



## eXner files

### Referential purchase price clauses

It is not inconceivable when marketing a property in an environment of multiple offers, that a Listing Agent might come across what is generally referred to as a “referential purchase price clause” (RPPC). The thrust of the RPPC is for a Buyer to piggyback on the next highest bona fide offer which is acceptable to the Seller. Such clause might read as follows:

“The purchase price is \$1,000.00 above the price offered in the nearest competing bona fide offer acceptable to the Seller to a maximum price of \$350,000.00. The Seller agrees to provide a copy of such nearest competing offer on acceptance of this offer.”

The RPPC is a clever means by which a Buyer endeavours to establish a purchase price by reference to prices contained in competing offers. As would be reasonably anticipated, there have been many variations in the wording of RPPC’s. Apparently such clauses are not uncommon in Alberta.

After having reviewed the case law, I am not 100 per cent certain that the language of a RPPC as described above would support either a

Buyer or a Seller pursuing a legal remedy should either of them default at completion. The leading case is a 1985 House of Lords decision from England which held that a referential offer is an offer which does not stand on its own and which is not understandable without reference to another bid. The House of Lords held that referential offers were invalid.

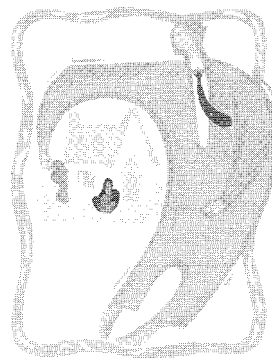
This case has since been adopted as being good law in Canada, at least insofar as it applies to “referential bidding”. The BC Court of Appeal in the case of *The Bank of Nova Scotia and Yoshikuni Lumber* held that an offer by one bidder which is dependent for its definition on the offers of others is invalid and unacceptable as inconsistent with and potentially destructive of the very tendering process in which it is submitted.

I could find no case authority directly on point. The only cases I could find dealt with the bidding or tendering processes. Nevertheless, there are enough similarities between “referential purchase price clauses” and the “bidding and tendering process” for a Listing Agent to be concerned when dealing with the former.

One approach a Listing Agent might use to circumvent the potential problems involved when confronted with a RPPC which is acceptable to the Seller, would be for the Listing Agent to counter with an addendum which deleted the RPPC and inserted a fixed price for an identical amount in its stead.

What this all means to a Listing Agent in a multiple offer scenario is that if they come across a RPPC then the Seller will be relying upon the judgment of the Listing Agent when it comes to assessing the legitimacy, enforceability and bona fides of the contract containing such clause.

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**Your comments are  
always welcome.**

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