



Avoid Holdback Headaches

The following article was originally published on The Calgary Real Estate Board's (CREB®) website.

Holdbacks can be frustrating, but we have some REALTips to help you avoid the headache.

What's a holdback?

A holdback is a portion of sale earnings withheld from the seller by either the seller's or buyer's lawyer until certain conditions in the purchase agreement have been fulfilled.

This usually occurs where there is a defect present in the property that the buyer requests the seller fix, or if there is an element of the property that cannot be inspected before closing.

REALTips for dealing with a holdback clause

1. If this clause is to be used in a transaction, the agreement must be in writing. It should be properly included and referenced in the main agreement or attached as an addendum/schedule if it is captured in a separate document.
2. Holdbacks should be set at a proportionate amount to the value of the seller's obligation. This will help to ensure that the seller is motivated to complete any outstanding work by a specific deadline or enable the buyer to revert to contingency terms to access the holdback amount to complete the necessary work (in which case it would operate like a cashback).
3. There must be full disclosure and transparency at all points of an agreement containing either a cashback or a holdback clause, especially as it pertains to the lender. This is critical because it impacts the lender's decision making and to act otherwise could leave members vulnerable to legal consequences.

4. Holdback clauses can be complicated and require an advanced level of experience and skill to execute. We advise REALTORS® to seek professional legal input when contemplating or dealing with these clauses. A high level of detail and conscientiousness is needed to ensure that the interests of the client are protected.

Dave De La Ronde, vice president of the Real Estate Insurance Exchange (REIX), states that “The holdback lawsuits we see are a direct result of very poorly worded and ambiguous conditions [or terms] or amendments. This results in a misunderstanding between buyers and sellers as to exactly what the expectation[s] are.”

Avoid Holdback Headaches

Avoid holdback headaches by drafting comprehensive holdback terms and following these tips:

- Know when a holdback is in the best interest of your client.
- Ensure the amount of the holdback is appropriate.
 - Clients and their REALTORS® need to negotiate the holdback term in good faith – don’t inflate a holdback amount. On the other hand, underestimating may lead to inadequate funds for buyers if they need to invoke the holdback clause.
 - Advise your client to get a quote that can be relied on after possession in case the buyer ends up having to complete the work. Learning a quote expired before the buyer could do the work after possession can lead to an unexpected cost increase.
- Get familiar with the requirements for a comprehensive holdback term:
 - Who is responsible for the work?
 - What is the work that needs to be done?
 - When does the work need to be completed by?
 - What needs to be provided as evidence of completion?
 - Where will holdback funds be kept (it should be in trust)?
 - How much is the holdback?
 - What happens if the work isn’t completed?
- Watch the CREB® training webinar presented by Jeff Kahane on [Drafting Clauses- Enforceable Terms and Conditions](#).
- Ask for assistance from your broker or lawyer to draft the holdback term if you are not comfortable doing it by yourself.

[The Real Estate Insurance Exchange \(REIX\)](#) provides mandatory errors and omissions insurance to approximately 13,500 Alberta and Saskatchewan real estate industry members and protects them from financial loss due to negligent acts while performing their real estate duties. Be sure to follow us on [Facebook!](#)