The Real Estate Solicitor's Last Stand: *Vendors and Purchasers Act* Applications

EMERGING ISSUES IN REAL ESTATE

presented by:
The Hamilton Law Association

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The Real Estate Solicitor's Last Stand:
***Vendors and Purchasers Act* Applications**

The *Vendors and Purchasers Act* R.S.O. 1990 c. V- 2, as amended, (the "Act") is a tool codified by statute to assist parties to a contract for the sale and purchase of land, and their solicitors, in adjudicating title disputes arising under the contract. Very seldom to opportunities present themselves to cure or resolve disputes between parties in a summary and relatively cost-effective manner and prior to a full-out litigious war. The Act, when used properly and after canvassing whether it should be applied to a given situation, is such a tool that should be in the minds of all real estate practitioners. This paper sets out a brief overview of the structure of the Act, with an emphasis on section 3 applications; it then identifies how such applications have been judicially considered and what considerations should go into a decision to apply under the Act for relief. Precedent application materials predicated on a hypothetical situation are included for reference.

A. Overview of the Act

The Act can be divided into three component parts: i) sections 1 and 2, which address matters of conveyancing and evidence; ii) section 4 which provides contractual 'deeming rules' relating to contracts for the sale of land; and iii) a summary application to the Superior Court of Justice to adjudicate responses to requisitions, objections or claims for compensation arising under the contract for the sale of land.

1. Deeming Rules—Evidence

Sections 1 and 2 of the Act assist in resolving matters of conveyancing and evidence by deeming certain facts to be true if contained in a recital or registered statement that is at least

twenty years old, unless proved to be inaccurate. The Act also deems references to memorials greater than twenty years old as evidence of their former existence. The assistance rendered by the Act in a forty-year search of Registry records is readily apparent: where, for example, no affidavit of marital status is registered but a recital refers to the vendor as a widow, the Act can apply to help feed title. These sections of the Act would appear to have limited immediate utility given certified title under the *Land Titles Act,* coupled with reliance on law statements in electronic conveyancing; however, the scope of the Act extends beyond such matters and can also assist in meeting evidentiary thresholds in litigation[1].

2. Deeming Provisions of Agreements of Purchase and Sale for Land

Section 4 of the Act provides for six terms to be included in all agreements of purchase and sale, unless the contract stipulates otherwise. Most of these have been inserted into the standard form of contract published by the Ontario Real Estate Association ("OREA")[2]. Generally, however, the purchaser has thirty days to submit requisitions on title. There has been a trend in the market recently to complete transactions quickly and real estate agents, who draft the majority of agreements of purchase and sale in Ontario, often reduce this requisition period to less than one week before the completion date. This has the effect of nullifying subsection 4(c) under the Act in favour of the shorter time period found in section 8 of the OREA form of agreement; the consequences, as discussed below, can be fatal to the agreement if a true objection to title is raised.

3. Applications to Resolve Requisitions

Much consideration has been given to section 3 of the Act, and indeed the bulk of this paper concerns it. The Act allows vendors or purchasers (and others as discussed later[3]) to apply to the Superior Court of Justice in a summary manner to have a judge resolve

requisitions/objections to title arising under the contract for the sale of land. The entire section is reproduced for convenience:

> *3(1). A vendor or purchaser of real or leasehold estate or the vendor's or purchaser's representative may at any time and from time to time apply to the Superior Court of Justice in respect of any requisition or objection or any claim for compensation or any other question arising out of or connected with the contract, except a question affecting the existence or validity of the contract, and the court may make such order upon the application as may be considered just.*

The Act has existed nearly in its present form for a century and the treatment of these applications, often known as "V & P Applications", has been sculpted by many judicial considerations, albeit sometimes inconsistent as discussed below. This treatment must be carefully examined to glean the true benefits of the Act and to properly advise one's client of the suitability of such an application.

B. Treatment of Orders under the Act

Orders under the Act have had numerous treatments throughout the decades and as such there is jurisprudence to shape legal requirements and limitations, particularly whether such Orders affect only the parties or the world at large.

1. No Factual Dispute

The general prerequisite to bringing an application under the Act is that no significant or material fact can be contested. This is not the proper forum to determine whether or not the Agreement of Purchase and Sale is a valid contract[4]. As such, the application should identify, by factum or affidavit, the requisition as posed to the vendor's solicitor and the vendor's response so

that all necessary facts relevant to the judicial decision are provided and agreed between the parties.

2. No Jurisdiction to Extend Contractual Timing

A Judge does not have the authority to amend or disregard the contractual completion date and, as such, a V & P Application must be brought before that specified date[5]. This has practical implications as to whether a party has time to bring such an application at all. Also, as real estate transactions are often negotiated and assembled by real estate agents and brokers, and depending on the nature of the market, there is occasionally only a few days between the requisition date and the closing date, rendering the time to bring an application difficult. The parties must consent to an extension of time under the agreement for an application to be heard beyond the contractual completion date.

3. *De Facto* Order for Specific Performance

Because the factual validity of the contract is not an issue (as a prerequisite for bringing an application under the Act), it has been held that an Order under the Act can be a *de facto* substitute for an action for specific performance. The court may order that the response to a requisition was proper and the purchaser must therefore complete the contract. Where the purchaser fails to do so, it is not necessary to bring a further action for specific performance[6], since the ruling, binding between the parties, serves to confirm existence of the contract and the purchaser's breach thereof, assuming no matter other than the title defect factored into the breach.

4. Return of Deposit

A judge has the authority and jurisdiction to order the return of a deposit to a purchaser who has been successful under an application; however, this authority only comes as a natural

consequence of the purchaser's victory[7]. If the response to the title requisition was insufficient and the vendor is not prepared to satisfy the objection, the agreement is terminated for failure to provide clear title. The application judge can order the return of a deposit only because the dispute is limited to the issue of title.[8] Other relief that a purchaser may seek, such as rescission, which depends upon an adjudication of other aspects under the contract or a party's conduct, must be the subject of an independent action. As a result, a determination of issues under the Act may be plead in subsequent actions or applications for alternative relief; it has been held that *res judicata* does not apply to an application under the Act.[9]

5. Order Under the Act as a Remedy *in personam* or *in rem?*

The largest issue that has been inconsistently applied among the jurisprudence is whether an Order under the Act is a remedy *in personam* or a remedy *in rem*.

i. Distinction

A remedy *in personam* grants a litigant a personal right; thus, the remedy is specific to a person, as in a contractual right. A remedy *in rem* affects the entire world and is thus applicable to future litigants in similar circumstances. As a generalization, remedies *in personam* affect contractual interpretation while remedies *in rem* affect rights against property. Because an application under the Act interprets contractual rights for real property, the distinction between the effect of an Order under the Act as being *in personam* or *in rem* has been blurred.

ii. *Stare Decisis* Value

Judgments *in rem* are generally said to have s*tare decisis* or precedential value. An *in rem* judicial Order applies to other litigants in similar circumstances and would be binding upon them, particularly if promulgated by courts of higher jurisdiction. Remedies *in personam* are merely persuasive and are not binding on other parties. The purpose behind the Act and the

intention of bringing a summary application under section 3 is to determine whether a vendor has the *contractual* obligation to rectify title. As such, and as a tool of contractual interpretation, a decision under the Act is a remedy *in personam* and only affects the named litigants: it is not binding on other parties with similar properties and situations[10]. Notwithstanding this, a number of decisions based on previous Orders made pursuant to the Act have cast some doubt on the proper treatment of these decisions.

iii. Registration of Order on Title

By registering an Order of the court on title to the affected property, it appears that the decision binds the land and runs with it forever, barring a similar requisition being made in respect of title to that specific land. A decision under a V & P Application does not bind the land[11], as the court does not speak to the land but rather the parties' obligations to take title to it. Because the decision is registered on title, it does not imply that the decision affects the world at large; it only impacts those who transact with that affected land: a monument of a resolved dispute.

The court's decision in *Ferguson v. Niagara Falls (City)* (1994), 21 O. R. (3d) 776 (Ont. Gen. Div.) appears to challenge the *in personam* nature of the Act's relief[12]; in that case, the court sought to enforce a previous order under a V & P Application against a party not named in the original application. Courts have held that for a decision under the Act to apply to third parties, they ought to be joined in the application.[13] Thus, while the Order binds the litigants and consequently affects the lands in question, the decision remains only persuasive as against third parties in similar circumstances.

iv. Obiter v. Ratio

A judge is not bound by the decision of another judge under the Act.[14] The law surrounding a judicial decision as to whether the requisition was properly answered, may be canvassed by other judges on other applications as persuasive argument, but a decision of a judge on an application under the Act is not considered binding.

C. Considerations in Bringing a V & P Application

There are a number of considerations that must be addressed prior to bringing and during the course of an application under section 3 of the Act. A number of these are discussed in turn.

1. Timing

Because a V & P Application must be brought and resolved prior to the completion date under the Agreement of Purchase and Sale, there must be sufficient time to search title, formulate requisitions and obtain a response from the vendor's solicitor. It is proper to allocate at least one to two weeks to assemble, serve and speak to the application, even for a summary matter. Solicitors should inquire of the local court Registrar on a regular basis as to when judges or masters are scheduled to hear applications to be prepared for possible applications on short notice.

2. Costs

Most solicitors do not contemplate bringing or responding to an application under the Act and their retainer and fee quote do not typically include these costs. As such, the cost of appearance should be canvassed with the clients the moment the possibility of an application arises and to adjust the retainer accordingly. Like other litigation in Ontario, costs of the application can be requested of the Judge hearing the application; however, many decisions have

not addressed the issue of costs, preferring to leave the issue to the parties. In many cases, the fact that the court is called upon to adjudicate a title dispute may warrant that the parties absorb their own costs.

3. Advice to Client

It has been held that a lawyer must advise his or her client of the possibility of bringing an application under the Act to resolve a title requisition and failing to do so could be considered negligent.[15] In some circumstances, particularly in commercial transactions where monetary values are considerably higher, the summary application to determine the issue may be a client's preferred method of completing the transaction. As such, it is important to note the importance of the Act and its ability to resolve such disputes, particularly when a faltering transaction might otherwise appear to be heading towards litigation.

4. Title Insurance Implications

Given the advent of title insurance in the Ontario real estate market, the need to undertake a number of off-title searches has been reduced, allowing solicitors to rely on title insurance coverage to guard against any risks. It would be foolish to believe so. Firstly, most title insurers still require a full title search to be conducted and an opinion given before coverage can be claimed. Indeed, a title opinion is a prerequisite to issuance of a title insurance policy. As such, a number of title issues that could be the subject of a requisition would be discovered through a title search, such as *Planning Act* violations, undischarged charges or other liens and interests affecting the land.

Secondly, any instance where the purchaser or the purchaser's solicitor has knowledge of a defect that may impact title, renders that defect an exception to coverage.[16] To that end, title

insurance will not necessarily resolve defects in title of which a solicitor is deemed to have knowledge. A purchaser's solicitor should not accept the vendor's solicitor's response to a requisition which advises the purchaser to rely on coverage under the title insurance policy.

5. Third Party, Mortgagee and Precedential Value Considerations

Given that a decision under the Act is a remedy *in personam,* it is highly possible that the purchaser's lender may not find the judicial decision acceptable for its purposes, namely any commercial risk of rendering the title unmarketable. As such, it is imperative to keep a purchaser's lender apprised of title requisitions and any contentious responses. The mortgagee should be named as a party to the application so that the decision binds the lender, and to afford the lender an opportunity to make submissions, if desired. If there is a disagreement between the lender's position and that of the purchaser, the purchaser's solicitor's joint retainer would be in jeopardy and the solicitor should govern him/herself accordingly, as per the *Rules of Professional Conduct.*

Because the judgment is a judgment *in personam,* the decision may not be binding on other parties; this could be a consideration of importance when addressing whether to bring such an application in response to a specific requisition. Due consideration should be made as to whether the relief sought under the Act will truly benefit your client or cause more litigation.

D. Sample Application Materials

To illustrate the use of an application under the Act, the following precedents have been provided based on the following hypothetical scenario.

1. Hypothetical Scenario

A purchaser and vendor enter into an Agreement of Purchase and Sale to acquire a single family residence. Prior to signing the Agreement, the vendor discloses that one side of an addition to the dwelling violates the side yard setback under the current zoning by-law for the subject lands. The vendor classifies this as a minor encroachment and the purchaser signs the Agreement with the acknowledgment of the encroachment. During the purchaser's due diligence, the purchaser's solicitor determines from the municipality that the dwelling, two additions and the garage are non-complaint with the zoning by-law due to encroachments into the side yard setback on both sides of the property. The purchaser requisitions compliance with the zoning by-law in respect of all four violations. The vendor responds that the purchaser had notice of the encroachment and took title subject to it.

i. Notice of Application

The standard Notice of Application should be issued and returnable in a summary manner. It should be noted that it is an application brought under the Act and should be accompanied by Affidavits as set out below. The requisition and response may be inserted in the Notice as grounds for the application. This should be provided at the same time as the Notice of Application or if required by the respondent's Notice of Appearance shortly thereafter, in order to make the summary application proceed quickly. At the time of writing, facta are to be filed and exchanged at least two days before the hearing pursuant to Rule 38.09 of the *Rules of Civil Procedure*. As of January 1, 2010, this time frame will be extended to four days before the hearing which may impact upon the timing one is able to bring a summary application under the Act.

ii. Affidavit (Applicant)

The Applicant (purchaser) should swear an Affidavit that sets out the facts relating to the existence of the agreement of purchase and sale, the nature of the title requisition, the response received and nature of the dispute.

iii. Affidavit (Solicitor for Applicant)

The solicitor in support of the application should also swear an Affidavit, although not the same solicitor attending at the hearing of the application. This affidavit should include the facts supporting the application and contain the agreement of purchase and sale, letter of requisitions and reply to requisitions from the vendor's solicitor.

iv. Factum

Where the parties dispute the legality of the requisition, a factum may be required to ensure that legal argument is made in a timely and comprehensive fashion.

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The power of the Act to resolve title requisitions is notably apparent: acting within the confines of the contract and before the commencement of an action for specific performance, damages or other remedy, parties can arbitrate a disagreement before it becomes overly litigious. The risks (and costs) to the client in failing to utilize the Act's summary resolution could be catastrophic. Solicitors who fail to consider the Act could be negligent. Notwithstanding the advent of title insurance and automated Land Titles systems, it is still apparent that the Act and its history of judicial assistance is still an available remedy that stands the test of time.

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[1] See *Evidence Act,* R.S.O. 1990, c. E-23, s. 59.
[2] Section 12 of the OREA form codifies section 4(a) of the Act; section 10 of the OREA form addresses section 4(c); section 18 codifies sections 4(d) and (f); and, section 16 codifies section 4(e).
[3] The Act has been applied to place Mortgagors and Mortgagees in the position of vendors and purchasers respectively (see *Re Buhlman and London Life Ins. Co.* (1932), 41 O.W.N. 17 (H.C.)).
[4] See *Re Mullin and Knowles* (1966), 1 O.R. 324 (C.A.).
[5] See *Re Buhlman and London Life Ins. Co.* (1932), 41 O.W.N. 17 (H.C.).

[6] *Re: Craig* (1883), 10 P. R. (Ont) 33 and *Re: Jones and Cumming,* [1912] 2 D. L. R. 77(H. C. J.)
[7] See *Lloyd v. Cutts* (1948), O.W.N. 410 (H.C.). Also see commentary by Paul M. Perell in *Remedies and the Sale of Land,* (Toronto/Vancouver: Butterworths, 1988) at 166).
[8] Note the court's decision in *McNiven v. Pigott* (1914), 31 O.L.R. 365 (C.A.).
[9] See *Verlysdonk v. Premier Petrenas Construction Co. Ltd. et. al.* (1987), 60 O.R. (2d) 65 (Div Ct).
[10] See also commentary by Jeffrey Lem in his paper "The Perfect Storm: A New "Present Use" Test from the Ontario Superior Court" in *The Abstract Page* Ontario Bar Association Vol. 34, No. 2 (May 2008), p. 6-12 and additional commentary on this topic in J. Lem and J. MacKenzie, "The Vendors and Purchasers Motion", in *Remedies Fast Forward*, Ontario Bar Association, October 31, 2007.
[11] See *Re Goldenberg and Glass* (1925), 56 O.L.R. 414 (S.C. Appl. Div).
[12] The court asserts that a decision under the Act is declaratory of the state of title and binds the world to it; as a result, the world is affected by the decision. As discussed later, there is much jurisprudence to indicate that a party can only be affected by a decision under the Act if he/she/it is named as a party, which is a hallmark of a remedy *in personam*.
[13] See *Modern Realty Co. Ltd. v. Shantz,* [1927] CanLII 13 (Ont C.A.).
[14] See *Mogus v. Bruz Family Trust,* [2007] CanLII 37019 (Ont S.C.) at para 34.
[15] In *Phinny v. Macaulay,* [2008] CanLII 47015 (Ont S.C.), the court found that it *was* negligent of a solicitor not to have canvassed the possibility of bringing a V & P application, given that the timing allowed for it and, as the court held, the adjudication would have prevented costly future litigation in that instance.
[16] All title insurance policies in Ontario contain an exclusion from coverage relating to knowledge of the purchaser and/or his/her solicitor.

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

[BLANK]

Applicant

- and –

[BLANK]

Respondents

PROCEEDING UNDER section 3 of the ***Vendors and Purchasers Act*** **R.S.O. 1990, c.V.2**

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for hearing on [DATE], at [TIME]. or as soon after that time as may be available at [ADDRESS].

IF YOU WISH TO OPPOSE THIS APPLICATION, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES

ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to oppose this application but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

Date: October 9, 2009

Issued by:_____
Address of
Court Office: 45 Main Street West
Hamilton, Ontario
L8N 2B7

TO: [NAME]
Barristers and Solicitors
[ADDRESS]

Tel: (###) ###-####
Fax: (###) ###-####

Solicitors for [INSERT NAME];
[INSERT NAME]

APPLICATION

1. The Applicant makes an application for:

    a. An order that the Respondent's response to the Applicant's solicitor's requisition is unsatisfactory and does not properly address and resolve the state of title to the lands municipally known as [ADDRESS] and legally described as [LEGAL DESCRIPTION];

    b. An order that, if the Respondent fails to address the title requisition by the completion date set out in the Agreement of Purchase and Sale between the Respondents and the Applicant dated [DATE] (the "Agreement"), that the Agreement shall be declared terminated and the Respondents shall forthwith deliver to the Applicant all deposit moneys paid thereunder;

    c. Such further and other relief as counsel may advise and this Honourable Court deem just.

2. The grounds of the Application are:

    a. The Applicant's solicitor's letter of requisition dated [DATE];

    b. The Respondents' solicitor's correspondence dated [DATE];

    c. Section 3 of the *Vendors and Purchasers Act* R.S.O. 1990, c.V.2;

    d. *Rules of Civil Procedure* pursuant to the *Courts of Justice Act* R.S.O. 1990, c. C.43, as amended, applicable thereto.

3. The following documentary evidence will be used at the hearing of the Application:

    a. Affidavit of the Applicant, [NAME], sworn [DATE];

b. Affidavit of the Applicant's Solicitor, [NAME], sworn [DATE];

c. Such other evidence as counsel may advise and this Honourable Court deem just.

Date: [DATE]

[INSERT NAME] LLP
[INSERT ADDRESS]

[INSERT NAME] (LSUC #)
Tel:
Fax:

Solicitor for the Applicant

[INSERT NAME], Applicant v. [INSERT NAME], Respondents

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT HAMILTON

NOTICE OF APPLICATION

EVANS, PHILP
Barristers and Solicitors
1 King Street West
Suite 1600
P.O. Box 930, Station "A"
Hamilton, ON
L8N 3P9

[NAME]
Tel : (905) 525-1200
Fax: (905) 525-7897

Solicitors for the Plaintiffs,
[INSERT NAME]

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

[BLANK]

Applicant

- and –

[BLANK]

Respondents

PROCEEDING UNDER section 3 of the ***Vendors and Purchasers Act*** **R.S.O. 1990, c.V.2**

AFFIDAVIT OF [APPLICANT]

I, [APPLICANT], of the City of Hamilton, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the Applicant herein, and as such, have knowledge of the matters hereinafter set forth.

Agreement of Purchase and Sale

2. On [DATE], I approached the Respondent's real estate agent, [NAME], concerning the purchase of the land and dwelling municipally known as [ADDRESS].

3. [AGENT] showed me the property and answered various questions I had about the property.

4. [AGENT] volunteered information about the dwelling and indicated that the easterly addition to the dwelling was built too close to the lot line of the property but that it was minor and would not be a problem to remedy, revealing he had the same problem with his own house.

5. [AGENT] did not advise me to seek advice about this issue prior to my signing the Agreement.

6. Based on the Agent's advice, I signed the agreement with the understanding that there was only an encroachment into the side yard.

7. I was not aware of any other defect in title or issue of non-compliance with the zoning bylaw by any other aspect of the dwelling or property.

8. Only after I retained my lawyer did I learn from my lawyer about other problems with the structures on the property.

9. I make this Affidavit in support of an Order pursuant to Section 3 of the *Vendors and Purchasers Act* and for no other or improper purpose.

SWORN BEFORE ME at the City of Hamilton in the Province of Ontario this_____day of October, 2009

_____
A Commissioner, etc.

_____
APPLICANT

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

[BLANK]

Applicant

- and –

[BLANK]

Respondents

PROCEEDING UNDER section 3 of the ***Vendors and Purchasers Act*** **R.S.O. 1990, c.V.2**

AFFIDAVIT OF [APPLICANT'S SOLICITOR]

I, [SOLICITOR], of the City of Hamilton, Barrister and Solicitor, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the solicitor for the Applicant herein, and as such, have knowledge of the matters hereinafter set forth.

Agreement of Purchase and Sale

2. On [DATE], the Applicant and the Respondents entered into an agreement of purchase and sale in respect of the land and premises municipally known as [ADDRESS]. Attached as

Exhibit "A" to this affidavit is a true copy of the Agreement of Purchase and Sale (the "Agreement").

3. Schedule "A" to the Agreement contained an acknowledgement by the Applicant that he accepted a minor encroachment of the easterly addition to the dwelling into the side yard setback. No particulars of the encroachment were detailed in the Agreement.

Due Diligence

4. On or about [DATE], I received from the vendor's agent a recent survey of the subject property.

5. On or about [DATE], I searched the records of the municipality for compliance with the zoning bylaw and was advised by [CONTACT and TITLE] that the dwelling violated the zoning bylaw by encroaching into the side yard setbacks. The dwelling, garage and additions on the east and west of the dwelling were non-compliant. Attached as Exhibit "B" to this affidavit is a true copy of the zoning and property report issued by [CONTACT] and dated [DATE].

Requisition

6. On or about [DATE] I wrote to the Respondents' solicitor [NAME] and set out various requisitions of title. Among those was a requisition concerning the encroachment as follows:

> "The schedule to the Agreement of Purchase and Sale contains a provision that there is a minor encroachment of the dwelling into the side yard. Our client advises that the agent acting for both vendor and purchaser indicated that there would be no problems with the City in resolving the minor encroachment. We enclose a zoning verification report from the municipality confirming that the dwelling, garage and two additions infringe the zoning bylaw. The encroachment of the dwelling, garage and westerly addition were not disclosed to the purchaser and remain a violation of the zoning bylaw.

REQUIRED: on or before closing, receipt of a consent to a minor variance from the Committee of Adjustment of the City of Hamilton with all appeal periods expired, permitting the non-conformity of the existing dwelling, additions and garage."

7. On or about [DATE] I received correspondence from [RESPONDENTS' SOLICITOR] responding to my letter of requisitions. In relation to the requisition noted above, [SOLICITOR] replied as follows:

> "The Agreement contains an acknowledgment by the purchaser of an encroachment into the side yard setback. The purchaser, being aware of same, is taken to know that the dwelling and additions also encroach. Your requisition is denied on the basis that the purchaser knew and acknowledged the encroachment."

Attached as Exhibit "C" to this affidavit is a true copy of [SOLICITOR]'s correspondence dated [DATE].

8. The Respondents' solicitor's response is not satisfactory as it fails to resolve the title issue which the Applicant did not agree to assume under the Agreement.

9. I make this Affidavit in support of an Order pursuant to Section 3 of the *Vendors and Purchasers Act* and for no other or improper purpose.

SWORN BEFORE ME at the)
City of Hamilton in the)
Province of Ontario)
this_____day of October, 2009)
)

_____ _____

A Commissioner, etc. SOLICITOR