e. 2% rely on title insurance

- f. None rely on purchaser client's information that the tank is full, partial or empty

WG Comment:

The WG agrees that the best and easiest method is to obtain a copy of the vendor's top off receipt. At a minimum, the WG considers having a discussion with the purchasers about them verifying the level of fuel when they first attend at the property after getting the keys. Verification can be challenging but one can usually tell the difference between a full and empty tank. The WG is not aware that claims for mis-adjustments on the SofA would be covered under a title insurance policy, unless, like municipal taxes they could be a lien on the property.

10. When dealing with a vendor-take-back mortgage (VTB), is there a credit for cost of registration?

Results:

- a. The majority of respondents indicated yes

WG Comment:

The WG is of the view that unless the APS indicates otherwise, the general rule is that the borrower always pays any of the lender's costs. So, if the purchaser is registering the VTB there is no need for an adjustment.

11. When dealing with a vendor-take-back mortgage (VTB), is there a credit for the vendor's solicitor's legal fee for VTB?

Results:

- a. The majority of respondents indicated no adjustment

WG Comment:

The general rule is that the borrower always pays any of the lender's costs. So, if the vendor's lawyer prepared the VTB there may be an adjustment or an invoice is sent to the purchaser's lawyer be paid on closing.

12. Who is responsible for the cost of and receives the benefit of any revenue on the day of closing? Respondents indicated:

Results:

- a. 44% of the time, the purchaser
b. 40% of the time, they refer to the APS

- c. 9% rely upon Section 4(f) of the *Vendors and Purchasers Act*
- d. 7% of the time, the vendor

WG Comment:

This question could have several right answers. Section 4(f) of the *Vendors and Purchasers Act* stipulates that the purchaser is responsible for and gets the benefit of the day of closing, unless modified by the APS. Technically, anyone of a), b) or c) were correct.

13. If your client is purchasing from a builder, what do you review the APS for?

Results:

- a. 100% - Items to be adjusted
- b. 95% - Extra adjustments in any schedule
- c. 95% - Compliance with TARION schedule B
- d. 91% - HST provisions
- e. 88% - Maximum limits provided (caps)
- f. 81% - Payment of any deposits
- g. 65% - Holdbacks for any work to be completed after closing

WG Comment:

This was a multiple answer question, so responses do not total 100%. The WG is pleased to see the amount of scrutiny that builder's SofAs are subject to. Builders often have many transactions closing on the same date or very close to one another. The volume can lend itself to oversights and so the purchaser's lawyer's review of the SofA becomes more important to ensure the client gets the benefits of the APS and only pays for the costs that are legitimate.

14. How do you verify realty taxes?

Results:

When acting for the	vendor	purchaser
a. I do not verify	2%	0%
b. Rely on the client's word	2%	0%
c. Request current tax bill from vendor	66%	N/A
d. Order a tax certificate	25%	73%
e. Call the municipality to confirm information	2%	0%
f. Rely on statutory declaration of the vendor	2%	5%
g. Rely on title insurance	N/A	23%

WG Comment:

The WG is pleased to see that most lawyers obtain objective evidence of the tax status to complete the tax adjustments. We are advised by title insurers that this is the No. 1 claim they receive after the transaction closes, in that often the payment credited to the vendor does not match the tax office records and the purchaser is surprised with a bill for the vendor's portion of taxes. Although title insurance generally covers this situation, the reputational damage the lawyer suffers likely does not justify ensuring the right information is relied on, ideally a tax certificate. When purchasers innocently go to city hall to correct the tax bill, they are told that if there is a discrepancy between the vendor's and purchaser's portion of the taxes, it is because their lawyer did not conduct the proper due diligence. If you rely on anything but a tax certificate, ensure that you have the discussion with your clients as to what may transpire after closing and put it in writing and definitely your reporting letter.

15. How do you verify the HST and rebates eligibility? Respondents said:

Results:

- a. 6% - Review client's Assignment of HST provided by builder's lawyer?
- b. 26% - Rely on client's information
- c. 21% - Consider the nature of the transaction
- d. 19% - Responded with a combination of the other selections
- e. 9% - Calculate the HST themselves

WG Comment:

Tax and especially HST are very complex. The WG reminds lawyers of the risks in calculating the tax themselves or their applicability in any one scenario. The WG recommends advising clients of the risks, the issues and then recommend that the clients seek professional advice from an expert. Lawyers are not expected to be all-knowing, but rather to understand the basics and guide the clients where possible, including to other professionals in the proper situation. What may appear to be a "simple" home purchase may be characterized by Revenue Canada as a property that does not qualify for the owner-occupied exemption (property used for Airbnb?).

16. What verification do you undertake to confirm extras on the Statement of Adjustments?

Results:

- a. 51% of respondents review details of APS
- b. 26% of respondents rely on client's information

- c. 14% of respondents request invoices and a statement from the vendor
- d. 5% of respondents rely on the information from the other side

WG Comment:

The WG suggests that the proper steps involve the review of the APS and SofA and a discussion with the clients about their understanding of the extras they had signed up for. In a new home transaction, the TARION schedule would also be a source to verify the charges the builder is entitled to claim from the purchasers but not all extras may be in the APS or an amendment and may be in separate invoices with the builder or another supplier.

17. How do you verify the amount of deposits?

Results:

- a. 59% of respondents review details of APS
- b. 14% of respondents confirm amount held from the holder (broker, agent, lawyer, etc.)
- c. 18% of respondents do a combination of a, b or d
- d. 9% of respondents rely on client's information
- e. 0% of respondents do nothing
- f. 0% of respondents rely on the information from the other side

WG Comment:

The WG notes that one of the incidents of fraud is falsification of deposits. It is recommended to always be suspicious of any deposits not noted in the original APS or that are added by amending agreements or other methods.

18. Are you aware that for some properties (rural or city) water is not metered but rather is a periodic charge?

Results:

80% of respondents indicated being aware that some water charges are not metered but rather are simply a flat fee for a period of time.

- a. How do you confirm if metered or periodic charge?
 - i) 21% of respondents know the municipality's practice
 - ii) 19% of respondents rely on title insurance
 - iii) 16% of respondents obtain account statement from the municipality
 - iv) 14% of respondents rely on item in SofA
 - v) 12% of respondents use a combination of the other selections noted here

- vi) 12% of respondents rely on client's information
- vii) 5% of respondents call the municipality
- viii) 2% of respondents get a copy of vendor's last invoice

WG Comment:

The WG acknowledges that most lawyers who work in a jurisdiction that charges a flat rate are aware of the practice. The WG appreciates the value of title insurance, however, it reminds lawyers of the possible reputational risk incurred if the issue is not raised with clients and properly documented. Whenever an issue arises out of a real estate transaction, clients are told that their lawyer did not do good or complete work. To safeguard against this, which may cost you the client, their referrals and possibly negative social media or a malpractice claim, lawyers should communicate and document the discussion with the client, which can be referred to when the issue arises later.

19. Are you aware that some garbage removal cost may have a periodic charge (green bins, recycling, oversized items)

Results:

Respondents were almost evenly split between those who knew (48%) and those who did not know (52%) that garbage removal could be charged other than on the tax bill.

- a. How do you confirm if a periodic charge?
 - i. 33% of respondents rely on title insurance
 - ii. 18% of respondents rely on item on SofA
 - iii. 13% of respondents call the municipality
 - iv. 10% of respondents rely on client's information
 - v. 10% of respondents know the municipality's practice
 - vi. 8% of respondents get a copy of the vendor's last invoice

WG Comment:

The WG acknowledges that most lawyers who work in a jurisdiction that charges periodic fees for garbage removal are aware of the practice. The WG appreciates the value of title insurance, however, it reminds lawyers of the possible reputational risk incurred if the issue is not raised with clients and properly documented. Whenever an issue arises out of a real estate transaction, clients are told that their lawyer did not do good or complete work. To safeguard against this, which may cost you the client, their referrals and possibly negative social media or a malpractice claim, lawyers should communicate and document the discussion with the client, which can be referred to when the issue arises later.

20. How do you deal with security systems or other rented items? Respondents indicated:

Results:

- a. 80% - Advise clients to contact the supplier for set up or cancellation
- b. 43% - Requisition information from the vendor
- c. 36% - Confirm if the system is owned or rented
- d. 11% - Contact the supplier to confirm the terms of the rented item
- e. 2% - Do nothing

WG Comment:

This was a multiple-choice question, so the results do not add up to 100%. The WG commends lawyers on discussing the matter with the clients and advising them to contact the supplier. Often the supplier does not want to deal with third parties due to privacy concerns and often they will want information from their new customer that clients are best suited to provide, and the supplier may offer the clients options or incentives that only the clients can assess and accept. It is best to have clients deal directly with these matters, however it would be important for lawyers to ascertain the status of the system – whether it is owned or rented.

21. How do you deal with utilities? Respondents indicated:

Results:

- a. 98% - Advise client to contact utility/supplier for set up or cancellation
- b. 11% - Rely on title insurance
- c. 11% - Contact utility/supplier to confirm the status of utilities
- d. 9% - Requisition information from the vendor
- e. 7% - Do nothing

WG Comment:

This was a multiple-choice question, so the results do not add up to 100%. The WG commends lawyers on discussing the matter with the clients and advising them to contact the utility/supplier. Often the utility/supplier does not want to deal with third parties due to privacy concerns and often they will want information from their new customer that clients are best suited to provide, and the utility/supplier may offer the clients options or incentives that only the clients can assess and accept. It is best to have clients deal directly with these matters. Utilities are rarely adjusted and so lawyers would typically not get any information on these, unless they are owned by a municipality, in which case arrears could be added to the tax account if not paid by the

vendors. In this case, lawyers will want to confirm the status of the account or address and document their practice with the clients. The WG appreciates the value of title insurance, however, it reminds lawyers of the possible reputational risk incurred if the issue is not raised with clients and properly documented. Whenever an issue arises out of a real estate transaction, clients are told that their lawyer did not do good or complete work. To safeguard against this, which may cost you the client, their referrals and possibly negative social media or a malpractice claim, lawyers should communicate and document the discussion with the client, which can be referred to when the issue arises later.

22. How do you confirm what municipal services a property has (water, sewer, electricity, gas, etc.)? Respondents indicated:

Results:

- a. 73% - Rely on the client's information
- b. 50% - Rely on the details in the APS
- c. 45% - Review the MLS listing
- d. 25% - Call the municipality
- e. 11% - Make enquiry of the various service providers
- f. 5% - Conduct a Google Map search

WG Comment:

This was a multiple-choice question, so the results do not add up to 100%. Lawyers can refer to multiple sources to understand what services a property has to determine which require an adjustment or other treatment. Lawyers should have this discussion with their clients to ensure the clients set up the accounts in a timely manner.

23. How do you verify the information for a mortgage being assumed? Respondents indicated:

Results:

- a. 98% - Mortgage statement provided by the lender
- b. 24% - Vendor's Statutory Declaration
- c. 24% - Undertaking to Readjust
- d. 24% - Lawyer holdback for last payment
- e. 17% - Verify most recent payment or holdback
- f. 17% - Rely on title insurance

WG Comment:

This was a multiple-choice question, so the results do not add up to 100%. It is unusual these days for purchasers to assume a vendor's mortgage, but it had been very common in years past, especially when interest rates were higher and rising. Typically, the best source of information for the terms, conditions and status of a mortgage being assumed is information provided by the lender. Clients often do not have a perfect recollection of the provisions of their mortgages and so the vendor's declaration may be of limited use. An undertaking to readjust will generally only deal with costs associated with the transfer date and not any ongoing obligations. Again, reliance on title insurance has reputational risks for the lawyer as discussed in other responses in this survey.

24. When dealing with a property that has a rental unit, respondents indicated:

Results:

- a. Do you verify that rent increases are/were lawful and their timing?
 - i. 50% - Only if the client specifically retains me for this extra function
 - ii. 24% - No
 - iii. 17% - Yes
 - iv. 2% - Rely on title insurance
 - v. 0% - Recommend client retain a third party to investigate and confirm
- b. Do you verify that the rate of interest on any deposits comply with the regulations?
 - i. 50% - Yes
 - ii. 24% - No
 - iii. 21% - Only if the client specifically retains me for this extra function
 - iv. 2% - Rely on title insurance
 - v. 0% - Recommend client retain a third party to investigate and confirm
- c. What support do you rely on to verify the actual rental calculations, including last month's rent deposit and interest?
 - i. 70% - Review copies of lease(s)
 - ii. 65% - Tenant's acknowledgment
 - iii. 61% - Vendor's Statutory Declaration
 - iv. 33% - Compare to details in the APS
 - v. 30% - Rely on the client's information
 - vi. 7% - Rely on title insurance

WG Comment:

The WG acknowledges that rents, their legality and compliance with the legislation is a very specific and complicated matter. Lawyers are cautioned about what

opinion or information they provide on these matters, unless they are particularly versed in this area of law. There are lawyers, paralegals and consultants that devote their entire practice to the issues that lurk in this subject matter. Lawyers should not take on this type of work unless educated in the matter or refer clients to a professional who can properly advise them. Remember that anything you say will be seen by the client as your opinion on the matter. The WG believes that title insurance would not normally cover this issue unless it was specifically addressed with the title insurer and the proper use documented in the title insurance policy.

25. How do you deal with security deposits on key return, mailbox or key fob?

Respondents indicated:

Results:

- a. 36% - Advise the client to deal directly with the building manager/post office
- b. 20% - Do not deal with this issue
- c. 20% - Provide for an adjustment
- d. 14% - Ensure all keys are delivered as requisitioned
- e. 0% - Obtain a vendor's undertaking to provide

WG Comment:

Often deposits for keys or other matters with various suppliers are not capable of being assigned to a purchaser and therefore clients should be advised to deal directly with the relevant supplier to ensure their account is closed or set up properly.