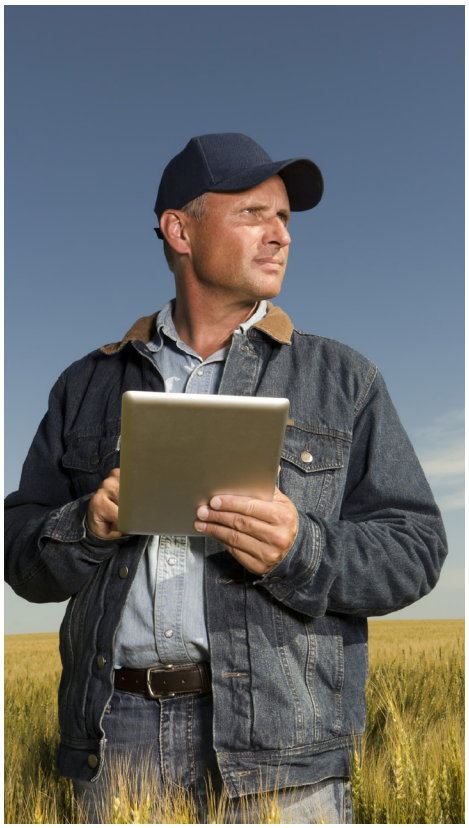

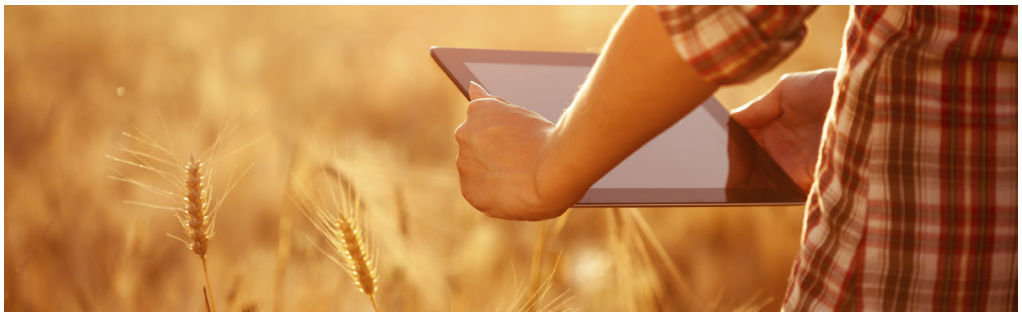

A Legal Guide to **Plan Farm Land Ownership and Sale** In Alberta

Growing Forward 2
A federal-provincial-territorial initiative

Alberta Government

Canada

Funding for this project was provided through Growing Forward 2, a federal-provincial-territorial initiative. The views and opinions expressed in this guide are not necessarily those of Agriculture and Agri-Food Canada.

A LEGAL GUIDE TO PLAN FARM OWNERSHIP AND SALE IN ALBERTA

Table of Contents

INTRODUCTION

Legal title to land in Alberta can be held in a number of different forms. Ownership rights may be subject to a variety of other claims and interests, such as crown (provincial or federal government) rights, municipal government rights and restrictions, easements and rights of way, dower, and various forms of financial charges. An owner who leases out land ("lessor" or "landlord") or a person who obtains a lease ("lessee" or "tenant") must know that the lessee's rights prevail until the lease ends. With few exceptions, these interests and claims must be registered in the land titles registration system to acquire validity and utility.

Before buying or selling land you should determine the exact legal ownership and all claims or restrictions affecting the subject title. The terms of land transactions are determined by a written purchase and sale contract. This agreement should include allocation of the price between the land itself and the buildings and other structures (and any included chattels). There are a variety of available methods of sale, including: use of a real estate agent, sale by auction, or conducting an independent private sale. Land transactions have numerous tax considerations for buyers and sellers, including municipal property tax adjustments, GST, exemptions, deferrals, and income tax on capital gains or business income, some of which are quite complex and qualified professional advice should be sought.

Starting the sale process involves the first step of determining an asking price and central terms. If you choose to list with a real estate agent, you will enter a contractual relationship with the realtor defined by a listing agreement. An interested purchaser will present an offer to purchase setting out details of price, terms, and conditions, which, once accepted, becomes the binding purchase and sale contract. Purchasers need to consider and provide for a number of things and factors depending on the type and character of the land and existing operations. An agreement is binding only once it meets all the requirements of a valid contract. There are a number of different methods of financing the purchase, the choice of which depends on your situation. The exchange of title for funds must occur in a process that ensures the purchaser obtains title free of interests and encumbrances that are not accepted or assumed, which is usually the job of the lawyers for the buyer and seller. Lawyers' fees and expenses make up part of the transaction costs. Other professionals may have roles in the sale as to a number of practical, legal, and financial matters.

.

1. What is “Land”

a. What is Included and Excluded?

Land:

“Land” has a much wider meaning in law than it does in ordinary conversation. When you agree to buy or sell a parcel of land, it involves a transfer of more than just the dirt. In law, land includes buildings, fixtures, and crops, and may include minerals, water rights, and rights affecting use of bordering parcels.

Fixtures:

A “Fixture” is anything that is attached to land (or to other fixtures), and that cannot easily be removed, or, in some cases, even if it is somewhat portable, exists to improve utility of the land rather than its own utility. Obvious examples are buildings, fences, septic tanks, plumbing, floor coverings, built-in appliances, cabinets, and light fixtures. As a fixture is considered by law to be a part of the land, it is automatically included in any sale of the land unless expressly excluded.

There can be legal uncertainty in the case of particular items. If a seller wants to exclude an item subject to any doubt, they must specifically exclude it in the purchase and sale contract.

Items such as portable grain bins, tools, furniture, fuel tanks, and general equipment are not fixtures. If a purchaser wants any such items, or any items where doubt may exist, to be included in the sale they must specifically include it in the purchase and sale contract.

Mineral Rights:

In general common land law, minerals on and under land, including oil and gas, are part of the land. But, in Alberta, most mineral rights belong to the Crown, and most titles to land express this as “Excepting Thereout All Mines and Minerals” (or similar language). There are variations, which arise for Land to which titles were created prior to Alberta becoming a Province, which include minerals, or, as to such titles, the minerals title was later separated from the surface title and is held by a non-Crown owner. If you do own the mineral rights to your land, the law presumes that a sale of the land includes them, but a seller can retain a separate title to mines and minerals if the contract expresses this, or if it was separated prior to selling the land.

Crops:

All plants growing on land at the date of transfer of title are part of the land at law and become property of a new owner. If a seller wants to retain title to crops and access to husband and harvest, then this must be expressed by the purchase and sale contract.

Water:

Bodies of water that are on your land that are permanent (lakes, rivers, streams) are considered part of your land, but the beds of the waterbodies and the water itself are owned by the Crown. The dividing line is the "high water mark" – generally where the soil changes or the non-aquatic vegetation starts. Occasionally, a title will expressly exclude a defined water body (ex. "…not covered by the waters of lake no. 119…") or define a different boundary.

Non-permanent bodies of water on your land, like sloughs, dugouts, or swamps belong to the owner and title to this water is included when you sell.

The use or diversion of water that you do not own is generally governed by the *Water Act* of Alberta. There may be a need for licensing for significant diversions – if the ongoing or proposed operations involve this, a purchaser should ensure, as a condition of the transaction, that the relevant licences are transferred or acquired.

Other:

Various other documented or acquired rights may "run with the land" (or with bordering lands) and be considered, at law, part of the land. To use one example, a parcel that does not border any road access may be the subject of an access easement (which should be registered) affecting title to the appropriate bordering parcel. The express means and terms of access may significantly affect value of either or both parcels involved. If you sell parcel A, and retain parcel B that can only be accessed through that parcel, or you buy parcel B, it is of obvious importance for an adequate registered easement to exist or be created and registered on title to parcel A (or both parcels).

b. Forms of Ownership

There are several forms of ownership:

Sole Ownership:

If you are the sole owner of a piece of land, your name alone will appear on the Certificate of Title. Subject to government regulation and any restrictions registered on title, you have complete control over how the land is used and disposed of. There is one other important exception. Land that is considered your "homestead" (the place where you and your marriage partner reside or have ever resided and the adjacent land up to 64.75 hectares or 160 acres) can be sold, mortgaged or leased only if your spouse consents in the proper written form. These "dower" rights are discussed further in this publication.

Joint Tenancy:

Joint tenancy is one of the ways that two or more persons can own land at the same time. To create a joint tenancy, the words "as joint tenants" must appear on your Certificate of Title.

The major features of joint tenancy are as follows:

- All tenants own the same interest or share in the property. If two people own a section of land in joint tenancy, each must own a one-half interest. Three persons owning the land would each have a one-third interest;

- All tenants are entitled to possess, use, and enjoy the whole piece of property. For example, one tenant could not fence off part of the property for his or her exclusive use without an express agreement between all;

- All tenants become co-owners at the same time and by one title;

- There is a “right of survivorship” meaning that when one joint tenant dies, his or her interest in the property passes automatically to the remaining joint tenants to share equally. The deceased’s interest does not and cannot become part of their estate.

These features make joint tenancy an attractive arrangement for married or common-law couples. If a couple owns the land in their farm jointly, and one dies, the other automatically takes full ownership of the property. The land does not form part of the deceased’s estate and therefore the land does not need to pass though formal probate or administration. This scenario will save the deceased’s estate the costs of probate or administration.

It should be noted that there may be exceptions to the right of survivorship. An example is where property is owned jointly between a parent and a child. If the child did not provide consideration (some form of payment) towards the purchase of their interest, on the death of the parent, the property may not automatically become the child’s property by virtue of the right of survivorship. The child may have to prove that his or her interest in the property was intended to be gifted to the child from the parent. If the child can show this intention, the property will transfer to the child by virtue of the right of survivorship. If necessary, the court will determine whether the deceased parent intended the asset to belong to the child by virtue of the right of survivorship or whether it was intended that a one-half interest in the property would belong to the estate. Ideally, a written agreement setting out whether the parent intends their child to become the owner of the property by virtue of the right of survivorship on his or her death, or not, should be completed at the time of purchase of the property by the parent and child where the child does not provide at least one-half of the consideration for the property.

A formal property transfer is not required to change the title to the survivor’s name. A sworn declaration as to decease of a joint tenant is registered in the Land Titles Office.

The interest of a joint tenant cannot be transferred to another person without having the consent of all other joint tenants, unless one proves prior adequate notice of such intention has been given to all other joint tenants. It can, however, be “severed” and terminated by application to the Court for “partition and sale” pursuant to the *Law of Property Act,* and by Court processes outlined in other statutes.

The interest of a joint tenant cannot be severed or transferred by gifting it in a will, as the interest automatically passes to the other joint tenants upon death.

If a joint tenancy is severed the form of ownership, as between the severed interest on one hand, and the other interests, becomes a “tenancy in common”. For example, if parties A, B, and C are joint tenants, and A transfers their interest to D, than the title will be expressed as “D, as to a one-third undivided interest, and B and C as joint tenants, as to an undivided two-thirds interest”. The two-thirds interest of B and C is still a joint tenancy as between those 2 parties but not with D.

Tenancy in Common:

Tenancy in common is another way that two or more persons can own a piece of land at the same time. In one aspect, it is the same as joint tenancy because all involved have an interest in the whole land. Each tenant has the right to enter, use and possess all of the land.

However, tenancy in common differs from joint tenancy in the following ways:

- Tenants in common may have unequal shares in the property;
- Tenants in common do not have to become co-owners at the same time and by one title;
- There is no right of survivorship with tenancy in common. When a tenant in common dies, his or her interest in the property becomes part of his or her estate to be passed on to the heirs instead of to the other tenants in common;
- The tenancy in common relationship does not end when a tenant in common transfers his or her interest. Instead, the party to whom the interest is transferred becomes a tenant in common with the others, replacing the former tenant. The interests of the other tenants are not affected or altered in any way.

In Alberta, tenancy in common may be expressed on title simply by the absence of the words "as joint tenants", or by the words "as tenants in common". In either such case each tenant in common will have an equal share interest. Or, if unequal ownership exists, it may be expressed by statement of the unequal percentage shares of each such owner, such as "A, as to an undivided 20 per cent share, and B, as to an undivided 80 per cent share".

Life Estate:

One or more individuals may acquire a "life estate" in titled land. Most commonly, this occurs when parents transfer title to the "fee simple estate" to a child or children, by sale or gift, but as part of the transaction, they are granted a life estate. The child or children get the normal legal Certificate of Title. A separate life estate title may be issued, or this may be secured merely by an appropriate caveat registered on the transferred title. The terms of the life estate may, by written agreement between the parties to its creation, have some variances from the default legal situation. But, basically, and most normally, a life estate is the right of the owners to occupy and use the land, so long as they pay the related costs (taxes, utilities, insurance, maintenance, etc.), until they cease the occupation and use, or upon their death. The life estate title or caveated interest is not transferrable. The legal title can only be transferred subject to the life estate, such that any transferee of legal title is bound by the terms of the life estate.

Beneficial Title:

If the registered owner(s) of a title hold it in their name only as trustees for others, or have sold it pursuant to an "Agreement for Sale" (a conditioned sale where the buyer only gets transfer of title upon completion of payment) then the beneficiaries of the trust, or the buyer, are regarded as "beneficial owners". If such beneficial owners register a valid caveat on the title, a transfer by the registered title owner only transfers the land subject to such beneficial ownership – in effect the rights of the beneficial owners take precedence to the rights of the legal title holder, who only acquires such actual interest and rights as were held by the transferor.

c. The Rights of a Landowner

The rights of a landowner are not absolute. The rights you have over your land are determined by the nature of your interest in it, the claims of others and applicable laws.

Expropriation:

The *Expropriation Act* of Alberta gives provincial and municipal governments the power to expropriate part or all of your land for public purposes. You have the right to independent review of the necessity of the expropriation, the right to fair value compensation, to appeal if you believe compensation paid is not adequate, and to have all your costs and expenses, such as moving and legal, repaid. Consult a lawyer who has experience in this area if you face this process.

The Federal *Expropriation Act* also gives the federal government similar rights.

Surface Rights:

The government may grant rights, by sale of lease, to extract minerals existing under your land, or to construct pipelines, power transmission lines, or communication lines, across your land. You are entitled to initial compensation for damage and disturbance due to construction, and ongoing compensation for existence of an oil or gas well or other mining operation and access to the operation. Under the *Surface Rights Act,* if you are unable to agree on terms and compensation for the surface lease, easement, or right of way, with the holder of the rights, or do not allow right of entry to its surveyors, etc., such matters will be determined by the Surface Rights Board, which will issue orders and may register them on title. The holder of such rights will register one or more caveats, easements, or rights of way on your title. So long as these continue to exist, any new registered owner on title takes their title subject to and bound by the term of these agreements or orders.

Normally, the buyer gets an assignment of surface leases, for purposes of receiving the ongoing compensation, and good surface leases may, therefore, add value to some parcels of land. But, as part of a sale of land, a seller may retain such rights and register a Caveat as notice of such separation of lease compensation from the owners' rights.

Municipal Government Rights:

Municipalities (Cities, Towns, Counties, Municipal Districts, and an array of distinct commissions and special authorities) have many rights which override rights of landowners. The *Municipal Government Act* ("MGA") and many regulations made under it, and particular bylaws enacted by each municipal authority, set out many such rights and processes. These include such rights and powers as:

- Imposing property taxes and selling land if the owner fails to pay such taxes;
- Temporary use of your land for roads, accesses and municipal works (with compensation);
- Entry to your land for surveying, measuring, grading, environmental testing, and appraising land and building values;

- Regulation of fires and combustible materials;
- Inspection of structures and ordering their repair or demolition;
- Ordering the cleanup and removal of garbage and junk, such as old vehicles;
- Restricting the permitted location of any residences, barns, and other structures, and requiring permits for construction;
- Controlling use of landfill and removal of topsoil;
- Requiring control of weeds on crop lands, or removal of noxious weed infestations;
- Restricting or preventing subdivision of land into smaller titled parcels.

In many such cases, the municipality may enforce these rights and powers by administrative orders and fines, or court orders, or enter for purposes of remedying the problem in question, and all costs and expenses may be converted into property tax charges for collection purposes.

Easements and Rights of Way:

Other individuals and entities may have a right of access to your land in the form of an easement or right of way. An "easement" is created when a landowner grants someone a right to enter, cross, or use your land for particular purposes. An example is if you give your neighbor permission to cross your land with vehicles and farm equipment for access to their bordering land.

An easement can also be someone's right to prevent you from building a structure on your land or blocking a waterway, or to give them access to and use of a water source or utility source located on your land.

The most common right of way to land is granted to public utilities. This arrangement works the same way as an easement. It gives the utility company the right to enter upon your property to fix, maintain or install wiring, cables, or pipes over and/or beneath your land.

A valid easement or right of way can and should be registered against your title in the Land Titles Office to notify others that the particular rights exist. Once granted, an easement or right of way burdens your title to the land until it is removed.

To avoid later disputes an easement or right of way should be the subject of a very clear and complete written agreement, clearly setting out exact mutual rights and obligations, which may include any initial or ongoing compensation. You should consult with a lawyer to advise and assist with any such agreement.

Restrictive Covenant:

A valid "restrictive covenant" is an agreement registered on title to affected land which imposes a restriction on use of land so that the value and enjoyment of bordering land will be preserved. An example would be an agreement imposed and registered by a seller of land which borders land on which the seller resides, which disallows the use of the land sold as a cattle feedlot. The owner of the beneficial land will have legal rights to enforce this by court action, for the duration of the restriction.

Dower Rights:

If you are legally married, and hold title to "homestead" land in your name alone, your marriage partner ("spouse") has "dower rights" in the homestead property. As to land outside the boundaries of a City, Town, or Village, a "homestead" is a residence which you and your spouse occupy (or which either of you have ever occupied) and the immediately surrounding land up to a maximum of 160 acres (64.75 hectares). Even if you are the sole owner in "fee simple" of the homestead, your spouse has several types of claims under the *Dower Act* that prevents your full control of the land and some personal property (property that is not "land"). "Fee Simple" ownership is entitlement of the owner to the entire property with unconditional power of disposition during the owner's lifetime and upon the owner's death.

The spouse may give a release of dower rights, in prescribed form, which includes certification of understanding of dower rights and voluntary release by the spouse in front of a lawyer, and which is registered on title. The spouse can, however, revoke this at any time.

First, if you wish to transfer (sale or gift), encumber (mortgage or other charge), agree to sell in any form, or lease all or part of the land, you require the spouse's consent (again in prescribed form endorsed by a lawyer). This will be appended to the transfer, mortgage or other document to be registered in the Land Titles Office. The document will not be capable of registration without this consent.

Second, if an owner does manage to sell, mortgage, or lease without the required consent (by swearing a false affidavit as to not being married or the land not being a homestead) an "innocent" purchaser, mortgage lender, or lessee (one who did not know of the spouse's claim) is protected. But the spouse is entitled to claim damages, in a prescribed measure of amount, against such owner.

Third, if you die before your spouse and you do not give the homestead to your spouse in your will, your spouse has a "life estate" in the homestead (refer to the previous explanation of this form of ownership).

There are similar forms of rights in land conferred by the *Matrimonial Property Act*, other statutes, and by common law, as to married spouses, and equivalent "common law" or "interdependent adult" situations, which apply not only to homestead lands, but all lands owned by one spouse. In some cases the holder of such rights can register a caveat to secure such rights until settlement or Court determination.

Under certain circumstances, an owner can obtain a court order dispensing with dower rights. Most commonly this arises where the spouse who has such rights has ceased occupying the

residence and cannot be located or is mentally incapable of understanding such rights and giving consent.

d. The Rights of a Leaseholder

If someone is leasing land from an owner, they have rights to use and control the land without interference by the owner, to the extent of the express terms of the lease, for so long as the lease lasts, and so long as the lessee complies with the express and implied terms and conditions of the lease. The rights of a leaseholder are governed by a combination of provisions of the *Land Titles Act,* the *Law of Property Act,* and common law.

If a lease is for less than 3 years, even if it is not registered on title (by caveat) it may have priority to rights of an encumbrancer (such as through a mortgage), or a transferee (buyer) whose encumbrance or transfer was registered after the commencement of the lease. The lender or buyer may have to assume and observe the lessee's rights even if they were unaware of the lease. Thus, it is common for astute buyers or lenders to investigate this issue and require a sworn declaration of the seller or mortgagor that no such leases exist unless they are prepared to acquire their title or encumbrance subject to the leaseholder's rights.

If a lease is for more than 3 years, it will not have priority to the right of a buyer who becomes registered owner, or the rights of a new encumbrancer, unless it is registered on title to the lands before registration of the transfer of land or the encumbrance. It may be registered by caveat, or as a lease as such, and such a leaseholder may even obtain issuance of a separate "leasehold title". The issuance of such a title is only common when the leaseholder interest is very long term interest, such as a 99 year lease. Such a title can be granted as security for a mortgage loan, with a value relative to the remaining length of term and risks of loss of rights by default in its terms.

Regardless of the term of the lease, a leaseholder, registered or not, will not have priority of interest as against an encumbrancer who registered prior to the commencement or registration of the lease. If the owner defaults on their mortgage and foreclosure, or sale via foreclosure action, occurs, the lender or new owner who becomes the registered owner will have the right to ignore the leaseholder's rights, unless they have postponed to or adopted those rights by written agreement. So, a prospective lessee should search title before entering into a lease and obtain a postponement or consent in writing from any financial encumbrancers if they do not wish to risk having all their inputs into the situation (costs of planting and husbanding crops, etc.) lost in such a situation.

If a lease includes an "option to purchase" or "right of first refusal", then that aspect must be separately caveated, and recognition of the same priorities must be exercised. Otherwise, this may be entirely defeated by the rights of prior registered lenders or buyers.

All of this just illustrates the importance on both sides, of having a proper, complete, and appropriate detailed written lease agreement, and of registering it on the title in question. Involving the advice of a lawyer who practices in the area is recommended.

e. The Land Registry System in Alberta

All interests in land in Alberta are recorded under a public, government run, “Torrens System”. The *Land Titles Act* and regulations under that Act, are the ultimate statutes which govern the relevant rights and processes, though many other statutes and regulations apply to some aspects of ownership and landowner rights.

In terms of ownership, the current Certificate of Title to any titled parcel of land (which is public information accessible by any registry agent, lawyer, or at the Land Titles Office) is reliable evidence of the facts set forth in it – the ownership and all other interests and encumbrances shown on that title. The most important feature of the Torrens System is that when you buy land you can rely completely on the Certificate of Title. It is presumed to be accurate and this is backed up by a form of insurance to compensate for errors.

Now, as we have already noted, there are a limited number of interests (such as unpaid municipal property taxes and unregistered leaseholder interests) that can affect this “what you see is what you get” scenario. But, generally, so long as one obtains and examines the contents of every registered item on a title, the Certificate of Title is a guaranteed accurate representation of the status of title and interests affecting the title.

There are two Land Titles Offices in Alberta – “Northern”, Edmonton, and “Southern”, Calgary. They operate, however, as one integrated office, such that one can register an interest in land geographically covered by one office in the other.

While, at the date of this publication, the system is still a hybrid of “electronic” and “paper”. It is in the process of transformation to a system based almost entirely on “e-transfer” of registrations, with certification by licensed registrants (primarily lawyers and surveyors). But, the pure “paper” alternative will continue to be available as a “counter” or mail option.

The real message in this regard is, firstly, if you acquire any interest in land, register it, secondly, get copies of and actually read and understand all registrations on title that precede your registration, and, thirdly, consider having a qualified lawyer review and interpret it all.

f. Grazing Leases

The *Public Lands Act* and regulations under the Act permit the leasing of land owned by the provincial government as (among other things) “Grazing Leases”. These may be held by a grazing association of ranchers who hold unit factors, or by one or more individuals, or by a corporation. They will allow exclusive use of certain public lands for grazing specified numbers of livestock (most for cattle, some for sheep or bison). They are often a feature connected to farms which also have titled land and can be part of a purchase and sale or taken on security by lenders, together with the titled land or separately.

Terms can be up to 30 years, with or without renewal rights. Rents are set by reference to “forage value” of the land and by most current opinion are quite low. Leaseholders have specified standards of stewardship and must allow reasonable access for recreational uses such as hunting and fishing. Leaseholders are entitled to the compensation arising from surface lease entry, damage, and occupation.

These leases, in some cases, particularly where there are surface leases, can have very substantial value in “sale” terms – really assignment of the balance of the term to a purchaser. Any assignment must be to a qualified assignee and consented to by the director (administrator on behalf of the government).

The director maintains a paper registry of leases, assignments, and mortgages or other forms of security interests. Leases can be “mortgaged” with consent of the director. A common form of security is a “Conditional Surrender of Lease” to the lender, whereby if the borrower defaults, the lender can “sell” the lease to a qualified and approved purchaser to whom the lease is assigned.

Thus, acquiring the lease requires a search of the registry for any registered charges and then removal of these charges as part of obtaining “clear title” (as it were) to the lease.

2. Buying and Selling Considerations

a. Are there Restrictions?

Before deciding to purchase or sell, ask yourself whether there are others who must consent to your decision to sell and whether they will actually do so. These persons may include your spouse, partners, other joint or common owners, or shareholders of a corporate owner.

Other individuals may have some claim to your property that must be cleared up before you can sell it free and clear. For example, if someone is presently renting your land, he or she may have rights which continue after the sale. If you are selling only part of the land which is affected by a mortgage also affecting other parcels, and the sale will not pay out the loan in full, you must settle the amount that the lender will require to release the land being sold.

If you wish to subdivide a parcel from an existing titled parcel, for sale or to retain after selling the rest of the parcel, you must obtain formal approval under MGA from the municipality, which generally requires a submission including a proposed Plan of Subdivision prepared by a Licensed Land Surveyor. The land may not be capable of subdivision, pursuant to provincial and municipal laws and rules. If the subdivision is approved it must be registered and result in issue of separate titles for the subdivided and remaining parcels before it can be transferred. Thus, any purchase and sale contract must be conditional upon approval and registration of the specified subdivision and deal with which party pays the related costs.

The *Agricultural and Recreational Land Ownership Act* and its regulations may restrict who can legally purchase and own your land. The *Foreign Ownership of Land Regulations* (made under both the provincial Act and the *Citizenship Act* of Canada) are complex in determining rules as to ineligible persons and exceptions. Very generally, an “ineligible person” is an individual who is not a Canadian citizen or permanent resident, a foreign government or government agency, or a foreign corporation. A “foreign controlled corporation” is any corporation with the prescribed degrees of control by ineligible persons. An ineligible person or foreign controlled corporation may not own or control any interests in “controlled land” (basically rural land) consisting of more than 2 parcels having total acreage of more than 20 acres, directly or indirectly.

From a buyer's perspective, you should ensure that any use you intend for the land will be possible and permissible. This includes determining what claims and interests are registered on title and will remain, and what provincial and municipal laws may restrict or limit the specific use for the particular land.

b. Purchase and Sale Contract

The amount of property and assets you include in your sale should be clearly stated in your Purchase and Sale Contract. When you sell your land, anything considered by law as part of the land, (for example, any fixtures) are presumed to be included in the sale. (See Part One of this guide.)

If you wish to exclude any fixtures from the sale, you and your buyer must have a specific agreement saying so. Otherwise, any fixtures will be transferred with the sale of the land. You must also specifically agree to any moveable farm assets which you wish to include in the sale, (for example, bins with no foundation). It is always wise to include in the Purchase and Sale Contract a complete list of all assets being included in the sale – both fixed and moveable.

For income tax purposes, you may also wish to allocate a certain amount of the purchase price to the land and a certain amount to the buildings and other structures, as well as an amount for included non-fixtures. You should consult a lawyer for advice with respect to the drafting of the Purchase and Sale Contract. You should consult an Chartered Professional Accountant for tax advice prior to allocating the purchase price between land and buildings, etc., and for general tax advice prior to selling or purchasing farm land. Taxation issues are discussed in greater detail later in this guide.

Why is the Allocation of the Purchase Price important?

The *Income Tax Act* allows an allocation of real property as between land, buildings, and other improvements. This allows a taxpayer to claim a capital cost allowance (tax depreciation, also commonly referred to a CCA) as an expense against business income at a stipulated rate for various types of assets of capital property. Such property is known as depreciable capital property.

No capital cost allowance may be claimed with respect to land, and consequently it is known as non-depreciable capital property. Due to this ability to claim capital cost allowance with respect to the improvements to real property, and non-fixtures, it is important in most farm transactions to allocate the purchase price between land and buildings. The seller will want less of the purchase price to be allocated to the buildings rather than the land. This will allow the seller to avoid any recapture on any capital cost allowance claimed. The purchaser will want more of the purchase price to be allocated to the buildings to leave room for depreciation. The seller and the buyer will have to reach an agreement on an appropriate allocation between the land and the buildings.

For income tax purposes farm land is generally no different than any other type of improved real property. On sale, one-half of the capital gain is included in the vendor's income and is subject to tax. Further, if any depreciable property is sold as part of the real property, then any capital cost allowance previously claimed may be recaptured on the sale if the sale price exceeds the undepreciated capital cost.

Canada Revenue Agency (CRA) may examine this allocation. CRA will generally accept an allocation reached between parties who are unrelated, so long as both parties abide by it. However, if CRA views an allocation to be unreasonable, they have the power to reallocate as they believe appropriate. If there is no allocation set out in the agreement for purchase and sale, and each party allocates the proceeds differently, very often CRA will attempt to reallocate the amounts in a way that appears reasonable to them.

c. Methods of Selling

You must decide whether to sell your property through a real estate agent, an auction, or by yourself (independent sale).

Real Estate Agent

Listing with a real estate agent has some advantages:

- You don't have to do the leg work of finding a buyer yourself;
- Your land should receive much wider advertising exposure, especially if sold through a multiple listing service; and
- A real estate agent knows how to sell property. An experienced farm land sales agent will know the market and may be able to sell your land faster and on better terms.

The main disadvantages of having an agent sell your land are:

- You must pay the agent a commission-either a straight fee or a percentage of the gross sale price, based on whatever formula is agreed; and
- You must sign a binding agreement with the agent that limits your control of how your land sale is handled. Please refer to the section entitled "Listing with a Real Estate Agent" later in this guide for more information on listing agreements.

Auction

Like a real estate agent, an auctioneer must be paid a commission, which may be a fixed amount or percentage of gross sale price. You must also sign a contract with the auctioneer.

Selling farm land by auction has become more common. Some benefits are:

- An auction creates competition among buyers and can exceed the price of a negotiated sale;
- An auction accelerates the sale process, as the seller knows exactly when the property will sell;
- An auction enables the seller to set the terms and conditions of the sale and maintain control of the property throughout the sale process. Farmland could be offered for sale as follows: "Will be sold subject to the owner's approval" or "confirmation from owner"; and

- An auction is a very open environment taking the seller out of the negotiation process, and allowing everyone to have an equal opportunity to purchase the property. In many cases, friends and neighbors are disappointed after the private sale, feeling that they were left out of the negotiation process. This should not happen with a public auction.

Independent Sale / Private Sale

Selling your land yourself means that you can avoid commission costs and have more freedom to deal with potential buyers. However, there are some disadvantages:

- You have to pay advertising costs yourself;
- You probably don't have as much expertise in selling as a real estate agent; and
- Investment of time and effort in presentation and negotiation.

d. Whom Should I Consult About Buying or Selling?

Because your financial and personal circumstances are unique, no amount of reading about selling farm property is a substitute for talking to qualified professionals such as your lawyer, your financial institution, your accountant, and your real estate agent. They can help you plan your property sale to meet your needs and goals and can make suggestions and ask questions you may not have considered.

Other sources of advice are departmental advisors and independent consultants, lenders, and real estate appraisers who are trained to deal with problems and questions about farm matters.

e. Tax Considerations for Buyers and Sellers

One of the most important considerations influencing your purchase or sale decision is tax: your desire to minimize your income tax will affect whether you gift rather than sell, what you sell, when you sell and how and when you arrange to be paid.

The income tax rules that affect land sales and transfers are complex and change constantly. You should always seek sound professional advice before making a decision. Do so well in advance as good tax planning often means planning for your sale years before it actually occurs.

The following information is intended only to provide a general overview of the income tax rules that apply to the sale of farm land. Please consult your chartered professional accountant to review your individual income tax considerations.

A valuable public resource is the publication "Tax Management Strategies for Farmers" which you can obtain from the Department. It is much more comprehensive and detailed than this guide.

Real Property Taxes

A tax adjustment will be made by credit or debit to the purchase price as of the date of closing of the sale, such that each of the seller and buyer will have paid these taxes (which are assessed on a calendar year basis) for the exact portions of the year during which they were the owner. If it is desired to change their presumption, then the Purchase and Sale Contract must specify the different adjustment date.

Land Transfer Tax

There is currently no land transfer tax in Alberta. However, transfer registration fees payable to the Land Titles Office are based on, and increase with, land value (generally, the purchase price).

GST

In addition to the income tax ramifications of real estate transactions there is also the possibility that the Goods and Services Tax ("GST") might apply. Currently, the GST is applied at the rate of five per cent to most sales of goods and services in Canada.

The obligation to collect the GST on real estate transactions varies depending on the type of property being sold, the nature of the buyer, and the nature of the seller. Generally all sales of real estate are subject to GST unless a specific relieving provision in the *Excise Tax Act* (Canada) applies.

The GST will apply to a farm land sale in the same way it would apply on the sale of any other type of commercial property. However, if the sale of the farm property is from an individual to a related individual who will use the land for his or her personal enjoyment, and not in the business of farming or other commercial activities, there will be no GST on the sale.

Further, a GST exemption will apply if:

- the sale is by a corporation, partnership, or trust, when the buyer is a shareholder, partner, or beneficiary and, in the case of a corporation is related to the corporation;

- all or substantially all (generally taken to be 90 per cent or more) of the seller's property was used in the business of farming;

- immediately prior to the sale the buyer was actively engaged in the business of the seller; and

- The buyer will use the land for his or her personal enjoyment.

If all these conditions can be satisfied, then a GST exception will apply.

The obligation to pay five per cent on the purchase of commercial real land can often be a cash flow concern to a buyer, especially if the buyer is a registrant for GST purposes and will be able to claim the GST as an input tax credit and, in a sense, get the tax back. To relieve this cash flow problem there is a self-assessing option. The *Excise Tax Act* allows for the self-assessing of the GST by a buyer of land, where the buyer is registered for GST purposes.

Where the buyer intends to use the land in his or her business then he or she reports the tax due on the purchase on the GST tax return for the period covering the closing date. On that same tax return the buyer claims an offsetting input tax credit which equals the tax self-assessed. The net effect is that $0 cash is laid out. This self-assessment applies equally to individual purchasers or corporate purchasers. This concept is illustrated by the example below:

> A Ltd. sells a one-quarter section parcel of farmland to B Ltd. for $200,000.
>
> B Ltd. self-assesses $10,000 GST on its next GST tax return covering the closing date for the GST due on the sale. On the same return B Ltd. is entitled to claim an input credit of $10,000 for the tax payable on the sale. Net cash outlay ($10,000 - $10,000) is $0.

Unfortunately, if the buyer of the property is not a registrant, then this option to self-assess is not available to the buyer and the cash flow problem discussed above can occur.

Mortgage Back

A seller may assist or finance the buyer of farm land by taking back a mortgage. For income tax purposes, a seller who does not receive all of its proceeds at the date of sale may be able to claim a deferral of a portion of the capital gain, if any, which has occurred on the sale. However, a minimum of one-fifth of the gain must be brought into income in each year. This essentially limits the deferral to five years. This rule exists in spite of the fact that the mortgage might be for a longer period. Of course, if the mortgage is for a shorter period and all of the proceeds are received before the end of the five years mentioned in the Act, then the gain must be reported in that shorter period. There is no reserve permitted for recaptured capital cost allowance.

A second issue to consider any time a seller assists in the financing of the purchaser is interest. It is normal commercial practice in a mortgage to seek interest on the monies not yet received. There is, of course, no legal obligation to charge interest.

Principal Residence Exemption

A special capital gains exemption exists for the sale of what is known as a “principal residence.” A “principal residence” is defined to include a housing unit owned either alone or jointly with another person that has been ordinarily inhabited in the year by the seller, or the seller's spouse or family, while the seller has been ordinarily resident in Canada throughout the year. If those conditions are met, the gain on the residence will generally be exempt from income tax.

Farm Rollover

There are two provisions of the *Income Tax Act* which allow for income tax free sales of farm property. The first is a sale by an individual to that individual's child, so long as the property involved is qualifying farm property. “Qualifying farm property” is land, depreciable property of a prescribed class, and any eligible capital property used by the individual or the individual’s spouse or children in the business of farming. To qualify for this rollover the seller must be a Canadian resident. This rollover also applies to the transfer by an individual to a resident child of shares in a family farm corporation or an interest in a family farm partnership.

If a full rollover is not required, there is an opportunity to defer any capital gain from the sale of farm property from a parent to a child so that only one-tenth of the capital gain is brought into income each year. A farm rollover is advantageous only after the benefits of the capital gains exemption have been considered.

Spousal Rollovers

If one spouse transfers property to the other spouse for nominal consideration or by way of gift, a specific rule dealing with sales between spouses will deem this sale to occur not at fair market value, but at the seller's cost base, unless both parties elect otherwise. This means that spouses may move property between themselves at no tax cost. However, any income earned from the property and capital gain realized on a subsequent sale by the recipient spouse will be attributed back to the seller spouse. Such attribution is avoided if the buyer pays fair value for the property purchased.

GST will generally not apply to property transferred in an inter-spousal situation, as generally that property tends to be of a personal nature, is residential, and is therefore exempt from GST. However, if both spouses are registered and the property in question is business property, then presumably the GST could apply. The same rules apply if the property is being transferred as a result of a separation or divorce.

Capital Gain v. Business Income

Any transaction involving real property will generally give rise either to an income gain, or a taxable capital gain. The difference between the two treatments is generally determined by the intention that the seller had when the property was purchased. For instance, if the seller purchased the property with the intent to resell, then the property will be treated as inventory, creating an income gain. However, if the seller purchased the property with the intent of using it in a business or for personal enjoyment, then the gain, if any, on its subsequent disposition would be treated as a capital gain. The importance of having the gain treated as a capital gain is that only one-half of the gain will be included in the seller's income and subject to taxation. If the gain is considered to be on the income account, all of the gain will be subject to taxation. In determining the intent of a party when purchasing land, the courts have looked at stated intent, past dealings in similar property, the business of the purchaser, and other such factors. Generally, farm land will be considered to be used for business resulting in a taxable capital gain rather than an income gain. Please review the discussion respecting the lifetime capital gains exemption further on in this guide for more information on the lifetime capital gains exemption.

Lifetime Capital Gains Exemption

There is currently a $1,000,000 lifetime capital gains exemption with respect to any capital gain realized on farm property regardless of who the purchaser is. This consists of both a lifetime capital gains exemption, currently, in 2015, $824,176, but indexed for inflation, and an additional exemption introduced in the 2015 budget for qualified farm properties, which brings the lifetime capital gains exemption for the sale of qualified farm property to $1,000,000. Once the indexed lifetime capital gains exemption reaches this $1,000,000 threshold, the exemption will index with inflation. To qualify for this exemption the land and equipment must be qualifying farm property. This exemption will also apply to shares of family farm corporations and interests in family farm partnerships. Treatment of farm property varies, depending on when the property was acquired.

The test for how long the property must have been used in farming is different for property owned prior to June 18, 1987 than for property acquired after June 17, 1987.

Deemed Disposition at Death

An individual is deemed to dispose of all the property that he or she owned immediately prior to death. This means that at the date of death all land will be deemed disposed of at its fair market value. There are two specific exceptions to this rule. The first is that any property left to a spouse will be considered to be sold by the deceased at his or her cost base, thereby ensuring that there will be no capital gain on the death, unless an election to the contrary is made. A similar rollover applies to farm land left to a child. In that situation the land is deemed to be disposed of at the seller's cost with no gain realized.

These two exceptions ensure that there is no gain at death unless an election to realize the gains has been made, and defer that gain until the spouse or child disposes of the property or until they die. For this purpose the spouse and/or child will "inherit" the seller's cost base and be subject to the gain that has been deferred, plus any gain which subsequently accrues to the land by virtue of appreciation in value during their lifetime.

With respect to deemed dispositions at death, as the GST only applies to sales made in the course of the business, a deemed sale on death will not be taxable. Further, the testamentary gift of the property will also not be considered to be a disposition in the course of business and will likewise not be subject to GST.

Change in Use

A sale is deemed to occur where the use of land changes. For instance, if land is purchased for personal use and is subsequently used in a business of the taxpayer, there will be a deemed disposition at fair market value at the date of the change of use. This could create a capital gain if the change is from personal use to business use. If the change in use is from business use to personal use it could also create recaptured depreciation.

Change of use occurs most often with respect to individuals owning land. Often the deemed sale on the change of use by an individual will go unreported, because the individual will not change title to the property and will therefore not seek professional advice. This can result in a reassessment some years later from CRA. It is therefore incumbent upon advisors, when advising persons who are retiring from business but holding onto the real property involved, that there might be a change in use from a business use to a personal use, which could trigger tax. This deemed sale will not occur where an individual rents real property to a successor in business. It would occur, however, where the property is retained and turned into a personal residence.

The GST will apply to changes in use when the change in use is from business to personal use or from personal to business use. This obligation to pay tax when no actual proceeds have been received can cause cash flow problems.

Involuntary Sales

An individual must report capital gains or recaptured depreciation on involuntary sales of land. Involuntary sales of land typically occur where the property is destroyed by fire or some other calamity, is expropriated, or is foreclosed or sold by a lender. If the property is destroyed and

insurance proceeds are received, the insurance proceeds will be considered to be the proceeds received on disposition and all appropriate calculations will be made. The same rule applies with respect to expropriation proceeds. If it is foreclosed, there will be a deemed disposition at fair market value. If sold by judicial sale, the disposition will generally be at the sale price.

Typically insurance adjusters can resolve the value of the real property fairly quickly and payment can be made within a reasonable amount of time. Valuing the real property on an expropriation, however, can take several years. Typically there is an expropriation order, and an initial offer made by the government authority involved. It is not unusual for this offer to be refused and for there to be litigation with respect to the valuation of the property. It can take some years before final expropriation proceeds are subsequently determined.

3. The Sale Process

a. Determining a Price and Terms

Once you have decided to sell, your first step may be to determine your asking price, by having your land appraised. You can pay a land appraiser to do so or you can have a real estate agent determine the market value. At this point, you should be able to decide what price you want to ask for your land, what price you will settle for and on what terms (ex., possession date) you will sell.

b. Listing with a Real Estate Agent

The job of a real estate agent is to bring buyers and sellers of property together. The listing agent acts as the seller's representative during the sale. The buyer's agent represents the interest of the buyer. An agent may act in both capacities. As a seller, you should expect your real estate agent to work for your best interests. He or she is obliged to:

- Honour your lawful instructions;
- Do his or her job competently;
- Make best efforts to get the highest possible price for your land; and
- Tell you anything that is to your advantage (For example, the agent might know of someone who would make you a higher offer than the one you have already received).

Real estate agents may approach you with their services. Before you choose, shop around. Look for an agent that has experience in farm property sales, or better still, one that specializes in farm real estate.

The Listing Agreement

Once you choose your real estate agent, you must sign a "listing agreement". This is a binding contract between you and the brokerage that the agent is associated with. It lists the terms under which the company will try to sell your property.

One of the major components of the listing agreement is the “listing period”. This is the length of time your agent has to find a buyer in order to collect the commission. Most listing periods for farm land are between three and twelve months. Your listing period should only be for as long as you are prepared to commit yourself to the particular agent and selling on the terms specified in your listing agreement.

The listing agreement also includes:

- a description of the land being sold and what is, or is not, included with it;
- an acceptable price and special or available sale terms;
- a possible possession date; and
- the real estate brokerage’s commission fee and when it is payable.

There are three types of listing agreements:

Open Listing: Where an owner gives one or more agents the authority to find a buyer for the property, while the seller reserves the right to try to sell it themselves. These are more common with commercial properties. These agreements may be written or oral. The terms usually allow the agent to bring buyers to view the property and require the owner to pay commission if the agent is successful in selling the property to that buyer. This type of listing cannot appear on a multiple listing system.

A variation of the open listing is a "fee agreement". This is most often used between a realtor and a "by owner" seller where the realtor has a specific buyer in mind for the property, and approaches the seller for agreement to pay a fee if that buyer becomes the purchaser.

Exclusive Listing: This form of listing gives one brokerage the authority to act on the seller's behalf. "Exclusive" does not mean the brokerage can unilaterally keep the listing to itself and prevent other brokerages from showing or selling the property, unless the client has very specifically requested such an arrangement. While most sellers want the best exposure possible, there are circumstances where a seller may have need for privacy or wish to exclude all other brokerages from conducting showings and bringing offers.

Multiple Listing Service Listing: The Multiple Listing Service (“MLS”) is a cooperative arrangement managed by real estate boards as a service to their membership. The system enables realtors to cooperate in the showing and selling of properties listed by all other realtors thereby encouraging transactions between clients of all the cooperating brokerages. This system can be an advantage to a seller wanting wide exposure for the property. This system is now accessible to “by owner” sellers through agents who charge a set fee for accessing and posting advertisement of the property for sale on the system.

Paying the Agent

A real estate agent is always paid a commission for his or her services. It could be a fixed amount or, more commonly, a percentage of the sale price. Commission is payable only if the property is sold in the specified listing period.

The agent is usually paid when the sale is closed (completed). The commission will be paid out of the sale proceeds and go directly to the agent, via your lawyer. If the selling agent is different than the listing agent, each agent will receive one-half of the agreed upon commission. The seller will pay the entire commission to the listing agent. The listing agent will forward to the selling agent, their one-half share.

You must treat your agent fairly and ethically. You cannot make a private deal with a buyer while the listing is in effect to accept his or her offer after the listing agreement has expired in order to avoid paying commission. If a buyer approaches you after this period, before you agree to sell your land, obtain proof such as a signed statement that he or she was never referred to you by the agent. You may have to pay a commission if you sell your land within a few months after your listing period expires. The “holdover” clause must be a specific term in the agreement in order for it to be applicable but this type of clause is a standard clause included in standard listing agreements.

Problems with your Realtor

If you have a concern about the services which have been provided by the realtor, you should consider the following options:

- First discuss the concern with the realtor involved;
- Raise your concern with the designated broker of the brokerage;
- If your concern is with respect to a financial matter or a civil claim for compensation, you should seek legal advice as to your rights and obligations; and
- If your concern does not involve a claim for compensation but is an ethical concern, you can direct a written complaint to the Alberta Real Estate Association for review.

c. Purchase and Sale Contract

Offer to Purchase

In order for an agreement for the purchase and sale of land to be legally enforceable, the buyer and seller must sign a written contract containing sufficient essential terms. If a real estate agent is involved then the agent will usually negotiate on behalf of the seller, and any buyer’s agent may negotiate on behalf of the buyer. The lawyers for the parties may be involved at this stage.

Most commonly the buyer will formally propose to buy the seller’s land by making an offer, which is most often in the appropriate standard written form used by agents for farm property, with many standard terms and conditions, and any special terms and conditions added. Once the seller signs their acceptance (which may follow counter offers and amendments to reach a final agreement), both parties are bound, and the signed agreement is a Purchase and Sale

Contract. This agreement is not just a preliminary or interim contract with final details to be worked out later (unless, of course it says just that as to any of its parts). It is therefore important that all necessary terms and conditions be included and set out with certainty. The agreement is what it expresses, not what either party understands it to express.

You are cautioned against using a "standard" pre-made offer to purchase or contract form which you find on the internet, got from a neighbor, or prepared from an old form relating to a transaction you were once involved in. The standard agricultural property contract forms published by the realtor associations and used by real estate agents may be quite adequate for a very ordinary sale of farm land and the related residence, but many farm sales are not at all "standard". Each is unique and, ideally, the contract should be prepared by a lawyer.

The offer to purchase should contain:

- Full names and addresses of the buyer and the seller;
- A legal description of the land;
- A list of all non-fixtures being included in the sale;
- The price being offered;
- The amount of deposit accompanying the offer, who will hold it, and on what terms;
- The date the offer was made and a deadline date for acceptance;
- The conditions accompanying the offer;
- The Closing and Adjustment dates; and
- Any other terms and conditions of sale (see requirements of a valid contract later in this guide).

Conditions

The offer to purchase can be drafted by either of the parties, a lawyer, or the real estate agent. If a lawyer is not involved in the drafting, it is wise to have it reviewed by a lawyer before you sign. If it is not possible to get a lawyer's advice due to time or other constraints, the buyer can put a condition in the offer that says it is valid "only upon approval of the buyer's lawyer". If the lawyer later does not approve, the offer can be cancelled, even if the buyer has already accepted it.

There are other conditions that can be written into an offer to purchase, and the document then becomes a "conditional offer to purchase". Other conditions might be that the buyer first sells his or her existing property, or that the sale is valid only if the buyer can arrange satisfactory financing. If the conditions in the offer are not met, the sale will be automatically cancelled and the buyer's deposit money will be returned.

The seller should insist a time limit be put on the satisfaction and removal of any conditions in the offer to purchase. Otherwise, the conditions will be presumed to expire on the date that the

property passes to the buyer (the “closing date”). If, on the closing date, the conditions are not met, the sale will be cancelled.

The range and type of possible necessary or advisable conditions is limitless. In the case of farms, with the variety of strict regulations that apply to many types of operations, the buyer must consider conditions of such things as system inspections and certificates (ex., septic, manure storage and disposal) and approval for transferring or obtaining permits and licenses (ex., water, confined feeding operations).

Acceptance

The offer to purchase must be accepted in the exact form it is presented within the time limit specified. After the expiry date, the offer is automatically over.

Once there is a binding contract, if either party fails to conclude the sale, that party can be sued in the courts for “specific performance” (a court order forcing completion of the sale, and enforcing possession of the land), damages for breach of contract, and costs of the court action. A buyer can lose their deposit if they are the defaulting party, and also be sued for any additional losses of the seller above this amount.

The contract, once accepted, cannot be changed other than by mutual formal agreement of both parties to amend it.

d. Requirements of a Valid Contract

A contract for sale must contain several elements in order for it to be legally enforceable.

Consideration

A contract is a bargain and in order for it to be enforceable, both parties must pay a price. That is, each must do something in return for something to be obtained from the other party. In legal language this price is called “consideration”. In a land sale, the seller gives the buyer title to land as consideration for the buyer’s payment of the purchase price.

Intention to be Legally Bound

Before a contract is legally enforceable, both the buyer and the seller must intend to create a legally binding agreement. If there is a dispute on whether it is binding, and the agreement is not clear in its terms, a court may be called upon to decide this issue. For most purposes in Alberta, oral contracts for the sale of interests in land, or to encumber land with financial obligations, are not legally enforceable, regardless of intention.

Legality

A contract must be legal to be enforceable. That is, it must not go against common law, written laws, or “public policy”. Examples of illegal contracts for the sale of land are:

- Those that sell more than the prescribed amount of controlled land to an ineligible person; or
- Those that do not have the Dower Consent of the seller’s spouse if the seller was indeed selling their homestead property.

Certainty of Terms

An offer to purchase cannot be validly accepted, and cannot form a valid contract, if its terms are uncertain – that is, if any important terms are missing altogether, are not stated clearly, or are left to be agreed upon in the future. For land sale contracts, for example, the most essential terms are:

- The exact parties to the agreement;
- The exact legal descriptions of the land being sold; and
- The purchase price, and how it will be paid.

If any of these have been left out, the sales contract will be void, before even considering any other matters.

Terms to be Included

Besides the three essential terms listed above, you need to include other terms in your contract for sale of farm land in order to make it as clear and complete as possible. These will be in your original offer to purchase. Some that might be included are:

- Date the offer expires;
- Terms of payment;
- Whether the buyer will take over the present mortgage or take out a new mortgage;
- Amount of deposit required with the offer;
- Provision for the return of the deposit if the offer’s conditions are not met;
- A list of non-fixture assets being sold with the land, and the value of each (portion of total purchase price each asset represents);
- Provision allowing the seller to keep anything that would normally pass to the buyer with the land (fixtures);
- “Closing date” - the date that the buyer receives possession of the property and the seller receives the purchase price;

- “Adjustment date” - the date that the buyer must begin paying for all items that the seller has paid for in advance or up to that time, such as land taxes and utilities. This date is often the same date as the closing date;

- Conditions of the sale such as the buyer getting satisfactory financing;

- An expiry date for each condition;

- Provision that the person protected by a condition may waive the condition – for example, the buyer may decide to close the sale even though a condition they imposed had not been met;

- Provision allowing the seller an ongoing right of access to the property after it is sold – for example, the right to continue storing grain in the bins on the property;

- Provision as to whether existing leases will be assigned to the buyer or must be terminated by the seller;

- Provision as to who is going to pay for the legal fees and disbursements (out of pocket costs) for transferring the title and registering the mortgage at the Land Titles Office;

- Who will carry the risk of the property being damaged between the date the contract is signed and the date the sale is complete, and what will happen if significant damage occurs;

- Whether GST is payable to the seller for payment to CRA, or treated as an input credit by the registered buyer; and

- A provision that interest will be paid to the seller if payment of the purchase price is delayed past the possession date by the time necessarily required for registration to be completed by the Land Titles Office.

If the sale is being financed by the seller, these terms should appear in the sales contract:

- Down payment required, if any;

- Size and schedule of payments; and

- Interest payable, and means of calculation.

Because each sale is unique, your sales contract will probably contain some terms not listed here – terms that reflect your particular circumstances. Ensure that <u>all</u> of the details of your agreement are included, and that they are clearly stated.

e. **Financing The Purchase**

One of the most important aspects of negotiating a farm sale is how the purchase will be financed. This discussion focuses on the legal aspects of financing the purchase, including the legal obligations of the buyer and the seller to one another.

Deposit v. Down Payment

A deposit is a sum of money that the buyer gives at the time of signing the offer to purchase to show the offer is serious. If the sale goes through, the deposit goes toward the purchase price. It is not required by law, but a prudent seller should insist on one, and in an amount that satisfies the seller as to the seriousness of the buyer's intentions, and the sufficiency of the amount as compensation to the seller if the buyer does not honor the contract. On the buyer's side, the deposit should be paid, in trust, to a real estate agent or lawyer, to ensure it is available for refund if the purchase is not completed. Generally, is the seller backs out of the sale, or the conditions are not met, the deposit is returned to the buyer. If the buyer wrongfully backs out of the deal, the seller will keep the deposit as compensation.

The "down payment" is the difference between the adjusted gross purchase price and the net amount the buyer receives as financing from their mortgage lender, and includes the deposit. The minimum amount will depend on the maximum amount that the lender is prepared to lend (usually a set percentage of value that varies with type and nature of the property) with the property as its security. A buyer may, from their viewpoint, want to also add their other costs invested (legal, appraisal, inspections, and the like) as additions to this, to determine the total amount of cash required to complete the purchase.

New Mortgage

The most common way of financing a land purchase is by way of a new mortgage. When you arrange a new mortgage with a financial institution (lender), you enter into a contract which gives both you and the lender certain legal rights and obligations.

As the borrower, you receive a loan of money, in return for which you make a personal promise to repay the loan and pledge the land you are buying as security or collateral. By this pledge, you give the lender an interest in your land.

The lender will secure this interest by having the mortgage registered as an encumbrance on your Certificate of Title. This does not mean that the lender owns your land – you will appear as the owner on the title.

In Alberta, the *Law of Property Act* largely governs the rights of the lender if you do not meet your obligations under the mortgage – such as not making the required payments, failing to pay property taxes, failing to maintain required insurance, or allowing the land to deteriorate from lack of maintenance ("default"). Upon default the lender can issue legal action in the court for "foreclosure and sale". The lender may or may not have rights to obtain a money judgment, as well as selling or taking your land, depending on the type of mortgage and whether the lender also took other security, such as security against non-land assets. If there is significant value in your property above the amount owing to the lender, the court will usually give you substantial time (up to a year or more) to sell it yourself, refinance it in order to pay out the lender, or otherwise remedy the default. If not, at some point, the court will order it sold by judicial sale (most often by listing with a real estate agent on behalf of the lender) or foreclosed (title and

possession transferred to the lender). The law in Alberta is, in comparison to most provinces, quite protective of the situation of farmers in these circumstances, but it is highly recommended that you seek assistance from a lawyer in any such situation.

If you comply with the terms of your mortgage, you are entitled to use the property as you wish without interference by the lender. When you have completely repaid the mortgage, the mortgage contract ends, the lender has no further rights to your property, and a discharge must be registered.

As a buyer, unless you happen to have the sufficient disposable cash, you should always make your offer to purchase on the condition that you can obtain satisfactory and sufficient financing. If you cannot obtain financing before the date specified, the condition will not be fulfilled and the sale will not go through.

Buyer Assumes Existing Mortgage

If the seller has not fully paid for the land you are buying, you may be able to take over the seller's mortgage instead of arranging a new one. To do so, you must have approval of the seller's lender. Some lenders will not allow mortgages to be assumed, and, in any event, if you are approved, will impose significant costs and documentary requirements.

With interest rates being low, this option is less common than it was in the past. This is advantageous if you would be unable to obtain a new mortgage with the same or a lower interest rate than the existing mortgage, and you have the cash resources or other financing to pay the difference between the price and amount assumed.

If the buyer assumes the seller's mortgage, the seller must ensure the financial institution specifically releases the seller from the mortgage obligations. Otherwise, the seller could still be held liable for the debt, if the buyer fails to pay.

Seller takes back a Mortgage

When the seller "takes back a mortgage", he or she gives the buyer a loan toward the purchase of the land. The loan could be for the total purchase price or a portion of it. The buyer then makes the mortgage payments to the seller, who has the same rights of foreclosure as any other lender.

In order to ensure the seller has all of the rights of a lender, a mortgage should be prepared by a lawyer and registered against the buyer's title in the Land Titles Office.

In this scenario, title is transferred to the buyer on the closing date. The buyer becomes the owner of the land subject to a mortgage in favor of the seller.

This type of arrangement is generally a disadvantage for the seller. The seller does not receive all of the purchase proceeds on closing. If the buyer fails to make his or her payments, the seller must proceed with foreclosure action. The seller is entitled to sell or repossess the property eventually through this process, but it can take a long time and involves substantial legal costs, which may not be recovered.

Agreement for Sale

An agreement for sale is a conditional sale that operates in much the same way as a mortgage back, with the seller financing the purchase and the buyer making payments over time. However, in this arrangement the seller remains the registered owner of the land until final payment is completed, at which point title is transferred. In the meantime the buyer has the use and possession of the land.

In this arrangement, the buyer protects their interest by registering a caveat in the Land Titles Office. A caveat provides notice to all of the buyer's interest in the land and ensures that the land cannot be sold to someone else before the buyer has had a chance to complete the purchase.

In Alberta there is no advantage in law for the seller in this arrangement, as compared to taking back a mortgage. The *Law of Property Act* treats this as if the buyer were the registered owner and the agreement for sale were a mortgage, and the process of foreclosure and sale to terminate the agreement, remove the caveat, and repossess or sell the land is virtually the same.

Interim Financing

A buyer of land will often be selling an existing property in order to acquire part or all of the funds required for the purchase. It is not uncommon at all for there to be delays in a seller receiving sale proceeds, past the agreed or anticipated closing date. This can be due to variances in time taken for the Land Titles Office to register documents after they are submitted, lender delays in forwarding funds to the buyer's lawyer, and other factors.

Unless the buyer does not need sale proceeds from another property to close, or the sale and receipt of proceeds from the other property is certain to have occurred before the purchase must be closed, then the buyer may need to obtain interim financing to ensure that their purchase can proceed. This usually takes the form of a short term line of credit or loan with the lender taking an assignment of proceeds from the buyer's sale, and perhaps also a second place charge on land being purchased, as its security for repayment. The lender may require registration of a caveat or caveats against one or both properties until it has been repaid.

f. Obtaining Clear Title

Encumbrances

An "encumbrance" is a charge or claim against title to a piece of land. For example, if a landowner uses his or her land as collateral for a mortgage, the mortgage will be an encumbrance on the owner's title until fully repaid.

Encumbrances on a seller's title do not disappear simply because the land is being sold to you. If the title carries encumbrances, you may not be able to get full ownership and control of the land. As a buyer, you must find out whether there are any encumbrances and obtain removal of any unacceptable ones, before you arrange to receive title to the land. A statement in a purchase and sale contract that the property is to be sold "free and clear" of encumbrances is not a substitute to searching for and ensuring the encumbrances are cleared up by the seller prior to closing. While such a statement may give the buyer legal recourse as against the seller,

the buyer will still be responsible to and bound by the third parties who registered the encumbrances against the title.

Once you are aware of all existing encumbrances, you must decide which you will allow to pass with the title and which you will not accept. You should never agree to accept encumbrances on the title before having reviewed all of them with a lawyer.

The following list describes the most common kinds of encumbrances:

1. Mortgage – A mortgage on a piece of land gives the lender rights to the land, as security or collateral for a loan. You can find out about mortgages registered against the title by examining the Certificate of Title. The document will not show how much money is still owing on a present mortgage. The process of sale and transfer of title must ensure that any mortgages are paid out and discharged. This is usually provided for expressly in the Purchase and Sale Contract.

2. Lease – A person with a valid lease to a piece of land may have the right to continue occupying and using the land even after it is sold. If someone is presently renting land that you plan to buy, he or she may continue until the lease runs out if the lease is for three years or less, or if it is for more than three years and is registered at the Land Titles Office. Since a lease for less than three years does not have to be registered to be protected, you will have to ask the seller if there is one in existence, and investigate to determine terms and whether you will accept assuming it or insist on termination.

3. Property Taxes – Unpaid property taxes are a charge on land with priority over even registered mortgages, and do not need any registration, until and unless a " tax notice" is registered as the start of a process of collection by the municipality. You need to obtain a tax certificate from the municipality, and if there are overdue unpaid taxes, arrange for these to be adjusted as a debit to the purchase price and paid in full at closing of the purchase. The municipality can sell the land by a process under MGA if property taxes are unpaid after specified time periods, and the interest, penalties and costs that accumulate can be substantial.

4. Builders' Lien – This is governed by the *Builders' Lien Act.* Anyone who performs work or services or supplies materials in respect to almost any "improvement" to land and has not been paid can register a builder's lien against the title. If the owner does not pay their contractor, or a contractor does not pay its subcontractor or labourers, and such a lien is registered within the prescribed time period, the lien can be enforced by court action, which can include sale of land or materials. As a buyer you must ensure that any builders' liens are removed before or as part of the transfer of title. Otherwise, you may have to pay these claims yourself.

5. Notice of Security Interest – Under the *Personal Property Security Act,* someone who finances the purchase by an owner of an item which will or may become a fixture when it is delivered and installed, can register a Notice of Security Interest ("NOSI") on title to the land. Common things to which this would apply are mobile or "manufactured" homes, grain bins, or furnaces. If such a notice is registerable before the item which is the security for the financing becomes a fixture, then the NOSI has priority, for example, over a mortgage which would otherwise encumber the item as a fixture. If the owner fails to pay the financing, the holder of the NOSI can repossess, remove, and sell the item. Unless a buyer of land ensures the

NOSI claim is paid out and discharged (or assumes the financing as an adjustment to price and accepts the NOSI on title), they will have to pay or see the item lost.

6. Easements, Rights of Way, Encroachments – The nature of these interests was explained earlier in this guide. Usually they are registered, their nature and terms can be determined by obtaining and reading copies obtained from the Land Titles Office, and they are referred to in a purchase and sale contract as "non-financial encumbrances" which will remain on the title and bind the buyer. However, a buyer should never just assume the nature and extent of something from the short form notation on the Certificate of Title, and should read and understand the terms of each such interest before agreeing to assume them. For example, if the pipeline easement which is registered takes in an area where a buyer plans to build a structure, they will not be legally able to place that structure in that location. Encroachments and some easements may exist without being registered. Generally, easements which are not disclosed or readily apparent by physical inspection will not bind a buyer in Alberta, and if the neighbor's structures encroach on your land you can force removal or put an encroachment agreement in place. Where there is uncertainty, obtaining a report by a qualified land surveyor is recommended.

7. Caveat – A caveat can be registered on a title to notify everyone interested in the title that there is or may be a claim or interest. Almost any kind of lawful and valid claim or interest in land can be involved. Some may only be registered in this way, and some things that can be otherwise registered can optionally be registered by way of caveat. Some of the claims that can be registered by caveat are:

   a) Leases;

   b) Dower or matrimonial property claims;

   c) Unregistered mortgages or agreements charging land in a similar way;

   d) Options to purchase or rights of first refusal;

   e) Easements or rights of way and encroachment agreements;

   f) Agreements for sale;

   g) Unpaid vendor's liens;

   h) Restrictive Covenants;

   i) Surface Leases; and

   j) Various municipal claims such as reserved rights to acquire part of the land relating to past or future subdivision.

If there are valid caveats registered against the title when it transfers to you, you will be legally obligated to honor these claims and interests. It is common, through past carelessness of previous owners, for caveats which relate to expired claims, or which are simply invalid, to exist on farm land titles. Thus, before taking title, a buyer needs to ensure arrangements for discharge of any caveats they are not prepared to accept.

8. Certificate of Lis Pendens – If there is an outstanding court action against an owner of land in which an interest is claimed or a claim is sought to be enforced, the person suing ("plaintiff" or "applicant") can register a Certificate of Lis Pendens against the title. This is most common in respect to mortgage foreclosure actions, builders' lien actions, and matrimonial property actions. This notice warns anyone, including a buyer, that the ownership rights in the land could be lost, in whole or in part, by a court judgment enforcing the pre-existing rights in question. A buyer should, obviously, never take title without arrangement for discharge of such a registration. If a buyer does so, quite aside from the threat to ownership, the buyer can face becoming a named defendant in the legal action.

9. Writ of Enforcement – If a money judgment of a court has been granted against a registered owner, or the holder of an ownership interest (ex., a purchaser under a caveated agreement for sale), a writ of enforcement can be registered on title. To the extent the land is not "exempt", it can be sold towards payment of the judgment. Thus a buyer must arrange for payment and discharge of the writ before title is taken.

Searching the Title

In Alberta all information relating to registered land ownership is public and a "title search" can be obtained at any licensed registry office, from any lawyer who subscribes to the system, or directly from the Land Titles Office. A first step in any purchase of land should be to obtain a title search of all lands involved and to ensure it includes all the titles indicated. Owners, as sellers, for example, often will describe their land simply as a quarter section (160 acres) parcel (ex., "NE 24-13-18-W5"), when, in actuality, it may be one or more parcels in that quarter section with different legal descriptions, due to historical subdivision (these may be "Plan X, Lot Y..", which is noted as "excepting thereout" on the base quarter section title). This is usually easy to determine by comparing "what is on the ground" to the title descriptions.

A competent real estate agent who has the listing will have this in hand for review. It is wise to have your lawyer confirm the information, review the title, and review and explain the type and nature of all encumbrances before you prepare and present an offer to purchase.

If any of the titles involved are described as "Plan..", you, or your lawyer, can also obtain a copy of the actual registered survey plan of the parcel, showing its precise measurements and boundaries, from the Land Titles Office, and it is wise to do so, in order to compare this to what was represented to you.

g. Transferring a Title and Closing the Sale

The last stage in the sale of farm land is transferring the title and ownership of the land from the seller to the buyer. The legal name for this transfer process is "conveyancing".

It should be noted that at the time of preparation of this guide, the Alberta Land Titles System is in the process of transferring to "electronic registration", initially as to transfers and mortgages. This will change the process of conveyancing as between lawyers for buyers and sellers in terms of some re-ordering of steps and terminology. However, the basics of the process of ensuring that the buyer and seller rights and interests are protected and observed will not change.

Steps in Transferring the Title

1. Searches and checks are completed – both parties should have checked into all aspects of the seller's title, including the status of existing encumbrances, and amounts owing of taxes, mortgages, and any other financial encumbrances. The seller must do everything necessary to make the title comply with all of the conditions of the sales contract, including eliminating encumbrances.

2. Statement of Sale and Adjustments – In the purchase and sale contract the seller and buyer will have agreed on an adjustment date. This is the date on which the buyer's responsibility to pay taxes and utilities, and to receive the compensation from such things as surface leases, will start. This will all be adjusted as debits or credits to the purchase price, depending on what is pre-paid (credit to seller) and what is unpaid (debit to seller). Usually the adjustment date is the same as the closing and possession date, but that is not always the case.

3. Seller delivers transfer documents – The seller's lawyer will prepare the transfer documents including the Transfer of Land (including a declaration of Canadian residency and any Dower affidavit or consent), a Bill of Sale for any non-fixture items, a form of GST certificate (depends on how GST is being dealt with), and any collateral documents such as an assignment of lease or surface lease, signed by the seller as required. These will be delivered to the buyer's lawyer upon express binding trust conditions limiting how and when they can be used, are valid, or must be signed and returned by the buyer. The seller's lawyer will also provide binding undertakings as to such things as the obligation to pay out financial encumbrances from the sale proceeds, obtain and register discharges, and provide a title search showing that this has been done.

4. Buyer signs mortgage documents, etc. – The buyer's lawyer (assuming the mortgage lender does not have their own separate lawyer, which is sometimes the case) prepares the mortgage documents in accordance with the lender's instructions. The buyer signs all these, along with signing those aspects of the documents delivered by the seller's lawyer that require the buyer's signature.

5. Buyer delivers "Shortfall" – The buyer pays the difference between the cash to close on the statement of sale and adjustments and the net mortgage proceeds to be received ("shortfall"), plus an allowance for estimated legal costs and for any interest that may be payable due to late closing, into trust with the buyer's lawyer. In some cases the trust conditions accepted between the respective lawyers may require the shortfall to be paid over to the seller's lawyer in trust before the transfer is submitted for registration.

6. Deposit – If a real estate agent is involved, they will retain the deposit until closing is confirmed and then apply it to the commission payable. If the deposit is more than the commission due, the difference will be paid over to the seller's lawyer. If the deposit is less than the commission, the seller's lawyer will pay the balance owing to the agent from the sale proceeds. If there was no agent involved then the deposit will be held by the seller's lawyer or buyer's lawyer as specified by the purchase and sale contract and applied or paid over on closing as is dictated by the respective entitlements.

7. Buyer registers documents – The buyer's lawyer will register the Transfer of Land, the new mortgage, and a "Foreign Ownership of Land Declaration" (a sworn declaration of the buyer that they are not ineligible buyers) in the Land Titles Office. The length of time it takes to

register depends on the volume of registrations “in the lineup”. In Alberta, over the last several years, registration has taken anywhere from one day to three weeks, to be confirmed. Registration fees are a set amount plus percentage amounts based upon value of land (for the transfer) and amount (for the mortgage), which varies from time to time with the applicable regulations.

8. Lender sends mortgage funds – Once registration is confirmed and the buyer’s lawyer provides the lender with a Certificate of Title in the buyer’s name, showing registration of the mortgage, and no prior registrations that are unacceptable and are not being discharged, the lender provides the net mortgage funds to the buyer’s lawyer.

9. Buyer pays cash to close – The lawyer for the buyer sends the cash to close (or the mortgage funds if the shortfall was previously paid over) to the seller’s lawyer, based upon the undertakings given by the seller’s lawyer – these are usually to pay out and discharge the encumbrances on title that must be removed. The seller’s lawyer advises the real estate agent (if one in involved) to release possession to the buyer. The payment of cash to close may be delayed past the date of possession due to delays in registration. Unless the buyer is required to purchase “title insurance” with “gap” provisions (this is obtained from private title insurers as insurance against intervening registrations), the buyer will pay interest on the cash to close to the seller, until payment occurs.

10. Seller certifies final title – The seller’s lawyer, from the sale proceeds, pays out all encumbrances that are required to be paid out, obtains discharge and registers them, and provides the required Certificate of Title, clear of non-accepted encumbrances, to the buyer’s lawyer. Whatever is left over, after deduction of the seller’s lawyer bills is paid to the seller. The buyer’s lawyer, in turn, certifies the final state of title to the lender.

This illustrates the basic process in Alberta, for a basic land transaction which does not involve the sale of farming business operations, grazing leases, or other licenses, permits, or substantial non-fixture assets. The process and the documentation and trust conditions involved will vary substantially according to the particular situation. There are often amendments to conditions, undertakings, and process along the way of any particular transaction.

The advantage of using lawyers to complete these processes, quite aside from their knowledge, expertise, and guidance, is that the “trust conditions” and “undertakings” that they utilize and give are backed up b**y** mandatory insurance and assurance. If a lawyer is negligent, breaches trust conditions, or fails in undertakings, their client will be indemnified for losses that result, by the insurer or the Law Society of Alberta.

h. Lawyer's Fees and Expenses

A lawyer who acts for a seller or buyer (and often also the lender) will charge fees for services, plus out of pocket expenses ("disbursements"), plus cost allocations for some internal services ("other charges"), and plus GST on the fees and most disbursements and other charges.

Fees may be based on a flat fee amount, which may be a percentage of the price included, or hourly rates for time spent on the matter by lawyers and paralegals. You should ask for an estimate of what you will be charged and an explanation of what will be included. This should ideally be set out in a written retainer agreement (which may be in simple letter form), which also makes it clear who is responsible for paying these costs and when they will be payable.

Disbursements include costs paid by the lawyer for postage, couriers, agents, search fees, tax search fees, and registrations at the Land Titles Office. The buyer usually pays the costs of registering the transfer and mortgage. The seller usually pays the costs of discharging existing encumbrances from the title.

Other charges include things like photocopying, document printing, and faxing tracked at a per item cost.

GST is charged and payable on all fees and other charges. Some disbursements, such as the cost of tax certificates and registration charges are exempt. If the client is a registrant, the GST can usually be recovered as an input credit on the next return to be filed.

Which party is paying which costs should be set out in the Purchase and Sale Contract.

i. Roles of Professionals in the Sale

There are a number of practical, legal and financial matters that you must consider in the course of buying or selling farm land. Because your personal circumstances are unique, you will want to plan your purchase or sale in a way that will best meet your particular situation. Qualified professionals can help you make the best plans. They will also help protect your rights and interests throughout the sale.

Lawyer

Because a land deal is one of the more serious and high-value transactions that you are ever likely to be involved in, it is highly recommended that you contact your lawyer before you sign any contract. As well, writing up a sales contract and transferring title is very complicated. Your lawyer has the knowledge and experience to do so in the manner that reflects your wishes. As well, he or she will take the proper legal steps to protect your rights throughout the sale. You should hire a lawyer who you feel is competent and conscientious.

Accountant

Your accountant can be very important to you before you sign a sales contract. He or she can help you analyze your financial situation, to see whether it is a good time for you to buy or sell. Your accountant will know all about the tax implications of your plans, and can discuss possible alternatives designed to save you tax dollars. He or she can also advise you on how best to finance the purchase or sale.

Real Estate Agent

Most land and house sales involve a real estate agent during the initial stage of the sale. He or she lists and advertises the land in order to attract buyers. When one is found, the agent may help complete the offer to purchase and take the deposit. A real estate agent helps the seller by taking away the work and worry of finding a buyer, or assists a buyer to find the right properties to consider. As well, the agent is trained to write up an offer to purchase that is complete and in satisfactory terms.

Lender

Your lender can help when it comes time to work out financing for the sale. As a seller, you can seek advice on the best arrangement for your purposes, especially if you wish to sell your land within your family. As a buyer, you can find out about the best mortgage for your financial situation.

Appraiser

You may wish to have a professional appraiser who is qualified to appraise farm land provide a report and opinion on values, from either the seller or buyer point of view, for a variety of reasons. A lender will normally require an appraisal report, either independent or from its own employed appraiser, in order to consider approval of mortgage financing.

Surveyor

A licensed Alberta Land Surveyor can certify locations of boundaries of land and all structures on land in relation to the boundaries and produce a “Real Property Report” in these respects. A buyer who is concerned about the actual boundary locations, and ensuring that structures on the land are completely on the land (or that neighbors’ structures do not encroach), and comply with all municipal requirements, will need one of these, and it is a common requirement of a Purchase and Sale Contract that one be provided. The lender may require this, along with a certification by the municipality, based upon such report, that all structures are permitted and comply with the applicable laws.

Other Professionals

There are a number of other possible requirements of buyers and lenders in a variety of situations. There may be requirements for certification of standards for septic systems, testing and certification of potability of well water or water treatment systems, structural integrity of buildings, and all such matters. These can involve a variety of professionals such as engineers, home inspectors, and laboratory testing technicians.

4. FREQUENTLY ASKED QUESTIONS

1. **Who is affected by the *Foreign Ownership of Land Regulations*?**
   This affects non-Canadian individuals and organizations or corporations that are controlled by non-Canadians. Unless an exemption applies or is obtained by application, they cannot buy or own controlled land consisting of a total of more than 20 acres in Alberta.

2. **Do I own mineral rights on and under my land?**
   Most mineral rights in Alberta belong to the government. You can determine this by looking at the Certificate of Title. If it says, as part of the legal description "Excepting thereout all mines and minerals" (or similar words), then unless you have a separate title to mines and minerals in the same land, you do not own the mineral rights.

3. **If I own my land jointly with my spouse, is my estate required to probate the jointly held land on my death?**
   No, jointly held land automatically vests in the survivor on the death of one joint tenant. Therefore, probating or administering the land is not necessary and will save your estate such costs.

4. **If I own the home quarter where my family residence is in my name alone, does my spouse have to consent to the sale of the land?**
   Yes. Your spouse has Dower Rights in the house and up to 64.75 hectares or 160 acres of surrounding land. As a result, your spouse must consent to the sale of and the mortgage of this land. If you have land in your name alone that is not your homestead, your spouse's consent to transfer the land would not be necessary.

5. **If someone is leasing my land and I sell the land, does the lease survive and continue after the sale?**
   It Depends. If the lease is for less than three years, the lease would continue after the sale. If the lease is for more than three years and registered in the Land Titles Office, the lease would continue after the sale. If the lease is for more than three years and not registered in the Land Titles Office, the lease would not continue following the sale.

6. **If I have a verbal lease with a landowner, what rights do I have if the property is sold?**
   Basically, you have no rights. The priorities provisions of the *Land Titles Act* only apply to "instruments", a term which in this context means a document in writing. It is very inadvisable to have a verbal lease as to farmland anyway, due to the potential for disputes as to essential terms.

7. **Is there an obligation to pay GST on the purchase of farmland?**
   Yes. Goods and Services Tax (GST) at the current rate of 5 per cent is required to be paid on the purchase of all commercial property. However, if the buyer is registered for GST, he or she will be able to claim the GST as an input tax credit and get the tax back at some point in the future. There is a self-assessing option which avoids having to pay the GST at the time of sale. A buyer must self-assess the GST and claim an input tax

credit on the GST return. The net effect is that $0 cash is actually laid out at the time of purchase.

8. **As a seller, will I receive the sale proceeds on the date of possession?**
   If registration of the transfer and mortgage at the Land Titles Office has not yet completed on the possession date, and the buyer has not obtained title insurance with "gap" coverage, this may be delayed. However, the buyer will usually have to pay interest on the cash to close to the seller until the date the buyer can confirm registration to their lender, obtain the funds, and make payment.

9. **How do I deal with caveats registered against title to the land I wish to purchase?**
   Some caveats may be registration of such things as easements or rights of way that do not really affect "clear title" and will remain after transfer. Others may be registration of leases, security for loans, options to purchase, and other things that the seller will have to remove in order to transfer title in acceptable form. These should be reviewed and dealt with by the purchase and sale contract. The lawyers involved will make secure arrangements to ensure that non-acceptable items are removed.

10. **Once an offer is accepted, can it be changed?**
    An accepted offer which meets the requirements of a valid contract cannot be changed without the mutual agreement of both buyer and seller. You should ensure the contract is complete and accurate in all conditions and obligations of both parties before it is signed.

11. **Should I list my property with a realtor?**
    A realtor has expertise in selling land. A realtor can provide a wide advertising exposure to your property through a multiple listing service. A realtor may be able to sell the property faster and on better terms than you could do on your own.

12. **Are there any benefits to selling my property by auction sale?**
    An auction sale accelerates the sale process as the seller knows exactly when their property will sell. An auction takes the seller out of the negotiation process. Your neighbours will all feel that they had an opportunity to purchase the land through a public auction.

13. **Does it matter how the sale price is allocated between land and buildings?**
    Yes. The seller will want less of the purchase price allocated to the buildings than to the land and vice versa. Both parties will have to reach an agreement on an appropriate allocation between the land and the buildings.

14. **Is Land Transfer Tax payable on the purchase of farm land?**
    There is currently no land transfer tax in Alberta. However, the fees payable to the Land Titles Office increase with value of the land and amount of the mortgage and can become substantial.

15. Can I sell part of the titled parcel and retain the rest?

You cannot subdivide land without the required municipality's formal approval and registration of an approved plan of subdivision to create the two or more new or amended titles. Approval may not be available at all, or for particular subdivisions.

5. Appendix

Visit the Service Alberta

Land Titles website http://www.servicealberta.gov.ab.ca/housing-property-utilities.cfm

Queen's Printers – Laws on Line http://www.qp.alberta.ca/570.cfm

6.Acknowledgment

- Adapted from

  A Legal Guide to Farm Land Ownership in Manitoba
  Manitoba Agriculture, Food and Rural Initiatives

- Reviewed and Prepared by

  Ian Logan and David Archibold, Barristers & Solicitors
  Sharek Logan & van Leenen LLP
  Edmonton Alberta

- Reviewed and Prepared by:

  Alberta Agriculture & Forestry
  Livestock Research and Extension Division
  Livestock and Farm Business Branch
  7000 – 113 Street, Room 200
  Edmonton, Alberta T6H 5T6

  Rick Dehod, Farm Financial Specialist